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Security and the Constitution

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SECURITY AND THE CONSTITUTION

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THE jurist has a large role in the American society in the delicate task of preserving the security of the Nation. On one side is his traditional role of holding tenaciously to that integrity which constitutes the moral and ethical foundations of the United States constitution. On the other is the legitimate prayer to keep the governments in these United States secure from enemies within as well as from those without.

But for the jurist the prior role is his higher role. A constitution for the ages obligates present generations to live under traditions evolved from the past as protectorate of the future. We may use up our lands, but we must be ever mindful we do not annihilate our culture, in which freedom is the guide and the individual intellect can rise to its highest proportions.

The role of the jurist and that of the lawyer is tied inextricably to the institutional role of the Supreme Court in the governmental structure of the United States. The constitution as spoken through the Supreme Court stands at the helm of our lawmaking, be it counseling, adjudicating, legislating or administering; all are subject to judicial review in terms of the letter and meaning of the constitution. Why the extensive reliance in America on lawmaking and on the jurists especially? Law means order; without order the elements of a democratic society, representative government and individual freedom, are lost.

But the law that provides order is not a static legal phenomenon. Processes are created and administered in the functioning of government to provide solutions to the social problems of the day. These processes created for the administration of government are subject to review and control under the constitution of the United States. In this sense the constitution is enforced through the processes which administer to those social problems, and stability and order is maintained through adapting the constitutional structure to the functioning of government in light of the political needs of the day.

Shaping the constitution to the political problems has cultural as well as legal consequences; to law, in the legal principles by which the constitution is adapted and enforced and, to the culture, by preserving the traditional ethical and moral foundations of individual freedom and representative government.

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The legal principles are explained in the decisions of the Court in terms of individual freedom and representative government, and out of the cultural cohesion from trust in these high precepts comes evolution through order.

In this perspective, law in America is an exciting subject and extremely complex. The complexities of modern society and traditions of America demand ever greater reliance on law and on the higher law of the constitution. The jurist must equip himself in learning and understanding to answer the demands of modern America for reliance on a creative law that reviews the functioning of government in terms of problems of greater complexity and at the same time preserves the constitutional structure of individual liberties and representation by the people. The integrity of law must be preserved to meet the responsibilities, otherwise the legal processes will be used merely to justify, not to review, whatever is wanted to be done at the moment.

SECURITY

Much of the social history of individual freedom and representative government is concerned with the problems of political conflict over internal security. The history of treason shows that treason was a political weapon used to attack and destroy opposing political factions and dissenting minorities. The constitution limits treason to levying war against the United States and to adhering and giving aid and comfort to the enemy. The statesmen of the constitutional convention sought to prevent the misuse of the judicial process and other government power during periods of public excitement and political conflict by prohibiting convictions for treason that are not supported by proof of overt acts of force and violence against the security of the nation.

The courts were not to be used to enforce a tyrannical power in the government to impose allegiance and loyalty, and in the end conformity to the government's policies, by convictions of treason based solely on thoughts and expressions in opposition to the government. Advocating and teaching a different form or philosophy of government is not treasonous under the constitution, at least not without proof of overt acts of force and violence against the government.

In addition to protection of individual liberties of thought and speech and freedom of association to participate in the processes of government, the constitutional statesmen feared that the misuse of power through treason would constitute a danger to the security of the nation. This danger was pointed to by James Madison in writing for *The Federalist* that "new-fangled and artificial treasons have been the great engines by which violent factions, the natural offspring of free government, have usually wreaked their alternate malignity on each other." John Adams thought that those who framed the constitution "feared despotism and arbitrary power more than they feared treason."

As so often happens in political history, a law is drafted in a constitution, a statute, or in a court decree that attempts to provide a protective veil against the misuse of power by having law dam up history, so to speak, to prevent the recurrence of arbitrary power in the sovereign or in the majority. What happens? Despotism from the same or similar political behavior recurs in another legal form. By law alone the jurist has little influence over political behavior. Only by cultural and institutional evolution can political behavior be stayed within the high principles that underlie the constitution.

The misuse of government power against opposing political factions occurred very soon after the beginning of the new government. In 1798, leaders of the Federalist Party in control of the national government enacted the Alien and Sedition Acts because of the dangers of war with France and more because they feared the attacks on their principles from the unlimited democracy of

the Republican Party. The Federalists referred to the Republican Party as the Jefferson faction.

It became a historic mission of the Federalists to save the country from too much democracy, which they considered to be incompatible with order and security. The political philosophy of the Jefferson faction was thought to be incompatible with the nation's internal security. The Federalists could not turn to the law of treason because the constitution prohibited the use of government power against peaceful participation in political affairs by opposing factions in the guise of protecting the nation's internal security. But the purpose and philosophy underlying the treason clause was not as yet institutionalized as a political philosophy of the American society through which the constitution was to be administered. This had to come later as reflected in the law of the First Amendment.

SEDITION

The Federalists turned to the English common law of seditious libel, then enjoying current favor in England, for protection of the sovereign's security. The sedition statute enacted under the great seal of the United States on July 14, 1798, made it a federal offense to make false, scandalous or malicious criticisms of the President, Congress, or the government of the United States with intent to defame the government or to bring the officials into disrepute "or to incite against them the hatred of the good people of the United States," or to encourage resistance to the laws. In short, political controversy was made a crime for those who opposed the principles and policies of the party in power, because to oppose those principles endangered the peace and security of a nation founded upon those principles.

The acts expired after two years in operation and when Jefferson became President he pardoned all who had been convicted. Many years later Congress paid an indemnity for the fines.

The legal machinery of internal security for the Civil War has a history all its own. The briefest reference is made to it here. During the open talk of rebellion prior to the Civil War the national government imposed no restrictions because it was seditious or disloyal. When the Civil War began the government adopted statutes to deal with insurrection and conspiracy to overthrow the government. The writ of *habeas corpus* was suspended, martial law was declared, and the executive power was used to round up Southern sympathizers. Military arrests were made in substantial numbers. Publication of some newspapers was briefly suspended by military order. Despite the drastic restrictions a national election was held during the War and the Lincoln administration was forced to defend its policies against vigorous criticism and political attack. But the opposition was free to conduct its campaign for the defeat of Lincoln and his party and for ending the War.

Following the end of the War the Supreme Court rebuked the President for establishing military commissions for trial of citizens for crimes of treason and sedition when committed outside the sphere of military operations. This is the Milligan case decreed in 1866. The constitutional philosophy of that case—civil control over the military, limitations on the inherent power of the executive, and protections of individual liberties under the Bill of Rights—has become ingrained in the political philosophy of the American people and in this sense the law of the Milligan case has great significance.

The First Great War brought to the government of the United States new and complex problems for political solution. For the first time the peace and security of the United States was inextricably tied to world peace and security. Such unknown and complex problems would inevitably have great impact upon the constitutional structure of the national government and of the states as well.

Problems of the United States growing out of responsibilities for world

security have brought disruption to the structural powers of our government, especially with regard to the continued recognition of the First Amendment in the functioning of government. The judicial institution of the Supreme Court has been pulled inevitably into the breach. The result has not been wholly defeat and despair; gains in spiritual and political strengthening can be noted. But the intellectual power of the Court has been taxed to its utmost to preserve the integrity of the judicial processes and of the executive and legislative as well. Judicial review to preserve individual liberties does more than vitalize our political faith; it builds integrity in the processes of government.

The draft act of 1917 and the declaration of war inspired our government once more to attempt to control utterances and publications by equating certain words to disloyal and seditious activity. The espionage act of 1917, which in fact had little to do with the prohibition of espionage, made it a crime to obstruct recruitment or enlistment or to cause insubordination, disloyalty, or mutiny in the armed forces. It was the administration of the government policy under the statute and not the statute and its purpose which was made applicable to Socialists and to other persons critical of war policies or other acts of the government.

In 1918, the espionage act was enlarged to make criminal expressions that were considered "disloyal, profane, scurrilous, or abusive" and that had or might have the effect of bringing "contempt, scorn, contumely, or disrepute upon" the form of government of the United States, the constitution, the flag, or the uniform of the Army or Navy. An umbrella of fear of enemy aliens and for national security spread like a silent, unseen conflagration throughout the country. Espionage and sedition laws were rushed through the state legislatures, onto the statute books, and into the prosecutors' offices for enforcement. There were over 2,000 federal and state prosecutions during the war.

The judicial process was so prostituted that it might be said the courts and juries operated a "reign of terror." Law is not self-executing. The human machinery of the judicial process collapsed from the wave of fear that enveloped our people. Our jurists, upon whom we look with such honor and respect, divorced themselves from their learning and their judicial actions from the protective integrity of the law.

The war was over by the time these circumstances, although not as yet fully realized, were presented to the Supreme Court.

As in the post-Civil War period the Court was called upon to take an active role in resolving conflicts concerning individual rights and the legitimate exercise of government power. The Court was asked to enforce the First Amendment of the constitution so that expressions of beliefs and ideas could not be equated to sedition and espionage. The Supreme Court now became the forum for the debate over the conflict of individual freedom and internal security.

Since the first case of *Schenck v. United States*, most discussions about freedom of expression have revolved around Supreme Court decisions. The debate is phrased in terms of constitutional law and theory such as the meaning and application of the clear and present danger principle devised by the Court. But more than that, each individual American ties his own political philosophy to the Supreme Court's interpretation of constitutional structure in relation to individual liberties.

In its first cases of adjudicating the administration of government under the espionage acts, the Court moved slowly in developing its new role in the enforcement of the constitutional requisites of the First Amendment. The Court, and especially Justice Holmes, has been given more than its due in terms of accomplishments and insights into the depth of the problems involved.

In the first case of *Schenck v. United States*, Mr. Schenck, who was the gen-

eral secretary of the National Socialist Party, sent out from his office leaflets, pamphlets, and other printings advocating the Socialist position on public affairs and political subjects of the day. On August 18, 1917, the party's executive committee authorized a printed card to be mailed to men who had passed the exemption boards for military service. The printing on one side expressed in general the Socialist position against the constitutionality of the draft act. It recited the Thirteenth Amendment against slavery and stated that the conscription act was in conflict with the idea embodied in that Amendment. In more impassioned language the printing labeled conscription as despotism in its worst form but confined suggested action to peaceful measures such as petition for repeal. The other side of the card admonished "Assert Your Rights." The only direct suggestion to the reader to violate the draft act was the statement that to consent would support an infamous conspiracy.

CLEAR AND PRESENT DANGER

The Court's decision was not based upon the First Amendment except in general discussion of the reasons for its decision and holding. Although the language of the decision is general, rather than technical, it actually applies the traditional notions of the common law for limitations on enforcing a government policy by a criminal offense. If the offense itself is not committed, supporting offenses are limited to attempt, assault, or incitement to commit the crime. The charge was causing and attempting to cause insubordination in the military and naval forces.

Justice Holmes writes in terms of clear and present danger which for him was then merely explanatory but since has been drawn out and encased in a highly significant legal principle. The legal principle was later used to determine the scope of the freedoms protected under the First Amendment as limitations on the functioning of government. Justice Holmes' oft-quoted language reads as follows:

> We admit that in many places and in ordinary times the defendants in saying all that was said in the circular would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done. The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. . . . The question in every case 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.

The opinion goes on to state that the question is one of proximity and degree. "When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right." The Court should regard them as protected even in war unless the expressions and circumstances constitute an incitement to others to act illegally against the government policy; the purpose otherwise is to influence public opinion which is as important for the whole society as it is for the individual and is a prerequisite to unity and support of the people sorely needed in war even more than in peace. The clear and present danger of language spoken or written bringing about acts against the government justified the jury finding that the defendant had committed the offenses charged under the sedition act.

Before leaving the Schenck case, note should be taken of the Holmes' analogy of falsely yelling fire in a theatre. The First Amendment does not protect mere noises whether they have tortious consequences or not. The oft-quoted phrase, which by now has become hackneyed, has no application to protections under the First Amendment. The phrase showed that Justice Holmes had not as yet conceived the problem.

The Court's post-war review of the cases under the 1917 and 1918 sedition acts was in general superficial and much too limited in scope in all the factors involved. The anemic recognition of the First Amendment freedoms and the extreme limitations placed upon the Court's power under the Amendment is understandable. This was the beginning of judicial review under the First Amendment and the Justices of the Court had little insight into the profoundness and continually recurring nature and growing complexities of the problems involved. No one could foresee then that the Court would later be called upon to exercise a politically powerful role to insist that the American people must preserve individual liberties and the political philosophy of their government during a period of great political conflict over preservation of world security.

The evolution of clear and present danger into a legal principle for shaping the prescriptions of the First Amendment in terms of individual liberties and integrity in the exercise of government power was not done in one opinion. This required a number of dissenting and concurring opinions and acceptance of the principle by the reconstructed Hughes Court.

WORLD WAR II

With the advent of the Second Great War the Court had evolved a legal principle that gave large scope to individual liberties under the First Amendment in relation to the peace and security of state and nation; and in administering this principle the Court itself had to play a dominant role in the preservation of these liberties. The underlying political philosophy of the Court's role in this area had continued to receive an ever larger acceptance among our people, and the work of the Court moved out into the political processes of local communities in protecting minority groups in the functioning of public schools and the local governments. Religious sects like the Jehovah's Witnesses were allowed to receive the benefits of public education without violating their religious beliefs in the flag-salute cases and were protected in the use of the public streets and parks for proselyting.

World War II came to the Court in a flourish with the case of the German saboteurs who were sent to this country by submarine and captured before committing sabotage. They were tried by military commission and sentenced to death for violation of the laws of war. The Court heard the case in special term in July, 1942, and affirmed the President's power to try enemy aliens by military commission for violation of the laws of war.

The Court was comparatively free from adjudication of the violation of the liberties of citizens growing out of the Second World War. While there was opposition to President Roosevelt's interventionist policies prior to December 7, 1941, following Pearl Harbor the war had the widest possible support. The draft cases caused serious problems in judicial review but they did not concern problems of internal security as in the First Great War.

The most serious invasion of individual rights for purposes of internal security was presented to the Court in the Japanese relocation cases. The Court upheld military internment of Japanese aliens and citizens of Japanese descent living on the West Coast on the exigencies of war-time necessity as determined by military officers and the President, and supported by the legislative branch of the government.

It was assumed intuitively without any substantial basis in fact that Japanese Americans would be inclined to disloyalty and treasonous acts in behalf of the homeland of their ancestors and that it was not possible to determine the question of loyalty on an individual basis.

Again the Court failed, as it did generally during World War I, to give constitutional adjudication what it must have to be a workable process of government—the protective integrity of the

most substantial review of the circumstances of the record and the government policy to infuse integrity into the other processes of government to justify in the fullest degree invasions of individual liberty. Following the war, the Court reviewed the circumstances for the declaration of martial law in the Hawaiian Islands and found the exercise of executive discretion insufficiently supported by facts and circumstances to justify military control of the civil affairs of the Islands.

A brief resumé for the period after 1945 in constitutional adjudication of individual liberty and internal security as evolved in the Communist cases shows that the Court has limited clear and present danger as a principle of the scope of the First Amendment and at the same time has limited the Court's institutional role. Like the Taney Court with slavery in the period prior to the Civil War, the Court had to review the functioning of government when an invasive political problem has dominated every aspect of government.

NON-COMMUNIST OATHS

Throughout the 1930's, various congressional committees had been at work to expose the pestilent activities of Communists and other totalitarian groups. Some of the committees made such farfetched allegations that their work fell into disrepute. It was not until the postwar period, when the intentions of Soviet Russia became apparent and international tensions increased, that the nation became fully alerted to the dangers to internal security from the Communist conspiracy. Congress turned to legislating in substantial measure to protect the nation's internal security against the political action of communism.

The first of this legislation to reach the Supreme Court for adjudication was the validity of the non-Communist oath required by the Taft-Hartley Act enacted in 1947 for officers of unions who wish to use the facilities of the National Labor Relations Board. The officer of the union is required to submit an affidavit that he is not a member of the Communist Party nor affiliated with it, and "that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods."

The question presented was the power of the government to enforce a policy by imposing disabilities upon individuals because of their political affiliations and beliefs. In cases following the Civil War, the Court invalidated laws which forbade persons to hold office or to follow certain callings unless they took an oath disclaiming participation in or sympathy with the South's cause in the war. Invalidation was on the theory that the legislation was attempting to punish for past conduct or beliefs, which was prohibited by the bill of attainder clause in the Constitution.

The potentiality of political strikes by Communist-led unions was thought by the Court to justify the legislative policy. But only three Justices thought the required affidavit was valid in its entirety. Justices Frankfurter and Jackson thought the prohibition of union officers who held party membership or affiliation was valid but the remaining part that invaded beliefs was invalid.

Mr. Justice Jackson wrote a widely publicized essay on communism as a concurring opinion. The Communist conspiracy should be known and made a part of the case so the Court's decision "may not be useful as a precedent for suppression of any political opposition compatible with our free institutions." Communist Party activities visible to the public closely resemble those of any other party. If the party activities merely constituted exaggeration of well-worn political techniques, as just another radical party, he would think the legislation unconstitutional.

Because of certain goals the party must be considered something different in law. The differences are the Communist Party plans to seize powers of gov-

ernment by and for a minority rather than through the vote of a free electorate; the party is dominated and controlled by a foreign government; and violent and undemocratic means are used to attain the goals of the party. Communist Party members who are members of unions are members of secret cells within the factory, union, group or community. These cells have attempted to control the labor movement so as to use labor's coercive power in the factory for purposes of Communist Party conspiracy.

The dissenting part of Justice Jackson's opinion is based upon the political philosophy that Congress cannot base the enforcement of a policy on demanding either the revelation or the rejection of beliefs and opinions no matter how odious. The first part of the section that requires disclosure or disavowal of membership, affiliation, or perhaps of relationship and association depends upon overt acts or concrete circumstances.

The difference between the two parts of the section are decisive on the question of power when the sanction is indictment for perjury. Proof of membership and relationships could be shown by proof of visible and knowledgeable criteria. Proof of one's thoughts and beliefs would lead to proof by conjecture.

This would be analogous to the olden times when men were tried for treason for wishing the king dead. Our governments are excluded "from the realm of opinions and ideas, beliefs and doubts, heresy and orthodoxy, political, religious or scientific." The right to speak out, or to publish, also is protected when it does not clearly and presently threaten some injury to society which the government has a right to protect.

It would be possible for the courts to require acts or other observable criteria to prove false swearing in relation to beliefs, but this would not overcome the odiousness of public invasion of one's inner thoughts in requiring the swearing in the first instance to enforce rejection of one's beliefs and opinions.

Justice Frankfurter's opinion is high in intellectual content. His concurring opinion is likewise a dissenting opinion in part. That part of the affidavit that requires avowal that one "does not believe in, and is not a member of any organization that believes in the overthrow of the United States Government by any illegal or unconstitutional methods" is in his opinion unconstitutional. It asks "assurances from men regarding matters that open the door too wide to mere speculation or uncertainty."

It is not merely the vagueness and uncertainty of prosecution for perjury since perjury requires an intentioned falsehood under oath. It is that the vagueness and uncertainty will allow the government power to reach through the oath to areas of men's beliefs and opinions that are inviolate and that makes that part of the affidavit unconstitutional.

In effect Justice Frankfurter uses the political philosophy and the underlying principles of due process to limit government power within the protections of First Amendment freedom. Congress must legislate so as to keep within the contours of due process. The part of the affidavit in question violates due process because of vagueness; the uncertainty in its obligation means uncertainty in the reach of government power with possible "surrender of freedoms which exceeds what may fairly be exacted."

Although Justice Frankfurter did not delineate this, a significant constitutional principle limiting the exercise of power is inevitably tied to the vagueness ground. What follows is an excessive use of power beyond the evils the government is attempting to alleviate which constitutes an arbitrary and capricious use of power. But as is stated in the Frankfurter opinion "legislation, in order to effectuate its purposes, may deal with radiations beyond the immediate incidence of a mischief."

The question is one of degree, the scope allowable for discretion in Congress reasonably to regulate but not to enter the area of oppression. Such is "the seesaw between freedom and

power"; through the Court's defining the limits to what is reasonable regulation we hope not to experience the painful cycle that makes up most of the history of governments, as Byrce points out, of anarchy to tyranny and back again.

THE SMITH ACT

The Smith Act of October, 1940, is the culmination of many years of study into Communist activities by Congress. The criminal offense created by the statute is advocating and teaching the duty and necessity of overthrowing the government of the United States by force and violence, to publish with the intent to teach and advocate the proscribed doctrine, and to organize or become a member of a group or assembly of persons who advocate and teach the proscribed doctrine. The act follows very closely the language of the New York anarchy statute reviewed by the Court in the Gitlow case.

The Smith Act is an extremely unprofessional statute to be enacted on the part of the Congress which had studied communism for some years and presumably knew something about its activities and dangers. The act fails to point to the real dangers of the Communist international conspiracy from the commission of sedition through underground activities. The act is unprofessional too because making a crime out of language alone does harm to the integrity of the judicial process and the legislative as well. This again is the equating type of offense against internal security that the constitutional statesmen sought to avoid in the treason clause. We are entitled to express a hope that Congress and the courts would be more professional in their work in light of our constitutional traditions. Political activity on the part of the Communists or any other group that is illegal in nature and destructive of peace and security in the use of violent methods, for example, must be regulated.

The Communists are extremely difficult to cope with in a democratic country because of the many aspects and forms that communism takes. There is open political activity, such as the publication of *The Daily Worker*, which takes positions on the social problems of the day. Its interest in the open forum is primarily for social welfare, such as favoring minimum wage laws or equal treatment of all the races, or in international affairs, usually favoring peace with a Russian twist.

Communists are master Machiavellians in the social order. They never fail to favor the advance of democracy in taking up the cause of discrimination against persons and groups, not because they believe in representative democracy —which they don't—but to gain support for the leaders of communism from as many sources as possible, the notion of the common front with the Communist Party as the vanguard of the proletariat. This method of political movement has been quite successful in areas held back by cultural restrictions from land reforms and economic and social betterment.

At one time the Communists thought these methods would have success in this country among the Negro population, but the American Negro is too sophisticated for the dialectically oriented Communist. What the Communists fail to understand is that what the Negro wants is very simple, not something complicated like a new social order; he merely wants to be a good American, to work and educate his children.

Another form of communism in terms of social and political activity is the secret group, often used for membership of professional groups, about which Mr. Philbrick has written. Membership in the party may be concealed or open. The concealed members and groups are often confused with the underground. Of course the secret members or groups are to further the cause, but these persons do not necessarily commit sedition or other illegal activity, like those connected with the underground. They will be called on to give their all to the

party, but in a different form. An example of a secret member would be a union or business leader or a member connected with some other respectable organization in the community.

The real underground carries on the illegal activities of communism, spy rings, sedition, espionage, sabotage or any illegal (or even legal) activity furthering the cause, as has been so ably reported by Whittaker Chambers from his own career.

The leaders of the Russian government, whether or not the Comintern or the Politburo exists, attempt to control communism in all countries in all its various forms. This strict control of the party, and strict party discipline from the top down is ironically named "democratic centralism." The leaders of the party seldom let an opportunity pass to talk on "Party unity and iron discipline"; it is such a favorite topic. A leader who deviates from this discipline commits the high crime of "revisionism." The words the Communists bandy about make one wonder whether their unintellectual parroting is psychological or environmental; perhaps it is a combination of the two. In light of such complicated political advocacy we must in due respect sympathize with Congress in the total inadequacy of the legislative process in the Smith Act to promulgate an effective policy against communism in light of our constitutional traditions.

In the Smith Act cases against the leaders of the Communist Party, they have not been indicted for those illegal activities of the underground that constitute the real crimes and the most real dangers against the peace and security of the nation. They have been indicted for violation of the Smith Act in terms of the open political activities of the party and in terms of the secret cells that carry on the same or similar activities as the open groups.

The proof comes mostly from the speeches they have made, from the books they have read and studied and taught from, the party's constitution and programs, concentration in the unions of basic industries, and the secret cells. All this is used to show the teaching and advocacy of the principles of Marxism-Leninism, meaning the teaching and advocacy of theories and doctrines that the state socialism which they advocate can be achieved only by the use of force and violence to overthrow the government of the United States.

The crime then is the teaching and advocacy of an illegal doctrine and the Marxism-Leninism theory of state organization is the illegal doctrine. Of course this socio-political menagerie is antithetical to our constitution and its traditions. But the illegality in law and government is the illegal purpose for which these theories are used. Therefore in the instructions to the jury the offense of the indictment was added to include the intent, purpose and plan of communism, to convict the leaders for managing the open and secret forms, of planning the overthrow of the government of the United States by force and violence when circumstances permitted. Then the Communists were charged with operating a political conspiracy against the government of the United States.

Even after Judge Medina's instructions made some sense out of the indictment and proof which was not there before in the prosecution of the first twelve of the Communist leaders, the clear and present danger principle as it had been created and applied would still have invalidated the conviction. Proof came from speech and language and association normally protected under the First Amendment. Although the danger was serious, the imminent tenet of the principle was not satisfied.

To validate the conviction under the constitution, the principle was amended to relinquish the requirement of immediacy when the gravity and seriousness of the evil is so great that it is necessary to protect the government and society from the danger. While the professional work of the government prose-

cutors in these cases leaves much to be desired, the Supreme Court and the lower federal courts have not abdicated themselves from their high role in holding to the constitutional traditions. Time and experience will be necessary to shape and preserve the constitution from the political excesses of the times and at the same time allow political solutions to the problems of communism.

The internal threat of communism is in part a police problem of investigating Communist espionage and sabotage. Since the peace and security of the United States is tied to world security this job is world-wide. With this in mind we must have some recognition of the magnitude of the problems facing our government. But the suppression of Communist parties within the country is objectionable on grounds not of expediency but of constitutional principle. If this must be done it should be done only in case of extreme emergency and then only with the strongest possible safeguards devised by capable hands.

It is not possible to divide our constitutional liberties among our citizens, grant to some and deny to others. And to use the problems of internal security for mass witch-hunting and political conflict exposes our society to other dangers no less insidious. This has been a recurring political phenomenon throughout our social history which has finally moved the Supreme Court to make individual liberties a predominant aspect of constitutional adjudication.

"I want to state frankly that I am a specialist in nothing that requires the reader to give attention to what I say. For seven years I have taught foreign visitors from all over the world. If I have anything to say at all, I want to say it against this background."

AMERICAN SECURITY VIEWED FROM ABROAD

By DAVID DENKER

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LAST summer, just before the conclusion of a six-week stay in America, a visiting Frenchman remarked somewhat acidly of the political atmosphere in the United States: "No, I'm not at all sure America's critics are wrong when they say your country is just another police state."

"But I don't understand," I said. "You're a scholar; your training has taught you to suspend judgment until you've examined all the facts. You've been here such a short time—and yet you've made up your mind that America has destroyed civil liberties."

"Well, frankly, I am sorry to say that