

7-23-1982

## Montana State Bar Convention

Max S. Baucus

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REMARKS OF SENATOR MAX BAUCUS  
BEFORE THE MONTANA STATE BAR CONVENTION  
KALISPELL, MONTANA  
JULY 23, 1982

BEING AMONG SO MANY LAWYERS THIS MORNING, I'M REMINDED OF THE STORY OF WHAT HAPPENED WHEN POPE JOHN PAUL THE FIRST DIED. IT SEEMS THAT HE AND A LAWYER ARRIVED AT THE FRONT GATE OF HEAVEN AT THE SAME TIME.

THEY WERE MET BY THEIR GUIDE. THE GUIDE WALKED THEM OVER TO A BEAUTIFUL PALACE AND TURNED TO THE LAWYER AND SAID, "THIS WILL BE YOUR HOME." HE THEN TOOK JOHN PAUL AND BROUGHT HIM TO A SMALL ONE ROOM HOUSE WITH DIRT FLOORS AND SAID, "FATHER, THIS IS YOUR HOME."

JOHN PAUL TURNED TO HIS GUIDE AND SAID, "I DON'T WANT TO BE DISRESPECTFUL, BUT WHY IS IT THE LAWYER GETS A MAGNIFICENT MANSION, AND I ONLY GET THIS ONE-ROOM SHACK?"

"WELL, FATHER," THE GUIDE RESPONDED, "WE HAVE MANY, MANY POPE'S UP HERE--BUT THAT'S THE FIRST LAWYER."

THERE IS NO QUESTION THAT HERE ON EARTH LAWYERS AND LAWMAKERS ARE VIEWED TODAY WITH DIMINISHING RESPECT. THE LATEST HARRIS POLL SHOWS THAT ONLY 16 PERCENT OF THE AMERICAN PUBLIC HAS SUBSTANTIAL RESPECT FOR THE LEGAL PROFESSION AND FEDERAL LAWMAKERS.

TO MAKE MATTERS WORSE, THE LEGAL PROFESSION IS BEHAVING A LOT LIKE RODNEY DANGERFIELD. IT GOES AROUND MUTTERING, "I CAN'T GET NO RESPECT," BUT IT ISN'T DOING MUCH TO EARN ANY.

THERE SHOULD BE LITTLE DOUBT THAT THE JUDICIAL SYSTEM IS FACING A CRISIS OF CONFIDENCE. MUCH OF THE BLAME RESTS WITH CONGRESS.

FIRST, CONGRESS HAS FAILED TO ENACT A SET OF REFORMS THAT COULD HELP RESTORE RESPECT AND CONFIDENCE IN OUR LEGAL SYSTEM.

SECOND, CONGRESS HAS BEEN WASTING MUCH OF ITS TIME CONSIDERING PROPOSALS THAT RUN COUNTER TO THE RULE OF LAW AND ARE LIKELY TO DIMINISH CITIZEN RESPECT FOR THE LAW.

THIS MORNING I WOULD LIKE TO DISCUSS WITH YOU BOTH SETS OF PROPOSALS--THOSE THAT I BELIEVE OUGHT TO BE QUICKLY ENACTED AND THOSE THAT THEMSELVES PRESENT A MOST SERIOUS THREAT TO OUR FORM OF GOVERNMENT.

#### OUR CRIMINAL LAWS

THERE IS NO AREA OF LAW THAT IS IN GREATER NEED OF REFORM THAN OUR CRIMINAL LAW. VIOLENT CRIME IN THIS COUNTRY IS A CONSTANT SOURCE OF FEAR AND CONCERN IN EVERY NEIGHBORHOOD AND ON EVERY STREET:

--PEOPLE ARE AFRAID TO VISIT OUR CITY PARKS.

- THEY'RE AFRAID TO SEND THEIR CHILDREN TO SCHOOL.
- THEY'RE AFRAID TO WALK TO WORK IN THE MORNING AND EVEN MORE AFRAID TO WALK HOME AT NIGHT.
- EVEN IN THEIR OWN HOMES, THEY'RE AFRAID.

WHILE THE FEAR OF CRIME AND THE RATE OF CRIME STEADILY INCREASES, THE FAITH IN OUR CRIMINAL JUSTICE SYSTEM PLUMMETS. PEOPLE ARE BECOMING MORE CONVINCED EVERY DAY THAT THE CRIMINAL JUSTICE SYSTEM IS INCAPABLE OF DEALING WITH CRIME:

- IT'S INCAPABLE OF SECURING "GUILTY" VERDICTS AGAINST GUILTY DEFENDANTS.
- IT'S INCAPABLE OF PROVIDING APPROPRIATE SENTENCES FOR HEINOUS CRIMES.
- IT'S INCAPABLE OF KEEPING DANGEROUS PERSONS OFF THE STREETS AND IN THE PRISONS.

IT IS THESE PERCEPTIONS THAT LIE AT THE HEART OF THE DECLINING RESPECT FOR OUR CRIMINAL JUSTICE SYSTEM. IT IS THESE PERCEPTIONS THAT CONGRESS CAN AND SHOULD BE ADDRESSING BY APPROPRIATE LEGISLATION.

#### THE INSANITY DEFENSE

PROBABLY THE MOST OBVIOUS AREA IN NEED OF IMMEDIATE REFORM IS THE FEDERAL RULE ON THE INSANITY DEFENSE. THE IMPLICATIONS OF THE HINCKLEY DECISION GO FAR BEYOND THE PUBLIC OUTRAGE ABOUT JOHN HINCKLEY.

SIMPLY PUT, IT IS DIFFICULT TO RESPECT A SYSTEM THAT CAN ACTUALLY ACQUIT A PERSON WHO SHOT THE PRESIDENT IN FULL VIEW OF THE ENTIRE NATION. THAT RESPECT IS FURTHER ERODED BY THE FACT THAT OUR RULES MAY PERMIT JOHN HINCKLEY TO BE A FREE MAN IN THE VERY NEAR FUTURE.

THE BLAME SHOULD NOT BE PLACED ON THE JUDGE OR THE JURY FOR THE VERDICT OF ACQUITTAL. THE BLAME FOR THIS AFFRONT TO OUR SENSE OF JUSTICE HAS TO BE PLACED ON THE RULES THEMSELVES.

AS IT NOW EXISTS, THE FEDERAL INSANITY DEFENSE IS CONFUSING AND UNPREDICTABLE. IT IS NOT BASED ON A CLEAR STATUTORY STANDARD.

I PERSONALLY FAVOR ADOPTION OF A MEASURE I CO-SPONSORED SOME TIME AGO THAT WOULD RESTRUCTURE THE INSANITY DEFENSE. IT WOULD OPERATE BASICALLY THE SAME AS MONTANA'S LAW ON THE SUBJECT.

THE ESSENCE OF THE MONTANA APPROACH IS THAT A PERSON MUST HAVE INTENDED TO COMMIT THE ACT HE IS BEING ACCUSED OF. IF HIS MENTAL DISEASE CAUSED HIM TO BELIEVE HE WAS SHOOTING A CABBAGE THEN THE DEFENSE WOULD BE AVAILABLE.

WHEN WE CHANGE THESE RULES WE MUST ALSO ENSURE THAT ALL MENTALLY ILL DEFENDANTS RECEIVE APPROPRIATE TREATMENT. THOSE WHO ARE ACQUITTED ON THE BASIS OF INSANITY SHOULD NOT BE ALLOWED TO GO BACK INTO THE MAINSTREAM OF SOCIETY IF THEY ARE STILL

DANGEROUS. THE MENTALLY ILL WHO ARE CONVICTED SHOULD BE TREATED IN PRISON.

THE PROPOSALS I HAVE JUST DESCRIBED WOULD BE A DRAMATIC IMPROVEMENT IN THE INSANITY DEFENSE. I BELIEVE SUCH A DEFENSE WOULD GIVE OUR JUDGES AND JURIES A CLEAR AND MORE REALISTIC WAY TO ASSESS THE CULPABILITY OF CRIMINAL DEFENDANTS. IMPORTANTLY, SUCH PROPOSALS WOULD RESTORE CITIZEN RESPECT FOR A CRIMINAL RULE THAT IS CLEARLY NOT WORKING TODAY.

#### SENTENCING AND PAROLE

OF COURSE, THE INSANITY DEFENSE IS ONLY ONE OF MANY CRIMINAL LAWS THAT ARE NOT WORKING. FEDERAL SENTENCING PRACTICES ARE ANOTHER MAJOR SOURCE OF PUBLIC SKEPTICISM.

THE SENTENCING OF CONVICTED DEFENDANTS IN OUR FEDERAL SYSTEM IS MARRED BY INCONSISTENCY AND DOUBLE TALK.

TODAY, FEDERAL JUDGES HAVE ALMOST UNFETTERED DISCRETION IN THE IMPOSITION OF SENTENCES FOR FEDERAL OFFENSES. THE LENGTH OF A PARTICULAR SENTENCE DEPENDS ON THE INDIVIDUAL JUDGE'S PERSONAL SENTENCING PHILOSOPHY AND SENSE OF JUSTICE. THE RESULT IS THAT WIDELY DISPARATE SENTENCES ARE BEING IMPOSED FOR SIMILAR OFFENSES AND SIMILAR CONDUCT.

FURTHERMORE, PUBLIC CONFIDENCE IS ERODED WHEN THE SYSTEM PERMITS JUDGES TO PUBLICLY ANNOUNCE A 30-YEAR SENTENCE THAT MAY



TRANSLATE INTO ONLY 5 OR 6 YEARS IN PRISON. THIS JUDICIAL DOUBLETALK IS EXACERBATED BY THE UNCERTAINTY CREATED BY OUR PAROLE SYSTEM.

I STRONGLY FAVOR REFORMS THAT WOULD REDUCE JUDICIAL DISCRETION IN SENTENCING AND WOULD ELIMINATE THE PAROLE SYSTEM AS WE KNOW IT.

LEGISLATION I HAVE CO-SPONSORED WOULD CREATE A FEDERAL COMMISSION TO ESTABLISH SENTENCING GUIDELINES FOR FEDERAL OFFENSES. JUDGES WOULD BE BOUND BY THESE GUIDELINES UNLESS THEY COULD SPECIFICALLY FIND AGGRAVATING OR MITIGATING CIRCUMSTANCES.

THE BILL WOULD ALSO FORCE JUDGES TO SENTENCE THE CRIMINAL TO THE TERM THEY ACTUALLY THOUGHT SHOULD BE SERVED--THUS ELIMINATING JUDICIAL DOUBLE TALK.

IN ADDITION, THE BILL WOULD ELIMINATE THE POSSIBILITY OF EARLY RELEASE ON PAROLE AND WITH IT THE UNPREDICTABILITY OF OUR CURRENT PAROLE SYSTEM. GOOD BEHAVIOR IN PRISON WOULD STILL BE RECOGNIZED, BUT EVERYONE-- THE PUBLIC AND DEFENDANT ALIKE--WOULD KNOW AHEAD OF TIME HOW MANY MONTHS OF GOOD TIME A FELON WOULD RECEIVE IF THEY WERE A MODEL PRISONER.

THE END RESULT OF THESE REFORMS IS THAT THERE WILL BE INCREASED PREDICTABILITY IN OUR CRIMINAL JUSTICE SYSTEM. CRIMINALS WOULD BE ON NOTICE OF THE TERM OF IMPRISONMENT THEY COULD ACTUALLY EXPECT TO RECEIVE FOR COMMITTING A CRIME; AND ONCE

WITHIN THE SYSTEM, THEY WOULD ALL BE TREATED EVENHANDEDLY.

THE VICTIMS OF CRIME--AND THE AMERICAN PUBLIC IN GENERAL--WOULD BE GIVEN A RENEWED SENSE OF CONFIDENCE THAT THE RULES GUIDING THEIR CRIMINAL JUSTICE SYSTEM ARE APPLIED CONSISTENTLY AND FAIRLY.

### BAIL REFORM

THERE IS ONE OTHER AREA OF OUR CRIMINAL RULES THAT MUST BE ALTERED. IT IS SIMPLY UNACCEPTABLE FOR DANGEROUS INDIVIDUALS WHO ARE IN THE CUSTODY OF OUR COURTS TO BE PERMITTED TO GO BACK ON THE STREETS TO COMMIT ANOTHER CRIME.

CURRENT FEDERAL BAIL PRACTICES ARE DESIGNED TO DETAIN ACCUSED CRIMINALS WHO ARE NOT LIKELY TO REAPPEAR FOR TRIAL. HOWEVER, JUDGES ARE MISUSING THE MONEY BAIL SYSTEM TO DEAL WITH DEFENDANTS WHO ARE A DANGER TO THE COMMUNITY. THE UNFORTUNATE RESULT IS THAT THOSE DANGEROUS DEFENDANTS WHO HAVE MONEY OR ACCESS TO MONEY--LIKE THOSE LINKED TO ORGANIZED CRIME--ARE RELEASED, WHILE THOSE WHO DON'T HAVE MONEY ARE NOT.

I HAVE CO-SPONSORED LEGISLATION THAT WOULD ELIMINATE MONEY BAIL. JUDGES WOULD THEREBY BE REQUIRED TO DETERMINE WHETHER THE RELEASE OF THE ACCUSED WOULD ENDANGER THE COMMUNITY.

THIS WOULD BE DONE IN A FULL-BLOWN HEARING WITH CIVIL LIBERTY PROTECTIONS. IF THE ACCUSED WERE FOUND DANGEROUS, THE

JUDGE COULD IMPOSE CONDITIONS ON HIS RELEASE.

I BELIEVE THIS REFORM IN OUR BAIL PROCEDURES WOULD BRING MORE CANDOR TO OUR SYSTEM BY PERMITTING JUDGES TO DIRECTLY ASSESS THE IMPACT OF THEIR DECISION ON THE SAFETY AND SECURITY OF THE COMMUNITY. IT IS A SENSIBLE AND REALISTIC APPROACH TO THE NEED FOR REFORM IN OUR BAIL RULES.

THE REFORMS IN THE INSANITY DEFENSE, SENTENCING, PAROLE AND BAIL THAT I HAVE OUTLINED THIS MORNING SHOULD BE COUPLED WITH REFORM OF THE EXCLUSIONARY RULE AND THE IMPOSITION OF A FEDERAL DEATH PENALTY FOR HEINOUS CRIMES. THIS IS A PACKAGE OF REFORMS THAT OUGHT TO BE ENACTED BY CONGRESS AT ONCE.

LET US NOT, HOWEVER, OPERATE UNDER ANY DELUSIONS. THESE REFORMS WILL NOT ELIMINATE CRIME. THEY WILL, HOWEVER, END THE PERCEPTION THAT THE RULES OF OUR CRIMINAL JUSTICE SYSTEM ARE CONTRIBUTING TO THE CONTINUING CRIME PROBLEM OUR COUNTRY FACES.

IF WE CAN DISPELL THAT PERCEPTION, WE WILL IN FACT HAVE GONE A LONG WAY TOWARD RESTORING SOME RESPECT FOR THE SYSTEM.

#### COURT JURISDICTION

YOU MAY BE ASKING AT THIS POINT WHY THESE REFORMS HAVEN'T BEEN ENACTED. AS I STATED AT THE OUTSET, PART OF THE REASON IS THAT CONGRESS HAS BEEN WASTING MUCH OF ITS TIME ON ANOTHER SET OF PROPOSALS THAT PRESENT A VERY REAL THREAT TO OUR SYSTEM OF

GOVERNMENT.

INSTEAD OF WORKING ON A CRIME PACKAGE THAT HAS A REAL CHANCE OF PASSAGE, MANY SENATORS OF THE NEW RIGHT HAVE BEEN FOCUSING THE SENATE'S ATTENTION ON THE CONTROVERSIAL SOCIAL ISSUES OF SCHOOL PRAYER, BUSING, AND ABORTION.

THUS FAR THEY HAVE FAILED TO MOBILIZE SUFFICIENT SUPPORT TO PASS CONSTITUTIONAL AMENDMENTS TO OVERTURN THOSE CONSTITUTIONAL DECISIONS WITH WHICH THEY DISAGREE.

INSTEAD, THEY HAVE BEGUN TO ADVOCATE A SERIES OF PROPOSALS THAT WOULD PERMIT CONGRESS TO OVERTURN SUPREME COURT DECISIONS BY SIMPLE STATUTE.

THESE SENATORS WOULD HAVE CONGRESS RESPOND TO A COURT DECISION IT DISAGREED WITH, BY STRIPPING THE COURTS OF THE POWER TO HEAR THAT CATEGORY OF CASES. AT LAST COUNT, THERE ARE APPROXIMATELY 30 SEPARATE PIECES OF LEGISLATION PENDING IN THE HOUSE AND THE SENATE THAT WOULD LIMIT THE JURISDICTION OF FEDERAL COURTS.

UNDER THE ANALYSIS OFFERED BY THE PROPONENTS OF THESE BILLS, THE CONGRESS COULD DISMANTLE ANY PART OF THE CONSTITUTION IT WISHED AND PARALYZE THE COURTS FROM REVIEWING THE CONDUCT. UNDER THEIR ANALYSIS, THE SUPREME COURT IS ONLY FREE TO ENFORCE A CONSTITUTIONAL GUARANTEE IF 51 PERCENT OF CONGRESS DOESN'T PRECLUDE IT FROM DOING SO.

IF CONGRESS CAN REMOVE SUPREME COURT JURISDICTION OVER THE ISSUE OF SCHOOL PRAYER, WHY CAN'T IT PASS STRINGENT GUN-CONTROL LEGISLATION AND INCLUDE A PROVISION TO PREVENT SUPREME COURT REVIEW OF ANY CASE INVOLVING THE "RIGHT TO BEAR ARMS"?

WHY COULDN'T CONGRESS IMPOSE ONEROUS AND DISCRIMINATORY TAXES AND INCLUDE A PROVISION TO PREVENT SUPREME COURT REVIEW OF THE CONSTITUTIONALITY OF ALL FEDERAL TAXATION CASES?

THE END RESULT OF THESE PROPOSALS IS THAT CONSTITUTIONAL PROTECTIONS BECOME ILLUSORY. IF CONGRESS CAN DETERMINE WHICH RIGHTS AND PRIVILEGES ARE TO BE REVIEWED, CONGRESS HAS, IN EFFECT, DECIDED WHICH RIGHTS AND PRIVILEGES EXIST.

THIS IS NOT WHAT WAS INTENDED BY THE FRAMERS OF OUR CONSTITUTION.

IT IS FOR THESE REASONS THAT THE PRESIDENT OF THE AMERICAN BAR ASSOCIATION HAS REFERRED TO THESE BILLS AS POSING "A POSSIBLE CONSTITUTIONAL CRISIS THAT COULD PROVE THE MOST SERIOUS SINCE THE CIVIL WAR." I AGREE.

IN MY VIEW, THE OUTCOME OF THE DEBATE OVER CONGRESSIONAL CONTROL OVER THE FEDERAL COURTS WILL DETERMINE THE STATUS OF INDIVIDUAL RIGHTS AND LIBERTIES IN THIS COUNTRY FOR DECADES TO COME.

CONCLUSION

I RAISE THESE COURT STRIPPING BILLS WITH YOU THIS MORNING BECAUSE I BELIEVE THEY REPRESENT A WARNING TO ALL OF US WHO SUPPORT REFORM OF OUR JUDICIAL SYSTEM.

CHANGE ALONE WILL NOT BRING ADDED RESPECT TO OUR SYSTEM OF JUSTICE. THE CHANGE MUST BE CAREFUL, THOUGHTFUL AND CONSISTENT WITH THE FUNDAMENTAL PRINCIPLES OF OUR CONSTITUTION.

THE REFORMS IN OUR CRIMINAL RULES THAT I AM ADVOCATING TODAY REPRESENT SUCH RESPONSIBLE CHANGE.

THE ATTEMPTS TO STRIP THE FEDERAL COURTS OF THEIR JURISDICTION OVER CONSTITUTIONAL ISSUES ARE INCONSISTENT WITH THE BASIC PRINCIPLES OF OUR GOVERNMENT. THEY WILL, THEREFORE, LEAD TO LESS RESPECT FOR OUR JUDICIAL SYSTEM.

WE CANNOT AFFORD TO SIT BACK AND LET RULES THAT AREN'T WORKING CONTINUE TO DESTROY PUBLIC CONFIDENCE IN OUR SYSTEM.

BUT NEITHER CAN WE AFFORD TO ENACT CHANGES THAT WILL FUNDAMENTALLY UNDERMINE THE CONSTITUTIONAL PROTECTIONS WE ALL CHERISH.

THANK YOU.