

# MOBILIZING THE PROFESSION FOR DEFENSE\*

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EUROPE has resumed its ancient strife, and other peoples of the world are obliged to give considerations of defense and security first place in their thoughts. Our philosophy of government makes the law by which the physical forces of the nation are controlled quite as definitely a part of our defense program as the mobilization of the force itself. We lawyers are again holding spring meetings under the auspices of our several legal societies to consider the state of our law. But we do not feel easy about it because we are finding it really difficult in the present condition of the world to give first consideration to our normal programs, to restatements of the law, to revisions of our court procedures, and to general advancement of the peace time administration of justice. My association with your own and with related societies interested in the betterment of the administration of justice dates from long before I entered public office and makes the office-holder's customary profession of sympathy with your usual purposes superfluous. I can get right down to what is troubling me.

## Deficiencies in Our Law for Defense Purposes

If we should put first things first, the legal profession would turn its highly competent and disinterested legal staffs to resolving the almost unbelievable conflicts, confusions and obscurities in the mass of law that governs our defense activities. I do not suggest that the organized legal profession could or should project itself into the complex and controversial questions of policy that are inherent in many of the legal questions presented to us now. But, apart from any differences over policy, much of our statute law, supplemented by judicial construction in some instances, is technically deficient to meet present-day demands.

## Opportunity for Service by the Profession

It is almost impossible for the legal staffs of the government departments involved, pressed as they are by the routines of their work and immersed as they must be in daily perplexities, to give either the time or the detached thought necessary to the coordination and modernization of the many laws and interpretations of laws relating to defense activities.

There is some further disadvantage that attends our efforts in this direction due to the fact that we inevitably are regarded as proponents of a policy and advocates of an administration, but I venture to say that no more

vital effort could be made than to name appropriate representatives of the legal profession and set them upon the task of considering what we may denominate broadly as defense law and its improvement.

## Declaration of War Often Omitted

Perhaps the greatest single difficulty arises from the changed custom of states as to the method of initiating a war. Our statutes for a century have been framed with the idea that war would begin with a gentlemanly and honorable declaration of war. That chivalrous practice has disappeared. Wars today are fought and won before they are declared. Any nation that in the presence of rising hostility and strain with another awaits a declaration of war to assert itself is as naive as a citizen who expects a burglar to make a formal call to announce his house-breaking intentions.

## Critical Period Preceding Use of Force

It is safe to say that under modern methods of warfare the most critical period for a nation under attack is the period preceding the actual employment of military force. It is then that forces are set in motion that will expedite or impede the military effort and which will either strengthen or rot out a nation's morale. In country after country, from Czechoslovakia to Greece we have seen this pattern of a pre-military and non-military invasion, an invasion of business, finance, labor unions, public opinion, and political organizations, accomplished with the liberal use of expert personnel operating entirely under the protection of the laws of the land being invaded. The secret weapon of the Nazis has been the failure of nation after nation to recognize and deal with this non-military invasion.

## Statute Law Out-Moded

Our statute law has in many respects failed to take into account this non-military period of attack. A good many of the government's abilities to deal with defense still await the existence of a formal state of war. For example, the nation's power to deal with certain disloyal aliens as "enemy aliens" has been considered to await some formal recognition of a state of actual belligerency. Yet we would be blind to the experience of a modern war if we did not recognize that actual activity by foreign agents who are really, if not legalistically, enemy aliens does not depend upon any declaration of war.

It may be said generally that most measures of internal defense can be successfully carried out only before

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excitement and hysteria and bustle of necessary preparations strike a nation.

### Duty to Anticipate Eventualities

We are fully aware in the Department of Justice that we are under the duty to anticipate and prepare for the worst of eventualities, although we may hope and pray for deliverance from them. As the department whose ties are so close to the legal profession that the functioning of our department as a whole may be fairly said to depend in large measure upon the confidence and good will of the profession, it will be of advantage if I tell you frankly some of the things that are troubling us as to the measures that could be taken wisely to discharge this high responsibility. I recognize that the ultimate success of our work and judgment upon it will depend upon the good opinion of those who are more detached than we who are in the heat of the thing can possibly be. You will quickly and rightly condemn us for any neglect of the public interest. You will also quickly and rightly condemn us for any disregard of the rights of individuals to differ with the government and to take measures which are considered to be within the range of their civil liberties, even though they result in some degree of nullification of the government's efforts. In fact, our fate will probably be that a portion of public sentiment will do both.

### Dual Responsibility of Department of Justice

It is no news to you that it is difficult to serve two masters. Yet the Department of Justice must labor under dual responsibilities. The public rightly expects its law officers to protect what the old indictment forms call "the peace and dignity" of the commonwealth. On the other hand, the most unimpeachable authority commands us to protect and respect the rights of individuals to do many of the very things that may be steps in the process of undermining the stability of the commonwealth.

It is inevitable that in the presence of threats to our national prestige and integrity our people will demand increased emphasis on the rights of the commonwealth. These public pressures for priority to security of the state over the liberty of the individual arouse slumbering conflicts in which emotion, temperament, and experience often divide us more bitterly than the logic of either position would warrant. The task of keeping the confidence of public opinion which shapes today's events and at the same time of steering a course that will be approved by the sober second thought of the nation is not easy.

It will help us to appraise these difficulties if we appreciate that our own principles and techniques for guarding our freedoms are by no means universally accepted among free peoples. In fact, our own system is the exception rather than the rule. The peculiar rigidity and uncompromising character of our American procedures is in sharp contrast with the procedures of Great Britain as they have been detailed for us by an

eminent friend of civil liberty, Mr. Harold Laski.

### British Solution of This Problem

The British solution of this dilemma between public safety and private liberty may be shortly stated as a combination of large official powers coupled with moderation in their exercise. The absence of a written Constitution leaves the government as a whole in possession of all powers which any organized society may possess. Out of its ample power Parliament confers in times of emergency correspondingly broad powers upon England's executive officials. English civil liberties thus depend for their survival, not upon legal limitations so much as upon a high sense of responsibility, a temperament of moderation, and a tradition of non-partisan and non-political action on the part of legislators and executives, and by judges as well. Britain, to save liberty, relies on limitations bred into the blood and bone of Englishmen and fostered by their culture more than it relies on parchment freedoms.

A recent article by Harold Laski points out that "the Government has powers little short of absolute over the lives and property of its citizens" in Great Britain. For example, a regulation permits prosecution of persons charged with creating alarm and despondency. I think you will agree that a proposal to give any American prosecuting officer such a power would be met with screams of opposition. However, the British Government has apparently made moderate use of the power, prosecuting only about 105 cases. A dozen of them were dismissed. Of those convicted, only 20 were sentenced to imprisonment varying from one day to three months, while the remainder were either bound over or fined.

Under a regulation granting power to suppress processions and public meetings, only three meetings have been prohibited in the whole country. The widest sort of criticism of the government has been tolerated, even from Communists. Yet where national safety was endangered two Communist newspapers were suppressed, pursuant to a control of the press that would not be allowed in this country.

Perhaps the most drastic regulation is one which gives the Home Secretary the power to detain persons whose conduct and views make it seem likely that they may be guilty of action prejudicial to the safety of the realm. Under this power about 1,000 persons are detained. Some others have been arrested and later released. A power so unlimited and so vaguely defined, available against both citizen and alien, is unheard of in America.

Whatever the merits or defects of this British policy, the conferring of such broad powers upon a public official leaves little room for an alibi if he does not protect the safety of the state. On the other hand, the existence among his constituents of a vigorous and wholesome respect for civil liberties and for decent treatment of the individual leaves him under a sense of responsibility which goes a long way to prevent abuses of that power. While Mr. Laski does not acquit

the police of instances of "stupidity and harshness" and while he admits that "one or two magistrates in alarm and despondency cases have played the fool on the bench," he asserts that "more than that the record does not permit anyone seriously to claim." Making allowance for the pressure which the imminence of invasion would seem bound to produce, we still must regard England as a citadel of civil liberty. And who will say that England is "soft"?

### American Methods Compared

Broadly stated, our American method of protecting our liberties is the exact opposite of the British. By constitutional limitation we impose upon all government, including the Congress, the courts, and the executive, numerous and inflexible limitations. Our government does not have the full powers of most organized societies, partly because some such powers are reserved to the States, but also because many powers commonly exercised in Europe are withheld or forbidden entirely. Our devotion to the philosophy of limitation of power is so ingrained that the Congress and our legislatures adopt it as their policy and make very limited concessions of power to executive officers. The American assumption is that officers will abuse whatever powers they have. Too frequently the expectation is realized. Every period of our national history which has felt great stress and tension from abroad has left a trail in the administration of justice that we do not retrace with pride.

### Narrowness of Public Powers

However, I want to put it to you squarely whether the excesses in the administration of justice and in investigative techniques which have prevailed during times of public excitement and which our profession has rightly condemned as reprehensible, do not bear a distinct relationship to the very narrowness of the powers which are granted to our officials. I have found that the greatest pressures to overstep the bounds of lawful law enforcement arise in situations in which existing legal procedures permit *no action at all* looking toward the protection of society. Confession of inability to use the law for ends that are generally held desirable gives rise to a search for means outside the law or to a vigilante movement among the populace. It is certainly an open question whether a liberty to abuse liberty does not generate a danger to liberty itself. My confidence in the perpetuity of civil liberty in Great Britain is due in no small degree to the knowledge that the law officers will be able to prevent such abuses of those liberties as would give rise to their impairment.

On the other hand, the greatest danger that I can see to American civil liberties lies in the fact that they are so rigid. The English officials responsible, by prompt and moderate actions, tend both to satisfy the public that abuses will not be allowed to reach the magnitude of a public menace and also to exert a restraining hand on the abusers. In America up to the present moment

we have found no technique by which the outright abuse of these privileges is preventable even when abused in the interests of a foreign government.

### Antiquated and Ill-Adapted Statutes

To the future of the liberties we have known it is of utmost importance that our laws be made as effective as possible within constitutional and proper policy limitations. Lack of adaptability of antiquated statutes to present world conditions should be remedied. Deficiencies in the discretion to judges and to administrative officers should be remedied. Conflicts and confusion should be eliminated by restatement of our statutes. Let me suggest a few things that are happening that I think could be partially or fully remedied by adequate application of legal craftsmanship. The continued existence of these conditions is in my judgment as menacing to liberty as to safety.

### Problem of Deportable Aliens

We have over 6,000 deportable aliens, against whom proceedings have been completed and deportation orders are outstanding. But, because of transportation breakdown or because of refusal of their native countries to accept their return, they are still here. They are not only here, they are *free*. They include some bad criminals and a considerable number of Communists proven to have advocated overthrow of our government by force and violence. But we can cite to the courts no statute to authorize us to do anything whatever with them when deportation fails. Hence, they are turned loose in habeas corpus proceedings and resume their evil ways in our society.

We have proposed remedial legislation. It is of great importance to the whole subject I am discussing. It needs the criticism where we are wrong and the help where we are right, of the organized lawyers.

### Problem of Foreign Agents

Another example: We arrest foreign agents for doing acts detrimental to the country. The Constitution commands bail. A little bail is fixed, put up by the help of their Governments, and they walk out of the courtroom and return to their jobs of producing discord in America. We must find means to a more prompt and emphatic way of enforcing our own law. It is peculiarly a problem for lawyers.

### Problem of Sabotage

We have today definite knowledge that the sabotage of ships in our ports was ordered by simultaneous telegrams sent to all ships' masters. They tell us that themselves. Yet the law officers of the United States cannot intercept those messages and use them as evidence in our courts. The wires of America today are a protected communication system for the enemies of America. Here, again, we have proposed legislation, carefully limited legislation, to give us an equal chance on the wires with saboteurs. Again I say—if we are

wrong, we need your criticism; and if right, we need your help.

### Propaganda Problem

The whole field of combating alien-directed and financed propaganda against the policy of our government is one of infinite legal difficulty, as you know. I do not think we are completely and constitutionally helpless, but we are sharply circumscribed. May we not compel propagandists to identify their stuff as we compel newspapers to disclose their ownership. Must we not only allow foreign attacks on our policy but also carry it for them in our mails? These are problems not easy of solution, they hit close to things fundamental in our life. Their solution is no job for amateurs.

And let me say to you that the enemies of America are not idle. They show up at Congressional hearings to oppose every move to strengthen our law enforcement; they show up in court astutely to raise every legal difficulty to prevent convictions and to obstruct obtaining evidence; they propagandize endlessly against investigative officials and agencies, against prosecution policies, against law enforcement itself. The force and prestige of the organized bar is needed to vindicate the competence of the law itself to deal with the burdens that the times put upon it.

### Free and Generous Cooperation by the Bar

I want to take this occasion to acknowledge free and generous cooperation from leading members of the bar who, without compensation, are assisting us in the discharge of duties—such, for example, as that of giving fair, impartial, and sympathetic hearings to conscientious objectors in the separate judicial districts of the nation.

I frequently have offers of services from my public-spirited fellows of the bar who want to offer their services, and I know that in professional organizations there is no lack of public-spirited men who would be glad to give their service if they could be mobilized.

### Need for Putting Our Legal Defenses in Order

I venture to suggest that nothing could be more helpful today than the organization under the auspices of some of our legal societies of a high-minded and disinterested group to canvass and appraise suggestions for putting our legal defenses in order. I say to you in all frankness that government lawyers are in a better position to tell you the problems than they are to work out the solutions. The pressure, the want of time, the burden of routine, and the commitment to departmental policy, prevent us from giving this sort of thing the quality of service it needs. You could bring to that task a quality of legal experience, of practical knowledge, and of public confidence in your disinterestedness which could be of inestimable benefit. I venture to suggest that the restatement and modernization of laws relating to defense in the light of modern emergency is as timely as any work in which the organized legal profession may engage.

### Mobilization of the Profession

If I could in one sentence state an appeal to my brethren at the bar, it would be this: "For the sake of your profession, your liberties, and your country, mobilize the great intellectual resources of your various societies in a master effort to put the law of national defense in order."