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Free Government by Free Men

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"Free Government by Free Men" †

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Boston University School of Law is cherished by its alumni. This is evident by your presence here and your action taken tonight. It is a small law school, but its accomplishments entitle it to high rank. In judges and jurists and in civic leaders and able lawyers, its contribution to the community has been far out of proportion to its size.

It is an honor to appear before you tonight for which I am deeply grateful. The invitation to speak, coming as it did through a distinguished alumnus, could not be refused, but I know that Judge O'Connell in inviting me was moved by a desire to recognize the alumni in my state, rather than a desire to pay tribute to me. I bring to you their greetings and gladly tell you that they maintain the high traditions of Boston University.

We live in an era of wars and revolutions. The liberal concepts of government which at the beginning of the era seemed likely to find universal acceptance were, after the First World War, largely swept aside by authoritarian ideology. The economic depression which followed the First World War over much of the world was attended by want and misery comparable to the ravages and suffering of war. In many nations the people, in the hope of greater economic security, surrendered their personal liberties to the state. Even in those states which preserved the liberal concepts, individual rights were restricted as greater authority was assumed by the government to meet new and complex problems. In our own country, big government cast its shadow over free institutions. Then came the Second World War. In this bitter conflict the skill and ability of our great military leaders and the courage and sacrifice of our fighting men have opened the way to final victory Under the impact of war and revolutionary forces long established institutions have been overthrown and great nations laid prostrate. While we cannot yet discern the pattern and form which the new world will take, it is evident that the problems of peace are no less complex and difficult than those of war. To meet these problems successfully we as a people must be strong and free.

Our government is a constitutional democracy. The powers of government are exercised through representatives chosen by the people at popular elections. In the nation and the states to assure a government amenable to the people, these powers are defined by written constitutions. To prevent abuse, the powers are divided among the three departments, legislative, executive and judicial. In addition, Bills of Rights guaranty certain essential rights

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and liberties to the individual, even as against his own government. The framers of our constitutions thus sought to resolve the unending struggle between authority and liberty. The vast enlargement of the authority of the Federal government opens a new phase in the struggle for liberty. In this time of great changes, we need to look to fundamental principles for our guidance. I think these may be found in the Bill of Rights. Freedom of speech, freedom of religion, the right of protection against inquisitorial processes in criminal proceedings and against cruel and unusual punishment, the right to just compensation for property taken by the government and the right to trial by jury are plainly fundamentals on which depends the American way of life.

The relative importance of these civil rights is not easy to pronounce because each has special significance, but freedom of speech is clearly the most pervasive. It is essential to the dignity and self respect of the common man. It is necessary to the democratic processes of representative government as the wise selection of candidates and right determination of issues depends upon open and complete access to the truth. The framers of the Constitution, as stated by Mr. Justice Roberts, in a recent opinion of the Supreme Court, believed that the exercise of freedom of speech and of the press "lies at the foundation of free government by free men."

Freedom of speech is American in its origin and development. It was not derived from English customs or laws as were others of our civil rights. It took form during the conflict between the British government and the American colonists which culminated in independence. It is our heritage from the resolute men and women who to achieve independence risked their lives and fortunes, and who to maintain order and freedom in an unparalled display of political genius established the Constitution of these United States.

In England, prior to the American Revolution, freedom of speech did not exist. The English licensing acts through the Seventeenth Century prohibited the publication of any periodical, book, pamphlet, or circular without the approval of the royal censor. In 1695, when the last of these acts was repealed, only one newspaper was published in London. Following the repeal, other newspapers were published but Parliament promptly responded in 1712 by an act imposing a special tax upon newspapers to restrain circulation.

These taxes were continued in to the Nineteenth Century and came to be known as "taxes on knowledge" because of their evident purpose to prevent the dissemination of knowledge. Even more effective in preventing the open discussion of public affairs was the common law of seditious libel, which consistently with the doctrine that "the King can do no wrong," made public criticism of the Crown or its representatives a felony. To prosecutions for seditious libel the truth was not a defense and this gave rise to the legal maxim, "The greater the truth the greater the libel." Only in Parliament which had won immunity from the hampering restraints was there freedom of speech.

These English laws were not compatible with a free society and did not find ready acceptance in the American colonies. When Parliament by the Stamp Act of 1765 imposed special taxes upon the colonies, including a tax upon newspapers, the taxes were vigorously resisted. The publishers of colonial newspapers and periodicals were in the forefront of this opposition and many newspapers were published without stamps in open defiance of British authority. The Stamp Act was shortly repealed to be followed in 1767 by an act imposing duties on a great variety of imports, including newsprint. This new attempt to subject the colonists to unauthorized taxation resulted in forcible resistance. This revolt against British authority did not end until the colonies by force of arms had gained their freedom. In this long and costly conflict American lawyers were among the leaders in organizing and directing resistance and in prosecuting the war.

Among the first states to adopt permanent Constitutions were New Hampshire and Massachusetts. In the Bill of Rights of each Constitution emphasis is placed upon freedom of conscience rather than freedom of speech, but freedom of the press, which was threatened by the Stamp Act, is specifically guaranteed. Each Bill of Rights declares that the liberty of the press is essential to the security of freedom in a state and that it ought, therefore, to be inviolably preserved.

The Federal Constitution as submitted for ratification contained no Bill of Rights. In spite of the limited powers granted the Federal government, the omission of a Bill of Rights became the basis of much of the opposition to ratification. As the debates upon ratification proceeded the need of a Bill of Rights to protect minorities from the abuse of Federal powers by the majority came generally to be recognized. In New Hampshire and Massachusetts the Conventions in ratifying the Constitution recommended several amendments, but none for freedom of speech or of the press. The view may have been taken that these were matters of local interest not within the limited powers of the Federal government. Thus Hamilton stated in *The Federalist* that the Federal government was intended "to regulate the general political interests of the nation," and not "every species of personal and private concern." However, in Virginia and New York, North Carolina and Rhode Island the amendments recommended included guarantees of freedom of speech and of the press.

The Congress in 1789 promptly upon the organization of the Federal government proposed amendments embodying the Bill of Rights which were finally ratified in 1791. In the resolutions submitting these amendments Congress stated "that further declaratory and restrictive clauses should be adopted" to the Constitution "in order to prevent misconstruction or abuse of its powers." The First Amendment broadly provides that,—

"Congress shall make no law respecting an establishment of religion, or

prohibiting the free exercise thereof, or abridging the freedom of speech or of the press, or the right of the people peaceably to assemble and to petition the government for a redress of grievance."

This guaranty of freedom of speech and of the press against abridgment by Congress is broad and unqualified. It applies to the powers vested in Congress because only in the exercise of these powers could Congress abridge speech. It applies as much to the power to wage war as to the power to impose taxes or any of the other powers of Congress. While the purpose to restrain Congress in the exercise of its powers is plain, there has been much difference of opinion as to the effect of this limitation upon these powers.

The first attempt to curb public speech came within the decade following the adoption of these amendments. The war for supremacy between Great Britain and France aroused intense feeling among partisans here and resulted in bitter controversy over American foreign policy. In no period in American history has the criticism of the Federal government been so venomous and unfair. In 1799 the Congress responded by enacting a law against seditious utterances, and since the purpose was to provide for the public safety during the emergency the act was limited in its operation to March 3rd, 1801. This Sedition Act of 1799 made unlawful the publication of "any false, scandalous and malicious writing or writings against the government of the United States, of either house of Congress, or the President of the United States with intent to defame." It is significant that the Congress made no attempt to revive the English law of seditious libel which penalized the publication of true as well as false criticism of the government.

The prosecutions under this act were not numerous, but the most notable against Matthew Lyon intensified the already bitter feeling. He was a publicist and a member of Congress from Vermont. In a letter he charged that President Adams had "an unbounded thirst for ridiculous pomp, follish adulation and self-avarice," and he published a letter written by Joel Barlow which also criticized President Adams and referred to his "bullying speech." For this he was prosecuted. Although truth was a defense and some extravagance of language might be excused in a political controversy, Lyons was convicted and imprisoned. While in prison he was re-elected to Congress, and in 1801, when the election of the President was thrown into the House of Representatives, he had the satisfaction of casting the vote of Vermont for Thomas Jefferson. The prosecutions for sedition, directed chiefly against political opponents of the Administration, caused a popular reaction against the Federalist Party, which contributed in no small degree to its defeat. Jefferson upon his inauguration discontinued the pending proceedings and pardoned those who had been convicted, and so none of the cases reached the Supreme Court.

The experience with the Sedition Act was so disastrous politically that the Congress for more than one hundred years made no attempt to abridge

freedom of speech. But upon our entry into the World War, Congress by the Espionage Act of 1917 prohibits in wartime (1) the wilful making or conveying of false reports or statements with the intent to interfere with the operations of the military or naval forces, (2) wilful attempts to cause insubordination, disloyalty or mutiny in the military or naval forces, and (3) the wilful obstruction of recruiting or enlistment. The clause prohibiting the publication of wilfully false statements requires no special consideration, as the guarantee of freedom of speech does not extend to deliberate falsehood. The second and third clauses do not expressly prohibit criticism either of the government or its war policies, yet criticism was dangerous because of the broad language employed to define the offense. It was impossible to determine with any certainty when public criticism of the Administration's foreign policies ceased to be legitimate and became an attempt to cause insubordination and disloyalty in the armed forces. The Espionage Act was vigorously enforced and in the more than twenty-two hundred prosecutions there were few acquittals. Consequently, critical discussion of the war or peace was largely suppressed. The constitutionality and scope of these provisions were not finally determined until after the armistice when most of the cases had been disposed of. The Act was upheld, but in the leading case *Scheuck v. United States,* 249 U. S. 47, Mr. Justice Holmes, speaking for the Court, said—

"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. It is a question of proximity and degree."

This test narrowed the loose construction which had been placed upon the statute by the lower courts during the war. The Espionage Act of 1917 as thus construed seems to have met with popular approval as it has never been repealed, but its provisions are effective only when the United States is at war. In 1940 the Congress enacted as an amendment to the Alien Registration Act a sedition law effective in peace as in war. The Sedition Law of 1940 makes criminal when done with the requisite intent (1) advising counselling or urging, or in any manner causing insubordination, disloyalty, mutiny or refusal of duty by any member of the armed forces (2) distributing written or printed matter calculated to have this effect (3) advocating, advising or teaching the desirability of overthrowing the government by force, and (4) organizing or becoming a member of any group for such purpose. The first two clauses apply in time of peace restrictions similar to those imposed by the Sedition Act of 1917 in time of war. The two clauses forbidding the inculcation of revolutionary doctrines are in interesting contrast to the right of revolution which was expounded among others by Jefferson and recognized in the Constitution of New Hampshire. In this, however, Congress is in strict harmony with the Constitution, which provides for orderly change through amendment. The Sedition Act of 1940 is chiefly significant in that it invoked

in time of peace restrictions which had been deemed proper only in time of war. In 1942, not long after our entry into the war, an unsuccessful attempt was made to enact a "War Secrets" act, which strictly administered, would have practically confined the press to the publication of official communiques. This measure would have prohibited publications in whole or in part of any map, plan, paper, memorandum, document, record or other writing in the custody of the United States made secret or confidential by statute or by the rule or regulation of any department or agency. The Espionage and Sedition Acts to the credit of the Department of Justice have during the present war been administered with admirable restraint, the only important exception being the mass prosecution for conspiracy instituted in the District of Columbia.

It may well be doubted whether the Espionage Act of 1917 or the Sedition Act of 1940 contributed materially to the winning of either World War. In contrast, during the Civil War when the nation was imperiled by strife from within, Congress did not attempt to abridge freedom of speech. President Lincoln, who had himself opposed the Mexican War, recognized the right of his opponents freely to be heard upon the vital issues of war and peace. In this great national crisis, except in war areas, freedom of speech was virtually unrestricted. In war areas, activities interfering with the prosecution of the war were dealt with by courts martial. Censorship was employed only to prevent information of military importance from reaching the enemy. In 1864 the opposition party nominated candidates for President and Vice-President on a platform which declared the war a failure, but President Lincoln was re-elected. The open debate seems to have unified the people of the northern states, as no policy of suppression could, in firm determination to win the war and preserve the Union.

The limitations of the first Amendment apply only to Congress. Since the first World War the Fourteenth Amendment has been held to impose a similar limitation upon the states. In *Schneider v. Irvington,* 308 U. S. 246, the Supreme Court declared that—

"The freedom of speech and of the press secured by the First Amendment against abridgment by the United States is similarly secured to all persons by the Fourteenth against abridgment by a state."

In successive decisions the Supreme Court has held invalid state laws which would establish some form of censorship by requiring licenses for public addresses or for the distribution of pamphlets. In a notable decision a state law imposing special taxes upon newspaper advertising was held unconstitutional and in another freedom of assembly was vindicated. The limitations imposed by the first and fourteenth amendments have been found effective to strike down federal and state laws which directly interfere with freedom of speech, but this does not assure a full and free dissemination of knowledge.

The constitution of Soviet Russia contains broad guarantees of freedom

of speech and of the press, but whatever may have been the purpose, as guarantees they are wholly ineffective because the government owns and operates the printing presses and the systems of communication. Consequently, nothing is published which the government does not approve. In the United States during the War censorship applied at the source has been effective to withhold from the American people important information especially concerning our allies, which had no relation to the effective prosecution of the War. Even before the War propaganda from federal departments and agencies had become a potent factor in shaping public opinion. This propaganda largely emanated from departments and agencies organized for other purposes. Since the War governmental propaganda has become so extensive as to make difficult a fair appraisal of public issues. In 1942 the Office of War Information was created by executive order to mold opinion here as well as abroad. When recently the appropriation for the OWI was drastically cut by the lower house a prominent columnist vigorously assailed Congress, asserting that the domestic propaganda of the OWI ought to be continued to inform the people concerning the government's aims and objectives. It is probably unnecessary to state that this critic of Congress has shown a strong bias for the government's objectives. If we could assume that our government would always be right we would have no occasion to fear governmental propaganda. Experience has demonstrated not only that no government is always right, but also that public officials irrespective of party are prone to justify their own mistakes and to insist upon their own indispensibility. Governmental propaganda is no more likely to be a revealing source of truth than other propaganda and is much more difficult to counterbalance, even when wrong. The time is here when we must consider whether governmental propaganda through its very volume shall be permitted to stifle other sources of information.

Freedom of the radio is today as essential to free government by free men as freedom of the press. However, the necessity for the regulation and allocation of wave lengths have placed radio broadcasting directly under the control of the Federal government. While the Communications Act forbids radio censorship, licenses may not be granted for a longer period than three years. The Commission in determining whether a license shall be renewed considers "the public interest, convenience and necessity." A station's status inevitably depends in some degree upon its programs. The broad powers of the Commission to grant or withhold renewals actually operates as a censorship. There is grave danger that these powers may be used not only to regulate the channels of communication, but also effectively to control the thoughts and ideas which may be disseminated over them.

The other great agencies, the press and the motion picture, despite constitutional guarantees, have also been subjected to restraints which tend to prevent the free dissemination of knowledge. The guarantee of freedom of the press does not assure freedom in the use of the mails for the distribution

of newspapers, pamphlets and other publications. In the first World War an effective censorship was exercised over publications deemed inimical to the public welfare through exclusion from the mails. Motion pictures have been held directly subject to censorship for reasons of doubtful validity.

In its development, freedom of speech fully exemplifies the struggle between authority and liberty. Our own experience demonstrates that the full enjoyment of our civil liberties even though guaranteed by the fundamental law depends upon constant vigilance. The constitutional guarantees protect us from laws violating civil liberties but not from our own excesses. Freedom of speech to function successfully requires not only vigilance in asserting our rights, but also in sustaining the rights of those with whom we disagree. Tolerance is as essential as vigilance. Social ostracism, unfair criticism, boycotts and the cruder manifestations of mob psychology are as effective to suppress unpopular ideas as could be any rule of law. Happily even in these critical times, the democratic processes of government have not been denied, and few organized attempts have been made to abridge freedom of speech.

The past warrants the belief that with freedom of speech we may approach our problems complex and difficult as they are with confidence in the future. Some problems in time will cease to trouble us, others will be successfully resolved, but others will continue to confound and confuse us. Big government is among the problems which will not pass away. It is a product of conflicting economic and social forces operating in a highly developed and complex society. We cannot expect to return to the simple ways which preceded this era. In many of its manifestations, big government is here to stay. We must control and confine it or it will control and confine us. Through trial and error, given freedom of speech, we may hope to find effective means to prevent big government from absorbing our civil liberties. In this new phase of the struggle for freedom the lawyer is eminently qualified by training and experience to lead the way. The American lawyers in this as in other great crises appreciate and accept their responsibility. Of this, a single illustration will suffice. The administrative agencies are the outstanding governmental development of our times. They have virtually become a fourth branch of governmental exercising promiscuously the powers vested in the other three. These agencies now comes closer to our daily life than any other department of the government. Unrestrained they could become the instruments of a new tyranny. The McCarran-Simners bill now pending before Congress represents the concerted effort of the American Bar Association to establish minimum procedural requirements for these agencies in the exercice of their rule-making and quasi-judicial functions, and also to provide simplified standards for judicial review of their findings, orders and decrees. To require these agencies to conform to elementary principles of justice will not impair their efficiency, and will protect the individual against the abuse of

the broad powers conferred upon them. The McCarran-Sumners bill is only the beginning, but an important beginning, in establishing the rule of law in this important branch of the government. It is indicative of the task which falls upon us as lawyers to prevent our government of laws from becoming a government of men. In the present crisis, the great social and economic changes directly challenge free government by free men. The preservation of our constitutional democracy in these times requires vision, wisdom and determination as great as were necessary for its establishment. In this struggle to maintain order, justice and freedom, we must not, shall not, fail.

Lawyers Are People†

By MALCOLM W. BINGAY *

The Bingay Institute of Human Relations, after some years of research, has definitely decided that lawyers are people. While this may be startling news to some ignorant or prejudiced persons it come as no surprise to me. Some of my best friends are lawyers. I attribute this to the fact that I have never had a law suit.

In a mild sort of a way, I have been interested in the study of law myself. Forty-five years of activity in journalism have made this necessary as a defense mechanism. In my salad days as a reporter and child-city-editor lawyers used to frighten me terribly with their Latin jargon, which I never could understand. Years later, I found that that was why they used it. I learned that the less Latin a lawyer used in threatening to punch my nose the better lawyer he was.

I always had a sneaking suspicion that they were just putting on dog. I had read the whole Constitution of the United States and had found it all written in very simple English.

While it was the great Coke who spoke of "the gladsome light of jurisprudence," it was the toast of Wilbraham a generation later which spoke of "the glorious uncertainties of the law." I do not know much about the gladsome light of jurisprudence in recent years after reading some decisions of our United States Supreme Court, but I see that the glorious uncertainties of the law have grown more glorious.

Hire a Tax Expert

If Coke is also right that "reason is the life of the law; nay the common law itself is nothing else but reason" why not just hire a tax expert in the first place and then see where you can get a stand-in with some bureaucrat who administers the rules and regulations without benefits of the courts?

Something must be nutty because I find little reason in what is passing

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