



*Intimations on
Justice George Sutherland*

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By Francis R. "Czar" Kirkham, Esq.
LAW CLERK TO JUSTICE SUTHERLAND

AN ADDRESS DELIVERED ON NOVEMBER 19, 1985, AT THE SUTHERLAND CHAIR INAUGURAL DINNER

He said that his goal had been not merely to be a good lawyer, or a good legislator, or a good judge. These, he said, were nothing compared to the ambition of being a good man.

Although more than half a century has gone by, I remember it as though it were yesterday. I telephoned my twenty-year-old bride and told her I was bringing Justice Sutherland's law clerk home for dinner. She started a mild protest about such short notice, but I told her just to dress up a little, and we would take him out for dinner. When I arrived I knocked at the door. She came out and looked around and said, "Where is Justice Sutherland's law clerk?" I said, "You are looking at him."

It was a wonderful dinner that followed and wonderful years succeeded it.

I knew, of course, when I was fortunate enough to receive my appointment, that I would be working with one of the greatest of living statesmen and jurists. But I soon learned something else that immeasurably enhanced the joy and reward in my work. I learned that to his great legal abilities, Justice Sutherland added a warm and kindly nature, a delightful sense of humor, an always over-generously expressed appreciation for the small contributions his law clerk was able to make, and, above all, a mature scholarship in the humanities, which was an inspiration to one privileged to share his thoughts and labors.

Through all his years on the Court—including a period when feelings ran high as the nation experienced an upheaval in constitutional law and when Justice Sutherland's views were strongly contested by other members of the Court—the respect accorded Justice Sutherland by his brethren and the affection in which they held him never wavered.

I do not know whether any writing in the Court's history more warmly expresses deep feelings than Chief Justice Taft's letter to Justice Sutherland when the justice was almost forced to resign because of a severe illness which kept him bedridden for several months. The chief justice wrote, simply, "We all love you, George," as he hoped for his speedy return.

Justice Roberts, whose chambers were next to those of Justice Sutherland in the old Capitol Building, once told me that at the commencement of the conferences of the Court, Justice Holmes often strolled over to Justice Sutherland and pleaded, "Sutherland, J., tell us a story." And the ensuing stories, often from his boyhood in the West, would bring roars of laughter.

I already have related to the students of the Law School another incident which to me epitomizes the high esteem in which Sutherland was held by his brethren. When Justice Brandeis returned his copy of Justice Sutherland's great dissenting opinion in the *Minnesota Mortgage Moratorium* case, Brandeis had inscribed on it

"My Dear Sutherland.

"This is perhaps the finest opinion in the history of American constitutional law.

"Regretfully, I adhere to my error. —Brandeis."

Years later, when Justice Sutherland finally retired from the bench, his colleagues sent him an unusually touching letter expressing their "warm affection" and their "high appreciation" for his "distinguished ability," "unvarying kindliness" and "unfailing humor."

George Sutherland was born on the old Roman road known as Watling Street, in the little town of Stony Stratford in Buckinghamshire, England, on March 25, 1862. Incidentally, only three justices before him, and none for more than 100 years, were of foreign birth. While he was still an infant his father embraced the Latter-day Saint faith and emigrated with his new family to Springville, Utah. After a short time the elder Sutherland renounced his faith and moved on to Montana. By 1869, however, he had returned to Utah to remain there for the rest of his life.

Young Sutherland, though not reared in the Mormon faith, held it always in highest esteem and numbered its followers and leaders among his close friends and partners in the practice of law. I well recall the warmth with which he and President Heber J. Grant used to greet each other when President Grant would stop by the justice's chambers in Washington, D.C., for a visit. And it was Sutherland's great speech in the Senate which saved Senator Smoot his seat when it was threatened by a resolution to bar him, engendered by bitter anti-Mormon forces. Sutherland's ringing defense eloquently states his belief in a "fundamental justice" which exists apart and above the laws of men. He told the packed Senate and galleries,

"In one sense the power of this Senate to deal with the accused Senator is plenary. It may be exercised arbitrarily. In a legal sense, the Senate is not accountable to any other authority or tribunal for its action. Right or wrong, wise or unwise, just or unjust, its decisions become the unappealable law of the case. But in another sense, and in a higher and better and juster sense, its action is restricted by those considerations of fundamental justice which find an abiding place in the conscience of every man."

Nothing could be more fitting than to have a chair in jurisprudence established in honor of Justice Sutherland at Brigham Young University, Utah, of the Mormon pioneer era, and this institution were the decisive influences in shaping his life and philosophy. His boyhood was typical of the pioneer days. At the age of twelve the necessity of earning his own living forced him from school. But, five years later, entirely as a result of his own industry and frugality, he was able to return to the classroom at the Brigham Young Academy. Here Karl G. Maeser touched his life with an inspiration that never diminished.

In 1936, when the Court and the Constitution were under attack as perhaps never before, Justice Sutherland wrote to a friend, "I recall . . . the words of Professor Maeser, who declared that [the Constitution] was a divinely inspired instrument—as I truly think it is."

Industry, thrift, honesty, independence, unimpeachable character, and respect for the law—these were the learned attributes of his early years, and they became and remained the foundation of his great career. To the students of this school, in an address shortly before his death—I think his last public utterance—he said that his goal had been not merely to be a good lawyer, or a good legislator, or a good judge. These, he said, were nothing compared to the ambition of being a good man.

From BYU he went to the University of Michigan Law School under the deanship of Judge Thomas Cooley. After a year's study he was admitted to the bars of Michigan and Utah and returned to Provo to start the practice of law at the age of twenty-one.

From the very outset Sutherland was interested in government and public service. While still in his twenties he ran for mayor of Provo, worked with Reed Smoot and others to organize national political parties in Utah, and was a delegate to the National Republican Convention in Minneapolis. He served in the Utah Senate from its first year of statehood to 1900, as a representative from Utah to Congress from 1901 to 1903, and as the senator from Utah, following election by unanimous vote of the Utah Legislature, from 1905 to 1917. He was appointed to the Supreme Court in 1922 and served until his retirement in 1938. He died four years later in 1942 at the age of eighty.

But this simply states the bare framework of a career which was filled with brilliant achievement in service to his state and nation. In Utah's first senate he chaired the Judiciary Committee and sponsored the act extending the right of eminent domain to the mining and irrigation industries, so essential to the development of his state. In the House of Representatives he aided in framing the Reclamation Act under which the arid lands of the West have been made to blossom. In the Senate his work on the Revision and Codification of Law and the Judiciary and Foreign Relations committees brought him national acclaim. The federal Criminal Code and Judicial Code were largely his handiwork. He was the acknowledged leader of the forces in the Senate fighting for women's rights. He introduced the Susan B. Anthony Resolution in the Senate and the Women's Suffrage Amendment to the Constitution and was praised by women's organizations throughout the country as a "powerful and generous ally" in achieving women's suffrage.

He was the principal actor in the passage of the Seamen's Act of 1915. Andrew Fureseth, president of the Seamen's Union, wrote of him.

"I learned to know a lover of freedom, a man who understands thoroughly what freedom means, and a man who, in the protection of freedom to all men, regardless of their station in life, may be trusted and relied upon under all possible conditions."

I remember well Andy Fureseth, nearly twenty years after he wrote those words, calling on Justice Sutherland. After a pleasant visit he came back through my office adjoining the Justice's Chambers, shook my hand and said, "Young man, your Justice is the greatest friend the American seaman ever had."

During his years in the Senate, as president of the American Bar Association, and in the private practice of law, he delivered a number of notable addresses on the Constitution, the courts and the principles and powers of government, including the Blumenthal Foundation lectures at Columbia University on "Constitutional Power and World Affairs." He also served as a member of the Advisory Committee of the International Disarmament Conference in 1921 and was counsel for the United States in the Norway-United States arbitration at The Hague in 1922.

By this time Sutherland had become a national figure, "recognized as a leading exponent of constitutional theory and practice," and admired for the "lucidity and vigor of his

intellect." As Nicholas Murray Butler of Columbia phrased it, he was a "statesman of high capacity and vision." President Taft characterized him as the "greatest constitutional lawyer in the Senate," and James Bryce described him as "the living voice of the Constitution."

His elevation to the Supreme Court in 1922 was expected and widely acclaimed.

While Justice Sutherland was on the Court no other justice spoke for the majority in so many great cases, extending to every sphere of government. He wrote with great clarity of expression and with a style that was simple, yet elegant. I have long treasured a copy of a letter he wrote to his friend Dean Bates of the Michigan Law School which illustrates his simple, beautiful, yet powerful prose, and at the same time well epitomizes his philosophy:

"The world is passing through an uncomfortable experience. In many respects it will have to retrace its steps with painful effort. The tendency of many governments is in the direction of destroying individual initiative, self-reliance and other cardinal virtues which I was always taught were necessary to develop a real democracy. The notion that the individual is not to have the full reward of what he does well, and is not to bear the responsibility for what he does badly, apparently is becoming part of our present philosophy of government."

Justice Sutherland was a conservative, but a conservative in the sense of one who cherishes the fundamental principles that underlie our democracy.

He believed in a written constitution setting forth precepts which can be altered only by the people—the sovereignty that created the Constitution—and not by executives or judges, else we will have a government of men and not of laws, or even by legislatures, else the liberties enshrined in the Constitution by the founders as unalterable guarantees of freedom can be abridged or destroyed by the whim of the moment.

He believed that the right to life and liberty were rights conferred by a Supreme Being which are, as the Declaration of Independence declares, inalienable. They can not be taken away by the state, or even bargained away to the state by those who possess them. He believed and wrote in his opinions that while the Constitution does not protect property as such, it does protect the right of men to own, possess, and use property rightfully as a basic ingredient of individual freedom. He stoutly defended in a number of great opinions the rights of men enumerated in the Bill of Rights and comprehended within the Due Process Clause of the Fourteenth Amendment. His dissenting words in the *Associated Press* case continue to ring through the years:

"Do the people of this land—in the providence of God, favored, as they sometimes boast, above all others in the plentitude of their liberties—desire to preserve those so carefully protected by the first amendment: liberty of religious worship, freedom of speech and of the press, and the right as freemen peaceably to assemble and petition their government for a redress of grievances? If so, let them withstand all beginnings of encroachment. For the saddest epitaph which can be carved in memory of a vanished liberty is that it was lost because its possessors failed to stretch forth a saving hand while yet there was time."

Chief Justice Stone, at the memorial services for Justice Sutherland held at the Supreme Court in 1944, magnificently summarized Sutherland's principles and work on the Court:

"During the sixteen years when Justice Sutherland served on this Court he exercised a profound influence on the development of constitutional law, and especially on the interpretation of the Fourteenth Amendment. . .

"In a time when it had become the fashion to classify men by labelling them, Justice Sutherland was labelled a conservative. . . . He saw in the encroachments of government on the freedom of the individual, the perils of the oppressive exercise of governmental power which he held it was the design of the due process clause to prevent. He gave vigorous expression to these views in a series of opinions which stirred widespread public discussion of some of the most fundamental problems of constitutional government. . . . Let it be said that the so-called conservative temper of these opinions was not inspired by any antagonism to progress in the law, but rather by the emphasis which Justice Sutherland placed on the constitutional protection of the few from the tyranny of the many. Indeed, these opinions were but steps in the process of finding solutions of what perhaps has been the greatest problem of constitutional interpretation throughout the twentieth century, the need to bring into proper balance the competing demands, on the one hand that constitutional sanctions shall safeguard the individual from the abuse of power by the majority, and on the other that the Constitution be not so interpreted as to clothe the individual with power to restrict unduly the welfare and progress of the community as a whole "

And then the chief justice concluded—and let me interpolate that I was privileged to attend those services as a member of the Committee on Resolutions, and I have never heard Chief Justice Stone speak with deeper emotion and sincerity

"The time will come when it will be recognized, perhaps more clearly than it is at present, how fortunate it has been for the true progress of the law that, at a time when the trend was in the opposite direction, there sat upon this bench a man of stalwart independence, and of the purest 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 guaranties of the liberty of the individual."

Many years after I listened to those words by Chief Justice Stone, my friend, Phil Neal, dean of the University of Chicago Law School, telephoned me to ask if I would be interested in interviewing the brightest scholar he had known in his many years of teaching at Stanford and Chicago. I of course arranged to meet the young man and tried my best to get him to come with our firm. He decided, however, to practice in his home state of Arizona, and this he did, with distinction, as a member of one of the state's leading law firms, until this university persuaded him to become the first dean of its new law school

You know what has happened since.

Rex Lee, it has been a privilege to know you and to follow your brilliant career. You come to us from the highest office a practicing lawyer can hold in this nation—or in the world. If Justice Sutherland could be with us today, he would, I know, rejoice at your selection as the first occupant of the chair established in his honor. He would appreciate your brilliant scholarship and achievements, but most satisfying of all to him, beyond any doubt, would be your unqualified integrity, strength of character, and dedication to those great principles of freedom and democracy which Justice Sutherland so greatly cherished and so stoutly defended.

Lee Returns As First Occupant of Sutherland Chair



The "prodigal son" is coming home. Rex E. Lee, founding dean of the J. Reuben Clark Law School and solicitor general of the United States from 1981 to 1985, began teaching constitutional law at the Law

School the fall of 1986. Lee has accepted an appointment to an endowed professorship at the Law School named in honor of George Sutherland, a BYU graduate who served as associate justice of the United States Supreme Court from 1922 to 1938.

Lee officially left his post as solicitor general on May 31, 1985. Since then, he has spent the bulk of his time working as a partner with Chicago-based Sidley & Austin in their Washington, D.C., office. However, Lee has been involved in various activities at the Law School.

On various sojourns to Provo this past year, Lee has lectured at a symposium on the religion clause of the First Amendment, taught several sessions of constitutional law, interviewed students for positions with Sidley & Austin, lunched with the Law Women, and most significantly, directed the introduction to law course offered to beginning first-year students. In his opening session with first-year



students, Lee was interrupted by an entourage of Law School faculty bearing gifts and presenting an "ode to BYU's prodigal son."

Returning to Provo as the Sutherland honoree, Lee will spend most of his time at the Law School. However, he is still involved in some appellate work for Sidley & Austin. "I can do that as well from Provo as anywhere," Lee said.

In a public statement, BYU President Jeffrey Holland said that BYU was delighted to have Lee back. "Rex is a superb teacher and will give the students special insights into the most challenging questions of constitutional law."

*Judging from press reports, Lee considers his time at the solicitor general's office to have been successful. "We won a lot more than we lost," he said. According to Lee, his greatest accomplishment as solicitor general was his victory in *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919 (1983), which eliminated Congress' use of legislative vetoes to control executive action. The case was heavily publicized.*

Among other successes as solicitor general, Lee persuaded the Supreme Court to tighten rules on standing, narrow the scope of the Exclusionary Rule, and allow the government to be more accommodating to religions without violating the First Amendment's Establishment Clause.

*Lee's biggest disappointment, he said, was his loss in the 1983 abortion decisions, *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983).*