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HUMAN RIGHTS IN AMERICA †

WALTER F. MONDALE*

In coming here this morning, I was thinking about the various ways the American Bar Association contributes to our society, and it struck me that beyond any specific program, the ABA and state and local bars throughout the country serve to remind all lawyers that we have special and unique responsibilities.

As members of the Bar, we are more than a trade group or a guild. We are officers of the courts—sworn to defend and uphold the Constitution and laws of the United States.

The ABA has helped meet those responsibilities in many ways—through your leadership on court reform under Justin Stanley and others, by screening judicial appointees, and through correctional reform.

But there was no more important moment in the ABA's history than in the mid-sixties, when Sargent Shriver asked for your support for the first federal program of legal services to impoverished Americans.

I fought for that program in the United States Senate, and there is no doubt in my mind that without the unanimous endorsement of your House of Delegates, and the leadership of Lewis Powell, this vital program would never have gotten off the ground.

When legal service attorneys began to become effective on behalf of their clients, and pressures grew to curtail the program, once again it was the ABA which reminded the Congress of the meaning of our Canons of Ethics. You made it clear it would be a mockery of justice to tell a lawyer he could pursue the rights of a poor client only so far and no further.

Finally, when it became clear that this program had to be insulated from improper political pressure, the ABA provided the critical support to those of us in the Congress who were proposing an independent Legal Services Corporation. Today, this vital program is moving forward with increased staff and funding.

All of these efforts have helped uphold the principles of law and justice in our society. But there is another important challenge to the rule of law in America all of us have a stake in meeting, which I would like to talk to you about this morning—and that is the abuse of power by government itself.

I served for nearly 2 years on the Senate Select Intelligence Committee investigating abuses of power by intelligence and law enforcement agencies. I chaired the Subcommittee which investigated domestic intelligence

† Address delivered to the Opening Assembly of the American Bar Association's Annual Meeting at Orchestra Hall, Chicago, Illinois in August 1977.

* Vice President of the United States.

activities. In frightening detail, we learned what happens when high government officials lose sight of the law and ignore our Constitution.

Much of the attention during that period was focused on the Watergate scandal, but our Committee discovered that those abuses were only the tip of the iceberg. We have had a chilling reminder of that fact in the recent revelations of secret, behavior-control experiments carried out by the CIA in the 1950's and 1960's.

Our investigation found that the roots of many of these abuses could be traced back to a frame of mind born in the early days of the cold war—to the belief that America could not be defended without more deceit and illegality than democracy permits or more cynicism and hypocrisy than our beliefs would allow.

A 1954 report to the President put it this way: "There are no rules in such a game. Hitherto acceptable norms of human conduct do not apply. . . . Long-standing American concepts of fair play must be reconsidered."

Operating in secret, and freed from traditional legal and ethical restraints, some officials of U.S. intelligence agencies plotted to influence free elections, subvert popular governments, and even plotted assassination attempts aimed at foreign leaders.

Before long, the tactics adopted to fight our enemies overseas came back to haunt us at home. To paraphrase Macbeth, the invention returned to plague the inventor:¹

- Agents of the CIA came home to launch "Operation CHAOS", a surveillance program directed against American citizens, even though that agency is forbidden from exercising internal security functions.

- Army officials spied on groups ranging across the political spectrum, from Carl McIntyre's conservative Christian Action Movement and the John Birch Society to the Urban Coalition, the Anti-Defamation League, and even the Chamber of Commerce.

- Members of the FBI and CIA illegally opened over 300,000 first class letters of private citizens like John Steinbeck, Senators Church and Kennedy, and organizations like the Federation of American Scientists.

- The National Security Agency obtained and read copies of *all* private telegrams sent overseas by American citizens and businesses.

- In 1969, the Internal Revenue Service established a "Special Services Staff" to examine the tax returns of individuals, not because they had violated the tax laws, but because some people in government did not like their politics.

- Eventually, officials in some of these agencies resorted to the commission of common crimes. Agents in the FBI and CIA illegally broke into homes and businesses of American citizens—the so-called "black-bag jobs"—to obtain information they considered necessary. Official liaison even occurred with organized crime in undertaking assassination plots.

¹ W. SHAKESPEARE, MACBETH, Act I, Sc. vii, lines 7-10.

James Madison could have been speaking for our time when he wrote to Thomas Jefferson in 1778: "Perhaps it is a universal truth that the loss of liberty at home is to be charged to provisions against danger real or pretended abroad."

●Perhaps the most dangerous and frightening abuse of power during this period was a program in the FBI called COINTELPRO. This program went beyond illegal surveillance. Government officials set themselves up as judge and jury to harass and punish anyone whose political views or activities were not considered proper. Tactics were employed to break up marriages, destroy reputations, cause innocent people to lose their jobs and sabotage political campaigns. Dr. Martin Luther King, Jr., winner of the Nobel Peace Prize, was bugged, wiretapped, and photographed during the last five years of his life. In perhaps the most disgraceful episode, someone in the FBI sent a tape and an anonymous letter to Dr. King which he interpreted as an effort to induce him to suicide.

Throughout the investigation, our Committee kept trying to come back to the question why these abuses happened and what was on the minds of the officials involved. What we found was equally disturbing.

For example, when I questioned the individual who ran the FBI's intelligence division for over a decade, this is what he told me:

Never once did I hear anybody, including myself, raise the questions: "Is this course of action which we have agreed upon lawful . . . is it ethical or moral." We never gave any thought to this line of reasoning, because we were just naturally pragmatic.

Or listen to an internal memorandum from the Deputy Director of the CIA justifying a program of secret tests of dangerous drugs on unsuspecting citizens, a program which cost the life of at least one American. It read:

While I share your uneasiness and distaste for any program which tends to intrude on an individual's private and legal prerogatives, I believe it is necessary that the agency maintain a central role in this activity

Implicit in these views was the belief that the law did not matter. Soon, we witnessed a President of the United States proclaim a doctrine that the President is a sovereign and has the implicit right to break the law. In a sworn statement to our Committee, former President Nixon said:

There has been and will be in the future, circumstances in which Presidents may lawfully authorize actions in the interest of the security of this country which if undertaken by other persons, or even by the President under different circumstances, would be illegal.²

One high presidential aide was asked whether this claim of inherent authority of a President could include the right to murder. He answered, "I don't know *where* the line is, Senator."

² SENATE SELECT COMMITTEE TO STUDY GOVERNMENTAL OPERATIONS, SUPPLEMENTARY DETAILED STAFF REPORTS ON FOREIGN AND MILITARY INTELLIGENCE, S. REP. NO. 755, 94th CONG., 2d SESS. 158 (1976).

The first recommendation of our Committee for reform was to draw that line *clearly* by reestablishing the principle that there is no inherent constitutional authority for the President, or any intelligence agency, to violate the law.

This administration has rejected absolutely the doctrine that any government official, including the President, is above the law. President Carter has made it clear that *he*, and everyone who serves under him, has a duty to obey the law just like every other citizen.

To ensure adherence to the rule of law, we are committed to establishing clearer lines of authority within the executive branch, greater accountability of officials, and stronger safeguards against abuse. This will be done by:

- Spelling out and strengthening the responsibility of the Attorney General to ensure lawful conduct by the FBI.

- Involving the Department of Justice at every level in the policy-making process for sensitive intelligence activities to ensure that these policies are consistent with the law.

- Upgrading the stature of the Intelligence Oversight Board so that it will have greater capacity to prevent illegal or improper intelligence activities. The President has pledged that he will personally review the IOB's findings regarding abuses and take responsibility for ensuring that they are corrected.

- Reorganizing management functions within the intelligence community to eliminate waste and duplication, but more importantly, to be sure that there is a clear need and policy justification for activities that are undertaken.

As part of this effort we are trying to end excessive secrecy which both conceals and fuels abuse:

- By fully informing Senate and House Intelligence Committees about the activities of the agencies they oversee.

- By promptly reporting abuses, as Admiral Turner did when new information came to light about past drug experiments by the CIA.

- By upholding both the spirit and the letter of the Freedom of Information Act. Attorney General Bell has directed that requests for information should not be denied simply because a plausible legal justification can be found to do so, but *only* when it can be shown that demonstrable harm would result.

Each of these steps is important, but it would be shortsighted to think reforms within the executive branch, alone, can prevent abuse. It would imply that all of these abuses over several decades were caused by evil people and that all we have to do is change the cast of characters and the problem will be solved.

The truth, as our Committee found, is that most of the officials in these agencies were dedicated Americans who honestly thought what they were doing was in the national interest.

Part of the problem was that these agencies were given responsibilities impossible to fill. They were asked to predict or prevent every crisis, respond immediately with information on every question, act to meet all threats, and through it all, to anticipate the special whims and political caprice of Presidents—Democrat or Republican.

We now have a more realistic view of what these agencies should and should not do. But we continue to live in a dangerous world, and we would be kidding ourselves if we thought that the pressures these agencies faced could never reappear.

That is why the problem is more than the character of the people who are entrusted with power; the problem is power itself, if it is unchecked, unrestrained and unaccountable.

In searching for a solution, our Committee discovered one simple thing: that the best answer to this problem could be found by rereading two documents—the Federalist Papers and the Constitution.

No one has explained and addressed this dilemma with greater genius than James Madison in Federalist Paper Number 51 when he said:

If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: You must first enable the government to control the governed; and in the next place, oblige it to control itself. A dependence on the people is no doubt the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.³

Madison's "auxiliary precautions" are the checks and balances within the Constitution, which in his own words, "correct by opposite and rival interests the defect of better motives."⁴ Lasting reform lies in restoring and strengthening those essential checks and balances.

President Carter, as one of his first actions in office, asked me to work closely with the Congress and officials in the executive branch to rebuild these critical institutional safeguards.

First, we are developing statutory charters for the FBI, CIA, and other intelligence organizations which spell out the appropriate responsibilities of these agencies and specify what they are and are not permitted to do under the law.

Control of these powerful agencies cannot rest in one branch of government alone. Charters established by executive order, as proposed by the last administration, are not enough. Binding statutes must be adopted that can be changed only with the consent of Congress and can be enforced by the full power of the courts.

These charters will:

- Prohibit conduct such as the COINTELPRO program of covert harassment.

³ THE FEDERALIST No. 51 (J. Madison) at 349 (1st ed. J. Cooke 1961).

⁴ *Id.*

- Stop "domestic security" investigations of the politics of people and concentrate instead on apprehending terrorists and foreign spies.

- Prohibit any electronic surveillance, mail opening, or searches of premises in the United States without a warrant based on probable cause.

- Prohibit domestic spying against Americans by the CIA.

- Provide a strong system to oversee CIA clandestine operations.

Second, we need legislation to protect the American people against improper use of electronic surveillance and to strengthen the power of Congress and the courts to halt abuse. A major administration proposal dealing with electronic surveillance was submitted to Congress in mid-May.

This legislation contains three important protections. First, it eliminates by law any claim of inherent executive authority to install a tap or bug within the United States without a warrant from a court. The test will no longer be whether it pleases a member of the executive branch to tap the phone of an American citizen, but whether it is found proper and necessary by a court of law. Second, this legislation would allow a court, for the first time, to examine and challenge a request for a warrant based on national security. The courts would have the power to ensure that warrants are based on the national interest, not the narrow interest of any person or political group. Third, it will make clear that the operations of the technologically powerful National Security Agency are subject to legal restrictions covering surveillance. Beyond this measure, new proposals are being developed to extend similar wiretap protections to Americans overseas.

Finally, the success of all these efforts depends on continuing and vigorous oversight by the Congress.

The creation last year by the Senate of a permanent Intelligence Committee was of crucial importance. The administration has worked closely with Speaker O'Neill and others in the House of Representatives to support and encourage the recent creation of the House Intelligence Committee as well. This Association should take special pride in the fact that bar groups and members suggested many of the procedures and guidelines which the Congress adopted.

As you know, the effectiveness of these Committees depends upon three essential powers:

Access to Information. First, they need the full facts about intelligence programs, including timely notice of all covert operations. They will have this information.

Public Disclosure. Second, when disputes arise between the Executive and the Congress over questions of secrecy, remedies must be available. Procedural remedies have been established so that Congress will be able to expose abuse and uphold the public's right to know.

Power of the Purse. Third, the Committees must have accurate and detailed information about the budgets of the agencies they oversee. This is the only way Congress can exercise effectively one of its most important

constitutional checks: the power of the purse. These Committees will receive complete, detailed information about the budget of each intelligence agency.

Our administration is cooperating fully and willingly with the Congress to strengthen these oversight powers. But what is equally important is that these Committees do not depend on our good will, or that of any future Executive, to do their job. They will have the tools to detect, expose and stop abuses by government agencies on their own, and that is exactly what our Founding Fathers had in mind when they devised the Constitution.

Each of these reforms is needed to ensure lawful government; they are needed to make government effective as well. The dangers of the past abuses deserve attention, but another striking aspect of what went on was the enormous waste in spending the manpower and resources of these agencies to spy on countless people like Eleanor Roosevelt and Helen Keller and dozens of legitimate organizations.

We need a tough, respected FBI to go after organized crime, combat terrorism and prevent espionage against the United States. We need a strong, effective intelligence community to protect America's vital interests in the world. That is why dedicated leaders and employees in these agencies are deeply involved in reform efforts. They know we can best pursue these goals within the law and in keeping with the values we share as Americans.

Our Constitution provides all the power government needs to defend our nation's interests and still protect the rights of the American people. It set up a system of government, which in James Reston's words, "was shrewdly designed to be strong enough for leadership, but in which power was diffuse enough to assure liberty."

No other system of government has arrived at the almost blessed balance found in our Constitution between liberty and authority. Our system has shown itself stronger than the abuse of any demagogue or leader who is so certain of himself he thinks that the law and the public's attitude need not be considered.

We sometimes take this system for granted. We would do well to recall John Gardner's words when he wrote:

When our nation was founded, there was a Holy Roman Emperor, Venice was a Republic, France was ruled by a King, China and Japan by an Emperor, Russia by a Czar and Great Britain had only the barest beginnings of a democracy. All of these proud regimes and scores of others have long since passed into history, and among the world's powers, the only government that stands essentially unchanged is the Federal Union put together in the 1780's by 13 states on the east coast of North America.

Our Constitution and our system of government have been sorely tested in recent years. But we have met those tests as we always have in the past, and our country is stronger for it.

I have been privileged to represent our country on two extended trips abroad. Everything we have been through in our nation—the civil rights movement, struggles for social justice, and even the challenge to our Constitution by a President of the United States—has made us stronger and more respected in the eyes of the world.

The public demonstration that even the highest officer in the land must live under the law and be accountable to the people or he can be removed through our institutions, peacefully and legally, has permitted our country to stand before the world and speak without hypocrisy once again on behalf of the great causes and values we believe in—liberty, justice, and human rights.

It all comes back to that revolutionary doctrine which Chief Justice Marshall put so well, “The United States [is] a government of laws and not of men.”⁵ All of us have a stake in upholding that law, and no group understands the importance of that responsibility better than you.

Judge Learned Hand summed up the meaning of that law to us when he said:

Without the law we cannot live; only with it can we ensure the future which by right is ours. The best of man's hopes are enmeshed in its success; when it fails they must fail; the measure in which it can reconcile our passions, our wills, our conflicts is the measure of our opportunity to find ourselves.⁶

⁵ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

⁶ Address by Judge Learned Hand, *To Yale Law Graduates* (June 17, 1931), reprinted in L. HAND, *THE SPIRIT OF LIBERTY* 349 (3d ed. 1952).