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Due Process and National Security

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Plaintiff, a telephone company employee, was denied a security clearance on the basis of his active participation in an organization on the Attorney General's list. A hearing was accorded at which plaintiff appeared but failed to offer any evidence in his own behalf. Plaintiff was not confronted with the witnesses against him. The hearing board affirmed the denial of clearance, and the telephone company discharged plaintiff from its employ. In an action for declaratory judgment, plaintiff moved for temporary injunction, *held:* motion denied on the ground that due process does not require confrontation of witnesses in this type of proceeding. *Dressler v. Wilson,* 155 F. Supp. 373 (D.C. D.C. 1957).

The Court's decision denying the motion is justifiable on the facts as given in the opinion. It appears that plaintiff offered no rebuttal evidence whatsoever. However, in the writer's view, the grounds of decision represent a choice between conflicting interests of national security and individual liberty. The following discussion analyzes the principle laid down by this case in relation to the larger problem created by the security-liberty conflict. Specifically, should due process under the Fifth Amendment require confrontation and cross-examination in this type of proceeding?

The Court in the *Dressler* case holds, ". . . there is no Constitutional requirement of confrontation with witnesses in a proceeding outside of criminal courts." *Dressler v. Wilson, supra* at 376. This is the principle to be considered. To be sure, this conclusion finds full support in the Sixth Amendment which confines its guarantee of confrontation to ". . . all criminal proceedings . . ." But a discussion of the confrontation issue requires looking beyond the Sixth Amendment to a consideration of the historical development of procedural due process guaranteed by the due process clause of the *Fifth* Amendment. What has it been held to encompass, and how has it been applied to various proceedings?

In the first place, procedural due process as guaranteed by the due process clause of the Fifth Amendment was early held to be basically a protection of the individual from the Federal government, and not applicable to state proceedings. *Barron v. Baltimore,* 7 Pet. 243 (1833). The due process clause of the Fourteenth Amendment which controls state proceedings has been held to encompass only those procedural elements which are ". . . of the very essence of a scheme of ordered liberty." *Palko v. State of Connecticut,* 302 U.S. 319 (1937). This idea that certain principles of justice are fundamental will be later referred to. We turn first to the procedural protection against governmental action secured by the Constitution. When the government brings prosecution for infamous crime, the procedural right to confrontation of witnesses, the right to grand jury indictment, the right to jury trial, the right to refuse to give self-incriminating testimony, and

the other specifically enumerated rights are inviolate. Moreover, in Federal criminal proceedings, procedural due process has been held to extend not only to those elements of procedure specifically enumerated in the Constitution, but to all ". . . established modes of procedure devised for the security of life and liberty." *Crain v. United States,* 162 U. S. 625, 644 (1869). On the other hand, the procedural requirements to which Federal criminal proceedings must adhere are far stricter than those required in Federal non-criminal proceedings. For example, a proceeding to punish for contempt of court does not even require the presence of the defendant, if there has been suitable notice and adequate opportunity to appear and be heard. *Blackmer v. United States,* 284 U.S. 421, 440 (1932). In *Ex Parte Wall,* 107 U.S. 265 (1883), the Court held it to be a ". . . mistaken idea that due process of law requires a plenary suit and a trial by jury, in *all* cases where property or personal rights are involved." (emphasis supplied), and cited many instances of civil proceedings, such as bankruptcy, admiralty, probate and the special habeas corpus proceeding, where such rights were not accorded. The Court summarized the extent of procedural protection in non-criminal matters as follows: "In all cases, that kind of procedure is due process of law, which is suitable and proper to the nature of the case, and sanctioned by the established customs and usages of the courts." With respect to administrative proceedings conducted by the government, the procedural requirements are often far less stringent. The Court has held that the demands of due process do not require a hearing at the initial stage, or at any particular point in the proceeding, so long as a hearing is held before the *final* order becomes effective. *Opp Cotton Mills v. Administrator,* 312 U.S. 126, 152, 153 (1941). In *Bowles v. Willingham,* 321 U.S. 503, 521 (1944), the exigencies of the war effort led the Court to hold that a statutory right to judicial review of orders fixing maximum rents, vitiated the right to a hearing at *any* administrative stage. This case would seem to mark the outer boundary on the range of protection afforded by the concept of procedural due process. Significantly, the Court in the *Bowles* case recognized that ". . . even the war power does not remove constitutional limitations safeguarding essential liberties," but felt that "A nation which can demand the lives of its men and women in the waging of that war is under no constitutional necessity of providing a system of price control . . . which will assure each landlord a 'fair return' on his property." It is clear that the security clearance hearing is not in this area of least procedural protection. Today, there is no "shooting" war being waged, and no American lives being lost in the effort. Judicial reaction, though prompted by genuine concern about Communist infiltration efforts, should be tempered accordingly. Moreover, the security clearance hearing threatens more than merely a 'fair return' on property of landlords. It threatens the right of a man to pursue his chosen vocation. Intangible though this right may be, it is inseparable from the concepts of liberty and property expressed in the Fifth Amendment. *Parker v. Lester,* 227 F.2d 708, 717 (9th Cir. 1955). Under these circumstances, the substitution of judicial review for an

administrative hearings, deemed sufficient in the *Bowles* case, will not suffice. A desire for *fairness* would seem to be at the core of the procedural requirements of due process. Even in a loyalty or security proceeding, such as the instant case grew out of, fairness is not to be abandoned. See *Adler v. Board of Education,* 342 U.S. 485, 495 (1952). Not fairness in the abstract, but fairness under all the relevant circumstances.

The industrial security clearance hearing is somewhat novel and, as will be seen in more detail later, presents a conflict between liberty and security. Resolution of this conflict requires consideration of the circumstances underlying and surrounding this type of situation.

The Communist attack on the internal security of the United States has taken many forms, including espionage to discover governmental, scientific, and industrial secrets. Undertaking to meet this challenge, the United States has adopted unprecedented measures to preserve internal security. Personnel security programs were initiated in the middle 1940's and now cover five separate areas of employment. See REPORT OF THE SPECIAL COMMITTEE ON THE FEDERAL LOYALTY-SECURITY PROGRAM OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, p. 4 and pp. 51-69 (1956). In the instant case, plaintiff's employment is covered by the Industrial Personnel Security Program, administered by the Department of Defense. The program is designed to insure that neither government contractors under contracts from the military departments, nor employees of such contractors are security risks. The standard applied is whether continued employment is ". . . clearly consistent with the interests of the national security." Department of Defense Directive 5220.6, 32 C.F.R. part 67, §67.1-3 (1957 Supp.). By its provisions, the Directive allows denial of the rights of confrontation and cross-examination of witnesses when the Hearing Board established by the Directive determines that permitting confrontation would be contrary to the best interests of national security. Department of Defense Directive, *supra,* §§67.1-4, 67.4-5(*e*). The denial of these procedural safeguards is based on a desire to facilitate investigative techniques in the interest of national security. Obviously, the disclosure of undercover agents working on vital counter-espionage assignments would be injurious to national security. The need for undercover agents and other anonymous informants as sources of security information has long been recognized. See 40 OPINION OF ATTY. GEN. 45 (1941), and Hoover, *A Comment on the Article:*, 58 YALE L. J. 401, 409 (1949). Compare the government's privilege against disclosure of written matter it deems confidential. *Chicago & S. Airlines v. Waterman S.S. Corp.,* 333 U.S. 103, 111 (1947). Unquestionably, the government has a right to control access to its classified data, but it is clear that this, and other such programs, create a threat to individual liberty. See O'BRIAN, SECURITY AND INDIVIDUAL FREEDOM, (1955); Douglas, *Due Process in a Time of World Conflict,* 39 A.B.A.J. 871 (1933). Determina-

tions under the programs may have the practical effect of excluding a man from his employment. If the nature of a person's vocation is such that the government and its contractors are the only likely employers, for example, the vocation of an atomic weapons expert, denial of security clearance may have the practical effect of excluding a man from this vocation. See GELLHORN, SECURITY, LOYALTY AND SCIENCE, p. 111 (1950). Further, and perhaps more significant, denial of security clearance generally results in dismissal by the employer. *Cf.* Comment, *Loyalty and Private Employment,* 62 YALE L. J. 954, 956 (1953).

The above quoted principle of the *Dressler* case to the effect that there is no confrontation requirement outside of criminal proceedings, seems wholly concerned with the specific guarantee in the Sixth Amendment. This is an unnecessarily narrow view of the problem and displays a hardened attitude toward individual liberties. The due process concept is flexible. Should it require more protection here? It is the writer's view that confrontation and cross-examination should be *qualified* rights. That is, they should be recognized as inuring to every employee who requests a hearing, and they should be modified only under certain limited situations. This view rests on two grounds. First, because substantial rights are involved. In *Parker v. Lester, supra* at 718-721, 723, it was held that confrontation should be afforded six hundred seamen who had been denied security clearance. The opinion laid great stress on the right of the plaintiffs to pursue their chosen occupations. Fifth Amendment rights to life, liberty and property deserve the fullest protection of the law. They should be scrupulously protected. Secondly, because the tradition of fairness which has pervaded our legal society should not be abandoned on the ground of preserving national security. The importance of national security should not be minimized because it is clear that without national security there can be no personal security. But jettison of the defensive weapon of cross-examination in security cases, should be carefully considered. As Justice Frankfurter pointed out in dissent from the holding in *Joint Anti-Fascist Refugee Com. v. McGrath,* 341 U.S. 123, 170 (1951), fairness is rarely obtained in a secret, one-sided determination. It is true that the employee in these proceedings has an opportunity to be heard. But what meaning has this without the concomitant opportunity to test the validity of the government's proof by the use of cross-examination? For a full statement of the case for cross-examination, see 5 WIGMORE, EVIDENCE, §1368 (3rd ed. 1940). Isn't the principle of justice embodied in the right of confrontation and cross-examination so ". . . rooted in the traditions and conscience of our people . . ." as to be considered fundamental and well-nigh indispensable? This was the test of due process under the Fourteenth Amendment applied in the *Palko* case, *supra* at 325. Confrontation of the actual person who supplied the security information to the government is not advocated in *each* and *every* instance. As pointed out above, in the case of an undercover agent, this would be foolhardy. What is advocated is a *balancing* of the interest of personal liberty, epitomized in the procedural right to

confrontation, against the interest of national security, represented by the denial of confrontation. Admittedly, no *one* balance can be struck to insure justice in *all* future cases, but certain guiding principles can, and should, be laid down. For instance, where the information supplied to the Defense Department is not sworn to by the informant under oath, the suspected employee should be accorded the right to question the F.B.I. agent, or any other investigator who elicited the information. Similarly, where the informant is *not* an undercover agent, he should be brought before the employee at the hearing and cross-examined. This will, of course, necessitate a change in existing regulations to empower the Hearing Board to subpoena witnesses. No such power now exists. Department of Defense Directive, *supra*, §67.4-4(*c*): In a sentence, the choice between the interests of security and liberty should be pre-disposed in favor of the citizens' liberty.

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Heart-Balm Statute No Bar to Restitution of Property

An eighty-year old plaintiff sought the return of substantial cash gifts that he bestowed upon a thirty-year old woman on the condition that she marry him, which condition was broken. Her defense was based upon the Pennsylvania Heart-Balm Statute, PA. STAT. ANN. tit. 48 §171 (1935), which abolished actions based upon breach of contract to marry. *Held:* the act did not affect contracts subsidiary to the actual marriage compact and in no way discharged obligations based upon a fulfillment of the marital contract. The plaintiff received restitution of his property. *Pavlicic v. Vogtsberger,* 136 A.2d 127 (Pa. 1957).

Heart-Balm statutes have been a main line legislative attack at abuses of the law of contracts as applied to contracts of engagement to marry and the breach thereof. In many jurisdictions today, in New York as well as Pennsylvania, prior to 1935, the case books are full of decisions such as *O'Brien v. Manning,* 101 Misc. 123, 166 N.Y. Supp. 760 (Sup. Ct. 1917), that had awarded exorbitant amounts to sorrowful young ladies who had claimed damages of the heart and marriage market, caused usually by wealthy men who unwisely associated with them and then paid-off to avoid the notoriety of such a law suit. The difficulty of proof as to whether or not the contract was agreed upon at all, or who broke it, if it was agreed upon, gave the courts much concern. Since there were seldom any witnesses or written evidence of the agreement, the proof depended entirely upon who gave the most convincing story. The juries in turn were never seriously in doubt as to the path of justice when confronted with a weeping female complainant.

The states that have adopted a heart-balm statute remedy for such hapless males are quite generally worded as are New York's and Pennsylvania's, "All causes