

This is a very difficult area. Drawing that line, as I have said, is very perplexing.

But to come back to your question, I do not consider it was a fixed view considering the circumstances under which it was expressed, the brevity of expression—I was not writing a law review article. And yet I would add one other point, Senator, just to be absolutely clear: If I should go on the Court, and this Sixth Circuit case comes up after I come on the Court, I will be very conscious of the fact that I have written a few things, very few, really, in this area; and it may well be that I will disqualify myself. At the moment I would rather not say positively that I will or I won't.

Senator BAYH. Well, I asked the question not to go to the specifics of the rightness or wrongness of your allegations here but there are a number of people, perhaps older people, who are concerned about our being a repressive society.

I don't have any youngsters in college. I have talked to a lot of good people who are, and I found one of the things that was impossible to do is to stereotype the so-called younger generation. Some of the loud voices don't necessarily represent the masses.

You said that you would consider this. This is quite frankly a hazy area, and that is why I am asking the question. If it were written in the law, if we had cases on point, I would not be bothering with it.

Mr. POWELL. I understand.

Senator BAYH. This is a hazy area. Congress has not enacted and the Court has not ruled, and as one who is concerned with the propriety or impropriety or the appearance of impropriety, I think it is important that prospective nominees look hard at what they said so far as the responsibility they may have at a future date relative to a case that comes before them where what they have written and what they said prejudged the circumstances.

Mr. POWELL. I will not be insensitive to that, Senator Bayh, I can assure you.

Senator BAYH. I will ask, Mr. Chairman, that two or three paragraphs of this quotation be put in the record because although the area is hazy and this is not a law review article, let me say that the wording is rather specific. Perhaps in fairness to you, Mr. Powell, rather than taking two or three paragraphs, I ought to ask unanimous consent to put in the whole article.

Mr. POWELL. I would prefer that, Senator Bayh.

(The material referred to follows:)

[From the Richmond Times-Dispatch, Sunday, August 1, 1971]

CIVIL LIBERTIES REPRESSION: FACT OR FICTION?—"LAW-ABIDING CITIZENS HAVE NOTHING TO FEAR"

(By Lewis F. Powell Jr.)

(Lewis F. Powell Jr., a Richmond lawyer who has closely followed developments in the exploding field of "civil liberties," is a former president of the American Bar Association. He has also served as chairman of the State Board of Education, chairman of the Richmond School Board and member of the 15-man Blue Ribbon Defense Panel named by President Nixon to study the Defense Department.)

At a time when slogans often substitute for rational thought, it is fashionable to charge that "repression" of civil liberties is widespread. This charge—directed primarily against law enforcement—is standard leftist propaganda. It is also made and widely believed on the campus, in the arts and theater, in the pulpit, and

among some of the media. Many persons genuinely concerned about civil liberties thus join in promoting or accepting the propaganda of the radical left.

A recent syndicated article, by AP writer Bernard Gavzer, cited several such persons. According to Prof. Charles Reich of Yale, America "is at the brink of . . . a police state". Prof. Allan Dershowitz of Harvard decries the "contraction of our civil liberties."

The charge of repression is not a rifle shot at occasional aberrations. Rather, it is a sweeping shotgun blast at "the system," which is condemned as systematically repressive of those accused of crime, of minorities and of the right to dissent.

Examples ritually cited are the "plot" against Black Panthers, the indictment of the Berrigans, the forthcoming trial of Angela Davis and the mass arrests during the Washington Mayday riots.

The purpose of this article is to examine, necessarily in general terms, the basis for the charge of repression. Is it fact or fiction?

There are, of course, some instances of repressive action. Officials are sometimes overzealous; police do employ unlawful means or excess force; and injustices do occur even in the courts. Such miscarriages occur in every society. The real test is whether these are episodic departures from the norm, or whether they are as charged part of a system of countenanced repression.

The evidence is clear that the charge is a false one. America is not a repressive society. The Bill of Rights is widely revered and zealously safeguarded by the courts. There is in fact no significant threat to individual freedom in this country by law enforcement.

Solicitor General Griswold, former dean of the Harvard Law School and member of the Civil Rights Commission, recently addressed this issue in a talk at the University of Virginia. He stated that there is greater freedom and less repression in America than in any other country.

So much for the general framework of the debate about alleged repression. What are the specific charges?

The attack has focused on wiretapping. There seems almost to be a conspiracy to confuse the public. The impression studiously cultivated is of massive eavesdropping and snooping by the FBI and law enforcement agencies. The right of privacy, cherished by all, is said to be widely threatened.

Some politicians have joined in the chorus of unsubstantiated charges. Little effort is made to delineate the purposes or the actual extent of electronic surveillance.

The facts, in summary, are as follows: The Department of Justice employs wiretapping in two types of situations: (i) against criminal conduct such as murder, kidnapping, extortion, and narcotics offenses; and (ii) in national security cases.

Wiretapping against crime was expressly authorized by Congress in 1968. But the rights of suspects are carefully safeguarded. There must be a prior court order, issued only upon a showing of probable cause. The place and duration are strictly controlled. Ultimate disclosure of the taps is required. There are heavy penalties for unauthorized surveillance. Any official or FBI agent who employs a wiretap without a court order in a criminal case is subject to imprisonment and fine.

During 1969 and 1970, such federal wiretaps were employed in only 309 cases. More than 900 arrests resulted, with some 500 persons being indicted including several top leaders of organized crime.

The government also employs wiretaps in counterintelligence activities involving national defense and internal security. The 1968 Act left this delicate area to the inherent power of the president.

Civil libertarians oppose the use of wiretapping in all cases, including its use against organized crime and foreign espionage. Since the 1968 Act, however, the attack has focused on its use in internal security cases and some courts have distinguished these from foreign threats. The issue will be before the Supreme Court at the next term.

There can be legitimate concern whether a president should have this power with respect to internal "enemies." There is, at least in theory, the potential for abuse. This possibility must be balanced against the general public interest in preventing violence (e.g. bombing of Capitol) and organized attempts to overthrow the government.

One of the current myths is that the Department of Justice is usurping new powers. The truth is that wiretapping, as the most effective detection means, has been used against espionage and subversion for at least three decades under six presidents.

There may have been a time when a valid distinction existed between external and internal threats. But such a distinction is now largely meaningless. The

radical left, strongly led and with a growing base of support, is plotting violence and revolution. Its leaders visit and collaborate with foreign Communist enemies. Freedom can be lost as irrevocably from revolution as from foreign attack.

The question is often asked why, if prior court authorization to wiretap is required in ordinary criminal cases, it should not also be required in national security cases. In simplest terms the answer given by government is the need for secrecy.

Foreign powers, notably the Communist ones, conduct massive espionage and subversive operations against America. They are now aided by leftist radical organizations and their sympathizers in this country. Court-authorized wiretapping requires a prior showing of probable cause and the ultimate disclosure of sources. Public disclosure of this sensitive information would seriously handicap our counter-espionage and counter-subversive operations.

As Atty. Gen. John Mitchell has stated, prohibition of electronic surveillance would leave America as the "only nation in the world" unable to engage effectively in a wide area of counter-intelligence activities necessary to national security.

Apparently as a part of a mindless campaign against the FBI, several nationally known political leaders have asserted their wires were tapped or that they were otherwise subject to surveillance. These charges received the widest publicity from the news media.

The fact is that not one of these politicians has been able to prove his case. The Justice Department has branded the charges as false.

The outcry against wiretapping is a tempest in a teapot. There are 210 million Americans. There are only a few hundred wiretaps annually, and these are directed against people who prey on their fellow citizens or who seek to subvert our democratic form of government. Law-abiding citizens have nothing to fear.

In the general assault on law enforcement, charges of police repression have become a reflexive response by many civil libertarians as well as by radicals.

Examples are legion. Young people are being incited not to respect law officers but to regard them as "pigs". Black Panther literature, in the vilest language, urges the young to assault the police.

The New York Times and the Washington Post reported, as established fact, that 28 Panthers had been gunned down by police since January 1968. Ralph Abernathy attributed the death of Panther leaders to a "calculated design of genocide". Julian Bond charged that Panthers are being "decimated by police assassination arranged by the federal police apparatus." Even Whitney Young referred to "nearly 30 Panthers murdered by law enforcement officials."

These charges, upon investigation (by the New Yorker magazine, among others), turned out to be erroneous. The fact are that two—possible four at most—Panthers may have been shot by police without clear justification. Many of the 28 Panthers were killed by other Panthers. There is no evidence whatever of a genocide conspiracy.

But the truth rarely overtakes falsehood—especially when the latter is disseminated by prestigious newspapers. Millions of young Americans, especially blacks, now believe these false charges. There is little wonder that assaults on police are steadily increasing.

The latest outcry against law enforcement was provoked by the mass arrests in Washington on May 3. Some 20,000 demonstrators, pursuant to carefully laid plans, sought to bring the federal government to a halt.

This was unlike prior demonstrations in Washington, as the avowed purpose of this one was to shut down the government. The mob attempted to block main traffic arteries during the early morning rush hours. Violence and property destruction were not insignificant. Some 39 policemen were injured. Indeed, Deputy Atty. Gen. Kleindienst has revealed that the leaders of this attack held prior consultations with North Vietnamese officials in Stockholm.

Yet, because thousands were arrested, the American Civil Liberties Union and other predictable voices cried repression and brutality. The vast majority of those arrested were released, as evidence adequate to convict a particular individual is almost impossible to obtain in a faceless mob.

The alternative to making mass arrests was to surrender the government to insurrectionaries. This would have set a precedent of incalculable danger. It also would have allowed a mob to deprive thousands of law-abiding Washington citizens of their rights to use the streets and to have access to their offices and homes.

Those who charge repression say that dissent is suppressed and free speech denied. Despite the wide credence given this assertion, it is sheer nonsense. There is no more open society in the world than America. No other press is as free.

No other country accords its writers and artists such untrammelled freedom. No Solzhenitsyns are persecuted in America.

What other government would allow the Chicago Seven, while out on bail, to preach revolution across the land, vastly enriching themselves in the process?

What other country would tolerate in wartime the crescendo of criticism of government policy? Indeed, what other country would allow its citizens—including some political leaders—to negotiate privately with the North Vietnamese enemy?

Supreme Court decisions sanctify First Amendment freedoms. There is no prior restraint of any publication, except possibly in flagrant breaches of national security. There is virtually no recourse for libel, slander or even incitement to revolution.

The public, including the young, are subjected to filth and obscenities—openly published and exhibited.

The only abridgement of free speech in this country is not by government. Rather, it comes from the radical left—and their bemused supporters—who do not tolerate in others the rights they insist upon for themselves.

Prof. Herbert Marcuse of California, Marxist idol of the New Left, freely denounces "capitalist repression" and openly encourages revolution. At the same time he advocates denial of free speech to those who disagree with his "progressive" views.

It is common practice, especially on the campus, for leftists to shout down with obscenities any moderate or conservative speaker or physically to deny such speaker the rostrum.

A recurring theme in the repression syndrome is that Black Panthers and other dissidents cannot receive a fair trial.

The speciousness of this view has been demonstrated recently by acquittals in the New Haven and New York Panther cases—the very ones with respect to which the charge of repression was made by nationally known educators and ministers.

The rights of accused persons—without regard to race or belief—are more carefully safeguarded in America than in any other country. Under our system the accused is presumed to be innocent; the burden of proof lies on the state; guilt must be proved beyond reasonable doubt; public jury trial is guaranteed; and a guilty verdict must be unanimous.

In Recent Years, dramatic decisions of the Supreme Court have further strengthened the rights of accused persons and correspondingly limited the powers of law enforcement. There are no constitutional decisions in other countries comparable to those rendered in the cases of Escobedo and Miranda.

Rather than "repressive criminal justice," our system subordinates the safety of society to the rights of persons accused of crime. The need is for greater protection—not of criminals but of law-abiding citizens.

A corollary to the "fair trial" slander is the charge that radicals are farmed and tried for political reasons. This is the world-wide Communist line with respect to Angela Davis. Many Americans repeat this charge against their own country, while raising no voice against the standard practice of political and secret trials in Communist countries.

The radical left, with wide support from the customary camp followers, also is propagandizing the case of the Berrigans.

The guilt or innocence of these people remains to be determined by juries of their peers in public trials. But the crimes charged are hardly "political." In the Davis case a judge and three others were brutally murdered. The Berrigans, one of whom stands convicted of destroying draft records, are charged with plots to bomb and kidnap.

Some trials in our country have been politicized—but not by government. A new technique, recently condemned by Chief Justice Warren Burger, has been developed by the Kunstlers and others who wish to discredit and destroy our system. Such counsel and defendants deliberately seek to turn courtrooms into Roman spectacles—disrupting the trial, shouting obscenities and threatening violence. It is they—not the system—who demean justice.

The answer to all of this was recently given by former California Chief Justice Roger J. Traynor, who said: "It is irresponsible to echo such demagogic nonsense as the proposition that one group or another in this country cannot get a fair trial. . . . No country in the world has done more to insure fair trials."

America has its full share of problems. But significant or systematic government repression of civil liberties is not one of them.

The radical left—expert in such matters—knows the charge of repression is false. It is a cover for leftist-inspired violence and repression. It is also a propaganda line designed to undermine confidence in our free institutions, to brainwash the youth and ultimately to overthrow our democratic system.

It is unfortunate that so many nonradical Americans are taken in by this leftist line. They unwittingly weaken the very institutions of freedom they wish to sustain. They may hasten the day when the heel of repression is a reality—not from the sources now recklessly defamed but from whatever tyranny follows the overthrow of representative government. This is the greatest danger to human liberty in America.

Senator BAYH. Let me just explore that a bit, because you talk about the concern for individual rights, free speech.

Are you of the opinion that certain types of governmental activity can have a chilling effect on the exercise of these rights? In other words, would you give the committee your thoughts on this question: although we have a right to free speech, the right to exercise it, does the presence of governmental agents, the presence of people taking pictures, the presence of a tail on you, following you wherever you go, might this not inhibit one's use of these individual rights?

Mr. POWELL. I can certainly say I don't want anybody tailing me, Senator Bayh. I think it is a little difficult to say, to describe the circumstances under which taking pictures would have inhibiting effect. There are a certain number of people who enjoy having their pictures taken. I would prefer not to, and it would chill me, I can tell you that.

Senator BAYH. Well, we are talking about a delicate balance here. You recognize that in speaking for the Justice Department, some high representatives of that branch of our Government have said that all that is necessary to protect these rights is to have self-discipline. Do you feel that self-discipline is enough to protect our right of free speech, our right to petition, and the others inculcated in the Bill of Rights and the 14th amendment?

Mr. POWELL. Well, I certainly don't wish to comment on anything that—

Senator BAYH. I don't ask you to do that.

Mr. POWELL (continuing). On what the Justice Department says. No; I would not trust any government to self-discipline, Senator Bayh. I think the purpose of the Bill of Rights was to assure there are limitations on what the Government can do.

Senator BAYH. The whole Bill of Rights was so designed, was it not? From the beginning of this Government our Founding Fathers had had rather sad experience with self-discipline and they put that Bill of Rights in there to try to provide some discipline other than self-discipline?

Mr. POWELL. I come from the State that produced Mason, Jefferson, Madison. I think Mason wrote the first Declaration of Rights that went into a constitution in Virginia—well, in this country, perhaps was the model from which our Bill of Rights was drawn. I think it was Madison who led the fight to have the Bill of Rights incorporated into the Constitution for the reasons you have stated.

Senator BAYH. You mentioned the picture-taking incidents. If you had a peaceful assembly in a public place, and there were those present who were criticizing public officials or public policy peacefully, and agents or representatives of law enforcement agencies were present taking pictures around, you don't feel that would have a