National Defense and Individual Liberties

Wilbur G. Katz
University of Chicago Law School

Follow this and additional works at: http://www.repository.law.indiana.edu/ilj

Part of the Civil Rights and Discrimination Commons, Constitutional Law Commons, and the Military, War, and Peace Commons

Recommended Citation
Available at: http://www.repository.law.indiana.edu/ilj/vol16/iss1/3
NATIONAL DEFENSE AND INDIVIDUAL LIBERTIES

WILBUR G. KATZ*

I hope that I am not abusing your hospitality in speaking seriously this noon upon a serious subject. After the three days of meetings which you have diligently attended, you deserve relaxation, if not entertainment. But this annual meeting is held in serious times. Since you met at Indianapolis last August, we have all been subjected to a series of shocks which have jolted us out of our complacency and impressed us with the imminence of national danger.

The crystallization of American opinion last spring is perhaps the most striking and rapid development of public sentiment in our history. The absorption of Czechoslovakia and Poland and the defeat of Finland had shocked millions of our citizens; but they had produced no conviction of danger to this country or of the necessity of an affirmative program. The conquest of Norway, the low countries, and France, however, produced in the brief period of a few weeks overwhelming sentiment in favor of a colossal armament program and vigorous action against espionage and sabotage.

But the very unanimity and vigor of opinion behind this program have created serious dangers. This country is still at peace and a large majority of people west of the Atlantic seaboard see no imminent likelihood of our entry into the war. But we have already observed symptoms of war hysteria which in 1917 and 1918 developed only after months of actual war conditions.

One of the chief reasons for this development, I believe, is the growth of nation-wide systems of radio broadcasting. The radio has made the public infinitely more susceptible to nation-wide propaganda and the skillful use of slogans and epithets. The terms “fifth column” and “Trojan horse” have caught the popular imagination more effectively than any phrases we can remember. These phrases are symbols which provide a focus for public fears, symbols which are the more powerful because of their vagueness.

* Dean Wilber G. Katz, University of Chicago Law School at the annual banquet of the Indiana State Bar Association, Fort Wayne, August 24, 1940.
We have seen how convenient is the term “fifth column” as a category in which to place anyone with whom we disagree. We have seen the term used with reference to Colonel Lindbergh. However one may feel about the views he has expressed, one cannot but be alarmed by the violence with which he has been attacked and the utterly extravagant character of the charges which have been made against him.

Another symptom of public hysteria has been the flood of ill-considered proposals such as the bill to forbid employment in interstate commerce of more than one alien for every ten citizens.

Since these symptoms began to appear, the Presidential nominating conventions and the beginning of the campaign have furnished wholesome distractions. The cautious platform statements may have served to allay the public excitement. In any event, I believe that there is now a lull during which we may consider dispassionately the measures by which we may meet the national emergency without unnecessary restriction of individual liberties.

I believe that it is well for us to consider the experience during and after the last war. In 1917 and 1918 Congress and many of the states passed laws which were so general in their prohibitions as to include virtually all public criticism of the government and its policy. As Professor Cushman of Cornell has said, these statutes were in all too many cases brutally enforced by our executive officers, and in a number of cases were unintelligently interpreted and applied by the courts. For example, a man was sent to a federal penitentiary because he publicly advocated that the costs of the war should be met by taxation rather than by the issuance of bonds. Another man was convicted under the Espionage Act and sentenced to twenty years because he circulated a pamphlet urging the voters of Iowa not to reelect congressmen who had voted for the draft. In 1917 a former German, who had been naturalized in 1882, refused to contribute money to the Red Cross or the Y.M.C.A and said that he did not want to aid in the defeat of Germany. A federal district court revoked his naturalization on the ground that his disloyal refusal to contribute proved that his oath of allegiance, taken thirty-five years before, must have been taken with mental reservations which made it fraudulent.
In 1920, a group of celebrated lawyers made public a report upon illegal practices of the United States Department of Justice, and in June of that year, Charles Evans Hughes, the present Chief Justice of the United States, referred to this report in the following terms: "Very recently," he said, "information has been laid by responsible citizens at the bar of public opinion of violations of personal rights which savour of the worst practices of tyranny."

An even stronger indictment of some of the effects of the wartime hysteria was made by a distinguished Boston lawyer, Moorfield Storey, a former president of the American Bar Association. Referring to the post-war "red-hunts," Mr. Storey said: "Upon a small scale a 'reign of terror' [was produced] in which some thousands of innocent people were . . . cruelly treated and exposed to much suffering and loss . . . . No evidence was ever produced which excused the action of the government. The safeguards of the Constitution were ignored, and any true American must blush at what was done and at the indifference in which he, and all but a handful of his countrymen, tolerated it."

In 1920 the present Chief Justice made perhaps his most courageous stand for the preservation of civil rights. In that year five socialists elected to the legislature of New York were refused their seats. Mr. Hughes headed a delegation representing the Association of the Bar of the City of New York, and went to Albany to face a hostile legislature and to protest against this action.

But in many respects the problems facing us today seem more difficult than those we faced in the last war. They are more difficult especially because we cannot know what emergencies may arise and how soon. We only know that our plans must be made on the basis of many alternate assumptions, all of which would have been dismissed as impossible even a year ago.

In the first place, there are problems in the determination of national policy. We must decide what areas we propose to defend. We must face without deceiving ourselves questions about the Far East and South America. We must consider the place of foreign trade in our economy and the possible effects of its destruction. We must decide the extent to which the preservation of our export
trade requires central control to meet the tactics of states under economic dictatorship.

Then there are gigantic problems of technical organization to carry out our defense program. We must remember that the congressional appropriations are only the first step. We are beginning to see some of the difficulties in the relation of this program to the production of non-war commodities. We shall have pressing questions as to the necessity of inroads upon freedom of enterprise in strategic industries and upon the institutions which we have developed to handle labor relations.

A third type of problem is that of protection against the secret agent, the spy, and the saboteur. We had our experience with this problem in the last war, but the revelations of the past two years leave no doubt that the dictatorships have developed methods far more insidious and successful than those used twenty-five years ago. What Gilbert Murray then referred to as "the monstrous and debauching power of the organized lie," has since been demonstrated on a gigantic scale.

In facing these problems we may be tempted many times to use the easy way, to adopt the methods of the totalitarian states. We could have the objectives of national policy decided by a single man or a small clique. We could solve the problems of technical organization by methods of autocratic control. There is no doubt that we could excel in a race of dictatorships. The American genius for organization and our vast resources could develop the most formidable dictatorship the world has ever seen. We might check foreign propaganda by measures including iron control of newspapers and radio. We might arrest thousands upon suspicion of disloyalty; and if our jails are not large enough, we might resort to the concentration camp.

But the price of such measures is to place in jeopardy the very system which we seek to preserve. It is not merely that we would be temporarily surrendering our traditional liberties. The effects of such a surrender are not easily thrown off. After the last war it took ten years; and under the conditions of this generation who can be sure that the return to freedom would ever be achieved?

While the spread of totalitarian doctrine has made our problems vastly more difficult, it has also vastly increased
our devotion to the liberties enshrined in our Bill of Rights. Nor is this development merely a matter of public sentiment. It is reflected in the trend of decisions by the United States Supreme Court. The series of opinions which have been handed down since Hughes became Chief Justice have recently been referred to as an "impressive arsenal of judicial bulwarks against the violation or erosion of civil liberties." I think that it is worth while to consider this remarkable series of opinions.

In the Schenck case, the first of the war-time prosecutions to reach the Supreme Court, it had been argued that freedom of speech does not cover utterances which have some tendency to cause illegal acts. Mr. Justice Holmes, speaking for a unanimous Court, rejected this criterion of "bad tendency" and established the rule of "clear and present danger." "The question in every case," he said, "is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree." There has never been any dissent from this principle of clear and present danger, although the Court has not always been unanimous in its application.

The striking development of the last twenty years has been in cases involving state legislation. As late as 1922, the Supreme Court said "... neither the Fourteenth Amendment nor any other provision of the Constitution... imposes upon the States any restrictions about 'freedom of speech'..." Within three years, however, the contrary view was assumed by the Court in a series of cases involving state anarchy or syndicalism laws. And in 1931, in Stromberg v. California, Chief Justice Hughes regarded it as settled that "the conception of liberty under the due process clause of the Fourteenth Amendment embraces the right of free speech." "The right is not an absolute one, ..." he added. "There is no question but that the State

may . . . provide for the punishment of those who indulge
in utterances which . . . threaten the overthrow of . . .
government by unlawful means.” But in this case the Chief
Justice spoke for a unanimous court in holding invalid a
statute forbidding the display of a red flag as a symbol of
opposition to organized government. The state court had
construed the statute to include opposition by lawful means.

At the same term of court, in Near v. Minnesota, the
majority held unconstitutional the so-called Minnesota Gag
Law. This was a statute authorizing the abatement as public
nuisances of newspapers found to be malicious, scandalous
and defamatory. The Chief Justice emphasized that the
increasing complexity of the administration of government
has made it increasingly important that we maintain a vigi-
lant and courageous press.

The next important case reached the Supreme Court
in 1936. By that time, developments in Europe, and also
some ominous signs in this country, had caused the public
to be increasingly concerned about the danger to free gov-
ernment. The Supreme Court had before it a Louisiana
statute imposing a tax on the gross receipts of large new-
spapers. The purpose of the tax was disclosed in a circular
distributed over the signature of Huey Long. “The lying
newspapers,” he said, “are continuing a vicious campaign
. . . We managed to take care of that element here last
week. A tax of 2 per cent on what newspapers take in was
placed upon them. That will help their lying some.”

Mr. Justice Sutherland spoke for a unanimous Court
in holding this tax invalid as a violation of freedom of the
press. “It is bad,” he said, “because, in the light of its
history and of its present setting, it is seen to be a deliberate
and calculated device . . . to limit the circulation of informa-
tion to which the public is entitled . . . A free press stands
as one of the great interpreters between the government and
the people. To allow it to be fettered is to fetter ourselves.”

In 1937, in DeJonge v. Oregon, the Court unanimously
reversed a conviction under the Oregon Criminal Syndicalism
Law. The defendant had been charged with participating

5 283 U.S. 697, 51 Sup. Ct. 625 (1931).
(1936).
in a meeting called by the Communist Party, and while it was assumed in the opinion that the Communist Party advocates the use of violence in the overthrow of government, and while the defendant was a member of the party, there was no proof that violence had been advocated in the meeting referred to in the indictment. The language of the Chief Justice reflects the increasing concern of thoughtful people for the safety of our institutions. He said, "The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by . . . violence, the more imperative is the need to preserve . . . constitutional rights . . . in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceable means. Therein lies the security of the Republic, the very foundation of constitutional government."

In June 1939, the Court decided the celebrated case of 
_Hague v. The C.I.O._ 8 This was a suit brought by the union and some of its officers, alleging that Mayor Hague had prevented their holding meetings in Jersey City and distributing circulars and pamphlets. The suit was to enjoin the continuance of this conduct. The defendants relied upon an ordinance providing that no public assembly might be held without a permit from the Director of Public Safety. The ordinance authorized the Director to refuse a permit when he believed such action proper for the purpose of preventing riots or disorderly assembly. This ordinance was held unconstitutional by a vote of five to two. On the appeal the Committee on the Bill of Rights of the American Bar Association had intervened as friends of the Court, supporting the right of freedom of assembly.

The work of the Supreme Court in protecting civil rights was continued in the term of court just completed. Last November four handbill ordinances were held invalid in an opinion in which Mr. Justice Roberts spoke for a majority of eight. 9 The Court decided that the purpose to keep the streets clean is insufficient to justify an ordinance which prohibits a person from handing literature to one willing to receive it. The opinion is important, furthermore, for the

---

9 Schneider v. State, 308 U.S. 147, 60 Sup. Ct. 146 (1939).
emphatic statement which it contains contrasting the function of the Court in civil rights cases with that in other constitutional cases. The court said: "Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions. And so, as the cases arise, the delicate and difficult task falls upon the courts to weigh the circumstances and to appraise . . . . the reasons advanced in support of the regulation . . . ."

In May, Mr. Justice Murphy spoke for the same majority in holding that freedom of speech was violated by the drastic anti-picketing statute of Alabama and a similar ordinance of a California city.10

Later in the same month, the Court handed down what is perhaps its most striking civil rights decision. In Cantwell v. Connecticut,11 it unanimously held unconstitutional as an invasion of religious liberty an ordinance forbidding solicitation for charitable or religious purposes without a permit. Under the ordinance, permits were to be issued only after a finding by the Secretary of the Public Welfare Council that the cause was a religious one. The defendants were members of Jehovah's Witnesses, a group which is actively opposed to organized religious, Protestant and Catholic alike. They were engaged in house to house canvassing, equipped with a portable phonograph and a set of records, as well as books and pamphlets. The phonograph records consisted of descriptions of the books which the defendants were attempting to sell. It was their custom to ask permission to play one of the records and then to solicit the purchase of the book.

Cantwell was convicted for inciting a breach of the peace as well as for violation of the ordinance requiring a permit. It appeared that the defendants were operating in a neighborhood where about ninety per cent of the residents were Roman Catholics. They stopped two men on the street and were given permission to play one of their records. The record described a book entitled "Enemies," and included an attack upon the Catholic church. The men who were ap-

11 60 Sup. Ct. 900 (U.S., 1940).
proached testified that they were incensed by the contents of the record and were tempted to strike Cantwell. But on being told to be off, Cantwell immediately packed up his bag and left. There was no evidence that he was personally offensive or entered into any argument.

Mr. Justice Roberts used the following language in setting aside the conviction for inciting breach of peace: "In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader . . . . at times, resorts to . . . . vilification of men . . . . prominent in Church or State, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy."

The Supreme Court's strong plea for tolerance—even of the preaching of intolerance—came at a most critical time. Popular irritation against the activities of Jehovah's Witnesses had reached the boiling point in many communities. In a single month, while the case was pending, there were some fifty incidents of mob lawlessness against members of the sect in twenty states, in every section of the country. Whether these attacks resulted from the militant religious policy of the group or from their pacifism, or their unwillingness to engage in flag salutes, it is difficult to say. But in any event, the inability of many of our citizens to maintain their sense of proportion or to exercise self-restraint constitutes one of the most alarming signs of the times. We need to remember the words of Mr. Justice Holmes, that freedom of thought means not "free thought for those who agree with us, but freedom for the thought that we hate."12

I have traced the fifteen year record of growing vigilance on the part of the Superior Court in the protection of civil rights. The American Bar has had an important part in this rejuvenation of traditional American liberties and in the discussion of their relation to national defense. I have already referred to the Committee on the Bill of Rights of the American Bar Association. The Committee has been in

existence for only two years, but in this period it has been of great service in the development of public opinion on these subjects.

The work of this Committee has been three-fold. Its intervention in the Jersey City freedom of assembly case was widely praised in newspapers representing all shades of opinion. The Committee also intervened in the flag salute case to which I shall refer. It is now considering intervention in a case which might test the right of an employer freely to express his opinion to his employees with respect to unionization or the choice of a particular union. Let me say in passing that I hope that this right will soon be conceded or tested out. For if prohibitions of picketing are invalid as invasions of freedom of speech, the same would seem to be true of regulations denying to employers the right to express their opinions. In either case abuse should be checked by measures short of prohibition.

A second type of activity of the American Bar Committee has been in furthering the organization and work of special state and local bar association committees in this field. There are now fifty-one such groups, including your own committee under the chairmanship of Mr. W. J. Murray, and that of the Indianapolis Bar Association under the leadership of Mr. Walter Myers. Some of these state and local committees have done work of the very greatest value. I might mention, particularly, the Chicago Bar Association Civil Rights Committee, with whose work I am familiar. Its chairman, Mr. Willard L. King, has recently been cited by the Chicago Civil Liberties Committee for distinguished service in the cause of civil liberty in Chicago.

The American Bar Association Committee has also an educational program. According to one of its spokesmen, this program may well become "the organized bar's greatest contribution in the preservation of the 'American way.'" One of the most striking features of this program is the publication of a new quarterly, The Bill of Rights Review. The first issue of this magazine was published in June. It contains statements of leading members of the bar which are well worth your attention. I recommend particularly the statement of Mr. Arthur T. Vanderbilt, former President of the Association, who said: "As we glance at the terrible things that are happening . . . . abroad, as we look back
over the course of history, as we reflect on the strange cases of intolerance or worse that our own courts have had to deal with, is it not clearly demonstrated that there is no task of the lawyer that can equal in fundamental importance the preservation of the rights of the citizen as guaranteed by the First Amendment?"

Why have I spent so much time tracing the recent developments in the protection of civil rights and the contribution of lawyers to this cause? It is because I think that this tendency furnishes substantial hope that our gigantic problems of national defense will be solved without undue sacrifice of individual rights. But we have come to realize that avoiding unnecessary restriction is not enough. We are convinced that a positive program is necessary not only to check subversive activities of foreign governments but also to promote loyalty to American institutions. Of particular interest, therefore, are the decisions dealing with legislative efforts in this direction. In the present setting, the question decided in 1923 in *Meyer v. Nebraska*\(^{13}\) appears in a new light. In this case the Court struck down a law forbidding foreign language teaching in grammar schools. Justices Holmes and Sutherland dissented on the ground that such regulations might be viewed as reasonable efforts to promote national unity through the use of a common language.

Even more striking is this decision when it is contrasted with the action of the Court last June in *Minersville School District v. Gobitis*.\(^{14}\) Here the Court upheld a regulation requiring daily flag salute by students in public schools. The regulation was attacked by children of a family affiliated with Jehovah's Witnesses, who believe that the salute violates the biblical injunction against idolatry. It was attacked more generally as an unprecedented requirement of affirmative expressions of opinion. Again the Committee on the Bill of Rights of the American Bar Association filed a brief in support of the attack.

Mr. Justice Frankfurter stated the question as one of peculiar solemnity, as a question concerning the validity of a legislative effort to promote "national cohesion, to safeguard the nation's fellowship," to develop "that unifying sentiment without which there can ultimately be no liberty,

---

\(^{13}\) 262 U.S. 390, 43 Sup. Ct. 625 (1923).

\(^{14}\) 60 Sup. Ct. 1010 (U.S., 1940).
civil or religious.” He characterized this objective as “an interest inferior to none in the hierarchy of legal values. National unity is the basis of national security.” In their efforts to promote this end the Court held that legislatures should have much freedom of action.

Mr. Justice Stone alone dissented. “History teaches us,” he said, “that there have been but few infringements of personal liberty by the state which have not been justified, as they are here, in the name of righteousness and the public good.” “While expressions of loyalty, voluntarily given, may promote national unity, it is quite another matter to say that their compulsory expression by children in violation of . . . . religious conviction can be regarded as playing so important a part in our national unity as to leave school boards free to exact it despite the constitutional guarantee of religious freedom.”

These cases present, it seems to me, exceedingly close questions of judgment. If I should express my own opinion it would be in favor of the dissent in each case. I believe that the assimilation of various national groups is an objective of increasing importance and that reasonable efforts to promote this end by checking the use of foreign languages should be sustained. Of much less importance, I believe, was the question in the flag salute case. The exemption of religious objectors from such observances would not seriously impede the development of patriotic sentiments among the school children.

But efforts such as these are certainly insufficient to promote the deepest loyalty. If loyalty is to be more than a passing sentiment or thrill it must result from a profound sense of values jointly cherished, of principles shared by citizens of our country. Education and free discussion of the principles of democracy will go farther in developing real loyalty than compulsory flag salutes. It will go farther than the exclusion from our universities of students who are not yet convinced that democracy is the ideal form of government. The development of such loyalty must remain a leading objective in our program of national defense.

We must seek to understand more profoundly what it is that we are defending and why it is worth the effort which we are making. We have heard much about the democratic way of life, but are we clear about the principles upon which
it rests and the specific respects in which it differs from the systems which we hate and fear? As Mr. Vanderbilt has said, we need to face fundamental questions as to the relation of the state and the individual, as to the purposes of the state and the ideals and aims of individual life. Now these are questions of moral and political philosophy, and for well over a half century educated Americans have neglected them. This was not always so. In the early days of the country, its leaders and educated citizens in general read widely the classic works in political philosophy. But we have grown up in an age in which science and scientific method have dominated intellectual life; we have often sneered at philosophical questions since they cannot be answered by the methods of scientific investigation. In our universities, the departments of government have been concerned increasingly with the mechanics of power politics. Political science has largely become a study of who gets what and how. Political theory, as it was widely studied and discussed in the first decades of our country’s history, has been all but forgotten.

We need to analyze the meaning of freedom. Let me borrow the words of one of your favorite, though long absent, sons. Wendell Willkie put at the head of his statement of principles the proposition that the purpose of government is to make men free. But what is this human freedom that is the purpose of government? Is it simply the absence of constraint or coercion, the freedom to do as you please, to come and go and to eat and drink? This was not the view of the founders of our country. In the language of Mr. Justice Brandeis, “Those who won our independence believed that the final end of the State was to make men free to develop their faculties.” He was speaking of freedom to pursue the ultimate happiness of man, the full development of the intellectual and moral powers that make us men.

We need to analyze other concepts basic to our American faith. Philosophers have told us that the state enables the individual to seek happiness by promoting the common good, which is peace, order, and justice. And justice is promoted through the rule of law. But do we mean this? Is the common good anything but a pious phrase to hide the conflicts of individual and class desires? Has justice any real meaning except in terms of the interest of the stronger?
Is law anything but what the courts and the enforcement officers will do in fact? It is questions such as these that we must face and answer before we can be confident of our devotion to democracy and our ability to promote the deepest loyalty among our citizens.

While the development of such loyalty is a vital part of our defense program, it is not the only part. What of the more immediate measure for checking subversive activities? We must of course push ahead with both zeal and intelligence the work of investigating the activities of foreign interests. We are agreed that this work must be in the hands of responsible officials and not of private vigilantes; and we realize that the officials must have adequate powers. In this country, we have hitherto been free from the kind of police surveillance which has been accepted as routine in most European countries. There are dangers, of course, in any steps which we take in this direction, but in time of national peril I do not think that we can defend a right of privacy from governmental scrutiny and inquiry.

Take for example the recent act for the registration and fingerprinting of aliens. We can understand the feeling akin to terror which this inspires in the hearts of many refugees from central Europe. There is still too clearly imprinted in their minds a picture of the methods of secret police and the horrors of concentration camps. We should see to it that such legislation is administered with all intelligence and consideration; many of the aliens to be registered are loyal persons who have declared their intention of becoming American citizens. But even such aliens should be willing to accept considerable inconvenience in order to aid in our efforts to locate and deal with activities which may endanger us all.

We cannot assume, of course, that the most dangerous activities are to be found among aliens. And if the experience of the Department of Justice indicates that steps such as the registration and fingerprinting of citizens is necessary in order effectively to carry out their work, I believe that all of us should accept such legislation as a necessary evil. For protection against the obvious dangers of such measures, we must see to it that its administration is in the hands of men whose devotion to American liberties is not open to question. In this connection the record of Attorney General
Jackson goes back to the last war when as City Attorney of Jamestown, New York, he made a courageous stand for a sane enforcement of wartime legislation.

I think that I should approve also the Voorhis Bill for the registration of certain organizations and the filing of information concerning their activities. The Bill applies to organizations which engage in both political activity and what is referred to as civilian military activity, including the training of its members in the use of firearms or engaging in military drill or parades. Registration is also required of organizations which engage in either political or military activity if they are subject to foreign control; that is, if they accept financial contributions from any foreign government or political party, or if their policies are determined at the suggestion of or in collaboration with any such foreign interest. I believe that we should have full information as to the activities of such organizations.

We must have not only investigation but also relentless prosecution of criminal acts which threaten our defense program. It may be that new statutes are necessary; our criminal laws must keep pace with the ingenuity of possible enemies. But the investigations of the Department of Justice should make it possible to define in reasonably specific terms the activities prohibited. The capacity of the American Bar should be equal to the task of drafting statutes which will meet the actual dangers without using language so sweeping that it may prohibit legitimate expression of opinion. We learned during the last war that, when popular feeling runs high, juries, and even federal judges, cannot always be relied upon to give a fair application to vaguely worded criminal statutes.

In any new criminal legislation I believe that we should be careful to preserve the right of free public criticism of government officers. In the months to come, we will need criticism as well as support. We cannot assume that the development of our program of national defense will always take the wisest form or that government departments will always operate at maximum efficiency. As Professor Cushman has recently put it, "This right of public criticism must be preserved because we cannot safely destroy it. If the things which have happened in British and French politics have any lesson for this country it is to emphasize the folly
of assuming that because the nation is in peril the govern-
ment in power is always right. To stifle free public criticism
in a time of national danger may be to protect the incompete-
tence which may cost the nation its life. We cannot afford
to run that risk."

In the months to come we shall have many demands for
the complete suppression of unpopular groups. Many of our
citizens will not be satisfied with a policy of closely scrutin-
izing the activities of bodies such as the Communist Party
and the German-American Bund, and the policy of taking
action only against specific unlawful practices. There will
be stronger clamor for a policy which might turn such or-
ganizations into secret conspiracies whose underground ac-
tivities would be more difficult to unearth and combat.

In considering such proposals I think that we must rec-
ognize that today there is little danger that sympathy with
the Nazi cause may gain substantial headway in this country
in the near future. In the hey-day of the Ku Klux Klan or
that of Father Coughlin and Huey Long, I should not have
said this with confidence. Today, however, the public temper
is such that the danger is not that Fascist ideology will
spread but that we shall go farther than necessary in bor-
rowing Fascist methods of suppression. Nor is there any in-
dication that sympathy for the Communist cause is spreading
at this time. First the Russian deal with Germany and then
the invasion of Finland made deep inroads in the ranks of
Communist sympathizers in this country. True, we have not
lacked apologists for these actions as well as for the German
and Italian aggressions. But in neither case are they gaining
adherents, in neither case do they constitute what the Su-
preme Court referred to as a "clear and present danger." We
may well give thought to the statement of the American
Youth Commission, of which the chairman is Owen D.
Young, former president of the General Electric Company.
As reported in "Time," the Commission counselled: "If dic-
tatorship comes to the United States it will not be as the
result of propaganda but of economic paralysis, uncontrolled
monopoly, unemployment and poverty."

I have suggested that one of the greatest dangers con-
fronting us is the development of hysterical public sentiment.
In checking this development, I believe that the lawyers of
the country can be of the greatest help. It can be checked
only by the counsel and example of courageous men in communities, great and small, throughout the land. It is to you, perhaps more than to any other group, that our citizens look for leadership. You are in a position to help whip up public fear and frenzy to a point where the demand will be irresistible for measures which would make those of 1918 seem mild by comparison. You are also in a position to counsel sanity and calmness and to help prevent our undermining the structure of American liberty. We must remember that the excesses of the prosecutions of 1918 resulted, not so much from the belief of responsible officers that such measures were necessary, as from the clamor of a fear-inspired public.

Events in Europe have inspired much talk about the inherent weakness of democracy, the inability of democracy to defend itself. Let me remind you in closing that this is not the first time that such pessimism has been expressed. We need to recall other critical periods in our country's history. We need to read, for example, the history of the presidencies of Washington and Adams. As we read this record, we realize how real was the danger that the principles of our Constitution might then have been undermined by forces from abroad. These principles were attacked on the one hand by the advocates of the doctrines of revolutionary France and on the other by those who wanted to make of our country an aristocracy of wealth. And the controversy was by no means an academic debate.

Nor was it merely a danger to our form of government. The maintenance of our position as an independent and sovereign state amid the wars and intrigues of Europe was no easy task. Our diplomats were given scant respect in London and Paris; illegal attacks upon our commerce were openly countenanced by both England and France. Both parties to the European conflict counted upon American party strife to advance their interests.

It was in this situation that the harassed Federalist Party drove through Congress the famous Alien and Sedition Laws of 1798. The first of these acts authorized the President to order from the country all aliens whom he thought dangerous or suspected of any secret activity against the government. The Sedition Act made criminal the publication of any false, scandalous or malicious statement designed
to bring the government, the Congress or the President into contempt or disrespect.

We need to remember the storm of opposition which the Alien and Sedition laws evoked, and the verdict of historians that they contributed, in large measure, to the distintegration and defeat of the Federalist Party. We need to remember, furthermore, that they were courageously opposed by John Marshall, although that action jeopardized his future as a leader of the Federalist Party. Marshall expressed his opposition to the acts in these words: "... had I been in Congress when they passed, ... I should have opposed them because I think them useless; and because they are calculated to create unnecessary discontents and jealousies at a time when our very existence, as a nation, may depend on our union ..."

One cannot but be impressed with the courageous leadership which could see in those difficult times that our union and strength are promoted by the maintenance of freedom of discussion. Here was ground upon which Marshall and Jefferson could stand together. To be sure, in 1798, civilization had not yet refined the instruments of warfare or of propaganda which we have today. But in view of the weakness of the infant republic, who can say that the threats from abroad were less serious than they are today. We can still afford to listen to the words of Jefferson's first inaugural with which I close.

"If there be any among us who wish to dissolve this union, or to change its republican form, let them stand undisturbed, as monuments of the safety with which error of opinion may be tolerated where reason is left free to combat it. I know indeed that some honest men have feared that a republican government cannot be strong; that this government is not strong enough. But would the honest patriot, in the full tide of successful experiment, abandon a government which has so far kept us free ... on the theoretic ... fear that this government, the world's best hope, may ... want energy to preserve itself? I trust not. I believe this, on the contrary, the strongest government on earth."