

MR. JUSTICE HUGO L. BLACK

*Plain Words and Constitutional  
Absolutes*

*Hugo L. Black was a Senator from Alabama before being appointed to the Supreme Court by Franklin D. Roosevelt in 1937. On April 14, 1962, the American Jewish Congress held a banquet in honor of his twenty-five years of service on the Supreme Court. The program for the occasion was a public interview with Justice Black, conducted by the late Professor Edmond Cahn of the New York University Law School. The focus of the unrehearsed interview, reprinted here in its entirety, was on Justice Black's interpretation of the free speech provision of the First Amendment. Justice Black will soon be celebrating his 30th year on the Court.*

*Cahn:* Let me start by explaining the purpose of this interview. Two years ago, when you delivered your James Madison Lecture at New York University, you declared your basic attitude toward our Bill of Rights. This was the positive side of your constitutional philosophy. Tonight I propose we bring out the other side, that is, your answers to the people who disagree with and criticize your

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principles. The questions I will ask, most of them at least, will be based on the criticisms. As you know, I consider your answers so convincing that I want the public to have them.

Suppose we start with one of the key sentences in your James Madison Lecture where you said, "It is my belief that there are 'absolutes' in our Bill of Rights, and that they were put there on purpose by men who knew what words meant and meant their prohibitions to be 'absolutes.'" Will you please explain your reasons for this.

*Justice Black:* My first reason is that I believe the words do mean what they say. I have no reason to challenge the intelligence, integrity, or honesty of the men who wrote the First Amendment. Among those I call the great men of the world are Thomas Jefferson, James Madison, and various others who participated in formulating the ideas behind the First Amendment for this country and in writing it.

I learned a long time ago that there are affirmative and negative words. The beginning of the First Amendment is that "Congress shall make no law." I understand that it is rather old-fashioned and shows a slight naïveté to say that "no law" means no law. It is one of the most amazing things about the ingeniousness of the times that strong arguments are made, which almost convince me, that it is very foolish of me to think "no law" means no law. But what it says is "Congress shall make no law respecting an establishment of religion," and so on.

I have to be honest about it. I confess not only that I think the Amendment means what it says but also that I may be slightly influenced by the fact that I do not think Congress *should* make any law with respect to these subjects. That has become a rather bad confession to make in these days, the confession that one is actually for something because he believes in it.

Then we move on, and it says "or prohibiting the free exercise thereof." I have not always exercised myself in regard to religion as much as I should, or perhaps as much as all of you have. Nevertheless, I want to be able to do it when I want to do it. I do not want anybody who is my servant, who is my agent, elected by me and others like me, to tell me that I can or cannot do it. Of course, some will remark that that is too simple on my part. To them, all this discussion of mine is too simple, because I come back to saying that these few plain words actually mean what they say, and I know of no college professor or law school professor,

outside of my friend, Professor Cahn here, and a few others, who could not write one hundred pages to show that the Amendment does not mean what it says.

Then I move on to the words "abridging the freedom of speech or of the press." It says Congress shall make no law doing that. What it means—according to a current philosophy that I do not share—is that Congress shall be able to make just such a law unless we judges object too strongly. One of the statements of that philosophy is that if it shocks us too much, then they cannot do it. But when I get down to the really basic reason why I believe that "no law" means no law, I presume it could come to this, that I took an obligation to support and defend the Constitution as I understand it. And being a rather backward country fellow, I understand it to mean what the words say. Gesticulations apart, I know of no way in the world to communicate ideas except by words. And if I were to talk at great length on the subject, I would still be saying—although I understand that some people say that I just say it and do not believe it—that I believe when our Founding Fathers, with their wisdom and patriotism, wrote this Amendment, they knew what they were talking about. They knew what history was behind them and they wanted to ordain in this country that Congress, elected by the people, should not tell the people what religion they should have or what they should believe or say or publish, and that is about it. It says "no law," and that is what I believe it means.

*Cahn:* Some of your colleagues would say that it is better to interpret the Bill of Rights so as to permit Congress to take what it considers reasonable steps to preserve the security of the nation even at some sacrifice of freedom of speech and association. Otherwise what will happen to the Nation and the Bill of Rights as well? What is your view of this?

*Justice Black:* I fully agree with them that the country should protect itself. It should protect itself in peace and in war. It should do whatever is necessary to preserve itself. But the question is: preserve what? And how?

It is not very much trouble for a dictator to know how it is best to preserve his government. He wants to stay in power, and the best way to stay in power is to have plenty of force behind him. He cannot stay in power without force. He is afraid of too much talk; it is dangerous for him. And he should be afraid, because dictators do not have a way of contributing very greatly to the

happiness, joy, contentment, and prosperity of the plain, everyday citizen. Their business is to protect themselves. Therefore, they need an army; they need to be able to stop people from talking; they need to have one religion, and that is the religion they promulgate. Frequently in the past it has been the worship of the dictator himself. To preserve a dictatorship, you must be able to stifle thought, imprison the human mind and intellect.

I want this Government to protect itself. If there is any man in the United States who owes a great deal to this Government, I am that man. Seventy years ago, when I was a boy, perhaps no one who knew me thought I would ever get beyond the confines of the small country county in which I was born. There was no reason for them to suspect that I would. But we had a free country and the way was open for me. The Government and the people of the United States have been good to me. Of course, I want this country to do what will preserve it. I want it to be preserved as the kind of government it was intended to be. I would not desire to live at any place where my thoughts were under the suspicion of government and where my words could be censored by government, and where worship, whatever it was or wasn't, had to be determined by an officer of the government. That is not the kind of government I want preserved.

I agree with those who wrote our Constitution, that too much power in the hands of officials is a dangerous thing. What was government created for except to serve the people? Why was a Constitution written for the first time in this country except to limit the power of government and those who were selected to exercise it at the moment?

My answer to the statement that this Government should preserve itself is yes. The method I would adopt is different, however, from that of some other people. I think it can be preserved only by leaving people with the utmost freedom to think and to hope and to talk and to dream if they want to dream. I do not think this Government must look to force, stifling the minds and aspirations of the people. Yes, I believe in self-preservation, but I would preserve it as the Founders said, by leaving people free. I think here, as in another time, it cannot live half slave and half free.

*Cahn:* I do not suppose that since the days of Socrates a questioner ever got answers that were so co-operative.

In order to preserve the guaranteed freedom of the press, are you willing to allow sensational newspaper reports about a crime

and about police investigation of the crime to go so far that they prejudice and inflame a whole state and thus deprive the accused of his right to a fair jury?

*Justice Black:* The question assumes in the first place that a whole state can be inflamed so that a fair trial is not possible. On most of these assumptions that are made with reference to the dangers of the spread of information, I perhaps diverge at a point from many of those who disagree with my views. I have again a kind of an old-fashioned trust in human beings. I learned it as a boy and have never wholly lost that faith.

I believe in trial by jury. Here again perhaps I am a literalist. I do not think that trial by jury is a perfect way of determining facts, of adjudicating guilt, or of adjudicating controversies. But I do not know of a better way. That is where I stand on that.

I do not think myself that any one can say that there can be enough publicity completely to destroy the ideas of fairness in the minds of people, including the judges. One of the great things about trials by jury in criminal cases that have developed in this country—I refer to criminal cases because there is where most of the persecutions are found in connection with bringing charges against unpopular people or people in unpopular causes—we should not forget that if the jury happens to go wrong, the judge has a solemn duty in a criminal case not to let an unfair verdict stand. Also, in this country, an appellate court can hear the case.

I realize that we do not have cases now like they had when William Penn was tried for preaching on the streets of London. The jury which was called in to send him off quickly to jail refused to do so, and suffered punishment from the judge because they would not convict a man for preaching on the streets. But that is a part of history, and it is but one of thousands of cases of the kind. Those people had publicity; that is why they would not convict William Penn. They knew, because the people had been talking, despite the fact that there was so much censorship then, that William Penn was being prosecuted largely because he was a dissenter from the orthodox views. So they stood up like men and would not convict. They lost their property, some of them their liberty. But they stood up like men.

I do not myself think that it is necessary to stifle the press in order to reach fair verdicts. Of course, we do not want juries to be influenced wrongfully. But with our system of education we should be in better condition than they were in those days in England,

when they found that the jury was one of the greatest steps on their way to freedom. As a matter of fact, Madison placed trial by jury along with freedom of the press and freedom of conscience as the three most highly cherished liberties of the American people in his time.

I do not withdraw my loyalty to the First Amendment or say that the press should be censored on the theory that in order to preserve fair trials it is necessary to try the people of the press in summary contempt proceedings and send them to jail for what they have published. I want both fair trials and freedom of the press. I grant that you cannot get everything you want perfectly, and you never will. But you won't do any good in this country, which aspires to freedom, by saying just give the courts a little more power, just a little more power to suppress the people and the press and things will be all right. You just take a little chunk off here and little bit there. I would not take it off anywhere. I believe that they meant what they said about freedom of the press just as they meant what they said about establishment of religion, and I would answer this question as I have answered the other one.

*Cahn:* Do you make an exception in freedom of speech and press for the law of defamation? That is, are you willing to allow people to sue for damages when they are subjected to libel or slander?

*Justice Black:* My view of the First Amendment, as originally ratified, is that it said Congress should pass none of these kinds of laws. As written at that time, the Amendment applied only to Congress. I have no doubt myself that the provision, as written and adopted, intended that there should be no libel or defamation law in the United States under the United States Government, just absolutely none so far as I am concerned.

That is, no federal law. At that time—I will have to state this in order to let you know what I think about libel and defamation—people were afraid of the new Federal Government. I hope that they have not wholly lost that fear up to this time because, while government is a wonderful and an essential thing in order to have any kind of liberty, order or peace, it has such power that people must always remember to check them here and balance them there and limit them here in order to see that you do not lose too much liberty in exchange for government. So I have no doubt about what the Amendment intended. As a matter of fact, shortly after the Constitution was written, a man named St. George Tucker, a

great friend of Madison's, who served as one of the commissioners at the Annapolis convention of 1786 which first attempted to fill the need for a national constitution, put out a revised edition of Blackstone. In it he explained what our Constitution meant with reference to freedom of speech and press. He said there was no doubt in his mind, as one of the earliest participants in the development of the Constitution, that it was intended that there should be no libel under the laws of the United States. Lawyers might profit from consulting Tucker's edition of Blackstone on that subject.

As far as public libel is concerned, or seditious libel, I have been very much disturbed sometimes to see that there is present an idea that because we have had the practice of suing individuals for libel, seditious libel still remains for the use of government in this country. Seditious libel, as it has been put into practice throughout the centuries, is nothing in the world except the prosecution of people who are on the wrong side politically; they have said something and their group has lost and they are prosecuted. Those of you who read the newspaper see that this is happening all over the world now, every week somewhere. Somebody gets out, somebody else gets in, they call a military court or a special commission, and they try him. When he gets through sometimes he is not living.

My belief is that the First Amendment was made applicable to the states by the Fourteenth. I do not hesitate, so far as my own view is concerned, as to what should be and what I hope will sometime be the constitutional doctrine that just as it was not intended to authorize damage suits for mere words as distinguished from conduct as far as the Federal Government is concerned, the same rule should apply to the states.

I realize that sometimes you have a libel suit that accomplishes some good. I practiced law twenty years. I was a pretty active trial lawyer. The biggest judgment I ever got for a libel was \$300. I never took a case for political libel because I found out that Alabama juries, at least, do not believe in political libel suits and they just do not give verdicts. I knew of one verdict given against a big newspaper down there for \$25,000, and the Supreme Court of Alabama reversed it. So even that one did not pan out very well.

I believe with Jefferson that it is time enough for government to step in to regulate people when they *do* something, not when they *say* something, and I do not believe myself that there is *any* halfway ground if you enforce the protections of the First Amendment.

*Cahn:* Would it be constitutional to prosecute someone who falsely shouted "fire" in a theater?

*Justice Black:* I went to a theater last night with you. I have an idea if you and I had gotten up and marched around that theater, whether we said anything or not, we would have been arrested. Nobody has ever said that the First Amendment gives people a right to go anywhere in the world they want to go or say anything in the world they want to say. Buying the theater tickets did not buy the opportunity to make a speech there. We have a system of property in this country which is also protected by the Constitution. We have a system of property, which means that a man does not have a right to do anything he wants anywhere he wants to do it. For instance, I would feel a little badly if somebody were to try to come into my house and tell me that he had a constitutional right to come in there because he wanted to make a speech against the Supreme Court. I realize the freedom of people to make a speech against the Supreme Court, but I do not want him to make it in my house.

That is a wonderful aphorism about shouting "fire" in a crowded theater. But you do not have to shout "fire" to get arrested. If a person creates a disorder in a theater, they would get him there not because of *what* he hollered but because he *hollered*. They would get him not because of any views he had but because they thought he did not have any views that they wanted to hear there. That is the way I would answer: not because of what he shouted but because he shouted.

*Cahn:* Is there any kind of obscene material, whether defined as hard-core pornography or otherwise, the distribution and sale of which can be constitutionally restricted in any manner whatever, in your opinion?

*Justice Black:* I will say it can in this country, because the courts have held that it can.

*Cahn:* Yes, but you won't get off so easily. I want to know what you think.

*Justice Black:* My view is, without deviation, without exception, without any ifs, buts, or whereases, that freedom of speech means that you shall not do something to people either for the views they have or the views they express or the words they speak or write.

There is strong argument for the position taken by a man whom I admire very greatly, Dr. Meiklejohn, that the First Amendment



really was intended to protect *political* speech, and I do think that was the basic purpose; that plus the fact that they wanted to protect *religious* speech. Those were the two main things they had in mind.

It is the law that there can be an arrest made for obscenity. It was the law in Rome that they could arrest people for obscenity after Augustus became Caesar. Tacitus says that then it became obscene to criticize the Emperor. It is not any trouble to establish a classification so that whatever it is that you do not want said is within that classification. So far as I am concerned, I do not believe there is any halfway ground for protecting freedom of speech and press. If you say it is half free, you can rest assured that it will not remain as much as half free. Madison explained that in his great Remonstrance when he said in effect, "If you make laws to force people to speak the words of Christianity, it won't be long until the same power will narrow the sole religion to the most powerful sect in it." I realize that there are dangers in freedom of speech, but I do not believe there are any halfway marks.

*Calm:* Do you subscribe to the idea involved in the clear and present danger rule?

*Justice Black:* I do not.

*Calm:* By way of conclusion, Justice Black, would you kindly summarize what you consider the judge's role in cases arising under the First Amendment and the Bill of Rights?

*Justice Black:* The Bill of Rights to me constitutes the difference between this country and many others. I will not attempt to say most others or nearly all others or all others. But I will say it constitutes the difference to me between a free country and a country that is not free.

My idea of the whole thing is this: There has been a lot of trouble in the world between people and government. The people were afraid of government; they had a right to be afraid. All over the world men had been destroyed—and when I say "government" I mean the individuals who actually happened to be in control of it at the moment, whether they were elected, whether they were appointed, whether they got there with the sword, however they got there—the people always had a lot of trouble because power is a heady thing, a dangerous thing. There have been very few individuals in the history of the world who could be trusted with complete, unadulterated, omnipotent power over their fellowmen.

Millions of people have died throughout the world because of

the evils of their governments. Those days had not wholly passed when the Pilgrims came over to this country. Many of them had suffered personally. Some of them had their ears cut off. Many of them had been mutilated. Many of their ancestors had. Some of your ancestors came here to get away from persecution. Certainly, mine did.

There had been struggles throughout the ages to curb the dangerous power of governors. Rome had a sound government at one time. Those who study it carefully will find that, except for the slave class, they had, so far as most of the people were concerned, a good form of government. But it turned, and then they had Augustus and the other Caesars, and the Neros and Caligulas and Tiberiuses.

One of the interesting things about Tiberius is that in all the history I have read he is about the only man of great prominence who ever defended informers. He made the statement that the informers were the guardians of Rome. Recently I have heard that said here once or twice.

When our ancestors came over here and started this country, they had some more persecutions of their own. It was not limited to any one religion. A lot of my Baptist brethren got into trouble; a lot of the Methodist brethren got in trouble; a lot of the Episcopal Church got in trouble, the Congregational Church—each of them in turn. A lot of the Catholics got in trouble. Whichever sect was in control in a state for a time, they would say that the others could not hold office, which is an easy way of getting rid of your adversaries if you can put it over. Even for half a century after the Constitution was adopted, some of the States barred the members of certain faiths from holding office.

Throughout all of this—as the Jewish people know as well as any people on earth—persecutions were abroad everywhere in the world. A man never knew, when he got home, whether his family would be there, and the family at home never knew whether the head of the family would get back. There was nothing strange about that when Hitler did it. It was simply a repetition of the course of history when people get too much power.

I like what the Jewish people did when they took what amounted to a written constitution. Some of the states did it before the time of the Federal Constitution; they adopted written constitutions. Why? Because they wanted to mark boundaries beyond which government could not go, stripping people of their liberty to think, to talk, to write, to work, to be happy.

So we have a written Constitution. What good is it? What good is it if, as some judges say, all it means is: "Government, you can still do this unless it is so bad that it shocks the conscience of the judges." It does not say that to me. We have certain provisions in the Constitution which say, "Thou shalt not." They do not say, "You can do this unless it offends the sense of decency of the English-speaking world." They do not say that. They do not say, "You can go ahead and do this unless it is offensive to the universal sense of decency." If they did, they would say virtually nothing. There would be no definite, binding place, no specific prohibition, if that were all it said.

I believe with Locke in the system of checks and balances. I do not think that the Constitution leaves any one department of government free without there being a check on it somewhere. Of course, things are different in England; they do have unchecked powers, and they also have a very impressive history. But it was *not* the kind of history that suited the people that formed our Constitution. Madison said that explicitly when he offered the Bill of Rights to the Congress. Jefferson repeated it time and time again. Why was it not? Because it left Parliament with power to pass such laws as it saw fit to pass. It was not the kind of government they wanted. So we have a Bill of Rights. It is intended to see that a man cannot be jerked by the back of the neck by any government official; he cannot have his home invaded; he cannot be picked up legally and carried away because his views are not satisfactory to the majority, even if they are terrible views, however bad they may be. Our system of justice is based on the assumption that men can best work out their own opinions, and that they are not under the control of government. Of course, this is particularly true in the field of religion, because a man's religion is between himself and his Creator, not between himself and his government.

I am not going to say any more except this: I was asked a question about preserving this country. I confess I am a complete chauvinist. I think it is the greatest country in the world. I think it is the greatest because it has a Bill of Rights. I think it could be the worst if it did not have one. It does not take a nation long to degenerate. We saw, only a short time ago, a neighboring country where people were walking the streets in reasonable peace one day and within a month we saw them marched to the back of a wall to meet a firing squad without a trial.

I am a chauvinist because this country offers the greatest opportunities of any country in the world to people of every kind, of

every type, of every race, of every origin, of every religion—without regard to wealth, without regard to poverty. It offers an opportunity to the child born today to be reared among his people by his people, to worship his God, whatever his God may be, or to refuse to worship anybody's God if that is his wish. It is a free country; it will remain free only, however, if we recognize that the boundaries of freedom are not so flexible; they are not made of mush. They say, "Thou shalt not," and I think that is what they mean.

Now, I have read that every sophisticated person knows that you cannot have any absolute "thou shalt not." But you know when I drive my car against a red light, I do not expect them to turn me loose if I can prove that though I was going across that red light, it was not offensive to the so-called "universal sense of decency." I have an idea there are some absolutes. I do not think I am far in that respect from the Holy Scriptures.

The Jewish people have had a glorious history. It is wonderful to think about the contributions that were made to the world from a small, remote area in the East. I have to admit that most of my ideas stem basically from there.

It is largely because of these same contributions that I am here tonight as a member of what I consider the greatest Court in the world. It is great because it is independent. If it were not independent, it would not be great. If all nine of those men came out each Monday morning like a phonograph speaking one voice, you could rest assured it would not be independent. But it does not come that way. I want to assure you that the fact that it does not come that way does not mean that there is not a good, sound, wholesome respect on the part of every Justice for every other Justice.

I do hope that this occasion may cause you to think a little more and study a little more about the Constitution, which is the source of your liberty; no, not the source—I will take that back—but a protection of your liberty. Yesterday a man sent me a copy of a recent speech entitled "Is the First Amendment Obsolete?" The conclusion of the writer, who is a distinguished law school dean, was that the Amendment no longer fits the times and that it needs to be modified to get away from its rigidity. The author contends that the thing to do is to take the term "due process of law" and measure everything by that standard, "due process of law" meaning that unless a law is so bad that it shocks the conscience of the Court, it cannot be unconstitutional. I do not wish

to have to pass on the laws of this country according to the degree of shock I receive! Some people get shocked more readily than others at certain things. I get shocked pretty quickly. I confess, when I see—and this I say with trepidation because it is considered bad to admit it—but I do get shocked now and then when I see some gross injustice has been done, although I am solemnly informed that we do not sit to administer justice, we sit to administer law in the abstract.

I am for the First Amendment from the first word to the last. I believe it means what it says, and it says to me: "Government shall keep its hands off religion. Government shall not attempt to control the ideas a man has. Government shall not attempt to establish a religion of any kind. Government shall not abridge freedom of the press or speech. It shall let anybody talk in this country." I have never been shaken in the faith that the American people are the kind of people and have the kind of loyalty to their government that we need not fear the talk of Communists or of anybody else. Let them talk! In the American way, we will answer them.