

doesn't interfere with some legitimate function of the Federal agency, then, controls, it seems to me, are highly desirable without working to get the precise definition of a constitutional right.

I am not minimizing what I said earlier. All I am saying is that I think so often in this country, we bog down in rather involved constitutional arguments which are important, I grant, as there are very central values associated with the Constitution, but I would not think that you always must say, we are doing this because there is a constitutional right we are protecting.

I think the effort to create the kind of a political system we want, the kind of society we want, should be the dominant aims and let the courts and the lawyers struggle over the precise terminology of the right, whether this or that is in it or not over time, because that is the way it will be done legally.

There is never going to be one right to privacy, which, for once and for all, is going to exist. It will be etched out by decisions over time, as people who are oppressed by some of these practices, work up a case and the courts are called upon to decide it. So that is all I care to say in a preliminary way.

Mr. GALLAGHER. Thank you very much, doctor. In relationship to your last statement, the court decisions that we have been discussing have been in the area of criminal investigation. The *Olmstead* case certainly would fall within that category of the fourth amendment situation but the Government inquiring into an employee's privacy and other areas, such as the questionnaire type of thing, the lie detector, this is a different area. This is one of the areas that this committee is concerned with.

What are your thoughts along this line?

Mr. BEANEY. It seemed to me an argument can be made that the first and fifth amendments would be the appropriate places to look with respect to a Federal employee in this position, that is, the argument that if freedom of expression is to have any meaning, it must mean that we can keep back some things we don't care to talk about. It is the reverse and converse of it, and it is also that liberty which is guaranteed in the fifth amendment.

If you accept my analysis, privacy, one's freedom to decide what part of one's life and thought will be shared, is a liberty guaranteed to Americans, and then I think the 5th amendment would apply and similarly, the 14th amendment would apply to state action.

Mr. GALLAGHER. You say protections to the individual, do you see any constitutional authority to require this type of information as a condition precedent to employment?

Mr. BEANEY. I know of nothing in the statutes that requires or provides for such questioning. It has been my impression that these practices have generally evolved from the efforts of personnel officers and others to try and insure that a high type, a security type, a reliable type of employee is recruited into the Federal service.

I did make the suggestion in my statement, that I think the spirit in which one should approach the conflicts which have arisen between privacy claims and the actions of agencies, is not to assume that those who have utilized these intrusive measures, are evil men, any more than Brandeis did. These are people who are trying to do a good job, maybe as zealously as possible in carrying out the public interest, as they define it, but in the process, as Brandeis indicated, they lose sight of other values.