



# Department of Justice

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ADDRESS

BY

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before the  
STATE JUNIOR BAR OF TEXAS  
and  
STATE BAR OF TEXAS

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Convention Center  
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## I. INTRODUCTION

It is a great pleasure for me to be here in San Antonio to address this combined annual meeting of the Texas State Bar Association and the Junior Bar.

The topic I would like to discuss today is the First Amendment protection for freedom of speech and assembly which many commentators have said is the most treasured amendment in our Bill of Rights.

I have chosen to speak on the First Amendment for a number of reasons.

Only yesterday in Washington, we celebrated the 100th anniversary of the Department of Justice. As you know, most of our first century was dedicated to the problems of federalism and economic rights.

It was not until 1919 that the Supreme Court decided a First Amendment case involving the Federal government; and not until 1927 that the First Amendment was made applicable to the states.

The Civil Rights Division in the Department of Justice was only founded 14 years ago but it has become one of our most active divisions.

Our Community Relations Service, which is devoted to maintaining racial harmony, was only founded six years ago.

The pattern seems clear: in our second century the Department of Justice will spend a great deal of time and effort

protecting human rights, protecting those incorporeal values that are so necessary for the human dignity that must accompany a free society.

The Department of Justice is proud of its reputation as the institutional commitment of the Executive Branch to "equal justice under law" in order "to secure the blessings of liberty to ourselves and our posterity."

And you may be sure that the President and this Administration are firmly committed to making human dignity a reality for all of our citizens.

These values have come to us in the words of the Declaration of Independence, whose signing we celebrate this weekend.

The Declaration is basically a legal document--a list of juridical complaints against the English King.

When these complaints are all put together, they become a moral indictment of despotism whose first rule is to stop free speech and association.

Your own great State of Texas has a similar tradition of independence which is symbolized by the Alamo here in San Antonio.

Your State suffered at the hands of three separate despotic governments--the French, the Spanish and the Mexican--before asserting the rights of free men.

But perhaps the most compelling reason for discussing the First Amendment today is that I am addressing a number of younger lawyers from the Junior Bar.

It is today's young men and women who will be the custodians of our Constitutional system in the future.

It is today's young people who are becoming increasingly active in social and political affairs and who--at the same time--are questioning some of the fundamental institutions of the nation.

Some are asking, for example, if our tradition of freedom of speech is really working and whether the First Amendment guarantees--as we know them--have any relevance in today's society.

What I propose to do in this short address is to discuss the legal and practical problems that face all of us in making freedom of expression a living concept.

And let me remind you that there is no nation in the world today which offers the average citizen more opportunity to speak his mind without fear or intimidation than the United States of America.

## II. A NEW AGE OF DISSENT

The necessity to reexamine and reaffirm the principles of the First Amendment comes about because we are in a new age of dissent.

Thirty years ago, our young people came out of colleges and law schools anxious to make a living in an era of economic depression. Later, they went off to war and then to the relatively quiet domestic situation of the Eisenhower Administration.

It was not until the early 1960's that the young people in our country began to believe that they had a significant role to play.

Some joined the civil rights movement. Others joined the Peace Corps, the Job Corps, Neighborhood Legal Services and other projects, without much thought of financial remuneration.

The "generation gap" had started, although neither generation was prepared for the intensity of the chasm.

This intensity developed because of two trends which were not entirely obvious at the time.

First: The older generation did not fully recognize that the activists among the younger generation were indirectly attacking fundamental values of the Establishment. They were sacrificing the accepted values of financial security in favor of the human values of working with the poor and underprivileged.

But, at the same time, they were becoming disillusioned with their own efforts. Being young, they were not prepared for the years of hard work that is necessary to implement reform programs.

And so, having given their best efforts to reform society overnight within the system, they started criticizing the system itself on the grounds that it is not responsive to the needs of the nation.

Frequently, I might add, they rely on rhetoric and not facts. They throw around catch-word phrases like "repression" and

"relevance" without any serious inquiry into the particular cases they cite as examples of government misfeasance.

Basically, their dissent and activism has taken two forms.

A small minority chose violence. But the great majority of the young dissenters have chosen to highlight their cause by exercising freedom of expression as it is protected by the First Amendment.

They march and sing. They walk silently with candles past the White House. They produce songs and books and newspapers and plays. They have developed their own motion picture and art techniques. They have evolved their own dress and language styles.

As they become more impatient, their message becomes more militant; their marches larger; and their platforms more radical; and they have gained some adherents of all ages.

They are a whole new culture: parading in the streets, striking against schools, crowding the halls of Congress, and organizing political campaigns.

In general, they are activist but also peaceful young men and women who--in our best traditions--are working within the system in order to change it.

Therefore, I must reject the claim that our established Constitutional methods of dissent are not working effectively for the dissemination of minority views.

If there is any greater proof that the First Amendment is alive and well and that it is working in today's society, we need only look at the recent growth and vitality of citizen action programs--most of them depending upon young people for their strongest support.

What this proves beyond a reasonable doubt is that there is more freedom of speech and more freedom of assembly today than at any time in our nation's history; and so long as I am Attorney General I will do everything within my power to see that these rights continue to flourish.

### III. THE CONSTITUTIONAL RIGHT TO DISSENT

The First Amendment is based on the premise, as Mr. Justice Holmes said, that "the best test of truth is the power of the thought to get itself accepted in the competition of the market..."

Why we should permit this market of ideas is perhaps well explained by Mr. Justice Brandeis in his dissent in Whitney v. California. He said:

"...we must bear in mind why a state is, ordinarily, denied the power to prohibit dissemination of social, economic and political doctrine which a vast majority of its citizens believes to be false and fraught with evil consequence.

"Those who won our independence...believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth..."

"They knew that...fear breeds repression; that repression breeds hate; that hate menaces stable government; (and) that the path of safety lies in the opportunity to discuss freely supposed grievances."

In line with this reasoning, the Supreme Court has vigilantly guarded First Amendment rights and has reserved some of its most caustic comments for those who attempt to infringe on free speech and assembly.

The court has insisted that, ordinarily, citizens have the right to speak, to write and to disseminate even the most unpopular ideas by peaceful methods.

They have the right to use the streets and other public grounds to conduct peaceful demonstrations, to distribute hand-bills, to quietly picket; to broadcast on radio and television; to produce controversial motion pictures, and to ignore ex parte injunctions.

As evidence of our high regard for the First Amendment we have even evolved special procedural rules. These permit attacks on prospective government action limiting freedom of speech on the grounds that we must discourage any "chilling effect" on such a vital right.

#### IV. THE LIMITS OF DISSENT

However, there are limits beyond which the First Amendment may not be carried.

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The most famous, of course, is that laid down by Mr. Justice Holmes in Schenck.

"The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater, and causing a panic.

"It does not even protect a man from an injunction against uttering words that may have all the effect of force.

"The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree."

#### V. FREEDOM OF ASSEMBLY

Nowhere are the questions of "proximity and degree" more difficult than under the right of assembly provision of the First Amendment, as opposed to the right of free speech.

While today we tend to speak of assembly and speech in the same breath, they are two different rights. During the Constitutional Convention, there was a heated debate over the freedom of assembly clause, with its detractors claiming it was "minutiae."

The Supreme Court has pointed out the two different standards. It said in Cox v. Louisiana:

"We emphatically reject the notion...that the First and Fourteenth Amendments afford the same kind of freedom to those who would communicate ideas by conduct such as patrolling, marching, and picketing on streets and highways, as these amendments afford to those who communicate ideas by pure speech."

The Court added:

"We also reaffirm the repeated decisions of this Court that there is no place for violence in a democratic society dedicated to liberty under law . . . There is a proper time and place for even the most peaceful protest and a plain duty and responsibility on the part of all citizens to obey all valid laws and regulations."

Thus, the Supreme Court has ruled that demonstrators do not have a constitutional right to cordon off a street or to use a loud amplification system or to block the entrance of a building, or to insist that passersby listen to speeches, or even to peacefully demonstrate on public property, such as a county jail, which is set aside for specific governmental purposes.

In that case, the Court noted:

"The United States Constitution does not forbid a State to control the use of its own property for its own nondiscriminatory purpose."

## VI. THE APPLICATION OF THE FIRST AMENDMENT

Here, we come to the most difficult question: How do we, as lawyers and public officials, insure a maximum range for free speech while, at the same time, attempting to insure a minimum opportunity for violation of the rights of those who are not involved in a demonstration?

Here are some of the guidelines that we in the Federal government follow in Washington and which I believe should be considered by local and state officials.

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1. Encourage the peaceful exercise of First Amendment rights, regardless of how unpopular the cause. Merely to tolerate freedom of expression is not good enough.

We believe it is appropriate to establish an atmosphere in which citizens want to express themselves on the issues of the day.

And to make sure that persons wishing to conduct a demonstration be given the benefit of the doubt; that in questionable situations it is always wiser to offer a little more freedom than a little less.

2. Realize that most large political demonstrations may entail a certain amount of inconvenience to local residents, may impose additional expenses on local taxpayers, and may engender widespread community hostility to demonstrators.

Traffic may have to be rerouted. Sidewalks may become crowded. Police and health officials may have to leave their normal routine. Additional manpower may have to be employed.

Because the police have the primary government obligation of insuring an orderly demonstration, perhaps a few words of guidance are in order.

Police should remember that they are professional law enforcement personnel who should not be swayed by their approval or disapproval of the views expressed by the demonstrators.

They should be sensitive to and understanding of the fact that persons emotionally involved in a demonstration do not always behave in a normal fashion.

If arrests must be made, they should be accomplished with a minimum of force needed to restore order.

We have found in Washington that the key to a successful demonstration is careful preparation and extended negotiations with the demonstrators.

When both the local government and the demonstrators attempt to understand the problems that each side faces, the problems tend to be solved quickly in an atmosphere of compromise.

Of course, there may be a sizeable cost in terms of manpower and money. But we think that this should be a cost that a local community is more than willing to absorb as the price of being part of a free republic.

Given our times, we cannot expect political demonstrations to be conducted like prayer meetings. We must expect language which may incite hostility or may be obscene.

This is because the First Amendment protects all of us, including men and women who choose to be unruly, unreasonable, and impolite.

On the other hand, residents of local communities have rights, rights which should not be seriously impaired.

Businessmen must be able to conduct their affairs. Schools and municipal services must be provided. The ordinary life and commerce of a city must be allowed to function effectively.

I reject the notion that persons exercising freedom of speech have a right to shut down a community any more than a community has a right to keep out demonstrators.

But this leaves several difficult problem areas still unresolved. Generally, these are cases where public officials have good reason to believe there may be violence perpetrated by the demonstrators or against them.

Because local officials have the obligation of protecting the demonstrators and the community, certain limitations may be in order on how and where the demonstration is conducted.

Most of these problems come down to case-by-case decisions, frequently made under extreme pressures of time. I do not think there are any hard and fast rules. Local officials should be familiar enough with their own communities to work out acceptable compromises.

Of course, there are always the courts as a last recourse for either side. But judges are hardly in a better position to make law enforcement decisions than are reasonable and responsible city officials.

## VI. CONCLUSION

In recent months hundreds of thousands of American citizens have come to Washington, D. C., to exercise their rights of free speech and peaceable assembly,

The Department of Justice has now furnished to the Senate a voluminous report on the lessons we have learned and the steps we have taken to protect and confirm the First Amendment rights.

I think you will find the report encouraging and I believe you will agree that it matches performance to the promise offered by President Nixon when he said:

"Peaceful protest is part of the American tradition. The right to dissent is a force for change, but it is the right to disagree, not the right to disobey laws.

"So let us have order in America--not the order that suppresses dissent and discourages change, but the order that guarantees the right to dissent and provides the basis for peaceful change."