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Berge, Wendell

CIVIL LIBERTIES AFTER A YEAR OF WAR

An Address

by

WENDELL BERGE

Assistant Attorney General of the United States

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CIVIL LIBERTIES AFTER A YEAR OF WAR

It would be idle to deny that our civil liberties are facing a crisis in the world of today. The nature of the crisis, however, is not generally understood. It is commonly misconceived to arise from the fact that during wartime the government has assumed stricter controls over the lives of the people. But such is not the real source of the crisis. So long as democracy functions controls are in turn delegated to and withdrawn from the executive branch of government as necessity requires. But while this process goes on, the normal democratic checks on abuse of power still operate.

The crisis in civil liberties arises from factors much deeper and more far-flung than the temporary assumption of wartime controls by executive government. It arises from the threat to our civilization that is inherent in the world-wide war we are fighting. Our civil liberties will disappear if we, the liberal forces of the world, lose either the war or the peace. If we win both the war and the peace, our civil liberties will be safe.

So I emphasize at the outset that we who believe deeply in the Bill of Rights must not be deflected by false issues from our greatest usefulness to the cause. We must see to it that after we win the war we establish a peace which will assure order and freedom to the common man throughout the world. Without such a peace there can be no security for civil liberties here or elsewhere. Therefore, we who are interested in furthering and protecting civil liberties must concentrate on the larger issues. As David Reisman so well stated in his recent study on "Civil Liberties in a Period

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of Transition:"^{1/}

Nothing will bring totalitarian dictatorship more quickly than to see it where it does not exist and to use this fantasy as an excuse for avoiding responsibility for action which seeks to vindicate democracy and to remove the roots of fascism.

I do not mean to say that organizations like your own should not be on the alert to check particular abuses of power when they occur. I the fact that they occur must not be misinterpreted as evidence that civil liberties generally are in danger. Rather the fact that you are permitted actively to work against the abuses is potent evidence that civil liberties are very much alive and that democracy here is still actively functioning. In calling the government to account from time to time, you and other organizations furnish proof that our vital freedoms in this country are fundamentally impaired by the war. If it were otherwise, you would not be functioning as an organization, and we would not be meeting today. And so I repeat that civil liberties are facing a crisis, but it stems not from any present invasions of our rights at home, but from the world-wide menace which we must conquer if we are to remain free.

That this is true will become clearer upon a brief review of what a year of war has cost us in terms of civil liberties. Before Pearl Harbor dire predictions were made as to what would be the effect upon our civil liberties of involvement in war. It was said that the government would take over and operate all industry. The rights of labor would be forgotten and free speech and free press would vanish. Our mental processes would be whittled

^{1/} Reprinted from PUBLIC POLICY, vol. iii, 1942 (Published by the Graduate School of Public Administration, Harvard University, Cambridge, Massachusetts)

and pounded into a rigid mould by official propaganda. Trial by jury and the writ of habeas corpus would be supplanted by stern military rule. It was even asserted, and I believe it formed the basis for an editorial in one of our leading newspaper chains, that the elections of 1940 would be the last to be held in this country if we "permitted our leaders to drag us into the imperialistic conflicts of Europe."

Such false ideas as these were honestly held by a large number of people. But now, after more than a year of war, we may take stock of our civil liberties and appraise, to some extent at least, what we have lost and the prospects for preserving and extending what we have retained.

Freedom of speech, which includes freedom of the press, is the key-stone of our Bill of Rights. What has happened to freedom of speech under the impact of war?

First of all, it has been subjected to certain rules of censorship. The primary object of this censorship is to prevent the leakage of vital information to the enemy. But it is a unique prohibition we have invoked. Our domestic censorship is on an entirely voluntary basis. The newspapers, the radio industry and the other channels of public information have agreed with the Office of Censorship not to disseminate certain types of strategic information. The code is reinforced by no law or compulsion whatever. Only in the transformation of information beyond our borders is there a legally enforced censorship.

That, certainly, is not an onerous impairment of the right of free speech in a nation at war. Only if the power of censorship is abused; if needless and arbitrary rules are imposed; if we are denied information which a free people at war ought to have, or if information is twisted and colored

to give an inaccurate picture of events -- only under such circumstances would our wartime censorship become an unreasonable interference with our freedom of speech and of the press.

That such infringements have not occurred is, it seems to me, a patently obvious fact. The Office of Censorship, the Office of War Information and the Public Relations Offices of the Army and Navy have been criticized from time to time on various grounds. In virtually every instance this criticism has been due to the withholding of military information -- a fact which puts these agencies in the uncomfortable position of being unable, usually, to publicly explain or defend their actions without revealing the very facts they are endeavoring to conceal from the enemy. It has not been a criticism of the existence of censorship itself, or of the broad policies under which it is being applied. Of course, censorship of any sort is an unfamiliar tool for the government of the United States to utilize, and it was inevitable that there would be some uncertainty in the initial application of censorship practices. But it certainly cannot be seriously contended that the application of censorship during the first year of war has in any significant sense unduly interfered with the freedom of the press.

Another wartime limitation on freedom of speech is the application of the laws relating to sedition. The line between seditious utterance and legitimate criticism is often a difficult one to draw. The clear and present danger doctrine enunciated by Mr. Justice Holmes^{2/} has frequently been quoted as constituting the criterion for sedition prosecutions. As a statement of policy or general objective it is still valid. As a guide for determination of action in specific cases, it falls short.

^{2/} See Schenck v. United States, 249 U.S. 47 (1917).

We are fighting a war in which propaganda is one of the weapons; a war in which the civilian population is engaged in almost as important a sense as the military and naval forces. It would be quite unrealistic to say that utterances and writings cannot directly interfere with the prosecution of the war unless they specifically counsel insubordination, disloyalty, mutiny or refusal of duty by the armed forces, and unless they are spoken or written under conditions that make them amount to an immediate incitement to action. When concerned with waiting for a danger to become clear and present, the test may enforce the risk of meeting it too late.

On the other hand, we must, of course, be careful not to adopt such a broad rule that persons will be prosecuted for bona fide criticism of war methods and objectives merely upon a superficial showing that the words spoken or written may have had some remote tendency to discourage civilian morale.

Quite apart from technical considerations, it must be obvious to intelligent persons that during war there are some types of utterance directed against the prosecution of the war which fighting people will not permit to be said. The sedition statutes represent the legislative expression of the popular will that some curtailment of obstructionist utterances shall occur in wartime. The statute is very loose and general in its terms. Admittedly, through irresponsible prosecution policy it could be abused.

I submit, however, that during the present war the use of the sedition laws has not been abused. I do not mean to claim that no mistakes have been made. But as one of those charged with the responsibility for enforcing these laws, I can sincerely tell you that we have made an honest effort only

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to institute prosecutions on evidence that seemed to be clear and convict of subversive purpose and substantial obstruction to war morale.

Many of the defendants we have prosecuted were constantly repeating most or all of the Axis propaganda themes. It is understandable, of course that a loyal American citizen shall hold some opinions critical of the policies and conduct of the war. But when he frequently repeats substantially all of the Axis propaganda themes, and when he appears to be active in his desire to spread them, then the government can well afford to scrutinize his conduct more closely in an effort to determine whether his actions should be deemed seditious. As Vice President Wallace has urged, "We must be especially prepared to stifle the fifth columnist in the United States who will try to sabotage not merely our war material plants, but even more important, our minds."

I can assure you that we are making every effort to exercise intelligent and responsible judgment in the selection of cases, and we approach these prosecution problems conscious of the need to allow a maximum play for free criticism, even in time of war. And if occasionally we err in the selection of cases, there are the juries, the trial judges and the appellate courts to correct our mistake. And if anyone says that those guarantees are inoperative in time of war, that hysteria prevails and influences courts and juries so that the rights of defendants are not adequately protected, the answer is to be found in the fact that some of these cases have already been won by defendants, albeit not very many.

The fact that our courts are functioning as usual, the fact that the rules of evidence for the protection of defendants are still applicable, the

fact that in order to obtain a conviction the government must still prove guilt beyond a reasonable doubt -- these facts make all the more remarkable the recent tendency of some persons to seek to try in the newspapers and on the floor of Congress the sedition conspiracy case now awaiting trial in the District Court for the District of Columbia.

In this particular case, which has attracted nationwide interest, indictments have been obtained before two different grand juries after many months of inquiry. The avenues are open through appropriate proceedings in court to raise every possible objection to the validity of these indictments, to question the theory on which they are founded, or to challenge the substantial character of the government's evidence. And yet, notwithstanding, numerous charges have already been made publicly, in advance of trial, that the government does not have a case.

I suggest that it would be appropriate to reserve judgment on such questions until after this case has been tried. Certainly the likelihood of a fair trial for the defendants is greater in a court than in any other forum.

An editorial from a midwestern newspaper recently came to my attention which I would like to think reflects the attitude of large numbers of intelligent and understanding people toward these problems. This editorial stated:

It will be for the historian to say how true and genuine the American democracy proved itself to be in a period of a great national crisis.

* * * Will he say that in a period of great peril the American people, reflecting the attitude of the department of justice, conducted themselves with admirable restraint, frequently in the face of great irritation and provocation?

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Up until now, at least, the answers seem to be clear and simple. Where prosecution was deserved, prosecution was had. * * *

This Freedom from hysteria, from hot-headedness, and from mob psychology that so frequently results in a cruel injustice to individuals or to racial groups is majestically impressive. It is a different experience than that had in hundreds of American communities during World War I.

As for religious freedom, I suppose that its continuance substantially unimpaired by the war is so obvious as to require little comment. There have been minor disturbances concerning the right of certain groups to spread their religious beliefs through unconventional channels of distribution which bring them into collision with local police regulations. But this problem is not peculiar to the war and is not to my mind primarily a problem of interference with freedom of religion. It is more a question of how far police regulations can appropriately go in limiting the use of public places for meetings, distribution of handbills, etc. Moreover, since the war we have obtained one notable victory in West Virginia in the prosecution of a local police officer who had personally participated in mob violence against members of a religious minority -- in this instance Jehovah's Witnesses.

In the West Virginia case the underlying cause of the mob violence had been the refusal by the victims to salute the flag. It is, therefore, very interesting to note that in another case, also arising in West Virginia, a specially-constituted three-judge Federal District Court has courageously faced the delicate question of the constitutionality of compulsory school flag salute requirements. The Court, in an opinion by Judge John J. Parker, concluded that these requirements infringed the constitutional guarantees

religious freedom when enforced against school children having religious convictions against such ceremonies. This decision will be reviewed by the Supreme Court, but the remarkable fact is that such a decision is handed down at all in this country in time of war. It is inconceivable that such a decision could be made in a country heading for totalitarianism and abolition of civil rights.

In what other spheres have our accustomed liberties been affected by the war? Consider freedom of movement. The draft, manpower controls and the regulations regarding alien enemies unquestionably have hampered the American people in their freedom of movement and in the exercise of their traditional right to come and go as they please.

There is also our freedom of action as consumers which has been very materially altered. We can no longer drive up to a gasoline station and order the attendant to "fill 'er up," and drive off for a vacation in the country. We cannot buy as much coffee or butter or canned goods as we would like to enjoy. We have to fill out questionnaires in order to procure such necessities of life as fuel oil.

Again, there are restrictions on our freedom as producers. These are best typified by the virtually forced conversion of industry to war production, the withholding of raw materials and supplies, and the host of orders and regulations promulgated by the War Production Board, the Office of Price Administration and the Office of Defense Transportation. Such infringements on the rights of the businessmen two years ago would most certainly have resulted in a 'march-on-Washington' by the massed chambers of commerce of the entire nation.

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And, finally, there are numerous minor restrictions enforced primarily by the sanctions of public opinion rather than of law. Our freedom to invest our money as we choose is limited by the pressure to buy war bonds. Unnecessary travel and lavish entertaining collide with the sanctions of public opinion, which in such instances are quite as effective as the sanctions of law.

Such are the casualties among our civil liberties after a full year of war. In general, I do not see how we can have any cause for real complaint. Our energies must be centered on the winning of the war. Making due allowance for inevitable mistakes, I do not see how on the whole we could have fewer restrictions without impairing our effectiveness as a fighting nation.

Our freedom of speech has been curtailed -- yes -- but the fundamental right has not been destroyed or even perceptibly weakened. The inalienable right of every editor to lambast the government whenever he has a mind to do so is preserved today in all its lusty vigor. Indeed, you people of Chicago should be the last to believe that the press is shackled when evidence to the contrary meets your eye every morning over your breakfast coffee.

And I think the same observation applies to the other rights I have enumerated. We could scarcely have become an effective foe in this war if we had not suffered the regimentation of the draft, of manpower controls in essential industry, of conversion to war production, and of the rationing of raw materials as well as vital consumer goods. I think that the American people as a whole are sacrificing these tokens of their freedom with complete

good will and understanding, and that they realize that their loss is temporary.

Indeed, the American people look confidently toward an era of even greater freedom, of even wider acceptance of democracy here and elsewhere in the world when peace returns. For the fight to protect and extend civil liberties on the positive side has gone on even during the war.

Here are some conspicuous examples that are worth citing:

The Executive Order of the President setting up the Committee on Fair Employment Practices has done more to break down race barriers in industrial employment than all the agitation of the previous decade.

The general handling of conscientious objector cases by the Selective Service Administration and the courts has evidenced a degree of tolerance hardly to be matched in any other nation at war. The opprobrium of "slacker" and "draft dodger" which made miserable the lives of so many sincere people in the last war is completely lacking today.

Minority persecutions and mob violence arising from spy hunts and similar war-inspired motives have been almost totally lacking during this first year of war.

Within its own immediate sphere the Department of Justice has fought aggressively during the last twelve months for the preservation of constitutional rights. We have fought peonage and slavery in several important prosecutions. We have counseled and advised with State prosecuting officers in many cases where Federal investigation has indicated that the states have exclusive jurisdiction. State officials and the local United States Attorneys have been most cooperative and helpful in carrying out these policies of the Department in local situations.

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We have been ever on the alert to protect the sanctity of the ballot. A far-reaching step was achieved in the now famous Classic case, which in effect extended federal jurisdiction to those primary elections which are an integral part of the elective process, or are tantamount to an election. Within the past twelve months the Department has had numerous occasions to apply the principles of the Classic decision, namely, that the right to vote for members of Congress and the right to have one's vote counted as cast, without dilution by fraudulent practices, are federally secured civil rights.

And in what has always been one of the most hopeless of all federal crusades, the crusade against the barbarities of lynch law, our persistent efforts have at last yielded fruit. Within the past fortnight we secured an indictment by a federal grand jury in a lynching case, the first such indictment in forty years. Four private citizens and a deputy sheriff of Jones County, Mississippi were charged with the lynching of Howard Wash, a negro prisoner held in the jail at Laurel. This case has attracted widespread attention and very likely will ultimately determine whether the new application of the civil rights statutes which we have invoked can withstand the assault of the familiar States' rights argument. If we are sustained, the way will be cleared for prompt and vigorous action by Federal authorities in many types of lynching cases which heretofore have been closed to us. This federal lynching indictment, I think you will agree, is a milestone of very great importance, and it has been reached in this year of war, 1943.

You are familiar with the argument that we should bury our ideals of social reform for the duration of the war; that we cannot afford to

tract our attention from the main job of winning the war to more nebulous projects. The same myopic vision is responsible for the argument that we should not go about stirring up racial issues, labor issues or any of the other more sensitive political sore spots until we can settle down comfortably after the war and do it calmly and dispassionately. This, of course, is just another way of saying 'let's try to get by without doing it at all.'

Let us keep clearly in mind that human society does not possess the regenerative qualities of the fabled phoenix which arose with new life and plumage from the ashes of its own destruction. When the havoc of war passes, man must laboriously fashion a new structure for living. In the post-war world our civil liberties must be extended, they must gain a popular acceptance among all people not merely as abstractions but as dynamic realities. Civil liberties cannot develop in a society that denies full economic opportunity or equal justice before the law to a part of its people. They cannot develop in a social system that complacently accepts inequality of opportunity.

It surely must be clear that the future of civil liberties is inextricably tied up with the peace that follows military victory. The sabotage of Woodrow Wilson's peace program after the last war has been the great tragedy of the 20th century. And yet the lines of those who would throw the coming peace to our enemies are already forming. Even now we can hear the rattle of their sabres as they prepare to cut the cords of cooperation between the United Nations after the war. They seek again what the historian Frank H. Simonds called "peace without responsibility." Their

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counsels are the counsels of despair. Their course, if followed, would lead to the final cataclysm of democracy and the complete destruction of our civil liberties.

Surely we shall not let it come to pass. We shall build on a broad basis for the civil rights of the new world of tomorrow. We shall strive today to strengthen the foundation on which those rights will rest. We have seen already what liberties we have been called upon to sacrifice because of the war. The sacrifice is not too burdensome. As yet the temporary loss of these liberties constitutes no real threat to our way of life. Even while we yield some of our liberties to the exigencies of war, we are strengthening and expanding others. And we shall labor with increasing vigor to see that the new world we build incorporates the true ideal of individual liberties for every man.