

President Kernan:

I know I speak for every man and woman in this audience when I thank Judge Parker for his inspiring address. Judge Parker, we are your very grateful debtors.

Bob Jackson thinks a lot of the New York State Bar Association—I know because I was associated with him when he was active in its affairs—but it is nothing to what the New

York State Bar Association thinks of Bob Jackson. He has traveled far during recent years, and in this hour when there is need for courage and integrity in the public service, for a staunch patriotism and high ideals, there are many who believe that he will travel much farther. We congratulate him and we rejoice on his own account, because he has been named Attorney General—even more so, we rejoice, for the Nation, because of the fact that, in this time of peril, its legal affairs are safe in his hands.

It is my great pleasure to introduce to you, if any introduction is necessary, the Attorney General of the United States, Robert H. Jackson.

Hon. Robert H. Jackson:

A PROGRAM FOR INTERNAL DEFENSE OF THE UNITED STATES

The course of the war in Europe has raised many new and unpleasant problems for each of us. Among them is the attention which must be given to the so-called "fifth column." This is a problem which is of peculiar interest to lawyers, for back of the rather lurid phrase are real questions as to the continued validity of the lawyers' concepts of a government of limited powers and as to their philosophy of the rights of individuals. For the first time the United States must meet the competition of a totalitarian economy and must resist a well-developed strategy of penetration and infiltration both by ideas and by foreign agents. The so-called "fifth column" is a challenge to the adequacy of our legal methods, and—if it should get out of hand—might greatly affect our legal and constitutional liberties.

I am here to give you neither false fears nor false assurances. I will speak plainly about the problem of the so-called "fifth column." This consists of a small corps of foreign agents, cushioned in a much larger group of sympathizers and dupes. Their present objective is not military and they will not descend on us with parachutes nor will they ride in on motorcycles. Their immediate object is to sabotage American morale, to

slow up production, to stir up strife, to cultivate hates and divisions, to destroy confidence in the government, and generally to weaken us, whether as a military power, a business competitor, or as the source and example of democratic self government which they fear and hate.

I can give you assurance that, as yet, there is no such number of these mischief makers, nor is there such cohesion among them, nor have they such positions of power or influence that America need be panic stricken. Nonetheless, their presence and their aims raise some very real problems.

There is no more appropriate occasion for plain speaking about uncomfortable things than among the lawyers of New York State, whose fellowship in the law I have long enjoyed. But when we deal as lawyers in terms of law making or law enforcement we must abandon use of the term "fifth column." It is catchy and colorful but very loose. It covers a multitude of activities, as currently used, which range from the most aggravated treason to a simple disagreement with the government's policy. Any satisfactory analysis requires that the column be broken into undramatic squads.

Though their object may consciously or unconsciously be the same, the most natural legal classification is that which separates them into those who would reach their ends by resort to *legal wrongs*, or crimes, and those who resort to a use or manipulation of their *legal rights*. In other words, the activities seem best divided into espionage and sabotage, on the one hand, and organized propaganda on the other.

These activities are undertaken by citizens as well as aliens. But the special controls which government is permitted to exercise over the admission and retention of aliens suggest that they be discussed as a separate and preliminary problem.

II

We must recognize that an alien population affords a screen in which foreign agents may be difficult to identify. Indeed, aliens who are not wilfully disloyal are sometimes subject to pressures from abroad. A mean technique has been worked out by certain foreign governments to exercise control over

the acts of residents here by threats of harm or promises of favors toward their kinsmen who have remained in Europe. Families remaining abroad are treated as hostages to assure that the emigrant will do the bidding of the old country. Many new countries have fallen under the control of the dictator who has most effectively developed this technique, and new nationalities, which would ordinarily be in opposition to him, are now subject to his pressure. And, while the overwhelming majority of aliens are loyal and grateful for American hospitality, there are among them some who share the racial or national ambitions of their fatherland. All of these things make stricter alien control appropriate and inevitable.

But, while a stricter control is necessary to internal defense any form of hateful treatment or repression is not only unnecessary, but would tend to make sullen enemies of those who wish to be good Americans. We have over three and a half million resident aliens, mostly loyal but sensitive to unfriendliness. We also have as naturalized citizens a large number from each belligerent country, many of whom disapprove events in the homeland, but who would not fail to resent discrimination or harsh treatment.

As head of the Department of Justice, which is now responsible for alien control, I must act where there is power, and appeal to public opinion where there is not, against prejudice and oppression of those who have come to our shores in response to the invitation our laws held out, unless they individually are wrong-doers here. If we want to stop entrance here, wholly or in part, that is one thing. But to let them come and then subject them to mass mistreatment is indecent, it lacks even good sportsmanship and it is a menace to our national security.

Employers have asked us if they should discharge all aliens. The answer is certainly *not* loyal and faithful ones. The unjust discharge of aliens may serve only to make them susceptible to the urgings of "fifth column" organizers. Also, we must not create a relief or a refugee problem here by denial of a chance to work or by unreasoning boycotts or discrimination.

We have, however, undertaken to accomplish a number of specific safeguards to our internal security.

Illegal entry is being sharply reduced if not entirely prevented by a strengthening of the border patrol, along both the Mexican and the Canadian borders. This is particularly necessary, for as Canada has increased the effectiveness of her regulations the persons subjected to these controls tend to squeeze into the United States.

Legal admissions have been tightened and it may be said that the philosophy of granting permission to enter the United States has changed from one in which anyone could enter unless he was known to be a menace, to one in which none may enter who is not shown to be without danger to the country.

Some sixteen to twenty thousand aliens are visiting in this country on temporary permits. While some of them have been here their homelands have been conquered. Some, if they returned, would face death or imprisonment. Among them, on the other hand, are some who were sent here to serve the purposes of foreign governments. A careful study of all these persons and their activities is being made. Their cases will be dealt with individually. The first purpose must be to protect the interests of the United States, but we intend to exercise every care to do no injustice to those who are suffering the misfortunes of war.

Congress has authorized and I have at all times favored a registration and identification of aliens. This is not an anti-alien move. The alien who promptly registers and obtains a certificate of registration will undoubtedly be relieved of much local embarrassment and suspicion. I am convinced that if it is properly presented to the aliens, and carried out with a decent regard to their feelings and rights, registration will be a welcome protection to those who comply. It will be carried out in that spirit. The Department plans an intensive educational campaign both to reassure the alien and to make him alive to his responsibilities under this act.

Aliens who are illegally here, or who have been guilty of illegal conduct while here, may not register voluntarily and it will be a matter of some difficulty to locate them. In that effort we will call for considerable co-operation of the public. We will make every effort to get aliens to understand their duty to

register and plans for detection of those who fail are thorough and, I believe, will be effective.

The federal government thus has a wide and comprehensive program under way which should assure adequate control of the aliens and adequate protection of their rights. There is no need to supplement this program by local laws directed against aliens. A multitude of regulations by different authorities will produce such confusion in the minds of those not familiar with our institutions that we will not be able to tell whether one fails to register wilfully, or because he thinks he has already done his duty by complying with some local scheme of control. In the first place, state laws and municipal ordinances directed at alien registration are probably unconstitutional; the Pennsylvania law, for example, has already been declared invalid by a lower federal court as invading a federal field. Moreover, the local programs, even if constitutional, would necessarily be overlapping and unco-ordinated and their chief effect would be to produce confusion in administration and resentment in the alien.

I think that our federal program will ensure that the country need have no especial fear of the alien, and that the alien need have no fear of repression. I shall deal with the problems presented by the so-called "fifth column" without further specific attention to the alien.

III.

The most dramatic activities of this "fifth column" are those which are legal wrongs. Our criminal laws and our enforcement machinery is quite able to deal with these problems.

There are, it is true, men in this country whose functions are to betray our nation, to spy on the secrets of the government, to sabotage industrial and military production, and to act as the secret agents of foreign governments.

These activities are definitely illegal, and they expose the offender to risks. They are recognized as morally reprehensible, and so they are unpopular. Relatively few men have the dishonor or the recklessness to engage in such activities.

Those who do undertake to break our laws against treachery, espionage and sabotage can be dealt with by law enforcement methods. It is true that strictions upon search, seizure and the interception of communications make criminal detection more difficult here than in other countries; the many protections given the defendant by our criminal procedures make conviction less certain after apprehension of the criminal. But the illegal "fifth column" activities can be kept in control with vigorous policing and prosecution in the courts.

However, the Department of Justice is placing emphasis on preventive measures as well as upon prosecutions of these illegal activities. Preventive measures are less dramatic. In fact the more successful they are the less the public knows about them. But it seems better to circumvent the plans of evil-doers than to let them succeed and then depend on the not wholly certain processes of the criminal law for a conviction.

The preventive activities may be described, in the main, as counter-espionage. In cases where arrests could be made and probably successful prosecution could be had, it is often more expedient to keep a known group under observation than it is to institute prosecutions. The known agents act as decoys and bring those of their kind and those who are sympathetic and co-operative with them into the range of government observation to an extent which would not be possible if arrests were made. The absence or infrequency of prosecutions or of publicity does not mean that our defenses are being neglected. On the contrary great publicity is an injury to such programs.

Another important branch of our activities is active surveillance of individuals and groups within the United States who are sympathetic with the systems or designs of foreign dictators. This surveillance includes, Nazi, Fascist, and Communist groups and societies. It does not include, and it will not include, surveillance of legitimate business or labor activities or religious movements.

Among liberal thought there has been considerable opposition to the efforts of the Department of Justice to identify these groups and to keep track of their doings. I have sympathy with this opposition, and I recognize that this duty of the Depart-

ment, as is the case with most governmental powers, could be distorted so that it would produce grave abuses.

But I do not concede that it is a civil right of a citizen that his government should remain in ignorance of foreign born movements within the country, or that he has a right to conduct political activities in the dark. A country which permits open opposition to the government has no duty to remain ignorant of underground movements.

All of these groups are under observation and will remain under observation. No one will be prosecuted unless there is probable cause to believe that he has committed a violation of the law. The information obtained is not available to employers or to private persons, but will be used solely in law enforcement and in preparation for national defense.

In order to prevent sabotage, there has been instituted a wide program of plant protection. This has nothing whatever to do with labor policies or activities. Plant protection is designed to bring to plant managements the latest suggestions and experience in dealing with the physical arrangements to make damage difficult and sabotage unlikely. We cannot, of course, prevent all opportunity for sabotage, but it will be possible to reduce it to a minimum.

Finally, if we were faced with an immediate necessity for defense or with a breakdown of law and order, you may be assured that through the co-operation which has long been established between the Federal Bureau of Investigation, the Army Intelligence and the Navy Intelligence Departments, together with the Intelligence Services of friendly foreign powers, there can be identified and immediately apprehended the chief sources of danger in this country. So long as we are in no immediate danger and are moving under a reign of law, they do not need to be apprehended and, indeed, could not lawfully be arrested merely because we suspect that in an emergency they might be dangerous. Should an emergency arise, we would take no chances. America is not helpless in the face of enemies within itself, and in a surprisingly short space of time the core of the disloyal elements in this country could be rounded up and put where they would not constitute a danger.

But those radical and oppressive measures are not for peacetime, nor are they for any period in which civil law is effective.

Thus, by investigation, prevention and prosecution, we have the "fifth column" activities which are legal wrongs safely in hand. There is no occasion, to combat these crimes, for us to abandon these ordinary legal processes or to permit vigilante groups to undertake amateur spy-hunts.

IV

I have indicated how the Department of Justice is dealing with the problems of the alien. I have outlined the steps which we are taking to guard against *legal wrongs* such as sabotage and espionage. A much more difficult question is how to cope with those, citizens as well as non-citizens, who use their *legal rights* as a protective cloak for carrying on activity hostile to the country, those who, under cover of our traditional freedom, attack us with the newest weapon of modern warfare—propaganda.

The first Article of our Bill of Rights declares that "Congress shall make no law * * * abridging the freedom of speech, or of the press." This prohibition in its full vigour is directed by the Fourteenth Amendment against state action which would similarly infringe this basic freedom of speech. Most of the state constitutions contain a similar declaration. Even more important, this freedom has become engrained in all of our ways of life. Throughout the fabric of our history there is woven the pattern of free thought, free speech, and a free press.

In 1791, when the First Amendment was adopted, the issue of free speech was tied to the simple question of whether difference of opinion should be permitted, whether each man could with impunity criticize his government. It was contemplated, of course, that the liberty to speak and to write as one chose carried with it the liberty to try to persuade others. But the persuasion, as it was then understood, would be unorganized and aided only by the appeal of the thought or the speaker.

We face today a quite different situation. The man who spoke to his neighbors from a stump in an open field has given way to the man who speaks over a nation-wide net work. The hand press has been driven out by the linotype. The teachings of the psychologist and the experience of the advertiser now lie ready at hand for the propagandist with money to spend. The appeal is spread throughout the nation not by converts but by men whose minds are for sale.

Thus, strictly within the law, the campaign operates with use of every trick of mass psychology through the foreign language press, through sponsored radio programs, often in foreign languages, and through speeches, pamphlets, motion pictures, meetings and assemblies.

All will agree that the freedom of speech and press includes as its very core the right freely to criticize and to protest against the form and organization of our government. The question raised by the present day is whether that right is qualified by the degree of organization of its use. A free nation must permit dissident opinion and even propaganda. Dissenting individuals are one thing; a highly organized machinery for producing dissent is quite another.

V

The gravity of the abuses threatened by uncontrolled propaganda should not be minimized. We should frankly face the fact that our complete freedom of speech and of the press means not only a liberty of expression for individual opinion but also affords a liberty for a systematic and unscrupulous indoctrination.

The experience of recent years, brought into sharp and unhappy focus by the events of the past few months, have caused many to question the wisdom of an unqualified application of the principle that freedom of speech should be extended even to the avowed enemies of freedom. I do not flinch at the question, but I think we should face it with a full realization of its implications.

On two notable occasions, the federal government has undertaken to stamp out critical speech and propaganda. In calmer

years we have bitterly regretted each indulgence. The Alien and Sedition Acts of 1798 more than any single force served to destroy the Federalist Party; the "red-hunt" of 1919, under the auspices of the Espionage Act, is an unhappy memory. We must be determined that if, in the future, any modification of our traditional rights should be found necessary, the change should be thoughtfully and deliberately made, with full and calm consideration of all its effects. We must not by administrative pressure or by lawless mass action excitedly abandon our standards.

It is not difficult to understand the feelings of those who say they would gladly suffer the curtailment of some of their own liberties for the sake of curbing the harmful activities of others. We could wish that the solution to our problem were as simple as that. But I fear that attempts to control propoganda by suppressing it would necessarily prove to be either inadequate or intolerable in actual practice. Any partial or selective suppression of opposition will be likely to end in total suppression. There are no standards by which to know where opposition should be allowed and where it must be prohibited. The "fifth column" adopts a protective coloration which makes it difficult to identify and distinguish from a legitimate exercise of political rights. How does a campaign to discredit the President and destroy the moral authority of an administration cease to be the customary and current political party opposition and become "fifth column" activity? Both have the same purpose and use the same methods. How do you distinguish honest pacifism from a foreign-inspired opposition to adequate national defense? Both use the same arguments. How do you separate a sinister mischief-making among labor from a legitimate pressing of grievances? Indeed, observers have noted a growing subtlety in the propoganda of the dictators; much of it is not a frontal attack upon our institutions but instead a reasonably fervent admiration for them coupled with suggestions for improvement by new aspirations or by changes in emphasis in their operation.

No civilized government could retain the respect of decent men if it were to forbid a criticism of its operations. There has

never been a formula worked out for semi-freedom. Attempts at partial suppression will prove ineffective and will lead to further suppression. The forces of organized propaganda will not be thwarted by partial suppression, and total suppression serves only to drive them underground. A glance at the experience of the dictatorship should show us that the attempt to stifle opposition through suppression necessarily ends with the terrorism of the Gestapo and the OGPU.

This is not defeatism. Let us not despair because we cannot safely utilize the techniques of the dictators. Let us take account of our own methods and our own resources.

Our nation was founded and has before weathered severe storms of foreign pressures on the assumption that the good sense of the people is the only proper guaranty against hostile doctrines. The American way of dealing with foreign ideology is to fight it with healthy robust American thought. Let us defend ourselves with the genius for which our culture is distinguished. Let us wield the weapons in the use of which our heritage has trained us. We have a permeating and a vigorous press which should be, and in the main is, alert to seize and demolish the hostile argument wherever it is raised. We have nation-wide radio networks which we can and must use to answer the foreign propagandist fully and effectively. We have a motion picture industry which, I am sure, stands ready to aid in the fight on anti-democratic doctrines. We have a vigorous bar, whose members, trained by profession for the task, can exercise a powerful influence in every community in the country. If we utilize these channels to their full extent, wisely and thoughtfully, the enemies of our freedom will be hard pressed indeed.

In accomplishing this task no single force is more important than the support and approval of the legal profession. The steady holding of freedom's course does not have a dramatic appeal to heated emotions. It can only be maintained so long as the great body of thoughtful people support it and the American people will in the end get only as much liberty as members of the bar will fight for.

Lawyers better than any other group know that an arbitrary power invented to serve a cause frequently ends by being turned against its creator. Fritz Thyssen is wandering in exile and his great properties confiscated under a law he favored because he thought it would be used only against communists. The propertied classes of the United States should not forget the lesson which his experience affords.

VI

So far, I have been discussing the acts of government. But we move upon a wholly unrealistic plane if we fear only the government as a threat to our freedom. Considerably more dangerous, because wholly freed of the controls developed to curb official action, are the activities of private groups. Their repression of free speech and free thought has often been, in this country, far more ruthless and vicious than any which would be contemplated by any decent government.

For example, in the past weeks there have been over sixty mob actions in about thirty different states against an obscure religious sect known as Jehovah's Witnesses. It is reported that in Germany the sect, known to be in disfavor, is mostly in concentration camps, so it can hardly be a part of German organization here. It may well be that injudicious conduct or abuse of the right of free speech has provoked these attacks, but I have a real fear lest many other forms of group morbidity become equally common. We must combat by all means within our power the notion that persons with foreign names or accents, or otherwise failing to conform to our smug conventions, are to be scorned, boycotted or beaten. The detection of real danger is not the work for hot-headed amateurs, and the dealing with really dangerous elements is not a job for cowardly exhibitionists.

It is important that American people do not permit an attitude of suspicion of their neighbors, and charge with disloyalty every person with whom they have individual disagreements. Not every person who sticks his neck out in curiosity is a spy. Not every person who believes that there is need for improvement in our government or a need for change in its laws is an

under-cover agent of foreign governments. And not every bad job done in an industrial plant is the result of sabotage; we have put on new workers and increased their speeds and a good deal of bad work is certain to result. The greatest reliance of the law enforcing authorities is upon sound and calm and dispassionate attitudes on the part of the American people and its press. We must not yield to any tendency to become frightened and to make enemies among ourselves.

On the other hand dissenting groups or nonconforming individuals will help to maintain the law that gives them such freedom if they will use a common sense recognition that events have unsettled public opinion and that it is a period of uncommon excitement and sensitivity. Persons who go about flaunting their rights to be provocative or disagreeable or intemperate in speech are among the chief enemies of the liberty we are trying to preserve.

Let us avoid some of the mistakes which give aid and assistance to any "fifth column";

First, we must permit no tampering with our civil rights, for the first break in that bulwark will provide the opening wedge for those who seek the breakdown of our democratic system;

Second, we must prevent lawlessness and mob violence, for by destroying law and order we create the confusion in which the "fifth column" thrives;

Third, we must not alienate the alien who wants to be loyal, for by so doing we drive him into the camp of the "fifth column."

Fourth, I have not dwelt upon the necessity of a social and economic policy in the nation which will not leave millions of people hopelessly outside of its benefits and comforts. That is not my theme tonight. But to keep the record straight I must say that I would regard a reactionary national policy as the greatest aid and comfort a "fifth column" could hope for.

Our native good sense is our surest guard against foreign agents and foreign propaganda, and good sense does not flourish in an atmosphere of mutual suspicion among ourselves.

Our liberties stand in more danger from our own excitement than from our enemies. America has grown great through the freedom of its citizens. Let us never forget that our liberties, and the liberties of those with whom we disagree, are themselves the surest protection against the doctrines and the agents of the dictators.

President Kernan:

Thank you very much, Mr. Jackson, for your very reassuring address.