BAR ASSOCIATION OF SAN FRANCISCO

Rose Room, Palace Hotel

July 31, 1950

Mr. Chairman, fellow members
of the legal profession:

It is a great relief to me before I start home to have the assurance of your chairman that I look all right. After having spent a little over two weeks on the coast I feel somewhat as Daniel Webster, who was in my part of the State of New York at one time to dedicate a railway station. He arrived early in the morning and had a rather busy day. When he arose and made his way somewhat unsteadily to the rostrum he said, "Your hospitality has almost overcome me."

But I enjoy and occasion when I can talk to lawyers. You have no idea how much harder it is for a judge to get up and make a speech than it is for a lawyer to get up to make a speech before a judge. After all, the lawyer has a record from which he can get his facts. In case he is hard-put, he can read some prior decision, whether they apply or not, and at least he knows that he wants and generally knows what he wants to say, and his only problem is to get

a chance to say it. I used to say that I have three arguments in every case before the Supreme Court. First, there was the argument that I planned. It always pleased me and it was very logical and consistent to follow it along from part to part and it was well organized. Then there was the argument I actually made: Interrupted, inconsistent, answers that only half answered the questions asked. And then there was the unanswerable argument I made at night afterwards.

All of which reminds me somewhat of a tale of a lawyer in northwestern Pennsylvania near where I lived where we practiced law very informally in small communities. All the lawyers knew the judges and the judges knew the lawyers. There a lawyer went in before the court to make an argument and he stated his proposition before he got to argue, and the judge said, "there is nothing to that; there is nothing to that, Mr. Stone. What is your next point?" The lawyer said, "Your Honor, you are a great deal better lawyer than I am. I laid awake for this case every night for two weeks and I have thought about it all day and you have only heard of it twenty minutes; and, as I say, you are a great deal better lawyer than I am, but there ain't that much difference between us."

I often long to tell that story in court, but I never quite dare to.

These are days of wars and rumors of wars. No meeting of a serious profession can quite get out from under the shadow that lies upon the whole land. I shall leave all the foreign aspect of this problem to Mr. Dulles, who is participating in the adjoining meeting, but I would like to talk with you seriously today for a few minutes about what internal changes we may face as a result of a long foreign war, if the fates have one in store for us. We must not forget that in the two past wars we were not long belligerents. Our part was performed towards the end of each, and we never reached that stage which would be characterized abroad as total warfare. Neither of these wars ever touched the shores of our continent. If we have to face, either now or in some foreseeable period, a long war, a total war, there are certain problems which I think are primarily problems for the legal profession, because they have to do with American liberties, American rights and with the American system; a system which in its legal and constitutional aspect are largely the work of lawyers, and which it will be the work of lawyers to preserve.

If we have to face total mobilization in this country, we must expect that private property rights will be greatly interfered with as we have known them. You cannot have total mobilization, unless the state is in a position to summon all the assets and resources belonging to all of the people.....you cannot have private enterprise allowed, each man in choosing that to which he will devote his energies. Manpower will have to be mobilized and directed into channels that make for victory. A great many of the enterprises that we have are luxury, amusement, or otherwise unnecessary enterprises. We know that we live on a scale that will stand a great deal of clipping without injuring our true welfare. We may expect many of those things to be clipped.

War is the greatest ally of socialism, because war forces a socialization of resources, it forces the state -- whether it would do so as a matter of policy or not -- to regard all assets of every individual as assets of the state. And then the problem is, after you have achieved a nationalization of resources for the purpose of war, how do you get back to peace? I don't think we can be greatly surprised that after a great war there is an increasing trend toward socialization. Certainly the greatest impetus in that direction has come from our two wars. You have housing for example to take a simple matter. If there should

be a bombing in which many people would become homeless in San Francisco, do you think you would live in a twelve-room house with many people without housing? It just doesn't work that way. There would be a necessary socializing or devotion to the public use of all the assets of the community. Big industry completely at the service of the government during war has a difficult time finding its way back. The great problem for those who believe in our present system is how to have a total mobilization for war purposes and a demobilization when war ends. A great many people will not willingly give up those measures once achieved. There is a certain sweetness of power which makes men reluctant to relinquish the power which government acquires over industry and over people's activities in time of war. What then is to happen about civil liberties? What does a long war mean on that subject? Civil liberties affect us all and we all know that one of the incidents of war is a greatly increased control by the government of the press, of speech, of the right to assembly, a tendency to substitute trial by court-martial, sometimes the substitution of the right of habeas corpus, an increase in the use of search and seizure, arrests on suspicion, internment; all of those things go with war wherever war is fought.

I happened to have been Attorney General of the United States during the years 1940 and the first half of 1941, which Mr. Churchill has described as the most difficult period of the war for him. In some ways it was the most difficult for us, too. Although we were not in the war, we were endeavoring to furnish assistance to the victims of aggression and thereby avoid the necessity of getting into the shooting war ourselves. And the difference, from a civil liberties point of view between the last war and any war that we can foresee in the future, is a very important one. There was not in thic country at the outbreak of the last war any very large, extensive or efficient Nazi underground. I don't mean to say there were not dangerous persons and groups, but they were rather small and pretty easily identified; a rather grumbling, blundering, boasting sort, for the most part. By themselves, while they might have accounted for a particular disaster, they were not a widespread, great problem. The problem was, this group had the assistance of the Communists underground, a vastly better organized and larger group which had penetrated into industry, into communications and into places where the Nazi underground never reached. And insofar as those two were together, as they were during the period that Stalin and Hitler were partners in the aggression against

their neighbors, they presented a real problem in this country. Shortly after my time as Attorney General the break between Stalin and Hitler came, and then, as you recall, the underground -- so far as it consisted of Communists -- became much more patriotic. Civil liberties were not seriously affected in this last war, partly because of the government's care in protecting them and partly because of the fact that an underground never became the widespread menace that it might be in another war. Those who are disloyal to the United States were loyal to our ally Mr. Joseph Stalin.

Now, what did we do about these matters? What problems do they put up to the legal profession on the bench and at the bar? In these matters the eyes of the nation must be the Federal Bureau of Investigation. I shall say a word or two about that organization to you from my experience, and from my experience I hope you will use all your influence to the utmost to see that the warning recently given by Mr. Hoover is observed, that no vigilantes step out to do private jobs of enforcing justice, that information is turned over to the Federal Bureau of Investigation for screening and examination, that they are used and relied upon as the force for the investigation, that irresponsible charges are not handed about,

that irresponsible accusations of loyal citizens being Communists mere makes an ambush in which disloyal elements can be covered. In my time the two things which gave us difficulty were the concealed Communists and the notoriety-seeking patriot, most of whom embarrassed the processes of justice.

Now, sometimes lawyers have a great misunderstanding of the function of the Federal Bureau of Investigation, and I have heard a great many criticisms of it at the bar by men who didn't understand what it is and its place in the Department of Justice. I used to try to make it clear when I was Attorney General -- and Mr. Hoover tried to make it clear -- but always there were those who misunderstood it, because oftentimes the truth is a little complicated and a distortion simplifies matters and makes it easy to understand. The Federal Bureau of Investigation is an investigative agency. It has no authority and assumes no function of accusation or exonderation of anybody. If you read in the newspapers that the FBI has cleared somebody, that does not mean that the FBI has found and certified that this man is loyal. Nothing of the kind. If you find that someone is arrested on the motion of the FBI, it merely means that they have dug up the evidence. The

initiative for accusation and any statement of exoneration, the evaluation of their reports comes from the Department of Justice, the Criminal Division primarily. Now, it is important that we understand that both on the bench and at the bar, because we find frequent criticisms of the scope of FBI reports. Upon those reports, through some sort of misfortune, necessarily misfortune, sometimes reach the public. They find that they contain a great deal that is rumor, gossip, hearsay, so they say they are not reliable. Now, let's remember this: The FBI report is not an indictment. If it were, a great deal that they contain would be improper. It isn't evidence. If it were, a great deal that it contains would be inadmissable. It is information for the man who might have to try a case for the government. They had a deal of fun once, those who enjoy criticizing without taking pains to find the facts, because in a loyalty investigation it came out that the Federal Bureau of Investigation had reported that this particular subject of inquiry had studied anthropology and so it was reported in the various sessions of the press that the FBI regarded one who studied anthropology is a menace to security and that anthropology

was known as disloyalty in the Bureau.

I don't know how you would feel about it if you were to try a case as a lawyer, but if I was to try a case in which I might have to cross-examine an adversary witness, I would like to know whether he specialized in anthorpology or ballet dancing; I would like to know what his intellectual interests were; I would like to know what he studied and where to find his associates, and that's what that information is for. I know that many a rumor that would not for one moment be admissable in court is brought into the Department of Justice for the Federal Bureau of Investigation. I know it is a great help to a trial lawyer to have at his elbow a collection of gossip, if you please, about the participants in the drama of a trail. And so, after a complete disassociation from the Bureau now nearly ten years old, I say from experience I had before that the safest thing for civil liberties in the United States is the leave the handling of these investigations to the Federal Bureau of Investigation and not to go setting up private agencies. These private agencies, however well meant, however loyally directed, do not have the experience. They do not have the access to the information that enables them to conduct that sort of thing successfully. And you don't want to make the mistake of hanging the wrong man. That is no help to civil

liberties. It is also a help to the efficiency of the government, for I think that civil liberty is best served in the end by an efficient administration of justice, and you can't have efficiency if it is made a private enterprise. But what about it when it gets to court? What is the problem of the court about civil liberties in wartime? I suppose that nothing portrays the dilemma on the horns of which courts are cast in wartime like the contest between Chief Justice Taney and Abraham Lincoln. The contest between the Bill of Rights has absolute doctrine and measures of security. You remember the famous Marmon case. Marmon was arrested without a warrant, held without charges. Taney issued a writ of habeas corpus. Lincoln put it in his pocket and disobeyed it. Both, in a sense, were doubtlessly right. I suppose if I were to ask you who was the man who did more for American freedom, most men would name Abraham Lincoln. And yet at no time in the history of this country were so many men arrested on suspicion without charge, without evidence, without trial, as under the orders of Abraham Lincoln. It isn't a question in these matters of right or wrong. It is a question of conflict between two rights. To appreciate the difficulties of

our own courts, you have to compare our system with other systems a little. Our Bill of Rights makes no exception in time of war, no exception for emergency. Let's look at England for a moment. In England the Parliament is absolute. The war cabinet is a creation of Parliament. By regulation, it is given wide powers, powers which would be beyond out Constitution. And when the war ends they blandly take tho powers away from the war cabinet and wind it all up and say the emergency is over, we will just go back to our peacetime ways. In constitutional Europe, particularly the Latin countries, they have the state of siege. The political powers can declare a state of siege, which means substantially a dictatorship, as you would have, I assume, if your city were besieged. Somebody would dictate and the state of siege goes on until the political forces decide that it is lifted, and then it is off. In Germany the Weimar constitution had a bill of rights with many of the provisions of our won, but it also had a provision that those rights could be suspended in emergency. Many administrations in Germany were suspended. On the morning after the Reichstag fire, which seems to have been of suspicious origin,

Mr. Hitler put before Hindenburg a general suspension of the Bill of Rights which he signed, and we know the story from there on. Now, in the United States we have no such emergency powers anywhere. There is a war power, of course. There is a power to suspend the right of habeas corpus. But apart from that, there are no war powers en emergency powers to which the court can resort to sustain measures in wartime that would not be sustained in peacetime. It leaves much, too much, I think, to the courts. Each of these systems of dealing with emergencies has its dangers. The great advantage of the English system and of the European state of siege is that when public sentiment gets sick and tired of the emergency powers they can end it; and therefore, powers can be given temporarily which would not be tolerated permanently, because there is a different problem. Since we never recognize the emergency as a source of power, we can never end our power on the ground that the emergency has ended it. Of course, you can verify the interpretations somewhat, and throughout history there has been some variety of interpretation. We know that Ex Parte Milligan, for example, was not decided while President Lincoln lived, and it would be interesting to know whether it

would have been so decided had he lived. The great problem which faces judicial power in the United States in cases of this kind is that if it sways too heavily in the direction of security it creates precedents which will hold over into peacetime so that the liberties which are denied during an emergency are in great danger, the law being what it is, its deference to precedent, not so much deference as to the other times. But the danger is that if you sustain broadly emergency powers you have no control of the emergency. On the other hand, if you lean too far into the direction of liberty, you handicap the government in its struggle for national existence. And if you went too far, of course, I suppose you would come out like Taney did; you would be issuing a writ that would not be obeyed.

The great problem of our jurisprudence created by war is that problem of security against liberty. As Chief Justice Hughes once said, "the power to wage war must include the power to wage war successfully." And that, of course, we must agree. At the same time, the courts can never close their eyes to the fact that the war power is the Achilles heel of our system of individual liberty, and that if ever the war power gets into the hands of the men or group of men who

are disposed to set up some sort of a dictatorship in the United States, that is the power undoubtedly that will be invoked as the justification of its earlier steps.

Now, between the two the courts have to steer a course by common sense guided by the Constitution, guided by the desire to perpetuate those things which are dear to us, both against internal enemies and foreign enemies, not to give the internal enemies advantages which operate to the aid of the foreign enemy unfairly or unconstitutionally, or not to set up precedents which will deprive you of your liberties which will subject you to unfair and unconstitutional controls when the war is over.

As I said earlier, it was lawyers who created this system. It was lawyers who wrote the story. It is the lawyers who must finish it. The rights in this country are just about the rights which the sound, respected lawyers of the country hold to be such to the point that if the bar yields the country yields. The people must depend upon lawyers to define where this line between security and liberty will rest. I hope we shall not have to engage in any long war which compels a drawing and redrawing of that line. It is a

very difficult task, but if we have to we have to draw the line with fidelity to the principles which have made this country what it is. And in those matters there is one reward and only one for the judge. And that is that his efforts meet the approval of the majority of his own profession.