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Constitutional Law - Due Process - Whether the Denial of Loyalty Clearances May Be Based on Faceless Informer Evidence

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of Peoria v. *The Nichols & Shepard Company.*[10] However, in that case, the agent was a mere sales representative whereas, in the principal case, the agents were the officers of the plaintiff. The cases are distinguishable because officers are charged with the management of a corporation's daily affairs and are vested with more discretion than a mere sales representative. The analogy is further weakened because the forgers had since become authorized signers, although that information had not yet been communicated to the bank. It would appear that the defendant was correct in returning the voucher to the officers because the only other apparent alternative was to return it to the board of directors which met only intermittently and which was effectively incapable of receiving it.[11]

The statute, by imposing an absolute duty, placed an extreme limit upon the period during which the depositor could perfect its cause of action and thus offered the bank an opportunity to seek restitution seasonably. It, in effect, provided that the account between the depositor and the bank became an account stated no later than one year after the return of the voucher unless the depositor gave notice within that period. The statute enhances the equities between the parties because its effect was to give the bank a definite advantage which it did not previously possess. On the other hand, it works no particular hardship on the depositor by imposing the duty of giving notice within one year. While this requirement is inconsistent with the common law of Illinois, the only real obstacle to its easy fulfillment is the carelessness of the depositor in managing its own affairs.

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CONSTITUTIONAL LAW—DUE PROCESS—WHETHER THE DENIAL OF LOYALTY CLEARANCES MAY BE BASED ON FACELESS INFORMER EVIDENCE—Much recent controversy has centered on the problem of whether or not a person working with classified government material can be denied a loyalty clearance through an administrative proceeding in which he is not allowed to confront and cross-examine adverse witnesses. The "cold war" has tended to accentuate the issues presented, so that both sides of the controversy have now been fully represented by vigorous exponents. Typically this problem has embraced two classes of individuals who have been denied loyalty clearances; those engaged in governmental projects who are privately employed by firms working on government contracts, and those employed directly by the government.

10 223 Ill. 41, 79 N. E. 38 (1906).

11 A case from another jurisdiction supports this conclusion. The Court of Appeals of New York held that when vouchers are returned to the president of the depositor, they have been returned to the depositor within the meaning of the New York statute: Shattuck v. Guardian Trust Co. of New York, 204 N. Y. 200, 97 N. E. 517 (1912).

The leading case reviewing this point is that of *Bailey* v. *Richardson,*[1] which resulted in a four-to-four affirmance of a lower court decision by the United States Supreme Court. Therein, it was determined that the government could dismiss an employee in its executive branch without disclosing the sources of the information on which it based her dismissal. This administrative proceeding was upheld against the contention that it violated the due process clause of the fifth amendment to the federal constitution. It was allowed to stand affirmed, principally because national security was found to have been intimately related to the non-disclosure of the evidence and its sources.

In analyzing all of the considerations, the reviewing courts have first turned to the matter of jurisdiction. The petitioner must first show that he has been denied a right to life, liberty or property before he can demonstrate that he has sufficient standing to raise a question of due process of law. At the outset, he is at a loss to show that he has been deprived of life, and his liberty has not been curtailed in any way, so he must necessarily turn to his property rights in order to spell out a standing.

It has been repeatedly held that public employment is not "property" and that a loyalty clearance is not a contract.[2] The criterion for appointment and removal of governmental employees is the confidence of their superior officers, and confidence is not a concept which can be tested under due process of law. Further, a loyalty clearance, itself, is a matter of privilege, not a vested right. Even after the privilege of a loyalty clearance has been granted, it still does not ripen into a property right, as do licenses to engage in learned professions.[3]

Petitioners who have successfully spelled out property rights have done so on the theory that they have acquired special training at considerable expense, that they are prepared to engage only in a narrow field of endeavor, that this field is entirely occupied by government-controlled projects, that without a loyalty clearance they cannot be so employed, and they would thus be forced to accept a lesser position at a loss of salary if denied a loyalty clearance.[4] But even if a petitioner established a property right of which he has been denied, a further jurisdictional hurdle faces him. There is a strong line of cases that indicates that the courts will not review actions of executive officials in the dismissal of their employees, except to insure compliance with statutory requirements.[5] It has

[1] 86 U. S. App. D. C. 248, 182 F. (2d) 46 (1949), affirmed in 341 U. S. 918, 71 S. Ct. 669, 95 L. Ed. 1352 (1950).

[2] Taylor v. Beckham, 178 U. S. 548, 20 S. Ct. 890, 44 L. Ed. 1187 (1900).

[3] Bridges v. Wixon, 326 U. S. 548, 65 S. Ct. 1443, 89 L. Ed. 2103 (1945).

[4] Cole v. Young, 351 U. S. 569, 76 S. Ct. 861, 100 L. Ed. 1396 (1955).

[5] Harmon v. Brucker, 137 F. Supp. 475 (1956).

been decided, for example, that allegations that a petitioner was innocent, that an investigation was biased, or that removal was prejudiced, were all immaterial so long as the executive department has acted within its statutory limitations.[6] No claim on which relief can be granted is thus stated by the petitioner.[7]

It has been contended that certain cases have been decided contrary to the doctrine of the Bailey case,[8] but these decisions can be distinguished on one of two grounds; they either involve criminal prosecutions or have been cases where national security was not critically at stake. The case of *United States* v. *Reynolds*[9] stands for the proposition that the courts will not tolerate faceless-informer evidence when the petitioner is faced with a criminal charge, and the case of *United States* v. *Jencks*[10] indicated that even the confidential files of the Federal Bureau of Investigation will be opened to a person who is faced with a criminal penalty.

The second distinguishing feature is introduced in cases where national security could not be seriously jeopardized if a full disclosure of all evidential sources were ordered by the court. These cases have indicated that a petitioner will be allowed to confront and cross-examine all adverse witnesses if the government cannot demonstrate a real danger to national security.[11] The burden of proof is on the government to establish danger to national security, and no such claims will be flatly accepted without substantiation.[12]

It has been contended that denial of a loyalty clearance is comparable to conviction of a crime in the stigma it places upon a person's character. The results have been viewed as being similar; loss of employment opportunity, detriment to social standing and disgrace to family reputation. This position has been rejected by the courts, because no fine or imprisonment is meted out when a loyalty clearance is denied. Therefore, the rule of *United States* v. *Reynolds*[13] is inapplicable to cases of this nature in that suspicion of disloyalty has been determined to have peculiarities which distinguish it from a criminal conviction.

A further factor to be considered in these cases is whether or not the sensitivity of the position of the petitioner should be weighed in estab-

6 Eberlein v. United States, 257 U. S. 82, 42 S. Ct. 12, 66 L. Ed. 140 (1921).

7 Saggau v. Young, 138 F. Supp. 142 (1956).

8 86 U. S. App. D. C. 248, 182 F. (2d) 46 (1949), affirmed in 341 U. S. 918, 71 S. Ct. 669, 95 L. Ed. 1352 (1950).

9 345 U. S. 1, 73 S. Ct. 528, 97 L. Ed. 727 (1952).

10 353 U. S. 657, 77 S. Ct. 1007, 1 L. Ed. (2d) 1103 (1957).

11 Cole v. Young, 351 U. S. 569, 76 S. Ct. 861, 100 L. Ed. 1396 (1955).

12 Peters v. Hobby, 349 U. S. 331, 75 S. Ct. 790, 99 L. Ed. 1129 (1954).

13 345 U. S. 1, 73 S. Ct. 528, 97 L. Ed. 727 (1952).

lishing the risk to national security. The theory propounded is that an atomic physicist would be potentially more dangerous than would some clerk in the executive branch. The cases have rejected this proposition, for the reason that access to classified material is the critical factor, whether the petitioner is a secretary,[14] a merchant seaman,[15] a civil service employee,[16] or an atomic scientist.[17] The danger is perceived in the access to the material and its disclosure, rather than in the understanding of its implications.

A further facet of this problem is illustrated by the case of *Parker* v. *Lester*,[18] wherein a merchant seaman who was privately employed was denied a loyalty clearance. A loyalty clearance was required in his case, because he worked with classified government material in the normal course of his employment. When a clearance was denied, he was dismissed from his position. He contended that the government could deal with its own employees in this manner, as an inherent right, but that it could not do so in the case of persons privately employed. This contention was rejected by the court, because the danger to national security was said to be equally as great in private employment as it was in public employment.

In support of the government's position, one designed to justify the use of faceless-informer evidence, there is a persuasive line of cases which tend to favor its use in loyalty-clearance cases. This type of evidence has been upheld in immigration cases[19] for the same reasons. The discretion of the attorney general has been upheld where the surrounding circumstances have made it necessary to resort to faceless-informer evidence in the interest of national security.[20]

There are two basic considerations which have led the courts to favor the position of the government. First, it has been demonstrated that government agents cannot function effectively after they have been made to appear and testify in open judicial proceedings. After that, they can be identified and avoided by others under suspicion. Secondly, it has been argued that cross-examination and the full disclosure of all evidence would in itself, damage national security. The confidential material sought to be protected by loyalty-clearance proceedings might thus be prejudicially revealed.

[14] 86 U. S. App. D. C. 248, 182 F. (2d) 46 (1949); affirmed in 341 U. S. 918, 71 S. Ct. 669, 95 L. Ed. 1352 (1952).

[15] Parker v. Lester, 112 F. Supp. 433 (1953).

[16] Scher v. Weeks, 231 F. (2d) 494 (1956).

[17] Nadelhaft v. United States, 131 F. Supp. 930 (1955).

[18] 112 F. Supp. 433 (1953).

[19] Jay v. Boyd, 351 U. S. 345, 76 S. Ct. 919, 100 L. Ed. 1242 (1956).

[20] United States ex rel. Knauff v. Shaughnessy, 338 U. S. 537, 70 S. Ct. 309, 94 L. Ed. 317 (1950).

It is submitted, however, that there is another side to the policy lying behind this problem that must be considered. If the government seeks to protect national security, it must procure the finest personnel available, to further the advancement of atomic research. Such prospective personnel certainly would not be encouraged to engage in activities which require loyalty clearances, if those clearances could be revoked on a basis of faceless-informer evidence. The possible hardship involved may discourage many who might otherwise be willing to make a career of public employment.

Opposed to the position of the government is the case of the individual who stands under suspicion of disloyalty. The harm to him is substantial; he may lose his employment, his social status may suffer, he may suffer financially, and his family may be subjected to hatred and ridicule. With such serious consequences involved, the government should not be permitted to make unfounded charges, shielded by considerations of national security.[21] There is always a danger that a faceless-informer will come forth, prompted by spite or malice, secure in the knowledge that his real motives cannot be revealed by confrontation or cross-examination on the witness stand.[22]

There is a conflict of interests, thus presented, which places national security on one side and the right of the individual on the other. The benefit to the country as a whole must be balanced against the possible hardship on the individual under suspicion of disloyalty. A nation cannot allow full freedom and immunity to those who are reasonably suspected of engaging in subversive activities against it, or its destruction from within might certainly follow.[23] When and if a real danger to national security is demonstrated, the rights of the individual must give way, even to the point of hardship.[24]

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CONSTITUTIONAL LAW—PERSONAL CIVIL AND POLITICAL RIGHTS—WHETHER, AFTER ACQUITTAL OR RELEASE WITHOUT CONVICTION, RETENTION OF IDENTIFICATION DATA IN THE FILES OF A LOCAL POLICE DEPARTMENT CONSTITUTES AN INVASION OF AN INDIVIDUAL'S RIGHT OF PRIVACY—Until the decision in the case of *Kolb* v. *O'Connor*,[1] Illinois Appellate Courts

[21] Joint Anti-Fascist Refugee Committee v. McGrath, 341 U. S. 123, 71 S. Ct. 624, 95 L. Ed. 817 (1951).

[22] See the dissenting opinion of Edgerton, C. J., in Bailey v. Richardson, 86 U. S. App. D. C. 248, at p. 268, 182 F. (2d) 46, at p. 67 (1949).

[23] Schenk v. United States, 249 U. S. 47, 39 S. Ct. 247, 63 L. Ed. 471 (1919).

[24] Lochner v. New York, 198 U. S. 45, 25 S. Ct. 539, 49 L. Ed. 937 (1905).

[1] 14 Ill. App. (2d) 81, 142 N. E. (2d) 818 (1957).