

LAW AND ACCESS TO JUSTICE
Address by Robert Morgan
U.S. Senator
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We appreciate the Constitution because it created the framework for this great nation, but it did more than that. It created a way of life for us as citizens that is just as appropriate-- just as fulfilling-- today as it was 200 years ago. The most fundamental principle of the way of life established by the Constitution is that it is based on rules of law that protect and define our personal rights as well as those we have agreed to share.

We make an important distinction between the rights we give to the government and those which we reserve to ourselves.

The Ninth and Tenth Amendments set the stage for this distinction.

The Ninth Amendment provides that:

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

And in the Tenth Amendment we find the following language:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

We in North Carolina can be proud of these Amendments because our State was one of those which refused to ratify the Constitution until a promise was made that a Bill of Rights would be added. These Amendments are a constant reminder of the line we have drawn between government and the people. We gave up certain rights to the government and then drew the line on what that government could do.

It is this line that is so very critical in maintaining a proper balance between the government's

necessary powers and the absolute right which we have to freedom.

Various amendments protect an entire spectrum of individual rights, but there is one in particular that I would remind you of as being central to the fabric of this nation. I am referring to the Fifth Amendment, which states in part that

No person shall... be deprived of life, liberty, or property without due process of law...

Let me underscore that phrase "due process of law."

When a government is given authority and power over people, abuse is not only a possibility, but quite likely. The temptation to exercise righteous dominion over another is almost impossible to overcome. Due process is the safeguard we have in our system to protect us. The government is accountable to the individual and to the rest of society when

it seeks to deprive a person of his liberty.

The magnificence of this nation lies in the very fact that we operate by law, by common consent, and not by intrigue, by force or by partiality.

In recent times we have passed through confusing and demanding events. Sadly, there have been national leaders and administrative agencies that have believed themselves above the law. They were not. What other nation, so beset by internal problems could have continued? Our ultimate confidence in the law and in our Constitution supported us. The checks and balances provided by our Constitution insured our access to justice. Our individual rights continued to survive.

We read, on occasion, of police brutality, of intimidation,

of governmental abuse or some unjust event that seems to test the principle that we have access to justice in the United States. We have found so often, however, that the ultimate consequence of some episode such as this is that due process comes into play and opens the door for a return to responsible government action.

JUSTICE AS PRIVACY

A freedom which characterizes the American system is the right of a citizen to be left alone, a right to personal privacy. Denial of this right, contained in the Fourth and Fifth Amendments, is to my mind one of the greatest injustices that can take place. Freedom of thought, of speech and of action are all tied to the right to be left alone and to act freely where the government has no right to regulate.

The rule of law allows us to secure justice when the government infringes on our personal lives.

My service on the Senate Select Committee on Intelligence for the last three years has opened my eyes to just how serious the threat to our liberties can become. I am firmly convinced that the work of the Intelligence Committee in monitoring the activities of our intelligence services is one of the most important tasks now being undertaken by the Senate of the United States.

While much of the work of the Committee is secret, I can tell you that the efforts of the Committee have resulted in the modification of many policies which had threatened our individual freedoms. We have all heard of the unwarranted eavesdropping and surveillance of civilians by the government

which went on in the 1960's and early 1970's. I can report that because of the work of the Intelligence Committee these practices have stopped and, I believe, the services are more responsible and effective.

There can be no doubt in my mind that effective, responsible law enforcement without unnecessary violations of individual freedoms is not only possible but essential. Law enforcement can serve to protect our freedoms, but it should not in the course of that effort, infringe on others. Law enforcement should serve the people and the law of the people. Law enforcement is not above the law; as I have said we all live within a rule of law.

The experience of the past few years indicate to all of us the need to be ever vigilant in assuring that our system continues

to function for the benefit of all and with all due process. In short, freedom requires work-- work by law enforcement to act within the system, work by the legislature to insure that our laws reflect the will of our people and give guidance to law enforcement, and most important, work by the people to see that our rule of law is maintained.

I want to restate that I fully support law enforcement. Only by effective law enforcement of our laws can we be protected from those who would diminish our freedoms. It is only through responsible law enforcement that our rule of law can be preserved.

My only concern for law enforcement is that it heed the words of Justice Brandeis in his dissent to the Olmstead case in 1928, when he said,

Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent...The greatest dangers to liberty lurk in insidious encroachments by men of zeal, well-meaning but without understanding.

The work of the Intelligence Committee has been long and hard. Yesterday, the Senate passed a bill from the Intelligence Committee, which I cosponsored. The bill is known as the Foreign Intelligence Surveillance Act.

The bill regulates surveillance of U.S. citizens who may be conducting espionage for a foreign power. In such a business, due process is a critical concern. While there can be no doubt of the value of electronic surveillance to protect us from foreign espionage and to preserve our free society from foreign intelligence services, as I noted earlier, innocent citizens have a right to be left alone. That right continues until proper procedures are employed to determine that they do not deserve

the security afforded other citizens.

As the law currently stands, the use of electronic surveillance to determine whether or not an American citizen is engaged in intelligence activities on behalf of a foreign power is within the discretion of the President. He can order surveillance as part of his national security powers. In the past, every president, from Franklin Roosevelt to Gerald Ford, has received information secured by questionable techniques. People as diverse as the Reverend Martin Luther King, Jr. to advisers to Henry Kissinger on the National Security Council have come under the watchful eye of the intelligence services by virtue of the use of national security. This was done by discretion without regard to what I consider to be a most important constitutional protection-- due process of law.

The Foreign Intelligence Surveillance Act provides that a judicial order must be obtained prior to initiation of surveillance. While the procedures under the bill are not completely analgous to those involved in obtaining a wiretap in criminal cases, there are similar protections.

Additionally, a change was made as to who could be the subject of surveillance under the Act. Last year I voted against reporting the bill out of Committee because it permitted surveillance of individuals not involved in criminal activity. This was simply too intrusive. After my objections, the bill was substantially strengthened to restrict surveillance to suspected criminal activities.

After the modification I favored was added, I became a cosponsor of the bill. It will go a long way to insure that

law enforcement will be more responsible and I am confident more effective. I say more effective because I believe that the new legislation will do away with unwarranted and wasteful surveillance efforts. The judicial step we've added of requiring court approval will not only insure due process for the individual, it will require the intelligence services to take time to consider carefully what they are planning to do whether it will be worthwhile. This will make for more efficient law enforcement.

I am proud to be serving on the Intelligence Committee and I am proud of the work that has been done by the Committee. It has insured that due process and access to justice is denied to no one because of overzealous intelligence activities.

THE CRIMINAL LAW AND THE INDIVIDUAL

I would like to turn now to another area where the individual in our country is protected by the rule of law and through the law can secure justice. The criminal law is seen by many as the offensive arm of the government. I view it as the defensive arm of the citizen as well. The criminal law protects us from those in our society who would deny us our freedom of action. At the same time it specifically limits the power of the government to what the law says and no more. The law may appear to limit the citizen, however, I feel it limits the government as much or more. Law is the part of our lives which protects us, not the part which allows the government to infringe on our lives.

This past January, the Senate passed and sent to the

House the Criminal Code Reform Bill. This measure is an attempt to reorganize and recodify our criminal laws which are currently spread out through the fifty titles of the United States Code. I welcomed the measure, not only as a need housecleaning effort but as well as a means of protecting our individual rights.

It is the criminal law which most directly affects our freedom for it is the criminal law which can deny us our ability to live freely in society. Even though this was a primarily technical effort, it was important. Too often justice has been denied because of a technicality or delay.

There can be no greater denial of justice than to be denied one's life, liberty or property without due process.

In the case of the criminal law it is one's life or liberty which is at stake. Both the substantive and procedural rules of the law are of great importance as a result. Due process is the guarantee that the criminal law will operate in a fair and equal way for all of us. The denial of due process in the criminal area means more than a denial of justice, it may mean the denial of liberty. I am glad the bill came through, although it was a bit rushed. Since the House may not be able to complete its work on the measure, we should see it again next year and, perhaps, give it the vital attention it deserves.

I'd like to mention just two provisions of the Criminal Code Reform Bill which reinforce my views that the law is our

best access to justice.

The first provision was added to the bill on the Senate floor and stated that the provisions of the criminal code should be construed strictly. Or in layman's terms, the bill should be interpreted in a narrow fashion and neither judges nor law enforcement officers should attempt to expand the meaning of the parts of the code.

This was an important statement of policy by the Senate.

First, it made it clear that criminal law is such serious business that we must be most careful in applying it.

Criminal law must be explicit so all know what is legal and

~~what is illegal and~~ no one must be uncertain about society's

views on right and wrong. The procedures must be special.

Ignorance of the law when it's the criminal law is simply too risky a business.

Second, the floor amendment on strict construction made it official policy that law enforcement should not attempt to "interpret" the law so as to create crimes or to expand authority. It is imperative that criminal laws be narrowly drawn and be specific so that law enforcement does not violate the constitutional prohibition against ex post facto crimes. In short, our criminal laws must not be vague for the result might be that acting in a certain manner today, which appears to be legal, may by interpretation of a judge be a crime tomorrow.

Finally, strict construction restates our historic

policy that the lines between the citizen and the government be strictly drawn; it is a policy to which I fully subscribe.

The second provision is an amendment which I was able to introduce and have agreement on prior to passage of the bill. I believe this amendment is a vital one and one which again reinforces the need for fairness and due process in our dealings with the government.

The amendment, which was agreed to on January 30th during the floor debate on the Criminal Code Reform Bill, was one I was proud to introduce since it grew out of my experience in North Carolina and was modeled on North Carolina statutory law.

The amendment deals with comments by a judge to a jury

during the course of a trial or in his instructions to the jury before their deliberations. Specifically, it provides that no judge may express his opinion on the credibility of a witness/or of evidence during the course of a trial. The findings of fact in a criminal case are very much the province of a jury and therefore their opinion of the evidence in a case should be formed by the jury members as much as possible. The defendant in a criminal trial deserves no less than an independent jury, not one guided down the path to a decision by a judge - this would be a serious injustice.

Now, most states have such a provision, however, I have noted for some time the absence of such a rule in the federal system and I noticed that it was missing from the new code.

What does this mean to an individual.

At present, a federal judge can, if he wants to, in the presence of the jury just simply say, "Now, while, gentlemen of the jury, it is your prerogative to find the facts, I do not believe the testimony of this witness, and I do not think you believe it," just so long as he reminds the jury it is their province to find the facts, he can say anything he wants to.

That is a two-edged sword. I have tried a lot of cases in Federal court and I can name one Federal judge who thought everybody ought to be in prison. He is sort of prosecution-minded. He had been a former U.S. attorney. We'd come in with a defense, present the finest witnesses in the world,

and he could express his opinion to the jury that he does not believe what the witness had to say. But as long as somewhere along the way he emphasized or said, "It is your province to find the facts," it is permissible under the Federal law.

The North Carolina Supreme Court said that the founders of our legal system intended that the right to trial by jury should be a vital force in the administration of justice. They realized that this could not be if the jury should become a mere unthinking echo of the judge's will. To insure against this, they clearly demarcated the respective functions of the judge and the jury in criminal trials by State law.

I hope that this provision remains in the bill on the House side because I feel it is an important one for our

liberties. When faced with the ultimate power of our government - the power to deprive me of my freedom - I want to be sure that the system which makes that decision - the criminal justice system - operates in the fairest manner possible and with all due process.

I believe that small provisions such as this one, which often get overlooked in a bill as large as the criminal code bill, which was some 400 pages long, can go a long way to preserving the confidence of the people in our system. I'll continue my efforts in this direction and I hope you'll support this approach.

CONCLUSION

I would like to close with a few observations about our system of law and its value to each and every American citizen.

The American system of law is unique. Everyone is innocent until proven guilty. People are entitled to receive the services of a lawyer to defend themselves. Everyone may bring their grievances to court, and get a fair hearing.

And there is more. Individual citizens can readily bring suit against the government, and even challenge the laws passed by Congress. We extend all the rights of our judicial system to all residents of this country, not only American citizens, and we even allow foreign governments to bring suit against the United States in our courts.

These facets of our judicial system demonstrate a respect for justice unequalled anywhere in the world, both now and in the past. The American desire for due process and our willingness to allow anyone their day in court has made possible the protection of this country's greatest tradition, the tradition of individual rights.

Now, we all realize that our legal system is not perfect. But even as we strive for improvements, we have to maintain our perspective, and remember that the U.S. has by far the best legal system in the world.

There are many measures of a nation's greatness, among them military strength, material wealth, large populations, and possession of land. And the United States has all of these.

But what distinguishes the United States, and will earn us a place in history, is our respect for individual rights and the legal system set up to protect them. Not only is this unique, but it is best for each and every American, and it is fundamental to our society.

If our tradition of due process, of allowing everyone access to the courts for a fair hearing, is weakened the United States will no longer be the country we know. Every American, for his own individual benefit and for the benefit of us all, has no obligation to help maintain this tradition. But this obligation falls heaviest on us lawyers, who have received specialized training and have the best understanding of our legal system and its traditions. We must remain informed,

sensitive to the issues, and active in protecting the
right of each American to due process of law.