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Constitutional Law -- Due Process -- Denial of Confrontation to Witnesses in Loyalty-Security Hearings

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motorists in the United States. The principal case seems to indicate that the court, in furtherance of the basic policy of the doctrine, does not wish to impair its utility by imposing technical standards for its use. Thus, from *Small v. Mallory* it may be inferred that if there is any evidence of control in the defendant, it will be sufficient to withstand his motion of nonsuit on the issue of liability under the family purpose doctrine.

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Constitutional Law—Due Process—Denial of Confrontation to Witnesses in Loyalty-Security Hearings

The issue of the right to confront and cross-examine witnesses in loyalty-security hearings was presented to the United States Supreme Court in the recent case of *Greene v. McElroy*.[1] Greene was an aeronautical engineer employed as general manager and vice-president of a private corporation which was doing classified research for the Navy under contract. Such contracts incorporated by reference[2] a condition that the contractor was to exclude from the job all persons not cleared for access to classified information.

Although Greene had been previously cleared,[3] the corporation was notified by the Secretary of the Navy in April 1953 that his clearance was revoked and that he was to be denied access to any classified information. This led to Greene's discharge. He appealed to the Eastern Industrial Personnel Security Board (EIPSB), and a hearing was held at which he was subjected to intense cross-examination by the board without the opportunity to confront and cross-examine his accusers.[4] EIPSB affirmed the order of revocation and this action was affirmed by

[1] 360 U.S. 474 (1959).

[2] All government contracts for classified work incorporated by reference the Department of Defense Industrial Security Manual for Safeguarding Classified Information, 32 C.F.R. § 66 (1954).

[3] Greene was given a Confidential clearance by the Army in August 1949, a Top Secret clearance by the Assistant Chief of Staff G-2, Military District of Washington in November 1949, and a Top Secret clearance by the Air Materiel Command in February 1950. 360 U.S. at 476 n.1. In 1951 Greene's clearance was withdrawn but was restored by the Industrial Employment Review Board (IERB) in 1952. In 1953 the Secretary of Defense abolished the Personnel Security Board (PSB) and the IERB and directed the Secretaries of the three armed services to establish Regional Industrial Personnel Security Boards. 360 U.S. at 480.

[4] The revocation of Greene's security clearance was based primarily on incidents occurring between 1942 and 1947. It was during this period that Greene was living with his former wife who was alleged to have been an ardent Communist. The fact that he stayed with her until 1947 seems to be the main reason that the government suspected that he was a security risk. 360 U.S. at 490. Greene testified that the main reason for the divorce was that his ex-wife held views with which he did not concur and was friendly with persons with whom he had little in common. 360 U.S. at 479. From a review of the record it appears that Greene's clearance was revoked because of his association with his wife.

the Industrial Personnel Security Review Board (IPSRB) in 1956. Greene then started his action in the federal courts.[5] On appeal[6] the Supreme Court avoided the constitutional question concerning the right of confrontation, and reversed on other grounds the decisions of the lower courts, which had affirmed the IPSRB ruling.[7]

In proceedings other than security hearings, where disclosure of sources of information does not endanger national security, the problems of confrontation and cross-examination are less acute. Thus, in the field of criminal law the sixth amendment explicitly secures the right of confrontation in the federal courts in any case where disclosure of the informant's identity, or the contents of his communication are relevant to the defense.[8] Though the right is less definite in state criminal

[5] Before an employee can get a decision in the federal courts he must first show that the court has jurisdiction. In the type of case under discussion this involves two important things. First, he must show that he has a right which has been violated. In this situation the due process clause of the fifth amendment is usually invoked to show that a property right has been taken without due process of law. In the case of government employees there is a question as to whether the right to employment is a property right. Bailey v. Richardson, 182 F.2d 46 (D.C. Cir. 1950), *aff'd mem. by an equally divided Court,* 341 U.S. 918 (1951). In the case of the private employee there is the question of whether a security clearance is a mere privilege to be taken away without procedural due process or a property right like the license to practice a profession. *Ex parte* Robinson, 86 U.S. (19 Wall.) 505 (1873); Suckow v. Alderson, 182 Cal. 247, 187 Pac. 965 (1920); People *ex rel.* State Bd. of Health v. McCoy, 125 Ill. 289, 17 N.E. 786 (1888). Secondly, he must show that the issue is justiciable, *i.e.,* that it is a matter which the courts should and are able to decide, and not a question which can best be determined by the political departments of the government. The problem of justiciability has been much discussed by the courts in security type cases. Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206 (1953); Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123 (1951); Adams v. Humphry, 232 F.2d 40 (D.C. Cir. 1955); Bailey v. Richardson, *supra*; Harmon v. Brucker, 137 F. Supp. 475 (D.D.C. 1956), *aff'd,* 243 F.2d 613 (D.C. Cir. 1957), *rev'd,* 355 U.S. 579 (1958).

[6] The district court in Greene v. Wilson, 150 F. Supp. 958 (D.D.C. 1957), denied Greene's motion for summary judgment and granted the government's same motion on the ground that Greene had shown no invasion of his rights. This was affirmed in Greene v. McElroy, 254 F.2d 944 (D.C. Cir. 1958), with the holding that it was not a justiciable controversy because it was an executive decision as to whether a person was fitted to be assigned to a particular kind of confidential work. This decision is criticized in Note, 46 CALIF. L. REV. 828 (1958).

[7] The basis of the decision was that there had been no explicit authority from the President or Congress for the Department of Defense to fashion and apply an industrial security program which denied the procedural safeguards of confrontation and cross-examination. In the absence of explicit authorization the Court was not willing to find authority for such restraint on the traditional forms of a fair proceeding. The Court also said it was not necessary at this time to decide whether such procedures, where explicitly authorized, would be constitutional. 360 U.S. at 580.

[8] Roviaro v. United States, 353 U.S. 53 (1957); United States v. Reynolds, 345 U.S. 1 (1953). In Jencks v. United States, 353 U.S. 657 (1957), the Court held that even the reports in the files of the F.B.I. must be turned over to the accused for his use in preparing a defense when such reports contain relevant statements of government witnesses touching the subject matter of their testimony at the trial of the accused. Shortly after this decision Congress passed the Anti-Jencks Act, 71 Stat. 595 (1957), 18 U.S.C. § 3500 (1958), which was enacted to place limits on the accused and prevent him from making fishing expeditions into the F.B.I. files hoping to find helpful information.

proceedings,[9] the Court has held that a denial of the right of confrontation in a state proceedings is a denial of due process under the fourteenth amendment.[10] In the area of civil court proceedings the problem of confrontation has presented little difficulty as it has been dealt with adequately by the "hearsay rule" and an established right of cross-examination.[11] Finally, in the field of administrative hearings where there is no question of the national security being endangered, the parties have the full right of confrontation and cross-examination both in federal and state proceedings.[12]

The "cold war" situation has provided some execptions to the elements of procedural due process which heretofore have been applied as a matter of course. The rationale of any resulting deprivation of personal rights lies in the balancing of national security against individual rights.[13] The due process provisions of the Constitution are not definitive terms by which it can be said that one certain act is a denial of due process while another is not. Rather they are applied in the light of the entire situation.[14] With the cold war in the background it is not inconceivable that the Court will hold that the denial of confrontation is not a denial of due process where the national security is involved.[15] Much more than this has been done under the war powers,[16] and the exigency of the cold war might likewise be deemed such as to warrant denial of some procedural rights in the interest of national security.

Thus far the rule that the Supreme Court will avoid all constitutional

[9] Snyder v. Massachusetts, 291 U.S. 97 (1934).

[10] *In re* Oliver, 333 U.S. 257 (1948). *But cf.* Stein v. New York, 346 U.S. 156 (1953), where petitioner alleged denial of due process when a confession of a co-defendant was used against the petitioner who did not have the opportunity to confront because the co-defendant did not take the witness stand. The Court held that the right of the co-defendant not to testify was greater than the petitioner's right to confrontation. However, since this case the Court has reiterated its former position. *In re* Murchison, 349 U.S. 133 (1955). Compare Williams v. New York, 337 U.S. 241 (1949), where the Court held that it was not a denial of due process for the trial court to use confidential information in passing sentence because the right of confrontation goes only to the establishment of guilt.

[11] 5 WIGMORE, EVIDENCE § 1367 (3d ed. 1940).

[12] Reilly v. Pinkus, 338 U.S. 269 (1949); Carter v. Kubler, 320 U.S. 243 (1943); Morgan v. United States, 304 U.S. 1 (1938); Ohio Bell Tel. Co. v. Public Util. Comm'n, 301 U.S. 292 (1937); Southern Ry. v. Virginia, 290 U.S. 190 (1933). See also Larche v. Hannah, 176 F. Supp. 791 (W.D. La. 1959), where the court followed the principal case in that since the Civil Rights Commission had not been explicitly authorized to adopt rules that denied confrontation, investigating state vote registrars without allowing the registrars to face their accusers was illegal.

[13] Bailey v. Richardson, 182 F.2d 46 (D.C. Cir. 1950), *aff'd mem. by an equally divided Court,* 341 U.S. 918 (1951).

[14] Carlson v. Landon, 342 U.S. 524 (1952); Rochin v. California, 342 U.S. 165 (1952); Wolf v. Colorado, 338 U.S. 25 (1949); Betts v. Brady, 316 U.S. 455 (1942). Compare Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272 (1856).

[15] See Ullmann v. United States, 350 U.S. 422 (1956).

[16] U.S. CONST. art. I, § 8; see Korematsu v. United States, 323 U.S. 214 (1944); Hirabayashi v. United States, 320 U.S. 81 (1943).

questions if there is another ground in which a decision may rest[17] has prevented the Court's determination of the question of whether a person has a constitutional right of confrontation and cross-examination in administrative hearings where it is contended that the national security would be endangered by divulging the source of the information on which the government bases its charge or decision. The decisions in this area have usually turned on the construction of a departmental regulation or, as in the principal case, its authorization.

The issue of confrontation and cross-examination was before the Court in *Bailey v. Richardson,*[18] where a government employee was fired for security reasons without being given the opportunity to face or cross-examine her accusers at the security hearing. And, as typical in this type of case, the identify of the informant was withheld not only from the employee, but also from the members of the hearing board who had to judge its probative value. The Court of Appeals held that the sixth amendment did not apply because its application is limited to criminal actions where the accused may be punished,[19] and that the fifth amendment did not apply because government employment is a privilege, not a property right, nor "life" nor "liberty." The court also said, "Never in our history has a government administrative employee been entitled to a hearing of the quasi-judicial type upon his dismissal from government service."[20] The Supreme Court affirmed this decision by an equally divided Court without a written opinion.[21] This is the only case that holds that an employee at a security hearing does not have the right to confront his accusers. In all the recent cases which involved security-dismissals, including the principal case, the Court has found other grounds on which to reverse the lower courts' decision upholding dismissal.[22]

There are several different views concerning the right of confrontation in security hearings that have been advanced extrajudicially.[23] One view is that there should be no right of confrontation because to allow it would unnecessarily endanger the national security.[24] It is argued

[17] Peters v. Hobby, 349 U.S. 331 (1955); Rescue Army v. Municipal Court of Los Angeles, 331 U.S. 549 (1947).

[18] 341 U.S. 918 (1951), *affirming mem.* 182 F.2d 46 (D.C. Cir. 1950).

[19] 182 F.2d at 55. The dissent took the view that a dismissal for disloyalty is punishment and requires all the safeguards of a judicial trial. *Id.* at 69.

[20] *Id.* at 57.

[21] Bailey v. Richardson, 341 U.S. 918 (1951).

[22] Vitarelli v. Seaton, 359 U.S. 535 (1959); Cole v. Young, 351 U.S. 536 (1956); Peters v. Hobby, 349 U.S. 331 (1955).

[23] Krasnowiecki, *Confrontation by Witnesses in Government Employee Security Proceeding,* 33 NOTRE DAME LAW. 180 (1958), gives a good summary of the reasons most commonly advanced against disclosure.

[24] The most noted exponent of this doctrine of complete non-disclosure is the Director of F.B.I., J. Edgar Hoover. For a discussion of the Director's views and reasons, see McKay, *The Right of Confrontation,* 1959 WASH. U.L.Q. 122 (1959).

in support of this view (1) that professional informants must be protected if the effectiveness of their work is to be unimpaired; (2) that the casual informant would not volunteer his adverse testimony if required to do it openly; and (3) that in any event, the use of confidental informants is not unfair to the person who by his own conduct has created a doubt as to his loyalty to this country and who, therefore, should not expect the nation, or its responsible officials, to gamble national security on his continued status.[25] The difficulty with these arguments is that they assume that there are no other ways to insure a continued inflow of information which bears on national security but by the use of undisclosed informers, and that the employee is guilty as charged and therefore entitled to no procedural rights. Also it is difficult to say that one by his own conduct has created a doubt as to his loyalty when in fact it is the conduct or word of the faceless informer which has created the doubt. If there is no right of confrontation the word of the undisclosed informant is allowed to create a presumption of disloyalty and the employee must rebut the presumption by guessing what the basis of the charge is and then defend himself before a hearing board which most often does not know the source or reliability of the evidence against the employee.

Another view is that the employee should have the right to confront the casual informant, but not the professional informant.[26] The difficulty with this view is obvious; there is no practical way to determine who is "casual" and who is "professional." Where would you place the man who works without charge but who constantly gives information? Furthermore, who is to make the decision? If left with the investigatory agency in charge, any doubt would probably be resolved in favor of security and against the individual as has been the marked tendency throughout the total operation of the security programs. It would seem that whether the derogatory information comes from a casual or professional informant should not be important when the question of the constitutional right of confrontation is being considered. The basic issue remains the same, and this suggested compromise does not change that issue. The issue for consideration is *how* such information is used against the employee at the hearing.

A third view is an alternative to confrontation. Its premise is that the hearing officer or board should conduct an *in camera* proceeding and examine informants privately for the purpose of satisfying them-

[25] This is the reason advanced by a special committee of the American Bar Association for its position on the question. U.S. COMMISSION ON GOVERNMENT SECURITY, REPORT 661 (1957).

[26] This is the view approved by the Commission on Government Security. *Id.* at 668, 670. Proposed legislation adopting this view has been introduced in Congress, S. 2314, 86th Cong., 1st Sess. (1959), to replace the present industrial security program invalidated by the principal case.

selves as to the reliability of such informants and the truthfulness of the information they furnish.[27] This view provides for an unbiased party to have access to the true basis of the disloyalty charge.[28] However, this view does not meet the issue. It would seem that a third party confronting the informant would not satisfy the *reason* for the constitutional right of confrontation, if there is such a right. The accused has a great advantage over any third party in examining the accuser to determine the truth, for he will know if and when the informant is lying and by cross-examination can show this to be a fact.

The fourth view is one which would do away with any practice that denies the right of confrontation.[29] In support of this view it is argued that if an informant is not willing to testify openly and subject his reliability to the test of cross-examination, his statement should not be used to damage another person. It is further argued that the informant can be used by the investigatory agency to develop leads to independent evidence[30] that can be disclosed at a subsequent hearing. By this view the accused would have adequate personal safeguards, and at the same time the government could conceal the identity of the informant and thereby maintain his effectiveness. In essence this would parallel the rule now followed in criminal prosecutions. The difficulty with these arguments is that in the situation where the only evidence available is that possessed by the informant the government must either compromise the effectiveness of future sources of information to the possible detriment of national security or let the alleged security risk remain at his job.

By way of summary it should be pointed out that the first view assumes that there is no constitutional right of confrontation. The second and third views appear to be nothing more than compromises in avoidance of the issue. It is only the fourth view that assumes that there is such a right.

There are many indications that when the constitutional issue of confrontation is decided by the Court the decision will be that the denial

[27] This policy is used by the Atomic Energy Commission to some extent as expressed in the revised regulations issued in May of 1956. U.S. COMMISSION ON GOVERNMENT SECURITY, REPORT 663 (1957); 10 C.F.R. § 4.27(m) (1959).

[28] The merits of an *in camera* proceeding are discussed in Note, 45 CALIF. L. REV. 524 (1957).

[29] This view is supported by the American Jewish Congress. U.S. COMMISSION ON GOVERNMENT SECURITY, REPORT 662 (1957).

[30] To appreciate the practicality of this argument it is important to know the sufficiency of evidence necessary to sustain a security dismissal. It need not be a preponderance of the evidence as in civil litigation, nor must it be beyond a reasonable doubt as in criminal cases. It is something less than either of these. "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 the national security." 32 C.F.R. § 67.3-1 (Supp. 1959). (Emphasis added.) The same standard is applied to government employees. Exec. Order No. 10450, 18 Fed. Reg. 2489 (1953). For an interpretation of this standard see Cole v. Young, 351 U.S. 536 (1955).

of such an important procedural right is a violation of the due process clause of the fifth amendment. While the majority in *Jay v. Boyd*, a deportation case, held the issue to be non-justiciable, four dissenting justices reached the issue and supported such a right in strong language.[31] Also, in the principal case the Court went much further in its language expounding on such rights than was necessary in making the decision arrived at.

> Certain principals have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots . . . . This Court has been zealous to protect these rights from erosion. It has been spoken out not only in criminal cases . . . but also in all types of cases where administrative and regulatory action were under scrutiny.[32]

The Court also quoted Wigmore[33] to the effect that there is no safeguard for the testing of human statements comparable to that fur-

[31] 351 U.S. 345 (1956). (Warren, C. J., dissenting at 362) "Such a hearing [as Jay had] is not an administrative hearing in the American sense of the term. It is no hearing . . . . To me, this is not due process. . . . I am unwilling to write such a departure from American standards into the judicial or administrative process or to impute to Congress an intention to do so in the absence of much clearer language than it has used here." (Black, J., dissenting at 365, 366) "No nation can remain true to the ideal of liberty under law and at the same time permit people to have their homes destroyed and their lives blasted by slurs of unseen and unsworn informers. There is no possible way to contest the truthfulness of anonymous accusations. The supposed accuser can neither be identified nor interrogated. He may be the most worthless and irresponsible character in the community. What he said may be wholly malicious, untrue, unreliable, or inaccurately reported. In a court of law the triers of fact could not even listen to such gossip, much less decide the most trifling issue on it . . . . Article III of our Constitution and the Bill of Rights intended that people shall not have valuable rights and privileges taken away from them by government unless the deprivation occurs after some kind of court proceeding where witnesses can be confronted and questioned and where the public can know that the rights of individuals are being protected." (Frankfurter, J., dissenting at 373) "In this country, if someone dislikes you, or accused you, he must come up in front. He cannot hide behind the shadow. He cannot assassinate you or your character from behind, without suffering the penalties an outraged citizenry will impose." (Douglas, J., dissenting at 375, 376) "Fairness, implicit in our notions of due process, requires that any hearing be full and open with an opportunity to know the charge, and the accusers, to reply to the charge, and to meet the accusers . . . . A hearing is not a hearing in the American sense if faceless informers or confidential information may be used to deprive a man of his liberty."

[32] 360 U.S. at 496.

[33] *Id.* at 497, citing 5 WIGMORE, EVIDENCE § 1364 (3d ed. 1940).

nished by cross-examination and that no statement should be used as testimony until it has undergone that test. This seems to indicate that the Court is of the opinion that the right of confrontation and cross-examination is a basic right guaranteed under the Constitution and when the question is met it will so hold. The dissent in the principal case was of this opinion when it said: "While the Court disclaims deciding this constitutional question, no one reading the opinion will doubt that the explicit language of its broad sweep speaks in prophecy."[34]

There is much more involved than the accused employee's right to work.[35] It is submitted that there is a right not to have unchallenged and unverified suspicion and contempt with their concomitant social and economic disadvantage cast upon an individual and his family. This writer suggests that the due process clause does require the accused be given an opportunity to face his accusers and to cross-examine them, and that a decision by the Court to this effect would be fully warranted.

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Constitutional Law—Right To Travel and Area Restrictions—Foreign Relations Power

Worthy v. Herter[1] involved a newspaperman who was denied a renewal[2] of his passport when he would not agree to comply with the area restrictions[3] stamped on it. The issue presented was whether the Secretary of State had the power to prevent the travel of a law-abiding United States citizen to certain areas of the world in a time when the nation is not at war. The federal district court dismissed the action which sought a declaratory judgment and injunctive relief against the Secretary of State. The Court of Appeals for the District of Columbia affirmed

[34] *Id.* at 524.

[35] The writer has made no distinction in his discussion between the rights of private and government employees. It is submitted that there is no valid distinction to be made. Both require security clearances; the effect of dismissal is the same; the constitutional guarantees appear to be the same. *Compare* Meyer v. Nebraska, 262 U.S. 390 (1923), and Trauax v. Raich, 239 U.S. 33 (1915), *with* Slochower v. Bd. of Educ., 350 U.S. 551 (1956), and Wieman v. Updegraff, 344 U.S. 183 (1952). The danger to national security is the same, Parker v. Lester, 112 F. Supp. 433 (N.D. Cal. 1953), and each is in fact engaged in government work, often at the same place.

[1] 270 F.2d 905 (D.C. Cir. 1959), *cert. denied,* 361 U.S. 918 (1959).

[2] It appears that Worthy had traveled to Hungary and Communist China on his previous passport. This would explain why the State Department took occasion to ask Worthy about his intended use of a renewed passport.

[3] At the present time the following inscription is stamped in U.S. passports: "This passport is not valid for travel to the following areas under control of authorities with which the United States does not have diplomatic relations: Albania, Bulgaria, and those portions of China, Korea and Viet Nam under Communist control." *Hearings Before Senate Foreign Relations Committee on Department of State Passport Policies,* 85th Cong., 1st Sess. 65 (1957) [hereinafter cited as *1957 Hearings*].