Testimony on the Meaning of the First Amendment

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Mr. Chairman and Members of the Committee:

I deeply appreciate your courtesy in asking me to join you in an attempt to define the meaning of the words, “Congress shall make no law ... abridging the freedom of speech, or of the press; or the right to peacefully assemble, and to petition the government for a redress of grievances.” Whatever those words may mean, they go directly to the heart of our American plan of government. If we can understand them we can know what, as a self-governing nation, we are trying to be and to do. Insofar as we do not understand them, we are in grave danger of blocking our own purposes, of denying our own beliefs.

1. It may clarify my own part in our conference if I tell you at once my opinion concerning this much-debated subject. The First Amendment seems to me to be a very uncompromising statement. It admits of no exceptions. It tells us that the Congress and, by implication, all other agencies of the government are denied any authority whatever to limit the political freedom of the citizens of the United States. It declares that with respect to political belief, political discussion, political advocacy, political planning, our citizens are sovereign, and the Congress is their subordinate agent. That agent is authorized, under strong safeguards against the abuse of its power, to limit the freedom of men as they go about the management of their private, their non-political, affairs. But the same men, as they endeavor to meet the public responsibilities of citizenship in a free society, are in a vital sense, which is not easy to define, beyond the reach of legislative control. Our common task, as we talk together today, is to determine what that sense is.

Mr. Chairman, in view of your courtesy to me, I hope you will not find me discourteous when I suggest that the Congress is a subordinate branch of the government of the United States. In saying this I am simply repeating in less passionate words what was said by the writers of the Federalist papers when, a century and three-quarters ago, they explained the meaning of the proposed Constitution to a body politic which seemed very reluctant to adopt it. Over and over again the writers of those papers declared that Constitutional Convention had given to the public adequate protection against a much-feared tyranny of the legislature. In one of the most brilliant statements ever written about the Constitution, the Federalist says—

It is one thing to be subject to the laws, and another to be dependent on the legislative body. The first comports with, the last violates, the fundamental principles of good government, and, whatever may be the forms of the Constitution, unites all power in the same hands. (No. 71)

It is chiefly the legislature, the Federalist insists, which threatens to usurp the governing powers of the people. In words which unfortunately have some relevance today, it declares that “It is against the enterprising ambition of this department that the people ought to indulge their jealousy and exhaust all their precautions.” And, further, the hesitant people were assured that the Convention, having recognized this danger, had devised adequate protections against it. The representatives, it was provided, would be elected by vote of the people. Elections would be for terms brief enough to ensure active and continuous popular control. The legislature would have no lawmaking authority other than those limited powers specifically delegated to it. A general legislative power to act for the security and welfare of the nation was denied on the ground that it would destroy the basic postulate of popular self-government on which the Constitution rests.

As the Federalist thus describes, with insight and accuracy, the Constitutional defenses of the freedom of the people against legislative invasion, it is not speaking of that freedom as an “individual right” which is bestowed upon the citizens by action of legislature. Nor is the principle of the freedom of speech derived from a law of Nature or of Reason in the abstract. As it stands in the Constitution, it is an expression of the basic American political agreement that, in the last resort, the people of the United States shall govern themselves.

To find its meaning, therefore, we must dig down to the very foundations of the self-governing process. And what we shall there find is the fact that when men govern themselves, it is they—and no one else—who must pass judgement on public policies.

And that means that in our popular discussions, unwise ideas must have a hearing as well as wise ones, dangerous ideas as well as safe, un-American as well as American. Just so far as, at any point, the citizens who are to decide the issues are denied acquaintance with information or opinion or doubt or disbelief or criticism which is relevant to those issues, just so far the result must be ill-considered, ill-balanced planning for the general good. It is that mutilation of the thinking process of the community against which the First Amendment is directed. That provision neither the Legislature, nor the Executive, nor the Judiciary, nor all of them acting together, has authority to nullify. We Americans have, together, decided to be politically free.
2. Mr. Chairman I have now stated for your consideration the thesis that the First Amendment is not “open to exceptions”: that our American “freedom of speech” is not, on any grounds whatever, subject to abridgment by the representatives of the people. May I next try to answer two arguments which are commonly brought against that thesis in the courts and in the wider circle of popular discussion?

The first objection rests upon the supposition that freedom of speech may on occasion threaten the security of the nation. And when these two legitimate national interests are in conflict, the government, it is said, must strike between them. And that means that the First Amendment must at times yield ground. The freedom of speech must be abridged in order that the national order and safety may be secured.

In the courts of the United States, many diverse opinions have asserted that “balancing” doctrine. One of these, often quoted, reads as follows:

To preserve its independence, and give security against foreign aggression and encroachment, is the highest duty of every nation, and to attain these ends nearly all other considerations are to be subordinated. It matters not in what form such aggression comes … The government, possessing the powers which are to be exercised for protection and security, is clothed with authority to determine the occasion on which the powers shall be brought forth.

That opinion tells us that the “government” of the United States has unlimited authority to provide for the security of the nation, as it may seem necessary and wise. It tells us, therefore, that constitutionally, the government which has created the defenses of political freedom may break down those defenses. We, the people, who have enacted the First Amendment, may by agreed-upon procedure modify or annul that amendment. And, since we are, as a government, a sovereign nation, I do not see how any of these assertions can be doubted or denied. We Americans, as a body-public, may destroy or limit our freedom whenever we choose. What bearing has that statement upon the authority of Congress to interfere with the provisions of the First Amendment? Congress is not the government. It is only one of four branches to each of which people have denied specific and limited powers as well as delegated such powers. And in the case before us, the words, “Congress shall make no law … abridging the freedom of speech,” give plain evidence that, so far as Congress is concerned, the power to limit our political freedom has been explicitly denied.

There is, I am sure, a radical error in the theory that the task of “balancing” the conflicting claims of security and freedom has been delegated to Congress. It is the failure to recognize that the balancing in question was carefully done when, 170 years ago, the Constitution was adopted and quickly amended. The men who wrote the text of the Constitution knew, quite as well as we do, that the program of political freedom is a dangerous one. They could foresee that, as the nation traveled the ways of self-government, the freedom of speech would often be used irresponsibly and unwise especially in times of war or near-war, and that such talking might have serious consequences for the national safety.

They knew, too, that a large section of the voting population was hostile to the forms of government which were then being adopted. And, further, they had every reason to expect that in a changing world, new dissatisfaction would arise and might in times of stress break out into open and passionate disaffection. All these considerations, I am saying, were as clearly and as disturbingly present to their minds as they are to our minds today. And because of them, the First Amendment might have been written, not as it is, but as the Courts of the United States have re-written it in the war-maddened years since 1919. The Amendment might have said, “Except in times and situations involving ‘clear and present danger’ to the national security, Congress shall make no law abridging the freedom of speech.” Or it might have read, “Only when, in the judgement of the legislature, the interests of order and security render such action advisable shall Congress abridge the freedom of speech.” But the writers of the Amendment did not adopt either of these phrasings or anything like them. Perhaps a minor reason for their decision was the practical certainty that the Constitution, if presented in that form, would have failed adoption. But more important than such questionable historical speculation are two reasons which are as valid today as they were when the Amendment was decreed.

First, our doctrine of political freedom is not a visionary abstraction. It is a belief which is based in long and bitter experience, which is thought out by shrewd intelligence. It is the sober conviction that, in a society pledged to self-government, it is never true that, in the long run, the security of the nation is endangered by the people. Whatever may be the immediate gains and losses, the dangers to our safety arising from political suppression are always greater than the dangers to that safety arising from political freedom. Suppression is always foolish. Freedom is always wise. That is the faith, the experimental faith, by which we Americans have undertaken to live. If we, the citizens of today, cannot shake ourselves free from the hysteria which binds us to that faith, there is little hope for peace and security, either at home or abroad.

Second, the re-writing of the First Amendment which authorizes the legislature to balance security against freedom denies not merely some minor phase of the amendment but its essential purpose and meaning. Whenever, in our Western civilization, “inquisitors” have sought to justify their acts of suppression, they have given plausibility to their claims only by appealing to the necessity of guarding the public safety. It is that appeal
which the First Amendment intended, and intends, to outlaw. Speaking to the legislature, it says, “When times of danger come upon the nation, you will be strongly tempted, and urged by popular pressure, to resort to practices of suppression such as those allowed by societies unlike our own in which men do not govern themselves. You are hereby forbidden to do so. This nation intends to be free. ‘Congress shall make no law … abridging the freedom of speech.’”

The second objection which must be met by one who asserts the unconditional freedom of speech rests upon the well-known fact that there are countless human situations in which, under the Constitution, this or that kind of speaking may be limited or forbidden by legislative action. Some of these cases have been listed by the courts in vague and varying ways. Thus libels, blasphemies, attacks upon public morals or private reputation have been held punishable. So too, we are told that “counselling [sic] a murder” may be a criminal act, or “falsely shouting fire into a theatre, and causing panic.” “Offensive” or “provocative” speech has been denied legislative immunity. “Contempt of court,” shown by the use of speech or by refusal to speak, may give basis for prosecution. Utterances which cause a riot or which “incite” to it may be subject to the same legal condemnation. And this listing of legitimate legislative abridgements of speech could be continued indefinitely. Their number is legion.

In view of these undoubted facts, the objection which we must now try to meet can be simply stated. In all these cases, it says, inasmuch as speaking is abridged, “exceptions” are made to the First Amendment. The Amendment is thus shown to be, in general, “open to exceptions.” And from this it follows that there is no reason why a legislature which has authority to guard the public safety should be debarred from making an “exception” when faced by the threat of national danger.

Now the validity of that argument rests upon the assumed major premise that whenever, in any way, limits are set to the speaking of an individual, an “exception” is made to the First Amendment. But that premise is clearly false. It could be justified only if it were shown that the Amendment intends to forbid every form of governmental control over the act of speaking. Is that its intention? Nothing could be further from the truth. May I draw an example from our own present activities in this room? You and I are here talking about freedom within limits defined by the Senate. I am allowed to speak only because you invited me to do so. And just now everyone else is denied that privilege. But further, you have assigned me a topic to which my remarks must be relevant. Your schedule, too, acting with generosity, fixes a time within which my remarks must be made. In a word, my speaking, though “free” in the First Amendment sense, is abridged in many ways. But your speaking, too, is controlled by rules of procedure. You may, of course, differ in opinion from what I am saying. To that freedom there are no limits. But unless the chairman intervenes, you are not allowed to express that difference by open speech until I have finished my reading. In a word, both you and I are under control as to what we may say and when and how we may say it. Shall we say, then, that this conference, which studies the principle of free speech, is itself making “exceptions” to that principle? I do not think so. Speech, as a form of human action, is subject to regulation in exactly the same sense as is walking, or lighting a fire, or shooting a gun. To interpret the First Amendment as forbidding such regulation is to so misconceive its meaning as to reduce it to nonsense.

The principle here at issue was effectively, though not clearly, stated by Mr. Justice Holmes when, in the Frohwerk case, he said—

The First Amendment, while prohibiting legislation against free speech as such, cannot have been, and obviously was not, intended to give immunity to every form of language. … We venture to believe that neither Hamilton or Madison, nor any other competent person, ever supposed that to make criminal the counselling [sic] of a murder would be unconstitutional interference with free speech.

Those words of the great Justice, by denying that the First Amendment intends to forbid such abridgments of speech as the punishing of incitement to murder, seem to me to nullify completely the supposed evidence that the amendment is “open to exceptions.” They show conclusively the falsity of the “exception” theory which has been used by the courts to give basis for the “danger” theory of legislative authority to abridge our political freedom. If, then, the “danger” theory is to stand it must stand on its own feet. And those feet, if my earlier argument is valid, seem to be made of clay.

3. Mr. Chairman, in the first section of this paper I spoke of the negative fact that the First Amendment forbids the legislature to limit the political freedom of the people. May I now, surveying the same ground from its positive side, discuss with you the active powers and responsibilities of free citizens, as these are described or taken for granted in the general structure of the Constitution as a whole? If I am not mistaken, we shall find here the reasons why the words of the great proclamation are so absolute, so uncompromising, so resistant of modification or exception.

The purpose of the Constitution is, as we all know, to define and allocate powers for the governing of the nation. To that end, three special governing agencies are set up, and to each of them are delegated such specific powers as are needed for doing its part of the work.

Now that program rests upon a clear distinction between the political body which delegates powers and the political bodies—Legislative, Executive, and Judicial—to which powers are delegated. It presupposes,
on the one hand, a supreme governing agency to which, originally, all authority belongs. It specifies, on the other hand, subordinate agencies to which partial delegations of authority are made. What, then, is the working relation between the supreme agency and its subordinates? Only as we answer that question shall we find the positive meaning of the First Amendment.

First of all, then, what is the supreme governing agency of this nation? In its opening statement the Constitution answers that question. “We, the People of the United States,” it declares, “do ordain and establish this Constitution ....” Those are revolutionary words which define the freedom which is guaranteed by the First Amendment. They mark off our government from every form of despotic polity. The legal powers of the people of the United States are not granted to them by some one else—by kings or barons or priests, by legislators or executives or judges. All political authority, whether delegated or not, belongs, constitutionally, to us. If any one else has political authority, we are lending it to him. We, the people, are supreme in our own right. We are governed, directly or indirectly, only by ourselves.

But now what have we, the people, in our establishing of the Constitution, done with the powers which thus inhere in us? Some of them we have delegated. But there is one power, at least, which we have not delegated, which we have kept in our own hands, for our own direct exercise. Article I, (2), authorizes the people, in their capacity as “electors,” to choose their representatives. And that means that we, the people, in a vital sense, do actively govern those who, by other delegated powers, govern us. In the midst of all our assigning of powers to legislative, executive, and judicial bodies, we have jealously kept for ourselves the most fundamental of all powers. It is the power of voting, of choosing by joint action, those representatives to whom certain of our powers are entrusted. In the view of the Constitution, then, we active electorate—a Fourth, or perhaps better, a First Branch which, through its reserved power, governs at the polls. That is the essential meaning of the statement that we Americans are, in actual practice, politically a free people. Our First Amendment freedom is not merely an aspiration. It is an agreement made by women and men who vote freely and, by voting, govern the nation. That is the responsibility, the opportunity, which the Constitution assigns to us, however slackly and negligently we may at times have exercised our power.

It follows from what has just been said that under the Constitution, we Americans are politically free only insofar as our voting is free. But to get the full meaning of that statement we must examine more closely what men are doing when they vote, and how they do it.

The most obvious feature of activity at the polls is the choosing among candidates for office. But under our election procedures, with their party platforms and public meetings, with the turmoil and passion of partisan debate, the voters are also considering and deciding about issues of public policy. They are thinking. As we vote, we do more than elect men to represent us. We also judge the wisdom or folly of suggested measures. We plan for the welfare of the nation. Now it is these “judging” activities of the governing people which the First Amendment protects by its guarantees of freedom from legislative interference. Because, as self-governing women and men, we the people have work to do for the general welfare, we make two demands. First, our judging of public issues, whether done separately or in groups, must be free and independent—must be our own. It must be done by us and by no one else. And second, we must be equally free and independent in expressing at the polls, the conclusions, the beliefs, to which our judging has brought us. Censorship over our thinking, duress over our voting, are alike forbidden by the First Amendment. A legislative body, or any other body which, in any way, practices such censorship or duress, stands in “contempt” of the sovereign people of the United States.

But, further, what more specifically are the judging activities with which censorship and duress attempt to interfere? What are the intellectual processes by which free men govern a nation, which therefore must be protected from any external interference? They seem to be of three kinds.

First, as we try to “make up our minds” on issues which affect the general welfare, we commonly—though not commonly enough—read the printed records of the thinking and believing which other men have done in relation to those issues. Those records are found in documents and newspapers, in works of art of many kinds. And all this vast array of idea and fact, of science and fiction, of poetry and prose, of belief and doubt, of appreciation and purpose, of information and argument, the voter may find ready to help him in making up his mind.

Second, we electors do our thinking, not only by individual reading and reflection, but also in active associations of private and public discussion. We think together, as well as apart. And in this field, by this group action of congenial minds, by the controversies of opposing minds, we form parties, adopt platforms, conduct campaigns, hold meetings, in order that this or that set of ideas may prevail, in order that that measure or this may be defeated.

And third, when election day finally comes, the voter, having presumably made up his mind, must now express it by his ballot. Behind the canvas curtain, alone and independent, he renders his decision. He acts as sovereign, one of the governors of his country. However slack may be our practice, that, in theory, is our freedom.

What, then, as seen against this constitutional background, is the purpose of the First Amendment, as it stands guard over our freedom? That purpose is to see to it that none of these three activities of judging shall the
voter be robbed, by action of other, subordinate branches of government, of the responsibility, the power, the authority, which are under the Constitution. What shall be read? What he himself decides to read. With whom shall he associate in political advocacy? With those with whom he chooses to associate. Whom shall he oppose? Those with whom he disagrees. Shall any branch of government attempt to control his opinions or his vote, to drive him by duress or intimidation into believing or voting this way or that? To do this is to violate the Constitution at its very core. We, the people of the United States, are self-governing. That is what our freedom means.

4. Mr. Chairman, this interpretation of the First Amendment which I have tried to give is, of necessity, very abstract. May I, therefore, give some more specific examples of its meaning at this point or that?

First, when we speak of the Amendment as guarding freedom to hear and to read, the principle applies not only to the speaking or writing of our own citizens but also to the writing or speaking of every one whom a citizen, at his own discretion, may choose to hear or to read. And this means that unhindered expression must be open to non-citizens, to resident aliens, to writers and speakers of other nations, to anyone, past or present, who has something to say which may have significance for a citizen who is thinking of the welfare of this nation. The Bible, the Koran, Plato, Adam Smith, Joseph Stalin, Gandhi, may be published and read in the United States, not because they have, or had, a right to be published here, but because we, the citizen-voters, have authority, have legal power, to decide what we will read, what we will think about. With the exercise of that “reserved” power, all “delegated” powers are, by the Constitution, forbidden to interfere.

Second, in the field of public discussion, when citizens and their fellow thinkers “peaceably assemble” to listen to a speaker, whether he be American or foreign, conservative or radical, safe or dangerous, the First Amendment is not, in the first instance, concerned with the “right” of the speaker to this or that. It is concerned with the authority of the hearers to meet together, to discuss, and to hear discussion by speakers of their own choice, whatever they may deem worthy of their consideration.

Third, the same freedom from attempts at duress is guaranteed to every citizen as he makes up his mind, chooses his party, and finally casts his vote. During that process, no governing body may use force upon him, may try to drive him or lure him toward this decision or that, or away from this decision or that. And for that reason, no subordinate agency of the government has authority to ask, under compulsion to answer, what a citizen’s political commitments are. The question, “Are you a Republican?” or “Are you a Communist?”, when accompanied by the threat of harmful or degrading consequences if an answer is refused, or if the answer is this rather than that, is an intolerable invasion of the “reserved powers” of the governing people. And the freedom thus protected does not rest upon the Fifth Amendment “right” of one who is governed to avoid self-incrimination. It expresses the constitutional authority, the legal power, of one who governs to make up his own mind without fear or favor, with the independence and freedom in which self-government consists.

And fourth, for the same reason, our First Amendment freedom forbids that any citizen be required under threat of penalty to take an oath, or make an affirmation as to the beliefs which he holds or rejects. Every citizen, it is true, may be required, and should be required, to pledge loyalty to, the nation. He must agree to support the Constitution. But he may never be required to believe in the Constitution. His loyalty may never be tested on the grounds of adherence to, or rejection of, any belief. Loyalty does not imply conformity of opinion.

Every citizen of the United States has constitutional authority to approve or to condemn any laws enacted by the Legislature, any actions taken by the Executive, any decisions rendered by the Judiciary, and any principles established by the Constitution. All these enactments which, as men who are governed, we must obey, are subject to our approval and disapproval, as we govern. With respect to all of them, we, who are free men, are sovereign. We are “The People.” We govern the United States.

5. Mr. Chairman, I have tried to state and defend the assertion that constitutional guarantee of political freedom is not “open to exceptions.” Judgement upon the theoretical validity of that position I now leave in your hands.

But as between conflicting views of the First Amendment, there is also a practical question of efficiency. May I, in closing, speaking with the tentativeness becoming to a non-lawyer, offer three suggestions as to the working basis on which decisions about political freedom should rest?

First, the experience of the courts since 1919 seems to me to show that, as a procedural device for distinguishing forms of speech and writing and assembly which the Amendment does not protect from those which it does not protect, the “clear and present danger” test has failed to work. Its basic practical defect is that no one has been able to give it a dependable, or even assignable, meaning. Case by case, opinion by opinion, it has shifted back and forth with a variability of meaning which reveals its complete lack of constitutional basis. In his opinion confirming the conviction of Eugene Dennis and others for violation of the Smith Act, Judge Learned Hand reviewed the long series of judicial attempts to give the words “clear and present” a usable meaning. His conclusion reads, in part, as follows:
The phrase “clear and present danger” … is a way to describe a penumbra of occasions, even the outskirts of which are indefinable, but within which, as is so often the case, the courts must find their way as they can. In each case they must ask whether the gravity of the “evil,” discounted by its improbability, justifies such an invasion of free speech as is necessary to avoid the danger.

And to this bewildering interpretation of the words, “clear and present,” he adds:

That is the test in whose application the utmost differences of opinion have constantly arisen, even in the Supreme Court. Obviously it would be impossible to draft a statute which should attempt to prescribe a rule for each occasion; and it follows, as we have said, either that the Act is definite enough as it stands, or that it is practically impossible to deal with such conduct in general terms.

Those words, coming from the penetrating and powerful mind of Learned Hand, show how intolerable it is that the most precious, most fundamental, value in the American plan of government should depend, for its defense, upon a phrase which not only has no warrant in the Constitution but has no dependable meaning, either for a man accused of crime or for attorneys who prosecute or defend him or for the courts which judge him. That phrase does not do its work which protect our political freedom.

Second, as we seek for a better test, it is of course true that no legal device can transform the making of decisions about freedom into a merely routine application of an abstract principle. Self-government is a complicated business. And yet, the “no-exception” view which I have offered seems to me to promise a more stable and understandable basis for judicial decision than does the 1919 doctrine which the courts have been trying to follow.

For example, the most troublesome issue which now confronts our courts and our people is that of the speech and writing and assembling of persons who find, or think they find, radical defects in our form of government, and who devise and advocate plans by means of which another form might be substituted for it. And the practical question is, “How far, and in what respects, are such revolutionary planning and advocacy protected by the First Amendment?”

It is, of course, understood that if such persons or groups proceed to forceful or violent action, or even to overt preparation for such action, against the government, the First Amendment offers them, in that respect, no protection. Its interest is limited to the freedom of judgment-making-of inquiry and belief and conference and persuasion and planning and advocacy. It does not protect either overt action or incitement to such action. It is concerned only with those political activities by which, under the Constitution, free men govern themselves.

From what has just been said it follows that, so far as speech and writing are concerned, the distinction upon which the application of the First Amendment rests is that between “advocacy of action” and “incitement to action.” To advocacy, the amendment guarantees freedom, no matter what may be advocated. To incitement, on the other hand, the amendment guarantees nothing whatever.

This distinction was sharply drawn by Justice Brandeis when, in the Whitney case, he said—

Every denunciation of existing law tends in some measure to increase the probability that there will be violations of it. Condonation of a breach enhances the probability. Propagation of the criminal state of mind by teaching syndicalism increases it. Advocacy of law-breaking heightens it still further. But even advocacy of violation, however reprehensible morally, is not a justification for denying free speech where the advocacy falls short of incitement and there is nothing to indicate that the advocacy would be immediately acted on.

Those words, I think, point the way which decisions about our political freedom can, and should, follow. An incitement, I take it, is an utterance so related to a specific overt act that it may be regarded and treated as a part of the doing of the act itself, if the act is done. Its control, therefore, falls within the jurisdiction of the legislature. An advocacy, on the other hand, even up to the limit of arguing and planning for the violent overthrow of the existing form of government, is one of those opinion-forming, judgement making, expressions which free men need to utter and to hear as citizens responsible for the governing of the nation. “Shall the present form of our government be maintained or changed?”; if, when that question is asked, the two sides of the issue are not equally open for consideration, for advocacy, and for adoption, then it is impossible to speak of our government as established by the free choice of a self-governing people. It is not enough to say that the people of the United States were free 170 years ago. The First Amendment requires, simply and without equivocation, that they be free now.

Third, and finally, if we say, as this paper has urged, that in many situations, speech and writing and assembly may be controlled by legislative action, we must also say that such control may never be based on the ground of disagreement with opinions held or expressed.

No belief or advocacy may be denied freedom if, in the same situation, opposing beliefs or advocacies are granted that freedom.

If then, on any occasion in the United States, it is allowable to say that the Constitution is a good document, it is equally allowable, in that situation, to say that the Constitution is a bad document. If a public building may be used in which to say, in a time of war, that the war is justified, then the same building may be used in which to say that it is not justified.
If it may be publicly argued that conscription for armed service is moral and necessary, it may be likewise publicly argued that it is immoral and unnecessary. If it may be said that American political institutions are superior to those of England or Russia or Germany, it may, with equal freedom, be said that those of England or Russia or Germany are superior to ours. These conflicting views may be expressed, must be expressed, not because they are valid, but because they are relevant. If they are responsibly entertained by anyone, we, the voters, need to hear them. When a question of policy is “before the house,” free men choose to meet it, not with their eyes shut, but with their eyes open. To be afraid of any idea is to be unfit for self-government. Any such suppression of ideas about the common good, the First Amendment condemns with its absolute disapproval. The freedom of ideas shall not be abridged.

(The following prefatory remarks are provided to the above testimony in Alexander Meiklejohn: Teacher of Freedom.

“In 1955, when he was eighty-three years old, Meiklejohn was summoned before the Senate Subcommittee on Constitutional Rights to summarize his interpretation of the First Amendment. This was a subcommittee to the Senate Judiciary Committee, also the parent body of the Subcommittee on Internal Security. The Hennings Subcommittee took its name from its chairman, Thomas Carey Hennings, Jr., who had been elected senator form Missouri in 1950 on a platform of opposition to McCarthyism and the Internal Security Act of 1950. In early 1955, when Hennings was named chairman of the Subcommittee on Civil Rights, he changed its name to Constitutional Rights, so that the committee could examine the whole Bill of Rights to see whether it was being violated. The Senate had censured Senator Joseph McCarthy in November, 1954, but it was still a bad time for the Bill of Rights. Chief Justice Earl Warren said in St. Louis in February, 1955, that if the nation were asked at that time to ratify the Bill of Right, it would not do so.

The Hennings Subcommittee began its hearings on freedom of speech, press, and assembly by inviting four legal scholars to discuss the extent to which Congress could constitutionally limit these freedoms in the interest of national security. The subcommittee invited Alexander Meiklejohn; Zechariah Chafee, professor of law at Harvard University; Thomas I. Cook, professor of political science at Johns Hopkins University; and Morris L. Ernst, a leading ACLU lawyer in New York City. After these four testified, the subcommittee heard testimony from witnesses about actual conditions. Hennings wanted, by means of these hearings, to reduce the size of the security program and to reform its procedural failings. But before he could issue a final report the Supreme Court, on June 11, 1956, in Cole v. Young, held that the Eisenhower Security Program exceeded the authority granted by Congress in Public Law 733 (1950).