Buffalo Law Review

Volume 5 | Number 1 Article 54

10-1-1955

National Security and Individual Freedom. John Lord O'Brian.

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Recommended Citation

Paul D. Lagomarcino, *National Security and Individual Freedom. John Lord O'Brian.*, 5 Buff. L. Rev. 108 (1955).
Available at: https://digitalcommons.law.buffalo.edu/buffalolawreview/vol5/iss1/54

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BOOK REVIEW

NATIONAL SECURITY AND INDIVIDUAL FREEDOM. John Lord O'Brian. Cambridge, Mass.: Harvard University Press, 1955. Pp. 84. $2.00.

The steady erosion in the cause of national security of our constitutionally guaranteed civil rights during the past decade ranks as one of the frightening phenomena of our time. Alarmed by charges and disclosures of Communist infiltration in the federal government, the American citizen virtually acquiesced in a succession of individual Congressional acts and executive orders which, read together, foreshadow far-reaching changes in our traditional legal philosophy, constitutional theory, and attitudes toward our governmental institutions. Allowed to proceed unchallenged, this trend might well result in a permanent reorientation of the relationship between the state and the individual in this country.

In the Godkin lectures delivered at Harvard last Spring, John Lord O'Brian, the distinguished American attorney, turned to the pressing problem of striking a balance between the admitted need for security devices against Communist threats on the one hand and the preservation of our historic civil liberties on the other. In these lectures, now published by Harvard University Press under the title *National Security and Individual Freedom,* he analyzes the nature of these encroachments against our civil liberties, their implications, and how and why the American people permitted them to occur. The book goes beyond a mere recital of incidents. Instead, it seeks to evaluate them in broad historical perspective. This book is no jeremiad. It is a rational study of cause and effect and a call to action.

The American people's *immediate* legacy from the last war was a profound sense of anxiety, the product of an unfulfilled peace, the threat of Communist aggression, the potential of atomic warfare, and the awareness of new dimensions of human brutality as practiced by totalitarian states. This resulted in a drive for personal and national security, to be achieved regardless of its immediate cost or of the eventual implications of the measures used. At the exposure of both real and fancied Communist infiltration in government, the American people were confused and fearful. These fears were skillfully exploited by unscrupulous political opportunists. In this charged atmosphere of emotionalism and intellectual confusion, the "remedy" was a steady succession of measures limiting civil liberties in the name of security. In retrospect, it is ironical that measures designed to increase national security resulted, instead, in further anxiety, doubt and distrust, and interfered with maximum national effectiveness during a period of international stress. Moreover, time proved the remedy as dangerous, if not possibly worse, than the illness it sought to cure. These measures were the McCarran Immigration

Act, President Truman's Loyalty Order, the Internal Security Act, and President Eisenhower's Federal Security Program.[1]

In these, Mr. O'Brian perceives both a *new legal philosophy* and *new procedural practices* to implement and administer it which form "a coherent pattern for a legal system quite opposite from the distinctive features of our tradition of fair play as well as American Constitutionalism." These measures establish ". . . something like a new system of *preventive* law applicable to the field of *ideas*."

Traditionally, Anglo-American jurisprudence has refused to act upon conjecture and suspicion in order to prevent the possibility of an unlawful act. Only after the commission of an overt act of illegality may punitive action be taken. In contrast, recent security statutes and executive orders establish a system of *preventive* law applicable to the communication of political ideas. Mr. O'Brian points out:

> . . . preventive remedies against unorthodox political ideas have been increasingly imposed on the theory that unless such preventive action is taken, the communication of such ideas will be the direct cause of acts which are wrongful in themselves."[2]

Preventive law gave rise to the concept of imputing guilt because of association. Under this concept men are found "untrustworthy," not because of wrongful acts, but because of their ideas, of motives attributed to them, and even

1. Together with new interpretations of the Smith Act.

Former Secretary of State Dean Acheson, in his very recent book *A Democrat Looks At His Party,* refers to charges made by the government of a person's disloyalty "on the basis of evidence of which he is not told, received from persons whom he is not allowed to confront, and of which only an anonymous summary is given to his judges" and acknowledges a "grave mistake" in the Executive Order instituting the federal loyalty program.

"These practices had their root in the President's Executive Order, 9835, of March 21, 1947. This order and the Act of August 26, 1950, upon which rests the present Executive Order, 10450, of April 27, 1953, were adopted under a Democratic Administration. I was an officer of that Administration and share with it the responsibility for what I am now convinced was *a grave mistake and a failure to foresee consequences which were inevitable* . . . The President believed that his Executive Order could and would be carried out with fairness and restraint, that, as he said, 'loyal government employees should be protected against accusations which were false, malicious or ill-founded.' But his expectations were not fulfilled by the multitudinous administrators of the loyalty program, pressed, as they were, by the emotions generated by the reckless political attack on the Administration. Furthermore, it was not realized at first how dangerous was the practice of secret evidence and secret informers, how alien to all our conceptions of justice and the rights of the citizen, even though he was also an employee." (Emphasis added.)

2. Although preventive action against the communication of ideas up to now has been taken only against groups, the Internal Security Act of 1950 authorizes imprisonment of an individual citizen because of "suspected intentions."

"suspicion as to their future conduct." Mr. O'Brian asserts that the use of the Attorney General's list of alleged subversive organizations is the best illustration of such governmental pressures "in the direction of thought control."[3] He even asks "whether in practice this list does not operate as a bill of attainder."

These new concepts were implemented by procedural innovations, many of which deny critical Constitutional safeguards. Of these Mr. O'Brian states:

> It is in the procedures established for the enforcement of these statutes and orders that the most serious questions are arising affecting individual freedom and the present political status of the citizen in the American polity.

An early procedural aberration was the empowering of *administrative* agencies and officials, rather than the judiciary, to pass judgment upon the personal beliefs and associations of a private citizen employed or seeking employment in the government. Mr. O'Brian strenuously condemns these agencies. He decries the lack of competence of some of their members, and their lack of knowledge or regard for Constitutional guarantees, which are treated "merely as rules of thumb" to be freely set aside in the interest of expediency."[4] In this, the most vigorous part of the book, Justice Brandeis is aptly quoted to the effect that "the greatest dangers to liberty lurk in insidious encroachments by men of zeal, well-meaning but without understanding." There is further warning of "the subtle and insidious way in which what appear to be slight aberrations of procedure grow into major invasions of Constitutional freedom."

Reviewing these encroachments, Mr. O'Brian does not necessarily advocate the abolition of security programs. He does advocate a "drastic revision by men soundly educated in the history of freedom and in the history of constitutionalism," and that the program be keyed to the actual internal threat from Communism, which has diminished steadily. He asks whether this danger now cannot be met

3. Compare the statement by Judge Learned Hand: "I believe that that community is already in process of dissolution where each man begins to eye his neighbor as a possible enemy, where non-conformity with the accepted creed, political as well as religious, is a mark of disaffection; where denunciation, without specification or backing, takes the place of evidence; where orthodoxy chokes freedom of dissent; where faith in the eventual supremacy of reason has become so timid that we dare not enter our convictions in the open lists to win or lose. Such fears as these are a solvent which can eat out the cement that binds the stones together; they may in the end subject us to a despotism as evil as any that we dread." (Excerpt from the speech of Judge Learned Hand at the University of the State of New York, October 24, 1952; reprinted in *The New York Times* of January 21, 1953.)

4. This basic departure was followed by the use of information from secret informers whose competence was unknown even to the hearing officers, to the resulting denial of cross-examination, the use of paid informants and the denial of judicial review of agency decisions. See Note 1, Supra.

adequately by "traditional procedures consonant with the constitutional guarantees."

Needed revisions, however, will come about only in response to public demand. Mr. O'Brian states that no clear-cut demand has been felt, because the public has been needlessly confused by an issue presented in terms of the complexities of legal philosophy and procedure. He suggests that this problem of restrictions on the right to speak, think and criticize be presented in the form of a moral issue which the public has a demonstrated competence to resolve.[5]

> "Although there are always present latent forces of political bigotry and intolerance, there are also present powerful and assertive elements of moral leadership. But the reaction will not come until disinterested leaders of public opinion, and presumably educators, assume the unpopular burden of resenting the current encroachments upon civil liberty and, more important, provide constructive suggestions for such changes in administrative policy as will restore the confidence and independence of the individual and strengthen once again his faith in the liberties guaranteed him by the Constitution."

Not a little of the significance of this book derives from the personality and background of the writer. Mr. O'Brian, a man of wisdom and integrity, is neither the unworldly intellectual nor the professional crusader, but a practicing attorney at the summit of a truly outstanding public and private career. His warnings are not the cliches of the doctrinaire liberal, but the thoughtful deductions of one accustomed to dealing with affairs of substance in law and public affairs. If the reviewer may use the word "conservative" in its finest sense, it is this conservatism, together with the high caliber of the writer's observations, which lends so much weight to his words.

Mr. O'Brian may well be termed one of those "leaders" whom he calls upon to "awaken to their obligation to protect the freedom of the human spirit." This book is one manifestation of the "uprising of the public conscience."

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5. As; for example, the defeat, because of moral resentment by the mass of the people, of President Roosevelt's "court-packing" bill of 1937 and, more recently, the enthusiasm of the public for the decision of the Supreme Court condemning the seizure of the steel plants by President Truman.