Tennessee Journal of Law and Policy

Volume 6 | Issue 1 Article 7

April 2014

In Defense of Liberty

Bobby Lee Cook

6:1 Tennessee Journal of Law and Policy 92

TRANSCRIPT

IN DEFENSE OF LIBERTY[1]

Bobby Lee Cook[2]

Dean Blaze, distinguished members of the faculty, members of the student body, guests, ladies and gentlemen: I consider it an honor to have been invited to speak here today, and I congratulate the distinguished faculty for its great contribution in producing lawyers and judges of superior talent that have served with distinction and courage in the preservation of liberty, justice, and civil rights.

As law students, we studied the branches of the common law system: contracts, torts, civil practice, constitutional law, and whatever else our law schools required. "What branches of the law did you learn at Harvard?" Emerson asked Thoreau, who replied: "All of the branches and none of the roots."[3]

I have had time to study the roots, but even so I must confess that I feel like C. S. Lewis, who wrote: "On a mountain road in the cold black night, we would give far

---

[1] This address was the Wyc and Lyn Orr Lecture at the University of Tennessee College of Law on September 11, 2009.

[2] Bobby Lee Cook is a founding partner of Cook & Connelly in Summerville, Georgia. He has practiced criminal defense law for over sixty years and is widely believed to have inspired the television character of Ben Matlock. Among his famous cases is the 1986 defense of Tennessee banker, C.H. Butcher Jr., who faced twenty-five counts of fraud and was acquitted on all counts, and the 1988 defense of former Auburn University All-American football star Bobby Hoppe, who was charged with murder in a 1957 shooting and then set free after a deadlocked jury voted ten-two for acquittal. Mark Curriden, *Lions of the Trial Bar: 7 over 70—Bobby Lee Cook*, 95 A.B.A.J. 44, 47 (Mar. 2009).

[3] MICHAEL E. TIGAR, FIGHTING INJUSTICE 25 (2002).

more for a glimpse of a few feet ahead than for a vision of some distant horizon."[4]

When my generation came to the bar, the growth of criminal law, constitutional and civil rights had been on a veritable holiday for a century or more—a Rip van Winkle syndrome had consumed much of the bar, bench, and the entire populace. We were then in the throes of recovering from a loss of blood and treasure following World War II and before that, from a devastating depression that had swept across the entire country, rendering many without hope.

The doctrine of *Plessey v. Ferguson*[5] had deprived millions of American citizens of most all the advantages of normal citizenship and relegated them to a role of being mere non-participants in most of our democratic institutions.

Let me give you a brief view of this period in Georgia, Alabama, and much, if not all, of the South. When you entered into any courthouse, there were separate drinking fountains for whites and colored. There was a balcony where the blacks were required to sit. Blacks were prohibited from serving as jurors, and so were all women in Georgia until 1954. Where blacks had been fortunate enough to pass the rigid and unfair tests for voting requirements, the polling precincts of blacks and whites were separate. Segregation in its most vile form was rampant and extended to public transportation, schools, playgrounds, parks, and in every other conceivable manner. There were no black judges—no U. W. Clemons, Horace Ward, or Clarence Cooper.

In the late forties and fifties, one could read the Bill of Rights, as Hugo Black often did; in fact, he carried a small copy of the Constitution in his coat pocket. It, in all of its simple yet eloquent rhetoric, bestowed upon us a

---

[4] *Id.* at 9.

[5] 163 U.S. 537 (1896).

panoply of rights—in name only—as they were in large measure inapplicable to the states. We were in what appeared to be a sea of constitutional rights but yet totally impoverished.

During this period in Georgia, an accused was often arrested on mere suspicion without probable cause and held without bond. His house or person could be searched without probable cause and without a warrant.

The Fourth Amendment did not apply to state searches. *Mapp v. Ohio*[6] had not yet been decided, and *Connally v. Georgia*[7] came even later. Coerced confessions were the order of the day, and I can tell you with absolute certainty and personal knowledge that police brutality was rampant.

The clarion call of Gideon[8] was yet to be heeded. There were no warnings of Fifth Amendment rights and no advice to the right of counsel. Oftentimes counsel would be appointed in a major felony case and given no more than thirty minutes to prepare, and I have participated in many. There was an all-male, white jury. Women and African-Americans were systematically excluded from all jury panels—so there were no *Batson* challenges.[9]

In addition to these serious problems, Georgia was the only jurisdiction in the United States and the English-speaking world where a criminal defendant could not be sworn as a witness in his own behalf. In fact, the defendant could only make an unsworn statement to the jury in which he was not subject to the penalties of perjury and in which he could not be cross-examined by the prosecution. Likewise, the defendant could not be asked any questions

---

[6] 367 U.S. 643 (1961).

[7] 429 U.S. 245 (1977).

[8] Gideon v. Wainwright, 372 U.S. 335 (1963).

[9] *See* Batson v. Kentucky, 476 U.S. 79 (1986) (holding that a prosecutor cannot exercise preliminary challenges to eliminate members of the defendant's race from the jury solely because of their race).

by his own lawyer. This was changed in the late fifties in *Ferguson v. Georgia*[10] when the U.S. Supreme Court held the unsworn statement law to be unconstitutional.

Slowly, gradually, but with predictable constancy, the tide began to turn. Although the urging of Hugo Black that the Bill of Rights be applied *in toto*, by virtue of the Due Process Clause in the Fourteenth Amendment, was not heeded, yet it was done by a selective incorporation on a case-by-case basis.

We saw cases such as *Mapp v. Ohio*[11] restoring the Fourth Amendment to all of the states; *Davis v. Alaska*,[12] enshrining the valuable right of cross-examination; *Gideon v. Wainwright*,[13] *Brady v. Maryland*,[14] *Miranda*,[15] and a host of others. The Court finally recognized the truth of Lincoln—that a nation half-free and half-slave could not long survive.[16]

To many who had fought in the trenches during this period, it was thought that we were finally witnessing a renaissance in the restoration of vital civil and individual rights, but to many others the selective incorporation doctrine was viewed as a legal abomination.

At present, it is fashionable opinion in the highest political circle of Washington that any understanding of the Constitution is wrong if it deviates from that which the framers held. For reasons of logic, philosophy, and practical law, that opinion won't work. But it wouldn't matter if that opinion were right, for the entire course of

---

[10] 365 U.S. 570 (1961).
[11] 367 U.S. 643 (1961).
[12] 415 U.S. 308 (1974).
[13] 372 U.S. 335 (1963).
[14] 373 U.S. 83 (1963).
[15] Miranda v. Arizona, 384 U.S. 436 (1966).
[16] ABRAHAM LINCOLN, A HOUSE DIVIDED: SPEECH DELIVERED AT SPRINGFIELD, ILLINOIS, AT THE CLOSE OF THE REPUBLICAN STATE CONVENTION, JUNE 16, 1858, *reprinted in* THE NORTON ANTHOLOGY OF AMERICAN LITERATURE, 1820-1865 (6th ed.), at 1609.

American history shows that regardless of how passionately the "original intention" view is held, the Constitution is a living document. We adopt it even as we adapt to it, and it will be interpreted to fit the times.[17]

For the past thirty years or so we have been witnesses to the aftermath of the criminal law and civil rights revolution. For instance, the great writ of habeas corpus, as envisioned by the founders and memorialized in American and English jurisprudence, has been mortally wounded. Some believe, including former President George W. Bush, that it can be suspended at will by using talismanic and buzz words such as "enemy combatants" or "terrorism."

For the first time FBI agents are now visiting the public libraries and book sellers to keep tabs on the reading habits of people the government considers dangerous—as authorized by an obscure provision of the USA Patriot Act.[18] The Act passed the U.S. Senate by a vote of ninety-eight to one without hearings or debate in the world's most deliberative body. It provides for a variety of surveillance measures, including clandestine searches of homes and expanded monitoring of telephones and the Internet.

Nearly everything about the procedure is secret. The search warrant carried by the agents cannot mention the underlying investigation, and librarians and booksellers are prohibited under threat of prosecution from revealing an FBI visit to anyone, including the patron whose records were seized.[19]

I vividly remember that in the sixties and seventies, FBI agents attended meetings of women's liberation groups, noting in the groups' file the names of every person attending. They infiltrated the NAACP and spied on the Rev. Dr. Martin Luther King Jr., whom its domestic

---

[17] *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).
[18] Pub. L. 107-56.
[19] *Id.*

intelligence division considered to be "the most dangerous and effective Negro leader in the country."[20]

In 1970, the FBI ordered investigations on every member of "every black student union [and similar groups], regardless of their past or present involvement in any disorder or illegal conduct."[21]

I am reminded of a time in the sixties when the Preventive Detention Act was introduced in the U.S. Senate and was defeated by a significant vote. This bill would have denied bail to any person found to be dangerous to the community, even one not charged with a specific crime. In the ensuing debate, Senator Sam Ervin stated: "In a free society you have to take some risks. If you lock everybody up, or even if you lock everybody up you think might commit a crime, you'll be pretty safe. But you won't be free."[22]

There came a time in our recent past when even freedom of speech was inhibited by the Vietnam conflict. Those who protested the war were viewed as either traitors or dissident members of society. Sometimes perfectly normal crowds of ordinary citizens were hauled off to jail and charged with criminal offenses for exercising their First Amendment rights.

Sadly, we have reached a stage in this country where people speak of the Fourth, Fifth, and Sixth Amendments as mere legal loopholes through which

---

[20] Jen Christensen, *FBI Tracked King's Every Move*, CNN.COM, Dec. 29, 2008, http://www.cnn.com/2008/US/03/31/ mlk.fbi.conspiracy/ index.html (last visited Nov. 29, 2009).

[21] David Berry, *The First Amendment and Law Enforcement Infiltration of Political Groups*, 56 S. Cal. L. Rev. 207, 208 (1982).

[22] *Preventive Detention: Hearings on H.R. 16196 Before the Subcomm. on Constitutional Rights, Committee on the Judiciary* 91st, Cong., 2nd Sess. 292-374, 384-95 1970. *See also* Sam J. Ervin, Jr., Foreword: Preventive Detention—A Step Backward for Criminal Justice. 6 HARV.C.R.-C.L.L.REV. 291 (1970-71).

criminals parade and then are disgorged back into the public.

We have reached a stage in this country when a lawyer who represents a disrespectable racketeer, smuggler, or alleged murderer must all too frequently move to protect his reputation. This is sheer nonsense. He is doing his duty. He is being criticized for doing the same duty that Lord Erskine noted when he described the censure he experienced for defending Thomas Paine's publication of the *Rights of Man* in 1792: "And for what? [O]nly for not having shrunk from the discharge of a duty which no personal advantage recommended, and which a thousand difficulties repelled."[23]

It may even be that our forefathers understood more of some of our constitutional heritage than our present generation. They had full knowledge of the rack and screw, the lack of confrontation as enshrined in the Sixth Amendment, the wall between church and state, the lack of free speech, and searches of their houses and persons without legal precept—they all came here seeking something different from what they had left in their native lands.

By and large, they were the poor, the oppressed, the risk takers possessed of a new pioneer spirit. They did not want to bow to kings or curtsey to queens. They came in droves from all over—from England, Ireland, Scandinavia, Asia, Germany, Italy, the ghettos of central Europe and Russia, and from the highlands of Scotland. They came and still come to stem the hemorrhage of oppression, to help sow the seeds of a new freedom, which had either been nonexistent in their native lands or which had shriveled up from thirst or fallen upon the hard ground of tyranny.

---

[23] THOMAS LORD ERSKINE, THE SPEECHES OF THOMAS LORD ERSKINE 231, 233 (James Ridgeway & Edward Walford, eds.) (1880).

The habit of freedom is perhaps the hardest habit to break. There seems to emerge, when we need it, a conspiracy of ordinary people who say they have had enough. During and after each of these episodes of repression, there has been a resurgence of belief in individual freedom. While perhaps excessive in some instances, the response to repression has been daring. But we have governed ourselves, and most of the time we have done so with the law and the courts.

Necessity has frequently been the plea for every infringement of human freedom. As Justice Brandeis so eloquently penned in his dissent in *Olmstead*:

> Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in the insidious encroachment by men of zeal, but without understanding.[24]

As we gather here today, our civil and criminal justice system is in a death struggle for survival. Trial lawyers are especially being assaulted in the media. We are often singled out in the state legislature and Congress as callous, uncaring, greedy sharks just waiting to sue innocent people for profit or to represent some horrible criminal in an atrocious crime.

Some politicians and others with a vested interest would have the American public believe that the judicial system is out of control. They often say judges let the guilty go free while the innocent are made prisoners in their own homes. The popular view is that judges make ridiculous decisions based upon legal technicalities.

---

[24] Olmstead v. United States, 277 U.S. 438, 479-80 (1928).

The media and the U.S. Chamber of Commerce tell us about our low standing in the eyes of the public on a daily basis.

The public needs to be told that the right to a jury trial and the preservation of the Bill of Rights has evolved over 200 years and that serves as the bedrock foundation of freedom. As the Georgia Supreme Court has said, "These are the sacred jewels that have come down to us from an ancient ancestry, hallowed by the blood of a thousand struggles and stored away in the casket of the Constitution. It is infidelity to forget them."[25]

In 1787, thirty-three of the eighty-seven members of the Constitutional Convention were lawyers. Their efforts produced one of the greatest documents in the history of the civilized world.

The public needs to be told that our legal system, as it presently exists, is the foundation of a civilized people and with all of its imperfections, the best that has ever been devised. In Nazi Germany and former communist countries, there was and is no litigation crisis or delay of legal procedure. In fact, there is no real trial, as we know it, no jury, and no justice.

It is not our heritage to preside over a liquidation of the Bill of Rights. A little temporary safety may be obtained, but a whole lot of liberty is given in exchange. It seems that all too frequently bad ideas that have died seem to rise up again. And it is incumbent upon some of us to wade into battle and to kill them. So it is with the idea, as some people suggest, that there is too much freedom. So it is with the idea that the Bill of Rights is full of mere loopholes. And so it is with the notion that adherence to doctrine is a test for loyalty to country or fitness to hold office.

We cannot allow our institutions or body politic to become infested with superficial ideologies. We don't need

---

[25] Underwood v. State, 78 S.E. 1103, 1106 (Ga. Ct. App 1913).

to do away with freedom. We need to take responsibility for it. We need to defend it, and more importantly, we need to exercise it.

This great nation was born in an age of rebellion and innocence, when it was believed possible for the people to create a government strong enough to assure them safety from foreign enemies and not strong enough to threaten their liberties. Over two centuries have passed, and with some exceptions the constitutional balance that was struck between liberty and safety has served us reasonably well.

This liberty of which I speak is the liberty of conscience, of labor, the right to a fair trial, and with all of the attributes of due process and the right to be left alone. This liberty of which I speak makes the heart beat faster and shakes the world.

France has given the world a lot; not the least is the skepticism of Montaigne and Voltaire. Skepticism is what is needed today, skepticism of easy solutions, of ideology of the left or right. Skepticism does not equate with cynicism; it is not inconsistent with the fiercest patriotism or the firmest belief in basic values. But it can be the anchor to windward when our basic institutions seem to be adrift with the tides.

It is true, as Santayana said, that those who cannot remember the past are doomed to repeat it.[26]

Yet it is equally true that those who do remember the past may not know when it is over.

That is a deep truth.

Whether one is a liberal or a conservative, our duties and responsibilities are the same. Our fundamental character declares that all men are created equal. Our basic religion declares us to be our brother's keeper. But the demand for justice and fairness rests not alone on legal precept or theological tenet. It is a demand that spans creed

---

[26] 1 GEORGE SANTAYANA, *Reason in Common Sense*, *in* THE LIFE OF REASON (1905).

and clan, age and continent; it speaks now as it has to the prophet, saint, and patriot—and to unnumbered millions of men and women throughout all time. It wells up from the heart as a plain truth.