

The New Respect for Justice George Sutherland

by Andrew M. Morse

We need to name our new federal courthouse. Perhaps it should simply be known as “The United States Courthouse,” like many. But if it bears the name of an exemplary Utahn, it should be named after Justice George Sutherland, the only Utahn to serve on the United States Supreme Court.

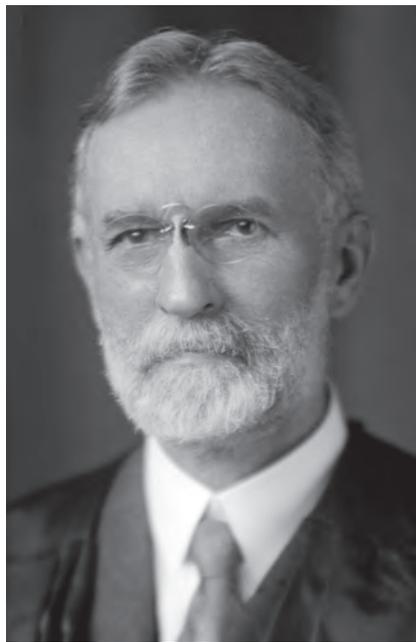
To date, Sutherland has been Utah’s most accomplished attorney, public servant, and judge. Before joining the Court, he was a renowned legal scholar and sage politician, having served in the Utah State Senate, U.S. Congress, and U.S. Senate. No past or present Utahn has done more for his state or country, or accomplished more as a lawyer.

Last October my firm, Snow, Christensen & Martineau, sponsored a commemoration highlighting this remarkable man. We commissioned a bronze bust for the Federal Courts, and made a short film for the public. See videotape: *George Sutherland – The Man / The Work / The Legacy* (2011), available at http://www.scmlaw.com/george_sutherland_commemoration. Chief Justice Durham, Judge Stewart, and Judge Benson gave thoughtful speeches exploring the new respect for Justice Sutherland. See *id.*

We learned that Sutherland was born in England in 1862 to Mormon converts. His family immigrated to Utah via an oxcart company in October 1863. The Sutherlands first settled in Springville, Utah, and then moved to Tintic, Utah where George Sutherland, Sr. sold dry goods to miners. George Sr. left the church in 1870, and young George was never baptized. For this and other biographical information, see Edward L. Carter & James C. Phillips, *The Mormon Education of a Gentile Justice: George Sutherland and Brigham Young Academy*, 33 J. SUPREME CT.

HISTORY 322 (2008). Sutherland remembered his boyhood as:

a period when life was very simple, but, as I can bear testimony, very hard as measured by present-day standards.



....

Nobody worried about child labor. The average boy of ten worked – and often worked very hard[.]

....

Society was not divided, into the idle rich and the worthy poor. There were no rich, idle, or otherwise. Everybody was poor and everybody worked. Neither the eight-hour day nor the 40 hour week had arrived. Work began when it was light enough to see and ended when it

became too dark.

A Message to the 1941 Graduating Class of Brigham Young University from Justice George Sutherland, L. Tom Perry Special Collections Library, Harold B. Lee Library, Brigham Young University, Provo, Utah, June 4, 1941, at 3-5, available at

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http://www.scmlaw.com/public/1941_BYU_Commencement_Address.pdf

He had no schooling between ages twelve and seventeen, but was taught well by his parents, as he entered the Brigham Young Academy (BYA) in 1879 as an excellent student and writer. Before that, though, he worked first in a clothing store in Salt Lake City, then as a Wells Fargo agent and as a mining recording agent until age seventeen, when his family moved to Provo. At BYA he flourished under the tutelage of renowned headmaster Karl G. Maeser, who nurtured the institution for decades.

At BYA, Sutherland made many lifelong friends. Nearly all were LDS, including Sam Thurman, later his law partner, cofounder of the predecessor firm to Snow, Christensen & Martineau, and Utah Supreme Court Chief Justice; William H. King, his future law partner and political opponent, against whom he ran for Congress in 1900 and U.S. Senate in 1916; and James E. Talmage and Richard Lyman, future Apostles of the LDS Church.

At BYA he met Rosamond Lee of Beaver, Utah. They married several years later and were together for nearly sixty years. They had three children: a boy who died at seventeen and two daughters who survived him.

Sutherland graduated from BYA in 1881, and attended the University of Michigan Law School for a year. He passed the Michigan Bar, married Rosamond Lee and moved to Provo, where he started a practice with his father, by then a self-taught lawyer.

I transacted all kinds of business, civil and criminal. A lawyer in a small town can't pick and choose – public opinion demands that he shall treat all men alike when they call for his services. I often traveled on horseback in the mountains to try cases before Justices of the Peace.

Alan Gray, *Untitled Biography of George Sutherland* 4 (1928) (unpublished biography on file with the Collections of the

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Manuscript Division, Library of Congress), *available at* http://www.scmlaw.com/public/pdfs/Untitled_Biography.pdf.

Sutherland had a well deserved reputation as a hardworking and honest family man. He was smart, empathetic, and kind.

In 1886, at age twenty-four, he partnered with Sam Thurman in a new law practice and two years later added William King. As young lawyers, he and Thurman defended nine Irish miners accused of lynching, a capital offense. The victim had murdered a teenager in a bar fight, and the teen's father led the lynch mob. All were tried at the same time; all were convicted but none was executed – a victory for Sutherland and Thurman.

Sutherland also represented many Mormon men charged with violating the Federal Edmunds Act outlawing polygamy.

Through these cases and his general character, he earned the respect of the Mormon community. At the same time he received the political support of the non-Mormon community.

In 1887, Maeser was convicted of violating the Edmunds Act. Although Sutherland did not represent Maeser, he nonetheless appeared at Maeser's sentencing and made an impassionate and successful plea imploring the Court not to jail Maeser, citing his many accomplishments at BYA. The Court did not sentence Maeser to jail, but fined him \$300, which Sutherland immediately paid to the Court.

As a young lawyer Sutherland dove into public service and politics. Between 1886 and 1890 he was an Overseer of the State Hospital in Provo. In 1890 he ran for Mayor of Provo as a Liberal Party candidate on an anti-polygamy platform, and lost. Mormon Church sanctioned polygamy soon ended in late 1890 via the Manifesto, gutting the Liberal Party of its purpose, so Sutherland became a Republican. He narrowly lost the 1892 Republican nomination for Congress.

His legal practice blossomed. In 1894, he left Thurman & Sutherland and moved to Salt Lake City where he joined the predecessor to

the Van Cott firm. In 1895, his friend and former partner Thurman served on the commission that drafted the Utah Constitution, which provided for women's suffrage, a cause for which Sutherland campaigned throughout his political career.

He helped form the Utah Bar Association in 1895, and in 1896 was elected to the first Utah State Senate. He chaired the Judiciary Committee, which drafted the first Utah Judicial and Penal Codes. Sutherland proposed Utah's first State Workers' Compensation Statute, and laws granting eminent domain to irrigators and miners.

In 1900, he narrowly defeated democrat William H. King, his old law partner, for Utah's lone U.S. Congressional seat. He remained very active in State and National Republican Party affairs, serving as a party delegate from Utah to every Republican

convention between 1900 and 1916. In his only Congressional term, he was instrumental in passing the Reclamation Act, which allowed western water projects to be engineered and financed with federal money, and allowing the West to grow much faster than it would have if water projects had been left to private and state financing.

This was a remarkable achievement for a freshman Congressman.

Sutherland did not run for a second term, so in 1903 he resumed his practice with Van Cott. In 1905 U.S. Senators were elected by State Legislators. With the endorsement of his friend U.S. Senator Reed Smoot, Sutherland prevailed in an interparty fight with incumbent Thomas Kearns. Years earlier, Sutherland had represented Smoot's father in a polygamy case.

Sutherland's two-term Senate career was stellar. Through his legal ability, affability, and hard work he accomplished much regarding women's suffrage, workers' compensation, reclamation, Indian affairs, and foreign policy. He was the driving force behind the Federal Employer Liability Act, creating a workers' compensation system. He argued that the change would increase safety.

When we are able to get to the truth as to how

"Through his legal ability, affability, and hard work [Sutherland] accomplished much regarding women's suffrage, workers' compensation, reclamation, Indian affairs, and foreign policy."

these accidents happen we will be able to apply the remedy with greater certainty, so that the law is not only just in providing compensation to all injured employees, one of the legitimate expenses of the industry, but what is perhaps still more important, it will tend greatly to reduce the number of accidents and consequently the aggregate of human suffering.

George Sutherland Speech to the Senate of the United States Workers Compensation 9 (1912) (transcript on file with the collection of the Manuscript Division, Library of Congress), *available at* http://www.scmlaw.com/public/pdfs/Speech_to_Senate.pdf.

Sutherland championed many other labor causes, earning him the praise of Samuel Gompers, President of the American Confederation of Labor.

Sutherland's Judiciary Committee rewrote the U.S. criminal and judicial codes, "a monumental task" according to Chief Justice Charles Evans Hughes. In 1907, his courtroom skills were well

displayed in the Senate where he mounted a detailed and successful defense of Senator Reed Smoot when the Senate considered expelling Smoot due to his religious and alleged polygamous practices. *See* Senator George Sutherland, Reed Smoot and Conditions in Utah (January 22, 1907), Washington Government Printing Office, *also available at* http://www.scmlaw.com/public/pdfs/Smoot_and_Cond_in_Ut.pdf.

Sutherland did all he could to pass the Nineteenth Amendment giving women the right to vote. He sponsored the Amendment in 1915, and he gave several lengthy well received speeches promoting the Amendment, including a 1914 speech where he said:

I...give my assent to woman suffrage because, as the matter appeals to me, there is no justification for denying to half our citizens the right to participate in the operations of a government which is as much their government as it is ours upon the sole ground that they happen to be born women instead of men.

Speech of Senator George Sutherland of Utah before the Senate of

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the United States 7 (February 18, 1914), Washington Government Printing Office, *also available at* http://www.scmlaw.com/public/pdfs/Wm_Sufrg_1914.

Sutherland was no pacifist. Contending that security should be won through vigilance and strength, he sharply criticized President Wilson's reaction to Germany's aggression. Germany's new submarine fleet had attacked shipping in the open sea, and President Wilson's apparent vacillation in 1915 gave rise to a long speech by Sutherland in the Senate, where he said:

[M]y own view of the matter is that the new weapon [the submarine] must yield to the law and not that the law must yield to the new weapon. . . .

. . . .

I for one am becoming sick and tired of the spineless policy of retreat and scuttle. . . . Instead of warning our own people to *exercise* their rights at their peril, I would like to see issued a warning to

other people to *interfere* with these rights at *their* peril. The danger of it all is that by this policy of always backing down instead of backing up we shall encourage an increased encroachment upon our rights until we shall finally be driven into crisis from which nothing but war can extricate us.

Senator George Sutherland, Neutrality and American Rights at 7, 11 (March 7, 1916), Washington Printing Office, *also available at* http://www.scmlaw.com/public/pdfs/Neutrality_and_American_Rights.pdf.

During his Senate years he was a sought after speaker on many public affairs. Meanwhile, with a growing reputation as a constitutional scholar, he argued three cases in the U.S. Supreme Court, while he was in the Senate.

In 1915 Sutherland supported the Seventeenth Amendment, which provided for popular election of United States Senators. The Amendment was adopted. In 1916 Sutherland ran for a third term against his old law partner and friend, King, and lost. Although he had not run a statewide campaign for sixteen years,



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his loss was likely due to the coattail effect of the anti-war fervor that propelled President Wilson to a second term, on the mantra that “He kept us out of war.”

The Republicans in general were badly defeated in 1916. He consoled William Howard Taft on his loss of the presidential race:

We are to pass through a period of readjustment, and the present administration, in view of its past history, is not likely to deal with the serious problems which will arise in such a way as to satisfy the country. The result will be, therefore, that we shall come back into power for a long time.

Letter from George Sutherland to William Howard Taft (Dec. 23, 1916) (unpublished manuscript on file with the Collections of the Manuscript Division, Library of Congress).

However, the Republicans won the next three presidential elections.

After Sutherland retired from the Senate, he practiced law in Washington, D.C. and argued four cases in the U.S. Supreme Court. In 1917, he was elected President of the ABA. He also gave a series of six lectures at Columbia University Law School on the Constitution and Foreign Affairs.

Always a keen political strategist, he supported Warren G. Harding’s seemingly unlikely, but successful bid for the Republican nomination. After Harding was elected he appointed Sutherland as lead counsel for the U.S. in a seven-week trial at The Hague. Sutherland was also counsel to the U.S. Delegation to the Armament talks of 1921.

On September 5, 1922, President Harding nominated Sutherland for an open seat on the United States Supreme Court. The Senate unanimously confirmed him the same day. There was acute public interest in and support for Sutherland’s appointment, because he was the first Utahn to be appointed, one of the few Senators to ascend to the bench, and was only the fourth foreign-born Justice to serve in the Court, and the first to do so since 1793.

As he had throughout every aspect of his life, Sutherland worked very hard on the Court. In fifteen years he wrote 295 majority opinions, thirty-five dissents, and one concurrence –

an average of twenty majority opinions per year, which doubled the average production of today’s Supreme Court Justices.

Sutherland’s broad life experiences, sobriety, hard work, and self-reliance brought a valuable perspective to the Court. He had grown up poor and worked extremely hard as a boy. These work habits, combined with his intellect and ambition, propelled him into the highest echelon of power on the state and national levels, exposing him to people from all walks of life. Moreover, his extensive experience in the state and national legislative branches gave him a solid foundation as a constitutional scholar and an expert in governmental affairs.

Sutherland was wary of the tyranny of the majority. He had seen temporary factions spring to life from time to time with all the answers, only to fade away leaving in their wake ill-considered legislation that often infringed on individual rights, or violated other constitutional principles. Justice Sutherland challenged the Congress, the President, and other courts in order to protect individual rights or fundamental constitutional doctrines. For an in-depth study of Justice Sutherland’s Supreme Court career, see Hadley Arkes, *The Return of George Sutherland: Restoring a*

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Jurisprudence of Natural Rights (1997).

Room does not allow for any exploration of Sutherland's varied opinions. That said, in *Berger v. United States*, 295 U.S. 78 (1935), he eloquently set the standard for prosecutorial misconduct. In *Berger*, an Assistant U.S. Attorney was guilty of gross misconduct during a criminal trial, *see id.* at 89. He used innuendo, misled jurors, badgered and bullied witnesses, lied about the evidence, and used undignified and intemperate arguments. *See id.* at 85-86. The trial court denied mistrial and new trial motions, and the Court of Appeals affirmed. *See Id.* at 79-80. The Supreme Court reversed. *See id.* at 89. Justice Sutherland wrote that the misconduct called for a stern rebuke and repressive measures. He wrote:

The United States attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape, or innocence suffer. He may prosecute with earnestness and vigor – indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Id. at 88.

This decision better clarified the prosecutor's role and obligations and it gave trial judges a clear directive and authority to punish prosecutorial misconduct.

The most controversial opinions that Justice Sutherland wrote struck down portions of President Franklin Delano Roosevelt's New Deal legislation. When Roosevelt overwhelmingly defeated President Hoover in 1932, Congress quickly passed many acts to address the economic calamity. The laws, however, were not thoroughly assessed from a constitutional point of view before they were passed. This led to scores of court challenges, and

many laws were struck down by unanimous vote in 1934, 1935, and 1936. Others were struck down by close votes on various constitutional grounds.

After his landslide 1936 reelection, Roosevelt tried to change the size of the Supreme Court, which he saw as a roadblock to economic recovery. He proposed adding six Justices to the Court. The political upheaval that the court-packing plan sparked caused conservative Justice Owen Roberts to change his votes and to uphold the New Deal legislation. This switch of a vote and strong public opposition to court-packing led to its defeat in the Senate, and it avoided a constitutional and perhaps a national crisis. *See* Jeff Shesol, *Supreme Power: Franklin Roosevelt vs. the Supreme Court* (2010).

Justice Sutherland was bitterly disappointed with Justice Roberts's vote change. When the Supreme Court then reversed recent Supreme Court decisions, Sutherland dissented sharply, contending that political expediency had trumped constitutional principles. He retired in 1938 much to the disappointment of moderates and conservatives.

Sutherland sought no plaudits or accolades. Humble to the end, he did not mention the Supreme Court or his career in his last public address: The Convocation of the BYU Class 1941. Instead, he reminisced about Utah in the 1860s and 70s, his daylong labors as a child, and his education at his beloved Brigham Young Academy. Above all, he implored graduates to be vigilant caretakers of their character, then to focus on career, family, and church. He died in 1942. *See A Message to the 1941 Graduating Class of Brigham Young University from Justice George Sutherland*, L. Tom Perry Special Collections Library, Harold B. Lee Library, Brigham Young University, Provo, Utah, June 4, 1941, available at http://www.scmlaw.com/public/1941_BYU_Commencement_Address.pdf.

George Sutherland died seventy years ago last July. On this anniversary we should recall that our heritage and good sense teach us to honor distinguished and exemplary forefathers. To do so here our Congressional delegation should appreciate that the new respect for Sutherland makes him the presumptive choice for this high honor. Other public servants may deserve such recognition, but none deserves it more.