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CHANGING ATTITUDES TOWARD FREEDOM†

JOHN LORD O'BRIAN*

It may be helpful to epitomize at this point some of the changes which have been brought about by executive, legislative and administrative action during the short period of time from 1940 through 1950, altering substantially some of the traditional concepts of the rights guaranteed to the citizen by the First and Fourteenth Amendments. The particular rights to which I refer are freedom of thought, freedom of speech and freedom of association. These are the more important changes:

I. The enactment by Congress of these provisions of the Anti-Subversive Act of 1940:

(1) Establishing guilt by association as a valid test of guilt applicable both to citizens and aliens;

(2) Overriding the decision of the Supreme Court by making the power of deportation retroactive and unlimited in time;

(3) The action of Congress exempting deportation proceedings from the operation of the Administrative Procedure Act and thus overriding the decision of the Supreme Court that the functions of prosecutor and judge must be separated in administrative proceedings.

II. In March, 1947, the promulgation by the President of the so-called Loyalty Order requiring an examination into the loyalty of persons employed by the government and of persons applying for government positions.

(1) The authority conferred by the President on the Attorney General in the Loyalty Order to classify organizations which, in his opinion, are of a subversive character, together with instructions to

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furnish copies of these lists to Loyalty Boards, Government Agencies, etc.

(2) The authority granted by the President to the administrative officials operating under the Loyalty Order to take into consideration as evidence these lists of subversive groups and, in their discretion, to consider membership in such groups as one of the tests of the loyalty of an employee.

(3) The enlargement in the Loyalty Order of the doctrine of guilt by association as a test of loyalty by making it applicable not only to persons who held membership in or were affiliated with a subversive group, but adding in a new category persons in "sympathetic association with" such organizations.

III. In 1947, the introduction of a type of trial procedure hitherto unknown; that is, the trial of the issue of the loyalty of a citizen upon secret, undisclosed information obtained from unknown persons or secret agents and without granting to the accused person the safeguards ordinarily afforded in the trial of both civil and criminal cases under the Constitution.

IV. The authority conferred by the President in 1947, and by the Congress in 1950, upon administrative officials to make determinations of the issues of loyalty or of security involving the interpretation of the guarantees of the Bill of Rights.

V. The use of secret agents, employees of the F. I. B., to investigate and report upon the private lives of citizens, not only with the purpose of detecting criminal or subversive activities, but also for the purpose of determining fitness for appointment and ascertaining information bearing upon their loyalty or disloyalty.

VI. In the period of 1940 to date the greatly increased number of instances of abuses of power by legislative committees in the conduct of hearings and the looseness of procedure frequently resulting in irreparable injury to the character or reputation of innocent persons.

VII. Certain provisions of the Act of 1950, and particularly the Internal Security Section, authorizing the Attorney General in time of war or national emergency, acting for the President, to arrest and detain by administrative warrant, persons, both citizens and aliens, "as to whom there is reasonable ground to believe that such person *probably will* engage in or *probably will* conspire with others to engage in acts of espionage or sabotage."

(1) The provisions of the same statute authorizing the Attorney General, in his discretion, in hearings given the accused to refuse to

disclose certain types of information and of evidence in his possession.

(2) Finally, the establishment in this statute of an administrative procedure for trials and review subject to only a limited type of judicial review, thus undertaking to deprive the citizen under such circumstances of his right to adequate protection in the courts.

These, then, are the definite changes which have already taken place and which are subjecting our courts to grave and unaccustomed strains in attempting to give expression to the policies so laid down by Congress.

Summarizing these changes, these developments of one decade are not unrelated, one to another. They reflect in the aggregate a marked departure in our treatment of individual thought and expression, which has proceeded along two broad courses, and the end of which is not yet in sight.

First, the standards by which guilt or disqualification is established have been progressively broadened. Proof of overt acts has been replaced by appraisal of beliefs or expressions. Proof of guilt beyond a reasonable doubt has given way to proof of a reasonable doubt as to innocence. For the first time in our history, Congress has established the alien doctrine of guilt by association, as a measure of conduct by citizens.

As standards of guilt have broadened, procedural safeguards have been narrowed in unprecedented fashion. Persons have had their reputations irreparably injured through being stigmatized as disloyal without having any opportunity to meet the charges or the evidence against them. Frequently they have been met with secret, undisclosed information furnished by anonymous sources, and have been afforded no hearing in any realistic sense. As though recognizing that such procedures are alien to our judicial system, Congress and the President have turned to administrative enforcement, with the result that—again for the first time in our history—administrative officials possess broad powers to determine issues of individual liberty, involving guarantees contained in the Bill of Rights.¹

The differences in point of view of members of the present court depend largely upon the importance which they attach to measures intended to protect the security of the nation on the one hand, and, on

¹Cf. Mr. Justice Jackson, dissenting in *United States v. Spector*, 72 S. Ct. 591, 594, 96 L. ed. 544, 547 (1952) protesting against administrative ruling on deportation being conclusive on courts in criminal trials.

the other hand, their conception of the liberties guaranteed to the citizen by the First Amendment. The dissenting Justices in recent cases accent the latter consideration. For example, in the *Dennis* case, Mr. Justice Douglas said:

"But the command of the First Amendment is so clear that we should not allow Congress to call a halt to free speech except in the extreme case of peril from the speech itself. The First Amendment makes confidence in the common sense of our people and in their maturity of judgment the great postulate of our democracy. Its philosophy is that violence is rarely, if ever, stopped by denying civil liberties to those advocating resort to force. The First Amendment reflects the philosophy of Jefferson 'that it is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and order'."²

Whereas, in the same case, Mr. Justice Jackson said:

"Also, it is urged that since the conviction is for conspiracy to teach and advocate, and to organize the Communist Party to teach and advocate, the First Amendment is violated, because freedoms of speech and press protect teaching and advocacy regardless of what is taught or advocated. I have never thought that to be the law."³

On the other hand, Mr. Justice Frankfurter emphasized the need for the Court to accept, if possible, the precautions thought necessary by Congress, saying:

"Primary responsibility for adjusting the interests which compete in the situation before us of necessity belongs to the Congress. The nature of the power to be exercised by this Court has been delineated in decisions not charged with the emotional appeal of situations such as that now before us. We are to set aside the judgment of those whose duty it is to legislate only if there is no reasonable basis for it."⁴

The extreme difficulty of making a just choice between considerations of individual liberty and of public security is again illustrated by the opinion written by Mr. Justice Frankfurter in the case of *Joint Anti-Fascist Refugee Committee v. McGrath*. In that opinion is discussed the all-important question of the weight to be attached in these

²*Dennis v. United States*, 341 U. S. 494, 581, 590, 71 S. Ct. 857, 903, 907, 95 L. ed. 1137, 1189, 1194 (1951).

³341 U. S. 494, 561, 574, 71 S. Ct. 857, 893, 900, 95 L. ed. 1137, 1179, 1186 (1951).

⁴341 U. S. 494, 517, 525, 71 S. Ct. 857, 871, 875, 95 L. ed. 1137, 1156, 1161 (1951).

critical situations to the scope of the clause guaranteeing Due Process of Law. Impatient with legalistic limitations upon the protection afforded by this clause, he emphasized thus the necessity for fair play:

"The requirement of 'due process' is not a fair-weather or timid assurance. It must be respected in the periods of calm and in times of trouble; it protects aliens as well as citizens. But 'due process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances. Expressing as it does in its ultimate analysis respect enforced by law for that feeling of just treatment which has been evolved through centuries of Anglo-American constitutional history and civilization, 'due process' cannot be imprisoned within the treacherous limits of any formula. Representing a profound attitude of fairness between man and man, and more particular between the individual and government, 'due process' is compounded of history, reason, and the past course of decisions, and stout confidence in the strength of the democratic faith which we profess. Due process is not a mechanical instrument. It is not a yardstick. It is a process. It is a delicate process of adjustment inescapably involving the exercise of judgment by those whom the Constitution entrusted with the unfolding of the process."⁵

What he was suggesting is something which has been very much in the minds of the public, namely, that elemental conditions of fair play ought to be imported into the constitutional guarantees of due process of law in order to observe its basic meaning, and that while summary procedure may at times be sanctioned by history or obvious necessity, recognition of these instances in the Supreme Court has been rare. In remonstrating against determinations in this field by administrative officers, he said:

"That a conclusion satisfies one's private conscience does not attest to its reliability. The validity and moral authority of a conclusion largely depend on the mode by which it was reached. Secrecy is not congenial to truth-seeking and self-righteousness gives too slender an assurance of rightness. No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it. . . . Due process is not confined in its scope to the particular forms in which rights have heretofore been found to have been curtailed for want of procedural fairness. . . . Due process is perhaps the most majestic concept in our whole constitutional system. While it contains the garnered wisdom

⁵Joint Anti-Fascist Refugee Committee v. McGrath, 341 U. S. 123, 149 162, 71 S. Ct. 624, 636, 643, 95 L. ed. 817, 842, 849 (1951).

of the past in assuring fundamental justice, it is also a living principle not confined to past instances."⁶

Justices Black, Douglas and Jackson on different occasions have likewise all evinced concern over the impingement of administrative power upon the liberties guaranteed to the citizen in this field.

But over and beyond these tangible evidences of the effect of our distrust, suspicion and fear and the attitude of some of our courts, other disturbing symptoms have appeared. I refer to the growth of secrecy in the operations of our government.

Constant references in the daily press and on the radio to confidential files, to anonymous accusations and to the expanding necessity for protection of governmental secrets, have brought an atmosphere of mystery and sinister influence into our discussions of vital policies. This is a new development in this country and one which is affecting to a substantial degree the thinking of the public. Time forbids the exploration of this vast and varied field. Some of the considerations are colored with the necessity for protecting the national security. With this type of secrecy aimed to prevent the disclosure of secrets in the fields of diplomacy, atomic energy, military plans and policies, etc., etc., all of us are in sympathy. But what I wish first to draw to your attention lies in a much narrower field, that is the increasing resort to secrecy in legal procedures, with particular reference to its effect upon the historic freedom of the individual.

Closely allied with this subject is the new doctrine that our government, in certain civil litigations, has inherent rights as a sovereign which give it a superior and preferential position as against the rights of an individual defendant. Of this phase more later.

For generations we have been voicing our agreement with the oft-repeated statement of Lord Acton:

"Everything secret degenerates, even the administration of Justice; nothing is safe that does not show how it can bear discussion and publicity."

In the past we believed that stability in our government was largely due to absence of secrecy. For we have long accepted as a truism that government by consent means government by discussion; that the stability of our whole civilization rests in the last analysis upon the conscience of the individual and his sense of responsibility, and that one fundamental essential of that stability is the right of criticism

⁶Joint Anti-Fascist Refugee Committee v. McGrath, 341 U. S. 123, 149, 173, 71 S. Ct. 624, 636, 650, 95 L. ed. 817, 842, 855 (1951).

freely expressed. But the validity of this whole statement of principle depends in turn upon the citizenry being alert and fully informed. There should be no need to add in this gathering that for the same reasons the right of cross-examination is the most essential of all rights for the protection of the individual.

The necessity for secrecy in these matters of national security which affect military and diplomatic spheres lies outside this discussion. Nor need we consider at this moment the question of how we are to deal more effectively with subversive individuals and subversive organizations. All of us want this done, and effectively done. The only question in that connection is whether the methods we are following are either justifiable or truly effective. For at all times, no matter what the crisis, one fundamental consideration which should be borne in mind is the effect of secret operations of government upon the historic rights of the individual.

Confining this discussion for the moment to the secrecy which results from contentions by government officials that they or the Administration are entitled to assert government privilege against the disclosure by them of documents or other evidence in judicial proceedings, it is surprising and disconcerting to note the extreme position into which this tendency has developed. There are two basic questions: First, on what theory can the executive branch of the government claim a privilege? It may be readily conceded that there is a privilege which may be asserted to protect "state secrets" as well as some forms of the traditional "informers' privilege," and the legislative branch is, of course, competent to provide privilege in special instances for protection of particular and definite categories of information. It may also be that the courts in special instances will recognize other categories which should be protected by privilege, even in the absence of legislation.

The second basic question is, Who should determine in any given instance whether the evidentiary information should be protected from disclosure,—that is, the executive agency which possesses the information or the court before whom the controversy arises? Decisions in some of the cases dealing with this general problem suggests the possibility that the answer should depend upon whether or not the government is a party to the litigation. It may be doubted, however, whether this fact should make any real difference.

In *United States v. Cotton Valley Operators Committee*⁷ a civil anti-trust case, the government attorney refused to produce certain

⁷339 U. S. 940, 70 S. Ct. 793, 95 L. ed. 1356 (1950).

documents and went so far as to deny the right of the court to scrutinize such documents and make a determination as to whether they were privileged. The government attorney, having been given a fair opportunity to produce the information, refused to do so whereupon the court dismissed the case. Because of an even division in the Supreme Court the action of the lower court was affirmed without opinion. In *United States ex rel. Touhy v. Ragen*⁸ a subordinate of the Attorney General acting on orders from the Attorney General refused to produce documents in response to a subpoena duces tecum and the Supreme Court upheld the regulation, but did not pass upon the privilege. These two cases illustrate the extreme character of the government's assertion of its rights to withhold information. That is, the Attorney General asserts that the executive branch has a privilege of refusing to disclose any information in its possession regardless of its character and whether or not the government is a party to the litigation; provided, only, that the appropriate department head believes that the disclosure would operate against the public interest. The government also relies on a congressional statute which empowers the head of each government department to promulgate regulations for the "custody, use and preservation of records" in his department. Such regulations when promulgated ordinarily provide that all information is confidential and shall not be disclosed without the approval of the head of the department.

More important, however, the government also insists that the determination of whether or not information should be privileged from disclosure must be made by the executive branch and not by the courts.

Up to now the courts have refused to accept the government's more extreme assertions, although the decisions on the various claims of the government are not altogether comprehensive. Frequently, however, the courts have been compelled to rule on these assertions of privilege in litigations in which the government itself is a party. In discussing this privilege, Judge A. N. Hand recently said:

"It has been the policy of the American as well as of the English Courts to treat the Government when appearing as a litigant like any private individual. Any other practice would strike at the personal responsibility of governmental agencies which is at the base of our institutions."⁹

Unfortunately, the decisions of the courts are still in a confused state in dealing with such important questions as whether reports by, or information in the possession of, the Federal Bureau of Investigation

⁸340 U. S. 462, 71 S. Ct. 416, 95 L. ed. 417 (1951).

⁹*Bank Line, Ltd. v. United States*, 163 F. (2d) 133 (C. C. A. 2d, 1947).

are protected from disclosure either in civil suits or criminal prosecutions. On the most important phase of the matter, the question of whether the determination should be made by the executive branch or by the courts, there is still confusion.

In a recent case the Court of Appeals of the Third Circuit dealt with this problem in these words:

"The Government contends, as we have stated, that it is within the sole province of the Secretary of the Air Force to determine whether any privileged material is contained in the documents and that his determination of this question must be accepted by the district court without any independent consideration of the matter by it. We cannot accede to this proposition. On the contrary we are satisfied that a claim of privilege against disclosing evidence relevant to the issues in a pending law suit involves a justiciable question, traditionally within the competence of the courts, which is to be determined in accordance with the appropriate rules of evidence upon the submission of the documents in question to the judge for his examination *in camera*. . . . But to hold that the head of an executive department of the Government in a suit to which the United States is a party may conclusively determine the Government's claim of privilege is to abdicate the judicial function and permit the executive branch of the Government to infringe the independent province of the judiciary as laid down by the Constitution."¹⁰

One phase of the position sometimes taken by the Department of Justice was recently illustrated in the trial of a civil anti-trust case at New York City. It developed there that one of the important witnesses called by the government had had numerous conferences with officials of the Department of Justice in connection with the bringing of the suit and had given them information and advice. Over the objection of the government counsel, the court permitted the cross-examiner to bring out the nature of these discussions. Government counsel asserted that if the court ruled against him on the question of privilege, the action of the court would "destroy, impede or dry up the source of information which the Government may have available to it if you bring out what was said in the conversation between them."

This excuse has been repeatedly given by the law officers of the government in asserting their right to refuse to disclose documents or other evidence. Their assertion, in short, is if they are required to

¹⁰Reynolds v. United States, 192 F. (2d) 987, 997 (C. A. 2d, 1951). This problem was presented in acute form also in the so-called Coplon cases tried in Washington and New York, in each of which the court compelled the government to disclose information in its possession gathered by the Federal Bureau of Investigation. Vide.

disclose evidence which they themselves believe to be privileged, it will make more difficult the work of the Department of Justice in obtaining information from witnesses in the future. Regarded from the standpoint of the public interest, this statement might well be considered a pretext rather than a valid excuse.

On the oral argument before the Supreme Court in the *Cotton Valley Operators* case,¹¹ counsel for the government frankly asserted that in such litigation "the Government stands in a different position than the private litigant." Trial lawyers are all too often confronted in court by similar utterances by government counsel. Such assertions might be interpreted to indicate a drift toward statism. What are the implications of these attitudes? The citizen cannot invoke secrecy for his protection nor can he claim this kind of privilege in our courts. Can it be that there has come into existence a supreme, separate and tangible entity known as the government which, acting in its own self-interest may deny equal rights to one of its citizens? It would seem that those asserting this doctrine cannot have considered the implications—or else they are not profoundly versed in American history. The motto on the wall of Solicitor General Lehman's office in the old days read: "Whenever in the Courts, Justice is done to one of its citizens, the Government wins its case." Surely the essentials of that justice cannot have changed.

The importance of maintaining the independence of each of the three great departments of government certainly needs no emphasis with this audience. A sense of realism, nevertheless, suggests that perhaps the time has come to re-examine the scope of executive discretion. The legal fiction that each executive department or agency has at its head an all-wise and disinterested statesman concerned only with thoughts of the public interest and constitutional right may have had validity in earlier simpler days. Whether the same sacrosanct quality should now be attributed to these officials, overwhelmed as they are with innumerable and complex problems of administration, and presiding over whole hierarchies of subordinates, is at least a legitimate question for inquiry. This is even more obvious to those of us who have carried the responsibility of government posts and who know how decisions of policy are actually made by subordinates in day-to-day problems of administration. Such a review involving grave questions of constitutional power need not now concern us. The problem suggested by the constantly increasing resort to secrecy on the part of various government officials is the broader problem.

¹¹339 U. S. 940, 70 S. Ct. 793, 95 L. ed. 1356 (1950).

All of these observations take on special pertinence when considered in relation to the Internal Security Act of 1950.¹² The extreme character of this statute seems thus far to have gone unnoticed. Historians will, I think, regard it as a fitting climax to the decade of legislation and executive and administrative action inspired by fear and pressure of unchecked mass emotion which began with the enactment of certain features of the Anti-Subversive Activities Act of 1940.¹³ Time forbids an exhaustive review of this statute. The subdivision pertinent to this discussion is designated as the "Emergency Detention Act."¹⁴ Under it the President is authorized to proclaim the existence of an internal security emergency in the event of the invasion of the territory of the United States or its possessions, declaration of war by Congress, or insurrection within the United States in aid of a foreign enemy. The heart of the statute is in this language:

"Sec. 103 (a). Whenever there shall be in existence such an emergency, the President, acting through the Attorney General, is hereby authorized to apprehend and by order detain, pursuant to the provisions of this title, *each person as to whom there is reasonable ground to believe that such person probably will engage in, or probably will conspire with others to engage in, acts of espionage or of sabotage.*"

It will be noted that this statute in terms embraces citizens as well as aliens. It sets up detailed administrative procedure for the review of the causes of detention, in which the initial hearing officer, an administrative official, is required only to find probable cause for detention. I have already cited to you some provisions of this statute but in connection with what has been said about secrecy they deserve re-emphasis here. The most questionable feature is the provision that, although an accused person may introduce evidence and may cross-examine witnesses, "the Attorney General or his representative shall not be required to furnish information the revelation of which would disclose the identity or evidence of Government agents or officers which the Attorney General believes would be dangerous to the national safety and security to divulge." It is further provided in Section 104 (f) that in case of board or court review the Attorney General shall present to the board, the court, and the detained person *to the fullest extent possible consistent with national security*, the evidence supporting a

¹²64 Stat. 987 (1950).

¹³54 Stat. 1201 (1940).

¹⁴64 Stat. 1019 (1950), 50 U. S. C. A. § 811-826 (1951).

finding of reasonable ground for detention with the limitation above quoted.

More pertinent are the provisions of Section 108 (g):

"In any proceeding before the Board . . . the Board and its hearing examiners are authorized to consider under regulations designed to protect the national security any evidence of Government officers and agencies the full text and content of which cannot be revealed for reasons of national security, but which the Attorney General in his discretion offers to present."

It is important to note that in these provisions Congress has for the first time undertaken by statute to confer upon the Attorney General discretion to refuse to divulge information gathered by government agents or officials. Although the statute purports to confer a right of judicial review directed to the findings of the Board of Review, this privilege is restricted by the provision that the findings of the the Board of Review "with respect to questions of fact, if supported by reliable, substantive and probative evidence *on the record considered as a whole*, shall be conclusive." This rule of evidence apparently originated in the Administrative Procedure Act. It is doubtful whether the framers of that code ever intended that it should be applied in a case involving the liberty of the citizen. Again, although this statute provides that it shall not be considered to suspend or authorize the suspension of the privilege of the Writ of Habeas Corpus, it would seem that the court, in considering such a case, might be hampered by the pendency of administrative hearings. It would also seem questionable whether under the privilege conferred on the Attorney General to withhold evidence, the court could have before it an adequate record. Here, again, Congress has deliberately undertaken to confer on administrative officials power to deal with those liberties of thought, speech and association which were guaranteed under the First Amendment and under the Fourteenth Amendment. Whether or not this statute will ultimately be held to be constitutional, it is in and of itself another example of the length to which the lawmakers have gone in response to the pressure of war hysteria and mass emotion. This statute, considered in connection with the other statutory changes made during this decade, together with the acts of the executive in connection with the loyalty inquisitions, certainly evidences a definite and persistent trend in American policy. In the view of many, it appears equally certain that this tendency is steadily undermining the constitutional guarantees which have hitherto protected the citizen.

As I have indicated, many legalistic and technical arguments have

been advanced in support of the changes brought about by the tendencies which I have described, but is there not a broader aspect from which this whole subject should be viewed? First of all, why not face up to the underlying problem and endeavor to ascertain impartially and objectively what these mysterious dangers are, appraise the threats soberly, and then determine whether they can be adequately dealt with without the enactment of laws so extreme as to menace the freedom of the individual. This is a task which has not yet been accomplished. Past experience indicates doubt as to the potency of foreign propaganda in this country. The great labor organizations seem to be dealing successfully with the problem of infiltration. If it should develop that foreign attempts at infiltration have been frustrated by the alertness and intelligence of our people and have accomplished only negligible results, perhaps the time will come to re-assert the constitutional guarantees.¹⁵ The real danger to our institutions is a danger which originates not in the field of overt hostile acts or in tangible events but in the field of ideas, and mischievous ideas can be met and defeated only by the power of constructive ideas.

While, as John Stuart Mill long ago pointed out, it has occasionally been possible in past centuries to suppress by force the dissemination of ideas, the large conclusion to be drawn from history is that in a democratic society ideas cannot be put down or modified by means of governmental machinery. Lord Acton thought that reliance upon the intrinsic power of freedom was the broadest lesson to be learned from history. He also thought that the future of mankind must be determined by applying stringently the test of common morality. An underlying sense of decency based on considerations of morality is, we like to think, the predominant and distinctive trait in American character. The difficulties that lawmakers and courts have met in weighing the value of conflicting ideas is one of the oldest problems in government. The founders thought that they had solved it and the experience of this nation for one hundred and fifty years, passing through one national crisis after another, apparently confirmed the wisdom of the constitutional guarantees. Some at least of the tendencies that I have described, I think you will agree, can never be satisfactorily reconciled with these fundamental guarantees.

There are in our time many serious-minded students of government who believe that danger lies in the tendencies which I have described. No one denies the need for protecting the security of the

¹⁵Cf. The point of view recently expressed by Arthur M. Schlesinger, Jr.: "The one striking fact about the Communists in the Thirties and Forties, was not their success but their failure." *S. R. L.* May 24, 1952, p. 39

country. Communistic doctrines are abhorrent to every true American.

To repeat, they are especially disturbed by these major developments:

1. Statutory establishment of guilt by association.
2. The power given administrative officials to determine issues which involve interpretations of the First and Fourteenth Amendments.
3. The refusal to grant fair hearings to persons whose behavior is under scrutiny in formal governmental proceedings.
4. The authority to use secret, undisclosed evidence of unknown informants in hearings affecting the liberties guaranteed by the Constitution.

What has been said here is not intended as sweeping criticism or broad condemnation of all the governmental action aimed at protecting national security. My comment is directed rather to certain particular phases of these activities, which if unchecked may lead to the undermining of our sense of justice. It may be historians, looking back to this period, will find that the greatest danger to our welfare lay not in the threats of foreigners, but in our own failure to rationalize these problems and our own weakness in yielding to emotion and disregarding the ultimate rights of the citizen. As Bryce observed in his work *Modern Democracies*:

"As for the love of justice, it belongs to mankind generally, and to all systems of law. Such differences as may be noted between different peoples consist not in the reality of the wish to give every man his due—*Suum quique tribuere*—but in the self-control which prevents emotional impulses from overriding justice."

I have spoken of the sense of decency and fairness of the plain American. There is another distinctive quality which has made possible our form of government and made possible self-government in the English-speaking world generally. That quality is self-restraint. One of the wisest sayings of Thucydides was: "Of all manifestations of power, restraint is the one which most impresses mankind." And I am bold to assert that evidences of this restraint have been sadly lacking in our government during the past dozen years.

"There is nothing so daemonic as reason entirely divorced from moral will."

Fortunately, or unfortunately, Americans do not ordinarily concern themselves with legal considerations, but on problems of this general character they base their decisions upon factors of moral judg-

ment. And for the most part their concepts of justice are colored by those same influences. The considerations of morality and idealism that, generally speaking, have characterized our foreign policies from early days down to the Marshall Plan should be all-sufficient evidence of this truth. As President Conant of Harvard remarked a few years ago, "for generations the American people have historically taken their stand on the side of Christian humane ethics." But whether this attitude of theirs is due to ethics or to an innate sense of decency and fairness makes little difference. The average American, we like to believe is always on the side of fair play. Whatever as lawyers we may think or say, Americans in general instinctively agree with the declaration of Elihu Root, a great Secretary of State of the last generation, that:

"Under the view with which this Government was founded and exists, there is a duty of public morality as truly as there is a duty of private morality. There can be no sovereignty superior to the law of morals. Above official power stands always the conception of public right. The answer to the question 'What is the rule of public morality: What is the test of public right?' is to be found . . . not in the reasoning of acute and highly trained specialists, but in the conscience of the great body of the people when the people are instructed, law-abiding and liberty-loving, and when their voice is free from the impulses and distractions of special occasions, interests and desires."

And this lofty concept of public right, of public morality as here defined, is equally true of the American sense of fair play and the time-honored insistence of Americans upon fair hearings wherever their personal liberties are involved. What I am trying to say is that the right to a hearing—the right to a fair hearing— involves a moral principal and one recognized as an element of "public morality" long before the adoption of the Constitution. It has become a legal right because it was a moral right, and the age-old test remains unchanged—the test of "what is fair between man and man." This phase of the American tradition is the most precious heritage that has come down to us. It must not be sacrificed now to the hazard of undisciplined emotion, nor to the sophistry and casuistry of the new ideologies. To preserve that heritage is not only essential to the future of our own organized society, but it is even more necessary if we are to hold our distinctive place in this changing world. It short, the American idea of justice must be considered not as abstract doctrine in which we alone are concerned. It must be appraised against a background of brutality, of torture, of massacre and memories of horrors passing belief. A modern philosopher reminds us that:

"There is only too much reason to fear that Western civilization, if not the whole world, is likely in the near future to go through a period of immense sorrow and suffering and pain—a period during which, if we are not careful to remember them, the things that we are attempting to preserve may be forgotten in bitterness and poverty and disorder."

This is a grim picture; it may be an exaggeration. Nevertheless there is every reason to believe that the world, your world, for the next generation will be one of tension, of alarms, of dangers. To repeat, it is in this atmosphere that American ideals of justice must be appraised and tested. It is imperative that, if the nation is to survive, if its influence is to be effective in a chaotic world, Americans must discipline themselves to resist emotional stress. They must uphold those traditional standards of fairness and justice which have been and will be landmarks of morality to be seen by all men everywhere.

Legislation, even when intelligently thought out, can accomplish much. But it is scarcely necessary to remind this audience that laws cannot inculcate qualities of character—not a sense of private honor, not self-restraint, not even faith in one's country. Neither law nor legal proceedings can create ideas or ideals. On the surface at least some of the tendencies and trends which we have been considering seem incompatible with fundamental characteristics of the American character and the common conscience of our people. In the minds of disinterested students all of these considerations lead into a growing conviction that in considering the guarantees of individual freedom, legalistic interpretations and sophisticated concepts should be laid aside and both the legislative and judicial branches of our government should refrain from reliance upon narrow interpretations of the guarantee "of due process of law." Instead they should frankly recognize the American right to a fair hearing and restore the elementary principles of fair play to their ancient place in our polity.

If Congress does not choose to protect these freedoms, a still greater strain will be imposed upon the courts. But after all, the courts are our ultimate safeguard. Looking back in long historical perspective, whatever our disappointments in a particular period, they have ultimately responded to the power of that common conscience of which I have spoken. We may still be hopeful, therefore, that our judges in this present time of confusion and change in the end will establish principles which will protect the American sense of fair play, and in so doing protect also the constitutional guarantees of freedom of thought, of speech, and of association.