Statement of Hal Witt
on behalf of
American Civil Liberties Union

on

H. R. 7199

To protect the civilian employees of the executive branch of the United States Government in the enjoyment of their constitutional rights and to prevent unwarranted governmental invasions of their privacy.

before the

Subcommittee on Employee Benefits
Committee on Post Office and Civil Service
U. S. House of Representatives

Monday, May 17, 1971

My name is Hal Witt. I am appearing here today on behalf of the American Civil Liberties Union. I am an attorney in private practice in Washington, D. C. and a member of the Executive Board of the American Civil Liberties Union, National Capital Area.

The ACLU appreciates the opportunity to testify in support of H. R. 7199, a bill to protect the employees of the executive branch of the United States Government in the enjoyment of their constitutional rights and to prevent unwarranted governmental invasions of their privacy.

We wish to express our appreciation to Chairman Hanley and the members of the Subcommittee on Employee Benefits for holding these hearings and inviting us to testify. H. R. 7199, introduced by Representative Charles H. Wilson of California, is (with one major exception) substantially the same as S. 1438, the bill which has been championed in the Senate by Senator Ervin for several years. Representative Wilson and Senator Ervin, and all of their colleagues who join them in co-sponsoring these bills, are to be congratulated for their interest in and concern for the rights of Federal employees.

There is no matter which is more deserving of the attention of the Congress. The proper and effective functioning of our government depends to a high degree upon the support and morale of the vast body of Federal employees. We believe that nothing can be more damaging to the morale of those employees and to their devotion to their jobs than the fact that the government itself in many instances disregards the rights of employees in serious ways.

It is a truism, but worthy of repetition, that an institution will generally receive from the individuals who are involved with it a measure of respect which is commensurate with the respect with which the institution treats the individuals. In order, therefore, to inspire the highest sense of loyalty and devotion to duty on the part of its employees, the Federal government must set an example of loyalty and devotion to the rights and interests of the employees.

Unfortunately, the record of our government has all too often been clouded with violations of this principle. It is, perhaps, easy to understand that an overzealous official may be tempted, by what he or she understands to be the interests of the government, to take measures which appear to advance that interest, but which at the same time disregard the rights of an individual employee. The fact that such tendency is understandable, however, does not make it justifiable. Indeed, the fact that the tendency is understandable means that the behavior is all too likely to occur and reoccur, and that it is essential to build into the system itself the best possible protections against the tendency, whether well-intentioned or not, to infringe individual rights.

We believe that the subject of Federal employees' rights to privacy is particularly important at this time. There is increasing public awareness of the power of new technology to invade the privacy of individuals.

The Wall Street Journal of Monday, May 3, 1971, carries a thought-provoking article by David C. Anderson, a member of the Journal's editorial-page staff, entitled, "On Communications and Common Sense." Mr. Anderson discusses two recent books, "The Information Machines," by Ben Bagdikian and "The Assault on Privacy," by Arthur R. Miller. These books point out the rapid developments in the techniques of communications and information-gathering and storage, and their alarming implications, in terms of the possibilities of monitoring and spying upon the activities of citizens and their private lives.

Mr. Anderson notes that one may conclude from the books of Messrs. Bagdikian and Miller that "As the technologies grow more pervasive and sophisticated, they may have the subtle effect of eroding the amount of common sense we normally bring to our decisions, either as leaders, or as voters."

For the convenience of the Subcommittee, we are attaching to this statement a copy of the article by Mr. Anderson and of the editorial, "Accountability and Arrogance," which appeared on the editorial page of the Wall Street Journal on the same day, May 3, 1971.

We also want to quote here from the last paragraph of that editorial, where the Wall Street Journal observes that "The modern world makes the idea of accountability for power in a democracy more important than ever, however upstanding the people who use it. To ignore this idea is at best remarkably short-sighted; at worst it involves an arrogance no free society can afford for long."

It is important, and admirable, that this Subcommittee is turning its attention so seriously to the rights of privacy of Federal employees at this time, in this context.

We would like now to discuss some of the particular provisions of H. R. 7199.

The bill would make it unlawful for any government or military official:

1. To require any employee or applicant to disclose his race, religion or national origin;

2. To inform government employees that they are required or expected to attend or not attend any meeting or lecture unrelated to the performance of assigned duties.

3. To require employees to participate in activities or undertakings not directly within the scope of their employment;

4. To require or request reports of government employees concerning any activities or undertakings not directly within the scope of their employment;

5. To require any employee or applicant to submit to any interrogation, examination or psychological or polygraph test designed to elicit information about personal relationships with relatives, or religious beliefs or practices, or his attitude and conduct with respect to sexual matters;

6. To require or request any employee to support any candidate, program or policy of any political party by personal endeavor or contribution;

7. To coerce any employee to buy U. S. Savings Bonds or make any kind of donation ("appropriate" publicity would be permitted);

8. To require any employee to disclose his financial assets or liabilities or those of any member of his family, with exceptions for those with authority to make final determinations in tax and certain other matters;

9. To require any employee who is under investigation for misconduct to submit to an interrogation without the presence of counsel or other person of his choice;

10. To discharge, discipline, or fail to promote any employee for refusal to submit to any requirements, requests or action made unlawful under this bill.

The bill forbids the Civil Service Commission from requiring any Federal agency to do any of the above things. The bill provides for court action by any employee to enjoin any threatened violation of the Act or to obtain redress, and establishes a Board of Employees' Rights which would be empowered to receive complaints, hold hearings, and order that officials cease and desist from violations of the Act. In an important difference between this bill and the Senate bill, to which we have previously referred, this bill does not exempt the FBI from its coverage generally. We believe this is an improvement over the Senate version. Persons who work for the FBI should have the same rights all other persons have, and recent incidents which are well known through the press are illustrative of the need for legally guaranteed protection for people who work for the FBI.

Questions on Religion and Religious Beliefs

Section 1(a) would ban questions of applicants or employees forcing them to disclose their religion or the religion of their forebears. We would like to suggest that in Section 1(a) the word "religion" be replaced with the words "religious beliefs or lack of religious beliefs." In many cases we have encountered, the argument has been made that trying to find out if a person doesn't believe in God is not an inquiry into religious beliefs -- because atheism is not a religion. Needless to say, this sophistry should have been thoroughly laid to rest by the case of Torcaso v. Watkins, 367 U.S. 488 (1961), yet it continues to arise. If the wording is changed as we have suggested, it should help avoid this contention.

Questions on Race

The ACLU recognizes that questions about race raise difficult problems. The issue of whether or not to collect and disseminate information about race creates a conflict among several equally important civil liberties: the rights of free speech, free inquiry, freedom of religion, and privacy, on the one hand, and the right to equality of opportunity and treatment, on the other hand.

It may be necessary, in order to ensure that government hiring and other personnel practices are free from racial discrimination, to acquire information about the race of applicants for employment, so that the pattern or practice of hiring as among persons of various racial backgrounds may be examined and so that patterns and practices with regard to job assignments, promotions and other personnel practices may be similarly examined.

We think therefore, that there may be serious questions raised by the blanket prohibition, contained in Section 1(a) of the bill, on questions about race. We recognize that the intention of the bill, to protect the privacy of the individual, is excellent, but we feel that some consideration must unfortunately be given to the need for racial information in order to combat racial discrimination.

Questions on Political Beliefs and Associations

We believe that H. R. 7199 should be broadened by including within the prohibitions of Section 1(e) a prohibition on interrogation, examination or psychological testing with regard to the employee's political beliefs and associations. Since H. R. 7199 is aimed at protecting the constitutional rights of federal employees, it is appropriate to consider the inquiries presently being made by the Civil Service Commission of all applicants for federal employment.

The Civil Service Commission asks all applicants questions about their political beliefs and associations and asserts the right to investigate them and their beliefs and associations under the guise of determining their "suitability." This is a practice which has no business in a democratic country.

The only law presently in effect which denies public employment on the basis of political beliefs or associations is P.L. 330-84th Congress (5 U.S.C. § 118(p)) which bars from federal employment any individual who:

1. advocates the overthrow of our constitutional form of government in the United States;

2. is knowingly a member of an organization that so advocates;

3. participates in any strike or asserts the right to strike against the government of the United States; or

4. is knowingly a member of an organization of government employees that asserts the right to strike against the government.

There is no law passed by Congress that sets any other disqualifications based on political beliefs or associations. At one time, a loyalty program encompassed all federal employees, under Executive Order 9835 issued by President Harry S. Truman, on March 21, 1947. It was, however, specifically repealed by Executive Order 10450, issued by President Dwight D. Eisenhower on April 27, 1953, which replaced the Truman loyalty program by a security

program. This was interpreted by the United States Supreme Court in the case of Cole v. Young, 351 U.S. 536 (1956), holding that the federal security program under E.O. 10450 was restricted to sensitive jobs i.e., those which can effect national security.

The Civil Service Commission has chosen to ignore this Supreme Court decision and has been operating a loyalty program under the guise of a "suitability" program. It cites as its authority, § 2 of the Civil Service Act authorizing the Commissioners to prepare rules that provide, among other things, for examinations to test relative capacity and fitness. It has issued Part 731.201 of the Commission's regulations authorizing the Commission to remove an appointee on the grounds of "reasonable doubt as to the loyalty of the person involved to the government of the United States." Its interpretation of this standard is so broad and general that it poses a continuing constant threat to the constitutional rights of all government employees.

It should be made clear that we are not talking about sensitive positions in which individuals must have access to classified material or can influence governmental policy.

The Personal Qualifications Statement (Standard Form 171) to be filled out by applicants for Federal employment contains a question 25 which reads:

A. Are you now, or within the last ten years have you been, a member of:

(1) The Communist Party, U.S.A., or any subdivision of the Communist Party, U.S.A.?

(2) An organization that to your present knowledge advocates the overthrow of the constitutional form of government of the United States by force or violence or other unlawful means?

B. If your answer to Item A(1) or A(2) is "Yes," write your answers to the following questions in Item 34 or on a separate piece of paper:

(1) The name of the organization? (2) The dates of your membership? (3) Your understanding of the aims and purposes of the organization at the time of your membership?

It should be noted that Congress did not specifically require this question to be asked. Congress, instead, did require in 5 U.S.C. § 118(q) that an affidavit be filed by all government employees after August 9, 1955, that his acceptance and holding of employment does not constitute a violation of Section 118(p) -- that he advocates or belongs to organizations advocating the forceful overthrow of the government or the right to strike. It further states that such affidavit shall be considered prima facie evidence that the acceptance and holding of office or employment by the person executing the affidavit does not or will not constitute a violation of such section.

Since Congress itself has set forth the specific disqualifications based on advocacy or organizational views and the method for enforcing them, there is no legislative authorization for the Civil Service Commission to have any broader kind of inquiry as it does in Question 25 on Form 171.

However, even if this were not true, there is absolutely no legal basis for the Civil Service Commission to require all applicants to answer questions as to whether they had belonged to such organizations in the past. The disqualification in P.L. 330 is solely directed to present membership or advocacy.

The ACLU believes that Public Law 330 is unconstitutional in its entirety, in infringing on First Amendment freedoms. There is no basis or justification for the Civil Service Commission going further.

Recognizing the fact that the determination of loyalty is a very sensitive matter not to be entrusted to bureaucrats without specific legislative authorization, the Supreme Court has looked with a jaundiced eye on broad and vague limitations on the political rights of government employees by means of questions and inquiries which affect First Amendment freedoms. Elfbrandt v. Russell, 384 U.S. 11; Baggett v. Bullitt, 377 U.S. 360; Cramp v. Board of Public Instruction of Orange County, 368 U.S. 278; Speiser v. Randall, 357 U.S. 513.

Standard Form 85 requires all employees who are going to work in non-sensitive positions to answer the following question:

> 8. Organizations with which affiliated (past and present) other than religious or political organizations or those which show religious or political affiliations (if none, so state).

The form of the question suggests that the political organization exception refers only to organizations connected with political parties. Since no other explanation is given, employees may be required to include organizations such as League of Women Voters, NAACP (See NAACP v. Alabama, 357 U.S. 449 (1958) in which the Supreme Court held that NAACP had a right to conceal its membership list in Alabama; Bates v. Little Rock, 361 U.S. 516 (1960) similarly in Little Rock, Arkansas, and Louisiana v. NAACP, 366 U.S. 243 (1961), similarly in Louisiana), American Legion, National Rifle Association, Americans for Democratic Action, Americans for Constitutional Government, John Birch Society, Friends Committee on National Legislation, Chamber of Commerce and even the American Civil Liberties Union. All of these organizations take positions on legislation -- and, therefore, the exception of "political affiliations" is a phantom in protecting the right of individuals from inquiry as to their political beliefs. This form requires each new employee to certify that his statements are "true, complete and correct to the best of his knowledge and belief and are made in good faith." Also the form contains a warning that a false statement on the form is punishable by law. This means that if any federal employee fails to disclose all of the organizations with which he has ever been affiliated, he may be subject not only to be discharged and barred from federal civil service, but also to criminal prosecution for giving false information.

So far, we have only discussed the questions on federal forms given to all applicants and employees. We have not discussed the operation of the "suitability" program run by the Civil Service Commission. Under this program, the Commission asserts the right to send interrogatories to any federal employee and to conduct background investigations questioning friends and neighbors about political views and associations. The Commission's investigators at one time also asserted the right to question any employee or applicant and absolutely bar counsel from being present. (Other agencies of the Government still bar counsel for the employee!)

How has this suitability program been operating? We will describe six cases, all involving non-sensitive jobs -- with absolutely no security ramifications.

A. A newly employed research chemist in the Food and Drug Administration received an interrogatory from the Bureau of Personnel Investigations of the U. S. Civil Service Commission asking him to explain allegations that some eight years before, he and his college roommate were alleged to have attended meetings of the Labor Youth League and a group called the Student Socialist Society of Philadelphia which was alleged to have been under the domination of the Communist Party. As it happened, he had never belonged to either organization but had attended a few meetings because his roommate had been interested. Needless to say, he never had belonged to the Communist Party nor did the Commission charge him with this. Yet in interrogatories, he was asked to give:

1. A statement of your views, past and present concerning communism and the aims and purposes of the Communist Party and the date of and reason for any significant changes in these views.

2. The names of individuals known or believed by you to be members of the Communist Party with whom you were associated while a member of the Labor Youth League and the Student Socialist Society of Philadelphia and the extent of your association with these individuals after termination of your affiliation.

This trained chemist with a Ph.D. was so outraged by these questions (which he answered) that he left government employment as soon as he could, although the Civil Service Commission informed him that he had been determined to be suitable.

B. A young woman, a recent college graduate, obtained a position as a program analyst in the Division of Water, Supply and Pollution Control for the Department of Health, Education and Welfare. She received interrogatories from the Bureau of Personnel Investigations on the usual grounds that her appointment "was made subject to investigation to determine her suitability." The alleged derrogatory information against her was:

1. That in 1959-60, some four years before, she was the alleged "contact" at Swarthmore College for a group known as the Young Socialist Club of Philadelphia. She was also alleged to have been on the mailing list of the Socialist Workers Party in 1959 and to have been invited to attend a forum sponsored by that organization in December, 1959.

2. That her parents were alleged to have been members of the Communist Party prior to 1953 and her brother in 1963.

She responded to the questionnaire pointing out that she had been Chairman of the Swarthmore Forum which was a club supported by college funds whose purpose was to bring speakers on topics of public moment to the campus. In her capacity as Chairman, she had invited a member of the Socialist group as speaker and, thus, may have been placed on the mailing list of that group, although she had no recollection. Whether she had received an invitation to attend a forum sponsored by the Socialist Worker's Party, she

had no idea. (Note, that she was not even charged with attending.) She likewise was asked to give her views on communism, past and present. She absolutely refused, however, to give any information concerning the allegations made against her relatives. In spite of that, she was determined to be suitable by the Civil Service Commission, showing that the questions and allegations about her relatives were not really important after all.

C. Another young woman applied for the position of biologist with the Department of Health, Education and Welfare and also received interrogatories from the Civil Service Commission's Bureau of Personnel Investigations. Only a single allegation was made against her -- that, six years before, she had attended a single gathering at the home of an individual who was alleged to be a member of the Communist Party. In addition, it was alleged that at this gathering that she "reportedly organized a progressive youth group." All of the other information made allegations against her father, an aunt, an uncle and a sister, alleging that some of them were former members of the Communist Party. The interrogatories sent to her included the following questions:

1. The extent of your knowledge of the Communist Party membership and activity of your father, your father's views concerning communism and the aims and the purposes of the Communist Party to the best of your knowledge, and the extent to which your father has influenced you or attempted to influence you concerning communism and the aims and purposes of the Communist Party.

2. The names of the associates of your father known and believed by you to be members of the Communist Party or sympathetic to communism and the aims and purposes of the Communist Party and the nature and extent of your association with these individuals.

This young girl, a recent college graduate, refused to answer the questions and demanded a hearing in which she would have the right of confrontation, and cross-examination. The Civil Service Commission ruled, however, that since a year had expired from the filing of her application for federal employment, it had lost jurisdiction over her case and refused to accede to her demands or process the matter further.

D. In the last year, a young man who had been employed for approximately 11 months as a Management Intern in the U. S. Office of Education received interrogatories from the Bureau of Personnel Investigations of the Civil Service Commission asking questions in connection with the fact that three years earlier he had received a general discharge, under honorable conditions, from the Army. Although the Army had never charged this young man with any plan or intention to bring about his separation from the Army, the Commission's Bureau of Personnel Investigations reported to him in its interrogatories that it has "received information" that as part of an alleged "plan" on his part to force his separation from the Army, he had engaged in a series of misdemeanors while in the Army. The Bureau went on to state to the young man that to the Bureau it appeared that his actions in the Army represented a willful intent and design on his part to deny the Army faithful and competent service. All of this was done by the Bureau despite the absence, as far as was known to the young man, of any such allegations against him by the Army.

In addition, the Bureau interrogated the young man about private writings which he had allegedly made and left among his belongings, where they had been found during a search by Army officials. Still further, the Bureau interrogated the young man about his refusal, upon entering the Army five years earlier, to sign the Army's oath of allegiance and obedience, despite the fact that the young man had explained at the time that although he considered himself a loyal citizen and would swear allegiance to his country, he could not take an oath committing him to obey all orders by officers appointed over him, because if he did so, he might be required to follow orders which were in violation of his moral or other responsibilities.

After receiving the young man's response to the interrogatories, supported by statements from all of the officials in the Office of Education who had supervised the young man during his 11 months of employment, all attesting to his diligence, suitability and apparent devotion to duty, the Bureau nevertheless concluded that the young man should be discharged from his employment. In its decision, the Bureau quoted extensively from the young man's writings which had been seized by the Army, and stated that its quotation from those writings was to show the young man's "state of mind."

It required an appeal to the Civil Service Commission's Board of Appeals and Review to reverse the Bureau's decision which would have required the Office of Education to fire the young man against its will.

E. About two years ago, security officials of the Department of Health, Education and Welfare interrogated a young doctor who was applying for a position in the Public Health Service about his relationship with his father, who the security officials said had once upon a time been called a Communist. The security officials asked the young applicant whether he had "acted as a courier" between his father and another alleged Communist at a time when the applicant would have been 11 years old. As far as we know these security officials were not in the possession of the slightest indication or suggestion that there was any basis for questioning the loyalty of the applicant, yet his appointment in the Public Health Service was temporarily refused and almost blocked entirely, apparently as a result of the fact that the applicant had told the security officials that the kind of questions they were asking him were improper and not deserving of response. As far as we have been able to determine so far, his subsequent career with the Public Health Service has been adversely affected by this situation.

F. In another case which occurred as recently as this year, interrogatories were sent to an individual who performs services for the Government on a contract basis, reporting to him that security officials had received "certain unevaluated information of a derogatory nature which, if true, might create a doubt concerning your loyalty to the Government of the United States." The individual was, as a result of that "unevaluated information," required to respond to such inquiries as:

> State whether you are opposed to the form of government of the United States.
>
> Include in your reply . . . a brief summary of your views on the world-wide communist movement.
>
> Please note hereon any comments you desire to make regarding your loyalty to the United States which you believe should be considered in determining your suitability for employment.

There can be no other name for some of the questions set forth in the foregoing pages except "fishing expeditions," in which the Civil Service Commission is attempting to obtain the views and information about close relatives and associates of these employees of prospective federal employees. Such "fishing expeditions" should be out of bounds for a government such as ours, dedicated as it is to democratic institutions. Implicit in our society is the belief in the value of the family unit and the preservation of close family relationships. Obviously, questions such as these would destroy those relationships. It has always been considered a hallmark of totalitarian governments, that individuals are encouraged to spy on everyone, including relatives, because the individuals owe their only loyalty to the state. There are all kinds of loyalty and loyalty to one's relatives and loved ones and friends is something that a democratic society should not attempt to destroy.

In some of the cases above, the Civil Service Commission did find the employees suitable for federal employment. However, the matter never ends there. In the letter of notification, two of the employees were told on a form letter:

> After careful study of all the facts revealed by investigation, including your explanation, the Commission has decided to take no further action in your case other than to furnish the results of investigation to your agency.

There would seem to be absolutely no justification for this last action, even conceding that the alleged information in these cases has some bearing on federal employment. Why there should be different "loyalty" or "suitability" standards for different employing agencies for someone who is working in a non-sensitive position, is difficult if not impossible to see. It is clear that every agency of government has different standards of control on what information is kept confidential within their files. Therefore, the charges and the responses from the individual applicant or probationary employee are not guaranteed confidentiality.

Several sections of H. R. 7199 would bar this kind of governmental nosiness. Section 1(d) would bar any request or requirement that any employee make a report concerning any of his activities or undertakings unless such activities are directly within the scope of his employemnt. Section 1(e) would bar any interrogation or examination of any employee or applicant concerning his personal relationship with any person connected with him by blood or marriage, or his attitude or conduct with respect to sexual matters.

Perhaps both of these provisions should be expanded. Section 1(d) should be amended to cover, not only employees, but also, applicants for federal employment, and secondly, should be amended to make it clear that it covers any report concerning any of the employee's activities or undertakings, past or present, unless such activities are related to his employment.

Section 1(e) should be amended to make it clear that it covers not only oral interrogation but also covers written interrogatories. It should also be amended to bar the attempt to elicit information concerning political beliefs and affiliations outside of those covered by 5 U.S.C. § 118(p).

Examples of overreaching by investigators in violation of their duties or guidelines are legion. Just for example, our office previously culled the following questions from the transcript of an interview by an Army security investigator. (As a matter of fact this is the same investigator who started the interview by asking the question, "For the purposes of administering the oath, do you believe in God?")

1. Would you say any of your opinions are against the best interest of the United States and the form of government that we have now?

2. Would an affirmative answer to your past actions and opinions reflect adversely upon the best interest of the United States Government?

3. Let's say Kennedy or Khrushchev, they make the decision. Would Kennedy feel that your actions or opinions are of the best interest of the United States, or would Khrushchev?

4. Are all of your friends in favor of the democratic form of government?

5. What do you call yourself?

6. If you can't give yourself a label, can you just explain what you are, since you can't say you're a Rockefeller Republican, Goldwater Republican, Liberal Democrat?

7. What type of person is this who has this viewpoint? How would you describe it?

8. Are you associated with people you can classify as leftists?

9. Do you have any friends that you think might be to the right of center?

10. Do you have any friends that are in the middle?

11. Even though they may be card carrying members of the Communist Party. Is there a possibility? Where does your father fit in on this scale from right to left?

12. Is he a member of the Socialist Party.

13. Are his views further to the left than yours?

14. How about your mother?

In another case an Army interviewer, again in violation of specific guidelines, asked a young man: (a) What books the man in question had read. (b) Whether he had read "Lord Jim" by Joseph Conrad. (c) Why he protested against racial discrimination in the Washington D. C. area.

We would also like to suggest the broadening of the bill not only to bar asking of improper questions of applicants or federal employees, but of anyone.

In an excellent memorandum of November 26, 1962, Walter T. Skallerup, Jr., Deputy Assistant Secretary of Defense (Security Policy) set forth guidelines for security investigations and adjudicative proceedings. These guidelines barred improper inquiries into religious beliefs and affiliations or beliefs and opinions regarding racial matters, political beliefs and affiliations of a "nonsubversive" nature, opinions regarding the constitutionality of legislative policies, and affiliation with labor unions.

These prohibitions applied not only to inquiries of individuals who were the subject of investigations but also to others as well -- and were not limited to federal employees.

H. R. 7199 is directed at protecting the rights of federal employees and applicants. We would like to suggest the serious consideration of a similar bill setting forth similar restrictions on federal officials in their relationships with anyone. In other words, we see no logic in barring federal officials from asking religious, political or racial questions of employees or applicants but impliedly permitting them to ask such questions of the public.

Inquiries and Investigations into Sexual Conduct

The Civil Service Commission contends that it has the right to bar individuals from government employment because of immoral conduct. On this basis, it asserts the right to make inquiries and investigations with respect to sexual matters in order to determine whether applicants or probationary employees are "suitable" for government employment.

One female government employee received interrogatories from the Civil Service Commission's Bureau of Personnel Investigations, primarily concerned with the fact that she was alleged to be cohabitating with a man with whom she was not married. He happened to have been her fiance, yet the interrogatories asked her to admit she was engaged in an immoral relationship. Presumably, if she had admitted that, she would have been barred from federal employment. Investigators had gone around to neighbors asking them if they knew about the living arrangements of the two individuals.

The Civil Service Commission Chairman had stated the policy of the Commission as follows:

> We reject categorically the assertion that the Commission pries into the private sex life of those seeking federal employment . . . We know of no means consistent with American notions of privacy and fairness and limitations on governmental authority which could ascertain the nature of individual private sexual behaviour between consenting adults. As long as it remains truly private, that is, if it remains undisclosed to all but the participants, it is not the subject of an inquiry.

The ACLU wrote to Chairman Macy protesting the investigation and interrogatories. We pointed out the rule of law in the naturalization field requires that applicants for naturalization be persons of good moral character for at least five years prior to naturalization. We pointed out that the courts have held that premarital or extramarital relations do not make an individual a person of bad moral character.

In Petition of Rudder, 159 F.2d 695 (1947), it was held that even though four individual applicants for naturalization had lived together in adulterous relationships with women not their wives, they were still of good moral character and were entitled to naturalization. Judge Swan, in writing for the court, said (page 697), "Morality is not to be measured solely by conventional formality, nor are the mores of a community static. The trend of recent naturalization decisions is to stress stability and faithfulness in the 'marital' relationship rather than the mere legality of ties, which everyone knows may so easily be severed if the parties have the financial resources to obtain a Reno divorce." Similarly, in United States v. Rubia, 110 F.2d 92, citizenship was granted to an applicant despite the fact that he was living with a woman separated from her husband for six months prior to the filing of his petition for naturalization.

Judge Learned Hand, in the case of Schmidt v. United States, 177 F.2d 450, writing for the 2nd Circuit Court of Appeals, held that an alien was entitled to citizenship even though he admitted that he "now and then . . . engaged . . . in sexual intercourse with single women." Judge Hand stated (page 452), "We have answered in the negative the question of whether an unmarried man must live completely celibate or forfeit his claim to a 'good moral character,' but, as we have said, those were cases of continuous, though adulterous unions. We have now to say that the alien's lapses are casual, concupiscent and promiscuous, but not adulterous. We do not believe that discussion will make our conclusion more persuasive; but so far as we can define anything so tenebrous and impalpable as the common conscience, these added features do not make a critical difference."

Judge Hand also cited cases previously decided in the 3rd Circuit, United States v. Manfredie, 168 F.2d 72, in which an unmarried man admitted that he had had occasional surreptitious relations with a single woman for pay, and also United States v. Palonibella, 168 F.2d 903 in which the same facts existed except that the applicant had a wife and children living in Italy from whom he had not legally been separated. See also Pellcone v. Hodges, 320 F.2d 754.

In light of the high standard required for naturalization, it was difficult if not impossible to see on what basis the Civil Service Commission's Bureau of Personnel Investigations was operating.

It would be ridiculous if good moral conduct meant one thing for an application for citizenship and an entirely different thing for holding federal employment.

Despite these principles, the Civil Service Commission Chairman responded to the ACLU that the investigation was justified in his view because he said other people knew of the living arrangements. They knew of his living arrangements primarily because of the questions and investigation of the Civil Service Commission investigators.

It is, therefore, apparent that the policy statement of the Civil Service Commission Chairman is not going to prevent inquiries into attitudes or conduct with respect to sexual matters by investigators of the Civil Service Commission.

It was disclosed in testimony before a House Appropriations Subcommittee that all male applicants for jobs in the State Department are being asked "have you ever engaged in a homosexual act?"

From other cases reported to the ACLU's Washington office it is clear that a number of government investigators interrogate in what they conceive to be sexual misconduct cases with blatently prurient interest. In one case, a woman was questioned for six hours by two Office of Naval Intelligence investigators about every aspect of her sex life, real, imagined and gossiped, with an intensity that could only have been the product of inordinately salacious minds. There is no place in federal employment for such cruel and officious meddlers who misuse their official positions. Just this year, one of the Federal agencies called in a young woman employee and informed her that the FBI had been told that she had engaged in sexual relations with at least one man to whom she was not married. The young lady was interrogated extensively about her sexual activities and was given to believe that she might lose her job if she were not successful in "clearing" herself in connection with those allegations. The agency involved showed great resistance to permitting the young lady to have the benefit of representation by counsel. The agency finally informed

the young lady that it would not fire her at this time, but instructed her that she was not to permit any man to come to her apartment and that she was not to associate in any way with one particular man with whom she had been friendly. Volunteer counsel supplied to her by the ACLU has requested written clarification of the agency's position on this matter, asking whether it is indeed the position of the agency that the young lady may not see any man in her home and may not see or associate in any way with the particular individual named by the agency. We have yet to receive a response from the agency.

It is not too far from that kind of sexual inquisitiveness to ask all applicants, male and female alike, "have you ever engaged in premarital or extramarital relations?", and thus bar, according to the Kinsey report, the vast majority of Americans from government service.

It is for that reason that Section 1(e) of H. R. 7199 is so important in banning interrogation or examination into attitudes or conduct with respect to sexual matters.

Questions on Criminal Records

We note that the Civil Service Commission's Federal employment application form formerly carried a question which read as follows:

> Have you ever been arrested, taken into custody, held for investigation or questioning, or charged by any law enforcement authority? (You may omit: (1) Traffic violations for which you paid a fine of $30.00 or less; and (2) Anything that happened before your 16th birthday. All other incidents must be included, even though they were dismissed or you merely forfeited collateral.)

On August 15, 1966, Chairman John W. Macy, Jr., announced the replacement of that question with the following:

> Have you ever been convicted of an offense against the law or forfeited collateral or are now under charges for any offense against the law? (You may omit: (1) Traffic violations for which you paid a fine of $30.00 or less and (2) any offense committed before your twenty-first birthday which was adjudicated in the juvenile court or under a youth offender law.

The ACLU has applauded that change. It shows a keen awareness of a problem which has haunted individuals who have been arrested through no fault of their own and against whom no criminal charges were ever placed or who ultimately were acquitted. Also, excluding juvenile offenses committed prior to the age of twenty-one gives vitality to the concept that juvenile court proceedings are not to be considered convictions of crime.

Another change was also made in revising the question which formerly required information as to whether the applicant while in the military service had ever been arrested for an offense which resulted in a trial by deck court or by summary, special or general court-martial. This was changed to:

> While in the military service were you ever convicted by general court-martial?

It is to be hoped that the kind of serious consideration given to the arrest and military offense questions which prompted the changes by the Civil Service Commission might be given to other questions on the application form as well.

Questions on Past Employment

Question 27 on the Form 171 asks:

> Within the last five years have you been fired from any job for any reason?

Question 28 asks:

> Within the last five years have you quit a job after being notified that you would be fired?

These questions are an improvement over the old questions 27 and 28 on Form 57, which inquired about whether the applicant had ever been fired or quit after such notification. However, on Form 85, "Security Investigation Data for Non-sensitive Position," after obtaining a federal job each employee is required to list all his employers back to January 1, 1937 -- almost thirty-five years ago! Why? Employees in non-sensitive jobs should consider themselves lucky, though. Employees in sensitive jobs have to list every employment ever held on their Forms 86.

It should be pointed out again that the employee must certify the truthfulness and completeness of the list. He also is warned that a false statement is punishable by law. The main purpose that we have been able to discern for the required listing of prior employment is to discharge employees who fail to list all, on the grounds that they have filed a false and fraudulent statement.

Questions on Physical and Mental Health

Question 26 on the Form 171 asks, among other things, whether the applicant ever had a nervous breakdown.

There is no accepted definition of what is meant by a "nervous breakdown." This is an inquiry encompassing the present to the far distant past. If an individual had been in a mental institution thirty years ago, or had been under the care of a psychiatrist, what possible difference does that make now to the federal government?

An extreme example of how an individual is harmed by disclosure of prior psychiatric consultation arose in a case handled by our Washington office several years ago. This case involved a young inductee who was denied a security clearance because he disclosed on an Army form that he had consulted his university psychiatrist several times in 1962 because he was disturbed about his studies. This was in response to a question, "Do you have a history of mental or nervous disorders?"

For several months even the combined efforts of a Congressman's office as well as those of the Director of our Washington Office to find out the reason for the security clearance denial only resulted in the advice that "information developed during his background investigation made him ineligible for this type of assignment" and that "episodes in his pre-military service years cast doubt upon his judgment and discretion."

Finally, we were informed that the sole reason was his psychiatric history, in spite of the fact that the college psychiatrist had specifically told Army investigators that nothing in his record would suggest he might be a security risk.

This case highlights the difficulties which an individual can create for himself by too readily giving an affirmative answer to questions such as No. 26 on the Form 171.

It should be noted that the Form 86 asks "Have you ever had a nervous breakdown or have you ever had medical treatment for a mental condition?" (Are aspirins for headaches covered by this?)

There is no reason why this inquiry should not be restricted to asking about present psychiatric treatment or mental illness.

Psychological Testing

The American Civil Liberties Union has long been concerned about the civil liberties implications of psychological testing. Our interest was prompted not only by the disclosures of Senator Ervin's Subcommittee and the House Subcommittee studying such tests in connection with their investigations of governmental invasion of privacy, but in the growing use of these tests in a wide variety of governmental and private agencies. In the light of new and multiple methods that have been created for obtaining information about individuals, the ACLU shares the increasing concern being expressed about the dangers to privacy that these methods present.

We are not commenting here on the intrinsic merits or demerits of psychological testing. We do not have sufficient information or knowledge to make a determination at this time. What does deeply trouble us, however, are the kinds of questions contained in the tests being used.

For example, 20,000 air traffic controllers employed by the FAA were given a psychological test known as the 16 Personality Factor Test. Several of the questions concern the political, racial and religious opinions or associations of the FAA personnel. Such inquiries obviously raise serious First Amendment problems because they permit the government to intrude into the private beliefs, not of a few selected government workers, but of an exceedingly large number of government employees. In view of the strong strictures set down frequently by our courts against such questioning by government in other areas, we fail to see how these protections can be denied individuals where psychological testing is utilized. Are we to say that psychologists and their tests possess either greater wisdom or assume a higher level of importance than others in our society against whom constitutional restrictions have been imposed, when the need for information has been urged?

We know the argument made by proponents of psychological testing that privacy is not invaded because the tests are not designed to search out the individual's answer to specific questions, but are aimed at determining his psychological attitudes. But this ignores the fact that the individual concerned, regardless of whether the government avows disinterest in his particular answer, feels his privacy is being invaded when he is compelled by his government to disclose his beliefs and innermost thoughts.

Apart from the grave constitutional questions involved here, we also are concerned about the inhibitory impact that such questions have on the government worker in his future political association and activity. Even though he is promised that his anonymity will be preserved by the coding of the replies and even their eventual destruction, the very factthat government asks the questions may quite understandably cause him to refrain from joining organizations or voicing his views on political and other controversial issues. It is the fear of government compulsion which causes the harm.

We wholeheartedly support the provisions of Section 1(e) barring the use of psychological tests which would elicit information concerning personal relationships with relatives, or concerning religious beliefs or practices, or attitudes or conduct with respect to sexual matters. We would go even further and bar questions and testing concerning attitudes on racial matters, or political views.

Use of Lie Detectors

It is clear that in the vast majority of cases in which lie detector tests are given they are really involuntary. The individual who agrees to submit to a lie detector test generally feels that it would be disadvantageous not to submit.

The polygraph is used primarily as a psychological blackjack. It is not that the polygraph can infallibly detect lies, but rather that people are so frightened by them that they feel compelled to respond. This is coerced testimony fully as violative of the principle that individuals should not be compelled to incriminate themselves, as any confession would be under the Supreme Court decisions in the criminal due process field. Edward Bennett Williams expressed this well in his book One Man's Freedom, when he said:

> The right to silence is more than the mere right to refuse to answer incriminating questions. It is the respect which society pays to the inviolability of each man's soul in an era when hypnotism, narcoanalysis, truth serums, lie detectors and other scientific devices are being used to force the revelation of truths by persons who desire to keep them secret. The right should not be cast aside as a device exploited by hoodlums, for it is the last bastion against an ever more omnipotent government. It is the final shield against invasion of the soul.

Some states have statutes prohibiting the use of the polygraph in all private employment. Some include public employment as well. Congressman John Moss, after holding extensive hearings, before his Subcommittee of the Committee on Government Operations concluded:

> After months of investigations, including many hours of sworn testimony before my Subcommittee, I am firmly convinced that there is no such thing as a 'lie detector.' The American people have been fooled into believing that an electronic gadget used by an investigator with no scientific training can detect truth or falsehood. This is absolutely not the fact. Yet, the federal government owns hundreds of polygraphs and spends millions of dollars to give thousands of 'lie detector' tests each year. Until competent scientists complete the most careful study of the many problems involved in the lie detection process, the government should halt the use of the polygraph as a 'lie detector'.

We wholeheartedly support the provisions of Section 1(f) banning the use of any polygraph test designed to elicit information concerning personal relationships, religious beliefs and attitudes and conduct concerning sexual matters. The ACLU would not stop there. We would prohibit at all levels the use of lie detector tests as a condition of employment. We would not exclude the FBI, the CIA or any other agency from the prohibition. And we would include the area of political beliefs and associations among the proscribed subjects of inquiry.

Right to Counsel

Senator Ervin's Subcommittee conducted a survey to determine whether federal employees and applicants are permitted to have a counsel, friend, or relative present at interviews pertaining to suitability for government employment and for clearance for sensitive positions. According to the results of the Subcommittee's survey released in December, 1964, 25 agencies made a flat statement that they did not discourage or deny presence of counsel, family member or friend at interviews.

At that time, three agencies, the Civil Service Commission, the U. S. Information Agency, and the Navy Department, either discouraged counsel or denied the right to counsel, even though such agencies as the Atomic Energy Commission, the Defense Department, including the National Security Agency, allowed counsel, friend, or relative at interviews. The explanation given for the Civil Service Commission's policy by Chairman John W. Macy, Jr., was

> We do not view (these interrogations) as a formal proceeding. Our investigators are not lawyers and we do not expect them to be versed in the legal niceties of formal hearings. Consequently, we have followed the practice over the years of not permitting attorneys to be present in the interview room. We do, however, permit the attorney to wait outside the room and allow the applicant to leave the room temporarily for consultation if he wishes to do so before answering any specific question.

It is a pleasure to note that the Civil Service Commission abandoned this outrageous policy and does permit counsel to be present. However, there is nothing in writing which can be obtained from the Civil Service Commission in which this policy is set forth clearly and distinctly. In addition, as recently as this year, our local affiliate in the District of Columbia has encountered a Federal agency which refused to permit our volunteer counsel to be present when a young female employee was interrogated about her alleged sexual behavior. The personnel officer of that agency informed the ACLU that he did not even want to discuss the case with counsel for the employee.

As early as 1932 the Supreme Court said in Powell v. Alabama, 287 U.S. 45, 68-99 (1932):

> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman . . . requires the guiding hand of counsel at every step in the proceedings against him . . . (Emphasis added)

Interrogations of government employees and applicants is generally not a part of criminal prosecution with potential sanctions of imprisonment or fine, but carries as a potential sanction dismissal or barring from government employment. However, the Supreme Court has recognized that this type of sanction is a sufficient deprivation of a citizen's "liberty" and "property" to require the traditional safeguards of due process, at least until dispensed with by explicit authorization for compelling reasons. Cf. Peters v. Hobby, 349 U.S. 331, 347 (1955); Cole v. Young, 351 U.S. 536, 546 (1956); Greene v. McElroy, 360 U.S. 474, 492 (1959).

There are many judicial expressions of apprehension at the dangers inherent in the compulsion of a suspect to submit to questioning in seclusion with the investigators, without the right to be accompanied by counsel. The suspected person is apt to be nervous and frightened. The investigators, no matter how objective, have a perspective aimed at ferreting out indications of guilt -- a perspective which is a necessary attribute of the investigative function. In those circumstances, the dangers of intimidation and misinterpretation are also quite high.

Section 6(a) of the Administrative Procedure Act, 5 U.S.C. § 1005(a) provides:

> Any person compelled to appear in person before any agency or representative thereof shall be accorded the right to be accompanied, represented, and advised by counsel . . .

Several years ago the Federal Trade Commission made the contention that Section 6(a) applies only to matters covered by § 5 of the Administrative Procedure Act, that is, to adjudicative proceedings. The Commission was conducting purely investigatory, non-adjudicative proceedings to implement its regulatory function. The Commissioner attempted to restrict the right to counsel of witnesses compelled to appear. However, an injunction was granted against such restriction. Wanderer v. Kaplan, 12 Pike & Fischer, Ad.L.2d 837 (D.D.C., Oct. 20, 1962).

The Court in the Wanderer case stated:

> The court rules that Section 6(a) applies to investigative as well as to adjudicative proceedings . . . 12 Pike & Fischer, Ad.L.2d at 838.

The legislative history of Section 6(a) makes it clear that it was intended to apply in investigatory proceedings. The report of the House Judiciary Committee expressly stated:

> The section is a statement of statutory and mandatory right of interested persons to appear themselves or through or with counsel before any agency in connection with any function, matter or process, whether formal, informal or public or private. (S. Doc. 248, 79th Congress, 2d Session, 263 (1946).

It would seem difficult to believe at this stage of constitutional development that any agency of government would attempt to discourage or deny counsel during an interrogation, yet it appears that such discouragement and denial continues. In light of the decisions of the Supreme Court in Miranda v. Arizona, 16 L.Ed. 694 (1966) and Escobedo v. Illinois, 378 U.S. 478 (1965), there can be no doubt that secret interrogation is one of the most dangerous periods for any individual with respect to abandoning legal rights and placing himself in jeopardy. Even though only a job may be at stake in "interviews" (as they are called) conducted by investigators of government agencies, there may be other repercussions, as well, including criminal prosecutions by reason of an individual too easily answering incriminating questions without being aware of their import.

Even though the right to counsel may be assured, investigators have techniques to discourage individuals from having counsel present. For example, in an interview conducted by two Office of Naval Intelligence investigators, they told the one being interrogated when she raised the question of obtaining an

attorney: "I do want to tell you that if you insist on being represented by counsel, we would have to put it in the record and it could possibly be used against you." Needless to say, that woman needed an attorney desperately, as shown by the highly improper questions which these investigators asked her during the six-hour interview.

If § 1(k) of H. R. 7199 is adopted, it is to be hoped it will end any further infringements of the Sixth Amendment right to have the assistance of counsel.

Right to Freedom of Speech

Many executive agencies have issued regulations on "Employee Responsibilities and Conduct." The Uniform Regulations issued by the Department of State, Agency for International Development and United States Information Agency, (Part 10, Title 22, Code of Federal Regulations, effective April 20, 1966), include some rather surprising sections infringing on right of free expression of employees of these three agencies.

Section 10.735-211, "Expression of Thoughts and Views" contains the following provisions:

> (d) Lectures and interviews abroad -- . . .(2) Restrictions. An employee abroad may not publicly speak on, or discuss, issues on official matters outside his fields of responsibility. Security regulations are to be closely observed in the dissemination of any information to the general public.
>
> (3) Topics to be avoided. An employee abroad may not allude in public speeches or newspaper interviews to disputes between governments, to active political issues in the United States or elsewhere, or to any matter pending at any overseas post, except by the direction or with the authorization of the ambassador, or his designee . . . .
>
> (f) Public criticism of another employee. An employee shall not publicly criticize any other employee of the United States. If an employee finds it necessary to criticize, or prefer charges against, any other employee, he shall do so only in a personal and confidential letter to the head of the overseas establishment, or the appropriate personnel office in Washington.
>
> (g) (3) Correspondence . . . . (i) In corresponding with anyone other than the proper official of the United States with regard to the public affairs of a foreign government or active political issues in the United States, an employee shall use discretion and judgment to ensure that neither the United States nor the employee will be embarrassed or placed in a compromising position.
>
> (ii) An employee abroad should not correspond directly on such matters with officials of other agencies but should have such correspondence cleared in Washington for transmission to the interested agency. This does not affect an employee's right to correspond with a Member of Congress (5 U.S.C. 652(d)). Inquiries on such subjects from persons who are not employees of the United States should be acknowledged and the inquiries referred to the appropriate office in Washington.

There may be some justification for setting some guidelines for employees of these three agencies, in what they should say and write as responsibilities of particular jobs. But even if that were true, certainly these regulations go far beyond that in infringing on First Amendment freedoms of such employees. Each of them would be subject to constitutional challenge in the event that any employee were dismissed for violation of them.

We do not know if similar restrictions exist in regulations for other agencies. If they do, this committee should be greatly concerned. We do not find in any of the provisions of H. R. 7199, specific protections for government employees in the right to freedom of speech and press. We urge the Committee to give serious consideration to amending the bill in order to protect First Amendment rights of federal employees.

Coercion of Employees in Respect to Unrelated Duties

Section 1(b) of the bill bars agencies from requiring or urging attendance by employees at meetings in respect to any matter other than the performance of their duties.

Section 1(c) bars attempts to require employees to participate in any activities or undertakings not directly within the scope of their employment.

Section 1(d) would bar requiring reports of any employees concerning activities or undertakings not directly within the scope of their employment.

All of these are eminently worthwhile in preventing attempts at indoctrination of government employees. Government employees are still American citizens; they are not sheep; they should be able to pick and choose their own exposure to ideas. Under no circumstances should they be subjected to any kind of governmental compulsion, direct or indirect, to force them to participate in any assemblage, discussion or lecture unassociated with the duties of their jobs.

Section 1(g) would bar attempting to force employees to support any candidate, program or policy of any political party by personal endeavor or contribution.

Section 1(h) would bar attempts to coerce employees to contribute to the purchase of United States Savings Bonds or to make charitable contributions.

Both of these prohibitions are also excellent and receive our firm support. We have had a number of cases reported to us of the attempts to coerce employees as well as servicemen to purchase U. S. Savings Bonds in order to make creditable records for their superiors. This is the kind of overbearing pressure to which no federal employee should be subjected.

We also endorse Sections 1(i) and 1(j) which would bar requiring the disclosure of financial assets by most government employees.

Need for Supplementary Legislation

There is one major area vitally related to the rights of privacy covered by H. R. 7199 which the bill does not deal with, and to which we hope the members of the Subcommittee will turn their attention. Although the bill would ban interrogations of employees and applicants for employment about race, religion, national origin, personal relationships with any person connected

with him by blood or marriage, or attitude or conduct with respect to sexual matters (and the bill could be broadened to proscribe interrogation about political beliefs and associations as well), the bill does not specify that such matters may not form the basis for decisions as to whether or not to hire or continue the employment of an individual, and the bill does not forbid Federal agencies from making independent inquiries into such matters.

We believe that the basic premise of H. R. 7199 is that the matters just enumerated are none of the Government's business, and that is why the individual's right to privacy with regard to such matters should be preserved to the extent that the individual should not be interrogated on those matters at all. We believe that it follows from that premise, with which we agree, that such matters should not be criteria for or against hiring or any other personnel decision, and that no independent investigation of such matters should be made.

Indeed, if the Government is permitted to continue to make investigations into such matters, and conceivably to make decisions on the basis of them, we would have the anomalous situation of the Government collecting and acting upon derogatory allegations about an individual while being forbidden by this Act from confronting the individual with the derogatory allegations and seeking his refutation or explanation.

We urge the Subcommittee, therefore, to give priority consideration to supplementary legislation which would fully protect Government employees against the violations of privacy involved in any Government investigation into or interest in the matters discussed above.

Conclusion

The Chairman and the Subcommittee are to be thoroughly congratulated for the fine work they have done in connection with H. R. 7199. The numerous co-sponsors of the companion bill in the Senate are to be congratulated as well.

We have urged that this bill be amended in some respects and broadened in others, in order to protect the rights of all American citizens in the enjoyment of their constitutional rights and to prevent unwarranted governmental invasions of their privacy. We believe that the basic import and most of the details of this bill are sound, and that passage of the bill would mark an important step forward for our American democracy.

No one has better expressed what is at stake here than did Justice Brandeis, forty years ago, dissenting in Olmstead v. United States, 277 U.S. 438 at 478:

> The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone -- the most comprehensive of rights and the right most valued by civilized men.

Finally, in closing, we want to pay tribute to the former Director of our Washington Office, Mr. Lawrence Speiser, a distinguished lawyer who testified on behalf of the ACLU in support of bills similar to H. R. 7199 in previous Congresses, and whose research and experience are responsible for most of the substance of our statement here today.

Thank you.

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On Communications and Common Sense

By DAVID C. ANDERSON

Presumably it is coincidence that two of this spring's more prominent developing controversies—one over the role of the electronic media in a democracy, the other over the increasing amount of information collected and stored by government about individual citizens—are reflected in two recent books.

"The Information Machines" (Harper & Row, 359 pages, $8.95) by Ben Bagdikian is the admirably researched product of a Rand Corp. study of the impact of developing technology on journalism. "The Assault on Privacy" (University of Michigan Press, 333 pages, $7.95) by Arthur R. Miller outlines the dangers to privacy and freedom from advances in information-handling technology.

The books illuminate issues not always apparent in the public controversies; most strikingly, they reveal that the two subjects are related in fundamental and disturbing ways.

An Electronics Expansion

The current communications equipment of the average American home—a radio, a telephone and a television set capable of receiving over-the-air broadcasts—is bound to look quite primitive in several years, according to Mr. Bagdikian, who is an assistant managing editor of The Washington Post. He envisions the rapid expansion of cable television to the point where cable communications penetrate nearly every American home, rivaling the telephone system in scope.

This would permit expansion of the number of channels the home viewer might receive. In addition to the entertainment offered now by a few over-the-air networks and local stations, the home entertainment and information console would allow the viewer to order a variety of communication services by punching a few keys.

The cables would also give the viewer the ability to feed back responses to the originator of televised material. This would permit audience participation in entertainment and public-affairs programing. It could even result in voting by television and other forms of massive public participation in ongoing events of intense national interest, since public reaction to them could be determined with some precision in a matter of seconds.

Indeed, Mr. Bagdikian writes, "this will be to politics what nuclear fission was to physical weapons, an increase in power so great that it constitutes a new condition for mankind. The new communications will permit the accumulation of a critical mass of human attention and impulse that up to now has been inconceivable."

As for the parallel development of information gathering and storage, Mr. Miller, who teaches at the University of Michigan Law School, does a thorough job of summarizing sources of current worry: The huge government agencies with their interest in computerizing the information they routinely gather on citizens and pooling it in central data banks; the apparent insensitivity of some government investigators to individual rights and of some government bureaucrats to everyone's right to privacy; the growth of private credit bureaus and their relatively free dissemination of salient details about people's lives; the vulnerability of both the government and the private computerized systems to mechanical or human error or to malevolence and their limited capacity to keep stored information confidential.

And he too notes that the future of information handling is bound to be more sophisticated and more disturbing. The widespread growth of computers to manage things like airline ticketing and credit card sales means that an individual's moves and purchases go down on permanent file in computer memories and can be printed out in a few minutes.

More alarming are the possibilities that might attend the widespread use of optical scanners to monitor the addresses of mail passing through the post office, or to record the license plates of cars passing a given point on the highways. Both activities have been considered recently by government agencies.

Notably, each author alludes to the area of technology considered by the other. Inevitably, they both suggest, the advancing technologies of communications and information are bound to marry in a system of awesome possibilities.

Mr. Miller points out, for example, that systems of computer time sharing, in which disparate users share the services of a centrally located computer, are set up along the lines of a cable television network, and could easily be integrated into such a national system.

Mr. Bagdikian points out that cable penetration of every American home would mean that government computers could monitor the entertainment and information habits of every single family. If popular opinion were sampled via the new communications systems, each response might be recorded for future reference; if the President gave a televised speech, he could find out who watched and who didn't, and who turned it off before he was finished.

A Serious Question

The question implicit in all of this—and in the current controversies over the media and government surveillance—is a serious one for a modern democracy. For the need for information by citizens about the state of their country and the world is basic to democratic government.

In fact, Mr. Bagdikian points out, "news as it is thought of today—information about distant events transmitted speedily to a popular audience—is a novelty in history."

For centuries men were ruled by kings, medicine men, priests and others who "like the Lowells, spoke only to themselves or to God about the regulation of society." The idea that the whole population should share the political and social information necessary for regulation arrived only with the very recent notion that the people should share in the regulation itself.

The same might be said for the need of democratic government to amass information about its citizens; the need for the census was foreseen by the architects of American government; sound information would seem even more necessary to the task of governing as the population grows larger and more diverse, with more complex needs.

And yet, as the books reflect, the pursuit of ever faster, more sophisticated methods of collecting, managing and disseminating information is perilous. And most frustrating, one concludes after reading them, the perils are not easily understood.

For one thing, the most obvious peril—that the new technologies could be seized by the power-mad and used to engineer a repression—does not seem to be the most possible.

If it is true, as the recent disclosures of Army spying suggest, that the technologies can make democracy more vulnerable to the foolish or the unscrupulous, it is also true that technologies could make the foolish or the unscrupulous easier to spot before they are allowed to cause too much damage as, in a sense, the discovery and widespread dissemination of the Army spying story is beginning to do.

Furthermore, Mr. Bagdikian observes, the power of the communications media involves the credibility of those who use it, however sophisticated the media themselves may become. President Nixon may use television to bring his views to the people more than other Presidents, but a lot of the people apparently still don't believe him, and in fact, an embarrassing percentage prefer to watch Doris Day.

As for the information handling advances, Mr. Miller is quite right that they constitute a grave threat to our privacy, and that we do have a right to privacy that must be taken seriously.

But how is an assault on privacy an assault on freedom? It is in certain indirect and intangible senses, of course, and these are deeply disturbing, but it is also important to note the distinction between an official threat and an indirect, intangible one. It is outraging to think that minor bureaucrats in large agencies know a lot of intimate details about us, which they might be tempted to misuse. But the fact remains that they cannot do so routinely unless we give our consent, as a society, to their doing so.

Here again, the apparent public revulsion to the reports of Army and FBI surveillance of civilians suggests that we are not about to do that yet. This does not mean that the powers of information cannot be abused by some bureaucrats in some situations, but it does mean that computers do not in themselves create a full-blown police state.

If the fears of the alarmists are not all that valid, however, there is still legitimate reason for worry about the new technologies. And this more valid reason is more difficult for us to consider, for it does not involve the temptations of the new technologies to the powerful so much as their effects on all of us.

The little-contemplated fault common to both the communications and the information technologies is that they encourage us to accept distorted or selective realities as the truth.

Capsulizing events for electronic media is a far cruder process than writing about them thoughtfully and precisely; the oversimplification of complex issues is nearly inevitable. (Though Mr. Bagdikian a bit too sanguinely believes that the increased information-handling capacity of future TV could ease this problem.)

If nothing else, the resulting falseness of impressions can produce much confusion. Last fall most journalists and politicians, including the President and the Vice President, were pursuaded that the U.S. was experiencing a furious reaction of the hardhats against the longhairs. But the results of the November voting showed that the actual patterns of popular feeling were much more complicated, in undramatic ways that wouldn't have come across well on the evening news.

Even less obviously, Mr. Bagdikian suggests, speedy communications have reduced the time men normally must take to think through the meaning of events and to reach a sound perspective from which to make decisions. What better evidence of this than the recent public reaction to the Calley conviction—fostered in part by media coverage of the case—and the President's unfortunate decision to intervene openly on the basis of the short-lived public response?

Computers also oversimplify reality in their need to reduce experience to quantifiable bits of information. Like television cameras, their product may reflect the subjective feelings of the people who operate them.

And this may work its effects on how our decisions are made too. People who feel like criticizing the government may feel constrained not to do so, not only because they feel the record of their dissent might one day be used against them directly, but also because records of their behavior may not reflect their feelings accurately or fully.

More basically, the capacity of the computer to deal with quantifiable information may encourage the temptation to quantify human problems that really can't be quantified, in the unrealistic hope of finding solutions to them by doing so. Such activity is already well encouraged by the recent decades of the social-architecture approach to solving domestic problems.

A Subtle Erosion

So, in the end, the conclusion one draws from Messrs. Bagdikian and Miller is that the new communications and information technologies do not directly portend our degeneration to anarchy and dictatorship, as some have predicted, but that they do portend something possibly as serious: As the technologies grow more pervasive and sophisticated, they may have the subtle effect of eroding the amount of common sense we normally bring to our decisions, either as leaders, or as voters.

Common sense—the ability to see that important problems are rarely simple problems, that compromise is often as unsatisfying as it is necessary, that there are some things men and their governments can do and some things they can't—has served us tolerably well in the past. In fact, our capacity as a society for common sense may be a great source of our relative strength to date.

It is not true, of course, that ignorance is better than partial and distorted information. But it is very unfortunately true that partial and distorted information can be as dangerous as ignorance. It will be so unless people use it with the utmost perspective and discretion, the deepest understanding that even the facts as assessed and presented by our latest technologies are never quite simple or clear, and that our insights and intuitions may be as valid in the end.

Can we attain this human sophistication necessary to accommodate our technical sophistication properly? If we can, it will only be by thinking about the problem in these terms. Mr. Bagdikian and Mr. Miller provide as good a place as any to start.

Mr. Anderson is a member of the Journal's editorial-page staff. An editorial on this subject appears today.

REVIEW *and* OUTLOOK

Accountability and Arrogance

Why does Attorney General Mitchell continue to insist that he has the right to eavesdrop on U.S. citizens in national security cases without the court approval normally required in other eavesdropping situations? Doesn't he see the risks inherent in such a policy to democratic traditions, whatever the practical considerations?

The answer to this disturbing question, so far as we can determine from Mr. Mitchell's aides, is not very reassuring. The Attorney General apparently believes that his doctrine of unaccountable power does not pose a threat to democracy simply because he believes himself to be an honorable man, a lawyer with the deepest respect for his country and its traditions. Why can't we accept his good will as insurance enough against the possible misuse of powers granted to him?

More disturbing still, this somewhat naive idea seems to be spreading, and to other powerful men who also should know better. For example, in a rare public speech recently, Richard Helms, director of the Central Intelligence Agency, declared truly enough that intelligence is vital to our defense, but he added that if the machinations of modern intelligence work seem to create the potential for undermining democratic traditions, the nation would just have to "take it on faith that we too are honorable men devoted to (the nation's) service."

Now it is not enough to call these statements naive, though that is obvious enough: Honor and good intentions are not the same as intelligence, understanding or even sanity. History is littered with the unfortunate acts of the stupid, the ignorant and the mad who abused their powers wretchedly in pursuit of goals which seemed honorable to them.

That men like the Attorney General and the director of the CIA should be tempted to such thoughts, however, should be seen in a deeper light. It is a great insight of the past few years that modern changes in the world, and especially advances in technology, have given men powers which tax their humanity. Science in effect has outdated the rules by which we have traditionally conducted our affairs. Leaders who must use the new powers find themselves faced with staggering moral dilemmas no man should have to resolve.

A notable example of such change is nuclear weaponry, which makes it possible for one man to destroy all of human civilization. What is worth the use of such power? But more recently, as Mr. Anderson notes in an article on this page, it is becoming clear that advances in communications technology are giving men powers which, perhaps more subtly, tax their humanity too.

This has serious implications for a powerful state that is also a democracy, a form of government that gives high value to the humanity of all its citizens and the morality of its role in the world. For the logic of giving more and more men in a democracy powers too great for any human being to wield with the wisdom necessary to their use implies, inevitably, the decline of these values.

As the technologies grow more pervasive, then, men in power should take with utmost seriousness their own attitudes in using them. Ultimately the new powers require a kind of humility in their masters, an understanding that they may not be aware of all the implications of what they do, a willingness to seek the advice of others in exercising their power, a ready acceptance of review by the objective and the informed.

Now we have no doubt that for Mr. Mitchell and Mr. Helms to accept this notion fully and act on it would complicate their lives tremendously. But at the same time we think it imperative that the idea at least be better understood: The modern world makes the idea of accountability for power in a democracy more important than ever, however upstanding the people who use it. To ignore this idea is at best remarkably shortsighted; at worst it involves an arrogance no free society can afford for long.