THE RIGHT OF CONFRONTATION

By Robert B. McKay†

In 1819 Chief Justice John Marshall, with typical forthrightness, properly identified the single most important principle for interpretation of the United States Constitution. He said "[W]e must never forget, that it is *a constitution* we are expounding," and that it is "intended to endure for ages to come, and, consequently, to be adapted to the various *crises* of human affairs."[1] It is scarcely necessary to record the fact that Marshall's successors heeded well his advice. They found in that document sufficient flexibility to assure the continuously successful operation of the government under widely varying circumstances from that date to the present, with only occasional formal amendment. No other written constitution has fared so well.[2]

Indisputably necessary and desirable as has been this concept of constitutional flexibility, an inevitable side effect has been seeming impermanence, even an element of constitutional uncertainty. This feature of American constitutional law has been much criticized, but usually for the wrong reasons. Critics of the Court have seized on overrulings and narrowly conceptual distinctions as somehow improper departures from the ordinary rule of stare decisis. In so complaining, they miss the point that this is precisely the function of a *supreme* court which presides over a constitution "intended to endure for ages to come." It is not the *fact* that the Court performs a function of policy formulation, as it must, which should be critically observed. Rather the potential difficulty is that the Court can become so relativistic in constitutional interpretation that even the absolutes of the Constitution may be drained of meaning. The danger is that all problems may be viewed as ones in which opposing values must be weighed as though on grocers' scales. To cite only the most obvious examples, it has long been clear that the first amendment admonition that "Congress shall make no law . . ." involves something less than a categorical negative;[3] similarly, the test of whether particular prohibitions of the Bill of Rights are also limitations upon the states has all the vagueness of the due process clause of the fourteenth amendment and none of the specificity of the particularized guarantees of the Bill of Rights.

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1. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407, 415 (1819).

2. See Supreme Court and Supreme Law c. I (Cahn ed. 1954).

3. See, e.g., Rogge, "Congress Shall Make No Law . . .," 56 Mich. L. Rev. 331, 579 (1958).

Thus, "the concept of ordered liberty"[4] is the perfect foil for the relativist's "on the one hand" and "on the other hand" argument.[5]

The purpose of this paper, however, is not to criticize this doctrine. Rather these examples are intended as illustrations of the inherent difficulties involved. One can scarcely expect that particular solutions to the vital problems of a dynamic constitution will be lastingly satisfactory. It is the intention in this study to explore a single area of constitutional dogma where the writer believes that the balancing of opposing interests, without proper regard for their qualitative differences, has led the federal courts into serious error. The problem may be simply stated: To what extent, and in what circumstances, does the national security interest justify the submerging of the otherwise fully assured right of a person to be confronted by his accusers?

I

THE RATIONALE OF CONFRONTATION

It is not the purpose here to break new ground in connection with the theory underlying the right of confrontation. That work has been done, and well.[6] Rather the more limited objective is to restate those principles, particularly in the context of denial of confrontation by the federal government in various kinds of administrative proceedings. It is the writer's conviction that a reminder of these first principles will show that regrettable departures from them have been permitted without justification in a number of situations. Appropriate notice will be taken of the possibly different applications of the rule in connection with criminal trials and civil actions, including administrative proceedings.

Confrontation as a Rule of Evidence.

If the best definition is the simplest, Dean Wigmore's definition of confrontation qualifies on this score as well as by virtue of the intrinsic authority of the author. He said:

> The right of confrontation is the right to the opportunity of cross-examination. Confrontation also involves a subordinate and incidental advantage, namely, the observation by the tribunal of the witness' demeanor on the stand, as a minor means of judging the value of his testimony. But this minor advantage is not regarded

4. Justice Cardozo in Palko v. Connecticut, 302 U.S. 319, 325 (1937).

5. See especially Justice Frankfurter in Rochin v. California, 342 U.S. 165 (1952).

6. 5 Wigmore, Evidence §§ 1364-71, 1395-1418 (3d ed. 1940). See also 1 Davis, Administrative Law §§ 7.05-.20 (1958); McCormick, Evidence §§ 19, 223-25, 231 (1954).

as essential, *i.e.*, it may be dispensed with when it is not feasible. *Cross-examination, however, the essential object of confrontation, remains indispensable.* (Emphasis added.)[7]

Practical necessity justifies, and fairness does not forbid, use of former testimony or depositions in some circumstances where the witness is unavailable "supposing, of course, that in each case there has been cross-examination."[8] But even these departures from the norm of cross-examination during the trial or proceeding are permitted only to the extent that they promote rather than impede fairness of procedure. Wigmore has strikingly stated the absolute essentiality of cross-examination:

> [Cross-examination] is beyond any doubt the greatest legal engine ever invented for the discovery of truth. However, difficult it may be for the layman, the scientist, or the foreign jurist to appreciate this its wonderful power, there has probably never been a moment's doubt upon this point in the mind of a lawyer of experience. . . . If we omit political considerations of broader range, then cross-examination, not trial by jury, is the great and permanent contribution of the Anglo-American system of law to improved methods of trial-procedure.[9]

In further emphasis of the special significance which Wigmore attached to the opportunity for cross-examination, he said:

> In short, however radically the jury-trial rules of Evidence may be dispensed with [, the right of cross-examination] . . . at least remains as a fundamental of fair and intelligent investigation of disputed facts.[10]

These words, which suggest that the right of cross-examination is required for a fair trial,[11] raise squarely the constitutional inquiry as to the extent to which confrontation is necessary in criminal and civil proceedings. In examining this central question, we shall first make a cursory study of the specific constitutional guarantees in criminal trials, specifically the sixth amendment for federal trials, and its carry-over into state matters through the due process clause of the four-

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7. 5 Wigmore, Evidence § 1365 (3d ed. 1940). For a more complete statement, see 5 id. §§ 1395-1400.

8. 5 id. § 1401. Other exceptions to the hearsay rule may also excuse confrontation, such as dying declarations, 5 id. § 1398; but the witness must always be offered when available.

9. 5 id. § 1367.

10. 5 id. § 1400.

11. While Wigmore's analysis in the portions quoted, as well as in full development, suggests his belief that cross-examination is a constitutional necessity in all criminal and civil proceedings involving disputed facts, he suggests as a possible exception certain administrative proceedings such as those leading to disbarment, citation for contempt, or deportation. Ibid. See also 5 id. § 1399 nn.12-14. These possible exceptions are discussed in text at notes 105-15 infra.

teenth amendment. Then, and principally, we shall inquire into the extent to which the due process clauses of the fifth and fourteenth amendments make similar demands of fairness for the conduct of civil proceedings, particularly certain administrative matters in which the issue is most critically presented.

II

THE CONSTITUTIONAL QUESTION

The rights of a defendant accused in a criminal proceeding are principally defined in the sixth amendment to the Constitution. The entire amendment is reproduced below to preserve the proper setting for those portions which are specifically relevant, which are set forth in italics:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and *to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him;* to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Even the most casual reading of the entire text of the sixth amendment reveals the crucial importance of the right to be confronted with adverse witnesses and the closely related right to be informed of the charges. The other safeguards are essentially amplifications of these central guarantees. For example, the right to a public trial is one special manifestation of the confrontation requirement, and one which the Court has insisted is an essential ingredient of a fair trial in state as well as federal courts.[12] Similarly, the right to compulsory process in securing witnesses is, in one of its important aspects, simply an adjunct of making effective the right of confrontation. Even the right to counsel becomes in large part significant as an assurance to the accused that full advantage can be taken by a trained specialist of what Wigmore called the "art of cross-examination."[13]

Federal Criminal Proceedings.

The command of the sixth amendment is explicit. The accused *shall* have the right "to be informed of the nature and cause of the accusation" and the right "to be confronted with the witnesses against him." The manifest reason for the inclusion of these protections in the Constitution was to assure the same rights in this respect that were already familiar attributes of the common law. There seems never to

12. In re Oliver, 333 U.S. 257 (1948).

13. 5 Wigmore, Evidence § 1368 (3d ed. 1940).

have been any serious challenge in criminal cases in the federal courts to the rights which the plain meaning of the language appears to insure: a sufficiently informative indictment to allow adequate preparation of the defense and an opportunity to cross-examine witnesses whose testimony might be used against the accused in his trial. Cases in the Supreme Court involving an interpretation of these provisions have related exclusively to determining whether the exceptions recognized by the common law were carried over into the apparently absolute language of the sixth amendment. The answer in general has been in the affirmative so long as the result did not unfairly prejudice the accused. Thus, an accused is not by this provision entitled to the names of witnesses before the grand jury.[14] On the other hand, no violation of the sixth amendment is involved in the admission of dying declarations [15] or the testimony given at a former trial by a witness since deceased.[16]

State Criminal Proceedings.

In a number of different contexts the Supreme Court has stated that the right to notice of the charge is guaranteed by the due process clause of the fourteenth amendment against state interference.[17] Less clear from decisions of the Supreme Court is the extent to which the confrontation requirement of the sixth amendment is carried over by the fourteenth amendment as a limitation on state action. Twice the Court has stated, in cases which did not require so broad a ruling, that there was no such incorporation;[18] on the other hand, the Court has unequivocally stated that the states must provide an opportunity for cross-examination.[19]

The first case to deny the applicability of the confrontation require-

14. See Wilson v. United States, 221 U.S. 361, 375 (1911); Logan v. United States, 144 U.S. 263, 304 (1892). But an accused is entitled to the names of informers not appearing at the trial where it "is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause. . . ." Roviaro v. United States, 353 U.S. 53, 60-61 (1957).

15. Mattox v. United States, 146 U.S. 140, 151 (1892). This of course is simply an application of an established exception to the hearsay rule. See also Dowdell v. United States, 221 U.S. 325, 330 (1911).

16. Mattox v. United States, 156 U.S. 237 (1895). Cf. Reynolds v. United States, 98 U.S. 145, 160 (1878).

17. See Snyder v. Massachusetts, 291 U.S. 97, 105 (1934); Powell v. Alabama, 287 U.S. 45, 68 (1932); Holmes v. Conway, 241 U.S. 624, 632 (1916); Twining v. New Jersey, 211 U.S. 78, 111, 112 (1908). Cf. Blackmer v. United States, 284 U.S. 421, 440 (1932).

18. Stein v. New York, 346 U.S. 156, 195-96 (1953); West v. Louisiana, 194 U.S. 258, 264 (1904).

19. In re Oliver, 333 U.S. 257, 273 (1948). Cf. Snyder v. Massachusetts, 291 U.S. 97, 106 (1934).

ment in state criminal proceedings was *West v. Louisiana,*[20] decided in 1904. The question in that case involved the admissibility of the deposition of a witness not present at the trial who was then permanently absent from the state. The deposition had been taken before the committing magistrate, in the presence of the accused; and defendant's counsel cross-examined the witness at that time. There was in this case then no denial of confrontation; indeed, the sixth amendment would be no barrier to the admissibility in a federal court of a deposition taken under similar circumstances.[21] Accordingly, it was totally unnecessary for the Court to state, as it did, that "the Sixth Amendment does not apply to the state courts . . . ."[22] A further difficulty in using that statement as precedent is the fact that other provisions of the sixth amendment have since been specifically held applicable to state criminal proceedings.[23] *West v. Louisiana* should be disregarded.

Although it is believed that *Stein v. New York*[24] is equally erroneous in its statements about confrontation, it cannot be so readily disposed of as the *West* decision. In *Stein,* one of three defendants convicted of a felony murder complained of the use in evidence against him of the confessions of his codefendants, who did not take the stand so that he was unable to cross-examine them. In finding this unobjectionable on due process grounds the majority simply cited *West v. Louisiana,* already shown to be unreliable on the proposition there stated. Without any independent analysis, the Court in *Stein* noted that

> [defendant's] objection to the introduction of these confessions is that as to him they are hearsay. The hearsay-evidence rule, with all its subtleties, anomalies and ramifications, will not be read into the Fourteenth Amendment. Cf. West v. State of Louisiana, supra.[25]

But again this statement misses the point. No responsible authority suggests that the hearsay rule was incorporated intact and unvariably rigid in either the sixth amendment or the due process concept of the fourteenth amendment. As Wigmore pointed out, the hearsay rule can be said to define the limits of confrontation only by recalling that the

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20. 194 U.S. 258 (1904).

21. "The rule sanctioned by the Constitution is the Hearsay rule as to cross-examination, with all the exceptions that may legitimately be found, developed, or created therein." 5 Wigmore, op. cit. supra note 6, § 1397. Cf. Mattox v. United States, 156 U.S. 237 (1895); Kay v. United States, 255 F.2d 476, 480 (4th Cir. 1958); Matthews v. United States, 217 F.2d 409, 418 (5th Cir. 1954).

22. West v. Louisiana, 194 U.S. 258, 264 (1904).

23. E.g., In re Oliver, 333 U.S. 257 (1948) (right of public trial); Powell v. Alabama, 287 U.S. 45 (1932) (right of counsel in capital cases).

24. 346 U.S. 156 (1953).

25. Id. at 196.

sixth amendment incorporates "all the exceptions that may legitimately be found, developed, or created therein."[26] Objection to the holding in *Stein*, then, is based not upon any disagreement with the Court's refusal to be bound by the "subtleties, anomalies and ramifications" of the hearsay rule, but because the result is thought to be eminently unfair and thus a denial of due process.[27] If the Court were to reach the same result in a federal criminal case, it would seem equally wrong.[28]

Where the use of evidence not subject to cross-examination was more squarely before the Court in *In re Oliver*,[29] the Court developed the point more fully and reasoned carefully to its conclusion. In that case, when a Michigan judge, acting as a one-man grand jury and relying at least in part on the testimony of an earlier witness with whom defendant was not confronted, sentenced the defendant for contempt for giving allegedly false and evasive testimony, the Court held the practice a denial of due process. As Justice Black said on this aspect of the case:

> We further hold that failure to afford petitioner a reasonable opportunity to defend himself against the charge of false and evasive swearing was a denial of due process of law. *A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense—a right to his day in court—are basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him,* to offer testimony, and to be represented by counsel. (Emphasis added.)[30]

A more direct holding seems scarcely necessary. Whatever may be the extent to which the attendance of an accused may be dispensed with during some portion of the trial proceedings,[31] it cannot be doubted that due process in criminal trials, in state as well as in federal courts, requires a fair opportunity for cross-examination.

Civil Proceedings: Litigation Between Private Parties.

It might be thought that private litigation involving issues of contract, property, or tort, for example, would not raise constitutional

26. See note 21 supra.

27. The Stein case has been much criticized. E.g., Garfinkel, The Fourteenth Amendment and State Criminal Proceedings—"Ordered Liberty" or "Just Deserts," 41 Calif. L. Rev. 672 (1953); Meltzer, Involuntary Confessions: The Allocation of Responsibility Between Judge and Jury, 21 U. Chi. L. Rev. 317 (1954). See also Scott, State Criminal Procedure, The Fourteenth Amendment, and Prejudice, 49 Nw. U.L. Rev. 319 (1954).

28. Cf. Krulewitch v. United States, 336 U.S. 440 (1949); Kirby v. United States, 174 U.S. 47, 55-56 (1899). But see Delli Paoli v. United States, 352 U.S. 232 (1957); Lutwak v. United States, 344 U.S. 604 (1953).

29. 333 U.S. 257 (1948).

30. Id. at 273.

31. E.g., Snyder v. Massachusetts, 291 U.S. 97 (1934).

issues involving confrontation and cross-examination. And the reported cases might appear to support such a conclusion because the right of cross-examination is ordinarily not discussed in terms of constitutional right. Rather, the matter is dealt with as a question of evidence, specifically as an application of the hearsay rule. Clearly, due process is no less required in civil than in criminal proceedings,

> for manifestly there is no hearing when the party does not know what evidence is offered or considered and is not given an opportunity to test, explain, or refute. . . . All parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents and to offer evidence in explanation or rebuttal. In no other way can a party maintain its rights or make its defense.[32]

Although there are, to be sure, differences of detail in the demands of fairness in the civil as opposed to the criminal forum, it has never been suggested that fairness of procedure is not essential. Thus, where an opportunity to cross-examine is an ingredient of fairness, as it ordinarily is, it would seem to be an indispensable part of due process. It would scarcely be argued that one who may be directly and adversely affected by the outcome of a civil suit is not entitled to fair notice and reasonable opportunity to present his case. The opportunity to answer of course includes the right of the defendant to know the evidence against him and an opportunity to challenge by cross-examination. That this requirement is formally enforced as a rule of evidence rather than as an articulated principle of constitutional law makes no difference. As already pointed out, the central purpose of the hearsay rule (of which the right of cross-examination is but the specific embodiment) is firmly embedded in the concept of fairness. It seems inconceivable that a private litigant would assert his right to be heard *ex parte*, or that he would ask the court to consider his own summaries of statements made to him in confidence by persons whose names he would not disclose to the court. One can well imagine that a common-law judge would be sufficiently outraged by such a request to consider the summary dismissal of the cause of action of a complainant who based his claim on such foundation.

The result, however, might be, and indeed often has been, different where only one of the parties to a civil proceeding was a private in-

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32. Interstate Commerce Comm'n v. Louisville & Nashville R.R., 227 U.S. 88, 93 (1913). See also Reilly v. Pinkus, 338 U.S. 269, 276 (1949); Carter v. Kubler, 320 U.S. 243, 247 (1943); Ohio Bell Tel. Co. v. Public Util. Comm'n, 301 U.S. 292, 300, 304 (1937); West Ohio Gas Co. v. Public Util. Comm'n (No. 1), 294 U.S. 63, 68 (1935); Southern Ry. v. Virginia, 290 U.S. 190, 195 (1933); Chicago, M. & St. P. Ry. v. Polt, 232 U.S. 165, 168 (1914).

dividual and there was arrayed against him an official representative of government pleading special exception to the uniformly accepted rules of fairness in the name of national security.

III

FAIRNESS VERSUS NATIONAL SECURITY: THE UNEQUAL CONTEST

> Procedural fairness, if not all that originally was meant by due process of law, is at least what it most uncompromisingly requires. Procedural due process is more elemental and less flexible than substantive due process. It yields less to the times, varies less with conditions, and defers much less to legislative judgment. . . .
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> . . . . Procedural fairness and regularity are of the indispensable essence of liberty. Severe substantive laws can be endured if they are fairly and impartially applied. Indeed, if put to the choice, one might well prefer to live under Soviet substantive law applied in good faith by our common-law procedures than under our substantive law enforced by Soviet procedural practices. Let it not be overlooked that due process of law is not for the sole benefit of an accused. It is the best insurance for the Government itself against those blunders which leave lasting stains on a system of justice but which are bound to occur on *ex parte* consideration.[33]

Presumably no one would quarrel with Justice Jackson's tribute to the unyielding and inexorable quality inherent in concepts of procedural due process. Indeed, even during the stress of wartime emergency, the principle of procedural fairness has stood up well.[34] Accordingly, there is strange irony in the inescapable conclusion that procedural due process has since World War II repeatedly given way to the flatly asserted demands of national security. Examination of this phenomenon prompts a threefold inquiry. First, we shall notice the various situations in which rights of procedural due process (i.e., in this context, the principles of notice and confrontation) have been relinquished to the exigent demands of national security. Second, we shall inquire into the cost, if any, exacted in terms of lessened national

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33. Justice Jackson, dissenting, in Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 224-25 (1953). Or, as Justice Frankfurter put it, "The history of American freedom is, in no small measure, the history of procedure." Malinski v. New York, 324 U.S. 401, 414 (1945) (concurring opinion). See also, e.g., Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 167 (1951) (concurring opinion of Justice Frankfurter).

34. See, e.g., Duncan v. Kahanamoku, 327 U.S. 304 (1946); Ex parte Milligan, 71 U.S. (4 Wall.) 2 (1866). But cf. Koki Hirota v. MacArthur, 338 U.S. 197 (1948); Ex parte Quirin, 317 U.S. 1 (1942). The most serious war-related invasions of personal liberty involved primarily questions of substantive due process. See, e.g., Korematsu v. United States, 323 U.S. 214 (1944); Hirabayashi v. United States, 320 U.S. 81 (1943).

security if the right of confrontation should be assured. And finally, we shall ask what the Constitution demands in terms of procedural due process.

A. Confrontation Denied.

In the postwar period during which confrontation has consistently been denied in a number of different situations, it is a curious fact that in other respects procedural due process has taken on new dimensions in making ever more scrupulous the demand of society that the game be played according to strict rules of fairness. Although some of these matters will be more fully developed subsequently, it is appropriate to note here the general movement of the law. In criminal proceedings, to identify only a few of the distinctly new rules, the indigent defendant is now assured that he will not be at a disadvantage in making an appeal by reason of poverty;[35] the defendant is entitled to inspection of statements to FBI agents to impeach testimony of witnesses against him;[36] and the identity of confidential informants may not be concealed where fairness to the accused requires disclosure.[37] Similarly, in civil proceedings, the right of an organization not to be listed as subversive on the basis, even in insubstantial part, of perjured testimony has been applied to the testimony of confidential informants;[38] an organization may not be listed as subversive without a fair hearing;[39] and neither a person nor an organization can be required to assume the burden of proving nonsubversive qualities in order to secure the advantages of tax exemption.[40] Other examples come to mind as well, but these suffice to make the point that protection of procedural due process is a cardinal tenet of contemporary constitutional law—with the single large exception that denial of confrontation has been tolerated in a variety of situations. The principal groups of individuals to whom confrontation has been held dispensable because of asserted requirements of national security are the following: government employees, employees of contractors with the government, maritime workers, international agencies employees, military personnel, aliens, conscientious objectors, and applicants for passports.[41]

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35. Griffin v. Illinois, 351 U.S. 12 (1956).

36. Jencks v. United States, 353 U.S. 657 (1957).

37. Roviaro v. United States, 353 U.S. 53 (1957).

38. Communist Party v. Subversive Activities Control Bd., 351 U.S. 115 (1956).

39. Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123 (1941).

40. Speiser v. Randall, 357 U.S. 513 (1958); First Unitarian Church v. Los Angeles, 357 U.S. 545 (1958).

41. Instances of the denial of confrontation for reasons not primarily concerned with national security are discussed in text at notes 105-15 infra.

Government Employment[42]

The current programs involving scrutiny of the beliefs and associations of employees of the federal government date from President Truman's Executive Order 9835, of March 31, 1947.[43] The story of that program and its successors has been fully told elsewhere[44] and will not be repeated here. Suffice it to note in the present context that from the beginning it was provided that

> the investigative agency may refuse to disclose the names of confidential informants, provided it furnishes sufficient information about such informants on the basis of which the requesting department or agency can make an adequate evaluation of the information furnished by them, and provided it advises the requesting department or agency in writing that it is essential to the protection of the informants or to the investigation of other cases that the identity of the informants not be revealed.[45]

It should be noted that from the beginning the test of sufficiency of the information furnished was to be measured by whether "the requesting department or agency" could adequately evaluate the information. No concern was expressed as to whether the person *against* whom the informant testified would be provided with sufficient information that he could evaluate or answer the charges. With variations of detail, this became the pattern for all succeeding legislative and executive action. The standard which has controlled since 1953 was fixed in President Eisenhower's Executive Order 10450, of April 27, 1953.[46] It provides that

> reports and other investigative material and information shall be maintained in confidence, and no access shall be given thereto except, with the consent of the investigative agency concerned, to other departments and agencies conducting security programs under the authority granted by or in accordance with [Public Law 733, 64 Stat. 476 (1950), 5 U.S.C. § 22-1 (1952)] . . . .[47]

Needless to say, the screening of present and prospective government employees under this program was a staggering task, whether the standard was "reasonable grounds" for belief of disloyalty under Executive Order 9835, or a required finding that employment was "clearly consistent with the interests of the national security" under Executive Order 10450. It must have been equally obvious from the

42. See Association of the Bar of the City of N.Y., Report of the Special Committee on The Federal Loyalty-Security Program (1956) (hereinafter cited as New York Report); Bontecou, The Federal Loyalty-Security Program (1953); Brown, Loyalty and Security (1958).

43. 3 C.F.R. 627 (1943-48).

44. See note 42 supra.

45. Exec. Order No. 9835, Part IV (2), 3 C.F.R. 627, 630 (1943-48).

46. 3 C.F.R. 936 (1949-53).

47. Id. § 9 (c), at 939.

beginning that the conservatism, timidity, or even sometimes outright stupidity of screening officers and boards would result in individual injustices justified in the name of national security. It is scarcely necessary to review here those now well-publicized instances of seeming arbitrariness.[48] The point is sufficiently illustrated in the three government employment cases which reached the Supreme Court, each of which involved, or was thought to involve, unfairness resulting from denial of confrontation.

The only one in which there was anything like a square holding on the issue, however, was *Bailey v. Richardson;*[49] and even there the Supreme Court merely affirmed by a four-four division the holding of the Court of Appeals for the District of Columbia. Accordingly, it is necessary to turn to the opinion of the court of appeals for an examination of the only relevant holding as to confrontation in the federal employee loyalty program. In that case Dorothy Bailey, an employee in the classified civil service of the United States, was advised in 1948 that the Civil Service Commission had received information that she was then, or had been, a member of the Communist Party or the Communist Political Association, had attended meetings of the Communist Party, and had associated with known Communist Party members. Beyond this she was given no further clue save that information had been received of her alleged past or present membership in the American League for Peace and Democracy and the Washington Committee for Democratic Action, both of which had been declared by the Attorney General to be subversive within the meaning of the then-controlling Executive Order 9835. Miss Bailey answered fully, including a denial under oath of all such affiliations past or present except a brief period of membership in the American League for Peace and Democracy. No witness testified against Miss Bailey; the unfavorable statements were not made available to her or to the court; and the informants were not identified to her, to the court, or even to the Loyalty Review Board. As the majority stated, "she was not given a trial in any sense of the word, and she does not know who informed upon her."[50] However, in a split decision, the court of appeals held that "the question is not whether she had a trial. The question is whether she should have had one."[51] Miss Bailey's constitutional argu-

48. See, e.g., Bureau of Nat'l Affairs, Case Studies in Personnel Security (Yarmolinsky ed. 1955). See also Barth, The Loyalty of Free Men (1951); Bontecou, The Federal Loyalty-Security Program (1953); O'Brian, National Security and Individual Freedom (1955).

49. 182 F.2d 46 (D.C. Cir. 1950), aff'd by an equally divided Court, 341 U.S. 918 (1951).

50. 182 F.2d at 51.

51. Ibid.

ments were rejected in their entirety. The sixth amendment was held inapplicable because the proceeding was not criminal in nature. Nor was the due process clause of the fifth ammendment considered a barrier in view of the court's conclusion that government employment is not a right but a privilege:

> [T]he President, absent congressional restriction, may remove from Government service any person of whose loyalty he is not completely convinced. He may do so without assigning any reason and without giving the employee any explanatory notice. If, as a matter of policy, he chooses to give the employee a general description of the information which concerns him and to hear what the employee has to say, he does not thereby strip himself of any portion of his constitutional power to choose and to remove.[52]

Subsequent to the 1951 Supreme Court's inconclusive, four-four affirmance of the *Bailey* decision, the loyalty-security program for government employees came before the Court in two further cases; but the confrontation issue was not passed upon in either case. In *Peters v. Hobby*[53] the Court merely held that the Loyalty Review Board had acted beyond the authority conferred on it by Executive Order 9835 when of its own motion the Board reopened and reviewed rulings favorable to employees. The Court did note, however, the following:

> While loyalty proceedings may not involve the imposition of criminal sanctions, the limitation on the Board's review power to adverse determinations was in keeping with the deeply rooted principle of criminal law that a verdict of guilty is appealable while a verdict of acquittal is not.[54]

Cole v. Young[55] was the first case in the Supreme Court to raise questions under Executive Order 10450. However, in that case, although once more challenge was made to the refusal of confrontation, the issue was not resolved. The Court merely ruled that Public Law 733 of 1950,[56] on the basis of which the summary dismissal procedures of Executive Order 10450 had been extended to all federal government employees, did not go so far. In short, as a matter of statutory construction, the congressional intent was to limit the special loyalty-security procedures to so-called sensitive positions in which there were opportunities for endangering the "national security." Since petitioner did not occupy such a position, the procedures were not properly applicable to him, and dismissal was improper. While the effect of this was to curtail sharply the coverage of the federal program, the con-

52. Id. at 65.
53. 349 U.S. 331 (1955).
54. Id. at 344-45.
55. 351 U.S. 536 (1956).
56. 64 Stat. 476 (1950), 5 U.S.C. § 22-1 (1952).

stitutional issue was not touched at all. As of early 1959 the matter remains unchanged except that other cases not directly involving the loyalty-security program suggest modification of the Court's views. These are discussed below.[57]

Employees of Government Contractors[58]

By far the largest number of individuals affected by the loyalty-security programs come within the coverage of the Industrial Personnel Security Program of the Department of Defense. The program extends to the nearly 3,000,000 employees of contractors with the armed forces who have access to classified information.[59] The program provides that companies which satisfy the test of a preliminary facility clearance, before bidding on a contract, shall agree to accept as a contractual duty the obligation to take the prescribed steps for the protection of classified information. For present purposes the significant obligation which the contractor assumes is the undertaking to permit access to security information only to persons authorized in accordance with the prescribed procedures. The standard for denial or revocation of clearance is that access to classified information shall be refused where it is "not clearly consistent with the interests of the national security."[60] Where an initial screening board makes an adverse determination on the basis of this test, the person concerned is given an opportunity to present his case to the appropriate hearing board, where he may (or he may not) take solace in the fact that, although the evidence against him need not be disclosed,

> The Board will take into consideration the fact that the person concerned may have been handicapped in his defense by the non-disclosure to him of classified information or by his lack of opportunity to identify or cross-examine persons constituting sources of information.[61]

The technical impact of a failure to receive clearance under these rules is simply that the subject must be refused access to governmentally classified information in the hands of the contractor with the government. What in fact the denial of clearance means, however, is that the individual must resign, be discharged, or be moved to nonsensitive employment, although his skills may relate solely

57. See text at notes 148-49 infra.

58. For a description of the program, see Note, The Role of Employer Practices in the Federal Industrial Personnel Security Program—A Field Study, 8 Stan. L. Rev. 234 (1956). See also First Ann. Rep., Industrial Personnel Security Review Program (1956).

59. New York Report 64.

60. Industrial Personnel Security Review Reg. § 12, First Ann. Rep., Industrial Personnel Security Review Program 174, 180 (1956).

61. Id. § 20(b), p. 189.

to work requiring clearance. Whichever of these consequences ensues in a particular case is of course the direct result of the denial of clearance, so that the impact of the refusal to permit confrontation is qualitatively the same as in cases involving outright discharge from government employment. The first important constitutional challenges to the denial of confrontation in this program are pending before the Supreme Court in *Greene v. McElroy*[62] and *Taylor v. McElroy*.[63] A third case, *Vitarelli v. Seaton*,[64] raises similar issues under the loyalty-security program for government employees. These cases are discussed below.[65]

Program of the Atomic Energy Commission

The AEC administers its own program, applicable to employees of the Commission and to employees of contractors with the Commission whose work gives them access to classified information. Thus, there is combined in this particular field a loyalty-security program for government employees and for employees of private contractors with the AEC. Like the general loyalty-security program for other government employees and the Defense Department program for other employees of contractors, information unfavorable to the subject of an investigation may be withheld even in the hearing made available to such individual.[66]

Program for American Employees of International Organizations

Although the United States does not directly control the hiring or firing of American citizens by international organizations of which the United States is a member, an International Organizations Employees Loyalty Board was established in 1953 to give "advisory determinations" on American citizens employed or considered for employment by the United Nations and related organizations.[67] The Board gives to the international organization an advisory opinion concerning citizens about whom the United States Civil Service Com-

62. 254 F.2d 944 (D.C. Cir.), cert. granted, 358 U.S. 872 (1958).

63. Cert. granted, 358 U.S. 918 (1958). The opinion and judgment of the district court are not reported; no opinion or judgment has been rendered by the Court of Appeals for the District of Columbia.

64. 253 F.2d 338 (D.C. Cir.), cert. granted, 358 U.S. 871 (1958).

65. See text at notes 152-65 infra.

66. Although confrontation of adverse witnesses is encouraged, it may be denied where the nature or the sources of information are deemed confidential. New York Report 82 n. For the text of the regulations, see 10 C.F.R. §§ 4.1-.35 (Supp. 1957).

67. Exec. Order No. 10422, 3 C.F.R. 921 (1949-53), as amended by Exec. Order No. 10459, 3 C.F.R. 945 (1949-53).

mission or the Federal Bureau of Investigation reports derogatory information. In the advisory opinion the reasons are disclosed "in as much detail as security considerations permit."[68]

Port Security Program[69]

The Magnuson Act of 1950[70] authorized the President to institute measures to safeguard American vessels and harbors upon a finding that the security of the United States is endangered by war, subversive activity, or disturbance of the international relations of the United States.[71] This program was designed to bar employment on any United States vessel to seamen denied clearance and to proscribe employment of longshoremen in facilities designated by the Coast Guard as restricted. As in the other programs already discussed, the hearing boards were originally authorized to withhold information deemed confidential. However, in *Parker v. Lester*,[72] the Court of Appeals for the Ninth Circuit held that the hearings, as traditionally conducted, did not satisfy procedural due process. In that case the seamen had been denied clearance on security grounds, although they were given no specific information as to the data relied upon. The court squarely held that the failure of the regulations to provide for adequate notice of the charges[73] and confrontation was a denial of due process, entitling the seamen refused clearance under such circumstances to an injunction restraining the Coast Guard against enforcement of the regulation. The government decided against an appeal, and the Coast Guard issued new regulations.[74] Subsequent to the promulgation of the new regulations, the government argued that the denial of clearance should be continued until the seamen could be rescreened and cleared under the new regulations. The contention was rejected.[75] Finally, in 1957 the Coast Guard commenced compliance with the final decree by issuing credentials stamped "Order of U.S. District Court."[76] Even under the most recent revision of the regulations, however, it is not clear that full confrontation is invariably available.[77]

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68. New York Report 68.

69. See Brown and Fassett, Security Tests for Maritime Workers: Due Process Under the Port Security Program, 62 Yale L.J. 1163 (1953).

70. 64 Stat. 427 (1950), 50 U.S.C. § 191 (1952).

71. See Exec. Order No. 10173, 3 C.F.R. 356 (1949-53), as amended by Exec. Orders No. 10277, 3 C.F.R. 778 (1949-53), and 10352, 3 C.F.R. 873 (1949-53).

72. 227 F.2d 708 (9th Cir. 1955), reversing, 112 F. Supp. 433 (N.D. Cal. 1953).

73. See United States v. Gray, 207 F.2d 237 (9th Cir. 1953).

74. Report of the Commission on Government Security 341 (1957).

75. Lester v. Parker, 235 F.2d 787 (9th Cir. 1956).

76. See Brown, Loyalty and Security 71-73, especially 73 n.18 (1958).

77. 33 C.F.R. Parts 121, 125 (Supp. 1958). See especially sections dealing with hearing procedures, §§ 121.19, 125.43.

Military Personnel[78]

In connection with loyalty-security inquiries, it has been said that the man in uniform "is in about the same position as his civilian counterpart when his membership in the armed services is voluntary, either as enlisted man or as officer."[79] That is, although he may be turned away summarily, once in the service he is entitled to whatever protections, including a hearing, that the program offers. The conscript is in a somewhat different position because of the presumed unwillingness of the Department of Defense to allow evasion of military service through pretended espousal of subversive causes.[80] However, in the context of confrontation afforded at hearings, a generalization seems permissible as to both volunteers and conscripts that the problem and its resolution are not dissimilar from the civilian programs.[81]

The one unique question in the military programs has been whether or not a less than honorable discharge may be given for preinduction activities rather than basing the character of the discharge exclusively upon the record of military service. Without reaching any constitutional issues, the Court resolved that particular problem in *Harmon v. Brucker*,[82] holding that the Secretary of the Army exceeded his statutory authority in basing discharges on activities prior to induction. There is no indication that this practice has been resumed; but the confrontation issue remains unchanged.

Exclusion and Deportation of Aliens

If frequency of reiteration be a proper test, it has become a truism of constitutional law that "whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."[83] Accordingly, when the Attorney General, on the basis of confidential information, denied a hearing to an alien seeking admission and found that her admission would be prejudicial to the

78. See Brown, Loyalty and Security 81-89 (1958); Jones, Jurisdiction of the Federal Courts to Review the Character of Military Administrative Discharges, 57 Colum. L. Rev. 917 (1957).

79. Brown, op. cit. supra note 78, at 81.

80. Id. at 80-81.

81. That is, disclosure may be denied of classified information, and investigative sources or techniques, including the identity of confidential informants, need not be revealed. 2 BNA Government Security and Loyalty 31:16 (1957).

82. 355 U.S. 579 (1958).

83. United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537, 544 (1950). See also Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206 (1953); Ludecke v. Watkins, 335 U.S. 160 (1948); Fong Yue Ting v. United States, 149 U.S. 698, 713-14 (1893); Nishimura Ekiu v. United States, 142 U.S. 651, 659-60 (1892).

interests of the United States, no voice on the Court was raised in protest on the constitutional issue. Rather the dissenters claimed lack of statutory authorization.[84] The majority stated:

> We reiterate that we are dealing here with a matter of *privilege*. Petitioner had no vested *right* of entry, which could be the subject of a prohibition against retroactive operation of regulations affecting her status.[85]

Once admitted to the United States, however, an alien is entitled to the same procedural due process as citizens,[86] neither less nor more. Thus, it has been held that, where the Attorney General has statutory discretion to suspend deportation, refusal so to suspend may be based on confidential information not disclosed to the applicant.[87] The suspension of deportation was described as "manifestly not a matter of right under any circumstances, but rather is in all cases a matter of grace."[88] Although the majority found "no difficulty" with the constitutional issue,[89] the four dissenters reflected varying degrees of dissatisfaction with the constitutional principle in the majority opinion. Chief Justice Warren said that "such a hearing is not an administrative hearing in the American sense of the term. It is no hearing."[90] Justice Black emphasized his belief that "the core of our constitutional system is that individual liberty must never be taken away by shortcuts, that fair trials in independent courts must never be dispensed with."[91]

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84. United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537 (1950). Justice Jackson, dissenting, however, did note his extreme reluctance to believe that Congress intended such unfairness even as to excludable aliens. He said: "Security is like liberty in that many are the crimes committed in its name. . . . In the name of security the police state justifies its arbitrary oppressions on evidence that is secret, because security might be prejudiced if it were brought to light in hearings. The plea that evidence of guilt must be secret is abhorrent to free men, because it provides a cloak for the malevolent, the misinformed, the meddlesome, and the corrupt to play the role of informer undetected and uncorrected." Id. at 551.

85. Id. at 544.

86. Kwong Hai Chew v. Colding, 344 U.S. 590 (1953); Carlson v. Landon, 342 U.S. 524, 538 (1952); Kwock Jan Fat v. White, 253 U.S. 454, 457-58, 464 (1920); The Japanese Immigrant Case, 189 U.S. 86, 100-01 (1903).

87. Jay v. Boyd, 351 U.S. 345 (1956).

88. Id. at 354.

89. Id. at 357 n.21.

90. Id. at 362.

91. Id. at 369-70. See also Justice Douglas' dissent, id. at 374, 376, and Justice Frankfurter's dissent, not specifically on constitutional grounds, id. at 370, 373-74.

Conscientious Objectors[92]

Section 6(j) of the Selective Service Act of 1948 provides exemption from military service—partial or full, depending upon the circumstances—for any person "who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form."[93] Where the local board denies relief under this section, the claimant is entitled to further review by an appeal board. By regulation and practice[94] the Department of Justice, relying in whole or part on FBI investigatory reports, makes a recommendation to the appeal board, which may or may not take the action recommended. The registrant is not permitted to see the FBI report nor to be informed of the names of persons interviewed by the investigators.

The constitutionality of this denial of confrontation was for the first time passed upon by the Supreme Court in *United States v. Nugent.*[95] In the series of cases consolidated for decision in that case each of the respondents claimed to be a conscientious objector entitled to full exemption from military service; and each was convicted of wilful refusal to submit to induction. In addition to challenges that the procedure was not authorized by the relevant statute, the claim was made that the classification was rendered invalid by the refusal to make the FBI reports available to the registrants. The Court held that the procedure was in conformity with the statute. In addition, not meeting quite squarely the constitutional argument that there was no sufficient hearing, the Court reasoned that the real hearing was in the hands of the local board where there was no claim of lack of confrontation. The majority of the Court thought it sufficient at the level of the recommendatory review to give the applicant a fair résumé of any adverse information in the investigative report. However, in so far as the review proceeding was in part a hearing de novo at which the government could introduce new evidence on an *ex parte* basis, the decision can be fairly read only as a holding that confrontation can in these circumstances be dispensed with.

Although this issue is somewhat distinct from the others here presented for discussion in that it does not necessarily, or even usually, turn upon loyalty-security considerations, the problem seems to be the same. In the *Nugent* case, although the articulation is rather nonspecific, the rationale appears to be that this departure from normal hearing procedures is justified by the fact that the Selective Service Act is an exercise of the war power. Hence the parallelism to national

92. See Note, The Scope of Review, Due Process, and the Conscientious Objector—Some Unresolved Problems, 50 Nw. U.L. Rev. 660, 669-76 (1955).

93. 62 Stat. 612 (1948), as amended, 50 U.S.C. § 456(j) (1952).

94. 32 C.F.R. § 1626.25 (Supp. 1958).

95. 346 U.S. 1 (1953).

security as the overriding consideration in loyalty-security cases seems proper. Although Justice Frankfurter, dissenting, did not have to reach the constitutional issue because he thought the proceeding a violation of congressional intent, he nevertheless stated the real objection to the form of the review proceeding when he said:

> The very purpose of a hearing is to give registrants an opportunity to meet adverse evidence. It makes a mockery of that purpose to suggest that such adverse evidence can be effectively met if its provenance is unknown. Nor is it possible to be confident that a "résumé is fair" when one cannot know what it is a résumé of.[96]

In any event, the *Nugent* case has been adhered to.[97] The only important challenge has been a contention that the decision in *Jencks v. United States*[98] should entitle an applicant for classification as a conscientious objector to have access to the investigative reports of the FBI which are adverse to his claim. This argument has to date been rejected.[99]

Applicants for Passports

Until the spring of 1958 the passport regulations of the Department of State provided that passports should not be issued to United States citizens who were believed to be members or supporters of the Communist Party, or when it appeared to the satisfaction of the Secretary of State that the applicant's activities abroad would violate the laws of the United States, be prejudicial to the orderly conduct of foreign relations, or be otherwise prejudicial to the interests of the United States.[100] Elsewhere in the regulations provision is made for an administrative hearing on behalf of the applicant before the Board of Passport Appeals, but that hearing has been described as "seriously deficient in that it fails to assure every applicant of the meaningful kind of hearing on which Anglo-American legal traditions are so largely premised."[101] Specifically, the defects which are here relevant consist of the failure on some occasions to state the reasons for denial

96. Id. at 13. Justices Douglas and Black dissented specifically on the constitutional issue. "A hearing at which these faceless people are allowed to present their whispered rumors and yet escape the test of torture of cross-examination is not a hearing in the Anglo-American sense." Ibid.

97. The Court has further particularized its insistence that the résumé of the FBI investigative report be a fair one, but without modification of the position in the Nugent case that confrontation could be denied. Simmons v. United States, 348 U.S. 397 (1955). See also Carnes v. United States, 260 F.2d 341 (6th Cir. 1958); Manke v. United States, 259 F.2d 518, 522 (4th Cir. 1958).

98. 353 U.S. 657 (1957).

99. Bouziden v. United States, 251 F.2d 728 (10th Cir.), cert. denied, 356 U.S. 927 (1958); Note, 26 Geo. Wash. L. Rev. 754 (1958).

100. 22 C.F.R. §§ 51.135, 51.136 (Supp. 1958).

101. Association of the Bar of the City of New York, Freedom to Travel, Report of the Special Committee to Study Passport Procedures 49 (1958).

"with sufficient specificity" and the fact that "no satisfactory standard is fixed for the disclosure of evidence and the confrontation of witnesses in hearings before the Board."[102]

In *Kent v. Dulles*[103] and *Dayton v. Dulles*[104] the Supreme Court, recognizing that the citizen's right to travel abroad is protected by the Constitution, held that Congress had not authorized the Secretary of State to withhold passports on reason to believe that an applicant was a member or supporter of the Communist Party. But no decision was necessary as to other bases for passport refusal, which were not raised in the cases before the Court. And, although the denial-of-confrontation issue was specifically raised in the *Dayton* case, the Court found it unnecessary to reach the question. The constitutionality of the presumably continuing practice of nonconfrontation where confidential data or informants are involved thus remains, so far as the Supreme Court is concerned, an open question. The issue is again one of fairness not notably different in qualitative content from the due process question raised in the other cases of governmental denial of confrontation already discussed.

Nonfederal Denials of Confrontation

The immediately preceding sections of this article have undertaken to describe briefly the various administrative programs conducted at the present time by the federal government in which there may be less than complete notice of charges upon the basis of which adverse action may be taken, and in which there may be no opportunity for confrontation of witnesses whose adverse statements are considered in arriving at a decision. It would of course be inaccurate to claim completeness of coverage or comprehensiveness of description of the programs thus briefly examined. However, it is believed that the questions of constitutionality and fairness, even to a large extent as well questions of wisdom, are consistently the same in each of these programs, at least in relation to the elements of a due process hearing, fair notice, and adequate opportunity to cross-examine. The stated limits of the study must, however, be specifically noted. No attempt is made here to analyze various state administrative programs in which full confrontation as the term is here used may not be accorded. Two contrasting reasons support the decision against complete coverage. In the first place, the state cases involving denial of confrontation are too diverse for generalized treatment, particularly in that they are not by any means all motivated by questions of national security. Second,

102. Ibid.
103. 357 U.S. 116 (1958).
104. 357 U.S. 144 (1958).

even if it were possible to explain in detail the different instances of state refusal to accord full confrontation, these additional instances would not alter the central argument. Where the issue is one of basic fairness, as it is in this connection, it should make no difference whether the constitutional standard is found in the due process clause of the fifth amendment or of the fourteenth. Nonetheless, since the test of fairness here has been linked in part to the basic requirements of cross-examination inherent in the hearsay rule, it is appropriate to note some special situations in which, as exceptions to the hearsay rule, the right of cross-examination has often been held unnecessary.

As already pointed out, Dean Wigmore stoutly insisted on the need for cross-examination, whether as a matter of constitutional necessity in criminal proceedings or as a matter of procedural fairness manifested in civil proceedings by the rule against hearsay.[105] The carry-over of the common-law exceptions to the hearsay rule, such as dying declarations and former testimony, as exceptions likewise to the constitutional requirement has also been observed.[106] But here it is proper to call attention to other exceptions which Wigmore believed appropriate because of some special aspect of the proceedings: disbarment proceedings, contempt proceedings, and deportation proceedings.[107] To these might now be added other commonly recognized exceptions, sentencing procedures and proceedings relating to suspension of sentence by reason of insanity. Of these five, only deportation proceedings are discussed in this article because they alone are exclusively federal and because the denial of confrontation in deportation cases typically involves loyalty-security matters. It is believed that Dean Wigmore was wrong in thinking a due process type hearing was not called for in such a case. The single case which he cites[108] should be overruled for reasons subsequently to be discussed. Brief comments must here suffice as to the remaining four problems.

(1) As already indicated, state disbarment proceedings are not here discussed because they raise somewhat different problems, involving also the whole question of issuance of licenses.[109] However, it should be noted that there is considerable authority for the proposition that the obviously serious consequences of a disbarment proceeding make necessary the essentials of a full and fair hearing, including the right of cross-examination.[110]

105. See text at notes 6-11 supra.

106. See text at notes 7-8 supra.

107. 5 Wigmore, op. cit. supra note 6, § 1398. See also note 11 supra.

108. Singh v. District Director, 96 F.2d 969 (9th Cir. 1938).

109. See Gellhorn, Individual Freedom and Governmental Restraints c. 3 (1956).

110. See Goldsmith v. United States Bd. of Tax Appeals, 270 U.S. 117, 123 (1926); In re Los Angeles County Pioneer Society, 217 F.2d 190 (9th Cir. 1954).

(2) Contempt proceedings also present special problems, and perhaps as well unique justifications, for dispensing with cross-examination. The only circumstances in which confrontation appears not to have been required in cases of criminal contempt are those in which the alleged acts of contempt took place in the presence of the judge so that a summary citation may be proper without jury trial or the hearing of other witnesses.[111]

(3) Where a judge, after defendant's conviction in a jury trial, examines expert witnesses and considers reports on an ex parte basis in determining a sentence which is within his sole discretion, the situation is surely not the same as those which are the principal concern of this article. The failure of confrontation in the sentencing situation may be perfectly justifiable, as was held to be the case in *Williams v. New York*.[112] As the Court said,

> modern concepts individualizing punishment have made it all the more necessary that a sentencing judge not be denied an opportunity to obtain pertinent information by a requirement of rigid adherence to restrictive rules of evidence properly applicable to the trial.[113]

(4) Similarly, a governor's ex parte consideration of medical evidence in determining whether to exercise his discretion to postpone execution of a prisoner claimed to be insane is very different from the cases previously dealt with.[114] Justice Black explained that difference succinctly in distinguishing these cases from the Attorney General's delegation to a subordinate of a power to make an ex parte determination whether to suspend deportation of an alien.

> The Court disposes of what has been done to Jay to its satisfaction by saying that his right to stay here if he proves he is a good citizen "comes as an act of grace," like "probation or suspension of criminal sentence." But probation and suspension of criminal sentence come only after conviction of crime. Cf. *Williams v. New York*, 337 U.S. 241. Here the Government with all of its resources has not been able to prove that Jay ever committed a crime of any kind.[115]

Cf. Schware v. Board of Bar Examiners, 353 U.S. 232 (1957); Ex parte Garland, 71 U.S. (4 Wall.) 333, 378 (1866); In re Carter, 192 F.2d 15 (D.C. Cir.), cert. denied, 342 U.S. 862 (1951). See also 1 Davis, Administrative Law §§ 7.18-.19 (1958).

111. See, e.g., Fed. R. Crim. P. 42.

112. 337 U.S. 241 (1949).

113. Id. at 247.

114. See Caritativo v. California, 357 U.S. 549 (1958); Solesbee v. Balkcom, 339 U.S. 9 (1950). But see the dissents of Justice Frankfurter, 357 U.S. at 552, 558-59; 339 U.S. at 14.

115. Jay v. Boyd, 351 U.S. 345, 366-67 (1956) (Justice Black, dissenting opinion).

B. In the Name of National Security

There can be no escaping the fact that the so-called cold war is a period of serious national jeopardy; and of course the war power permits exigent action to meet the danger in the ways that seem most appropriate. As the estimate of danger becomes very high, it may even be that limitations can be placed upon the exercise of some of the constitutionally guaranteed rights, even upon freedom of speech and association.[116] But this is only upon a showing that the danger is reasonably clear and imminent. Moreover, only "advocacy of that which incites to illegal action" is forbidden so that punishment can fall upon persons who incite to action, but not upon those who think, believe, join, or even those who advocate abstract doctrine.[117] Finally, and most significantly, there has been permitted no relaxation of procedural standards in these most critical cases where advocacy of overthrow of the Government of the United States is charged. Is it not curious, then, that in the cases where no such serious charge is made,[118] the normal elements of procedural due process should be denied? Notice the reasons that have heretofore been thought sufficient: First, national security forbids the disclosure to the person charged with disloyalty or as a security risk of anything more than a more or less incomplete, and typically rather general summary of the adverse information. Almost never is there anything more; there seem to be no degrees of necessity for confidentiality—all information is equally cloaked in the mantle of secrecy. Second, since these proceedings are typically administrative in form, and not criminal in nature, the constitutional requirements of fair notice and opportunity for cross-examination are said to be inapplicable.

This part of this article, it is hoped, will show that the need for secrecy has been over-emphasized; and in part C below, the writer will suggest why he believes that in any event the existing procedures fail to satisfy the procedural due process requirements of the Constitution.

National Security and the Communist Conspiracy

The cold war is real, it is intense, and there is genuine danger. The resulting sense of national insecurity is the product principally of the external threat to world peace inherent in the international Communist conspiracy and the internal danger of subversion. This conclusion

116. See, e.g., Dennis v. United States, 341 U.S. 494 (1951). Cf. Yates v. United States, 354 U.S. 298 (1957).

117. Yates v. United States, 354 U.S. 298, 313, 318 (1957).

118. Presumably, if a government employee should be thought guilty of Smith Act violation, for example, he would be prosecuted for that criminal offense rather than proceeded against indirectly under the loyalty-security standards for discharge.

has been recognized repeatedly by Congress,[119] the President,[120] and the Supreme Court.[121] Accordingly, the government not only acts properly, but would be remiss in doing otherwise, when it uses every energy at its command to combat the danger and frustrate the potential enemy. The various loyalty-security programs are products of this concern over internal security. They are premised upon the proper assumption that the government should not employ initially, and need not keep in its employment, any person who is not loyal to the United States. And indeed it has always been assumed that the heads of departments and agencies in the executive branch of the government are at liberty to hire and fire at will in the absence of statutory limitations.[122] Such limitations were contained in the Lloyd-LaFollette Act of 1912,[123] providing for notice and opportunity to reply in writing, but no hearing; and in the Veterans Preference Act of 1944[124] certain employees were given additional procedural rights including a right of appeal to the Civil Service Commission. However, when discharges were contemplated on loyalty or security grounds rather than because of budget-required reductions in force or for inefficiency, it was recognized that some kind of hearing must be provided. The reason must have arisen from recognition of the obvious fact that a loyalty or security discharge involves a penalty even though perhaps not in the technical criminal sense.[125]

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119. E.g., 64 Stat. 987 (1950), 50 U.S.C. § 781 (1952) (congressional finding of necessity for the Internal Security Act of 1950); 68 Stat. 775 (1954), 50 U.S.C. § 841 (Supp. 1954). "The Congress hereby finds and declares that the Communist Party of the United States, although purportedly a political party, is in fact an instrumentality of a conspiracy to overthrow the Government of the United States."

120. See, e.g., N. Y. Times, Feb. 26, 1959, p. 1, col. 8; id., April 5, 1959, p. 1, col. 8; any press conference; or any message to Congress.

121. See, e.g., the several opinions in Dennis v. United States, 341 U.S. 494 (1951).

122. Shurtleff v. United States, 189 U.S. 311 (1903); Reagan v. United States, 182 U.S. 419 (1901). See also Emerson and Helfeld, Loyalty Among Government Employees, 58 Yale L.J. 1, 98-99 (1948).

123. 37 Stat. 555 (1912), 5 U.S.C. § 652 (1952).

124. 58 Stat. 390 (1944), as amended, 5 U.S.C. § 863 (1952).

125. In Bridges v. Wixon, 326 U.S. 135, 154 (1945), the Court took this approach on a parallel issue in a deportation case. "Though deportation is not technically a criminal proceeding, it visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom. That deportation is a penalty—at times a most serious one—cannot be doubted. Meticulous care must be exercised lest the procedure by which he is deprived of that liberty not meet the essential standards of fairness." See also Schneiderman v. United States, 320 U.S. 118, 122 (1943). Cf. Lovett v. United States, 328 U.S. 303, 317-18 (1946).

The critical question was, what kind of hearing must be given? On the one hand was the need for fairness to the individual, and on the other the strongly asserted need to disclose nothing that might be detrimental to the national security. The resolution of this potential conflict was in every case to be decided in favor of protecting the national security, even if it involved some or a very large sacrifice of fairness to the individual. Even apart from the question, discussed in part C below, whether this result was constitutionally defensible, a threshold question requires more examination than it has received. That is an inquiry into how the national security stakes at issue may be fairly assessed to determine in each case what is the maximum disclosure which can be offered without risking national security. The facile, but logically insufficient, solution to this difficult question has been in virtually all circumstances to leave the determination as to what may be disclosed to the sole discretion of the governmental agency charged with protection of national security. Quite naturally, the decision has been in favor of nondisclosure. An alternative, favoring disclosure of witnesses who prefer anonymity and of internal investigative reports, should scarcely be expected from any agency charged with the protection of internal security interests of the United States, and not called upon to perform the essentially judicial function of preserving individual rights.

Perhaps less readily understandable is the fact that the governmental agencies responsible for the preservation of national security have been unwilling to rely on the trustworthiness and loyalty of other government personnel, such as members of loyalty review boards and members of the federal judiciary. Nevertheless, this has been the case: review board personnel and even federal judges have been called upon to accept investigative summaries of undisclosed evidence from undisclosed sources. Wherever a challenge has been made to the policy of nondisclosure, either in principle or in a particular case, the possibility of informed discussion has been precluded in advance by the very policy at issue. The magic formula has always been "national security" beyond which trespass is forbidden. Thus, even where conscientious study has been undertaken by governmental commission[126] or fair-minded bar association,[127] this assertion of national security has finally been the barrier beyond which no progress could be made.

126. The Commission on Government Security, acting pursuant to Act of Congress, concluded on this issue: "The Commission recommends that confrontation and cross-examination be extended to persons subject to loyalty investigations whenever it can be done without endangering the national security." Report of the Commission on Government Security xviii (1957). The definition of "endangering the national security" is left to the investigative agencies.

127. The Special Committee on the Federal Loyalty-Security Program of the Association of the Bar of the City of New York concluded in part as follows:

In the absence of specific data to show the national security dangers which would result from disclosure in individual cases or classes of cases, the outside observer has two choices: The way of caution is to accept without demonstration the claims of the investigative agencies. As already pointed out, other governmental agencies, including the review boards themselves, citizen inquiry groups, and even the federal courts, have in general taken this quiescent position. The only alternative course for a person who believes that individual fairness is being unnecessarily sacrificed is to seek to show by reasoned conclusions that the policy of secrecy conceals more than is required even in the interest of the national security thereby sought to be protected.

In pursuit of this second approach, it is necessary first to note how the investigative agencies operate in the national security area and what they seek to protect by nondisclosure. The principal investigative agency is, of course, the Federal Bureau of Investigation, and its director, J. Edgar Hoover, is its most authoritative spokesman. In appearing before the Loyalty Review Board operating under Executive Order 9835, he made the following statement:

> Now as to the matter of confidential informants. That, of course, is a problem that you have to pass on. I just want to outline to you gentlemen the three types of informants that we have contact with. The first type is what we call the top secret or highly confidential informant. Under no circumstances will we disclose his identity. That informant is one who may be in high rank in the Communist Party. It has been necessary for us to have informants in some of the higher subversive movements in the country. Those informants may have furnished us information concerning certain individuals who are now employed in the Government service, and consequently, when we initiate the investigation we may find that John Doe, an employee of the Department of Agriculture, has been reported by such confidential informant as having been a member of the Party, having Communist membership card so-and-so. That information would be included in the report to the employing agency. To identify that informant would destroy the informant for our subsequent work. It would very likely imperil the informant's life.

"[3] It should be the policy of the government to permit the employee to cross-examine adverse witnesses before a hearing board when the hearing board believes this important for the development of the facts, unless the disclosure of the identity of the witness or requiring him to submit to cross-examination would be injurious to national security.

"[4] The identity of an informant who regularly provides or is employed to provide secret information should not be disclosed by requiring his appearance before a screening board or a hearing board or otherwise identifying him, whenever the head of the department or agency which obtained such information shall certify that the identification or presence of such an informant would be detrimental to the interests of national security." New York Report 174.

The second type of informant is what we call the contact; that is, a person that we would not employ. It would be a professional man, a banker, a lawyer, a doctor, or some person of high standing in the community with whom we have had contacts for many years and who would not accept Government employment, but who is an outstanding, reliable source.... So we would record that confidential informant T-1 or T-2 has advised as follows. We would evaluate the informant by saying he is a leading member of the New York bar, and we can vouch for his thorough reliability. When that type of man gives us information in confidence, we of course are going to treat it in confidence.

The third type of informant is the next-door neighbor or fellow employee. Many times in many other types of investigations fellow employees will come in and give us information concerning some other employee in their office. It may be a superior officer. On some occasions he insists that his identity be treated in confidence. We endeavor to try to find out whether he is activated by malice, and, if he is, we try to explore that and establish the background for his hostility. He may be somewhat hysterical or overwrought as to some matter of administrative procedure that he may think he has been the victim of. Those are necessarily the functions of an investigator in interviewing a person like that. But if that person says he wants to be kept confidential we must not use his name. We will ask these employees as to whether they are willing to make a signed statement. If they will not make a signed statement, we will reflect that in our report, and that is for the evaluation by the loyalty board and the employing agency. We ask the employee if he would be willing to testify. If he says he will not, we observe that reaction and put that in the report.

Now the only other alternative that we have in that situation is a matter of policy for this committee to determine.... And if you decide that we should follow it, we will. We will instruct our agents that before they go in to interview that they advise the person that anything he says he must be prepared to testify to. I frankly don't believe we will get any information that way....

The function of the Bureau is a fact gathering and fact finding agency. We intend merely to get the information to run down allegations of disloyalty and to incorporate them in our records, giving the sources of information where it will not affect the security of our country. But, where the person giving us information insists upon being treated as confidential, we will not give the source of the information....

There has been some criticism and comment, I am told, about these designations of T-1, T-2, etc. I think it is a very simple problem. If it is the desire of this Board that the identity of confidential informants be given, I am perfectly willing to advise everyone in advance that they must be ready to testify. If they won't give it to us under those circumstances, we won't take the information. We can't afford, in the Bureau, to violate confidences.[128]

128. Quoted in Report of the Commission on Government Security 657-58 (1957).

In addition to the above statement, Mr. Hoover has testified[129] and written[130] extensively in support of the principle of nondisclosure. The justifications seem to be the following:

1. Identification of Informants. The first step of the argument is that if confrontation is required, the names of confidential informants will be revealed. This is of course true wherever the loyalty-security case can be established only with the testimony of such an informant. But the argument implies more disclosure than is implicit in the command of confrontation. The government would not be required to disclose military secrets, scientific processes, or indeed anything it might choose to withhold. The government would not even be obliged to offer as witnesses those persons who preferred to remain anonymous, so long as their statements led to other witnesses or other evidence which could be offered in support of the charges. It seems not unreasonable to conclude that if the derogatory information offered by the confidential informants could not be corroborated by other evidence sufficient to cast some doubt on the security reliability of a government employee, it should ordinarily be disregarded as of little probative value. After all, there is no requirement of proof beyond a reasonable doubt as in criminal cases. To raise doubts as to whether continued employment is "clearly consistent with the interests of national security" does not require a very substantial showing. But it does seem proper that there appear on the open record some evidence to support such a conclusion, and evidence which the subject of the charges may answer, including the right of cross-examination where appropriate.

Moreover, there is no indication from the FBI of the number of prospective confidential informants who are more reluctant to appear as witnesses in loyalty-security proceedings than is any person reluctant to testify in ordinary civil or criminal proceedings. Does the nonproduction of these potential witnesses not suggest too great a solicitude for their sensibilities as compared to the serious charges which

129. E.g., Hearings Before the Subcommittee of the House Appropriations Committee on Department of Justice Appropriation Bill for 1949, 80th Cong., 2d Sess., 245-47 (1948); Hearings Before a Subcommittee of the Senate Committee on Foreign Relations on the subject of State Department Employee Loyalty Investigations pursuant to S. Res. 231, 81st Cong., 2d Sess., pt. 1, at 327-28 (1949).

130. Book: Masters of Deceit (1958). Articles: Civil Liberties and Law Enforcement: The Role of the FBI, 37 Iowa L. Rev. 175 (1952); The Confidential Nature of FBI Reports, 8 Syracuse L. Rev. 1 (1956); A Comment on the Article "Loyalty Among Government Employees," 58 Yale L.J. 401 (1949). See also Whitehead, The FBI Story (1956); Richardson, The Federal Employee Loyalty Program, 51 Colum. L. Rev. 546 (1951). For a different view, see Cook, The FBI, 187 The Nation 222 (Oct. 18, 1958).

they anonymously advance? All must admit that the assurance that an informant's identity will never be revealed is calculated to attract unverifiable gossip, malicious talebearing, and downright falsification. There is no reliable way of sorting out the false from the true except through the time-tested device of cross-examination.

It is also contended that the disclosure of names will dry up sources of information. But this need not be the case. The government is free to assure nondisclosure to any person who gives information if it cannot be received on any other terms. The agency receiving information on such a condition might well have special reason by that very fact to be alert for error or falsehood. What the government would not be free to do, if confrontation should be required, would be to allow the use without cross-examination of the summarized statements of any person available as a witness, but not called. Mr. Hoover indicated in his statement quoted above that his only alternative would be to tell all persons who came to the FBI that a requested confidence could not be protected. If the FBI found it necessary to assure anonymity, stories could be accepted for verification from other sources. Indeed, this is almost precisely what is done at the present time by the FBI in the use of the wiretapping technique. As Mr. Hoover has pointed out on another occasion, as of August 1, 1956, there were ninety wiretaps in operation by the FBI[131] although the wiretaps themselves could not be admitted into evidence in federal courts.[132] Nevertheless, the FBI considered these to be vital in protecting the nation not only against dangers to its national security, but as well in connection with the detection of certain kinds of nonsecurity crime. Moreover, where the only barrier to the testimony of an informant before an administrative board is a prior agreement that the report will be held confidential, one can imagine that the FBI would be an effective advocate in persuading the individual to testify if in reality there were no other way to protect against a disloyal person having access to government secrets.

An alternative argument is that the disclosure of informants regularly employed by the FBI would render them subsequently useless to the government and might even endanger their lives. Again, as before stated, it seems clear that it would be the rare case in which the testimony of a particular informant would be indispensable. But if indeed his story was not elsewhere corroborated, the demands of fairness

131. Hoover, The Confidential Nature of FBI Reports, 8 Syracuse L. Rev. 1, 6 (1956).

132. Nardone v. United States, 302 U.S. 379 (1937). Indeed, leads gained from wiretapping, "fruit of the poisonous tree," are also not admissible in federal courts. Nardone v. United States, 308 U.S. 338, 341 (1939). Cf. Benanti v. United States, 355 U.S. 96 (1957); Hanna v. United States, 260 F.2d 723 (D.C. Cir. 1958).

would even more clearly require that the informant's tale be properly tested in the only possible way, through cross-examination. This seems especially true in view of the unfortunate indications of unreliability on the part of an appreciable number of regularly employed informants who were apparently regarded by the FBI as "sources known to be reliable."[133]

As to the fear for the safety of the informants, no data have been offered to establish that there is danger, despite the fact that, in preparation for the first Communist trial under the Smith Act,[134] the FBI used as witnesses thirty-eight informants never before disclosed;[135] and there is no report of reprisal against any of these. One would be reluctant to believe that the FBI would be unable to give as effective protection to informants in loyalty-security proceedings as it habitually does in behalf of those who testify in criminal proceedings. This argument, even if seriously advanced, scarcely outweighs the opposing interest in fairness to the persons informed against.

A final item should be noted in connection with the reluctance to disclose names and to use informants as witnesses. That is the fact that there are informants and there are informants. As Mr. Hoover pointed out in his statement before the Loyalty Review Board, there may be as many as three distinct categories of informants: regularly employed confidential agents, reliable contacts, and casual informants. Whatever may be the practical considerations which motivate the withholding of the identities of regularly employed informants, those reasons tend to vanish as to "contacts," however reliable they may be, and other informants of the neighbor, fellow-employee, and acquaintance class. As to all such "casual" informants, as those not in the business of informing are ordinarily described, there should be no realistic problem of drying up sources. It should not be lightly assumed that such individuals, who have a one-shot, or, at best, occasional, story to tell, will be unwilling to reveal their honest doubts about disloyalty or security risk indications among neighbors, fellow-employees, or social acquaintances. The normally accepted obligations of citizenship would suffice in most cases to prompt revelation. In particular, it seems unlikely that such a casual informant, whether one who volunteers information or one who answers the questions of an FBI agent, would bargain for a guarantee of nondisclosure as a con-

133. Communist Party v. Subversive Activities Control Board, 351 U.S. 115 (1956). See also Jencks v. United States, 353 U.S. 657 (1957); Mesarosh v. United States, 352 U.S. 1 (1956). Cf. Justice Frankfurter's memorandum in Mesarosh v. United States, 352 U.S. 808, 811 (1956).

134. See Dennis v. United States, 341 U.S. 494 (1951).

135. Hoover, The Confidential Nature of FBI Reports, 8 Syracuse L. Rev. 1, 7 (1956).

dition of giving the information. It seems more reasonable to believe that such immunity from disclosure is a kind of bonus *offered to* the person interviewed. Whatever may be the facts in this necessarily conjectural area, the FBI draws little if any distinction either in practice or in justification between the paid informer and the casual informer. In this connection it is notable that both the Commission on Government Security[136] and the Special Committee of the Association of the Bar of the City of New York[137] concluded that full confrontation should be provided in the case of casual informants. The practice, unfortunately, seems not to have been altered. In any event, as will be noted in part C below, the failure to disclose any informant, whether casual or regularly employed, raises serious doubt as to the constitutionality of such a hearing.

2. Revelation of Confidential Investigative Techniques. A second main argument advanced by the FBI in defense of its established practice of nondisclosure in administrative proceedings involving loyalty-security questions is that disclosure of the names of regular informants would not only destroy their individual usefulness in further information-gathering, as noted above, but might also endanger other operatives or even jeopardize the structure of investigative techniques. If there is any difference between this argument and the contention that disclosure of names would dry up sources, the difference is one of degree only. Once more, in the name of national security, we are not offered illustrations or explanation; rather we are asked to accept as fact what seems at best logically dubious. One can only wonder what are the consequences of disclosure of a single informant's name other than the conceded fact that his own usefulness will be impaired or even destroyed; what the implied chain of consequences may be is left to the speculation of the observer who, in this case, does not know.

3. Prejudice to Innocent Parties Named in the Reports. The contention is made that disclosure of unverified investigative reports would often be prejudicial to persons named therein, but against whom no charges are contemplated. This is a perfectly sound reason for not revealing investigative reports as such out of the context of a trial or other proper proceeding. But to argue from this that the same reports, with or without independent verification, may be used as evidence of disloyalty without a testing by cross-examination is an impossibly long jump. In fact, the suggestion is at least implicit in this line of argument that verification or discrediting of charges and rumors can be most effectively done by the FBI through further inquiry and investi-

136. Report of the Commission on Government Security xviii (1957).

137. New York Report 174-75.

gation.[138] We can be grateful that the FBI is properly reluctant to turn out such random reports without whatever verification is available to the Bureau. However, that is far from conceding, as seems to be suggested, that such checking by FBI agents is superior to the rigorous search for truth that can be promoted by searching cross-examination. Perhaps the contention, which is at best ambiguously made, is misunderstood. At least, as here stated, it has no merit.

Unfairness Compounded

As shown above, even the so-called practical arguments favoring the nondisclosure of evidence and witnesses are of doubtful merit. It remains to outline the opposing factors which demonstrate the particular injustice of denying confrontation in loyalty-security proceedings.[139] In addition to all the usual reasons for which cross-examination has long been recognized as the best vehicle for the ascertainment of truth, there are special considerations which relate peculiarly to loyalty-security hearings.

(1) Security charges often deal with events in the distant past. Moreover, the crucial charges often relate to events that may not have seemed terribly important to the participant when they occurred, such as a recital of meetings allegedly attended or of statements reputedly made many years earlier. Without an opportunity to learn from cross-examination the specific details and the relevant context, the subject of the charges is helpless to answer effectively, even to show mistaken identity.

(2) Charges in loyalty-security proceedings often relate to attitudes, beliefs, and even the ultimate in subjectivity, states of mind. A person identified with disloyal thoughts or associations is peculiarly disabled from purging himself of charges which he can answer only with a general denial. Moreover, the witnesses who might affirmatively assist in refutation may themselves be reluctant to identify their own activities or associations of another day. Since they are ordinarily not compellable by subpoena on behalf of the accused, he is again unable to defend effectively. Indeed, the very informants often sought to be concealed are persons who may themselves at one time have had connection with subversive causes. The unreliability of some of these informants has already been demonstrated.[140]

(3) In most proceedings involving loyalty-security issues the security-risk suspect carries the difficult burden of establishing that his

138. See Hoover, The Confidential Nature of FBI Reports, 8 Syracuse L. Rev. 1, 4-5 (1956).

139. For a more complete statement, see Brief for Petitioner, pp. 29-38, Taylor v. McElroy (No. 504, Oct. Term 1958).

140. See note 133 supra.

continued employment (or whatever may be the issue) is "clearly consistent with the interests of national security." Where, as here, his cause is lost if even a doubt remains in the minds of the screening board, the burden becomes almost impossible to sustain in the absence of an opportunity to meet and make effective refutation of the evidence considered against him.

(4) Finally, the proceedings become almost meaningless when the triers of the fact of loyalty or security themselves are not allowed to know the evidence upon which the decision must be made. Even the most conscientiously impartial summary is scarcely an adequate substitute for direct testimony subject to cross-examination.

C. Confrontation and Due Process

Without exception the existing federal programs in which loyalty and security issues may be raised provide for some kind of hearing. There appear to be at least three assumptions implicit in connection with the provisions for hearing. (1) It is apparently taken for granted that some kind of hearing must be provided as a constitutional necessity. Whatever may be permissible so far as ordinary refusals to hire or discharges for reasons unrelated to national security considerations, at least the government is not free to identify a person as unworthy of the trust of his government without some opportunity to answer. (2) The tendency is to provide for as specific notice of the charges and as much identification of adverse evidence and witnesses as is thought to be "consistent with the interests of national security," a phrase left magnificently undefined except in the conscience of the investigative agencies and the review boards. (3) Uneasiness over the failure to provide cross-examination opportunities is reflected in the caution typically pressed upon the review boards to take into account the fact that the subject of the investigation is thus handicapped in the preparation and presentation of his defense. All of which is simply another way of suggesting that the governmental sense of injustice is disturbed by the denial of rights that are taken as a matter of course in all criminal proceedings and in all other civil proceedings. In Part B above an attempt was made to demonstrate by reasoning—the relevant factual data being unavailable—that the entirely proper concern for security has in this context resulted in unnecessary and inappropriate safeguards. If the writer is correct in assuming that the responsible government officials would prefer to afford complete confrontation if they could be convinced that in doing so they would not jeopardize national security, then it is hoped that the above analysis will contribute to an understanding of how fairness can be promoted without peril to national security.

Even if the foregoing assumptions and reasoning lead to an errone-

ous conclusion, however, the matter does not end with a reluctant endorsement of the existing restrictive practices. More important is the conclusion that the present practice of nondisclosure is a denial of procedural due process in that the adumbrated hearings provided are not hearings in any meaningful constitutional sense. Accordingly, it is the purpose of this part to make the constitutional argument. Three principal contentions are advanced in support of the existing program, all of which are believed to be insufficient to overcome the ordinary due process requirement. First, since these are administrative rather than criminal proceedings, the sixth amendment does not require confrontation either directly or as a requirement of fifth amendment due process. Second, government employment, issuance of a passport, etc. are privileges and not rights so that no constitutional questions arise in connection with their grant, denial, or withdrawal. Third, the exercise of the war power to protect national security justifies limitations on what would otherwise be required by the concept of due process. Each argument merits answering.

Confrontation in Administrative Proceedings

It has already been pointed out in Part II above that, while confrontation as a specific constitutional mandate of the sixth amendment applies only to proceedings in the federal courts, the sense of fairness which impelled its inclusion there has logically carried over the same guarantee into criminal proceedings in state courts and in all civil proceedings except the kind here under review. The argument that, since these proceedings are not criminal, no confrontation is required (however desirable it may be), proves at once too much and too little. It proves too much in the sense that if this conclusion were really sound, then the strictures of the hearsay rule would have no constitutional place in civil proceedings. But that is just not so. To the extent that fairness forbids hearsay, the rule has a perfectly sound constitutional base. To be sure, legislatures and courts may vary the detail of the hearsay rule as it may be applicable in particular circumstances. For example, section 7(c) of the Administrative Procedure Act specifically provides that

> Any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. . . .[141]

On the basis of this rule much evidence which would be barred in ordinary litigation in the civil courts may be admitted and used in support of a finding, "if it is of a kind on which fair-minded men are

141. Administrative Procedure Act § 7, 60 Stat. 241 (1946), 5 U.S.C. § 1006(c) (1952).

accustomed to rely in serious matters. . . ."[142] It is significant, however, that section 7 (c) also provides

> Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts.[143]

Without such assurance of the right of cross-examination to promote fairness, the relaxation of the hearsay rule would presumably not have withstood constitutional attack. Clearly, the relaxation to this limited extent of the hearsay prohibitions is not to say that the APA was intended to permit the use of evidence that is not identified as to source, is not made available to the party against whom it is used, and is not even available to the scrutiny of the trier of the facts or the reviewing court. Yet this is exactly what is sought to be defended in the context of loyalty-security determinations.

It might be argued that, since such proceedings are not in any event subject to the requirements of the APA,[144] the evidentiary standards may be still further relaxed. But this would not seem to be true. If, as has been already pointed out, the essence of the hearsay rule incorporates the concept of fairness, it should follow that a complete relinquishment of that essential and salutary feature of the rule would constitute a denial of due process. A hearing in which these fundamental concepts of fairness are disregarded is not merely an insufficient hearing—it is no hearing. Perhaps it is worse than no hearing, since persons not privy to the procedures employed at the so-called hearing may be misled into believing that its finding represents an informed judgment similar in reliability to judgments handed down regularly in the civil courts or in other administrative proceedings. Thus, the person against whom an adverse decision is rendered is stamped, perhaps permanently, with an unanswered and unanswerable charge equivalent in the popular mind to disloyalty.

To say that confrontation is not required in loyalty-security cases because they are not criminal proceedings also proves too little. In fact, it misses altogether the point that confrontation is not only a specific command of the sixth amendment in criminal proceedings; in addition, the burden of this article has been to show that at least the cross-examination aspects of confrontation are so intimately bound up with traditional notions of fairness that cross-examination may

142. Ellers v. Railroad Retirement Bd., 132 F.2d 636, 639 (2d Cir. 1943). See also 2 Davis, Administrative Law §§ 14.01-.17 (1958).

143. Administrative Procedure Act § 7, 60 Stat. 241 (1946), 5 U.S.C. § 1006(c) (1952).

144. Administrative Procedure Act § 7, 60 Stat. 239 (1946), 5 U.S.C. § 1004 (1952).

not be denied where the charge involves such vital issues as charges of disloyalty.

It is right and natural that a person who is in fact disloyal to his country should be despised as untrustworthy. Scarcely less odium attaches to the man who is denied clearance because he is a "security risk." Accordingly, although it is technically true that denials of clearance are not criminal proceedings in so far as neither prison sentences nor fines are imposed, the substantive distinction between the criminal and the noncriminal disappears. It is cruel irony, then, that on such a subtlety a man may be branded disloyal without any of the procedural safeguards of which Anglo-American jurisprudence is so justly proud. Surely it cannot be said in any meaningful sense of the word that this is due process.

Privileges, Rights, and Confrontation

It has long been a comfortable rationalization for skimping on hearing procedures in connection with government employment or other "favors" dispensed at the discretion of government to say these are mere matters of privilege. Accordingly, so the argument runs, the privilege of employment may be conferred or withdrawn without regard to the amenities of due process. This conception has had recurring acceptance since it was given its most pungent statement by Oliver Wendell Holmes, speaking in 1892 for the Massachusetts court: "the petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."[145] The same idea was carried over uncritically into the loyalty-security context by Judge Prettyman in *Bailey v. Richardson,* when he said that "due process of law is not applicable unless one is being deprived of something to which he has a right."[146] But, as Professor Clark Byse has pointed out, "suffice it to note that 'privilege' is simply a label which expresses a conclusion reached on other grounds; it tells us nothing about the reasons, if any, for the conclusion."[147] The correctness of this judgment is reinforced by recent Supreme Court decisions recognizing that public employment is a right which may not be taken away except by proper procedures. In *Wieman v. Updegraff* the Court stated:

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145. McAuliffe v. Mayor of New Bedford, 155 Mass. 216, 220, 29 N.E. 517 (1892).

146. 182 F.2d 46, 58 (D.C. Cir. 1950), aff'd by an equally divided Court, 341 U.S. 918 (1951). See also Adler v. Board of Educ., 342 U.S. 485, 492 (1952); United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537, 544 (1950).

147. Byse, Opportunity to Be Heard in License Issuance, 101 U. Pa. L. Rev. 57, 69 (1952). But cf. 1 Davis, Administrative Law § 7.11 (1958).

> We need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory.[148]

Similarly, in *Slochower v. Board of Educ.* the Court reasserted the same concept:

> To state that a person does not have a constitutional right to government employment is only to say that he must comply with reasonable, lawful, and nondiscriminatory terms laid down by the proper authorities.[149]

Clearly, the simplistic privilege-right dichotomy of the *Bailey* case has been rejected.

National Security and the Dilution of Procedural Due Process

The Supreme Court seems never to have held that the qualitative content of procedural due process is subject to variation between cases in which the limitation is justified on grounds of national security and cases in which due process limitations are sought to be justified on other bases. Nor even does the government categorically argue that procedural due process may be dispensed with in loyalty-security proceedings. More circumspectly the contention is advanced that procedural due process is satisfied in these situations where, as a function of the executive power, confrontation is not accorded. Perhaps an analogy is sought to be drawn from the relativistic or balancing-of-evils position adopted by the Court in modern applications of the "clear and present danger test." As Chief Justice Vinson rephrased the classic Holmes-Brandeis formula for determining the extent of permissible limitation on first amendment rights, it does indeed become a kind of balancing of the seriousness of the threatened danger against the value attached, for example, to freedom of speech. Thus, Vinson, adopting the language of Judge Learned Hand in the court below, said in *Dennis v. United States:*

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148. 344 U.S. 183, 191-92 (1952).

149. 350 U.S. 551, 555 (1956). See also United Public Workers v. Mitchell, 330 U.S. 75, 100 (1947); Pike v. Walker, 121 F.2d 37, 39 (D.C. Cir.), cert. denied, 314 U.S. 625 (1941). Cf. Alpert v. Board of Governors of City Hosp., 286 App. Div. 542, 547, 145 N.Y.S.2d 534, 538 (1955).

See also Speiser v. Randall, 357 U.S. 513, 520-21 (1958): "To experienced lawyers it is commonplace that the outcome of a lawsuit—and hence the vindication of legal rights—depends more often on how the factfinder appraises the facts than on a disputed construction of a statute or interpretation of a line of precedents. Thus the procedures by which the facts of the case are determined assume an importance fully as great as the validity of the substantive rule of law to be applied. And the more important the rights at stake the more important must be the procedural safeguards surrounding those rights." Thus, where substantive rights of the first importance are involved, such as loss of employment on the implicit charge of disloyalty, the procedural protections must be of the highest order.

> In each case [courts] must ask whether the gravity of the "evil," discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger.[150]

The difficulty of analogizing this approach to the problems involved in limiting confrontation is that the "clear and present danger" test, whether in its original or in its revised form, is designed to measure only the permissible limitations upon substantive due process, as found particularly in the first and fourteenth amendments. To argue now the permissibility of the same approach in connection with procedural due process is to risk complete destruction of the procedural guarantees which constitute the essence of our constitutional structure. At this point Justice Jackson's words on this score are again relevant.

> Procedural due process is more elemental and less flexible than substantive due process. It yields less to the times, varies less with conditions, and defers much less to the legislative judgment. . . .[151]

IV

CONFRONTATION IN CONTEXT

Two principal contentions have been advanced thus far: First, it has been suggested that confrontation can, as a practical matter, be supplied in the various administrative proceedings where it is now denied, without danger to national security. Second, it has been argued that in any event the refusal of confrontation in the kinds of proceedings here discussed should be recognized as a violation of procedural due process. It remains now to place these somewhat theoretical contentions in the setting of specific factual situations. An opportunity to do exactly that is admirably available in connection with three cases before the Supreme Court for decision in 1959. Two of the cases arise under the Industrial Personnel Security Program and one under the government employee program. All three present more or less squarely the constitutional question of right to confrontation. However, since they vary in detail, and because the constitutional issue may be avoided in some of them, they require separate statement.

Greene v. McElroy[152] is the most important of the cases because it presents the constitutional question most clearly.[153] Petitioner is a trained and experienced aeronautical engineer who was, at the time

150. 341 U.S. 494, 510 (1951), quoting from 183 F.2d 201, 212 (2d Cir. 1950).

151. Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 224 (1953). See note 33 supra.

152. 254 F.2d 944 (D.C. Cir.), cert. granted, 358 U.S. 872 (1958) (No. 180, Oct. Term 1958).

153. The factual recital is based upon the opinion in the court of appeals and upon the transcript of record in the Supreme Court; but specific citation is avoided.

of his resignation because of denial of clearance, employed at a salary of $18,000 a year as general manager and vice president in charge of engineering by the Engineering and Research Corporation (ERCO), a corporation engaged in classified research under contracts with the Department of the Navy. Each of the contracts incorporated by reference the Department of Defense Industrial Security Manual for Safeguarding Classified Matter, which provided as a condition of the contract an obligation to exclude from access to classified matter employees to whom clearance was not granted. Twice in 1949 and once in 1950 petitioner received such clearance. In 1951 petitioner's clearance was withdrawn, but was restored in 1952 after hearing before the Industrial Employment Review Board. After a change in procedures and standards for clearance in 1953, the Secretary of the Navy notified ERCO that petitioner's clearance had been withdrawn; and petitioner resigned. In 1954 he received a statement of charges "to the extent permitted by security considerations." The thirteen paragraphs in the statement may be summarized under general headings: (1) Membership in or relationship with organizations cited as subversive or Communist-front; (2) association with persons known or thought to be sympathetic with Communist policies, including his first wife from whom he was divorced in 1947; (3) association with officials in the Soviet, Yugoslav, and Czechoslovak Embassies; (4) having Communist publications in his home during the time of his first marriage. The charges ranged from the vaguely general to the precisely specific. For example:

> 4. Many apparently reliable witnesses have testified that during the period of SUBJECT'S first marriage his personal political sympathies were in general accord with those of his wife, in that he was sympathetic towards Russia; followed the Communist Party "line"; presented "fellow-traveler" arguments; was apparently influenced by "Jean's wild theories"; etc.
>
> 6. On 7 April 1947 SUBJECT and his wife Jean attended the third Annual Dinner of the Southern Conference for Human Welfare, an organization that has been officially cited as Communist front.[154]

At the hearing the Board presented no witnesses. Thirteen witnesses testified on behalf of petitioner, and twenty-four exhibits were introduced by him. In his own testimony he denied all the implications of disloyalty and sympathy to alien causes; and he sought to explain the circumstances as to all the charges which were factually correct. This included the story of political difference with his wife contributing to the 1947 divorce and the explanation that the visits to the

154. Record, pp. 9-11.

embassies had been in connection with the business interests of ERCO during and shortly after World War II.

The judical proceedings were instituted in 1954 after an adverse finding, although the final denial of clearance on administrative review was not completed until 1956. The suit filed in the district court sought a declaration that the government's denial of clearance to petitioner should be declared "illegal, void, and of no effect." After stipulation of the facts and motions for summary judgment by both parties, the court granted the government's motion and ordered the complaint dismissed. The court held that petitioner's loss of employment resulted simply from ERCO's contractual agreement to abide by security requirements; that in so acting the government was acting properly to protect itself against threats to its survival; and that accordingly petitioner had shown no invasion of his legal rights.[155] The court of appeals affirmed. Although recognizing the reality of the injury to petitioner (who by then was employed as an architectural draftsman at $4,400 a year), the court denied the existence of a justiciable controversy. Judge Washington concluded:

> In a mature democracy, choices such as this must be made by the executive branch, and not by the judicial. If too many mistakes are made, the electorate will in due time reflect its dissatisfaction with the results achieved. It would be an unwarranted interference with the responsibility which the executive alone should bear, were the judiciary to undertake to determine for itself whether Greene or any other individual similarly situated is in fact sufficiently trustworthy to be entitled to security clearance for a particular project.[156]

Taylor v. McElroy[157] involves a further problem of confrontation, but is clouded in this case by a government contention of mootness.[158] Petitioner was employed from 1941 until 1956 as a tool maker at Bell Aircraft Corporation in Buffalo, New York. In 1956 his clearance was withdrawn, and he was discharged. The statement of reasons charged that in 1942 and 1943 petitioner had been a member of, paid dues to, and held a membership card in the Communist Party; and, it was charged, he "may still have membership in the Communist Party."[159] The hearing consisted exclusively of evidence in support

155. Greene v. Wilson, 150 F. Supp. 958 (D.D.C. 1957).

156. Greene v. McElroy, 254 F.2d 944, 954 (D.C. Cir. 1958).

157. The lower court proceedings are not reported. Certiorari to the Court of Appeals for the District of Columbia was granted at 358 U.S. 918 (1958) (No. 504, Oct. Term 1958).

158. Judgment of the jurisdictional question was reserved for argument on the merits. 79 Sup. Ct. 578 (1959).

159. The summary of facts is taken from the transcript of record and petitioner's brief in the Supreme Court.

of petitioner's categorically sworn denial of the charges. In the course of subsequent reviews and rehearings confrontation was never granted; but there were read into the record six anonymous synopses of communist affiliation in 1942-43, five of which refuted the allegation of continued membership by stating that petitioner had been expelled from the Party in 1943. The accusers appeared to have been casual informants rather than regularly used confidential informants. Clearance was denied on two separate occasions, most recently on October 13, 1958. But on December 31, 1958, shortly after the Supreme Court's grant of certiorari, the Acting Secretary of Defense found that the "clearance of Charles Allen Taylor is in the national interest." On January 9, 1959, the government sought to have the case dismissed as moot; but, as noted above, the Court agreed to hear argument on the mootness question at the same time as the merits.

Vitarelli v. Seaton[160] potentially raises the issue of confrontation also, but relief could be given petitioner on a narrower ground of statutory interpretation. Briefly, the case involves an employee in the Department of Interior, designated as an "Education and Training Specialist." In 1954 he was suspended by the Secretary of the Interior on charges (among others) (1) that he was a member of or in sympathy with the Communist Party; (2) that his behavior, activities, and associations tended to show that he was not reliable or trustworthy; and (3) that he had deliberately misrepresented or falsified material facts in answering questions put to him in 1952 by the Interior Department Loyalty Board. At the hearing petitioner filed an answer, together with some forty-four affidavits, but was not confronted with any witnesses; and certain information was withheld as confidential. After hearing, petitioner was dismissed. The suit for reinstatement relied principally on the doctrine of *Cole v. Young*[161] which denied the applicability of Executive Order 10450. Continuance of termination provided for in the new order was based upon independent authority under the general personnel laws. Petitioner contended that there remained a defamatory "badge of infamy" which could be cured only by reinstatement; but the court of appeals rejected the contention, stating:

> There is no basis on which we can weigh the evidence, or conclude that the Secretary's action in dismissing appellant could not properly be rested on that ground. The power of the Executive to discharge for untrustworthiness or deliberate misrepresentation is beyond dispute. . . .[162]

160. 253 F.2d 338 (D.C. Cir.), cert. granted, 358 U.S. 871 (1958) (No. 101, Oct. Term 1958).

161. 351 U.S. 536 (1956).

162. Vitarelli v. Seaton, 253 F.2d 338, 342 (D.C. Cir. 1958).

Judge Fahy dissented on the nonconstitutional ground that the discharge could not be regarded "as in any sense independent of Executive Order 10450."[163]

These three cases, then, present for decision a number of aspects of the loyalty-security program. At the threshold of each case is the issue of justiciable controversy or not. It is difficult to agree with the court of appeals in *Greene* that no issue for judicial determination was presented. There can be no denying the fact that if petitioner had not resigned he would have been discharged by his employer in order to forestall cancellation of all its defense contracts. It is patently unrealistic to argue that the condition of employee clearance in all defense contracts is merely an ordinary aspect of contracts freely negotiated between parties bargaining on equal terms. The denial of clearance to petitioner by the government was the operative act inducing employment termination, to the clear detriment of petitioner who was severely damaged in reputation and in economic well-being. Accordingly, it is proper judicial business to inquire into these private consequences of governmental action.[164] All three petitioners argue denial of constitutional rights by virtue of the conceded lack of confrontation and, to some extent, insufficient notice of the charges. *Greene* raises the issue most sharply, and possibly inescapably, whereas *Taylor* and *Vitarelli* could be decided on nonconstitutional grounds. Both of these, however, argue in addition that the proceedings to date, no matter what rectification is now given by way of expunging records, is insufficient to remove the stain of a charge of disloyalty. Accordingly both demand affirmative retraction of all charges in contrast to the merely negative act of clearing the records.

All three cases also raise the question of potential distinction between regularly employed confidential agents and mere casual informants, for in each of these cases important, and perhaps principal, reliance seems to have been placed on the testimony of casual informants whom the government was nevertheless unwilling to disclose.[165]

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163. Id. at 343.

164. See NAACP v. Alabama, 357 U.S. 449 (1958); Harmon v. Brucker, 355 U.S. 579 (1958); Service v. Dulles, 354 U.S. 363 (1957); Schware v. Board of Bar Examiners, 353 U.S. 232 (1957); Cole v. Young, 351 U.S. 536 (1956); Slochower v. Board of Higher Educ., 350 U.S. 551 (1956); Peters v. Hobby, 349 U.S. 331 (1955); Wieman v. Updegraff, 344 U.S. 183 (1952); Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123 (1951); Meyer v. Nebraska, 262 U.S. 390 (1923); Truax v. Raich, 239 U.S. 33 (1915); Allgeyer v. Louisiana, 165 U.S. 578 (1897); Cummings v. Missouri, 71 U.S. (4 Wall.) 277 (1866).

165. In a brief amicus in the Greene case the American Civil Liberties Union suggests that a distinction may be drawn between "under-cover" and "casual" informants, arguing that complete confrontation is constitutionally necessary at least as to the latter.

CONCLUSION

It has been the purpose of this article to make two principal points: First, that confrontation can be made available in federal administrative proceedings to persons against whom loyalty-security charges are advanced by an agency of the federal government without thereby endangering the national security. What is sought in these cases is the disclosure of witnesses and whatever evidence is considered in reaching a decision on the charges. This does not necessitate disclosure of defense or other essential secrets. Second, it has been argued that in any event the government is forbidden by the constitutional requirements of due process from refusing confrontation in these cases. That is, where a valuable right such as employment by the government or by a contractor with the government is in issue, it may not be taken away without a hearing, including such essentials of fairness as adequate notice of charges and full confrontation.

If these conclusions are accepted as sound, it is apparent that the *Greene, Taylor,* and *Vitarelli* cases should be reversed because of the fundamental unfairness of the hearing procedures resulting in each case in discharge of petitioner from remunerative employment, accompanied by the casting of doubt on each petitioner's loyalty to his country. Even if reversal in the *Taylor* and *Vitarelli* cases may be possible on nonconstitutional grounds, it seems necessary to reach the constitutional issue in the *Greene* case.[166] It is believed that full disclosure of all witnesses essential to establish the government's case is required. At the very minimum confrontation is necessary as to casual informants who, in this case, may very well constitute all the sources of information adverse to petitioner.

If the thesis of this article, that confrontation is required in administrative proceedings involving loyalty-security charges, becomes accepted in practice, an additional inquiry is relevant. If the government is still reluctant, for any reason, to disclose the necessary witnesses and evidence, what are the consequences? Has it any alternative choices? Where the question is one of continued employment, whether by the government or by a contractor with the government, it follows that the employee may not be discharged, although in some (but not all) cases reassignment may be possible to a position not requiring access to classified data. Obviously this may be a difficult choice and thus raises the issue most sharply, as the pending cases demonstrate. But the government is always faced with hard constitutional choices. It may not evade constitutional responsibility on

166. Petitioner also argues in the Greene case that statutory authority is lacking for the administrative denial of confrontation. Brief for Petitioner, pp. 52-58, Greene v. McElroy, 254 F.2d 944 (D.C. Cir.), cert. granted, 358 U.S. 872 (1958).

such grounds. Fortunately, the choice is not always presented in such an acute form. Consider, for example, the following:

(1) In cases involving the issuance or not of passports, there is no question of access to classified materials. If the Department of State is in any case reluctant to disclose the source of adverse information, it may avoid that necessity by the simple expedient of issuing the passport.[167] To grant the passport does not give the applicant access to any government secrets or files. Rather, it simply assures freedom of travel, a constitutionally protected right. As the Supreme Court noted in *Kent v. Dulles*:

> The right to travel is a part of the "liberty" of which the citizen cannot be deprived without due process of law under the Fifth Amendment.[168]

(2) Similarly, in loyalty-security investigations relating to induction into, or discharge from, the military service, there is no requirement that any individual in the military service be given access to, or assured continued access to, classified data. This applies a fortiori when the only issue is the characterization of the discharge as honorable or less than honorable. Surely a person should neither be denied induction nor given a less than honorable discharge for loyalty-security reasons without an opportunity to know and confront his accusers.[169]

(3) In the Port Security Program there is no question of seamen's access to secret data. For that and other reasons it has been held improper to deny confrontation where the alternative does not involve access to government secrets.[170]

(4) In connection with aliens seeking admission to the United States, as already observed, there is no constitutional requirement for any kind of a hearing. However, as to resident aliens a fair hearing, including confrontation, is required for deportation and, it would seem, in other cases where executive decisions affecting individual aliens are made on the basis of disputed facts. Again there is no question of access to government secrets; so a decision to refuse confrontation would simply mean, under circumstances like those in *Jay v. Boyd*,[171] that the discretionary stay of deportation would be granted rather than withheld—scarcely a dangerous result.

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167. Association of the Bar of the City of New York, Freedom to Travel, Report of the Special Committee to Study Passport Procedures 80-83 (1958).

168. 357 U.S. 116, 125 (1958).

169. Cf. Harmon v. Brucker, 355 U.S. 579 (1958). See Jones, Jurisdiction of the Federal Courts to Review the Character of Military Administrative Discharges, 57 Colum. L. Rev. 917, 930-36 (1957).

170. Parker v. Lester, 227 F.2d 708 (9th Cir. 1955).

171. 351 U.S. 345 (1956).

(5) In the case of applicants for the classification of conscientious objector, the only question is exemption or not from regular military service. In the unlikely event that some useful national purpose could be served by withholding from the applicant the information adverse to his claim, the alternative, granting the requested reclassification, would not appear to be seriously detrimental to the national interest. Nondisclosure in these cases is particularly difficult to justify.

It should be emphasized once more, however, that these distinctions and variations among the programs are not determinative of the constitutional question. It must by now be clear that this observer believes that confrontation which is fair in the circumstances must be afforded in all federal administrative proceedings involving loyalty-security charges.