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Security Clearance Revocation As A Justiciable Controversy

SECURITY CLEARANCE REVOCATION AS A JUSTICIABLE CONTROVERSY

Whether the withdrawal of a security clearance[1] from a government contract employee[2] presents a justiciable case or controversy is an issue which affects the status of nearly three million individuals in private employment.[3] This vital problem has been raised in *Greene v. McElroy*.[4] The appellant in this case also asserts the invalidity of the entire Industrial Personnel Security Program[5] and challenges the constitutionality of the procedures of the program.[6]

William L. Greene was, by profession, a trained and experienced aeronautical engineer. He was employed at Engineering and Research Corporation (ERCO), a manufacturing company located in Maryland, from 1937 until his dismissal in 1953. ERCO was engaged

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[1]32 C.F.R. § 67.1-2(c) (Supp. 1958). "The term 'clearance' means an administrative determination, in accordance with approved policy, that a contractor or contractor employee is eligible to have access to classified information.... A clearance is an administrative determination that the granting of such approval is clearly consistent with the interests of the national security.... In the case of a contractor employee, a clearance is an approval for the employee to have access to specified categories of classified information necessary for the performance of his work with a particular contractor on contracts with a military department or activity thereof which involve access to such information."

[2]Id. § 67.1-2(b). "The term 'contractor employee' means any United States citizen or immigrant alien who is an official or employee of a contractor...."

[3]Association of the Bar of the City of New York, Report of the Special Committee on The Federal Loyalty-Security Program 64 (1956); Hearings Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary (Hennings Subcommittee), 84 Cong., 2d Sess. 606 (1955).

[4]254 F.2d 944 (D.C. Cir. 1958), cert. granted, 358 U.S. 872, (1958). See also Taylor v. McElroy, cert. granted, 358 U.S. 918 (1958) (No. 504), which involves similar facts and issues and questions of mootness and the constitutionality of the procedures of the industrial security program. The Taylor and Greene cases were argued consecutively in the Supreme Court of the United States on April 1-2, 1959. 27 U.S.L. Week 3275 (U.S. April 7, 1959).

[5]254 F.2d at 950. See also 27 U.S.L. Week 3132 (U.S. Oct. 28, 1958). The program as it is presently constituted is set forth in Department of Defense Directive 5220.6 (Feb. 2, 1955), 32 C.F.R. § 67 (Supp. 1958). This article will not discuss the statutory basis for the program. The Court of Appeals reached the conclusion that there was sufficient authority for the program. For discussion of this phase of the case see 254 F.2d at 948-50. A comprehensive description of the program's operation may be found in Note, 8 Stan. L. Rev. 234 (1956).

[6]254 F.2d at 950. See also 27 U.S.L. Week 3132 (U.S. Oct. 28, 1958). Again, this question is not within the scope of this article. Primary emphasis was placed on this issue in the arguments before the Supreme Court. 27 U.S.L. Week 3275 (U.S. April 7, 1959). The Court of Appeals held that Greene was not entitled to confrontation by his accusers and to other procedural protections as a matter of due process of law. 254 F.2d at 950.

in classified research under contracts with the Department of the Navy. These contracts incorporated by reference the Department of Defense Industrial Security Manual for Safeguarding Classified Matter.[7] At the time of his dismissal Greene was Vice-President in charge of Engineering and General Manager of ERCO at an annual salary of $18,000 plus bonuses. He had government security clearances for access to confidential, secret, and top secret information of various governmental agencies, including the Navy Department.[8]

On April 17, 1953, the Secretary of the Navy informed ERCO's president that Greene's " 'continued access to Navy classified security information [was] inconsistent with the best interests of National security' "[9] and requested that he be excluded from classified Navy projects at ERCO and that he be barred from access to all Navy classified security information. ERCO proceeded to dismiss Greene from his job, although his position was held open for him pending review. On May 28, 1954, he was finally advised that his clearance was denied. Since the original order withdrawing clearance, Greene has worked as an architectural draftsman at a salary of $4,400 per year.[10]

In August 1954, after exhausting the administrative remedies, this suit was filed in the District Court for the District of Columbia, but before it came to trial, a new program regulating security clearances was promulgated. Greene's case was re-examined under these new regulations, but again, on March 12, 1956, the prior decision was affirmed.[11]

The appellant sought declaratory and injunctive relief by way of a judgment (1) declaring invalid the act of the Government in withdrawing his security clearance, and (2) ordering the Government to restore his security clearance.[12]

The district court found that there was no justiciable controversy, reasoning that when Greene's employer entered into the government contract, it was obligated to perform the terms of the contract, even though it might result in injury to an employee.[13] Moreover, the court

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[7]2 Gov't Sec. & Loy. Rep. 25:95 (Feb. 1957). This is the current edition of the Manual which was first issued in January 1951, and revised in May 1953.

[8]254 F.2d at 946.

[9]Id. at 946.

[10]Id. at 946, 952.

[11]Id. at 947.

[12]Ibid.

[13]Greene v. Wilson, 150 F. Supp. 958, 959-60 (D.D.C. 1957), aff'd, 254 F.2d 944 (D.C. Cir. 1958), cert. granted, 358 U.S. 872 (1958). "It is fundamental when one presumes to accept a contractual offer then that offer must be accepted in terms, and one of the terms here, as has been said, related to security controls. The neces-

implied that ERCO was free not to enter into such a contract, that it entered into said contract voluntarily, and that Greene had the same freedom with regard to his employment at ERCO. The injury to Greene, the court stated, was not the fault of the Government since it was only acting properly to protect its own existence.[14]

The United States Court of Appeals for the District of Columbia Circuit recognized that the appellant had suffered tangible injury in certain respects, but held that the mere recitation of injury without more did not present a justiciable controversy.[15] It said there must also be a conflict which the courts can effectively decide and administer.[16] The court noted that it would not inquire into the merits of the dismissal except to see if the Government had complied with the applicable statutes and regulations, said statutory compliance being conceded in this case.[17] Such judgments, it pointed out, must be made with regard to policy considerations which are appropriate only to the Executive Department.[18]

A justiciable case or controversy exists when adverse litigants[19] with substantial interests[20] have presented a real issue for determination.[21] An examination of the facts of this case shows that Greene is not a litigant with *substantial interests*.[22]

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sity for such is obvious. If the plaintiff's employer did not see fit to accept and conform, it had perfect freedom not to enter into the contract. On acceptance of the offer in terms, it was obliged in the circumstances to carry out its essentials, the presumed result of which was the loss by the plaintiff of his position. But this cannot be said in any degree to be the fault of the Government, for here, through properly constituted authority, it was exercising its right to protect itself against threats to its survival, and as far as the action of an individual was concerned, this action taken, even envisioning the result to the plaintiff, fails to set forth any invasion of his legal rights and therefore, as has been said, there is no justiciable controversy . . . ."

[14]Ibid.

[15]254 F.2d at 953.

[16]Ibid. "There must be a 'justicible' controversy—one which the courts can finally and effectively decide, under tests and standards which they can soundly administer within their special field of competence."

[17]Ibid.

[18]Id. at 953-54. "Indeed, any meaningful judgment in such matters must rest on considerations of policy, and decisions as to comparative risks, appropriate only to the executive branch of the Government . . . . In a mature democracy, choices such as this must be made by the executive branch, and not by the judicial."

[19]U.S. Legislative Reference Service, Library of Congress, The Constitution of the United States of America Annotated 539-40 & n.1 (Corwin ed. 1953).

[20]Id. at 542 & nn.1, 2, 3, & 4. See Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 693 (1949).

[21]U.S. Legislative Reference Service, Library of Congress, The Constitution of the United States of America Annotated 544-45 (Corwin ed. 1953).

[22]The Court of Appeals also apparently thought that no 'real issue' was presented

An attack upon the constitutionality of an act of a government department can only be made by a person who has sustained or is immediately in danger of sustaining a direct injury as a result of that action.[23] This interest is known technically as standing to sue.[24] This requirement is enforced in declaratory-judgment type relief cases as well as in cases seeking the more traditional types of relief.[25]

The question then resolves itself into one of whether or not Greene has been legally injured by the action of the Government in removing his security clearance. It is not enough that a person be seriously harmed in order to claim constitutional protection. He must also have been deprived of some *liberty* or *property* which the judiciary traditionally protects under the due process clause of the Constitution. This distinction is important in that it serves as the dividing line between those interests which are judicially protected against governmental interference and those upon which reliance must be placed on other branches of government.

Those interests which are said to be affected by the removal of a security clearance are "the economic interest in employment and the relational interest of reputation."[26] The Court of Appeals recognized,[27] and the Government has conceded,[28] that Greene was injured in certain ways, one of which was the loss of his employment. But these interests, the court said, are not of the type that have traditionally

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by these facts upon which the courts could make an effective determination. 254 F.2d at 953-54. This problem, which also concerns the right of judicial review on these facts, will not be discussed herein.

[23]11 Am. Jur. Constitutional Law § 111 (1938, Supp. 1958). "One threatened with injury by an act of an agent of the government done under statutory authority can challenge the validity of the statute in a suit against the agent, only where the right invaded is a legal right, one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege. Tennessee Electric Power Co. v. Tennessee Valley Authority, 306 U.S. 118, 83 L.ed. 543, 59 S. Ct. 366." See also 28 Am. Jur. Injunctions § 182 (1940). Cf. the language of Mr. Justice Brandeis, concurring in Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 347-48 (1936), in which he sets out his seven rules for avoiding constitutional issues: "The Court will not pass upon the validity of a statute upon complaint of one who fails to show that he is injured by its operation.... Among the many applications of this rule, none is more striking than the denial of the right of challenge to one who lacks a personal property right."

[24]Comment, 10 Stan. L. Rev. 335, 336 (1958).

[25]U.S. Legislative Reference Service, Library of Congress, The Constitution of the United States of America Annotated 552-53 (Corwin ed. 1953).

[26]Comment, 10 Stan. L. Rev. 335, 337 (1958). See also Note, 19 Mont. L. Rev. 121, 124 (1958), for an excellent discussion of these two interests.

[27]254 F.2d at 952.

[28]Brief for Respondents p. 30, Greene v. McElroy (No. 180, 1958 Term, in the Supreme Court of the United States on Writ of Certiorari).

been accorded judicial protection. In other words, these interests are not liberty or property within the traditional concept of due process.

Three lines of cases have been utilized to support the view that courts do protect a person's economic interest in employment. Firstly, it is said that the courts will protect *the right to work in the common occupations of the community.*[29] Certainly, the occupation here is not a common one; on the contrary, it is a highly sensitive position open only to those skilled in their profession and of unquestioned loyalty and reliability. Secondly, it is clear that a person has a *right to be protected from arbitrary and discriminatory exclusion from public employment.*[30] Aside from the fact that public employment is not involved in the principal case, it should be pointed out that Greene was not excluded from *employment* by the action of the Government in removing his security clearance.[31] Moreover, the words "arbitrary" and "discriminatory" as utilized by the Supreme Court in this context mean only that the Industrial Personnel Security Program, as a whole, must bear a rational relationship to a legitimate government objective. The security program, as presently constituted, does bear this rational relationship to a legitimate government objective—the requirements of national security and the protection of classified security information. Finally, it is said that a private person has *a right to engage in his chosen profession* and not to be barred from it through the imposition of a legal disability.[32] Here again, the action taken against Greene has not resulted in total exclusion from his profession.[33] However, the withdrawal of a security clearance may operate as

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[29]Truax v. Raich, 239 U.S. 33, 41 (1915).

[30]Slochower v. Board of Educ., 350 U.S. 551, 556 (1956); Wieman v. Updegraff, 344 U.S. 183, 192 (1952); United Pub. Workers of America, CIO v. Mitchell, 330 U.S. 75, 100 (1947).

[31]254 F.2d at 946 n.2. "Since a clearance relates only to access to classified defense information, the denial or revocation of a clearance to a contractor or contractor employee does not preclude his participation in unclassified work." 32 C.F.R. § 67-1-3(b) (Supp. 1958). "An employee who is denied clearance is thereby denied access to classified information, but he need not be discharged if employment not requiring this access is available for him." Association of the Bar of the City of New York, Report of the Special Committee on The Federal Loyalty-Security Program 64 (1956). "Denial or revocation of clearance for access to classified material does not require that an employee be discharged.... Clearances under the industrial security program are not for employment; they are merely for access to classified material." Report of the U.S. Commission on Government Security 257-60 (1957).

[32]Konigsberg v. State Bar, 353 U.S. 252, 262 (1957); Schware v. Board of Bar Examiners, 353 U.S. 232, 238-39 (1957); Dent v. West Virginia, 129 U.S. 114 (1889); Ex parte Garland, 71 U.S. (4 Wall.) 333, 379 (1866); Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 320 (1866); Parker v. Lester, 227 F.2d 708, 713 (9th Cir. 1955).

[33]254 F. 2d at 950; Webb v. United States, 21 F.R.D. 251, 258 (1957); 46 Calif. L. Rev. 828, 829 (1958). Cf. Parker v. Lester, 227 F.2d 708, 711-18 (9th Cir. 1955).

a legal bar to Greene's employment in the aircraft industry, as it seems to have done here. But the Supreme Court has stated "that neither damage nor loss of income in consequence of the action of Government, which is not an invasion of recognized legal rights, is in itself a source of legal rights in the absence of constitutional legislation recognizing it as such."[34] This statement illustrates the primary distinction between action by the Government in its *proprietary capacity.* and its action in a *regulatory capacity.* It demonstrates that persons dealing with the Government in its proprietary capacity do not acquire any interest entitled to judicial protection.

Courts generally will refuse "to protect interests which are considered to be privileges granted at the grace of the government."[35] This privilege-right dichotomy has been utilized to defeat justiciability in suits by government employees discharged for security reasons since government employment has long been considered a privilege rather than a right.[36] It appears that the granting of a government secuity clearance is even more of a privilege than the granting of employment. The access to confidential information, of necessity, cannot be more than a permissive privilege granted to individuals at the government's discretion.[37]

Moreover, the rights of government contract employees should be assimilated to those accorded government employees. The reason for this assimilation of the rights of these individuals to those of a government employee is basically that the national interests are the same in the situation in which government work is contracted out to private industry as it is when the Government itself is the employer. In these cases, the government's interest is in protecting the national security, and it is to be protected whether the employer is the Government itself or a private corporation under government contract.[38]

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[34]Perkins v. Lukens Steel Co., 310 U.S. 113, 125 (1940). Mr. Justice Black who wrote the opinion in the Lukens case may have thrown some doubt on the use of this language in this context in the recent arguments before the Supreme Court in the Greene case. 27 U.S.L. Week 3275, 3279 (U.S. April 7, 1959). Moreover, Assistant Attorney General George Cochran Doub, counsel for the Government in the Greene case, admitted to the Supreme Court that the denial of access to Greene did deprive him of his job. 27 U.S.L. Week 3275, 3279 (U.S. April 7, 1959).

[35]32 Tul. L. Rev. 313, 314 (1958).

[36]Dressler v. Wilson, 155 F. Supp. 373 (D.D.C. 1957); McAuliffe v. City of New Bedford, 155 Mass. 216, 29 N.E. 517 (1892); 32 Tul. L. Rev. 313, 314 (1958).

[37]The basis for granting access is spelled out in 32 C.F.R. § 67.3-1 (Supp. 1958). "Clearance shall be denied or revoked if it is determined, on the basis of all the available information, that access to classified information by the person concerned is not clearly consistent with the interest of national security."

[38]254 F.2d at 951; 27 U.S.L. Week 3275, 3279 (U.S. April 7, 1959); Brief for

If the economic interest discussed above is not entitled to constitutional protection, then it is equally true that any relational interest of reputation is not entitled to independent constitutional protection. For the reasons previously stated, reference should be made again to dismissals from government employment on security grounds. In *Bailey v. Richardson*,[39] a government employee was dismissed on suspicion of disloyalty, and it was urged that the resulting stigma impaired opportunities for future employment. Judge Prettyman, speaking for the United States Court of Appeals for the District of Columbia Circuit, nevertheless held that the employee had no redress against the Government on this basis.[40]

The finding here is only a characterization of doubt about the employee's reliability and is not an affirmative finding of disloyalty or of any other crime.[41] In this sense, the findings are different from those involved in *Harmon v. Brucker*[42] and *Joint Anti-Fascist Refugee Comm. v. McGrath*.[43] In the former, the appellant was discharged from the Army without an honorable discharge, a finding which amounted to an official statement as to his Army record.[44] In the latter case, the adverse finding would place the appellant organization on the Attorney General's list of subversive organizations.[45]

Respondents, p. 43, Greene v. McElroy (No. 180, 1958 Term, in the Supreme Court of the United States on Writ of Certiorari).

[39]182 F.2d 46 (D.C. Cir. 1950), aff'd by an equally divided court, 341 U.S. 918 (1951).

[40]Id. at 63-64. "But if no constitutional right of the individual is being impinged and officials are acting within the scope of official authority, the fact that the individual concerned is injured in the process neither invalidates the official act nor gives the individual a right to redress.... These harsh rules, which run counter to every known precept of fairness to the private individual, have always been held necessary as a matter of public policy, public interest, and the unimpeded performance of the public business."

[41]32 C.F.R. § 67.1-3(b) (Supp. 1958). "The denial or revocation of a clearance in and of itself does not necessarily carry any implication that the individual is disloyal to the United States."

[42]355 U.S. 579 (1958).

[43]341 U.S. 123 (1951).

[44]Case citation note 42 supra. This was an action to require the Army to issue an honorable discharge rather than a less-than-honorable one under the applicable statutes and regulations, said certificate being evidence of his character of service when the discharge was wholly unrelated to the character of service but instead was based on preservice activities. For other distinguishing factors, see 254 F.2d at 951 n.12.

[45]Case citation note 43 supra. This suit was to enjoin the continued listing of the complaining organization on the Attorney General's list of subversive organizations. Groups listed were subject to stringent regulations and prohibitions. For example, the list was utilized in denying passport applications to individual members of a listed organization.

In any event, a program of such magnitude and importance as the Industrial Personnel Security Program should not be ruled invalid because of this relational interest to reputation. If such an injury does in fact result, then the individual should be required to pursue some other more traditional civil remedy. As the Court of Appeals pointed out, no court should compel the Government to choose between the alternatives or disclosing state secrets to persons of doubtful reliability or of cancelling all of its contracts with ERCO on the basis that one man's reputation has been damaged.[46]

Admittedly, there are certain injustices in the present security program, but an adverse result in this case would overthrow a carefully organized security program and would open the files of America's defense secrets to those of doubtful reliability and trustworthiness. This is not to suggest that the theory of justiciability in these cases should be based upon that all-encompassing concept of "public policy." It is a suggestion that the grave nature of the issues involved and the legitimate objectives of the program should be weighed in the determination.[47]

Efforts are constantly being made to improve the program.[48] If these suggested improvements are made, many of the program's apparent inequities will tend to disappear. Until that day of perfection is reached, however, the Government should not be forced to choose between the drastic alternatives referred to, simply in the name of individual protection when it is rather clear that the courts will not always protect such individuals.

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ADDENDUM

On June 29, 1959, the Supreme Court of the United States handed down its long-awaited decision in the *Greene* case.[1] By an 8-1 vote,

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[46]254 F.2d at 951.

[47]Cf. Von Knorr v. Miles, 60 F. Supp. 962 (D.C. Mass. 1945), rev'd on other grounds sub nom. Von Knorr v. Griswold, 156 F.2d 287 (1st Cir. 1946). "Two interests are in competition and must be considered: the government's concern to prevent both sabotage and disclosure to the enemy of secret processes, statistics and information; and the private individual's concern to go where he pleases and engage in such work as is offered him." 60 F. Supp. at 970.

[48]See, e.g., U. S. Dep't of Air Force, Industrial Personnel Security Review Program, First Annual Report 11-12 (1956); Association of the Bar of the City of New York, Report of the Special Committee on The Federal Loyalty-Security Program 137-88 (1956); Report of the U.S. Commission on Government Security 266-319 (1957).

[1]Greene v. McElroy, 360 U.S. 474 (1959).

the Court held that "in absence of explicit authorization from either the President or Congress the respondents [Secretary of Defense, etc.] were not empowered to deprive petitioner [Greene] of his job in a proceeding in which he was not afforded the safeguards of confrontation and cross-examination."[2]

Thus, the Court based the decision on the issue of the executive or legislative authority for the Industrial Personnel Security Program and found such authority to be lacking. Although this comment did not cover that phase of the *Greene* case,[3] the opinion was significant in certain other respects which are pertinent to the comment. While the Court purported to refrain from touching upon other issues in the case,[4] their views on these issues were made quite plain, and the language of the opinion in relation thereto was broad.

In reference to the specific context of this comment, the Court stated that the right to hold specific private employment free from unreasonable governmental interference did come within the liberty and property concepts of the fifth amendment,[5] and, moreover, that Greene did suffer substantial injuries sufficient to give him standing to sue.[6] Mr. Justice Harlan, in his special concurring opinion, castigates Mr. Justice Clark, who dissented, for yielding "to the temptations of colorful characterization" in suggesting that the issue in the case was "whether a citizen has a 'constitutional right to have access to Government's military secrets.' "[7] While it is true that the issue cannot be stated so simply, Justice Clark is correct in saying that this issue must be answered in order to reach either the authorization of

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[2]Id. at 508. Chief Justice Warren wrote the majority opinion for the Court.

[3]See note 5 supra. The following statement from the Court's opinion is significant. "The issue, as we see it, is whether the Department of Defense has been authorized to create an industrial security clearance program...." 360 U.S. at 493. But see the view of Justice Clark in his dissent on this point: "Thus we see that the program has for 18 years been carried on under the express authority of the President, and has been regularly reported to him by his highest Cabinet officers. How the Court can say, despite these facts, that the President has not sufficiently authorized the program is beyond me, unless the Court means that it is necessary for the President to write out the Industrial Security Manual in his own hand." 360 U.S. at 521. (dissenting opinion).

[4]360 U.S. at 493.

[5]Id. at 492 (dictum).

[6]Id. at 493, n.22.

[7]Id. at 510. (concurring specially). Cf. the language of Justice Clark: "Surely one does not have a constitutional right to have access to the Government's military secrets.... [And the Court] has in some unaccountable fashion parlayed his [Green's] employment with ERCO into 'a constitutional right.' What for anyone else would be considered a privilege at best has for Greene been enshrouded in Constitutional protection." Id. at 511. (dissenting opinion).