



3-1-1958

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Recommended Citation

Jan Z. Krasnowiecki, *Confrontation by Witnesses in Government Employee Security Proceedings*, 33 Notre Dame L. Rev. 180 (1958).
Available at: <http://scholarship.law.nd.edu/ndlr/vol33/iss2/3>

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CONFRONTATION BY WITNESSES IN
GOVERNMENT EMPLOYEE SECURITY PROCEEDINGS

*Jan Z. Krasnowiecki**

A recent report of the Commission on Government Security has again touched upon the troublesome question of confrontation. This question was raised in the briefs of petitioner and amicus curiae in *Peters v. Hobby*,¹ but left undecided in that case. On the whole, the Commission's findings are not favorable to the view that confrontation by witnesses in Government security proceedings is a right to which there should be no exceptions.²

The Commission's special study on confrontation suggests the presence of certain assumptions which it is my purpose here to discuss. First, there is the statement that the existing provisions for a hearing in security cases are a "departure from what may be regarded as the normal procedures."³ The assumption which this statement suggests is that the Constitution does not require hearings in such cases for, unless this language is being used in some special sense, a procedure which is required by the Con-

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1 349 U.S. 331 (1955).

2 COMMISSION ON GOVERNMENT SECURITY, REPORT 66-68, 657-64 (1957).

3 *Id.* at 660.

stitution would seem to be normal. Second, there is the statement that to claim a constitutional right to confrontation in security cases is "to confuse an administrative hearing in an essentially employer-employee relationship with a criminal prosecution."⁴ The tone of finality which is given to this statement suggests the assumption that the Constitution speaks to confrontation only through the sixth amendment.

It can be seen that these assumptions make it a good deal easier to find, as the Commission did find, that confrontation by witnesses in government security proceedings, if given in all cases, would compromise the national security.⁵ The role which these assumptions may have played in the Commission's findings gains importance in the light of the restrictions placed upon its access to relevant information. Public Law 304, 84th Cong., 1st Sess. (1955), which established the Commission, provided:

Section 8. Nothing contained in this joint resolution shall be construed to require any agency of the United States to release any information possessed by it when, in the opinion of the President, the disclosure of such information would jeopardize or interfere with a pending or prospective criminal prosecution, or with the carrying out of the intelligence or investigative responsibilities of such agency, or would jeopardize or interfere with the interests of national security.

At present, civilian employees of the federal government are subject to three programs touching security: (1) the program applicable to civilian employees in the executive branch, established by Executive Order 10450⁶ under Public Law 733,⁷ which is a continuation and extension of earlier programs undertaken by the Government under the Lloyd-LaFollette and Veteran's Preference Acts;⁸ (2) the Atomic Energy Commission's program covering employees of the Commission as well as certain non-government employees⁹ (the employees of the Commission are also subject to Executive Order 10450); (3) the Civil Service Commission's regulations applicable to the classified personnel of the civil service.¹⁰

⁴ *Id.* at 662.

⁵ *Id.* at 668.

⁶ 18 FED. REG. 2489 (1953).

⁷ 64 STAT. 476, 5 U.S.C. § 22-1 (1950).

⁸ Lloyd-LaFollette Act, 37 STAT. 555 (1912), as amended, 5 U.S.C. § 652 (1926); Veterans' Preference Act, 58 STAT. 390 (1944), as amended, 5 U.S.C. § 863 (1947); Exec. Order No. 9835, 12 FED. REG. 1935 (1947); Exec. Order No. 10241, 16 FED. REG. 3690 (1951).

⁹ 10 C.F.R. §§ 4.1-4.35 (Supp. 1956); 68 STAT. 942 (1954), 42 U.S.C. § 2165 (Supp. IV, 1957).

¹⁰ 5 C.F.R. §§ 06.2, 06.4, 2.106, 9.101-9.108, 22.101-22.603 (Supp. 1956). The

These programs are discussed in detail elsewhere.¹¹ In this paper my purpose is simply to consider whether, under any of the applicable security programs, there is a constitutional basis for a claim by a government employee to a hearing and to confrontation by witnesses as a part of such hearing when the result of the hearing will be to publicly label him as a security risk. Thus the questions posed are: I. Is there anything in the United States Constitution which requires that a hearing be given to a government employee who is discharged for the publicly stated reason that he is a security risk? II. Assuming that a hearing of some kind is required under the Constitution, is confrontation by witnesses part of that requirement?

I

It should be noted that the basic security program which the Government undertook under the Lloyd-LaFollette and Veterans' Preference Acts made provisions for some kind of a hearing. Likewise, the Government's present program under Public Law 733, so far as it continues operative after the decision in *Cole v. Young*,¹² makes provision for some kind of a hearing. But while Public Law 733 specifically provides that at the employee's request a hearing shall be given to "any employee having a permanent or indefinite appointment, and having completed his probationary or trial period, who is a citizen of the United States . . ." the Veterans' Preference Act does not contain any such provision; the Lloyd-LaFollette Act provides, on the contrary, that:

No examination of witnesses nor any trial or hearing shall be required except in the discretion of the officer or employee directing the removal or suspension without pay.¹³

It can be seen, therefore, that my first question involves the constitutionality of this paragraph of the Lloyd-LaFollette Act in respect of the words "or hearing." The importance of my first question in its relation to the government employee security programs lies not only in the fact that it is logically antecedent

last of these deals with appeals of preference eligibles under the Veterans' Preference Act. *But see* 64 STAT. 476 (1950), 5 U.S.C. § 22-1 (1952): "[The] determination by the agency head concerned shall be conclusive and final . . ." See also *Cole v. Young*, 351 U.S. 536 (1956).

¹¹ COMMISSION ON GOVERNMENT SECURITY, REPORT 24-35 (1957); ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK SPECIAL COMMITTEE ON THE FEDERAL LOYALTY-SECURITY PROGRAM, REPORT c. 4 (1956).

¹² 351 U.S. 536 (1956).

¹³ 37 STAT. 555 (1912), as amended, 5 U.S.C. § 652 (a) (1952).

to any question in regard to confrontation at such hearings as are given under the programs, but also in the fact that certain decisions denying a constitutional claim to confrontation are based on the assumption, repeated by the Commission on Government Security, that no hearing of any kind need be given in the first place.

This assumption undoubtedly played an important role in *Bailey v. Richardson*,¹⁴ which shall be discussed fully later. Of the cases cited in support of the assumption, there is not one which squarely holds that no hearing of any kind need be given to a government employee who is discharged for a specified cause as against his constitutional objections that he must have a hearing. Not one of the cases involved a situation where the employee was both (a) discharged for a stated serious cause, and (b) given no opportunity whatever to refute the charges levelled against him. Indeed, while the Lloyd-LaFollette Act provides that a hearing is discretionary with the removing officer, it also provides, at the same time, that the employee "shall (1) have notice of the . . . charges preferred against him; (2) be furnished with a copy of such charges; (3) be allowed a reasonable time for filing a written answer to such charges, with affidavits; and (4) be furnished at the earliest practicable date with a written decision on such answer."¹⁵ All the cases involve situations in which the employee has been given opportunity to answer the charges brought against him in writing supported by affidavits.¹⁶

The case holding most squarely that the employee is not entitled to a hearing over and above such written answer is *Culligan v. United States*.¹⁷ But in that case there is no suggestion that the employee's claim for a hearing involved any constitutional

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

¹⁵ 37 STAT. 555 (1912), as amended, 5 U.S.C. § 652 (a) (1952).

¹⁶ *Levine v. Farley*, 107 F.2d 186 (D.C. Cir. 1939), *cert. denied*, 308 U.S. 622 (1939); *Gadsden v. United States*, 111 Ct. Cl. 487, 78 F. Supp. 126 (1948); *Culligan v. United States*, 107 Ct. Cl. 222, *cert. denied*, 330 U.S. 848 (1946); *Golding v. United States*, 78 Ct. Cl. 682, *cert. denied*, 292 U.S. 643 (1934); *Kellom v. United States*, 55 Ct. Cl. 174 (1920); *Eberlein v. United States*, 53 Ct. Cl. 466, *aff'd*, 257 U.S. 82 (1918). In *Maghan v. Board of Comm'rs. of Dist. of Columbia*, 144 F.2d 274 (D.C. Cir. 1914), no hearing whatever was given; however, (a) *Maghan* was not removed but only transferred, and (b) no cause was stated for transfer. In *Page v. Moffett*, 85 Fed. 38 (C.C.N.J. 1898), again no opportunity to defend was given but again no cause was stated for dismissal. In *Weinstein v. United States*, 109 Ct. Cl. 579, 74 F. Supp. 554 (1947), there was no hearing because *Weinstein* failed to avail herself of her right to one.

¹⁷ 107 Ct. Cl. 222, *cert. denied*, 330 U.S. 848 (1947).

attack on the Lloyd-LaFollette Act under which he was dismissed. All of the cases involve attempts by employees to obtain a review of the fact determination made by the removing officer, and allegations that the opportunity to answer in writing supported by affidavits is insufficient are made, not on constitutional grounds, but in order to indicate the weakness of the fact determination attacked.

There is no clear agreement between the litigants and the courts as to what is meant by a hearing. Thus in *Eberlein v. United States*¹⁸ the court said: "There can be no question from the findings in this case that the plaintiff had the benefit of a hearing according to the regulations then in force It is settled that in such cases the action of the executive officers is not subject to revision in the courts." If the report of the case below is consulted¹⁹ it will be seen that Eberlein did not in fact receive a hearing other than through a written answer supported by affidavits. While I have not been able to find any case which squarely holds that a government employee may be dismissed for a stated serious cause without a hearing, as against his constitutional objections that he must have a hearing, there are three cases which together suggest that he may not be so dismissed: *Shurtleff v. United States*,²⁰ *Slochower v. Board of Education*,²¹ and *Jay v. Boyd*.²²

In the *Shurtleff* case, the President dismissed a general appraiser of merchandise by a letter which read: "Sir: You are hereby removed from the office of general appraiser of merchandise, to take effect upon the appointment and qualification of your successor."²³ The act of June 19, 1890, authorizing the President to appoint general appraisers of merchandise provided that they could be removed by him ". . . for inefficiency, neglect of duty, or malfeasance in office . . ." The Court recognized that "where an officer may be removed for certain causes, he is entitled to a notice and hearing."²⁴ But the Court held that the power to appoint includes the power to remove at will unless the act of June 10, 1890, provided to the contrary. The Court held that Congress could not have intended, by specifying the causes

¹⁸ 257 U.S. 82, 84 (1921).

¹⁹ 53 Ct. Cl. 466 (1918).

²⁰ 189 U.S. 311 (1902).

²¹ 350 U.S. 551 (1955).

²² 351 U.S. 345 (1956).

²³ 189 U.S. at 312.

²⁴ *Id.* at 314.

for removal, to detract from the general power of the President to remove at will, as established by earlier cases. The right to a hearing where a removal is for cause, recognized in *Shurtleff*, is not of recent origin. In *Bagg's Case*, 1615,²⁵ one of twelve city burgesses was removed for disrespect to the mayor, without a hearing. The court granted mandamus to compel his reinstatement and Coke tells us:

[I]t was resolved, that no freeman of any corporation can be disfranchised by the corporation, unless they have authority to do it either by the express words of the charter, or by prescription And although they have lawful authority either by charter or prescription to remove anyone from the freedom, and that they have just cause to remove him; yet it appears by the return, that they have proceeded against him without hearing him answer to what was objected, or that he was not reasonably warned, such removal is void, and shall not bind the party . . . and such removal is against justice and right.²⁶

Why did the court feel so strongly that such removal is against justice and right? The court said:

[W]hen a man is a freeman of a city or borough, he has a freehold in his freedom for his life . . . and perhaps it concerns his trade and means of living, and his credit and estimation²⁷

While the court speaks of a "freehold" it is plain that it is most concerned with the damage done to a freeman's means of living, his credit and estimation. *Bagg's Case* contains a sweeping assertion of jurisdiction:

And in this case, first, it was resolved, that to this Court of King's Bench belongs authority, not only to correct errors in judicial proceedings, but other errors and misdemeanors extra-judicial, tending to the breach of peace, or oppression of the subjects, or to the raising of faction, controversy, debate, or any manner of misgovernment; so that no wrong or injury, either public or private, can be done but it shall be (here) reformed or punished by due course of law.²⁸

It has been suggested that "Coke's opinion in *Bagg's case* may have been part of his war on the prerogative — its date was 1615 — and to this end he may have been staking a claim by the common law courts to the jurisdiction of the Star Chamber or even the Council itself."²⁹ But it would be a serious historical

²⁵ 11 Co. Rep. 93 (b), 77 Eng. Rep. 1271 (K.B. 1615).

²⁶ *Id.* at 99(a).

²⁷ *Id.* at 98(b).

²⁸ *Id.* at 98(a).

²⁹ Jaffe and Henderson, *Judicial Review and the Rule of Law; Historical Origins*, 72 L.Q.R. 345, 360 (1956).

error to say that what the Court of King's Bench then said of the right to a hearing should be brushed aside because of the scepticism with which its broad claim of jurisdiction was later received by English lawyers. It is to the time of the struggle against the prerogative that we should look for a meaning of the due process clause of our own Constitution. The English revolution was only half a revolution. In the end, when the struggle was over, the same absolute power which had been claimed by the King was conceded to Parliament.³⁰ The appeals to "common right and reason," to the "fundamental law," to the "law of the land," were quickly forgotten by Englishmen.³¹ They were not forgotten here. And when Americans undertook to challenge Parliament itself they used the same arguments that were used against the prerogative.³² The other half of the English revolution occurred here. Looking to the period of struggle against the prerogative, and beyond, we find that the courts of England enforced the right to a hearing, not only in cases of dismissal by lay authorities,³³ but also in cases of dismissal by the Established Church.³⁴ In none of these cases is there any insistence upon the careful definition of the property right involved, but the determination proceeds upon the view that no one ought to be injured in his reputation and means of living without a hearing. As the court said in one case "the laws of God and man both give the party an opportunity to make his defense, if he has any."³⁵

In *Murray's Lessee v. Hoboken Land and Improvement Co.*,³⁶ we are told with regard to due process that "we must examine the constitution itself" and in addition we must look "to those settled usages and modes of proceeding existing in the common law and statute laws of England, before the emigration of our ancestors,

³⁰ *Lee v. Bude & Torrington Junction Ry.*, [1871] L.R. 6 C.P. 576.

³¹ GOUGH, *FUNDAMENTAL LAW IN ENGLISH HISTORY* (1955).

³² See Otis' arguments against writs of assistance, Quincy 471, 520 (Mass. 1761). Otis relies on Coke in *Bonham's Case*, 8 Co. Rep. 118, 77 Eng. Rep. 638 (K.B. 1610), who spoke of an Act of Parliament as being against "common right and reason" and so void. Coke may not have meant so broad a claim, but there cannot be any doubt that common right and reason was to him an integral part of due process. Cf. GOUGH, *op. cit. Supra* Ch. III, at 30. See on the American development, MULLET, *FUNDAMENTAL LAW AND THE AMERICAN REVOLUTION* (1933).

³³ *Rex v. Richardson*, 1 Burr. 517, 97 Eng. Rep. 426 (K.B. 1758); *Campion's Case*, 2 Sid. 97, 82 Eng. Rep. 1277 (K.B. 1658); *Watkins v. Edwards*, 1 Mod. Rep. 286, 86 Eng. Reg. 889 (K.B. 1670); *Protector v. Town of Colchester*, Sty. 447, 453, 82 Eng. Rep. 850 (K.B. 1655).

³⁴ *Regina v. Archbishop of Canterbury*, 1 El. & El. 545, 120 Eng. Rep. 1014 (K.B. 1859).

³⁵ *Rex v. Chancellor of the University of Cambridge*, 1 Str. 557, 93 Eng. Rep. 698, 704 (K.B. 1795) (per Fortescue, J.).

³⁶ 59 U.S. (18 How.) 272 (1855).

and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement in this country."³⁷ Coke's view that dismissal for a stated cause without a hearing is against "justice and right" has been acted upon by some of the courts of this country. The right to such hearing is firmly defended as "a fundamental principle of justice" in *Dullam v. Willson*³⁸ and *Page v. Hardin*,³⁹ yet, some confusion remains due to the spurious notion that dismissal for cause is a judicial act and may not be undertaken by the executive.⁴⁰ But this confusion is well resolved by some dictum in *Biggs v. McBride*⁴¹ where it is said that whether dismissal for cause is a judicial act or not there must be a hearing.

It is true that, on the facts of these cases and of the early English cases referred to, it might be argued that the recognition of a right to a hearing in them and in *Shurtleff v. United States* is confined to dismissals for stated cause where the power exercised is one to dismiss for cause only. But it seems that if it is against "justice and right" for the government to dismiss, without a hearing, under some stated charge, in the exercise of a power to dismiss for cause only, it must likewise be against "justice and right" to dismiss, without a hearing, under a stated grave charge, in the exercise of a power to dismiss at will. In any case, a restrictive interpretation of the cases discussed advances very little the cause of those who maintain that a hearing in government security proceedings is a matter of grace and not of right.

Anyone can observe that where the Government has power to dismiss at will it will be glad to do so. The trouble in the security proceedings has arisen in cases where the Government did not, or thought it did not, have the power to dismiss at will. The restrictive interpretation of the early English cases and the American cases concerning the right to a hearing, affects only those security cases where the Government has mistakenly stated the reason for dismissal when there was no need for it to do so. That was probably the situation in *Bailey v. Richardson*.⁴² The court there did not put a restrictive interpretation on the

³⁷ 59 U.S. at 276-77.

³⁸ 53 Mich. 392, 407, 19 N.W. 112, 119 (1884).

³⁹ 47 Ky. Rep. (8 B. Mon.) 648, 672 (1848).

⁴⁰ *Police Comm'rs of Jersey City v. Pritchard*, 36 N.J.L. 101 (1873), criticized in *Attorney Gen. v. Hawkins*, 44 Ohio St. 98, 5 N.E. 228 (1886).

⁴¹ 17 Ore. Rep. 640, 651, 21 Pac. 878, 881 (1889) (dictum).

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

cases I have discussed, but in fact ignored them completely. The court bolstered its opinion that no hearing and no confrontation by witnesses need be given by reference to the provision of the Lloyd-LaFollette Act, the constitutionality of which it is my purpose here to challenge, namely, the provision that "No examination of witnesses nor any trial or hearing shall be required except in the discretion of the officer or employee directing the removal or suspension without pay."⁴³ The Lloyd-LaFollette Act provides that dismissal of employees in the "classified civil service," as therein defined, shall be only "for such cause as will promote the efficiency of the service." Thus, even on a restrictive interpretation of the cases I have discussed, there appears to be grave doubt that this section of the act is constitutional.

Jay v. Boyd

*Jay v. Boyd*⁴⁴ involved a resident alien who had been ordered deported after a hearing "the fairness of which [was] unchallenged."⁴⁵ He applied to the Attorney General for discretionary suspension of deportation under section 244 (a) (5) and 244 (c) of the Immigration and Nationality Act of 1952.⁴⁶ This application was denied on the basis of "confidential information" the nature of which was not disclosed to Jay. Jay's position was that the statute providing for discretionary suspension of deportation itself required that a hearing be given to him and that such hearing, to be fair, must involve a full disclosure of the confidential information relied upon. Alternatively, his position was that if the statute does not expressly grant a right to a hearing, such right should be implied to accord with the "tradition and principles of free government." The majority of the Court held that "there is no express statutory grant of any right to a hearing on application to the Attorney General for discretionary suspension of deportation."⁴⁷ They did not see, in petitioner's alternative position, any constitutional attack upon the statute. The matter is disposed of in footnote 21 to the majority opinion:

It is not claimed that a contrary construction [contrary to that urged by petitioner] would render the statute . . . unconstitutional, or even that a substantial constitutional question would

⁴³ 37 STAT. 555 (1912), as amended, 5 U.S.C. § 652 (a) (1952).

⁴⁴ 351 U.S. 345 (1956).

⁴⁵ *Id.* at 348.

⁴⁶ 66 STAT. 214, 215-216, 8 U.S.C. 1254 (a) (5) (c) (1952).

⁴⁷ 351 U.S. at 351.

thereby arise. . . . Moreover, the constitutionality of § 244 as herein interpreted gives us no difficulty. Cf. *Williams v. New York*⁴⁸

The Court then went on to "adopt the plain meaning of [the] statute, however severe the consequences," brushing aside petitioner's claim that a right to a hearing should be implied, with the words "suspension of deportation is not given to deportable aliens as a right, but, by congressional direction, it is dispensed according to the unfettered discretion of the Attorney General."⁴⁹

The majority's view on the constitutional question, if any, presented in this case, though only contained in a footnote and confined to a short sentence, is very instructive for our purposes especially in view of the Court's citation to *Williams v. New York*.⁵⁰ In that case the Court upheld the constitutionality of a section of the New York Criminal Code authorizing the sentencing judge to use information obtained out of court and from witnesses who had not been subject to cross examination by defendant in his determination of the proper sentence. The Court held that once the defendant's guilt is established by competent evidence in open court, a sentencing judge should not be denied access to information which would aid him in the exercise of this discretionary function.

We can concede for present purposes that, absent statute, the Government has the same unfettered discretion to remove its employees as do private employers. Therefore, the argument at this point is that a government employee, with tenure, cannot complain of the procedures Congress authorizes for his dismissal as a security risk because Congress could withdraw the protection of the tenure laws altogether and open the employee to the possibility of dismissal without any procedures at all.⁵¹ To paraphrase this argument in terms of private employment, a private employee, with tenure, can be fired by his employer for the publicly stated reason that he embezzled some funds, and such employee has no right to litigate the truth of this reason because the employer could have hired him without tenure, and could have fired him without reason. Apart from its logical absurdity, the argument is belied by the law of defamation.

⁴⁸ *Id.* at 357.

⁴⁹ *Id.* at 357-58.

⁵⁰ 337 U.S. 241 (1948).

⁵¹ Apparently, this was the argument applied by the court in *Coleman v. Brucker*, 26 U.S.L. WEEK 2241 (D.D.C. Nov. 13, 1957).

The United States is immune from action for defamation,⁵² and most of its servants can claim an absolute or a qualified privilege in this respect. But the defense of privilege is available here not because government servants have a right to say what they will of others, but because it is in the public interest that those charged with the duty to speak should speak.⁵³

If there is a wide discretion here, it is a discretion which is born of legal defenses available to government servants to protect them in their duty to inform the public on matters which concern the public. This discretion is not of the sort which, on the reasoning of *Jay v. Boyd* and *Williams v. New York*, could lead us to say that the victim of the information has no right to a hearing.

Slochower v. Board of Education

In *Slochower v. Board of Education*⁵⁴ the Court struck down a provision of the charter of the City of New York which provided for the automatic termination of the employment of any city employee who invoked the privilege against self-incrimination to avoid answering a question relating to his official conduct. The Court noted that "In practical effect the questions asked are taken as confessed and made the basis of the discharge." It went on to state that "No consideration is given to such factors as the subject matter of the questions, remoteness of the period to which they are directed, or justification for exercise of the privilege"⁵⁵ The important portion of the opinion, for our purposes, is:

This is not to say that Slochower has a constitutional right to be an associate professor of German at Brooklyn College. The State had broad powers in the selection of its employees, and it may be that proper inquiry would show Slochower's continued employment to be inconsistent with a real interest of the State. But there has been no such inquiry here. We hold that summary dismissal of appellant violates due process of law.⁵⁶

⁵² 28 U.S.C. 2680(h) (1952).

⁵³ *Sauber v. Gliedman*, Civil No. 57C450, N.D. Ill., Sept. 24, 1957; *Barr v. Matteo*, 244 F.2d 767 (D.C. Cir. 1957); *Colpoys v. Gates*, 118 F.2d 16 (D.C. Cir. 1941); *Glass v. Ickes*, 117 F.2d 273 (D.C. Cir. 1940); *Mellor v. Brewer*, 18 F.2d 168 (D.C. Cir. 1927); see HART & WECHSLER, *FEDERAL COURTS AND THE FEDERAL SYSTEM* 1215-24 (1953), discussing *Gregoire v. Biddle*, 177 F.2d 579 (2d Cir. 1949).

⁵⁴ 350 U.S. 551 (1956).

⁵⁵ *Id.* at 558.

⁵⁶ *Id.* at 559.

The Court's opinion may mean either or both of the following: (1) since the inference of guilt from the invocation of the privilege is not permissible, a statute which provides for termination of employment upon the invocation is arbitrary unless it also provides for a hearing to determine the existence of the fact inferred and its relation to the duties of employment; and (2) a statute might be couched in such terms as to make discharge upon the mere inference of guilt from the invocation of the privilege a ground for dismissal, provided there is a much closer relation between the fact inferred and the duties of employment. But if the Court meant, or would agree to, the second proposition, would it say that dismissal may proceed without a hearing? The second proposition would, I take it, be satisfied by a statute which provides that any teacher employed in the public schools who invokes the privilege against self-incrimination when asked whether he had ever committed indecent assault upon a minor, would be discharged automatically. If that statute would pass the test on arbitrary classification, which appears to be the core of the *Slochower* case, should there be no right to a hearing?

The answer may be "No" if the statute, or the discharging letter, states that the reason for the discharge is not the teacher's assumed guilt but the loss of his effectiveness as a teacher due to the inference which the public in fact draws from his invocation of the privilege. Here it would seem that the discharge can proceed though there is no hearing on the issue of guilt. But that is only because that issue is irrelevant to the grounds for dismissal.

On the other hand, if the statute, or the discharging letter, admits of the construction that the reason for discharge is the inference of guilt, there must be a right to a hearing on this issue. For a government agency to foreclose the matter without a hearing would be to give an official stamp of approval to an inference of guilt and so to contribute materially to the destruction of the discharged teacher's means of living. It seems to me that the *Slochower* opinion comes close to recognizing that a person may have no right to continued employment and yet have a right to be protected against arbitrary action where his continued means of living are threatened in the mode of his discharge.

There is nothing in the "loyalty oath cases" which would impair this conclusion. It is clear that in *Garner v. Los Angeles Board*, the employees had been afforded a hearing.⁵⁷ The ques-

⁵⁷ 341 U.S. 716, 719 (1950).

tion of a right to a hearing, therefore, was not involved in that case. Nor was it at issue in *Wieman v. Updegraff*.⁵⁸ The position of the employees in each case was *not* that the inference from their refusal to take the oath was unjustified, but rather that the class of persons affected by the inference contained individuals whose loyalty attributes differ so widely that a classification of such individuals together for purposes of discharge was arbitrary.

Thus the principle which evolved from those cases is that the "loyalty oath" is invalid if it is construed as affecting adversely employees who during their affiliation with a proscribed organization were innocent of its purpose, or employees who severed their relations with any such organization when its character became clear. My contention that there must be a right to a hearing where the employee contests the truth of the fact inferred itself, is not disposed of *sub silentio*, in those cases. It is not disposed of either by saying that after all, if given a hearing, the employee will only continue to refuse to answer the critical question, or to take the oath, as before.

The value of the right to make a record of the reasons why one refuses to answer certain questions was plainly demonstrated in *Konigsberg v. State Bar of California*.⁵⁹ In that case the Court held *Konigsberg*, an applicant for admission to the California bar, had so clearly discharged his burden of proving that he was of good moral character, that a decision on this point against him, merely because of his continued refusal to answer questions directed to his communist party membership, was contrary to due process.

While, in this part of the paper, I am primarily concerned with showing that an employee may not be discharged for a publicly stated cause without his being afforded a hearing as to the existence of such cause, cases such as *Slochower*, in which the existence of the cause for discharge is inferred from a refusal to answer certain questions, raise another problem which merits careful consideration.

As we have seen in the *Slochower* case the Court openly condemned the practice of imputing a sinister meaning to the exercise of a person's constitutional privilege under the fifth amendment.⁶⁰ It might therefore be argued that even where the em-

⁵⁸ 344 U.S. 183 (1952).

⁵⁹ 353 U.S. 252 (1956).

⁶⁰ 350 U.S. 551, 557 (1956).

ployee is given an opportunity to introduce evidence on his behalf in opposition to the inference drawn from his refusal to answer, and where he fails to avail himself of that opportunity, or fails to temper the strength of the inference sufficiently to render a decision against him arbitrary, there remains a constitutional impediment to his discharge — the constitutional impediment that no sinister meaning can be attributed to his silence.

This question came before the New York Court of Appeals in *Lerner v. Casey*.⁶¹ Max Lerner, a subway conductor employed by the New York Transit Authority, was discharged under the provisions of the New York Security Risk Law,⁶² for in the words of the statute, “reasonable grounds exist for the belief that, because of [his] doubtful trust and reliability . . . [his continued employment] would endanger the security or defense of the nation and the state.” The sole fact relied on by the security agency for this ground of discharge was that Lerner had refused to answer whether he was then a member of the communist party when the question was put to him by the Commissioner of Investigation of the City of New York during the investigation of security in the transit system.

The case involved questions as to the validity and applicability of the Security Risk Law and as to the Commissioner’s power to conduct the investigation. All of these questions were decided against Lerner. Lerner’s remaining contentions are of importance. Consistently with the provisions of the Security Risk Law, Lerner was given the opportunity to submit statements or affidavits to demonstrate why he should be reinstated. He did not avail himself of this opportunity. While there is doubt in my mind whether this opportunity would satisfy what I have been concerned with showing was Lerner’s right to a hearing, Lerner clearly had no intention of asserting that right, and I have no doubt that he waived whatever argument he had on this ground. However, it remained open to Lerner to argue, as he did argue, that before the security risk agency could find him to be a security risk, the agency must not only give him a hearing, but must give him one at which the evidence against him is introduced, and that the agency could not discharge him for the mere failure to answer the question as to his communist party

⁶¹ 2 N.Y.2d 355, 141 N.E.2d 533 (1957).

⁶² N.Y. UNCONSOL. LAWS §§ 1101-08 (McKinney 1949).

membership. In this argument Lerner relied on the *Slochower* case. His argument was rejected.

In rejecting Lerner's contentions, the Court of Appeals approved the Appellate Division's interpretation of the *Slochower* Case. The Appellate Division was of the opinion that:

[I]n view of the manner in which the court stressed the 'remoteness of the period to which they [the questions] are directed,' the failure of the statute to provide an opportunity to explain the reasons for the refusal to answer and, more particularly, the nature of the inquiry being conducted by the Federal committee, that decision must be strictly limited to its own peculiar facts.⁶³

The court then pointed out that here, "the question asked was not remote, it was as to petitioner's *then* membership in the Communist party . . . the petitioner was given an opportunity to explain why he had chosen not to answer the question."⁶⁴ The court then came to the crux of the case:

Petitioner was not discharged for invoking the Fifth Amendment; he was discharged for creating a doubt as to his trustworthiness and reliability by refusing to answer the question as to the Communist party membership.⁶⁵

And earlier it said: "No inference of membership in that party was drawn from petitioner's refusal to reply to the question asked."⁶⁶

I think that it might validly be asked here how the court knew that "no inference of membership . . . was drawn." I doubt whether the Commissioner said that he drew no such inference. If he said so, I doubt whether, allowing for the operation of his subconscious, his statement can be taken as conclusive. It is clear that the court thought it knew that no such inference was drawn as a fact, for the Commissioner was merely required to find that "reasonable grounds exist," etc. But the Commissioner also removed Lerner under the "belief that . . . his continued employment would endanger the security or defense of the nation and the state." I suggest that the conclusion that no inference of membership was drawn from Lerner's refusal to answer is in the same logical category as the conclusion that a fact found in a civil case is only half as true as a fact found in a criminal case. The *terminus ad quem* in a security proceeding is the discharge of an employee as a security risk. The quantum of proof neces-

⁶³ 141 N.E.2d at 541.

⁶⁴ *Id.* at 542.

⁶⁵ *Ibid.*

⁶⁶ *Ibid.*

sary to reach it, does not seem to me to dilute its impact on the public and on the employee's good standing in the community. I do not think that the court's reasoning here avoids the thrust of what the Supreme Court said about the invocation of the privilege in *Slochower*.

The court's next point is much more persuasive. It pointed out that if it were to accept Lerner's claim that he may not be dismissed on the mere inference from his refusal to answer, the result would be that:

An employee may be dismissed for refusing information as to whether or not he is a Communist party member, *Garner v. Board of Public Works of City of Los Angeles* [341 U.S. 716] but if with his refusal he draws into or adds to his words of refusal a claim that to answer might tend to incriminate him and he, therefore, claims the privilege to refuse to answer under the Fifth Amendment to the United States Constitution, he may not be dismissed.⁶⁷

I think the court is right in its conclusion that "That cannot be."

One more case remains to be discussed in this part of the paper. It may be that in *Service v. Dulles*⁶⁸ the Court impliedly recognized that the Secretary of State, absent the binding force of the Department's regulations, could have terminated Service's employment under the so-called McCarran Rider, without affording him a hearing. This may be, but it does not destroy my position here. The McCarran Rider provided:

Notwithstanding the provisions of . . . any other law, the Secretary of State may, in his absolute discretion . . . terminate the employment of any officer or employee of the Department of State or of the Foreign Service of the United States whenever he shall deem such termination necessary or advisable in the interests of the United States . . .⁶⁹

The Court held that where the Secretary's action was based upon the Loyalty Review Board's determination that there was a reasonable doubt as to Service's loyalty, which determination followed upon a hearing undertaken by that Board of its own motion, the Secretary's action was affected by the same invalidity as was that of the Board under the decision in *Peters v. Hobby*.⁷⁰ In this decision the Court had held that the Loyalty Review Board is without jurisdiction to undertake a hearing of its own motion. In the *Service* case, the Court held that despite the Secretary's affidavit that his action was not dependent upon the

⁶⁷ *Ibid.*

⁶⁸ 354 U.S. 363 (1957).

⁶⁹ 60 STAT. 458 (1946).

⁷⁰ 349 U.S. 331 (1955).

Board's determination, he was bound by the Department's regulations which made proceedings before the Board a condition precedent to the exercise of the discretion vested in the Secretary under the McCarran Rider.

The point which I desire to make here is that a discharge under the McCarran Rider, without a hearing, need not be repugnant to the principle for which I am contending. If the discharge is couched in terms of the Rider, that is, "Your employment is terminated in the interests of the United States," I doubt that any constitutional objection to a termination without a hearing would be available.⁷¹ At any rate, it would not have the same force as in the case of a termination because "Your employment is not clearly consistent with the interests of national security."

I do not want to establish a formal distinction here; but I do want to indicate that the right to a hearing for which I am contending does not tie the Government's hands as an employer to hire and fire at will. It does, however, prevent the Government from exercising its rights in this respect in such a manner as to permanently and publicly record a serious charge against the employee without giving him an opportunity to defend. In the words of one state court:

[T]he exercise of such power, in such manner, would be too despotic for any attempt at vindication in a country which boasts of the utmost liberty compatible with the safety of the state, and is entirely opposed to the genius of our free institutions.⁷²

II

Assuming that the due process clause of the Constitution⁷³ does require that a government employee be given some type hearing before being discharged for the publicly stated reason that he is a security risk, is confrontation by witnesses part of that requirement?

It should be recognized at the outset that a right to a hearing is not necessarily a right to a full dress criminal trial. In *Norwegian Nitrogen Co. v. United States*,⁷⁴ the Court held that the statutory right to a hearing under the Tariff Act of 1922, need

⁷¹ Compare *Becker v. Toulmin*, 165 Ohio St. 549, 138 N.E.2d 391 (1956): "We have found it desirable to terminate employment of our employee, Walter Becker." *Held*: Not defamatory of plaintiff.

⁷² *Dullam v. Willson*, 53 Mich. 392, 492 (1884).

⁷³ U.S. CONST. amend. V.

⁷⁴ 288 U.S. 294 (1933).

not include access to confidential information relied upon by the Tariff Commission in fixing duties. But Justice Cardozo, speaking for the Court said:

If the Commission is under a duty to make disclosure . . . at all, the origin of the duty and its measure are to be found, we think, in this, that since a hearing is required, there is a command by implication to do whatever may be necessary to make the hearing fair.⁷⁵

As was pointed out by Justice Holmes in *Mayer v. Peabody*,⁷⁶ "It is familiar that what is due process of law depends on the circumstances. It varies with the subject-matter and the necessities of the situation."⁷⁷

We must pause here because it may be that something like the thought suggested in *Hurtado v. California*⁷⁸ is interfering with the perspective of the problem at this stage. The question in that case was whether the due process clause of the fourteenth amendment prohibits a state, the State of California, from providing for indictment by information in capital or infamous crimes. The Court pointed out that there was nothing in the common law of England, existing at the time of the immigration of our ancestors, which would indicate that presentment or indictment of a grand jury is a requirement of due process.

But the Court did not stop at this seemingly sufficient ground for holding the California provision valid; instead, it went on to apply a canon of statutory interpretation which has done a considerable disservice to clear thinking in this field. First, the Court said, with justice, that the words "due process of law" in the fourteenth amendment⁷⁹ must have the same meaning as do the same words in the fifth amendment. It then said:

According to a recognized canon of interpretation, especially applicable to formal and solemn instruments of constitutional law, we are forbidden to assume, without clear reason to the contrary, that any part of this most important amendment [fifth] is superfluous. The natural and obvious inference is, that in the sense of the Constitution, "due process of law" was not meant or intended to include, *ex vi termini*, the institution and procedure of a grand jury in any case.⁸⁰

Despite the words "*ex vi termini*," it is apparent from the context of the statement, that the purpose of making the statement

⁷⁵ *Id.* at 321.

⁷⁶ 212 U.S. 78, 84 (1909).

⁷⁷ *Id.* at 84.

⁷⁸ 110 U.S. 516 (1884).

⁷⁹ U.S. CONST. amend. XIV, § 1.

⁸⁰ 110 U.S. at 534.

was not merely to show that the due process clause of both amendments need not necessarily include the institution of grand jury; its purpose was to demonstrate that the due process clause cannot possibly include that institution. The argument from superfluity here hardly establishes its object.

If the Court meant that the due process clause of the fifth amendment cannot include the institution of grand jury because such inclusion would render the specific provision superfluous, the argument denies recognition to an old and useful legislative device for eliminating the *casus omissus*. Coke, to whose works there is considerable reference in *Hurtado v. California*, himself says in discussing the Magna Carta: "[T]hese words, *per legem terrae*, being towards the end of this chapter, doe referre to all the precedent matter in this chapter."⁸¹ Coke's canon of statutory interpretation is not new for Celsus tells us, Dig. IX (2). 27. 16, ". . . *non esse novum, ut lex specialiter quibusdam enumeratis generale subiciat verbum quo specialia complectatur . . .*"⁸²

If the Court, in *Hurtado v. California*, meant that the due process clause of the fifth amendment cannot include the institution of grand jury because such inclusion would render the due process clause itself superfluous, the argument is logically disastrous. If the inclusion of the institution of grand jury in the due process clause or, for that matter, the inclusion of any other specific provision of the amendments in that clause would make that clause superfluous, it follows, does it not, that the exclusion of such provisions would make that clause vacuous.

While the position of the special provision as to confrontation in the amendments makes the precise thought suggested in *Hurtado v. California* impossible here, I am afraid that something like that thought has caused the Commission on Government Security to regard the statement that dismissal from government employment is not a criminal prosecution as dispositive of the question raised in this part of my paper. That statement, while true, disposes only of a short cut from cases involving criminal prosecution⁸³ to our case here. A barring of the short cut certainly does not relieve us from further efforts

⁸¹ *Second Institutes* 46 (6th ed., Coke, 1681).

⁸² "[I]t is nothing new that a statute, after enumerating some special cases should append a general word including the case already provided for . . ." 1 KRUEGER, *Corpus Iuris Civilis* IX (2) 27.16 (1954).

⁸³ *Jencks v. United States*, 353 U.S. 657 (1957); *Roviaro v. United States*, 353 U.S. 53 (1957); *United States v. Reynolds*, 345 U.S. 1, 12 (1953). See, today, 18 U.S.C.A. § 2500 (Supp. 1956).

to reach an answer. Fortunately, in making the effort, we are not obligated to grope in the dark.

There were four dissenting opinions in *Jay v. Boyd*,⁸⁴ delivered by Chief Justice Warren, and Justices Black, Frankfurter and Douglas. Not all the dissenting Justices agreed as to why they disagreed with the majority opinion; but it is plain from what they said that they agreed on one point—that a fair hearing in the American sense means a hearing where one has the opportunity to meet the accusers. Justices Frankfurter and Douglas both referred to a statement made by President Eisenhower in 1953:

In this country, if someone dislikes you, or accuses you, he must come up in front. He cannot hide behind the shadow. He cannot assassinate you or your character from behind, without suffering the penalties an outraged citizenry will impose.⁸⁵

And Justice Douglas observed:

That bit of Americana is relevant here because we have a question as to what a 'hearing' is in the American meaning of the word. Fairness, implicit in our notions of due process, requires that any 'hearing' be full and open with an opportunity to know the charge and the accusers, to reply to the charge, and to meet the accusers.⁸⁶

*Bailey v. Richardson*⁸⁷ has been alluded to earlier. In that case the court squarely denied the right to confrontation. The circumstances of the case are peculiar and serve to show how completely the court misapprehended the nature of the questions before it. Prior to June 28, 1947, Miss Bailey was employed in the classified civil service. On June 28, 1947, she was separated from the service due to a reduction in force. On May 28, 1948, she was reinstated to her former position under a regulation which made such reinstatement subject to the condition that removal could be ordered by the Commission, after investigation, for certain disqualifications, among them, if ". . . on all the evidence, reasonable grounds exist for the belief that the person is disloyal to the Government of the United States."

Miss Bailey was given a hearing, both before the Commission and before the Loyalty Review Board; but she was denied confrontation by the witnesses against her. After these hearings, she was removed under the above-quoted paragraph of the regulations.

⁸⁴ 351 U.S. 345 (1956).

⁸⁵ Address by President Eisenhower, Washington, D.C., Nov. 23, 1953.

⁸⁶ 351 U.S. at 375.

⁸⁷ 182 F.2d 46 (D.C. Cir. 1950).

The court seems to have misunderstood the question before it as follows: (1) It thought it significant to determine whether, at the time of her final removal, Miss Bailey was in the classified civil service, thus making her case fall under the provisions of the Lloyd-LaFollette Act, or whether she was a "probationary employee" and thus outside the purview of the act. The court held that she was a "probationary employee." The purpose of this determination was not to avoid the effect of those early cases, including *Shurtleff v. United States*,⁸⁸ which hold that an employee dismissable *for cause* must be given a hearing, but merely to show that Miss Bailey had no rights in her employment. And the court said that, in any case, by being afforded a hearing without confrontation she was given a better treatment than she was entitled to under the Lloyd-LaFollette Act itself. (2) Having thus focused its attention on Miss Bailey's employment rights, the court went on to hold that she had no right to confrontation; (a) because her dismissal was not a criminal prosecution, and (b) because her claim to continued employment being a mere privilege, she was not being deprived of "property" and clearly she was not being deprived of "liberty" or of "life."⁸⁹

I have endeavored to point out in the first part of this article that the issue involved in this problem is not the right to continue in the Government's employ; rather it is whether the individual has any valid claim to due process when the Government undertakes to publicly record a serious charge against him which destroys his means of living, his credit and estimation, just as surely as if he were convicted of a crime. If it is necessary that the claimant show the invasion of some property right before due process be asserted, it would seem that the right to good standing in the community with its concomitant economic advantages is such a right. The court should not, it seems to me, exhibit the over-fastidiousness of a property law teacher when it is interpreting a provision which has for its essence the "protection of the individual against arbitrary action."⁹⁰ It is this preoccupation with the property right involved, and the unwarranted restriction of the inquiry to the nature of the employment right lost, which has led many to distinguish the decisions in *Parker v. Lester*⁹¹

⁸⁸ 189 U.S. 311 (1903).

⁸⁹ 182 F.2d at 57.

⁹⁰ *Ohio Bell Tel. Co. v. Public Util. Comm'n.*, 310 U.S. 292, 302 (1937).

⁹¹ 227 F.2d 708 (9th Cir. 1955).

and *United States v. Gray*⁹² under the Port Security Program, as being confined to loss of rights in private employment.

The recent passport cases show a much greater awareness of the primary issues involved than was shown in *Bailey v. Richardson*. In *Shachtman v. Dulles*⁹³ the court, in upholding the right of an individual to attack for insufficiency the reasons given for denial of a passport, was prepared to recognize plaintiff's claim to due process in the Secretary's refusal to issue a passport. In reaching its decision the court stated, "The right to travel, to go from place to place as the means of transportation permit, is a natural right subject to the rights of others and to reasonable regulation under law."⁹⁴ While this seems to be an extra-broad statement of the type of right protected by the fifth amendment due process clause, it does show that courts ought to be slow to find the absence of life, liberty and property in cases where arbitrary government action can do irreparable harm to the individual.⁹⁵ Subsequent cases have upheld the individual's right to have a complete statement of such reasons, or a statement why they should not be revealed. *Boudin v. Dulles*;⁹⁶ *Dayton v. Dulles*.⁹⁷ However, in *Dayton v. Dulles*,⁹⁸ the right to have disclosed confidential information relied on for denial of passport was not recognized. The court accepted the Secretary's reason that "the disclosure . . . might prejudice the conduct of the United States' foreign relations."⁹⁹

It should be noted that the claim that disclosure of information might compromise foreign relations is a special claim not to be treated on the same plane as the claim that a disclosure will endanger national security.¹⁰⁰ Quite apart from this fact, *Dayton v. Dulles* and the passport cases before it reach the basic question involved in all such claims. The question is not whether an employee about to be discharged as a security risk has a property right in his employment, for if he has no property right

⁹² 207 F.2d 237 (9th Cir. 1953).

⁹³ 225 F.2d 938 (D.C. Cir. 1955).

⁹⁴ 225 F.2d at 941.

⁹⁵ For an interesting discussion on this point, see Seavey, *Dismissal of Students: "Due Process,"* 70 HARV. L. REV. 1406 (1957).

⁹⁶ 235 F.2d 532 (D.C. Cir. 1956).

⁹⁷ 237 F.2d 43 (D.C. Cir. 1956).

⁹⁸ 146 F. Supp. 876 (D.D.C. 1956), *aff'd*, 26 U.S.L. WEEK 2203 (D.C. Cir. Oct. 25, 1957).

⁹⁹ 146 F. Supp. at 881.

¹⁰⁰ *Cf. Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1947).

in his employment he has a right to his good standing in the community which ought to be protected under the due process clause of the fifth amendment against arbitrary destruction by the Government. The question is not whether confrontation by witnesses is fair in the context of a charge which very closely approximates a charge of treason; the question is simply and solely whether the "balancing of the conflicting individual and national interests involved"¹⁰¹ justifies a denial of confrontation "in the interests of national security."

The question thus presented is not new in history. During the great debate upon the Liberty of the Subject which preceded the Petition of Right, one of the principal arguments made on behalf of the Crown was that its claimed prerogative to imprison without cause was essential to the safety of the Realm. "How unfit," argued Serjeant Ashley, "would it be for king or council to express the particular cause, it is easy to be adjudged, when there is no state, or policy of government, whether it be monarchical, or of other frame, which have not some secrets of state, not communicable to vulgar understanding."¹⁰² Undoubtedly the danger from subversive elements today cannot be compared with that which existed in 1628, but Coke's warning words are as relevant today as they were then:

[S]uch commitments will destroy the endeavor of all men. Who will endeavour to employ himself in any profession, either of war, merchandize, or of any liberal knowledge, if he be but a tenant at will of his liberty? For no tenant at will will support or improve anything, because he hath no certain estate¹⁰³

Coke's message has special significance for us today.¹⁰⁴

The abolition of the King's Court of Star Chamber by the Long Parliament in 1640 is for us symbolic of the death of arbitrary government. Henry Case, whose work, *English Liberties or the Free-Born Subject's Inheritance*, was much read by Americans,¹⁰⁵ tells us that "they [the Court of Star Chamber] pretended to a power to examine men upon their oaths, touching crimes by them supposed to be committed, which is contrary to all law

¹⁰¹ American Communications Ass'n, *CIO v. Douds*, 339 U.S. 382, 410 (1950).

¹⁰² 3 How. St. Tr. 150 (1628).

¹⁰³ 3 How. St. Tr. 131 (1628).

¹⁰⁴ GELLHORN, *SECURITY, LOYALTY, AND SCIENCE* (1950). For other authorities see Brief for the American Civil Liberties Union as amicus curiae, pp. 26-29; *Peters v. Hobby*, 349 U.S. 331 (1955).

¹⁰⁵ CARE, *ENGLISH LIBERTIES OR THE FREEBORN SUBJECT'S INHERITANCE* 106 (1703). See also Hazeltine, *The Influence of the Magna Carta on American Constitutional Development*, 17 COLUM. L. REV. 1, 19-20 (1917).

and reason; for . . . no man is bound to accuse himself." The idea that no man is bound to accuse himself is different from the later concept of the privilege against self-incrimination. Udall's trial in 1590¹⁰⁶ shows that he claimed the right to be accused by others but said nothing of the right, once so accused, to refuse to answer questions put to him. Wigmore missed the point by looking for the privilege in its present form. It led him to dismiss Coke's first mention of the privilege in 1589 in *Cullier and Cullier*¹⁰⁷ as a mere invention so far as the common law was concerned.¹⁰⁸ If he had looked for the privilege in the form in which it was claimed by Udall, at the early stages of prosecution, he would have found good evidence that the privilege was known at common law. Lambard speaking in 1579, ten years before Coke in *Cullier and Cullier*, of the statute 2 & 3 P. & M., c. 10 (1554), which required justices of the peace to take the examination of a prisoner before commitment, stated:

There also you may see (if I be not deceived) the time when the examination of the felon himselfe, was first warranted by our lawe. For at common lawe, his faulte was not to bee wrung out of himselfe but rather to be proved by others.¹⁰⁹

The significance of these observations is that from the earliest days of the common law, Englishmen claimed the right to be accused by others before they be put to answer, and this claim involved the claim to have the accusers brought face to face at trial. The statutes 25 HEN. 8, c. 14 1533); 5 & 6 EDW. 6 c. 11 § 12 (2) (1552); and 1 & 2, P. & M., c. 10 § 11 (1554), testify to this fact. Lilburn, whose treatment by the Star Chamber drew the wrath of the Long Parliament, claimed not only the right to be accused by others but the right to have the accusers produced.¹¹⁰

Wigmore notes that in treason trials the right to have the accusers produced, claimed under 1 EDW. 6, c. 12 § 22 (1522) and 1 & 2 P. & M. c. 10 § 11 (1554), was generally denied by a nice argument based on 1 & 2 P. & M. c. 10 § 7 (1554). He concludes that there was no such right in the early common law.¹¹¹ But he fails to note that the trials he refers to are all

¹⁰⁶ 1 How. ST. TR. 1271 (1590).

¹⁰⁷ Cro. Eliz. 201, 78 Eng. Rep. 457 (Q.B. 1589).

¹⁰⁸ 8 WIGMORE, EVIDENCE § 2250 nn.90-91 (3d ed. 1940).

¹⁰⁹ I LAMBARD, EIRENARCHA OR OF THE OFFICE OF THE JUSTICE OF PEACE 208-09 (1st ed. 1581). Lambard was no mean historian. See 4 HOLDSWORTH, HISTORY OF ENGLISH LAW 117-19 (3d ed. 1945).

¹¹⁰ Trial of Lilburn and Wharton, for Printing and Publishing Seditious Books, 3 How. ST. TR. 1315, 1322 (1637).

¹¹¹ 5 WIGMORE, EVIDENCE § 1364 nn.40-42 (3d ed. 1940).

before special commissions of Oyer and Terminer, which commissions should not be confused with the regular common law courts. It should be remembered, too, that in matters of State the King's judges were not too eager to incur the King's displeasure.¹¹²

It is a grave error to think that Englishmen in the years which gave content to the fifth amendment due process clause of our Constitution were unaware of the right to confrontation as a major guarantee against oppression. William Hudson, who must have written his Treatise of the Court of Star Chamber before it became clothed in contumely, tells us:

Now concerning the persons of witnesses examined in court, it is a great imputation to our English courts, that witnesses are privately produced, and how base or simple soever they be, although they be tested *diabolares*, yet they make as good a sound, being read out of paper, as the best; yea although a lewd and beggarly fellow take upon him the name and person of an honest man, and be privately examined, this may be easily over-passed, not easily found out . . . [he then tells us that some attempt was made to change this practice in the Star Chamber by Lord Chancellor Egerton] . . . But it is as much wondered, that this court [Star Chamber] suffereth not the parties to examine the credit of witnesses, to notify the court what their condition is . . . And the reason why it is not given way unto in this court is, for that causes being for the King, if witnesses lives should be so ripped up, no man would willingly be produced to testify; and therefore many opinions and circuits of judges are extant in this court, where it is adjudged that a witness deposing for the King upon an indictment shall not be questioned for perjury; yea this court hath ordered a great reward to witnesses in this court by yielding their testimonies for the King . . .¹¹³

The Court of Star Chamber, as Hudson wrote of it, was still the champion of the outcast, the disdained and the powerless. There seemed good reason why the names of witnesses should be withheld from the powerful defendant; there seemed good reason why those witnesses who were produced should not have their lives "ripped up."

The Inquisition too had a good reason for withholding from the accused all knowledge of the witnesses against him—the risk which witnesses would run in testifying in the midst of a

¹¹² See the pitiful excuses given before Parliament by the King's judges as to why they denied habeas corpus to the members who had been imprisoned by Charles I. Proceedings in Parliament Relating to the Liberty of the Subject, 3 How. St. Tr. 59, 159-64 (1628).

¹¹³ HUDSON, A TREATISE OF THE COURT OF STAR CHAMBER reprinted 2 HARGRAVE, COLLECTANEA JURIDICAL 1, 200-01 (1792).

generally hostile population. We are told that, “. . . the tender care for the safety of witnesses even went so far that it was left to the conscience of the inquisitor whether or not to give the accused a copy of the evidence itself if there appeared to be danger to be apprehended from doing so.”¹¹⁴ It is a somber fact that what appeared to be such good reasons for denial of confrontation, turned the Star Chamber and the Inquisition into instruments of crushing oppression.¹¹⁵

Too much depends upon security today to reject its demands at the first rattle of a few historical skeletons. But these instances of the argument from necessity should give us pause to see whether we have not left some stones unturned. Briefly, the arguments for denying confrontation in government employee security cases are: first, as to the undercover agent regularly employed by an investigative branch of the Government, his usefulness thereafter would be destroyed; second, as to the casual informant, his information would often not be forthcoming unless he could be assured that his identity would not be disclosed—a faith which must be kept to encourage others like him; third, the disclosure of one source of information is like giving the subversive element in our country a piece in a jigsaw puzzle, inasmuch as it might be matched with other such pieces to reveal the entire system employed in protecting our country from subversion.

The third argument does not seem to me to have any force independently of the first two. I do not think that it requires demonstration that the first two arguments are sound so far as they go. But they do not support the conclusion that confrontation by witnesses in all cases would endanger national security. They support only the conclusion that confrontation by undercover agents and casual informants who have a dread of publicity would endanger national security. What is necessary to support the conclusion that confrontation by witnesses in all cases would endanger national security is a showing that in some cases, at least, it would be impossible to obtain enough testimony from persons other than undercover agents and casual informants who request anonymity to satisfy even the very small quantum of proof required for a security discharge. Curiously enough, no such showing has been made; and, so far as I can see, the Commission on Government Security has called for none.

¹¹⁴ 1 LEA, *THE INQUISITION OF THE MIDDLE AGES* 440 (1888).

¹¹⁵ LEA, *op. cit. supra* 437-51. His work, while not unbiased, is regarded as a leading authority on the subject.

I have used the word impossible. I have no doubt that there are a number of cases where an employee should be removed, but where it might be difficult to obtain the testimony of anyone other than an undercover agent or casual informant who requests anonymity. This same problem has caused many an exasperated police officer to practice the third degree. Yet those detached from this police officer's everyday cares have been able to see that such methods impair police efficiency.¹¹⁶

What, however, if there are some cases where it is impossible to obtain the testimony of anyone other than an undercover agent or a casual informant who requests anonymity? I have no doubt that there must be a number of such cases. Most likely these would be cases where the activity or association throwing doubt upon the employee's loyalty occurred in the past so that the number of presently available witnesses could not be increased by presently recruiting persons to witness the subversive activities. But here the available witnesses must mainly be in the casual informant category. A regularly employed agent surely does not wait to put the information in the employee's file until the employee has discontinued his activities or associations. The only undercover agents that I can think of in this situation are ones that have become such upon defection from the subversive cause. It might be worth considering whether, in these cases involving past activities or associations and, very likely, inherently unreliable information, it might not be possible to assure the protection of national security by some method other than by discharging a government employee as a security risk without confrontation.

As to the employee whose present conduct throws doubt upon his loyalty, I find it difficult to believe that no usable testimony could be obtained without resort to that of the regularly employed undercover agent or the confidential informant who demands anonymity. It should be noted that, since such employee's discharge is not a criminal prosecution, the hands of the Government are not tied by the rule expressed in *United States v. Coplou*,¹¹⁷ which, in any case, seems to have been an unnecessary extension of the rule in *Nardone v. United States*.¹¹⁸ The Govern-

¹¹⁶ NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON LAWLESSNESS IN LAW ENFORCEMENT 187-88 (1931). See as to unlawful searches and seizures, *Harris v. United States*, 331 U.S. 145, 171-74 (1946) (dissent of Frankfurter, J., to same effect); *People v. Cahan*, 44 Cal. 2d 434, 282 P.2d 905, 914 (1955).

¹¹⁷ 185 F.2d 629 (2d Cir. 1950).

¹¹⁸ 308 U.S. 338 (1939).

ment would not have to disclose any secret source of the information against an employee in order to benefit from the testimony of a witness who followed a tip given by such source.

Conclusions:

(1) Early English and American cases indicate that when a governmental body undertakes to remove one of its employees for a stated cause, denial of a hearing is against "justice and right," or contrary to "fundamental principles of justice."

(2) The words "justice and right" and "fundamental principles of justice," when used in early cases, indicate that the courts were resting their opinion on due process of law.

(3) The early cases referred to admit of a restrictive interpretation of the employee's right to a hearing in that they recognize such right solely in cases where there is a dismissal for a stated cause pursuant to a statutory power to dismiss for cause only.

(4) If, in the exercise of a power to dismiss for cause only, it is contrary to "justice and right" to dismiss without a hearing under a stated cause, it must likewise be against "justice and right" to dismiss, without a hearing, under a stated cause, in the exercise of a power to dismiss at will. Therefore, the restrictive interpretation of the early cases ought to be rejected.

(5) In the context of Government security proceedings, the restrictive interpretation of the early cases supports the denial of a right to a hearing only in cases where the Government has stated a cause for removal when, under the applicable statute, it was free to dismiss at will.

(6) Most of the security cases, however, involve employees who can be removed only for certain stated causes. Even on the restrictive interpretation of the early cases referred to, a denial of a hearing in such security cases would be contrary to due process. A provision of the Lloyd-LaFollette Act purports to make hearings discretionary with the removing officer both in cases where the removal can proceed without stated cause and in cases where a cause must be stated for the removal. This provision is unconstitutional.

(7) At least in those Government security cases where, under the applicable statute, the employee can be removed only for certain stated causes, denial of confrontation cannot proceed

on the basis that the Government was not required to give the employee a hearing at all. And, if the restrictive interpretation of the early cases is rejected, neither is this basis for a denial of confrontation available in cases where, under the applicable statute, the employee can be removed at will but where the Government undertakes to state a cause for his removal.

(8) Where due process of law demands that a hearing be given, the American sense of the word "hearing" requires that it be full and open with an opportunity to know the charge and the accusers, to reply to the charge, and to meet the accusers. The burden is upon those who would deny it this meaning to establish their case.

(9) This burden is not discharged by pointing to the fact that a Government security proceeding is not a criminal prosecution. The Constitution speaks to the question of confrontation not only through Amendment VI but also through Amendment V; and a contrary conclusion based on the argument from superfluity is indefensible on ancient and proper canons of statutory interpretation.

(10) Where the Government undertakes to remove one of its employees for the stated cause that his continued employment is not clearly consistent with the interests of national security, the sole justification for denying him an unqualified right to confrontation is that the granting of such a right would endanger national security to the point where the balancing of the individual and national interests involved requires a rejection of the individual interests.

I do not reach a conclusion on the question whether the recognition of an unqualified right to confrontation would endanger national security to this point because I do not think that, on an issue so vital to our defense, one can speak rashly. But I hope that when the answer to that question is finally undertaken, the assumptions that a government employee has no constitutional claim to a hearing and that the Constitution speaks to confrontation only through Amendment VI, will not be allowed to weigh in the balance against the individual.