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rather than prohibiting the importation of materials denoted merely as obscene, might be aimed at materials whose effect would be to cause lustful thoughts or any specifically enumerated overt sexual conduct, such as masturbation or the various sex crimes.

JENCKS AND ADMINISTRATIVE PROCEEDINGS: CONSCIENTIOUS OBJECTORS AND GOVERNMENT EMPLOYEES

In one of its more controversial decisions, the Supreme Court in Jencks v. United States held that in criminal prosecutions the Government must release to the defense, upon request, pre-trial statements made by government witnesses which "were of the events and activity related in their testimony." Not only was the previous rule requiring the defendant to lay a preliminary ground of inconsistency between the contents of the report and the testimony before being entitled to inspect such reports held to be in error, but the accepted practice of the trial judge examining the reports in camera to determine their relevancy and materiality before turning them over to the defendant also was specifically disapproved. Perhaps the chief reason for public dissension with respect to this decision can be attributed to the dissent of Mr. Justice Clark in which he warned: "Unless the Congress changes the rule announced by the Court today, those intelligence agencies of our Government engaged in law enforcement may as well close up shop for the Court has opened their files to the criminal and thus offered him a Roman holiday for rumaging through confidential information as well as vital national secrets." The implication from this emotional language was two-fold.

2. Id. at 668.
3. Id. at 666. The Fifth Circuit, in deciding the Jencks case, 226 F.2d 540 (1955), used this theory as the basis for denying the FBI report to Jencks. It based its holding on Gordon v. United States, 344 U.S. 414 (1953). The Supreme Court, however, held that the reliance on Gordon was misplaced and that the proper interpretation of Gordon was that "for production purposes, it need only appear that the evidence is relevant, competent and outside any exclusionary rule." Jencks v. United States, 353 U.S. 657, 667 (1957), quoting Gordon v. United States, 344 U.S. 414, 420 (1953).
4. Jencks v. United States, supra note 3, at 669. For authority contra, see 8 Wigmore, Evidence § 117-18 (3d ed. 1940). For cases which had specifically held that an in camera inspection by the court was proper, see, e.g., United States v. Grayson, 166 F.2d 863 (2d Cir. 1948); United States v. Beekman, 155 F.2d 580 (2d Cir. 1946); United States v. Cohen, 145 F.2d 82 (2d Cir. 1944); United States v. Krulewitch, 145 F.2d 76 (2d Cir. 1944); United States v. Mesarosh, 116 F. Supp. 345 (D.D.C. 1953), rev'd on other grounds, 352 U.S. 1 (1956).
First, it pointed out the necessity for action to abate the decision, and secondly, it specifically stated that Congress was the body to make the change. If the view of the dissent is accepted, it necessarily follows that the holding was not grounded upon due process in the constitutional sense, but only set out the procedure to be followed by federal courts in criminal cases under existing law.

A careful reading of the *Jencks* case indicates that there was little, if any, justification for the conclusion of the dissent. However, the holding can be criticized because the Court failed to state who was to decide if the information in a statement by a government witness "touched the events and activity" related in his testimony. Subsequent federal court decisions disagreed on this point. Some courts held that the Government could not delete non-relevant portions, but had to produce an entire investigatory report to the defendant; other courts held to the contrary. Not one decision, however, held that the trial judge was the proper party to make this decision.

Shortly after the *Jencks* opinion, Congress, incited to action by these conflicting decisions and public opinion, enacted Public Law 85-269 which purported to codify the *Jencks* decision. This statute provides that any statement ordered to be produced which, in the opinion of the Government, contains matter which does not relate to the subject matter of the testimony of the witness shall be delivered to the court for inspection in camera. Since this enactment appears to be contrary to the holding of the *Jencks* case, its constitutionality has been the subject of much dis-

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6. The holding in the *Jencks* case is a very narrow one. A criminal (to use the language of the dissent) is only entitled to the statement made by a government witness who has already testified and which touches the subject matter of his testimony. This holding certainly does not appear to open up the intelligence files to accused persons to any extent. The dissent apparently forgot that the Government is not even required to turn over the statement; it has the discretion to dismiss the case and maintain the secrecy of the statement.


10. Upon receiving the statement the trial judge is to excise any portion which, in his opinion, has no relation to the subject matter of the testimony of the witness. If the defendant objects to such excision and the trial is continued to an adjudication of his guilt, the complete statement must be preserved by the Government and, in the event the defendant appeals, must be made available to the appellate court for the purpose of determining the correctness of the ruling of the lower court. *Ibid.*

11. There is another possible conflict between the statute and the *Jencks* case. *Jencks* requires the production of all oral statements taken by the Government as well as all written statements touching the events and activities to which government witnesses testified at the trial. The statute provides that if the record of the oral statement is not a substantially verbatim recital the Government need not disclose it to the defendant. 71 Stat. 596 (1957), 18 U.S.C. § 3500 (e) (2) (Supp. V, 1958). This provision appears
cussion and debate. In the Jencks case, after stating that the defendant was entitled to inspect the report before the trial court saw it, the Court concluded: "Justice requires no less." (Emphasis added.) This is very strong language and smacks of due process. If the Government gives the defendant less, as the congressional enactment appears to do, it would seem to be a violation of due process. The strongest argument against the conclusion that Jencks is based on due process is that the Court did not once mention the term "due process." It might well be that the Court based its decision upon purely procedural grounds under its common law power to administer procedure for the federal courts when Congress has not spoken. If this be true, Congress has the power to change or modify
such a procedural rule. The basis of the *Jencks* case will remain a mystery unless the Supreme Court explains it in some future case. However, the mandate that "justice requires no less" will be difficult to reconcile with a decision that *Jencks* only set out criminal procedure.

Although the primary question raised by the *Jencks* decision is one of criminal due process, concomitantly, it raises the broader issue of the possible conflict of fair procedure with national interest. There is probably no area of the law in which this conflict is more pervasive than in administrative procedure. Thus, the salient consideration of this writing is whether the *Jencks* doctrine is to be applied in proceedings before administrative agencies; more specifically, in conscientious objector and government employment proceedings. This consideration raises the question of whether the *Jencks* ruling is sufficiently broad to be controlling in administrative hearings. In a National Labor Relation Board hearing, a witness who had made a prior written statement to the Board testified for the Government. This statement was requested by the respondent for purposes of cross-examination with the *Jencks* case being cited as authority. The Board denied the request on the ground that *Jencks* was not controlling in administrative proceedings. However, a cogent dissent posited that the "spirit and intent" of the *Jencks* case should be followed in administrative hearings "so that the government's role in the administration of justice may be above suspicion and reproach." In a later case, in which the same issue was raised, the Second Circuit held

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of procedure and evidence. Such standards are not satisfied merely by observance of those minimal historic safeguards for securing trial by reasons which are summarized as 'due process of law'. . . . In the exercise of its supervisory authority over the administration of criminal justice in the federal courts . . . this Court has, from the very beginning of its history, formulated rules of evidence to be applied in federal criminal prosecutions." *Id.* at 340-41.

15. The Supreme Court has granted certiorari in several cases which should settle the question of the *Jencks* case. The chief issue presented by these cases is the holding of a court of appeals that a district court's refusal to require the Government to produce for the defendant's inspection summaries of interviews with government witnesses, even if erroneous under *Jencks*, does not constitute reversible error since on retrial the defendant would have no right to the statement under the new statute. *Lev v. United States*, 258 F.2d 9 (2d Cir.), *cert. granted*, 358 U.S. 903 (1958) (No. 435, 1958 Term); *Wool v. United States*, 258 F.2d 9 (2d Cir.), *cert. granted*, 358 U.S. 903 (1958) (No. 436, 1958 Term); *Rubin v. United States*, 258 F.2d 9 (2d Cir.), *cert. granted*, 358 U.S. 903 (1958) (No. 437, 1958 Term). In *Rosenberg v. United States*, 257 F.2d 870 (D.C. Cir.), *cert. granted*, 358 U.S. 904 (1958) (No. 471, 1958 Term), the specific question to be decided is whether the rule in the *Jencks* case is one of mere procedure or whether it involves a defendant's constitutional right.


17. *Id.* at 1284.

18. *NLRB v. Adhesive Prods. Corp.*, 258 F.2d 403 (2d Cir. 1958). This decision was accepted by the Board in *Ra-Rich Mfg. Corp.*, 121 N.L.R.B. No. 90, 8 *PIKE & FISCHER, ADMIN. LAW* (2d) 428 (1958), in which the Board reversed the *Tea* case and held that the *Jencks* case applied to Board proceedings.
that, since Jencks required the production of statements in criminal cases, logic compelled the conclusion that the rules of the Jencks case are applicable to administrative hearings. This issue was also raised in a hearing before the Subversive Activities Control Board. It was the opinion of the District of Columbia Court of Appeals that "simple justice" and the "fundamentals of fair play" required the application of the Jencks case in administrative hearings.

These decisions are not direct authority that the Jencks doctrine is to be applied in all administrative hearings. It is important to note two specific differences between the above cases and hearings involving conscientious objectors and government employees. First, the Government made no claim of privilege in the above cases; whereas such a claim is usually made in government employee cases. Secondly, the above cases involved the calling of witnesses by the Government to testify before the boards; in conscientious objector and government employee cases the Government merely submits the adverse information it has obtained from witnesses to the boards. However, there is one major similarity which must also be taken into consideration, namely that adjudicatory facts are in issue in each of these hearings.

Conscientious Objectors

In this country persons who by reason of religious training and belief conscientiously object to participation in any war are exempted from military service. This immunization, however, is not derived from the constitutional "freedom of religion" right but "arises solely through congressional grace, in pursuance of a traditional American policy of deference to conscientious objection." To understand the problems that arise in this area, it is necessary to be familiar with the procedure by which a person may take advantage of this immunization. Under the present law all male citizens upon reaching the age of eighteen are required to

20. Id. at 328.
21. For an excellent discussion of this point, see Davis, Requirement of a Trial Type Hearing, 70 Harv. L. Rev. 193 (1956).
22. Universal Military Training and Service Act, 62 Stat. 604, 613 (1950), 50 U.S.C. § 456 (j) (1952). This exemption, however, may not be absolute. The registrant may be inducted into non-combatant service if his only claim of exemption is from combatant service or training. If he is also found to be conscientiously opposed to participation in non-combatant service, he may be required to perform civilian work contributing to the maintenance of the national health, safety, or interest. Ibid.
24. This procedure is set out in detail in the Universal Military Training and Service Act, supra note 22.
register with a local draft board. At this time, or any time before the registrant reports for military duty, he may make a claim of conscientious objection and request to be so classified. If the local draft board refuses to accept a registrant's claim of conscientious objection, he may appeal the classification to an appeal board. On receipt of the appeal, the appeal board refers it to the Department of Justice for inquiry and hearing. The FBI conducts the inquiry for the Department and forwards the results to a hearing officer who conducts the hearing. The registrant has the right to be present, to be represented by counsel, and to introduce evidence in his own behalf. At the conclusion of the hearing, the hearing officer forwards a recommendation to the Department which in turn makes a recommendation to the appeal board. The appeal board conducts another hearing at which the registrant again has the right to present evidence and to be represented by counsel. There is no direct judicial review of the conclusion of the appeal board. Questions concerning the classification of the registrant may be raised only in a petition for habeas corpus after a registrant has been inducted into the service, or as a defense to a prosecution for failure to submit to induction into the armed forces. Even under these circumstances, the scope of judicial review is very limited, since a court can overturn the classification only if it has "no basis in fact."

Although the scope of an appeal is quite limited, the right to two separate hearings in the administrative procedure sphere would appear to afford the registrant a fair hearing. There has been much controversy, however, over the production of the FBI files to the registrant. In United States v. Nugent the Supreme Court held that a registrant was only entitled to a fair résumé of all adverse information in the FBI report. The Court did not reach the question of what constituted a fair résumé, as it found that Nugent was not denied any right. This holding was based on the grounds that he had not requested the information from the hearing officer and that there was no evidence that any information secured by the FBI had been used by either the hearing officer or the appeal board. The Court also did not state who was to determine that the résumé was fair or how it was to be determined. The Court did hold that the hearing

25. The Universal Military Training and Service Act, supra note 22, does not dictate that the FBI shall conduct the inquiry—this is the practice adopted by the Department of Justice.
29. Id. at n.10. The Court apparently assumed that if the hearing officer or the appeal board had used any adverse information from the FBI report, they would have mentioned it in their records.
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required by the statute and by due process was not a full scale trial for each appealing registrant.

Judge Hincks maintained that the Nugent decision was unsatisfactory because he could not conscientiously decide whether the résumé was fair unless he had an opportunity to inspect the investigatory report itself. He also stated that, even if the résumé be deemed presumptively fair, on trial the registrant should be able to combat the presumption by the only possible means—comparison with the investigative report itself.

The Ninth Circuit held that the requirement in the Nugent case that a fair résumé be furnished was obiter dictum, since Nugent had not requested a fair résumé. It interpreted the Nugent case as only affirming the procedure of the Department of Justice in conducting the hearing. The Fourth Circuit took a contrary view and held that where both the local board and the appeal board had access to the actual FBI file, the registrant was denied due process unless he had equal access to the files.

In a later case the Supreme Court defined fair résumé as "one which will permit the registrant to defend against the adverse evidence—to explain it, rebut it or otherwise detract from its damaging force." The

3. The Court's reasoning on this point is rather confusing. The conclusion that the statute does not require a "full scale trial" seems to be based on the reasoning that the Department of Justice only advises and takes no action which is decisive. However, it would seem that this advice itself, coming from such an important and impressive agency, could be decisive in the final decision by the appeal board.

31. Again the Court is not too explicit in its reasoning. It appears to be saying that "the imperative needs of mobilization and national vigilance—when there is not time for litigious interruptions" subordinates the due process requirement. Id. at 10. But as Mr. Justice Frankfurter points out in his dissent, "The enemy is not yet so near the gate that we should allow respect for traditions of fairness, which has heretofore prevailed in this country, to be overborne by military exigencies." Id. at 13. Also it would seem that the reasoning of the majority would apply only when there is actual combat, and thus would not be applicable today.


33. Ibid.

34. White v. United States, 215 F.2d 782 (9th Cir. 1954). "We see nothing in the requirements of the statute, or in the demands of due process, or in what was decided in the Nugent case which would require that any portion of the FBI investigation undertaken for these purposes should be made available to the registrant whether before the hearing officer or at the time for prosecution for failure to submit to induction." Id. at 790.

35. Brewer v. United States, 211 F.2d 864 (4th Cir. 1954). It may be that this case is reconcilable with the Nugent case. The Court in Nugent was careful to point out that the FBI report was not transmitted to the appeal board. Nugent v. United States, 346 U.S. 1, 6 n.10 (1953). See also United States v. Balogh, 157 F.2d 939 (2d Cir. 1947), judg. vacated on other grounds, 329 U.S. 692 (1946), where, under similar circumstances, Judge L. Hand said: "As the case comes to us, the Board made use of evidence of which Balogh [the registrant] may have been unaware, and which he had no chance to answer: a prime requirement of any fair hearing." Id. at 943.

36. Simmons v. United States, 348 U.S. 397, 405 (1955). The Department of Justice's recommendation disclosed that the FBI investigation had uncovered the following information: (1) The registrant had been a heavy drinker and crap shooter in and around local taverns and pool halls prior to becoming a Jehovah Witness. (2) The
Court specifically pointed out that due process was not involved and that the Court was only endeavoring to apply a procedure, set forth by Congress, in accordance with the statutory plan and basic fairness which underlies all legislation. Furthermore, the Court held the requirement of a fair résumé of adverse evidence could not be waived. It said that the discussion in the *Nugent* case on this point was directed at the availability of the résumé and not at the time or method of requesting it.

Subsequently the Supreme Court held that a registrant was entitled to a copy of the Department of Justice’s recommendation to the appeal board since he must be aware of all the facts before the board as well as the overall position of the Department if he is to present his case effectively to the appeal board.

Thus the state of law prior to the *Jencks* case was that a registrant

registrant was arrested May 29, 1950, on a complaint by his wife that he pulled her out of his car and hit her in the face. (3) One June 12, 1950, the police were called to settle a hot argument between the registrant and his wife. (4) His wife called the police on Jan. 6, 1952, and claimed that the registrant was abusive. As to the alleged gambling and drinking, the hearing officer merely told the registrant that he was reported to have been hanging around pool rooms. As to the reported incidents of violence and abuse towards his wife, the hearing officer only asked the registrant’s wife how he was treating her. The court held that “the remarks of the hearing officer at most amounted to vague hints” and certainly did not afford the registrant “fair notice of the adverse charges in the report.” (Emphasis added.) *Id.* at 404-05. See text accompanying note 74 infra.

37. 348 U.S. at 404-05. The Court’s reasoning on this point is rather mystifying. Most arguments that rely on due process contend that the complete FBI file should be transmitted to the registrant to enable him to determine if the résumé is fair. The Court here indicates that if the production of a fair résumé were based on due process, the registrant would have to show prejudice specifically in order to question the fairness of the résumé. This Court, however, states that since the right is a statutory one, the failure of the Department to furnish a fair résumé to the registrant automatically denies him a fair hearing. See also Mr. Justice Frankfurter’s dissent in the *Nugent* case, 346 U.S. 1, 13 (1953).

38. This holding appears to be an obvious dodge to avoid the language of the *Nugent* case. In *Nugent*, the Court stated that it did not reach the question of what constituted a fair résumé since the registrant could not complain of any failure on the part of the Department to supply him with a summary of the evidence. The reason for this was that “in view of this [the fact that the record before the appeal board contained no evidence secured by the FBI] and in view of his failure to make any request to the Hearing Officer, we think that Nugent was not denied any right.” United States v. Nugent, 346 U.S. 1, 6 n.10 (1953). The reasoning of the Court in *Simmons* that the above language only went to the “availability” of the summary and not “the time or method of requesting” it is difficult to perceive. This case would have been in conformity with *Nugent* if it had found that the *Nugent* case held that a waiver took place only when two factors were present: (1) no request for the information and (2) no transmission of adverse information to the appeal board. This would not have affected the decision in the *Simmons* case since adverse information had been transmitted to the appeal board.

39. Gonzales v. United States, 348 U.S. 407 (1955). “Just as the right to a hearing means the right to a meaningful hearing . . . so the right to file a statement before the appeal board includes the right to file a meaningful statement, one based on the facts in the file and with an awareness of the recommendations and arguments to be countered.” *Id.* at 415.
was entitled to a fair résumé of the FBI report which right could not be waived, and he was also entitled to a copy of the Department of Justice's recommendation to the appeal board. Even if the definition of a fair résumé is a workable one, the questions of who is to decide initially if the résumé is fair and how it is to be decided remain unanswered. As could be expected, after the decision in the Jencks case, registrants cited it as authority for demanding the complete FBI report. One district court had provisionally granted the Government's motion to quash a subpoena duces tecum ordering production of the FBI report. With the advent of the Jencks case, however, it withdrew the ruling and denied the motion on the ground that the registrant, in a criminal trial for refusing to be inducted, was entitled to test the accuracy of the résumé at least to the extent of comparing it with the FBI report to determine whether the résumé fairly reflected the contents of the report. The Nugent case was distinguished on the ground that it only applied to the procedure during the administrative proceeding phase, while this case brought forth the question of the proper procedure during the criminal trial phase. The court was also of the opinion that the shift in the attitude of the Supreme Court between the Nugent and Jencks decisions implied that Nugent might be overruled were the problem to arise again. While agreeing that the Jencks case did not deal with the instant problem, the court stated that the underlying principle expressed there is equally applicable here. It was the court's view that the concept of justice announced in the Jencks case required the FBI reports in their original form, not mere summaries, to be transmitted to the registrant.

Other federal courts refused to accept this reasoning. Thus it was subsequently held that the Jencks case could not govern selective service cases since there is a sharp distinction between demands for production of FBI reports in conscientious objector cases and applications by defendants in ordinary criminal cases to examine statements made to the FBI by witnesses called to the stand by the Government. The court agreed that the fairness and completeness of a résumé could not be judged easily without looking at the documents it purported to summarize, but was of

41. Since a review can also be had in a habeas corpus proceeding, query if this court would require the production of the FBI files in such a case. Also this court apparently refused to accept, or chose to ignore, the reasoning of its court of appeals which had stated: "We refuse to believe that the Court [in the Nugent case] labored and brought forth a mouse of a decision that the hearing officer need not show the FBI report when the situation was such that the trial court must necessarily admit it." White v. United State, 251 F.2d 782, 791 (9th Cir. 1954).
43. 247 F.2d 615 (4th Cir. 1957).
the opinion that the Nugent case held that the fairness of the résumé must be presumed.\textsuperscript{44}

It appears as if the Jencks case only created more confusion in this area and left unanswered the question of whether the doctrine of justice there formulated should be applied in selective services cases. The Supreme Court has offered no reasons why the registrant should be denied access to the FBI report except the statement that neither due process nor the statute require it.\textsuperscript{45} The Ninth Circuit advanced the following theory: “It is a matter of common knowledge that if the FBI is to obtain from neighbors or acquaintances of the registrant a report on which it can rely, it is essential that frankness on the part of persons interviewed be encouraged by assurance that identity will not be divulged.” A favorable report by a neighbor who expects to have his identity disclosed to the registrant would not be worth much.”\textsuperscript{46} The logic of this position is questionable. It can be argued with as much logic that an adverse report by a neighbor who expects not to have his identity disclosed would not be worth much.

The Government seldom, if ever, makes a claim of privilege in conscientious objector hearings.\textsuperscript{47} Consequently, there appears to be no valid reason for denying the production of FBI reports to the registrant. It is very doubtful if matters involving national interest or state secrets are involved in any of these reports. The informers in such cases will usually be the neighbors and acquaintances of the registrant. If they are willing to make an adverse statement about him, they should be willing to be confronted and cross-examined as to the veracity of such information. Rumor mongers and tale-bearers are at their best when they know


\textsuperscript{45} See Mr. Justice Frankfurter’s dissent in the Nugent case where he states that the Court is not called upon to devise a just procedure in this area but merely to apply one. It was his contention that the Court “ought not to reject a construction of congressional language which assures justice in cases where the sincerity of another’s religious conviction is at stake and where prison may be the alternative to an abandonment of conscience.” United States v. Nugent, 346 U.S. 1, 12-13 (1953).

\textsuperscript{46} White v. United States, 215 F.2d 782, 790 n.11 (9th Cir. 1954).

\textsuperscript{47} The so-called “informer's privilege” does not appear to be applicable in this area. The Supreme Court in Roviaro v. United States, 353 U.S. 53 (1957), stated: “What is usually referred to as the informer’s privilege is in reality the Government's privilege to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement of that law. The purpose of the privilege is the furtherance and protection of the public interest in effective law enforcement. The privilege recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law-enforcement officials and, by preserving their anonymity, encourages them to perform that obligation.” (Emphasis added.) Id. at 59.
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that their stories will never be questioned. 48

The main difference between conscientious objector hearings and other administrative hearings in which it has been held that the Jencks doctrine governs is that the Government presents no witnesses in the former. This distinction seems to manifest a greater need for disclosure of statements in conscientious objector hearings since the registrant does not have the opportunity to confront and cross-examine the witnesses. In the interest of justice the registrant should be entitled to inspect all of the facts in the FBI report except to the extent that some compelling national interest clearly necessitates that some particular evidence or is source remain confidential.

Government Employees

In 1892 Mr. Justice Holmes said that a person "may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." 49 This theory that public employment is a privilege was long, and still may be, the guiding light in the controversial area of government employment. It has taken on significant importance since World War II due to the added emphasis placed on the so-called loyalty programs. The chief issue herein is whether a government employee may be discharged summarily because of doubtful loyalty without being given the chance to know and to meet the evidence against him.

The leading case in this area is Bailey v. Richardson60 which was a four-to-four affirmance of a two-to-one decision resting upon the privilege doctrine and public interest. Miss Bailey was discharged from government service because it was the opinion of the Loyalty Board that she was disloyal to the Government. She was informed by letter from the Regional Loyalty Board of the Civil Service Commission that it had received information to the effect that she had or had had various communist affiliations. Miss Bailey denied all allegations, except past membership for a short time in the American League for Peace and Democracy, which was on the Attorney General's subversive list. A hearing before the Regional Board was granted at her request at which she presented the only evidence and was not permitted to know the names of her

48. See the dissent of Mr. Justice Douglas in the Nugent case in which he states: "The use of statements by informers who need not confront the person under investigation or accusation has such an infamous history that it should be rooted out from our procedure. . . . We should be done with this practice—whether the life of a man is at stake, or his reputation or any matter touching upon his status or right." Nugent v. United States, 346 U.S. 1,13-14 (1953).
50. 182 F.2d 46 (D.C. Cir. 1950), aff'd per curiam by an equally divided court, 341 U.S. 918 (1951).
accusers or to cross-examine them. Miss Bailey contended that the due process clause of the fifth amendment required that she be afforded a hearing of the quasi-judicial type before being dismissed. The District of Columbia Court of Appeals stated: "It has been held repeatedly and consistently that Government employ is not 'property' and that in this particular it is not a contract. We are unable to perceive how it could be held to be 'liberty.' Certainly it is not life. . . . Due process of law is not applicable unless one is being deprived of something to which he has a right." Judge Edgerton, dissenting, argued that the premise that government employment was a privilege did not support the conclusion that it might be granted on condition that certain economic or political ideas not be entertained.

The majority, holding also that public interest validated the summary action, said that disloyalty in the government service under present circumstances is a matter of great public concern and that individual rights guaranteed by the Constitution did not necessarily mean that a Government dedicated to those rights could not preserve itself in the current world. The dissent pointed out that this was a valid position, but that it had no bearing in this case since Miss Bailey was occupying a non-sensitive position and a suspicion of disloyalty in no way indicated a risk to national security. Thus, the dissent found no conflict of interest between the Government and the individual but instead a coincidence of interest in a fair trial. The dissent concluded: "The ominous theory that the right of fair trial ends where the defense of security begins is irrelevant. . . . Whatever her actual thoughts may have been, to oust her as disloyal without trial is to pay too much for protection against any harm that could possibly be done in such a job. We cannot preserve our liberties by sacrificing them." Both opinions attempted to weigh the public interest against the interest of the individual. The difference in conclusion arose because the dissent concluded that Miss Bailey's position was a non-sensitive one, a fact which the majority chose to ignore.

The Supreme Court wrote no opinions in the Bailey case, but some of the Justices took the opportunity to comment upon it in another case which was decided the same day. Mr. Justice Reed expressed the more commonly accepted view that government employees under investigation

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51. Id. at 57.
52. Id. at 72 (dissenting opinion).
53. Id. at 64-65.
54. Id. at 74 (dissenting opinion).
55. 341 U.S. 123 (1951) (opinion of Burton, J.). A majority of five, each writing a separate opinion, held that the Attorney General could not place an organization on the subversive list without giving it a chance to be heard.
have never had the right to confront and cross-examine witnesses, and as long as an employee has notice and the opportunity to explain his actions, he has been accorded all of the protection required by the Constitution. Mr. Justice Douglas, however, warned:

The problem of security is real; and the Government need not be paralyzed in handling it. The security problem, however, relates only to those sensitive areas where secrets are or may be available, where critical policies are being formulated, or where sabotage can be committed. . . . The British have [adopted] . . . the loyalty procedure only in sensitive areas and [use it] to test the qualifications of an employee for a particular post, not to condemn him for all public employment. When we go beyond that procedure and adopt the dragnet system now in force, we intrench upon the civil rights of our people. . . . Of course, no one has a constitutional right to a government job. But every citizen has a right to a fair trial when his government seeks to deprive him of the privileges of first-class citizenship.57

Parker v. Lester58 and Dressler v. Wilson59 are decisions that make

56. Id. at 208-09 (dissenting opinion).
57. Id. at 181-82 (concurring opinion). In 1955 the Supreme Court once again had an opportunity to clarify the law in this area in Peters v. Hobby, 349 U.S. 331 (1955). Dr. Peters was employed as a Special Consultant in the United States Public Health Service of the Federal Security Agency. His work was not of a confidential or sensitive character and did not entail access to classified material. From 1949-1953 he had been twice subjected to investigations and hearings pertaining to his loyalty and had been cleared both times by the Agency Board. In 1953 the Loyalty Review Board decided to reopen the case on its own motion and hold another hearing. The only evidence adduced was presented by Dr. Peters. He was not permitted to know the name of his accusers or to cross-examine them. In fact the Review Board itself did not know the identity of all of the informers and admitted that the information was not given under oath. Nevertheless, the Review Board determined that on all of the evidence there was reasonable doubt as to Dr. Peter's loyalty to the Government. The Supreme Court, avoiding the constitutional issue, held that in reopening the case the Review Board had exceeded its power under the executive order creating it. The effect of this decision is that Bailey v. Richardson still stands and that the Government can continue to dismiss employees, regardless of the fact that they do not occupy sensitive positions, for loyalty reasons without affording them the opportunity to know and to meet the evidence against them. The Court might well have followed the advice of Mr. Justice Black that the rule that the Court will not decide constitutional questions in cases which can be adequately disposed of on non-constitutional grounds "should not be treated as though it were an inflexible rule to be inexorably followed under all circumstances." Id. at 349 (concurring opinion). This area of the law is one of confusion and one in which there is a major conflict between the interest of the public and the interest of the individual. The more reasonable approach, especially when the constitutional question is adequately argued by opposing counsel as it was in this case, would seem to be that the Court ought to make an exception in such a case.
58. 227 F.2d 708 (9th Cir. 1955).
a complicated situation almost incomprehensible. In the Parker case the Commandant of the Coast Guard issued an order that seamen must have security clearance to serve on merchant vessels. The Magnuson Act authorizes the Commandant to issue security clearances if he is "satisfied that . . . the presence of the individual on board would not be inimical to the security of the United States."60 Parker had been denied clearance after a hearing which did not include the presentation of evidence against him.61 The court of appeals stated the question in issue as follows: "Is this system of secret informers, whisperers and tale-bearers of such vital importance to the public welfare that it must be preserved at the cost of denying the citizen even a modicum of the protection traditionally associated with due process?"62 The court pointed out that seamen were not government employees and thus Bailey v. Richardson was not applicable. It held that such a system of screening violated due process and that "the time has not come when we have to abandon a system of liberty for one modeled on that of the communists."63 Unfortunately, the Solicitor General did not seek Supreme Court review of this decision, and there is now a double standard. The constitutional rights of seamen entitle them to be given the opportunity to know and meet the evidence against them,64 while government employees have no such constitutional right.

In Dressler v. Wilson65 a private contractor entered into a contract with the Defense Department, by which it was to construct secret installations. Another agreement between the parties obligated the contractor to provide a system of security controls, and Dressler's name was submitted to the Defense Department for clearance. He was denied security clearance because it was alleged that he had been an active participant in the activities of the Milwaukee branch of the Socialist Workers Party, an organization on the subversive list of the Attorney General. Dressler was accorded a hearing by the Defense Department at which he questioned the jurisdiction of the board, offered no evidence, and declined to answer certain questions propounded to him. The private contractor then discharged him.66 Dressler contended that the procedure which de-

62. 227 F.2d at 719.
63. Id. at 721.
64. At least this is true in the Ninth Circuit.
nied him clearance was contrary to due process. The court had grave doubts if due process applied to the question of whether a person should receive government employment. Even if constitutional due process did apply the court said that what constitutes due process for one purpose does not necessarily constitute due process for a different purpose. Furthermore, it held that due process only requires confrontation with witnesses in criminal trials and that an administrative hearing in which a party is given an opportunity to answer questions, to offer testimony, and to make any explanation affords him due process.\(^6\)

This case can not be reconciled with *Parker v. Lester*. The *Parker* case pointed out that a seaman was not a government employee, while, strangely, the *Dressier* case apparently assumed that an employee of a private firm which was performing a government contract was a government employee or had the same status as a government employee.\(^6\) What-ever distinction can be made between the two groups certainly does not appear to be of such significance to require or permit different results in regard to the right of knowing and meeting evidence in a security clearance proceeding.\(^6\)

A congressional enactment of August 26, 1950, gave the heads of certain departments summary and unreviewable dismissal power over their civilian employees in sensitive positions when such heads deemed dismissal necessary or advisable "in the interest of the national security of the United States."\(^7\) The issue of whether the hearing provided by an agency pursuant to the act afforded due process was raised in the

\(^6\). 155 F. Supp. at 375-76.

\(^6\). The Government argued in the *Dressier* case that if there were any controversy, it was between Dressler and his former employer. The court, however, stated that it was "unnecessary to reach the question whether a justiciable controversy exists in this case because it [the court] is predicking its decision upon matters that are more fundamental and that go to the merits." *Id.* at 376. Apparently the court was speaking of the lack of the right of a government [defense-contract?] employee to have a trial type hearing in a clearance proceeding.

\(^6\). It should be pointed out that the opportunity for espionage and sabotage in our ports and on merchant vessels is possibly as great as in any other area in which communists are likely to attempt to infiltrate.

\(^7\). 64 Stat. 476 (1950), 5 U.S.C. § 22-1 (1952). The act as expressly made applicable only to specific departments which were directly concerned with security. Section 3 of the act, however, provides that the act may be extended "to such other departments and agencies of the Government as the President may, from time to time, deem necessary in the best interests of national security." The President extended the act under this authority "to all other departments and agencies of the Government." Exec. Order No. 10491, 18 Fed. Reg. 6583 (1953). In Cole v. Young, 351 U.S. 536 (1956), the Court held that an agency determination that a dismissal was "in the interest of the national security of the United States" was not sufficient—the agency must also specifically find that the employee was occupying a sensitive position. *Id.* at 551.
case of Coleman v. Brucker.\textsuperscript{71} Coleman occupied a sensitive position and was accorded a hearing when his loyalty was questioned. He was not confronted with adverse evidence at this hearing and contended that he was entitled to a trial type hearing. The court said that since the Government constitutionally could discharge an employee at whim or will, no removal procedure had to meet constitutional due process.\textsuperscript{72} As to the interpretation of the word "hearing" in the statute, the court said that it merely meant that an opportunity was to be given to a party to answer charges, to give an explanation, and to introduce evidence.\textsuperscript{73} This is rather an unrealistic position. Charges must be specific if one is to answer with any defense other than a general denial. To explain often times requires knowledge of who the witnesses and accusers are. To present evidence necessitates knowing against whom or what to present evidence. If the charges are not specific and the identity of the accuser not disclosed, the best defense that can be mustered is a general denial and the presentation of character witnesses.\textsuperscript{74} It also must be remembered that this statute is only applicable to employees who occupy "sensitive" positions, and any cases decided under it are not applicable to employees who occupy non-sensitive positions.

It is doubtful if anyone would question the right of the Government to discharge an employee for inefficiency without a trial type hearing. The question remaining is whether a discharge for loyalty reasons is of a sufficiently different nature to require such a hearing. Practically speaking, it would appear so. Once an individual is branded a subversive the stigma is almost impossible to efface. It is not plausible to believe that an employee discharged from one agency for security reasons would be able to find employment in another government agency. Private employers avoid the employment of such persons for fear of being tagged "communists sympathizers." One commentator states that if the employee is a young man, "he winds up in some recognizable marginal job, such as dishwashing or unskilled labor"; if the employee is middle aged,

\textsuperscript{71} 156 F. Supp. 126 (D.D.C. 1957).
\textsuperscript{72} "In other words, procedural due process . . . obviously is inapplicable to removal of employees from government service." \textit{Id.} at 128.
\textsuperscript{73} \textit{Ibid.}
\textsuperscript{74} See Mr. Justice Douglas's concurring opinion in Joint Anti-Fascists Refugee Comm. v. McGrath, 341 U.S. 123, 180 (1951); Note, 45 \textit{CALIF. L. REV.} 524 (1957). \textit{Cf.} Boudin v. Dulles, 136 F. Supp. 218 (D.D.C. 1955), \textit{rev'd on other grounds}, 235 F.2d 532 (D.C. Cir. 1956) (a passport case), where the court said: "How can an applicant refute charges which arise from sources, or are based upon evidence, which is closed to him? What good does it do him to be apprised that a passport is denied him due to association or activities disclosed or inferred from State Department files even if he is told of the associations and activities in a general way? What files? What evidence? Who made the inferences? From what materials were those inferences made?" \textit{Id.} at 221.
"he may end up on the industrial scrap heap." 

The fact that an employee dismissed for security reasons is seriously injured, not only in reputation but economically as well, is now fully admitted by the courts. The question is whether there is any remedy for this injury. If the privilege doctrine is relied upon, there is no remedy. Although there has been no Supreme Court decision directly on point, dicta in two recent cases indicate that the privilege doctrine will not pass the test of substantive due process. In *Wieman v. Updegraff* all state employees were required to take a test oath. The Supreme Court held that the statute offended due process because of indiscriminate classification of innocent with knowing association or membership in such organizations. The Court avoided the question of whether there is a right to public employment by stating, "We need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory." This being true, it can be argued that a discharge for security reasons without the opportunity to know and meet adverse evidence would be arbitrary and thus would offend due process.

In *Slochower v. Board of Higher Education* the Court held that there was a violation of due process where an employee was summarily dismissed under a statute which authorized dismissal if a government employee invoked the privilege against self incrimination to avoid answering a question relating to his official conduct before a legislative committee. In speaking of the right to government employment, the Court stated: "The problem of balancing the State's interest in the loyalty of those in its service with the traditional safeguards of individual rights is a continuing one. To state that a person does not have a constitutional right to government employment is only to say that he must comply with reasonable, lawful, and non-discriminatory terms laid down by the proper authorities." The essence of this language indi-

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75. BERLE, THE 20TH CENTURY CAPITALIST REVOLUTION 92-94 (1954). This fact is shockingly illustrated in *Greene v. McElroy*, 254 F.2d 944 (D.C. Cir.), cert. granted, 358 U.S. 872 (1958) (No. 180, 1958 Term). Greene, before being denied security clearance, earned $18,000 per year plus bonuses as vice-president of an engineering corporation. After he was discharged for failure to receive security clearance, the best job he was able to obtain was that of an architectural draftsman at the salary of $4,400 per year.

76. *Greene v. McElroy*, supra note 75.

77. 344 U.S. 183 (1952).

78. Id. at 191.

79. Id. at 192.


81. Id. at 559.

82. Id. at 555.
icates that the Court considers government employment a right, since all constitutional rights are subject to reasonable, lawful, and nondiscriminatory terms laid down by the proper authorities. Later in the same case, however, the Court pointed out that it was not holding that Slochower had a constitutional right to government employment. This contradictory language would seem to indicate that the Court is willing to subordinate the privilege doctrine in the interest of justice and sound public policy.

The Court in the two immediately preceding cases avoided the privilege-right question and held that a government employee could not be arbitrarily discharged without a proper inquiry. Whether a "proper inquiry" includes the right to know and meet adverse evidence is still uncertain. Mr. Justice Douglas believes that government employment is a right—a right to work—and when such employees are discharged without a trial-type hearing, they have been deprived of liberty within the meaning of the fifth amendment. He sums up his position by stating, "Those who see the force of this position counter by saying that the government's sources of information must be protected if the campaign against subversives is to be successful. The answer is plain. If the sources of information need protection, they should be kept secret. But once they are used to destroy a man's reputation and deprive him of his 'liberty,' they must be put to the test of due process of law. The use of faceless informers is wholly at war with that concept."

This position and the one enunciated in the Bailey case set forth the extremes. Reason dictates that neither need be accepted. In weighing the interest of the individual against the interest of national security, it is not necessary to come up with an answer entirely in favor of the one or the other. For example, if in the Bailey case the Government had obtained adverse information about her from her neighbors, her fellow-workers, and also from secret agents in the communist party, the Government should have been required to disclose the names of her fellow-workers and neighbors, but should have been privileged to keep confidential the names of their secret agents and the information they obtained, if it would have revealed the source. The disclosure of the names of her neighbors and fellow-workers would not have had an effect on national security, while the disclosure of the secret agents may have had such an effect. It is to be expected that this system would prevent investigative agencies from receiving a certain kind of information and that some

83. Id. at 559.
85. Ibid.
people would be discouraged from carrying rumors and suspicions to these bodies. Nevertheless these agencies should be able to perform their duties in this area just as they are able to obtain proof for criminal prosecutions which require confrontation. Surely it is better that these agencies suffer some handicap than that innocent citizens be branded as subversives. Such a solution would appear to follow the concept of justice as enunciated in the Jencks case. Non-disclosure only in those instances where national security would be affected and where the Government has a legitimate claim of privilege would bring these hearings in line with the cases that have held that the Jencks doctrine is applicable to administrative hearings.

The foregoing compromise as to what evidence should be made available solves only half of the problem; the remaining half involves the determination of who is to decide if the release of certain information or the name of an informer would adversely affect national security. It has been suggested that a single statute be enacted in the area of government employment to cover the clearance, hiring, and removal of government employees for security reasons. Under such a statute the proposed agency could consider evidence, the source and content of which had not been made available to the accused, only upon the affidavit of the Attorney General of the United States that disclosure would jeopardize the security of the United States. Such a procedure, if adopted, would appear to protect adequately both the interest of the government and the individual.

One commentator suggests that the question might be determined by an independent agency or board appointed specially for such purpose. While this method theoretically may have many advantages, it has been criticized on the ground that there would not be sufficient business brought before such an agency to justify its existence.

Those who fear placing such discretion in the hands of an agency or agency head advocate that the information be subject to an in camera

86. See Parker v. Lester, 227 F.2d 708, 720 (9th Cir. 1955).
87. Note that the Jencks case pointed out that in civil cases "it is unquestionably true that the protection of vital national interest may militate against public disclosure of documents in the Government's possession." 353 U.S. 657, 670 (1957).
89. Sanford, Evidentiary Privileges Against the Production of Data Within the control of Executive Departments, 3 VAND. L. REV. 73 (1949).
90. Note, 41 CORNELL L.Q. 737 (1956) suggests that it would have the advantage of combining "the expertise of the administrative agency with the impartiality of a court." Id. at 748.
91. Ibid. To the same effect, see Sanford, supra note 89, at 95. Sanford also states that this method would be subject to the same advantages and disadvantages as determination by the head of the respective department or agency. Ibid.
inspection by the trial judge with the usual appellate review. Such a proposal would require the clearance of all federal judges for the information to retain its confidential classification. Theoretically this would be sound but its practicality is doubted. Some judges probably would be denied clearance, and the question of the procedure to be used in clearing judges would be raised. Such a proposal is also subject to the criticism that a judge lacks the expert knowledge to decide whether the disclosure of information would have an adverse effect on national security.

The more practical, and perhaps the best, proposal is that of the New York City Bar Association’s Special Committee. It would require that disclosure of information and informers be made unless the head of the agency which obtained the information certified that disclosure would be detrimental to national security. This would demand of the agency head more than the mere summary approval of some subordinate’s recommendation. It would have to be the personal decision of the agency head. This solution is subject to the criticism that such discretion could not be checked by the courts and would still leave an individual subject to arbitrary power. However, the integrity and honesty of judges are accepted in many areas. In this situation where national interest is seriously affected, at some point individual interest must give way to the overriding interest of the government and the integrity and honesty of the agency head accepted.

CONCLUSION

The intent and rationale of the Jencks case is that the Government must not be out to win a case at any cost but that justice must be done. No one would seriously argue that the Government has any valid interest in withholding information that may acquit an accused. The relation-

95. Professor Davis suggests that in case the agency head should follow the past practice of automatically certifying that disclosure would be detrimental to national security, “perhaps a panel of three court-of-appeals judges, specially cleared for the purpose, could be appointed to determine when disclosure of informants would not be detrimental to national security.” Davis, Requirement of a Trial-Type Hearing, 70 HARV. L. REV. 193, 242 n.180 (1956).
96. Brown takes the position that “the whole loyalty apparatus, outside the field of sensitive employment, does more harm than good, and ought to be swept away.” BROWN, LOYALTY AND SECURITY 381 (1958).
97. This conclusion would appear to be true even where vital national interest would be adversely affected. In such cases the Government should either disclose the
ship of the Government and an accused is on an entirely different basis from that of a defendant and plaintiff in a civil action. In criminal cases the sixth amendment commands that an accused come forward and make himself known to the accused regardless of the fact that the disclosure of the accuser may have an adverse effect on national security. The Jencks case only provides for the complete application of this rule by allowing the accused all pertinent information given by the accuser and adverse witnesses to enable the accused to defend himself adequately.

No such rule is applicable in the administration of justice in administrative hearings. It would appear, however, that the interest of the Government does not change. It has no interest in winning a case but at all times is primarily interested in seeing that justice is dispensed. All pertinent information that the Government has, when it is a party to an administrative hearing, should be made available to an accused except to the extent that such an interest as national security clearly requires that particular evidence or its source not be disclosed. While the Jencks case is not directly applicable in hearings where no witnesses are presented by the Government, it is important in that it may well be a sign point toward disclosure in such cases. At least it positively demonstrates that FBI reports are not sacrosanct.

Administrative proceedings are a part of the judicial system of this country and any adverse comment or feeling as to their administration of justice reflects on the entire judicial system. Mr. Justice Frankfurter, in speaking of the administration of justice said: "The untainted administration of justice is certainly one of the most cherished aspects of our institution. Its observance is one of our proudest boasts. . . . [F]astidious regard for the honor of the administration of justice requires the Court to make certain that the doing of justice be so manifest that only irrational or perverse claims of its disregard can be asserted." 98

This mandate should be followed to its most extreme limits.

In all administrative hearings in which adjudicatory facts are in issue, the interest of the government in maintaining the confidential na-

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ture of its files must be weighed not only against the interest of an individual in a fair hearing but also against the public interest in the fair administration of justice.\textsuperscript{99} In hearings where the effect of the determination goes far beyond the sanction of the hearing itself, as in the discharge of an employee for security reasons, it is urged that the Government should be entitled to maintain the secrecy of its files only when public policy so dictates in the interest of national security.\textsuperscript{100} If due process does not command such a procedure, and the Court is unwilling to demand it, then public policy should require it in the character of a congressional enactment.

POSSIBLE EFFECTS OF THE FIRST PROVISO TO SECTION 9 (a) OF THE NATIONAL LABOR RELATIONS ACT

Section 9 (a) of the National Labor Relations Act as originally enacted provided:

Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment. Provided, that any individual employee or a group of employees shall have the right at any time to present grievances to their employer.\textsuperscript{1}

The Taft-Hartley Act added to the proviso so that it presently states:

\textsuperscript{99} Judge L. Hand expressed an even more liberal view: "Risk for risk, for myself, I had rather take my chance that some traitors will escape detection than spread abroad a general suspicion and distrust, which accepts rumor and gossip in place of undismayed and unintimidated inquiry. I believe that that community is already in a process of dissolution where each man begins to eye his neighbor as a possible enemy. . . ."

\textsuperscript{100} See Comment, 63 \textit{YALE L.J.} 206 (1953) where it is stated: "Whether or not a particular utilization of informers is constitutional should not be the decisive test; often what escapes constitutional interdiction is nevertheless unwise or unfair." \textit{Id.} at 230.
Mr. Justice Frankfurter expressed the same view in the following manner: "Civil liberties draw at best only limited strength from legal guarantees. Preoccupation by our people with the constitutionality, instead of with the wisdom, of legislation or of executive action is preoccupation with a false value. . . . Focusing attention on constitutionality tends to make constitutionality synonymous with wisdom." Dennis \textit{v.} United States, 341 U.S. 494, 555 (1951) (concurring opinion).

\textsuperscript{1} National Labor Relations Act (Wagner Act) § 9(a), 42 Stat. 453 (1935).