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Legislation and Administration: Constitutional Law -- Due Process -- Amended Regulations of the Coast Guard Port Security Program

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LEGISLATION AND ADMINISTRATION

CONSTITUTIONAL LAW — DUE PROCESS — AMENDED REGULATIONS OF THE COAST GUARD PORT SECURITY PROGRAM. — Amended security regulations of the Coast Guard covering seamen and those persons seeking access to waterfront facilities became effective May 1, 1956. 21 FED. REG. 2814 (1956) (Security of Vessels), amending 33 C.F.R. § 121 (Supp. 1955); 21 FED. REG. 2940 (1956) (Security of Waterfront Facilities), amending 33 C.F.R. § 125 (Supp. 1955). These new regulations are the results of an effort to align the procedures of the Coast Guard port security program with the decision in *Parker v. Lester,* 227 F.2d 708 (9th Cir. 1955). N. Y. Times, April 26, 1956, p. 1, col. 4.

Authority of the Coast Guard to conduct a security screening program for persons privately employed is derived from the Magnuson Act, 64 STAT. 427 (1950), 50 U.S.C. § 191 (1952) and Exec. Order No. 10173, 3 C.F.R. 140 (Supp. 1950) (later amended by Exec. Order No. 10277, 3 C.F.R. 460 (Supp. 1951) and Exec. Order No. 10352, 3 C.F.R. 77 (Supp. 1952)).

Under both the former and the amended regulations, a seaman must obtain security clearance from the Commandant of the Coast Guard if he seeks employment on a merchant vessel. In addition, any other person who seeks access to a waterfront facility which the Commandant has declared to be an area to which the security regulations apply must obtain security clearance. The *Parker* case arose when seamen who were denied clearance complained that the procedures employed in determining their status, pursuant to 33 C.F.R. § 121 (Supp. 1955), violated requirements of due process, and sought an injunction to prevent their enforcement. The plaintiffs maintained that they had been deprived of the right to follow their chosen occupation, which right was recognized in *Truax v. Raich,* 239 U. S. 33 (1915), and that their right to notice and a hearing under the Fifth Amendment had been denied.

The court drew the lines of conflict by saying, "... [W]e must weigh against the rights of the individual to the traditional opportunity for notice and hearing, the public need for *a screening system which denies such right to notice and hearing,*" 227 F.2d at 718, and by criticizing as too strong the statement of the trial court that "... [O]pportunity for confrontation and cross-examination of adverse witnesses cannot be afforded a petitioner in these situtions without destroying the security program."

Relief was granted the seamen, the court stating that the regulations as framed and operated fell short of the minimum requirements of due process. The court's principal objections were: (1)

the regulations did not provide for notice or hearing prior to a denial of clearance; (2) the notice required if the applicant appealed from a denial of his clearance was not sufficiently specific to disclose the source of data nor the identity of persons forwarding information; (3) the regulations did not provide sufficient opportunity for confrontation and cross-examination of adverse witnesses.

The amended regulations satisfy the first objection since provision is made for notice to the applicant and for a hearing prior to an effective adverse decision on the application. 21 FED. REG. 2815 § 121.07 (b), 2816 § 121.11 (e) (1956); 21 FED. REG. 2942 §§ 125.31 (b), 125.35 (e) (1956).

The second objection is countered in the amended regulations, 21 FED. REG. 2816 § 1 21.11 (a) (1956) and 21 FED. REG. 2942 § 125.35 (a) (1956), with the following:

> Such notice shall be as specific and detailed as the interests of national security shall permit and shall include pertinent information such as names, dates, and places in such detail as to permit reasonable answer.

The standard for the degree of disclosure, "... as specific and detailed as the interests of national security shall permit . . .," can hardly be improved, inasmuch as provision for national security must be made. For another nearly identical standard, see the recently promulgated regulations of the Atomic Energy Commission. 21 FED. REG. 3106 § 4.22 (b) (1956). For a suggested and more liberal standard, see REPORT OF THE SPECIAL COMMITTEE ON THE FEDERAL LOYALTY-SECURITY PROGRAM OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK 162 (1956).

Notwithstanding the suitability of the standard, it is questionable whether the "minimum requirements of due process" are met. Although the amended regulations go farther toward assuring the applicant that he will receive detailed information, they do not specify who will decide what information shall be disclosed, except to name the Commandant of the Coast Guard. 21 FED. REG. 2815 § 121.07 (b) (1956); 21 FED. REG. 2942 § 125.31 (b) (1956). The court in *Parker v. Lester, supra,* spoke of possible arbitrary and capricious withholding of information. 227 F.2d at 722. Assurance of fair use of the standard for disclosure should be a simple matter; at least, the Atomic Energy Commission security procedures more specifically denote who shall approve the notification letter; *i.e.,* the Division of Security, AEC, the Office of the General Counsel and the Manager of Operations (signatory). 21 FED. REG. 3106 § 4.22.

The amended regulations would not seem to satisfy the third objection of the court. The rights of confrontation and cross-exam-

ination are hardly more than acknowledged in the amended regulations, 21 FED. REG. 2816 § 121.19 (f), (g) (1956); 21 FED. REG. 2943 § 125.43 (f), (g) (1956):

> Every effort shall be made to produce material witnesses to testify in support of the reasons set forth in the Notice of the Commandant, in order that such witnesses may be confronted and cross-examined by the applicant. . . .

The applicant has no subpoena power, nor has the hearing board. With no provisions to force confrontation of any witness, the amended provisions do not substantially differ from those criticized by the court. Moreover, it is clear that greater concessions may be made to have witnesses appear, at least before hearing boards if not before the applicant, without jeopardizing the security program. See 21 FED. REG. 3107 § 4.27 (m) (1956) (Atomic Energy Commission security clearance procedure); cf. REPORT OF THE SPECIAL COMMITTEE ON THE FEDERAL LOYALTY-SECURITY PROGRAM OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK 174 (1956).

The new regulations cannot yet be scrutinized in the light of Supreme Court decisions, as that body has thus far declined to consider the constitutional issues here involved. *Peters v. Hobby*, 349 U. S. 331, 338 (1955). However, the concurring opinion of Justice Douglas is noteworthy, 349 U. S. at 352:

> If the sources of information need protection, they should be kept secret. But once they are used to destroy a man's reputation and deprive him of his 'liberty', they must be put to the test of due process of law.

Following circuit court affirmance of its decision in the *Parker* case, the federal district court issued an injunction directing the Coast Guard to issue the necessary sailing papers at once to those mariners who had been refused previously as security risks under the former security rules. These men could be screened later under the amended rules, but their papers could not be held up until then. N.Y. Times, July 14, 1956, p. 32, col. 4. The Government immediately sought a stay of the injunction, but the petition was denied in *Lester v. Parker*, 235 F.2d 787 (9th Cir. 1956). If the Government further appeals its petition, ensuing litigation in the *Parker* case may develop an opportunity to assay the amended security clearance procedures of the Coast Guard.

Eugene F. Waye

CRIMINAL LAW — PARENTAL RESPONSIBILITY FOR JUVENILE DELINQUENCY IMPOSED BY NEW YORK STATUTE.—On July 1, 1956, an amendment to the Children's Court Act of the State of New York and an amendment to the New York City Domestic Rela-

tions Court Act became effective, thus setting in motion another procedure for combatting juvenile delinquency in that state. By the provisions of these new amendments, when a child is adjudged delinquent the judge may issue a written order specifying conduct to be followed by the "parent or parents, custodian or other persons having custody of the child. . . ." The conduct specified must be such as would reasonably prevent the delinquency of the child; and a person who receives such an order and wilfully violates it commits criminal contempt of court. The persons charged with contempt are to be notified, and afforded a reasonable time to prepare a defense. The trial for contempt is not heard by the same judge who issued the prior order. Conviction is made punishable "by fine, not exceeding two hundred and fifty dollars, or by imprisonment, not exceeding thirty days, in the jail of the county where the court is sitting, or both, in the discretion of the court. . . ." N.Y. CHILDREN'S CT. ACT § 22 (h); N.Y.C. DOM. REL. CT. ACT § 83 (i).

This amendment embodies a new method of combatting juvenile delinquency—not because it places responsibility for delinquent acts on the parents, for parental responsibility statutes have been in use in the United States since 1903, Gladstone, *Spare the Rod and Spoil the Parent,* 19 FED. PROBATION 3 (1955)—but because it embodies the use of the contempt of court procedure as its means of enforcement. Further, it makes only wilful violations punishable, and it provides a procedure whereby those responsible are adequately warned of their responsibilities before any court action can be taken against them.

Prior to the passage of this amendment, the parental responsibility statutes have simply made it a crime punishable by fine or imprisonment or both for a parent to contribute to the neglect or delinquency of his child. New York is among the states to have enacted such a statute, N.Y. PEN. LAW § 494; in fact, a recent study indicates that all but two states, Delaware and Vermont, now have this type of criminal statute. LUDWIG, YOUTH AND THE LAW 137 (1955). These criminal statutes are very broad. A majority of them impose liability on the parents not only for intentional contributions to the child's delinquency, but also for negligence, and some go so far as to hold the parents strictly liable although there is no parental fault in the traditional criminal law sense. These statutes are not uniform concerning requirement of a prior adjudication of the child's delinquency before action may be taken against the parent. Some states require this adjudication while others do not. Ludwig, *id.* at 153-167. A further distinction lies in that some of these statutes "punish anyone who contributes to the delinquency of a minor . . . [while]

others require that the accused stand in position of 'loco parentis'." Vehar, *Admissibility of Violations of Law by Child as Evidence In Prosecution of Parents for Criminal Neglect*, 7 WYO. L. J. 133, 136 (1953). When these statutes were enacted it was thought that they would have to be nearly all inclusive to be effective; yet it is their broadness which has prompted much of the adverse comment concerning them. The criticism largely has been aimed at those statutes which hold the parents liable for negligent contributions to delinquency and those which hold the parents strictly liable. One critic stated his views thusly:

> Punishment as a method of control of that great bulk of delinquent parents whose contributing consists mainly of omission—failure to to teach, train, and supervise the child from the cradle on up—is so impracticable as to be worthless, and it appears quite useless to attempt it. Alexander, *What's This About Punishing Parents?*, 12 FED. PROBATION 23, 28 (1948).

Statistics seem to indicate that these statutes have not been as effective a deterrent of juvenile delinquency as their sponsors anticipated. On page ten of the REPORT OF THE NEW YORK STATE TEMPORARY COMMISSION ON YOUTH AND DELINQUENCY (1955), the report of the commission which recommended the new contempt amendment, it is stated that between 1948 and 1954 there was a 58 per cent increase in cases disposed of by children's courts throughout the nation while the total juvenile population increased during the same period by 13 per cent. It should be remembered that this increase occurred when there were parental responsibility statutes in a great majority of the states.

Before the passage of this amendment, the state of New York had one of the broadest type of parental responsibility statutes, yet it also witnessed an increase in juvenile delinquency. Though the New York state juvenile delinquency increase was not as great as the national average, the need for a reappraisal of existing legislation concerning juvenile delinquency was felt to be imminent. Therefore, the New York State Temporary Commission on Youth and Delinquency was established to study the problem and make legislative recommendations. In the report of the temporary commission one of the statutes referred to was section 494 of the New York Penal Law when it stated, "Present statutes are unsuitable because of their vagueness, spasmodic invocation and the occasional harshness of their penalties." REPORT, *op. cit. supra*, at 20 (1955). On July 10, 1956, in a letter to the writer discussing section 494 of the New York Penal Law and its relation to the new contempt amendment, Mr. Mark A. McCloskey, chairman of the New York State Youth Commission, stated:

> Some law enforcement agencies hesitate to proceed under section 494 of the Penal Law because it is difficult in certain cases to prove

> the connection between the act or omission on the part of a parent, guardian or other person and the juvenile delinquency of the child. . . . Under the new law it will only be necessary to prove that a written order was issued by the judge specifying conduct to be followed by the parent, guardian or other persons having custody of the child and that such reasonable order or orders were violated.

When it passed the amendment, the New York State Legislature did not repeal section 494 of the Penal Law. Thus, as Mr. McCloskey further pointed out in his letter of July 10, it will be possible now for law enforcement agencies in New York to proceed under the new law or under section 494 of the Penal Law.

By the enactment of this new amendment, it seems that the legislature of the state of New York has taken a well directed step forward in its continuous effort to curb youthful delinquency. The amendment seems to embody sound theory and there should be ample opportunity for its use, since "in the cases of delinquent or neglected children disposed of after investigations by the court's Probation Bureau (Domestic Relations Court of New York City) approximately 75% of the children were returned to the homes from which they had come." *Punishing Parents in The Children's Courts,* 30 ST. JOHNS L. REV. 318 (1956). Whatever may be expected of this new amendment, it does not seem that it can be expected to be a panacea for the problem of juvenile delinquency; for legislation can merely point up the responsibility of parenthood; it cannot be expected to take the place of the love and training which should be given the child in the home, the church, and the school. As one writer aptly stated, "Progress will be made in preventing delinquency when *all the resources of the community are utilized to help the child and the parents.*" Gladstone, *Spare the Rod and Spoil the Parent,* 19 FED. PROBATION 3, 39 (1955) (Emphasis added.)

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