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## ACCOUNTABILITY TO THE LAW\*

Walter F. Mondale\*\*

The goal of a good law school is to tap excellence of mind, ability, and scholarship, as well as to build public virtue. Thomas Jefferson once said that there is a natural aristocracy based on ability and virtue, and then there is an unnatural aristocracy based on inheritance and wealth, which possesses neither ability nor virtue.<sup>1</sup> I hope that you will accept these

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\* This essay is adapted from Mr. Mondale's address to the Touro Law Review on May 17, 1989, at its annual dinner.

\*\* 1984 Democratic Nominee for President of the United States; Vice President of the United States (1976-80); United States Senator from Minnesota (1964-76); Attorney General of Minnesota (1960-64); B.A. cum laude, LL.B., University of Minnesota; Member of Law Review.

1. See THE ADAMS—JEFFERSON LETTERS 378, 388 (1989) (letter from Jefferson to John Adams dated Oct. 28, 1813).

standards to build your skills, in order to serve virtuous causes in our country.

A great law school does not earn its reputation as a technical factory. Rather, I think the difference between a great law school and something less is the challenge of the broad ideals and ideas. A great law school does not merely churn out minds of steel and glass on an assembly line. A great law school produces special citizens: lawyers with hearts as well as minds, who assume the special obligation of moving our society to higher plateaus of justice.

Your class and this generation face extraordinary responsibilities and opportunities. Most of you soon will be counsel to individuals, corporations, or government. Many of you will serve in several capacities during your lifetimes. The next step for most of you will be to become members of the state bar and, thus, officers of the court. It is a very important commission that you will carry with you throughout life.

I think lawyers often forget they are not just lawyers but, also, officers of the court, and that this carries with it special burdens. As part of your vestiture to the bar, you will, as thousands before you have done, raise your right hand and swear to support and uphold the Constitution of the United States. Governors, senators, and congressmen take a similar oath, and the vow of the President is interestingly spelled out explicitly in the Constitution. He swears to preserve, protect, and defend the Constitution and to faithfully execute the laws of the land.<sup>2</sup> The oath is so profound that the Framers of the Constitution did not trust later drafters to design the text; they picked the words themselves.

I would like to discuss one aspect of the oath that you will take to support the Constitution, the nature of the importance of openness in government: of the freedom to speak, publish, debate, and dissent. I speak after more than thirty years in public life at practically all levels of government, much of it associated with national security and the handling of government secrets.

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<sup>2</sup> U.S. CONST. art. II, § 1

If there is one rule that I would like to teach young lawyers and people interested in government, it is that I see openness in government and the accountability of government officials, particularly the highest officer, as indispensable preconditions for the preservation of all other freedoms. Ironically, no other principles are as difficult to honor when you are in power.

In my book, *The Accountability of Power*,<sup>3</sup> I point out that, throughout almost two hundred years of American constitutional history, there has been constant tension between the American people, who demand openness and accountability in government, and those in power, particularly Presidents, who would prefer to be relieved of those demands. This tension is inevitable, but healthy, as long as we have a constitutional system.

I have worked very closely with one President, and watched several others from the other end of Pennsylvania Avenue. In doing so, I noticed several reasons for the persistence of this tension. First, being President is a most frustrating job. Everyone attempts to stand in your way, which is exactly what they have in mind. Congress is blocking you; your own administration is impeding you. The President cannot get a pencil out of the defense department unless he pleads for one. Cabinet officers forget your name. The budget bureau never gives you any money. Adversaries play tricks on you all the time, and “friends” around the world try to get into your pocket. Every time you try to get something done, somebody is trying to block the President of the United States.

This terrible frustration inevitably leads Presidents to believe they must do something to prove that they are, indeed, the President. What usually occurs first is some unilateral secret action. They don’t have to involve others. They use the apparatus made available to the President for legitimate uses—including covert action, which often is legitimate—for their own purposes.

The President does this because our nation has a mythical, mystical adoration for the power of the trench coat. We realize that, in most cases, you cannot send an army and win a victory

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<sup>3</sup> W. MONDALE, *THE ACCOUNTABILITY OF POWER* (1975).

without war and bloodshed. Incredibly, however, we think that, if you put several people in trench coats, they can surreptitiously accomplish the task without being discovered. Of course, it never works that way, but tired and frustrated Presidents become convinced it is the answer to their problems. This tactic usually is accompanied or followed by, what I call, the problem of intergenerational amnesia on the illegal use of covert powers by Presidents. I thought a generation was about twenty years, but I found out that, with respect to the illegal use of covert powers by Presidents, it is approximately eight years.

Even people who previously were involved and escaped the havoc do it again because they think they will get away with it once more. But they rarely do. History has been spotty. Sometimes covert measures have worked, and sometimes they were essential, but too often this has not been the case. For instance, our covert support in Chile for the overthrow of the Allende government<sup>4</sup> was foolhardy. We allowed Pinochet to take over, and the Chileans still blame us for it. Irangate is another example of how actions kick back at you.<sup>5</sup> In the 1960's, the administration tried to poison Castro's cigars.<sup>6</sup> That was Keystone Cop nonsense, and, while we were trying to keep it a secret, the Cubans were publicizing it and laughing at us.

Covert capers usually go afoul. The very desire to keep them secret is based on the recognition that the ideas themselves are so outrageous that, if people knew what was happening, they would be up in arms. That is why the last administration tried to keep Irangate a secret. If the administration had told us they wanted to upend Khomeini, we would have supported it. Yet, if they had told us they were going to send arms to Iran, we would have been outraged at such an absurd idea.

Presidents often have dealt with absurd ideas by executing them in an undercover manner. What Presidents never seem to understand is that the American society is absolutely and ut-

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4. See generally R. SANDFORD, *THE MURDER OF ALLENDE* (1975).

5. See Cary, *Examining the Loose Ends in the Iran-Contra Affair*, U.S. NEWS AND WORLD REPORT, Oct. 26, 1987, at 22; Church, *But What Laws Were Broken?*, TIME, June 1, 1987, at 24.

6. N.Y. Times, Nov. 21, 1975, at 1, col. 8.

terly no good at keeping a secret. When the President's deeds are disclosed, as they usually are, it is doubly bad because, not only has the President violated the law, he also has been caught doing embarrassingly foolish things. When a President is humiliated, it creates real psychological problems. So, inevitably, the President starts lying: just little lies at first—the so-called “plausible denial”—but then situations snowball, resulting in bigger and bigger lies.

A decade ago, I chaired a subcommittee in the Senate that explored the domestic covert operations of the intelligence agencies. Among other things, we found illegal mail openings,<sup>7</sup> surveillance and intimidation of dissenters,<sup>8</sup> the use of the Internal Revenue Service for political purposes,<sup>9</sup> and a despicable program of harassment directed against Martin Luther King.<sup>10</sup> During the same period, we had a President who orchestrated illegal bombings, whose closest associates were involved in burglaries and wiretapping, and who personally obstructed justice. All of it was a broad, pervasive, and systematic effort to undermine our Constitution.

The Senate hearings resulted in a new set of legislative requirements aimed at the prevention of a recurrence of what we had recently encountered. First, we established two committees on intelligence, one in the House and one in the Senate, with the requirement that the President make a timely report of secret actions to the committees. This requirement does not apply to the usual intelligence activities such as information gathering, spying, and so on, but only to activities where the administration is involved in covert *action*. Second, we passed the Electronic Surveillance Act.<sup>11</sup> Prior to the Act, there was a belief that Presidents had some sort of implied power that allowed them, in the name of national security, to tap anyone's

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7. *Proposed Standing Comm. on Intelligence Activities: Hearings on S. Res. 400 Before the Comm. on Rules and Admin.*, 94th Cong., 2d Sess. 95 (1976) (statement of Sen. Mondale).

8. *Id.* at 95-96.

9. *Id.* at 95.

10. *Id.* at 95-96; see *Lesar v. Department of Justice*, 636 F.2d 472 (D.C. Cir. 1980).

11. Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. §§ 1801-1811 (1982 & Supp. 1987).

wire without court authority. That has been changed. No tap may be undertaken without court authority. Third, we passed a requirement imposing a duty on the President to personally, and in writing, approve covert actions and to secretly report those approvals to the two committees of Congress.

This legislation was designed to prevent Presidents from using loopholes that, unfortunately, often had produced crises. We thought this method would work. Irangate showed us otherwise. The President, frustrated, pursued a strategy designed to violate the law: by ignoring that law, by denying that the violation had occurred, and by the destruction of both the paper and the oral trail that would lead to the President, and possibly, to others.

In any event, the good news is that the system works, even though it has been more than two hundred years since the framing of our Constitution. It is a testimony to the brilliance of our Founders in analyzing human nature and, as they said, pitting ambition against ambition. Every President tries to run free of the Constitution, but every one of them finally is reined in by this constitutional system that has been the basis of our continued liberty.

One of the most frequent proposals of agencies, not just in the United States of America but also abroad, in an attempt to deal with accountability of power in this area, is what is called an Official Secrets Act. Legislation of this kind was proposed by President Nixon and by the Director of the Central Intelligence Agency during the Carter administration. I opposed it then, and I oppose it now. Such a law would make it a crime for reporters, or others, to report something that has been labelled secret. As anyone who has worked for government knows, they put a secret label on everything. They put a secret label on the New York Times every morning, on Christmas cards, on birth notices. Everything gets a secret stamp. The proposal would make it a crime to disclose *anything* marked secret, no matter how harmless the information might be. In a vivid demonstration of what is at stake, the plan itself, to pass an Official Secrets Act, had a top secret stamp on it when it arrived.

In our two hundred year history, we have not had such a law. We have taken our chances on the side of openness, with the occasional risk to security. I think such an act would be a step in a very dangerous direction. The threat posed by such an act is demonstrated by the use of the Official Secrets Act<sup>12</sup> in the United Kingdom.<sup>13</sup> There, the government almost prosecuted a commercial television station because it showed a film disclosing that, for the past fifteen years, Britain's intelligence agencies had engaged in the illegal wiretapping of labor leaders and political activists. On another occasion, only a British jury, disregarding the judges' orders, prevented the imprisonment of an official who released classified documents to show that the Cabinet had been giving false information to Parliament during the Falklands crisis.<sup>14</sup>

Having seen the inner workings of our defense system, I, too, believe that there is information which must remain absolutely secret. But, there are legal ways of doing that, and there are many secrets essential to our government that have been kept for a long time by legitimate, responsible means.

During wartime, without changing the laws, American journalists have refrained voluntarily from reporting marching orders, military plans, and the like. On only one occasion in all of World War II, in the famous Chicago Tribune case, did someone step across the line.<sup>15</sup> Americans have sensed that there are times, especially during combat, when we need to stop short of full disclosure. But, our nation has been served well by this gutsy assumption of the American people that we can handle freedom. There are greater risks in reducing the range of openness in American government than there are in taking a chance that this freedom occasionally will be abused.

We are the most open, dynamic, powerful, and secure society on earth. We have achieved this by gambling on freedom, and we have done it in a system that holds even the President of the United States accountable to the law. That is the most

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12. Official Secrets Act, 1911, 1 & 2 Geo. 5, ch. 28 (amended through 1989).

13. See N.Y. Times, June 30, 1988, at A11, col. 1.

14. See N.Y. Times, Jan. 29, 1985, at A7, col. 5; N.Y. Times, Feb. 12, 1985, at A9, col. 2.

15. See F. WALDROP, MCCORMICK OF CHICAGO 261-63 (1966).



essential lesson of our system of liberty, and, I hope, as lawyers, you will serve that cause every day in your professional careers.

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