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THE INTERDEPENDENCE OF OUR FREEDOMS*

HON. WARREN E. BURGER†

IF I WERE TO GIVE A TITLE to what I want to say tonight, in this Bicentennial program, I think I would call it "The Interdependence of our Freedoms" and, in a sense, that is simply a more formal way of saying what the leaders of our revolution told each other, and the people, 200 years ago: we must hang together, or we will hang separately.

For 200 years philosophers, historians and political scientists have called our Declaration of Independence one of the most momentous political documents in all history. The basic ideas it advanced had been expressed many times before 1776, but never before had they been assembled and asserted in one instrument to outline a charter of liberty. It severed our political ties with the mother country, stated the reasons for that separation and became a guide for the framers of the Constitution. It gave more than independence—it gave opportunity.

The colonists who settled on the Eastern Seaboard had to be strong, self-reliant, confident people or they would not have survived for more than a century in that primitive wilderness, and they would never have succeeded in turning it into a thriving, orderly society. Those qualities enabled them to carry on from the landing at Jamestown up to 1776. The Declaration gave new impetus to those qualities and, in turn, led to the creation of new institutions, new industries and the expansion of education without class barriers.

The Constitution that implemented the Declaration made our country the first nation in history to establish a system of government under a written document by which the people voluntarily delegated powers to a central government, organized with an ingenious system of three divided and separated departments. This mechanism provided checks and balances on governmental power which, in turn, released the creative powers of a whole people. It encouraged diversity and enterprise so they could shape their future in ways that seemed best to them.

We know that two hundred years in the perspective of history is but the "twinkling of an eye," but we can take some pride that no other people have continued so long under one written Constitution.

Some historians, philosophers and statesmen of that time, including those who welcomed our unique Declaration, were openly skeptical that the ideals it

* Speech presented by Chief Justice Warren E. Burger on the occasion of the Utah American Revolution Bicentennial Celebration at Salt Lake City, Utah, Saturday, September 6, 1975.

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stated and the government it contemplated could really be made to work over a long period of time. They doubted that any government could survive without centralized power in the hands of a limited number of leaders with coercive powers. They did not believe that people generally had the essential qualities of goodness, virtue and self-discipline that would enable them to make decisions for the common good rather than for their own selfish interests. The history of the human race up to that time strongly supported that skepticism. Our leaders shared that skepticism enough that they carefully divided and limited the powers of the new national government, so as to release the energies and creative powers of people and ideas and to insure that governmental power would not be used to impair the new freedoms.

Even as late as 1787, when the Constitutional Convention finished its work, a legend survives that a Philadelphia lady asked Benjamin Franklin what kind of government the Convention had created, and Franklin is said to have answered: "Madam, a Republic, if you can keep it." Even so profound a lover of liberty and independence as Franklin seemed to have some doubts whether our great experiment in government would succeed. My distinguished predecessor, Chief Justice Warren, after his retirement, wrote a book that deserves a wide audience, and he used as the title Franklin's words: "A Republic, if you can keep it."

Three factors aided the American experiment in this new kind of government: first, our geographical isolation in a rich, undeveloped continent, far removed from the quarrels of Europe; second, the uniqueness of the institutions we created; and third, the personal qualities of the people and their leaders. There is no parallel in history of three million people producing such a galaxy of remarkable leaders as those who drafted the Declaration and the Constitution.

Events of the past 15 or more years have now given rise to new doubts in the minds of responsible men and women, who are dedicated to our country and to the ideals of freedom. They ask whether our constitutional system will survive the combined pressure of a period of rapid changes—both political and economic—now taking place in the world, and the strident demands from a wide array of special interest groups, each clamoring for the gratification of its own demands. They point to a trend of national indulgence with the idea of instant gratification.

All this should remind us that the great sentiments of 1776 launched an experiment unique in human history—that it was a beginning, not an end. It should remind us of other times in our national life when the survival of our experiment in government was in doubt. At Gettysburg, Lincoln

reminded Americans of the fragility of the Union, and you remember his words describing the Civil War as a test whether our nation, conceived less than 90 years earlier, could long endure. We survived that ordeal and emerged a stronger and wiser people.

Now, in this century, we have engaged in two world wars of unparalleled horror and other prolonged armed conflicts, the latest only recently terminated. The stresses on our country, especially in the undeclared conflicts, have divided our people, sapped our resources, and taxed our spirits to the utmost.

What must we do to assure the continuance of our freedoms in the complex modern world in which a change in the price of a barrel of oil, for example, can severely tax our way of life? Will we have the courage, the hardiness, the spirit of self-denial and the dedication to the common good, which carried Americans through the desperate struggles of the Revolution and the agony of the Civil War? Both these tests came in the first century of existence when we were more isolated and less dependent on events in other parts of the world. Can we adjust to these new realities of the interdependence of nations, whether the dependence is for oil, or wheat, or manufactured goods, or technology or the over-riding need for peace?

How and why did our experiment succeed when others had failed in the endless search for liberty with security?

In 1776, Russia and China, to mention only two examples, were equally blessed with land areas of continental proportions, each had natural resources equal to ours, each had a long tradition of culture and enlightenment, each had many millions of intelligent, skilled, industrious people. I have no doubt that those millions in Russia and China had the same natural urge for freedom as did our people, for man was meant to be free.

What was it, then, that we had that enabled us, in less than 200 years, to surpass those two countries in universal education, in science, in industrial production, in national unity and in the standard of living?

It was not simply independence from the mother country, and the new status as a sovereign nation. Far more important than the independence itself was the freedom that independence gave to each person to shape an individual future, and in doing that, to shape the course of the nation itself. That kind of freedom, unique in human history, unleashed the latent talents, the energies and the creative abilities of three million hardy people, while at the same time, the equally hardy, equally intelligent, equally industrious, equally talented people in those two other countries remained in the bonds of the past—bonds which only now in the 20th century, they are beginning to relax.

The use of the freedoms that Americans gained in 1776 was remarkably productive because, for the most part, they were used wisely, with restraint and responsibility, and with the awareness that the gift of freedom carries with it a burden. That burden is to use it so as to insure its continuation.

That freedom, I submit, even at the risk of oversimplification, made the difference and produced the country we have today—still imperfect, still not extending freedoms ideally, and still not sharing opportunity fully, but never static, either in terms of material improvements or in terms of enlarging and expanding our freedoms.

In observing the Bicentennial, it may be appropriate to examine, briefly, six areas of freedom that flowed from independence—new kinds of freedom never before so widely shared.

FIRST. The three branches of our national government must each remain strong, co-equal, and independent of the others, but we should always remember that, even though independent, they were intended to be coordinate as well as co-equal. The idea of coordinate clearly implies that the separate powers must be harmonized into a workable whole.

SECOND. The 50 states cannot exercise leadership in a national sense, but this does not mean they should not be allowed the independence and freedom that was plainly contemplated by the concept of federalism.

A complex of economic, social and political problems in the modern world calls for close cooperation between the national and state governments, based on the reality that those who are elected to state office derive their authority from precisely the same voters—and usually on the same ballot—as those sent to Washington to formulate national policy. The infinitely complicated national programs ordained by Congress are administered by great departments, usually under regulations drafted by those departments, with hundreds of thousands of staff members in whose hands rests much of the real power of day-to-day decision and policy-making.

As we begin the third century of independence, then, a major task in our federal-state relationships is to re-examine the practices of our federalism and our governmental machinery, as all machinery should be reviewed from time to time.

THIRD. The great institutions of America, the churches, colleges, universities, libraries, foundations, museums, and hospitals that grew under state and private control, had no parallel anywhere in the world. Their contribution to research, invention, culture, enlightenment and health is beyond

measure. Over the past 40 years or more, economic pressures have led to a growing dependence by many of them on nationally administered, federally financed programs. The genius of these diverse organizations, however, arose from their independence and individuality, for we know that creative development has never flowered under rigid uniformity. Together these independent institutions opened flood-gates of knowledge and awareness of our world, and stimulated invention and technology, because a new kind of freedom of the mind and spirit was released. These freedoms made possible the most productive farms and ranches in the world, and the most innovative and efficient factories and machinery whose products went into world markets on a scale unknown before that time.

We need not disparage the great work done by federal programs to recall that they were not intended to eliminate substantial state and local independence in shaping programs and policies at the grass roots of America. The concepts of a federal system of government contemplated that our people would make most of the decisions affecting their daily lives, through the men and women they placed in local and state offices.

Every institution of government must always be open to examination and none deserves to be continued, without change, unless it can withstand periodic examination.

FOURTH. Among the non-governmental institutions, whose freedom and independence have been major factors in our development, are the freedoms of press and speech. In the formative years, from at least 1770 onward, free speech from pulpits, platforms, and open air meetings flourished. At the same time there was a vigorous exercise of freedom of the press, both by regular newspapers, and by the great output of pamphlets, many of them authored by those who signed the Declaration and later the Constitution.

Without that free speech and a free press, it is doubtful whether the people would have been ready to support the separation from England, or whether the Constitution would have been ratified.

Even those editors who opposed ratification of the Constitution generally tended to cover the debates so that the people understood the issues. At every major turning point for 200 years, the power of free speech and a free press has made itself felt on the great issues, and the independence of each element of our social and political order has been preserved by open debate. The independence of our vital institutions, public or private, could not have survived without the protections of the First Amendment.

FIFTH. Nowhere in the Declaration or in the Constitution do we find any

reference to the crucial part that an independent legal profession plays in the very idea of freedom, because it was taken for granted. The fundamental principle of independence of lawyers had been established in England, and was accepted in America. The model for independence of lawyers and judges had been established by such courageous spirits as Sir Edward Coke, who forfeited his office as Lord Chancellor rather than submit to the dictation of the King, and that sainted "man for all seasons," Sir Thomas More, who calmly forfeited both his office and his head, rather than his convictions as a lawyer and judge.

We need not forego legitimate criticism of our legal institutions, or of the legal profession, to acknowledge that, as with the guarantees of free speech and press, the freedom and independence of lawyers have been key factors in our development before and since 1776. A majority of those who drafted the Declaration, and later the Constitution, were lawyers, and they knew that, along with Sir Thomas More, they were literally placing their heads on the block, or in a noose, by their acts—if the Revolution failed.

There are many examples in our history of the courage of lawyers in the struggle to vindicate peoples' rights. Our history books tell of what the militant revolutionaries called the "Boston Massacre," when British soldiers killed a number of Americans. Those soldiers were charged with murder and they asked John Adams to defend them. He did so, knowing well that in the heated atmosphere of that day it might spell the end of his career as a lawyer and as a political leader.

The British soldiers were acquitted by a jury of Americans and the people showed they valued the courage and independence of John Adams so much that he continued to be sought for leadership and became one of the authors of the Declaration and our second President.

Later, when Aaron Burr was indicted for treason with the prosecution instituted by President Thomas Jefferson, Virginia lawyers braved the wrath of public opinion, and of the Jefferson administration, to act as his attorneys. Burr was acquitted because the judges and jury followed the strict requirement of the Constitution that to convict for treason there must be two witnesses to the same overt act.

There are countless modern examples of the independence and courage of our lawyers, none more notable than that of my distinguished colleague, Justice Thurgood Marshall, who as a lawyer, devoted much of his life advocating the constitutional rights of one of America's largest minority groups. He succeeded in the face of personal risks and threats that have receded in memory since the events. In the two centuries between John Adams and Thurgood Marshall, thousands of lawyers have performed in the same way.

SIXTH. Finally, we come to the independence of a group, in whose hands, under our system, ultimately rests the protection of all of our freedoms—the judges who construe the Constitution and interpret the laws. Here we should remember that state judges, simply by reason of their broader jurisdiction and far greater number, are often the first line of defense of constitutional rights.

In England, the independence of judges had been firmly established by 1701. Had the same independence been extended to the royal judges sitting in the 13 colonies, one of the major grievances recited in the Declaration would not have been a problem. You recall the language of the Declaration, complaining that King George had "...made judges dependent on his will alone, for the tenure of their office, and the amount and payment of their salaries." The colonists rightly complained that this made many judges puppets of the King.

This explains why the Constitution expressly provided that all federal judges would hold office during good behavior, removable only by impeachment processes in the House and Senate.

There were and are risks in placing so much power in the hands of judges. It can be defended only as a calculated risk taken on the assumption that judges would exercise their great powers with restraint and responsibility. The selection process, with the Senate's power of confirmation, would minimize those risks.

There are countless examples of the appropriate exercise of this large judicial power in the defense of the rights of religious freedom, the rights of racial minorities, the right of freedom of speech and press, the right to a lawyer in criminal cases, the right not to be a witness against oneself, the right to a speedy trial, the right to equal protection of the laws without regard to race, sex, or other differences, and the right to have voting power equalized.

The very recital of these examples serves to remind us how much each freedom is dependent on other freedoms.

When attacks were made on the independence of the Judicial Branch, beginning as early as 1805, with the effort to impeach Justice Samuel Chase of the Supreme Court, and repeated as recently as the Court Packing Plan of the 1930's, it was the freedom of the press, and the independence of lawyers and of the Congress that combined to repulse those attacks, for the judges could not fight back. These freedoms survived because there were judges strong enough, and independent enough, to enforce the guarantees of the Constitution without regard to political currents or public clamor of the moment.

Thus it was that the independence that began in 1776, and the

new freedoms it brought to us, released the creative energies of our people for these 200 years.

We, as trustees of those precious freedoms, have a duty to pass them on, unimpaired, to those who follow, so that they will be able to apply to the new and complex problems of the future that same kind of creativity, imagination and responsibility that was released on July 4, 1776, and over these 200 years made our country great.