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STATEMENT OF ARLEN SPECTER

BEFORE THE SENATE SUB-COMMITTEE

ON

CRIMINAL LAWS AND PROCEDURES

In evaluating the results flowing from the Miranda decision, two factors should be considered before deciding upon any changes in the fundamental criminal law:

1. What rules are necessary to obtain justice, both from the viewpoint of the safety of the community and the rights of the individual?; and
2. How may modifications in existing rules be made without adversely affecting fundamental institutions such as the Supreme Court of the United States?

The experience of the Philadelphia District Attorney's Office discloses some of the problems resulting from the Miranda decision and may provide a basis for suggestions for future action.

Findings of the Philadelphia District Attorney's Office and the Philadelphia Police Department show that confessions and admissions are significantly decreased by giving defendants warnings before interrogation. While no statistics were compiled

prior to October 1965, consultation with police officials and experienced assistant district attorneys provide a basis for reasonable estimates. Prior to the Escobedo decision in 1964, it is estimated that 90 per cent of those arrested gave some type of a statement.

Frequently the statements did not constitute admissions or confessions, but they were very helpful in later investigation. For example, in some situations a suspect would give a statement which placed him in some locale other than the scene of the crime. When subsequent investigation showed that his statement was not true, it was helpful in establishing motivation to fabricate. Thus, even while such statements might be exculpatory on their face, they were later used to incriminate the suspect.

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 warnings resulted in refusals to give statements by approximately 20 per cent of those arrested.

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.[1] In general, the cases covered the most

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

serious offenses, such as homicide, robbery, rape and burglary and some other offenses, such as aggravated assault and battery and larceny.

Statistical Findings

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 per cent 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
7-10 to 7-16-66	127	78
7-17 to 7-23-66	139	73
7-24 to 7-30-66	167	90
7-31 to 8-6-66	158	76
8-7 to 8-13-66	113	62

DATE	TOTAL ARRESTS	TOTAL WHO REFUSED STATEMENT AFTER WARNING
8-14 to 8-20-66	138	99
8-21 to 8-27-66	158	87
8-28 to 9-3-66	170	104
9-4 to 9-10-66	161	99
9-11 to 9-17-66	176	108
9-18 to 9-24-66	167	96
9-25 to 10-1-66	127	77
10-2 to 10-8-66	164	107
10-9 to 10-15-66	130	74
10-16 to 10-22-66	142	67
10-23 to 10-29-66	136	78
10-30 to 11-5-66	143	78
11-6 to 11-12-66	145	82
11-13 to 11-19-66	156	86
11-20 to 11-26-66	142	96
11-27 to 12-3-66	157	100
12-4 to 12-10-66	151	98
12-11 to 12-17-66	154	85
12-18 to 12-24-66	134	73
12-25 to 12-31-66	107	97
1-1 to 1-7-67	141	78
1-8 to 1-14-67	151	96
1-15 to 1-21-67	156	89
1-22 to 1-28-67	143	86
1-29 to 2-4-67	145	92
2-5 to 2-11-67	134	68
2-12 to 2-18-67	118	64
2-19 to 2-25-67	143	101
	5220	3095

These statistics show that 59% of those arrested refused to give a statement after the Miranda warnings.

Cases Are Lost

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.

The Miranda decision has caused very acute problems in cases where the police investigation was conducted prior to June 13, 1966, the date of the Miranda decision, but the trial started after the date of Miranda. In those situations, the police conformed to the interrogation rules in effect at the time of the investigation. Those rules were changed before the trial so that confessions, admissions or other helpful statement were excluded.

In such situations, people have literally gotten away with murder. On January 9, 1967, the Commonwealth was forced to nol pros the case against Fred O. Aguson which rested to a substantial extent upon a confession given voluntarily by Aguson to Philadelphia police detectives. After the Miranda decision, the confession was suppressed because Aguson had not been warned that counsel would be provided for him in the events that he wished a lawyer and could not afford his own counsel. When the confession was suppressed, the prosecution for murder had to be abandoned.

A similar result followed in the case of Commonwealth v. T.L. Bailey Bailey and a co-defendant, Robert Rowe, were implicated in a robbery-murder substantially on the basis of confessions. The police investi-

gation and Rowe's trial occurred before the Miranda decision. Rowe was convicted of murder in the first degree and received life imprisonment. The Miranda decision intervened before Bailey's trial resulting in the suppression of Bailey's confession. Today Bailey is walking the streets of Philadelphia. These cases are illustrative of numerous prosecutions which have been abandoned or lost where statements had been suppressed under the Miranda rule.

A number of conclusions follow from our post-Miranda experience: (1) fewer suspects are giving statements; (2) some of the guilty are being acquitted because statements are not obtained by the Police Department under post-Miranda procedures, ahd (3) many cases are being lost because the Miranda rules apply to matters investigated before Miranda and tried after that decision.

As to the third problem, the Commonwealth ought to be permitted to use evidence which was legal when obtained. Many of those suspects could still be prosecuted, if the rule were changed, because cases have been nol prossed which would permit further prosecution without the bar of double jeopardy.

Some Alternatives

As to revising the restrictions imposed by Miranda on law enforcement, three alternatives come to mind:

1. A constitutional amendment;
2. Relitigating the Miranda rules with the appeal taken by the prosecution; or
3. Congressional action on a statute under the Fifth Clause of the Fourteenth Amendment.

Opposition To Constitutional Amendment

I adhere to the views which I expressed last year before the Senate Sub-Committee on Constitutional Amendments on the issue of amending the United States Constitution in order to countermand the Miranda decision. 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 outweighs any potential for disadvantages which may restrict state criminal prosecutions. I further adhere to the view, more extensively expressed last year before the Senate Sub-Committee on Constitutional Amendments, that 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.

Another Test Case

As to the second alternative, I have instructed my assistants to be alert to find a proper case to relitigate the Miranda rule. So far, we have not yet found the case which provides an opportunity to create a full record to relitigate the implications of Miranda. When the right case is found, it is my view that the suppression hearing should contain the full range of statistics showing the reduction in statements obtained by the police, the consequences of the Miranda rule including improper acquittals, the general impact on police procedures, and as many other factors relating to the underlying social policy as can be appropriately introduced in a suppression hearing.

Congressional Legislation

The third alternative would be congressional legislation such as that embodied in the bill designated S674. The thrust of that bill leaves it up to the trial judge to determine if a confession has been voluntarily given based on a number of factors. That bill could be extended to criminal proceedings in state courts where the Miranda rule is equally applicable.

The most important restriction of the Miranda decision is the requirement that a suspect in custodial interrogation must be advised that he has a right to have an attorney appointed for him, if he wishes one and cannot afford counsel, before he is questioned. After that warning, the suspect must affirmatively waive that right.

Once that right is asserted, police interrogation is, for all practical purposes, ended. If an attorney is not provided, the police may not question the suspect further. If an attorney is provided, further interrogation is worthless. In Miranda, the Supreme Court expressly recognized the propriety of defense counsel to advise the suspect not to talk:

> "An attorney may advise his client not to talk to the police until he has had an opportunity to investigate the case, or he may wish to be present with his client during any police questioning. In doing so an attorney is merely exercising the good professional judgment he has been taught. This is not cause for considering the attorney a menace to law enforcement. He is merely carrying out what he is sworn to do under his oath -- to protect to the extent of his ability the rights of his client. In fulfilling this responsibility, the attorney plays a vital role in the administration of criminal justice under out Constitution."[2]

Justice Harlan, in dissent, reached the same conclusion:

> "...the lawyer in fulfilling his professional responsibilities of necessity may become an obstacle to truthfinding."[3]

Those statements follow the frequently-quoted declarations of Mr. Justice Jackson in Watts v. Indiana:

> "To bring in a lawyer means a real peril to the solution of the crime, because, under our adversary system, he deems that his sole duty is to protect his client -- guilty or innocent -- and that in such a capacity he owes no duty whatever to help society solve its crime problem. Under this conception of criminal procedure, any lawyer worth his salt will tell the suspect in no uncertain terms, to make no statement to police under any circumstances."[4]

2 Miranda v. Arizona, 384 U.S. 436, 480-81 (1966)
3 Id. at 514
4 Watts v. Indiana, 338 U.S. 49, 59 (1949)

Therefore, the crucial question on police interrogation arises where the suspect is given the fourth Miranda warning and asked if he is willing to waive that right. Realistically viewed, it is inconsistent to say, as the Court does in Miranda, that the waiver must be "knowingly" and "intelligently" made. Any suspect who really understands that right could really not waive it "knowingly" and "intelligently" because to "know" or to act "intelligently" requires that he not give up that right. It is fictional to say that the fourth Miranda right could be knowingly and intelligently waived.

In the long run, it will be hard for the court to stand in the path of constitutional law on that fictional stone. I suggest that the stone will sink and the court must step one way or the other. The Court must say that a statement may be admitted only if an attorney is present because of the absence of a real intelligent waiver of that right. Or, to take a step to the side, the Court must say that the balance between individual rights and law enforcement does not require that the suspect be afforded that last protection.

From my experience in the District Attorney's Office, I believe a balance of fairness can be established without an affirmative waiver of the fourth Miranda requirement. At a maximum, I would think it sufficient to have the first three Miranda warnings to wit:

(1) You have a right to remain silent.

(2) Anything you say can and will be used against you in court.

(3) You have the right to have the advice of a lawyer.

Beyond those warnings and affirmative waivers, it is my view that it is sufficient to leave it to the discretion of the trial court to see that justice is done in the individual case under the general rule that statements must be voluntarily given.

By appropriate legislation, Congress may well be able to modify the detailed holding of Miranda and still conform to the broad Constitutional mandate on the privilege against self-incrimination announced by that decision, at least insofar as state criminal procedure is concerned. This is an idea which was first suggested to me by my law school classmate Jon O. Newman, the United States Attorney for Connecticut. Section Five of the Fourteenth Amendment provides that:

> "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

The Miranda decision makes the privilege against self-incrimination applicable by state criminal trials through the due process clause of the Fourteenth Amendment.

Congress has acted under the general terms of Section Five of the Fourteenth Amendment in order to enforce the provisions of the equal protection clause of the Fourteenth Amendment. That legislative action, and the cases interpreting it, show that Congress has discretion to establish appropriate standards for enforcing the equal protection clause, and for that matter the due process clause of the Fourteenth Amendment.

In Miranda the Supreme Court said that there could be alternative safeguards to guarantee the privilege against self-incrimination. An Act of Congress could provide such alternatives and could reasonably modify some details so long as the procedures guaranteed the ultimate protection of the privilege against self-incrimination.

The ultimate balance must be struck by the Supreme Court as to the extent of the Congressional function as compared to the Court's function. In the current context of the close decision on Miranda and the excellent argument against its outer limits, the possibilities

are substantial that the Supreme Court would not hold such federal legislation, under Section Five of the Fourteenth Amendment, to be unconstitutional even if the fourth requirement of Miranda is modified.

At least there is sufficient basis for this approach to warrant Congressional action to modify what Congress may conceive to be the most restrictive aspects of the Miranda case. The Congress, in hearings such as these, has a much broader opportunity to inquire into all the facts. It is likely that the Supreme Court would accept such legislation based on reasonable standards enacted after thoughtful legislative judgment following hearings which show a factual basis necessitating the modification.

Safe Streets & Crime Control Act

The proposed "Safe Streets and Crime Control Act of 1967" providing for federal assistance to law enforcement and the administration of criminal justice is splendid legislation. Our experience in Philadelphia shows that law enforcement is seriously hampered by the utter lack of any comprehensive plan to coordinate and improve the operation of the various law enforcement agencies and processes.

In response to this need, my Office early in 1966 together with the Greater Philadelphia Movement and a wide range of other civic agencies, undertook a survey of criminal justice in Philadelphia. At the present time, under the directorship of Professor Paul Bender of the University of Pennsylvania Law School, the survey is in process and has already uncovered many areas in which innovation and assistance are essential. Many of the areas found in Philadelphia to be desperately in need of improvement are the same areas which were spotlighted in the recent report of the President's Crime Commission.

The requirement of the proposed Act that grants not be made to local governments until a master plan has first been evolved is a salutary one. Such a requirement will encourage a much needed fact-finding survey in the urban communities of our nation and will help to insure that federal grants to law enforcement will be for specific, well thought-out projects rather than to hastily conceived schemes for merely obtaining federal funds. Article 3, permitting grants to universities, units of local government and private organizations is also essential as it is only through a mobilization of the entire resources of the community, including long established civic agencies with expertise in particular areas, that imaginative and effective advancements can be made in the field of crime prevention and enforcement.