

# The Bill of Rights - Our Heritage

## GOVERNMENT BY LAWS, NOT BY MEN

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**M**R. PRESIDENT, distinguished guests and members of the National Association of Manufacturers: When your Committee came to see me and extended an invitation to address you on the subject, "The Bill of Rights—Our Heritage," I accepted at once. In these critical times, when there is fear of what the future may hold in store for us; when each of us feels the impact of those forces at home and abroad that challenge our way of life; when traditional procedures at times seem unequal to the task of maintaining law and order; and when some of the most fundamental of our constitutional rights are under open attack, this is a provocative and interesting subject. What appealed to me particularly was the opportunity to do a little of what I call preaching the gospel.

And I may as well tell you my thesis and my mode of procedure right here in the beginning of this short address. I shall wander about, discussing now-this-now-that feature of the Bill of Rights, in an endeavor to open the subject up and let you see it from the inside and in the end to convince you, not merely that we must hold on to these precious freedoms for dear life, but that we can do this only by free and independent cooperative and individual thought and effort, despite the surrounding atmosphere of conformity which pervades contemporary life and, more often than we realize, obscures fundamental issues. This is the central, unifying thought which everything I shall say is intended to support.

Of course we are all familiar in a vague way with the words "liberty" and "freedom." Surely we have heard these words bandied about from the time we studied American History and Civics at school. What is freedom anyway? I thought I knew something about it, until I went through that trial of the Communist leaders back in 1949, and was subjected to a barrage of propaganda concerning the so-called freedom of the Russian variety.

To me freedom is a state of mind; it is a way of life. It is a concept, an idea. From one viewpoint, it is the individual on the one hand and all the powers of government and the state and society on the other. From another viewpoint, it is the preservation of property rights against the predatory demands of a multitude of forces. From still another viewpoint, in the context of the American scene, it is the finding of some means to prevent the complete absorption of state functions by an all-powerful federal government. There is no such thing as absolute freedom. How much individual freedom is consistent with the needs of a given nation or community at a given time? Freedom is the opposite of slavery; there is physical freedom and the freedom of the mind. Freedom is more precious than all the gold and all the jewels of the Indies. But it is not static; it is subject to the inexorable laws of growth and decay.

Not long ago Mrs. Medina and I had an exciting experience on Edward R. Murrow's "Person to Person" television program. Frankly, I did not know what we were in for. And, by the time they were ready to proceed, I thought our apartment would never look the same again. But it did. I thought there would be a rehearsal. But no; nothing like that. This

man Murrow is a remarkable man. One of the questions he popped at me, out of the blue, was: "Judge, can you recommend some little book, of a hundred pages or so, that will explain all about this freedom business?" Well, that was a question! *Freedom is the study of a lifetime. Our Bill of Rights, which looks so simple when we first read it, is a dynamic, flexible, ever-expanding and growing definition of our fundamental rights. Like the search for truth, the ultimate in freedom is always just over the horizon, just beyond our grasp. The trick is not to lose it, or any part of it, but rather to get as much more of it as we can assimilate.*

*And yet the temper of the times would seem to be in the opposite direction. In our zeal to defend ourselves against the onslaughts of the communists, we must be alert to the danger of adopting their ruthless methods and losing our freedoms in the process. It will not do merely to give lip service to the fundamental rights, as they do, whilst at the same time to indulge in actions the inevitable consequence of which must be the erosion or whittling away of our heritage of freedom.*

At this point, if time were available, which it is not, a sketch of historical background would be both logical and helpful. I shall content myself with a single illustration. Not long ago I was reading the diary of John Evelyn, who was writing in terms of 1650 or thereabouts, and I came to a description of his experience one day when he was taken to see a man put to the torture. The prisoner was charged as a pickpocket; the man whose pocket had been picked identified him, but the prisoner refused to admit his guilt. What he saw in the torture chamber was too much for worthy John's stomach and he declined an invitation to witness what was to be done to the next victim. But there is not a word of protest in the diary. He took it for granted that this was the thing to do, and it was the regular, lawful procedure.

Against this background, let us turn to the Bill of Rights. How is the individual protected against the government? The Fifth Amendment gives us part of the answer: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury; \* \* \* nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law \* \* \*"

There are those who wish to abolish grand juries; they say the grand jury is a cumbersome and antiquated device, that the grand jurors always indict when the District Attorney wants them to. But many of those here present have sat as grand jurors, you know that you can always seek instructions from the judge under whose jurisdiction the grand jury serves, and that no one can compel you to indict someone even if the District Attorney fusses and fumes and tells you the accused is guilty. And this happens—the case for the government is presented and the grand jury finds no true bill. The Bill of Rights provides the citizen with this protection against the possible tyranny of his government.

How does this privilege against self-incrimination actually work? Suppose the authorities are investigating the murder of a gangster or a shakedown by some union racketeer or a conspiracy of communists to overthrow the government by

force and violence. In the typical case a witness is called before a grand jury and he refuses to answer questions on the ground that his answers may tend to incriminate him. Do the authorities let the matter go at that? They certainly do not. Here is where the judge comes in again. Indeed, he always comes in, as somewhere down the line a judge must decide if constitutional rights have been infringed.

The judge is called in or the interested parties are brought before him and there is a hearing at which the judge decides in a proceeding to punish for contempt whether the witness has a right to refuse to answer the question. This may look easy to you but I tell you sometimes it is a tough proposition to decide.

It is a popular conception that if the witness pleads his privilege against self-incrimination he must be guilty. But that is absurd; it just is not so. What the judge has to figure out is whether the situation in which the witness finds himself is such that answers to the questions might be used against him in a criminal prosecution. Often it looks as though the witness were in no danger of being prosecuted criminally for anything but is simply trying to protect his friends or his relatives by withholding information. But how is one to tell? Surely in cases of doubt the scales should be tipped in favor of the protection of constitutional rights.

Many a time, when I was a practising lawyer, I advised clients not to talk, where I thought that anything they said might be used against them, perhaps in prosecutions under the anti-trust laws, or, as in the case of the officers of the companies that used to issue mortgage certificates, in prosecutions for the alleged offense of fraudulently obtaining money by use of the mail.

But what I am particularly interested in making clear to you is that such a right as the one under discussion requires redefinition from time to time. These concepts of the Bill of Rights are necessarily dynamic not static. The wily strategy and maneuvers of the communists and their sympathizers have caused the writing of new chapters in the court records of constitutional interpretation. Many of the cases currently arising have to do with the leaders of unions. Tomorrow the pressure will come from some other direction.

Without the protection of the Fifth Amendment we would bit by bit degenerate into a police state. This is one of the most important and fundamental of our freedoms. Despite all the loose talk we hear, we must be determined to preserve this right and not permit it to be whittled away by loose interpretation or torn from the Constitution by amendment. And if it protects the guilty as well as the innocent we must realize that this was obvious from the first. And no one knows who is guilty or who is not, under our laws, until the jury has rendered its verdict.

Thus the figure of the judge looms large. He is the one who in the last analysis stands between the government on the one hand and the citizen on the other. It may be that the judge is deciding a tax case: The government says he owes the money, the citizen says he doesn't. Or it may be a criminal case or any of a great variety of others in which the citizen is pitted against the United States or against the People of the State of New York or against the Commonwealth of Massachusetts or whatnot.

When judges from foreign countries visit the United States sooner or later many of them wind up in my chambers down in the United States Courthouse. One of the questions most of them ask is whether the executive tells me how to decide the cases, even by little hints. Well, I know how the government wants the case to come out all right, that is obvious from the pleadings; but if anyone connected with the Department of Justice tried to see me without the presence

of his adversary, under the guise of explaining some of the fine points of the case, I would consider it a personal affront and send him about his business in short order.

Now I know from my experience that in rare cases you may come across a judge who acts as though he were on the bench to decide cases in favor of the government. This is particularly bad when the judge signs a forty or fifty page document containing findings of fact, submitted by government counsel, without so much as changing a comma. But that is not the way the system is supposed to work; and that is not the way it does work. Of course, you always have to deal with the human equation. But I want to make it perfectly plain to you gentlemen that the judges are honorable men and any judge worth his salt will consider the United States Government or any state or municipal government simply as one of the parties in the case before him. If you have an idea that the government always gets the breaks, you should come down to our courthouse some time and wander around. All the court rooms are open to the public—come in and see for yourselves.

Let us turn to property rights. What is due process of law? If I branched off into particular situations, I could talk all day and still leave the subject as obscure as when I started, except to those of you who are lawyers. Naturally what is due process of law depends on the knowledge of legal principles and their historical development. But I do have something to say about the right approach to the subject and I am pretty sure you will understand what I have to say.

One of the strangest phenomena is the curious and absolutely unfounded belief on the part of the public that the judges know all the laws and that they only work when they are sitting on the bench hearing cases. The true fact is that most of their working time is devoted to reading statutes and decisions and briefs submitted by counsel in an effort to discover what the law is. Sometimes there are precedents "right on the nose," as the lawyers say, but more often there is no binding precedent on the precise point at issue. How does the judge go about "finding" the applicable law in such a case?

There are two approaches, diametrically opposed to one another. The first is to follow what is sometimes called the "humanitarian" or "equitable" approach, by which the judge meditates and finally comes out with something he thinks is fair, after the manner of King Solomon. When I went on the bench I thought I was going to do this; but, when I was faced with the responsibility, I soon came to the conclusion that I just could not do that without introducing into the law an element of chaos and uncertainty. My function really was to follow the second approach, which was to make a real honest-to-goodness effort to discover what the law was from a study of the available statutory and other material and then apply it, whether or not the result was pleasing to me. In one of my recent opinions I had this to say:

Indeed, I do not believe that under our system of jurisprudence, judges have the right to decide cases purely on the basis of what may strike an individual judge as the right thing to do, independent of any rule of law. We are not mere philosophers, nor is it our function to dispense *a priori* justice between the parties, but rather to determine and apply the law as best we can.

Under our Constitution we are governed by laws not by men. And this "due process of law" of which I have been speaking stems directly from the Bill of Rights. We must never tamper with these fundamentals.

In our lifetimes the most serious inroads upon the basic assumptions of the Bill of Rights have taken place in a continuing redefinition of the functions of the state and

federal governments *vis-a-vis* one another. There seems to be a race between the "general welfare" clause of the Preamble and the Tenth Amendment to see which one will gobble the other up, with the odds heavily on the "general welfare" clause. The Tenth Amendment, which is, of course, part of the Bill of Rights, provides:

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.

*What would the founders say if they knew how the concept of interstate commerce had been expanded so that to find an acknowledged exclusively intra-state matter is like looking for a needle in a haystack! There are a great variety of grants in aid, for school lunches, constructing highways, building airports, clearing slum areas, building hospitals and so on. There are always emergencies of one kind and another. One field after another of state activity is preempted and taken over by the federal government. Along these lines a colossal struggle is in the making over labor relations. Before too long, we may see this field preempted, too. Perhaps a mere amendment to the Taft-Hartley Act may do the trick and set the stage for a holding by the courts that the right to work provisions still in the statutes or constitutions of eighteen states are no longer of any force and effect.*

Indeed, last June, at the Forty-ninth Annual Conference

of Governors, President Eisenhower reported that a distinguished scholar had told him that the present trend toward centralizing governmental power in Washington would eventually make the states "powerless satellites of the National Government" unless checked; and he recommended the organization of a Task Force to study the subject and recommend a retransfer of some of the activities to the states with a corresponding alteration of the tax structure.

*We all know how every governmental body reaches out for more and more power. This seems to be one of the intuitive urgings men have when they are born. It is as natural and as inevitable as death and taxes.*

But I am an optimist. There is no occasion to go off in a corner and sulk or to think that the world is rapidly going to blazes. History belies all this despondency and I want no part of it. And all this preliminary is working up to some conclusions.

First, never lose faith in our precious Bill of Rights. Let us stand on it as on a rock and be steadfast against those forces that would amend it or tear it apart or whittle it down by loose interpretations suggested by way of compromise or by the seeming expediency of the moment.

Second, let us bore into and study these subjects, and try our best to understand that they are dynamic and not static, because life is that way. It is idle to sit on the side lines and cuss out the Supreme Court.

And, lastly, let us roll up our sleeves and pitch in as individuals, participating in the rough and tumble of politics, right at the bottom of the ladder in local political clubs, and from there on up, shouldering the burdens of citizenship and not minding it too much if we get hit with a little mud in the process or suffer some inconvenience. *One of the troubles with this great country of ours is that too many of us have abdicated to the self-seekers and those with particular axes to grind. We can preserve our heritage of freedom only if we will fight for it down in the arena where there is a chance of getting hurt.*

In conclusion, let me tell you a story. In 1949 on the trial of the Communist leaders, charged with conspiracy to teach and advocate the overthrow of the United States Government by force and violence, we started off with a challenge to the entire panel of jurors, based upon the claim that Negroes, housewives and working people had been systematically excluded from the jury list. I did not at first realize that this was funnelled into three of the most important of the lines of communist propaganda. Anyway, it soon developed that there had been no such exclusion and I overruled the challenge. So we began to pick the jury with about 400 talesmen in the courtroom. As I thought the case might take six weeks or two months to try, never dreaming that it could last from March into October, I suggested that we first dispose of the claims of all those who wished to be excused. The result was that every single business man or executive begged off. I was positively ashamed. Even in a case where our whole future might be at stake, for all they knew, not a single one of these substantial business men were willing to make the sacrifice. The result was that we had a jury composed of the very persons who were claimed to have been excluded: three Negroes, including a Negro woman as the foreman, a number of housewives and working people.

My friends, this is not a healthy sign. We are a free and independent people; we have in our Bill of Rights a precious heritage which we must at all costs preserve; and we can preserve it only by fighting for it, fighting for it intelligently, persistently and unselfishly.

Thank you for listening to me.

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