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STATEMENT OF ARLEN SPECTER

BEFORE THE SENATE SUB-COMMITTEE

ON
CONSTITUTIONAL AMENDMENTS

On the broad question of the wisdom of regulating state criminal trials by decisions such as Miranda, there are two essential issues:

(1) What are the best laws for all the people, including defendants, victims and society generally; and

(2) What are the best procedures to determine the best laws?

Experience in the District Attorney's Office may shed some light on the consequences of such decisions on law enforcement, and may provide a basis for suggestions for future action.

I sharply disagree with the public prosecutors who voice instant, stinging criticism of decisions by the Supreme Court of the United States. Part of the prosecutor's job, as an advocate in the courts, is to press his legal position vigorously; but when the decision is made by the highest court, it should be accepted as the law. The wave of violent protests which flow from the Court's decisions do nothing to help law enforcement

and do much to encourage disrespect for law. The prosecutor's personal preferences are irrevelant. When criticism is made to undermine the authority of the Supreme Court, such comments encourage many to believe that the individual may select which laws to observe and which to ignore. That attitude probably creates the policeman's most serious problem.

I also disagree with the tone of the criticism of decisions like Mapp and Miranda, because the critics do not possess the final answers which would justify condemning the Supreme Court for supplying the final answers I have substantial doubts about the wisdom of many Supreme Court decisions, but I have greater doubts about my own personal wisdom on the same subjects. However, I do believe that the procedures now used for making such sweeping changes in constitutional law on criminal procedures are open to substantial doubt.

Long before 1966 it has been clear, as Chief Justice Hughes pointed out, that the Constitution is what the Supreme Court says it is; and constitutional law generally is an evolving body of law to serve people in terms of the highest national values. In that sophisticated context, when the Supreme Court of the United States interprets the due process clause of the Fourteenth Amendment, the Court is essentially balancing two basic values:

(1) The search for truth to convict the guilty or acquit the innocent

as opposed to

(2) The fundamentals of fair treatment for men accused of crime.

It is obviously trite to say that many complex factors should be considered on such questions, but it may not be so obvious that the Supreme Court of the United States does not have before it all the relevant considerations. The confines of a single case like Mapp v. Ohio, or a group of cases, such as were decided under the heading of Miranda v. Arizona, provide an extremely limited forum for the consideration of such issues.

In the criminal law, the search for the truth, as the essential ingredient for determining guilt or innocence, has given way to deciding whether police procedures conform to the fundamental concepts of fairness in a free society. Convictions are frequently reversed where there is no real doubt as to guilt because procedural safeguards have not been observed. In balancing these complex values, there is much to be considered beyond the facts of a specific case which may reflect unfair tactics by police. In my opinion, it is simply not possible to generalize usefully in the abstract about the values to the community as opposed to the rights of defendants, without considering a great many specific factors. For example, experience from Escobedo and Miranda should be considered before these rules are extended.

The experience of the Philadelphia Police Department indicates that confessions and admissions are significantly decreased by warning the defendant of the right to remain silent and the right to counsel. Statistics have been compiled by the Detective Division of the Philadelphia Police Department starting in October 1965 shortly after the United States Court

of Appeals for the Third Circuit denied a rehearing in the Russo case.* In general, the cases covered the most serious offenses, such as homicide, robbery, rape and burglary and some other offenses, such as aggravated assault and battery and larceny.

After Russo, the Philadelphia Police Department followed the instructions of the Third Circuit by advising the suspect that he had the right to consult with counsel before making any statement, in addition to the warnings required by Escobedo. From October 17, 1965, through June 11, 1966, out of 4,891 individuals arrested, 1,550 or slightly less than 32 percent refused to give a statement in the face of Escobedo and Russo warnings.

During the period from June 12 through 18, 1966, which included the date of decision of Miranda, seventy out of 145 arrestees refused to give police a statement. On June 17, 1966, the District Attorney's Office provided the Police Department with guidelines on warnings to be given and questions to be asked in the light of the Miranda decision. When the requisite warnings were given, these statistics followed:

DATE	TOTAL ARRESTS	TOTAL WHO REFUSED STATEMENT AFTER WARNING
6/19 to 6/25/66	140	75
6/26 to 7/2/66	138	89
7/3 to 7/9/66	149	87

* United States ex rel. Russo v. New Jersey, 351 F.2d 429 (3d.Cir. 1965)

While no statistics were compiled prior to October 1965, consultations with police officials and experienced assistant district attorneys provide a basis for reasonable estimates. Prior to the _Escobedo_ decision, it is estimated that 90 percent of those arrested gave incriminating statements. Immediately following _Escobedo_, as a precautionary matter, the District Attorney's Office advised the Homicide Division of the Police Department to ask each suspect "Do you want a lawyer?" When four of the first five suspects requested a lawyer, that question was omitted and the more limited warnings required by _Escobedo_ were given. It is estimated that the post-_Escobedo_ and pre-_Russo_ warnings resulted in refusals to give statements by approximately 20 percent of those arrested. In the light of the post-_Russo_ warnings, some 32 percent refused to give statements. Then, on the short experience with the _Miranda_ warnings, approximately 58 percent of those arrested have refused to give statements.

It is not possible to obtain precise statistics on how many of these cases have been or will be lost without incriminating statements, but it is definite that a substantial number of these prosecutions will result in improper acquittals. A review of the 200 criminal cases on the daily list in the Philadelphia courts shows that many of the guilty are being acquitted where confessions or admissions have been suppressed on the authority of _Escobedo_ or _Miranda_.

Such experience, along with many other factors, should be considered by the Supreme Court in its future decisions. Among

other factors, there should be detailed study on the infringement on the rights of victims likely to be caused by releasing the guilty in the light of patterns of recidivism. Some studies are now being made on the plight of the victims of crimes in terms of proposed legislation to compensate such victims. This factor is important in evaluating rules of criminal proceedings which result in freeing the guilty who may repeat such offenses.

When the Court considers the coersive and intimidating effect of the police station on the defendant, the Court should also consider the psychological effect on the general citizenry of the Court's opinions. As District Attorney, I have received a substantial volume of mail on these subjects, and I am in constant contact with the victims of crimes who appear as witnesses for the Commonwealth. From this experience, it is my opinion that many people believe that the rights of the law abiding citizens are being ignored by the Court. The wave of crime in the big cities in recent years has terrorized communities such as Philadelphia. This attitude of insecurity is accentuated by Court decisions which make it more difficult for the police to gather evidence and make it more difficult for the prosecution to secure convictions of the guilty. Such factors need not be conclusive in the deliberations of the Supreme Court, but they ought to be considered beyond the individual experiences of the justices of the Court.

In deciding which values should be elevated, the delicate historical balancing of the criminal law has to be carefully

weighed in its practical effect. Criminal procedure has traditionally placed a heavy burden of proof on the State and has afforded the accused the presumption of innocence. One important counterbalancing factor to the burden of proof, which rests on the State, has been the State's ability to obtain confessions or key admissions from the accused through questioning. There are many crimes where it is simply not possible to convict the guilty if the police are denied any realistic opportunity to question the suspect.

The homicide case is perhaps the most important area where the only witness is the deceased, and there is frequently no tangible evidence to link the suspect to the offense. In addition to the homicide cases, admissions or confessions are important in burglary cases although there is frequently incriminating evidence found in the possession of the defendant which was taken from the burglarized premises, providing the search and seizure conform to the Mapp decision. When confronted by the vagueness of identification and the increasing number of alibi witnesses, an incriminating statement is frequently indispensible in balancing the scales in the prosecution of the rapist and the robber even though the victim is present to testify.

When the Supreme Court of the United States says that police questioning may continue after the accused has been provided with an attorney, the Court is, realistically viewed, eliminating the value of further questioning. The defense

attorney will not permit his client to make damaging admissions, because the attorney is well within the ambit of ethical conduct in requiring the State to prove its case beyond a reasonable doubt by other evidence. The balance, which has been achieved by placing the burden of proof on the State and allowing the police to question a suspect, has been eliminated by a rule which undercuts effective police questioning.

Against the background of decisions over the past quarter of a century and as accelerated by the rulings of the past five years, a public prosecutor is very much concerned about what may occur any Monday after next October's session commences. While the Court has refused retroactive application of some new principles, the unmistakable trend is to restrict law enforcement. Speaking as an advocate, it is my hope that the forthcoming decisions will not further restrict the police in obtaining confessions and admissions. The seeds may have been sown in Miranda to eliminate completely, at some future date, the use of the confession or admission other than one made in open court which, in effect, is a guilty plea. The doctrine of what constitutes an intelligent waiver can be expanded to eliminate virtually any type of admission. The burden of proof placed upon the State by Miranda also has the potential for making it virtually impossible to use confessions if such a requirement is interpreted to comprehend stringent requirements on verbatim transcripts of interviews of suspects by police officials. The next round of litigation on such issues should find district

attorneys more selective and hopefully more successful on such questions.

I am opposed to any constitutional amendment which would limit the authority of the Supreme Court to rule on questions of state criminal procedure under the Due Process Clause of the Fourteenth Amendment. I do not think that it is practical for the Congress and the state legislatures to consider a constitutional amendment which would change the law as announced by the Supreme Court on specific cases. In my opinion it would be highly dangerous to alter generally the authority of the Supreme Court to review state criminal proceedings. Should that be done, the danger would be substantial that unpopular reaction would later alter the interpretation of the Equal Protection Clause of the Fourteenth Amendment and nothing would be secure including the most basic guaranty of freedoms of speech, religion and press under the First Amendment.

Historically, the Supreme Court of the United States has been a progressive institution reflecting the national moral conscience. The Court has provided the medium of change, in conformance with the realities of modern times, which could not be achieved through the format of new legislation because of numerous procedural and other problems. The Court's decisions have obviously drastically altered the basic concept of federalism so that the division of authority between the federal government and the states is at great variance with that which was intended at the adoption of the Constitution or on the ratification of the Fourteenth Amendment. But the general benefit

enormously outweights any potential for disadvantages which may restrict state criminal prosecutions. The basic principle of the Constitution that the individual states should have substantial latitude in dealing with their own problems is still worth considering, but not in terms of any absolute limitations on the Court's authority.

Rather than changing any specific Court decision or limiting the authority of the Court generally by constitutional amendment, this distinguished Sub-committee might well consider the adoption of legislation or a constitutional amendment which would delineate procedures for future Supreme Court decisions. In my view, it would be highly desirable for the Supreme Court to conduct extensive hearings and consider much basic evidentiary material before making fundamental modifications in constitutional law. The Brandeis Brief which was used shortly after the turn of the twentieth century to persuade the Supreme Court to modify constitutional law points up the need for a modern counterpart. Many of the questions considered by the Supreme Court might better be considered by the legislature which has the opportunity for extensive hearings such as the ones now conducted by this Sub-committee. But, as I have indicated, I do not favor a change in the law which would remove the Supreme Court's authority to decide such questions and leave it only with legislative bodies.

The burden on the Supreme Court in conducting such inquiries would obviously be enormous. But the burden on the

other courts and agencies across the nation, occasioned by the Supreme Court's decisions, has been even more enormous. As difficult as it would be for the Supreme Court to consider the wide range of questions which bear on these matters, it is my opinion that such extensive consideration is imperative before fundamental changes are made in constitutional law on criminal procedures.

AS:wmw
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