

TRANSCRIPT OF SPEECH ON GEORGE SUTHERLAND GIVEN BY THE HONORABLE TED STEWART

I also would like to congratulate this law firm, Snow, Christensen & Martineau, for this rather remarkable event. I also would like to thank especially Andrew Morse for giving me this opportunity to talk about the judicial philosophy of Justice Sutherland.

I have been familiar with the name Justice Sutherland for 40 years. I knew that he was the only Utahn to ever serve on the United States Supreme Court. I also understood that he was one of the four horsemen of the Apocalypse which was another negative appellation that was given to him and the other members of the Supreme Court who were disparaged so soundly for standing in the way of Franklin Delano Roosevelt's early New Deal legislation. However, until asked to make this presentation, I did not appreciate the depth of his beliefs, the foundation for his judicial philosophy, and the reasons why he was not willing to abandon those beliefs in the face of extraordinary political pressure. Pressure that came from the President, from the Congress, from the media elite, and from the public. In all likelihood, the greatest political pressure ever exercised on the Supreme Court in the history of the country. My hope here this evening is to provide some understanding as to that philosophy and why he stood by it to the very end.

You have heard much tonight about Justice Sutherland's upbringing. His youthful years were spent in struggling for basic survival. He worked hard in a variety of jobs. He was forced to learn about hard work. He was forced to learn about the importance of personal initiative. The fact that he rose from poverty and deprivation to become a member of the United States House of Representatives, U.S. Senator and Justice of the Supreme Court greatly affected him. He believed in the reality of the American dream and especially that part which says that through your personal efforts you can succeed because he, in fact, had proved it.

In the commencement address to the students of Brigham Young University in 1941, he gave this very sage advice:

Be independent. Do your own thinking. Act upon your own judgment and responsibility. Cultivate self-reliance. Nothing so soon and so effectually destroys the moral fiber as the habit of constantly referring doubts and difficulties to others. Solve them for yourselves. Look the world in the face and as an individual and not merely as a part of a general mass.

This was not just advice to young students. It was a statement of his personal philosophy. It is how he had lived his life, and it is how he expected all Americans to live theirs. Although George Sutherland was not a member of the Church of Jesus Christ of Latter-Day Saints, we have heard how much he was affected by his training at Brigham Young Academy and in particular, the mentorship of Karl Maeser. From Maeser, Sutherland learned one very specific thing that affected his approach to constitutional law and I will here quote Sutherland: "I can recall as far back as 1879 or 1880 the words of Professor Maeser's classroom who declared that the Constitution was a divinely inspired instrument, as I truly think it is."

Sutherland was a member of the Supreme Court at a time when this nation was being swept by the revolutionary views expressed by the professor of history at Columbia University, Charles Beard, who in his 1913 book *An Economic Interpretation of the Constitution of the United States* had proffered evidence that the Founders, those responsible for writing the Constitution and for its ratification at the state conventions, were motivated almost exclusively by money. Their own economic self interest. This view was the exact opposite of the heroic view of the Founders held by Sutherland and the majority of Americans. However, in the two decades after Beard published his book it became the dominant view of historians and the nation's elite.

For example, in the two decades after the book was published 42 college textbooks on history and government were published and 37 of them fully endorsed Beard's view that a constitution was simply the product of a group of selfish white men. This non-heroic view of the Constitution was very convenient for those in this progressive era who were distressed by court decisions, primarily by the United States Supreme Court decisions, that were relying on the Constitution to strike down progressive legislation. Their cry was that the Constitution ought not to be viewed as sacred because it was simply an effort by a group of rich white men to preserve their wealth and power. Beard exercised considerable control and influence on the Supreme Court because he was a very dear friend of Associate Justice Harlan Fisk Stone. It was not until after World War II that an in depth analysis of Beard's proof for his thesis was undertaken. This analysis proved to be very damning for Beard was found to have falsified records, ignored evidence contrary to his argument, and generally set out to convince the nation of a claim that was contrary to the facts.

Now, I offer this bit of history to provide some context. The fact is is that George Sutherland believed what he did about the Constitution when the nation's political and media elite considered him to be a fool for having done so.

Sutherland was also greatly influenced by his Constitutional Law professor at the University of Michigan, Thomas Cooley. Cooley was a forceful advocate of the philosophy that equal operation of the law under the Constitution was most threatened by the dominance of factions whose primary goal was the unequal treatment under the law. These influences combined to shape George Sutherland into a legal classicist as defined by Professor Samuel R. Olken, who is a professor of law at John Marshall University who did a very exhaustive article on Justice Sutherland, and this is a quote: "Legal classicism sanctified the autonomy of the individual and posited a neutral state in which judges function as the guardians of private rights and liberties from the roiling passions of shifting democratic majorities."

Justice Sutherland and those of a similar judicial philosophy were accused by their critics of possessing laissez-faire or "hands off" approach to markets. In fact, their philosophy had nothing to do with economic theory at all. Rather, it was based on their concerns with the power and influence of factions and the injustice that a motivated minority or a majority can inflict on free people.

To further explore his philosophy, I don't want to try to put words into his mouth, I am going to read here a number of quotes which I hope will explain far better than I could what Justice Sutherland in fact thought about his judicial philosophy.

If constitutional and orderly government is to endure, there is but one course of the courts to follow and that is to set their faces steadily and unswervingly against any palpable violations of that great instrument no matter how overwhelming in a particular instance may be the popular sentiment or how strong the necessity may seem for if the door be opened to such violation or evasion on the ground of necessity, we shall be unable to close it against expedience or mere convenience.

Constitutions were made for the purpose of preventing hasty, ill-considered and unjust action on the part of the majority of the people themselves.

If the provisions of the Constitution are to be not upheld when they pinch as well as when they comfort, they may as well be abandoned.

The meaning of the Constitution does not change with the ebb and flow of economic events.

As I noted, this element of Justice Sutherland's philosophy is grounded on his great concern about the power and danger of factions. And the term factions, it was the term used by the Founders, specifically James Madison in the Federalist No. 10, to describe what they, the Founders, deemed to be the greatest threat to self government.

Sutherland also believed in the right of the American citizen to fully engage in the pursuit of happiness. He recognized that that phrase which is found in our Declaration of Independence meant to the Founders the right to possess property and to keep the fruits of their labors. Again, I quote him:

The vague feeling which some people have that the struggle to own and retain possession of property falls a little short of being completely respectable is generally confined to property of an extensive character. There is no thought of questioning the sacredness of the thrift stamp or the family cow or of the lowly cot by the brook side. But bonds or sleek herds on a thousand hills or mansions overlooking Central Park from the east side are altogether sinister and suspicious things. I personally entertain a very well-settled opinion that society, including the very rich themselves, would be greatly benefitted if the few who have great wealth had less and the vast number who have very little had more. But I know of no way of making the adjustment without the consent of those whose property would be depleted and that this is so is one of the great blessings of our constitutional heritage and one to be guarded with the utmost jealousy. For if the hand of power shall ever be permitted to take from 'A' to give to 'B' merely because 'A' has much and 'B' has little, we shall have taken that first step upon that unhappy path which leads from a republic where every man may rise in proportion to his energy and ability to a commune where energy and sloth, ability and ignorance occupy in common the same dead level of individual despair. The course of safety for our society as well as liberty for the individual is to make and enforce laws which will keep free the gates of equal opportunity to all, compel an honest contest and let the rewards for diligence fall where and how and in such measure as they may.

The final point that I would like to share with you is that Justice Sutherland possessed a great love of individual freedom. This is best expressed in the following:

We cannot maintain a government of laws if the rights of some men are submitted to the test of liberty and the rights of others to the test of power. We cannot have liberty itself in any real sense if we act upon the theory that liberty is right to do as we please and prevent others from doing as they please. Hence, any law which arbitrarily separates men into classes to be punished or rewarded not according to what they do but according to the class to which they are assigned is odious and despotic no matter how large a majority may have approved it.

At his passing, Chief Justice Harlan Fisk Stone, who had been one of Justice Sutherland's most consistent antagonists among his fellow Supreme Court Justices, stated in his eulogy:

He was a man of stalwart independence and of the purist character, who without a trace of intellectual arrogance and always with respectful toleration for the views of colleagues who differed with him, fought stoutly for the constitutional guarantees of the liberty of the individual." There of those of us in this audience tonight who might agree with Justice Sutherland's judicial philosophy and there are those who would heartily disagree. What cannot be disputed, however, is that from the beginning of his public life to the very end, he was consistent in espousing a philosophy that was well founded, an expression of very high constitutional ideals, and immune to the vagaries of public opinion.

As a judge, I could only hope that the same could be said of me. Thank you very much.