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James F. Janke

*University of Nebraska College of Law*

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## DUE PROCESS OF LAW—THE RIGHT TO CONFRONT AND CROSS-EXAMINE WITNESSES IN INVESTIGATIONS

The Civil Rights Commission<sup>1</sup> issued subpoenas *duces tecum* to certain voting registrars of the State of Louisiana commanding them to appear at a hearing in answer to charges that certain Negroes had been denied the right to vote because of their race, a violation of Federal law.<sup>2</sup> The Commission refused to name the informants, or to reveal the exact charges filed, and denied the registrars the right to confront and cross-examine the informants. A suit was brought against the Commission to enjoin the proposed hearing on grounds that the procedures sought to be used denying these rights were beyond the Commission's authority and denied them the Constitutional safeguards of confrontation and cross-examination.<sup>3</sup> The Federal District Court avoided the Constitutional question by declaring the procedures adopted by the Commission not authorized by Congress and void.<sup>4</sup> On appeal the United States Supreme Court in a 7-2 decision reversed and held further that the denial of the right to confront and cross-examine the informants would not deny the petitioners due process of law.<sup>5</sup>

Administrative agencies and fact-finding committees have assumed a major role in Government. Some of the various procedures adopted in their proceedings have resulted in serious con-

<sup>1</sup>The Civil Rights Commission, hereinafter referred to as the Commission, is a temporary agency, created in the Executive Branch of the Federal Government to investigate allegations made under affidavit that certain citizens of the United States are being deprived of their right to vote by reason of their color, race, religion, or national origin. 71 Stat. 634 (1957), 42 U.S.C. § 1975 (1958).

<sup>2</sup>18 U.S.C. § 242 provides: "Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than \$1,000 or imprisoned not more than one year, or both."

<sup>3</sup>The registrars also challenged the hearings on grounds that the act under which the Commission operated was not appropriate legislation under the Constitution, and on grounds that the procedures used by the Commission are governed by the Administrative Procedure Act § 7, 60 Stat. 241 (1946), 5 U.S.C. § 1006 (1958). *Hannah v. Larche*, 363 U.S. 420 (1960).

<sup>4</sup>*Larche v. Hannah*, 177 F. Supp. 816 (W.D. La. 1959).

<sup>5</sup>*Hannah v. Larche*, 363 U.S. 420 (1960).

stitutional questions. The *Hannah* case presents such a question concerning confrontation and cross-examination of witnesses. The broad questions presented are: (1) When is the right to a full hearing required by the Due Process Clause; and (2) When are informal, shortened hearings allowed. Due Process of Law is an elusive concept which embodies the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.<sup>6</sup>

There are at least two distinctions commonly made in requiring or denying a full hearing in various proceedings. In *Hannah* the court relied heavily on the distinction between judicial or quasi-judicial proceedings, which require the constitutional safeguards of a full hearing, and pure investigating or fact-finding proceedings, which do not.<sup>7</sup> This distinction is recognized in the Administrative Procedure Act which requires “. . . such cross-examination as may be required for a full and true disclosure of the facts” in adjudication proceedings and rule making proceedings only.<sup>8</sup> The reason for this distinction would seem to be the desire to protect persons who would be adversely affected by the adjudication or ruling, while in other proceedings no action is taken and no rights are directly injured. Our courts have, where public policy requires, recognized keeping the identity of informers secret, but the rights of the accused are also recognized and the privilege fails when disclosure of the informant’s identity is essential to a fair determination of the issues.<sup>9</sup>

The problem of what is an investigation has caused little difficulty. Investigations are “. . . informal proceedings held to obtain information to govern future action and are not proceedings in which action is taken against anyone.”<sup>10</sup> The Commission is clearly within this definition.<sup>11</sup> The presumption behind the distinction between investigations and other proceedings is that if no

<sup>6</sup> *Rochin v. California*, 342 U.S. 165 (1952).

<sup>7</sup> *Hannah v. Larche*, 363 U.S. 420, 442 (1960).

<sup>8</sup> 60 Stat. 241 (1946), 5 U.S.C. § 1006 (1958).

<sup>9</sup> For a general development of the rule see *Roviaro v. United States*, 353 U.S. 53 (1957), Annot., 1 L. Ed. 2d 1998 (1958); *Scher v. United States*, 305 U.S. 251 (1938); *Dellastatious v. Boyce*, 152 Va. 368, 147 S.E. 267 (1929). Cf. 8 WIGMORE, EVIDENCE § 2374 (3rd ed. 1940).

<sup>10</sup> *Bowles v. Baer*, 142 F.2d 787, 788 (7th Cir. 1944). Cf. *Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294 (1933).

<sup>11</sup> The Commission has no power to act or ordain. Its sole function is to investigate and report to Congress and the President of the United States. 71 Stat. 634 (1957), 42 U.S.C. § 1975 (1958).

action is to be taken against anyone, no rights are infringed and the safeguards of a trial are not necessary.

The other basic Constitutional distinction commonly made is between being deprived of vested interests and being deprived of mere expectations. In one case the right of confrontation and cross-examination was denied a resident alien who had been refused discretionary relief from deportation by the Attorney General.<sup>12</sup> Any relief given by him was by law only a matter of grace and not of *right* and therefore only expectations were denied. It is clear that no vested interests were involved there but the distinction is not always so sharp. When an alien immigrant returned to the United States after a nineteen month absence, he was permanently excluded from the Country on information of a confidential nature, the disclosure of which the court felt would be prejudicial to the public interest.<sup>13</sup> The proceeding was termed merely an exclusionary action involving no vested interests instead of a deportation action and therefore no constitutional rights were denied. On the other hand when the proceedings directly deprived a lawful resident alien of reentry into the United States, a full hearing with right to confront and cross-examine was held necessary for due process of law.<sup>14</sup>

Security is an area which highlights a conflict between individual rights and the public interest. When the natural result of revoking a man's security clearance was the loss of his job it was held that there was no authority to deny the security clearance without giving the right of confrontation and cross-examination.<sup>15</sup> But where the government was able to show that the nation's security program would be destroyed by allowing confrontation and cross-examination to seamen who were denied security clearance and therefore denied jobs, due process was held not violated.<sup>16</sup>

An examination of these cases indicates that what the courts will determine to be a vested interest or merely an expectation varies with the relative strength of the public interest involved in denying the right to confront and cross-examine witnesses.<sup>17</sup>

<sup>12</sup> *Jay v. Boyd*, 351 U.S. 345 (1956).

<sup>13</sup> *Shaughnessy v. Mezei*, 345 U.S. 206 (1953). Cf. *Wong Yang Sung v. McGrath*, 339 U.S. 33 (1950); *Knauff v. Shaughnessy*, 338 U.S. 537 (1950).

<sup>14</sup> *Kwong Hai Chew v. Colding*, 344 U.S. 590 (1953).

<sup>15</sup> *Greene v. McElroy*, 360 U.S. 474 (1959). See also *Bailey v. Richardson*, 182 F.2d 46 (D.C. Cir. 1950), *aff'd per curiam by an equally divided court*, 341 U.S. 918 (1951), and *Peters v. Hobby*, 349 U.S. 331 (1955).

<sup>16</sup> *Parker v. Lester*, 112 F. Supp. 433 (N.D. Calif. 1953).

<sup>17</sup> See cases cited in notes 12 to 16 *supra*, and Appendix to majority opinion of *Hannah v. Larche*, 363 U.S. 420, 454 (1960).

Investigation of "communists" is a recent example of how the government may injure a person by its acts even though there is no direct action taken—only investigations made. The rights of the individual were upheld when public investigations of suspected communists by the House Un-American Activities Committee were struck down as unlawful exposure for the sake of exposure.<sup>18</sup> When the Attorney General of the United States composed a list of "communistic" organizations without notice and a full hearing, it was held that the Constitution guaranteed freedom from unjustified governmental defamation.<sup>19</sup> The injury there was indirect, through the stigma and public reaction that seriously hampered "black-listed" organizations. But even these cases do not hold that indirect and collateral deprivations of life, liberty, or property are protected by the Fifth Amendment; only that the action was not a proper legislative function.

Variable as it may be, as the rule appears now, the right to a full hearing is required in a proceeding in which some direct action is taken against a person either through adjudication or rule making, and then only if the action taken deprives that person of life, liberty or property as distinguished from the deprivation of an expectation. But a full hearing seems not to be required if there is no direct action taken, regardless of a collateral deprivation of life, liberty, or property. The registrars in *Hannah* cannot demand a full hearing under this test since the Commission only investigates and reports its findings and has no power to act or ordain.<sup>20</sup> The real question raised in *Hannah* is therefore whether the right to confront and cross-examine informants should be limited to proceedings in which some type of direct action is taken against someone, or whether that right should extend to collateral and indirect deprivations of life, liberty, or property resulting from pure investigative proceedings.

The dissent in *Hannah* argues that due process is violated whenever Government action injures an individual without an opportunity to show that the evidence is untrue, and even though no affirmative action is taken, no indictment is returned, no commitment to jail is made, and no formal criminal charges are filed.<sup>21</sup> The injury likely to result is further aggravated when the pro-

<sup>18</sup> *Watkins v. United States*, 354 U.S. 178 (1957).

<sup>19</sup> *Joint Anti-Fascist Comm. v. McGrath*, 341 U.S. 123 (1951).

<sup>20</sup> 71 Stat. 635 (1957), 420 U.S.C. § 1975c (a) (1958).

<sup>21</sup> *Hannah v. Larche*, 363 U.S. 420, 493 (1960).

ceedings may be open to the public, the press, and television cameras.<sup>22</sup>

It can truthfully be said that persons accused of committing crimes are deprived of liberty when they are forced under subpoena to testify in answer to questions concerning their alleged illegal activities.<sup>23</sup> But *Hannah* indicates that there was no injury shown that was not purely conjectural and even if collateral consequences did follow the hearing it would not be due to affirmative action of the Commission and therefore made no difference.<sup>24</sup> The registrars in *Hannah* have no choice but to answer the subpoenas and are subject to contempt of court if they do not.<sup>25</sup> The investigations of the Commission are similar to those of a grand jury in which there is clearly no right to confrontation and cross-examination of witnesses,<sup>26</sup> but a grand jury, composed of impartial citizens, is a protection against oppressive public prosecution.<sup>27</sup> There is no assurance that evidence given by the registrars will not be used in a later prosecution, and there is a probability that any incriminating evidence will result in prosecution.<sup>28</sup> The Fifth Amendment plea of self-incrimination *may* be available but it in itself has shortcomings and is undesirable, especially in public hearings.<sup>29</sup> The injury is not limited to potential criminal prosecution but includes

<sup>22</sup>The rules of the Commission provide: "Subject to the physical limitations of the hearing room and consideration of the physical comfort of Commission members, staff, and witnesses, equal and reasonable access for coverage of the hearings shall be provided to the various means of communications, including newspapers, magazines, radio, news reels, and television. However no witness shall be televised, filmed or photographed during the hearings if he objects on the grounds of distraction, embarrassment, or physical handicap." *Id.* at 500, n.3.

<sup>23</sup>*Counselman v. Hitchcock*, 142 U.S. 547 (1892); *In re Hearing Before Joint Legislative Comm.*, 187 S.C. 1, 196 S.E. 164 (1938); *In re Grae*, 282 N.Y. 428, 26 N.E.2d 963 (1940).

<sup>24</sup>*Hannah v. Larche*, 363 U.S. 420, 443 (1960).

<sup>25</sup>71 Stat. 636 (1957), 42 U.S.C. § 1975d (g) (1958).

<sup>26</sup>*United States v. Central Supply Ass'n*, 34 F. Supp. 241 (N.D. Ohio 1940).

<sup>27</sup>*Stirone v. United States*, 361 U.S. 212 (1960); *Ex parte Bain*, 121 U.S. 1 (1887).

<sup>28</sup>42 U.S.C. § 1975c (a) authorizes investigations of allegations which if true constitute Federal crimes and § 1975c (b) requires the Commission to report to the President, whose duty is to uphold the laws of the land. It seems reasonable to draw the conclusion that prosecution will follow.

<sup>29</sup>See *Williams, Problems of the Fifth Amendment*, 24 *FORDHAM L. REV.* 19 (1955); *Noonan, Inferences from the Invocation of the Privilege against Self-incrimination*, 41 *VA. L. REV.* 311 (1955).

public scorn and the prejudices that accompany it even though the witness is guilty of no misconduct.<sup>30</sup>

To grant the requested rights to confront and cross-examine informants means that informants would be subject to intimidation. It must be recognized that in this period of high racial feeling, Negroes in Louisiana would be extremely reluctant to come forth with accusations, were their identity subject to disclosure, and the Commission would be severely hampered or perhaps thereby completely sterilized. Therefore the public interest in not disclosing the informant's identity is great, and the function of the Commission is in the public interest. But the Commission is investigating for purposes of corrective legislation and it seems this function would not absolutely require the testimony of the accused registrars to act effectively in its reporting capacity.

In view of the increasing popularity of investigations, danger of erosion of constitutional rights lies in restricting the right of confrontation and cross-examination to proceedings which act directly to deprive individuals of life, liberty, or property. The guide should be whether or not the necessary or probable result of the proceedings will be to injure those persons, whether directly or collaterally.

*Jim Janke, '61*

<sup>30</sup> Cf. *Greene v. McElroy*, 360 U.S. 474 (1959). See also Note, 26 *TEMP. L.Q.* 70 (1952); Jones, *Congress and Television: A Dissenting Opinion*, 37 *A.B.A.J.* 392 (1951).