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ADDRESS DELIVERED BY JUSTICE JESSE W. CARTER
OF THE SUPREME COURT OF CALIFORNIA
ON FRIDAY EVENING, JULY 25TH, 1958, AT TOWN & GOWN
ON THE UNIVERSITY OF SOUTHERN CALIFORNIA CAMPUS,
LOS ANGELES, CALIFORNIA, ENTITLED "A GREAT SUPREME COURT"

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Ladies and Gentlemen:

I am happy to join with those here tonight in paying tribute to those great men who now occupy the seats or the Bench of the greatest Supreme Court in the world today -- the Supreme Court of the United States. I say this notwithstanding the fact it has reversed the Supreme Court of California recently in two groups of very important cases. These decisions were rendered by a narrow margin of 4 to 3 by our Supreme Court, but were reversed by a unanimous court in the first group of cases and by a majority of 7 to 1 in the second group. It was my privilege to be with the dissenters in both groups of cases when they were decided by the Supreme Court of California.

I say the present Supreme Court of the United States is a great court because I believe that the present majority

of that court are endeavoring to articulate those fundamental concepts of civil liberties on which this government was founded. No unbiased mind can read history without being impressed with the broad fundamental concepts of civil liberties advocated by the founding fathers who unquestionably believed that they were establishing a government based upon fundamental

which would for all time protect the rights of the people against tyranny and all of the abuses which a tyrant might inflict upon his subjects. I stated in my dissenting opinion in the so-called loyalty oath cases that "It must be remembered that while our government was 'conceived in liberty,' it was born in revolution. The Declaration of Independence was the antithesis of a pledge of allegiance or loyalty to the British government of which the then American colonists were a part.

This memorable document epitomized the concept of its framers

the objects and purposes of government and the right of the people to change it by force if necessary." -- The events which followed the adoption of the Declaration of Independence

by the Continental Congress on July 4, 1776, are well known to every student of American history. These events culminated in the Constitutional Convention at Philadelphia during the summer of 1787 where the Constitution of the United States was drafted. Many of the delegates at the Constitutional Convention had been members of the Continental Congress which had adopted the Declaration of Independence. They were revolutionists in the truest and most dignified sense. It should be remembered that the Declaration of Independence and the Constitution of the United States were prepared by a group of men who had endured tyranny under a monarchical form of government for over three generations. They were the leaders in the struggle which overthrew that government and they sought to establish a government of the people, by the people, and for the people, which would derive its just powers from the consent of the governed. They sought to establish justice, ensure domestic tranquility, promote the general welfare, provide for the common defense and secure the

blessings of liberty to themselves and their posterity -- a government which would govern without tyranny and without oppression and which would guarantee to the governed all of the liberty that a free people in a homogeneous society could enjoy.

When I was a youth I was thrilled when I read the bold assertions of those courageous men who led the fight for the establishment of a government which would permit its subjects to enjoy the greatest degree of freedom possible in an organized society. I memorized and recited many times Patrick Henry's liberty or death speech. Thomas Jefferson's immortal words, "I have sworn upon the altar of God eternal hostility against every form of tyranny over the mind of man," inspired independent thinking; I found patriotic fervor in Emerson's verse commemorating the battle of Lexington:

"By the rude bridge that arched the flood
Their flag to April's breeze unfurled
Here once the embattled farmers stood,
And fired the shot heard round the world."

Longfellow's "Midnight Ride of Paul Revere; the martyrdom of Warren at Bunker Hill, the exhortation of Ethan Allan at

Ticonderoga; the valiant utterance of Colonel John Stark at the battle of Bennington; and the fighting words of John Paul Jones on the sinking Bonhomme Richard impressed me with the thought that these men knew they were fighting for a just and righteous cause.

In view of the illustrious history of achievements by those great men who founded our government and the philosophies which they propounded in the field of human behavior which constitute our fundamental law, it has difficult for me at times to rationalize many of the decisions of the Supreme Court of the United States in former years.

It must be remembered that there was fresh in the minds of the founding fathers the abuses which had been inflicted upon an oppressed people by a tyrannical government. A brief review of some of these abuses affords us some basis for the determined effort of the founding fathers to place restrictions in our fundamental law which would prevent the new government from a repetition of such abuses.

On February 22, 1634, ten ships were at anchor in the Thames, bound for New England, "fraighted with passengers

and provision." On that day, the Privy Council barred their departure because they were filled with people "ill affected and discontented as well with civil as ecclesiasticall government," who would add to the "confusion and disorder" in the Colonies, "especially in poynt of religion." Then the Council ordered that during the voyage the book of Common Prayers of the Church of England be read morning and night, and that before departure each passenger should produce a certificate from the port authorities that "he hath taken both the oaths of allegiance and supremacie."

In 1647, Oliver Cromwell's army made a Declaration insisting that courts be deprived of their power to make a person answer questions "against himself in any criminal cause." The same year came The Humble Petition of Many Thousands, which prayed:

" that you permit no authority whatsoever to ~~compell any person or persons, to answer to any questions~~ against themselves or nearest relations, except in cases of

private interest between party and party in a legal way, and to release such as suffer by imprisonment, or otherwise, for refusing to answer to such interrogatories."

The Founding Fathers well knew the various devices used to make men testify against themselves. Before 1776, it was common to find in the penal laws of the Colonies the oath

purgation. That is to say, the accused was asked to swear that he had not committed the crime. Refusal to take the oath was treated as a confession that he was guilty.

The history of oaths has burned itself deep in men's minds. It helps explain why all oaths -- whether loyalty oaths or oaths designed to exact a pledge of conformity to some orthodox creed -- are so obnoxious to our people. They

explain why the Methodists and the Unitarians instantly contested the California law requiring them to give a loyalty oath before their church property could be exempt from taxation

In December, 1641, the Massachusetts Colony adopted The Body of Liberties -- the code of laws to govern their

affairs. These men were Puritans and their laws reflected their severity and their faith. For example, blasphemy was a capital offense; civil courts had the authority to enforce "the peace, ordinances and rules of Christ" in every church; foreigners "professing the true Christian religion" and fleeing from persecution were made welcome; churches could be established by those who were "orthodox in judgment" and who organized them in a "Christian way with due observation of the rules of Christ revealed in his word." But The Body of Liberties also contained many of the seeds of the civil liberties which today distinguish us from the totalitarian systems:

equal justice under law for citizens and foreigners
no punishment except by an express law
compensation for private property taken for
public use
freedom of speech and publication at any town
meeting
freedom to leave the colony at any time
right to bail and to a speedy criminal trial
right to jury trial
protection against being twice sentenced for the
same offense

-- prohibition of use of torture and the hated inquisitional oath to make an accused or any other person testify to things that might incriminate him

-- right of the people to elect those who will govern them

-- prohibition of slavery and of inhumane, barbarous, and cruel punishment

-- free (as distinguished from feudal) land ownership.

Separation of church and state, and tolerance

diverse religious views, were yet to come. Moreover, The Body of Liberties provided that once a defendant had been convicted, he could be tortured in order to get evidence that might incriminate others. Yet The Body of Liberties, in its main emphasis, was a new Magna Carta.

The birth of religious liberty came later by the following declaration:

"No man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in body or goods, nor shall otherwise suffer, on account of his religious opinions or belief; but that all men shall be free

to profess, and by argument to maintain, their opinion in matters of religion, and that the same shall in no wise diminish, enlarge, or affect their civil capacities." This is the heart of A Bill for Establishing Religious Freedom drafted by James Madison and Thomas Jefferson and enacted by Virginia, January 19, 1786.

This philosophy has become part of the American ideal:

-- The community will tolerate every religion.

The state will establish, favor, or support no religion.

-- Each man's religion is his own affair.

-- Religious freedom and sanctity of rights of conscience go hand in hand.

This is the philosophy of the First Amendment:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

In 1776 and the years immediately following, church and state were not separated in this country. Most of the new state constitutions provided for taxes to support the churches and contained discriminations against Catholics, Jews, and

atheists. Moreover, from Maryland on south the Anglican Church was the established church. It was supported by taxation, and only its clergy could officiate at marriages and baptisms. Yet it represented only a minority of the people. Moreover, many of its clergy had opposed the Revolution, siding with England. During the time the Anglican Church was the established church, the other religious sects existed only as a matter of favor.

The Anglican Church was disestablished in 1779. Then an effort was made in Virginia to put all Christian churches on an equal footing by supporting all of them by taxation. This proposal was endorsed by George Washington and John Marshall.

Jefferson and Madison waged war against it and on December 24, 1784, got consideration of the bill postponed in the Virginia legislature. Thereupon Madison wrote the Memorial and Remonstrance against Religious Assessments, perhaps the most eloquent brief ever written for separation of church and state. It argued against the bill as follows:

-- Those who do not believe are taxed for the support of those who do.

An established clergy is always a convenient aid to rulers who want to subvert the liberties of the citizens.

Centuries of the legal establishment of a church produced pride and indolence in the clergy, ignorance and servility in the people, superstition, bigotry, and persecution in both.

-- If government can establish Christianity to the exclusion of all other religions, it can later establish one sect to the exclusion of the rest or force a citizen to support such sect as it may choose.

It was this Remonstrance which defeated the proposed Virginia law.

Our most famous Bill of Rights goes back to June 12, 1776, the date Virginia adopted a Declaration of Rights, drafted by George Mason. It guaranteed freedom of press and religion, right to jury trial, and most of the procedural safeguards for criminal trials now contained in the Fifth and Sixth Amendments. It subordinated the military to the civil power. It provided for free elections, and placed the taxing power in the hands of elected officials. It proclaimed against unreasonable searches and seizures. Beyond these specific

measures, it stated a profound, though revolutionary, concept of government:

1. That all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot by any compact deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.

2. That all power is vested in, and consequently derived from, the people; that magistrates are their trustees and servants, and at all times amenable to them.

3. That government is, or ought to be instituted for the common benefit, protection, and security of the people, nation, or community; . . . that when any government shall be found inadequate or contrary to these purposes, a majority of the community hath an indubitable, unalienable and indefeasible right to reform, alter or abolish it, in such manner as shall be judged most conducive to the public weal.

On June 13, 1779, Thomas Jefferson wrote his famous article of faith on free speech:

"The opinions of men are not the object of civil government, nor under its jurisdiction; that to suffer the civil magistrate to intrude his powers into the field of opinion and to restrain the profession or propagation of principles on supposition of their ill tendency is a dangerous fallacy, which at once destroys all religious liberty, because he being of course judge of that tendency will make his opinions the rule of judgment, and approve or condemn the sentiments of others only as they shall square with or differ from his own; that it is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order; and finally, that truth is great and will prevail if left to herself; that she is the proper and sufficient antagonist to error, and has nothing to fear from the conflict unless by human interposition disarmed of her natural weapons,

free argument and debate; errors ceasing to be dangerous when it is permitted freely to contradict them."

Most of this is in the preamble of an Act sponsored by Jefferson and Madison and finally passed by Virginia in 1786. It is the essence of the provision in the First Amendment that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ."

Courts have not always been faithful to that command.

have read "no law" as meaning "some law" and at times have allowed the legislature to curb speech when the courts thought the legislature had grounds for believing that the public interest required it. Jefferson placed no restraints on discussion of political, social, or economic affairs, whether the ideas expressed were popular or unpopular. His idea was that even rash and violent talk should be allowed;

debate and argument, no matter how revolutionary the sound, were sacrosanct. Only when speech moved into the realm of action against peace and security could it constitutionally be punished

Freedom of speech protects various interests. First, there is the interest of the speaker. The right of conscience -- the right to think and believe as one chooses -- does not amount to much if there is no right to give expression to one's ideas. Life in a police state is a suffocating experience.

There is, secondly, the public interest in allowing people to "blow off steam." It is good therapy for the individual, and for society as well. Grievances that are aired do not become as virulent as grievances that are suppressed or driven underground. The British experience at Hyde Park -- where sage or crackpot can speak as he will -- is evidence enough.

But the most important aspect of freedom of speech is freedom to learn. All education is a continuing dialogue questions and answers that pursue every problem to the horizon. That is the essence of academic freedom, of all scientific inquiry. Pursuit of that ideal caused Socrates his death. He was the "gadfly" whose mission was to rouse, reprove, and argue

with people. He plagued their consciences and challenged their prejudices. He taught that "virtue does not spring from riches but riches and all other human blessings, both private and public, from virtue." Hence, he was charged with "corrupting the youth."

limits are put on discussion people do not develop their capacities. They cease to learn and become saturated with the prevailing orthodox creed. They are apt to become minions of one political sect. New ideas become fearful or dangerous. That is why totalitarian governments dare not allow free universities, free speech, free churches. That is also why any totalitarian government cannot long endure. For the mind of man can never be long kept in chains.

the cases involving the university loyalty oath were before the Supreme Court of California a few years ago, one of my associates on the court stated that it was his view that if these people, referring to the professors who had refused to take the oath, desired to teach in our universities

they should conform to the prevailing concepts and teach courses as outlined by the Legislature. I immediately replied that the views expressed by him would bar as teachers in our universities such men as Socrates, Galileo, Columbus and even Jesus of Nazareth, as all of these men gave expression to concepts entirely out of harmony with those accepted by their contemporaries and they were either killed, tortured or imprisoned because of their unorthodox teachings. In other words, were all nonconformists and could not with honesty and good conscience have subscribed to an oath of the character adopted by the Regents of the University of California which many of the professors refused to subscribe to.

Dr. Robert M. Hutchins, formerly President of the University of Chicago, testified as follows before a House committee in 1952:

"Now, a university is a place that is established and will function for the benefit of society, provided it is a center of independent thought. It is a center of independent

thought and criticism that is created in the interest of the progress of society, and the one reason that we know that every totalitarian government must fail is that no totalitarian government is prepared to face the consequences of creating free universities.

"It is important for this purpose to attract into the institution men of the greatest capacity, and to encourage them to exercise their independent judgment.

"A university, then, is a kind of continuing Socratic conversation on the highest level for the very best people you can think of, you can bring together, about the most important questions, and the thing that you must do to the uttermost possible limits is to guarantee those men the freedom to think and to express themselves.

"Now, the limits on this freedom cannot be merely prejudice, because although our prejudices might be perfectly satisfactory, the prejudices of our successors, or of those who are in a position to bring pressure to bear on the

institution, might be subversive in the real sense, subverting American doctrine of free thought and free speech."

What Dr. Hutchins said is eminently true, but we find many would-be superpatriots who are disposed to brand every new idea as subversive, especially if it runs contrary to their political, social or economic concepts. When I hear the wail of these superpatriots against those who dare to champion unorthodox concepts, I contrast their expressions of fear and disaster with the forthright declaration of Thomas Jefferson in his First Inaugural Address which I cannot refrain from repeating here: "If there be any among us who would wish to dissolve this Union or to change its republican form, let them stand undisturbed as monuments of the safety with which error opinion may be tolerated where reason is left free to combat it. "

While watching television the other night I saw two Catholic priests who had been held prisoners in Communist China for five years. They had recently arrived in this

country by plane. In answer to questions as to their treatment by the Communists, they stated that they were forbidden to even converse with each other while under Communist rule. This is abhorrent to all liberty-loving people, but there are those among us who would consign anyone to enforced silence who attempted to give utterance to unorthodox concepts of government or social or economic theories.

A few years ago I met a man who had served with our State Department in Madrid, Spain during the first years of the Franco regime. I asked him what he observed with respect to the civil liberties enjoyed by the people there. He said, "Well, you can talk about the weather or a bullfight, but if you attempt to discuss political, social or economic concepts in public, you just disappear. You are free to attend any Catholic church you wish, but the only other religious service permitted is one service a week at the British Embassy which is conducted by the Church of England for British subjects only."

Of course, it is difficult for us here in America to appreciate restraints upon our liberties such as those which I have mentioned as existing in countries dominated by Communists and Fascists. But I cannot refrain from giving expression to the belief that if our courts would yield to the pressures of those who would stifle freedom of thought and expression by the use of test oaths, we would be headed for the same type of police surveillance and restraint against the expression of unorthodox views as exists in those countries.

While I accept as sound the views expressed in the opinions prepared by Mr. Justice Brennan in the so-called loyalty oath cases, I am in full accord with the broader views on the subject of loyalty oaths expressed in the concurring opinions of Mr. Justice Black and Mr. Justice Douglas, and I subscribe wholeheartedly to the declaration in the concurring opinion of Mr. Justice Black in the First Unitarian Church case where he stated:

"I am convinced that this whole business of penalizing people because of their views and expressions concerning government is hopelessly repugnant to the principles of freedom upon which this Nation was founded and which have helped to it the greatest in the world. As stated in prior cases, I believe 'that the First Amendment grants an absolute right to believe in any governmental system, [to] discuss all governmental affairs, and [to] argue for desired changes in the existing order. This freedom is too dangerous for bad, tyrannical governments to permit. But those who wrote and adopted our First Amendment weighed those dangers against the dangers of censorship and deliberately chose the First Amendment's unequivocal command that freedom of assembly, petition, speech and press shall not be abridged. I happen to believe this was a wise choice and that our free way of life enlists such respect and love that our Nation cannot be imperiled by mere talk.' Carlson v. Landon, 342 U.S. 524, 555-

(dissenting opinion)

"Loyalty oaths, as well as other contemporary 'security measures,' tend to stifle all forms of unorthodox or unpopular thinking or expression -- the kind of thought expression which has played such a vital and beneficial in the history of this Nation. The result is a stultifying conformity which in the end may well turn out to be more destructive to our free society than foreign agents could ever hope to be. The course which we have been following the last decade is not the course of a strong, free, secure people, but that of the frightened, the insecure, the intolerant. I am certain that loyalty to the United States can never be secured by the endless proliferation of 'loyalty' oaths; loyalty must arise spontaneously from the hearts of people who love their country and respect their government. I also adhere to the proposition that the 'First Amendment provides the only kind of security system that can preserve a free government -- one that leaves the way wide open for people to favor, discuss, advocate, or incite causes and doctrines however obnoxious and

antagonistic such views may be to the rest of us.' Yates v. United States, 354 U.S. 298, 344 (dissenting opinion)."

It is my view that no greater curse can befall a nation than the imposition by the government of restrictions, however slight, on the thoughts and expressions of the people, and that no government is justified in imposing restrictions upon the thoughts and expressions of its subjects unless such expressions are accompanied by overt acts of force or violence against the government or its officials. This, in my opinion was the concept of the founding fathers, and if this government is to endure as the greatest nation on the face of the earth, this concept must be the rule of decision in its courts of last resort. It is my hope that the Supreme Court of the United States will never recede from the principles it has announced in its recent decisions in the field of civil liberties and that the law as declared in these decisions will forever remain the fundamental law of these United States.