The Nathan Passport Victory and The Right to Travel, Page 2

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The Sinister Face Behind The Faceless Informer

The way the Supreme Court decided the *Peters* case is bitterly disappointing, though not unexpected. The course of the oral argument had indicated this outcome. In evading the issue of whether reputation and livelihood may be destroyed in loyalty proceedings by anonymous accusation, five members of the Court invoked the rule that constitutional questions should not be decided until necessary. But this rule was developed as a precept of judicial self-restraint not as a device for judicial comfort. It was not intended to be* an excuse for evading ticklish questions.

The invocation of the rule sounds impressive, but it begs the question. What is meant by saying that the Court will not decide constitutional issues in advance of the need to do so? Does it mean that constitutional questions should not be decided prematurely? Or does it mean, as in this case, that the court is justified in evading constitutional questions if it can find any technicality on which the case may be disposed of?

A Legalistic Straw

In this respect, it would be hard to match the *Peters* decision. The Court grasped at a point neither side had raised, and on which both sides agreed. Both sides agreed that the Loyalty Review Board had power to reverse favorable decisions by the lower boards as part of its "post-audits." Both sides agreed that this power was exercised in pursuance of instructions from the President to "coordinate the employe loyalty policies of the several departments. . . ." For Chief Justice Warren and the majority suddenly to decide that this accepted administrative practice was unauthorized by the President was to take refuge in a distant legal fiction. The Court was thus able to declare the Board's unfavorable decision against Dr. Peters null and void—and in this sense, but this sense only, to "clear" him.

This detour around the point on which both Dr. Peters and the government had asked the court to rule is not made more engaging by the analogy Chief Justice Warren drew. In holding that the Board's power to review was limited to those cases in which there had been an unfavorable verdict, the Chief Justice said this accords "with the deeply rooted principle of criminal law that a verdict of guilty is appealable while a verdict of acquittal is not." This is indeed to strain at the gnat. If the Court is going to bring up the principles of criminal law, what of the more deeply rooted principle that no man shall be convicted without a chance to cross-examine his accusers?

The Need for Decision

If ever a constitutional question was ripe for decision, it was in this case. The loyalty-security program is in its ninth year. Its use of secret informers has become a national scandal. The program itself has mushroomed; it now covers millions of workers in private as well as public employment. The Attorney General for two years has been seeking by the Butler bill to extend the loyalty-security program beyond "defense" workers virtually to the whole of American industry. There will soon be few Americans left whose reputation and livelihood are not at the mercy of anonymous accusations.

What began as a limited and temporary emergency measure threatens to become permanently a part of American life. The right to confront an accuser remains in the criminal law one of the essentials of fair trial. Even in that ultra-sensitive defense occupation, that of an officer in the Armed Forces, where disloyalty would be most dangerous and secret surveillance would seem most justified, an officer may not be dismissed without a court martial, and the Manual for Courts Martial forbids the use of testimony which is not "sworn and subject to cross-examination, the scrutiny of the court and confrontation of the accused." Yet the Supreme Court still declines to rule that similar safeguards must be accorded millions of ordinary workers in far less sensitive positions. Only Black and Douglas were prepared to take a fundamental stand; the latter's concurring opinion memorably expresses the better conscience of our time.

Perhaps we should be grateful for small mercies. The last occasion this issue was passed upon, in the *Bailey* case, Judge Prettyman in the Court of Appeals here five years ago held that the security of the state justified what he himself termed "these harsh rules, which run counter to every known precept of fairness to the private individual." The Supreme Court split 4-to-4 on the issue, and so Prettyman's ruling that anonymous accusers might be used in loyalty cases was left standing.

The Earlier Ruling

Perhaps we should be grateful that the Supreme Court this time did not, as the government urged, actually uphold the practice. But we had reason to expect better. The Court has displayed a creeping libertarianism. Two years after *Bailey* it held unanimously in the Oklahoma loyalty oath case—through Mr. Justice Tom Clark, no less—that "constitutional protection does extend to the public servant whose exclusion [*from employment*] *pursuant to statute is patently arbitrary or discriminatory.*" This was in flat contradiction to Judge Prettyman's holding that due process does not apply to loyalty proceedings. Yet now, in a case as clear as *Bailey's,* where again all the evidence on the record favored the accused and the fatal derogatory charge was anonymous, the Court has been unable to muster five judges to do more than clear Dr. Peters personally. The Supreme Court was unable to face up to the faceless informer.

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* For a comprehensive exposition of the rule and its purpose see Justice Brandeis's concurring opinion in *Ashwander* v. *TVA,* 297 U.S. 341.

The Meaning of the State Department's Surrender in the Otto Nathan Passport Case

A Victorious First Step in the Fight for the Right to Vote

The State Department is fighting a rearguard action to protect the arbitrary powers it exercises over the right to travel. On Thursday, June 2, it filed an affidavit with the Court of Appeals declaring that it would be contrary to the public interest to let Dr. Otto Nathan travel abroad. On Monday, June 6, it announced that Dr. Nathan was being granted a passport.

If it is contrary to the best interests of the United States to let Dr. Nathan travel abroad, then the Acting Secretary of State, Herbert Hoover, Jr., was guilty of violating national interest in granting the passport. On the other hand, if it is not true that his trip would be contrary to national interest, then Ashley J. Nicholas, who signed the affidavit as assistant director of the Passport Office, committed perjury.

Were Nicholas a private citizen, making the statement in conversation or writing, he would be subject to suit for slander or libel. It is a pity that Dr. Nathan cannot sue the State Department for defamation of character. Nicholas after accusing Dr. Nathan of various political associations went on to say (1) that other information had been considered which could not be disclosed and (2) that one of the considerations in the Department's decision was that some Americans had travelled abroad to carry on espionage and revolutionary propaganda activities on behalf of the Soviet Union. Such insinuations would clearly be actionable if Nicholas were not a public official.

Power to Destroy Reputations

The affair illustrates the fact that in exercising arbitrary powers over the right to travel the State Department is also in a position seriously to hurt reputation and livelihood. The news that one has been denied a passport carries the same stigma as a finding of disloyalty, and may interfere with one's job or profession, as it strikingly did in the case of Paul Robeson whose business as an international concert star was destroyed.

Yet in the memorandum filed by the Department Monday with the Court of Appeals there was no suggestion of an apology to Dr. Nathan. It merely said that the Acting Secretary having referred the case to the Board of Passport Appeals "and having received the report and recommendation of the Board, advises the Court that the application of Otto Nathan for a passport has been approved."

How is it that the Department filed an affidavit declaring Dr. Nathan's travel abroad contrary to public interest without waiting for a final determination? Or was this all a sham to avoid a showdown with the Court of Appeals?

Just as we went to press last week, the Department asked the Court of Appeals to stay an order by Federal Judge Henry A. Schweinhaut ordering the Secretary of State on pain of contempt to issue Dr. Nathan a passport. This was the first order of its kind in American history.

State's Misfortune

It was the Department's misfortune to encounter on the Court of Appeals a three man panel made up of the new Chief Judge, Henry W. Edgerton, David Bazelon and George Washington. The first two are the most liberal and the last (a lineal descendant) one of the most conscientious judges on the appellate bench.

These three, foreseeing the possibility of a historic test on appeal, issued an order shrewdly framed to put the Department squarely on the procedural spot. The Appeals Court Thursday, June 2, said the Department could have a stay providing it gave Dr. Nathan "a quasi judicial hearing" on or before Tuesday, June 7, to be concluded within three days, the hearing officer to make his recommendation in five days thereafter, and the Department to make its decision not later than ten days after that. The time-table was designed to make impossible the Department's favorite tactic—delay.

The Appeals Court was as precise in indicating just what kind of a hearing was required to fulfil its order—something Judge Schweinhaut had not specified. It said Dr. Nathan had never been accorded "an evidentiary hearing or confronted with the evidence, if any, which led to the denial of a passport."

This order, taken in connection with Judge Schweinhaut's opinion of last February 28, makes legal history. Schweinhaut held that the kind of hearings held by the Board of Passport Appeals is not the kind "which the law contemplates and guarantees." It is indeed only an extended interrogation of the applicant under oath, and as the pending test suit of Dr. Clark Foreman shows, no evidence or witnesses are offered.

Spelling Out "Due Process"

The Court of Appeals, upholding Schweinhaut, proceeded to spell out just what kind of hearing would fulfil the requirements of due process. To meet those requirements the Department would have to produce witnesses and offer evidence. It could not rely on undisclosed information or anonymous informants. Thus while the Bauer case three years ago held passports could not be denied without hearings, the Nathan case indicates what kind of hearing is necessary.

The Court of Appeals order offered the Department three alternatives. It could refuse to obey and face a contempt action. The chance of enforcing an order against the Secretary of State by contempt or mandamus are slim; the opportunities for delay are many. The sequel to the famous Bauer case shows how easily such an order may be circumvented.

A statutory court (106 F. Supp. 445) held the Department was wrong in revoking Miss Anne Bauer's passport without a hearing. The Department did not appeal but Secretary of State Acheson delayed compliance; there was talk of contempt; nothing happened; Miss Bauer, her funds and patience exhausted, gave up the fight, married a Frenchman and took out French citizenship.

Undoubtedly Dulles could have adopted the same tactics as Acheson. But a wholly non-legal consideration made this inadvisable. The Department might win such a running battle but the fact that Dr. Nathan had become Einstein's executor gave this long delayed passport case (the original application was made two and a half years ago) international prominence. The publicity would have focussed too much attention on the arbitrary way the passport division operates.

Unhappy Alternatives

So this left two alternatives. One was to hold the hearing ordered, but this would have set a precedent for the future. It might also have thrown on the record and opened to the scrutiny of the courts the sloppy character of what the Department regards as "evidence" in passport matters. The other alternative was to issue the passport without a hearing, thus avoiding adjudications which might ultimately have forced the Department to revise its hearings procedure. This was the course chosen.

The Emergency Civil Liberties Union and its general counsel, Leonard Boudin, by bringing this suit on behalf of Dr. Nathan, have demonstrated that the Department can be defeated. The Courts have been led to take judicial notice of the meaningless facade which is the Board of Passport Appeals, a Board which has no fixed membership, makes no findings, issues no decisions, and produces no witnesses. A passport has been won, and this victory is the precedent. Now is the time for all good men similarly situated to bring similar suits against the Department.

Replacement of Dulles By Stassen May Be In The Cards

Final Chance to Avoid Repetition of An Old Folly

The invitation to Bonn is a final warning to the West that unless the German problem is settled at the Four Power meetings soon to be initiated another Russo-German entente is in the making. The American public is so drugged with cold war propaganda by the State Department that it has forgotten 1917 and 1941 and all they cost, but it would be criminal if France and England permit the Germans to slip out of control again via a repetition of Rapallo and the Nazi-Soviet pact.

The Russians are playing for the withdrawal of American troops and bases from Western Europe. They are prepared to pay with a withdrawal from their own satellites and with a reunified Germany, i.e. the liquidation of the East German regime. Should this new Grand Design for a normalized Europe be negotiated between East and West, particularly within the framework of an arms limitation program, some restrictions on German militarization might be maintained. Some check at least would be provided by common agreement between East and West. But if the deal is made between Bonn and Moscow, no real check on German power is possible.

The Russians are reported ready to allow the Reich 500,000 men under arms as part of a bargain to stay out of NATO. But past history shows how little German promises are worth. Once the Germans have their army, rightist and military elements will control the Reich again; it will have freedom of action; it can resume the swing between East and West, bidding one side against the other. The Russians can maintain a German entente only by feeding more to the monster, and its appetite will grow with the eating. A new partition of Poland would be a mere entree to the meal.

Whether looked at from Moscow or Paris only a restoration of East-West understanding, i.e. to speak plainly, encirclement of Germany, can offer a minimum of safety once Germany is rearmed again. Why rearm her? Why hand over her youth, her workers, her sober middle class elements, all the new stirrings since the war of doubt and misgivings about militarism, and let the drill sergeants take over again for that Third Try at world dominion which were part of her General Staff's plans?

Stale Minuet

The Russians and the Americans have mobilized and moved outward only in fear of each other's expansion; basically both are isolationist peoples, satisfied powers, possessors of continental domains, men who march to war only out of necessity. But there is a dynamic element in Germany which loves war, a pattern of obedience which serves its purpose, a hunger for expansion that waits to be slaked, a contempt for other peoples whether Slav, Frenchman or American that is but thinly hid even now, and a Wagnerian sucidal mentality that may bring about the downfall of mankind once the Germans have the new nuclear weapons. Their militarists may easily make the world one vast crematorium. Experience since 1870, thrice repeated, underscores the folly of returning to the stale minuet of balance of power politics on the European continent. Is it too late for some counsel of caution to make itself felt?

If we were soberly consulting past lesson and present interest we would be trying to persuade Moscow that it was nonsense to conceive of a "neutral" zone in Europe built around a neutral Germany because Germany will never play a neutral role once rearmed. The context of a Europe from which Russian and American power has withdrawn is a context prepared for German penetration, expansion, hegemony and conflict. American military power moved into Western Europe little more than a decade ago for the same reason that Russian military power moved into Eastern Europe: each to protect itself against German expansion. The Atlantic Pact reflects the fact that the U. S. like Britain before it cannot permit a hostile power to come down to the Atlantic seaboard of Western Europe. This is what drew us into two world wars, and both were against German militarism. Must both sides repeat the same errors? Is the terrible teaching of the Nazi-Soviet pact so soon forgotten? The Russians were as unsuccessful in turning the Germans westward as Chamberlain was in the attempt to turn them eastward. A divided Germany is preferable to a reunited Germany if that reunited Germany is to be rearmed.

Ike Has Not Entirely Forgotten

As the meeting at the summit approaches, where in Washington are there such perspectives? Nowhere visibly, but unspoken and below the surface wherever there has been thoughtful study of the German question in preparation for the talks. Mr. Eisenhower has not entirely forgotten why he marched into Europe all so recently; his recent press conferences have encouragingly indicated awareness of the need for and a readiness to pursue an East-West understanding within which a German settlement may be achieved. "At the summit" the English, the French and the Russians may find an echo of their own misgivings in the President, an avenue for solution. This is why Dulles fears such a meeting, seeks so hard to make it a mere formal, sharply limited, purely ceremonial gathering, with no real function other than to set the stage and arrange the chairs.

Mr. Eisenhower's remarks last week about the three-day limit and his willingness to talk any reasonable time were indicative of the growing divergence between White House and State Department. Perhaps it would be more accurate to say between the White House and Mr. Dulles because the latter alone seems to be wedded indissolubly to that blind anti-Sovietism on which Goebbels (remember?) played so fatally.

The hopeful strand in events here in Washington is that this divergence in views is leading the Secretary of State visibly into the camp of the President's rivals in his own party. The political necessities which forced Eisenhower reluctantly into a clash with McCarthy in 1954 and Knowland in 1955 may push him into conflict with Dulles by 1956. The State Department's slap at Nixon for his Chicago speech so soon after the President made it evident that he did not want Knowland as a running mate in 1956 was not lost on the White House. It delighted Knowland, who sees Nixon as his rival; it served notice on those around the President that Dulles was undercutting his chief in domestic policy. The Secretary of State cannot surreptitiously play to the Knowland wing without political danger. If he were to be replaced with Stassen not only would the President have a lieutenant on whom he could rely at home but we would have a Secretary of State ready to negotiate co-existence and disarmament in an atmosphere of East-West understanding.

The Court's Evasion Was The FBI's Victory

(Continued from Page One)

The Supreme Court has failed us. Let no one think the issue has simply been postponed. Five years passed after the *Bailey* case before that of *Dr. Peters* was heard. More years will pass and this cancer on our law will eat itself in deeper before there is another. It is not easy to find the thousands of dollars which such appeals cost; even counsel as redoubtable as Arnold, Fortas & Porter* who fought both the *Bailey* and the *Peters* cases may be disheartened. The replacement of the old "loyalty" by the new "security risk" standard will serve further to confuse the issue.

The issue of the anonymous informant which the Supreme Court evaded is not one simple issue, but unfolds into several. Attention has been focussed on a man's right to confront his accusers, but there is a second related issue. This is whether the FBI is to be accorded such power that it can withhold its sources not only from the accused but from his judges. This was a point Mr. Justice Frankfurter raised during oral argument. "The very judges of the government," the Justice said, "are not allowed to know who the witnesses are . . . on the basis of whose testimony they are to make a finding." It is a pity he confined himself to this informal protest.

An Invitation to Gossip

A careful reading of the record in the *Peters* case shows three different reasons for withholding information. One is that FBI men are instructed to guarantee anonymity to casual informants; this makes people more willing to talk, but does it make them more reliable? "A large area of vital government information depends," the government argued in its main brief (p. 105), "on . . . casual informers who must be guaranteed anonymity." To guarantee anonymity is to encourage malice and invite gossip. A person who knews that he will never have to be responsible for anything he says is not the most dependable source of information. The rigorous standards of criminal trial force all such loose material through the strictest of sieves, but in loyalty proceedings loose talk loosely collected is shielded from scrutiny by the plea that to disclose the sources would be harmful to "security."

The second reason given for withholding information is that it would uncover the FBI's professional informers. Even in liberal circles, these are regarded as somehow sacrosanct and briefs *amicus curiae* in this case suggested that maybe "an undercover agent of the FBI . . . might be protected under many circumstances when the landlord, the school associate or village gossip ought not. . . ." (See footnote page five of CIO brief.) But surely enough has come out by now to show that these undercover agents include a most unseemly sampling of perjurers, psychopathic liars, stumble-bums and plain moochers who will say anything for a buck.

The Technics of Snooping

Finally a close reading of the *Peters* case will show that the government is protecting not only the FBI's informers but its other methods of surveillance. As the government also said in its brief (p. 105), "In addition to information from confidential informants, a large percentage of the material included in the reports under the loyalty and security program is derived from the use of extremely delicate and confidential techniques." What are these mysterious "extremely delicate and confidential techniques?"

At page 23 of the reply brief for Dr. Peters there is quoted a passage from Elinor Bontecou's *The Federal Loyalty-Security Program* (1953), perhaps the most authoritative scholarly work on the subject and one the government also cites in its briefs. Miss Bontecou says that in reporting loyalty information the FBI conceals not only the source of the information but the method by which it has been obtained "whether from an undercover agent, a stool pigeon, *a check to determine the source of incoming mail, a telephone tap or by other means.*" (Italics added.) So mail covers and telephone taps, both of questionable legality, are among those "extremely delicate and confidential techniques" which the FBI fights against disclosing. To hide the use of such methods from the executive branch of the government and from the judiciary is to draw a cloak over what may be large scale official lawlessness and invasions of privacy. The face behind the faceless informer is the sinister face of a secret political police. The evasion of the issue in the *Peters* case was a major victory for the FBI.

* A salute is also due Fowler Harper and Vern Countryman of Yale Law School as co-counsel for Dr. Peters.

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