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SECURITY VS. THE LAW: A FALSE CHOICE

Walter F. Mondale[†]

Throughout American history, whenever we have been confronted by security threats, Americans have struggled to prevent our fears from overwhelming our belief in our system of law and justice. Set against these fears has been faith: faith in the rule of law; faith that when America protects personal liberties, it is stronger, not weaker; faith that when America honors its Constitution, it is more secure and esteemed.

Unfortunately, the victory of fear over faith is nothing new for us. We saw it in the Alien and Sedition Acts, in the infamous loyalty crusades of the Minnesota Public Safety Commission during World War I, in the notorious “red scare” Palmer Raids, and in the disgraceful internment of Japanese Americans during World War II. And now looking back on it, we understand that those anxieties were based on an unfounded fear: the American legal system was too weak to protect us from our perceived dangers. In every instance, we disgraced ourselves and hurt innocent Americans and our Nation.

In the Bush administration, fear was again used as a hammer to justify an imperial, unaccountable presidency exercising an astonishing range of unchecked power: unreviewable assertions of executive privilege; the State Secrets Doctrine; the so-called unitary government concept; over six-hundred presidential signing statements; claims of plenary authority as Commander in Chief, such as the right to torture asserted in secret legal opinions; extraordinary rendition; unwarranted wire taps—a whole panoply of efforts to become an unaccountable president.

In the 1970s, I served as Chairman of the Domestic Subcommittee of the famous Church Committee. In an unparalleled investigation, we probed a vast array of abuses against

[†] This article is excerpted from an address given by former Vice President Mondale at a National Security Forum event on April 8, 2008, at William Mitchell College of Law. A portion of these comments are also published in *Keeping Faith in the Rule of Law*, BENCH & B. MINN., May/June 2006.

thousands of innocent Americans, perpetrated by almost every agency of the federal government: CIA, FBI, NSA, Army, Treasury, and Postal Service. Often acting on presidential orders, these agencies moved secretly and without restraint. A classic, and outrageous, example was J. Edgar Hoover's belief that Rev. Dr. Martin Luther King, Jr. was a "black hate leader"; Hoover hounded him mercilessly throughout his life. Our report on these devastating abuses led to the creation of the House and Senate Intelligence Committees, which exist today, and to the adoption of the Foreign Intelligence Surveillance Act (FISA) and the creation of the FISA Court.

In shaping these remedies, the Church Committee worked very closely with U.S. intelligence agencies to ensure a workable plan. We tried to make it easier to obtain intelligence warrants. The FISA Court and Justice Department were given support to ensure efficiency. We also allowed emergency periods for intelligence agencies to move forward, but eventually they had to be accountable: a warrant was issued later. Essentially, we tried to balance the legitimate needs of law enforcement and intelligence agencies against the protection of constitutional rights.

This system, now in operation for three decades, has been very successful. Indeed, it has been praised by Attorneys General and FBI and CIA Directors. And after thirty years, most of us thought it was settled and a given in American life. Then suddenly we heard the shocking news that the Bush administration had secretly violated FISA on a wholesale basis over several years. The *New York Times* noted:

[T]he administration has not offered the slightest evidence that it could not have efficiently monitored the [al] Qaeda-related phone call and e-mail messages while following the existing rules. . . . [T]here is not a shred of proof that the illegal program produced information that could not have been obtained legally, had the administration wanted to bother to stay within the law.¹

I was directly involved in the FISA reform, first in the Senate,

¹ Editorial, *Kabuki Congress*, N.Y. TIMES, Mar. 6, 2006, at A20, available at <http://www.nytimes.com/2006/03/06/opinion/06mon1.html>.

and later as Vice President. It is simply not possible to believe that we intended to excuse the President from complying with this law; in fact, FISA was passed precisely to hold presidents accountable.

The Congressional Intelligence Committees were established to discourage these kinds of abuses. But the administration, not just Bush's, has often stiffed them. As Jay Rockefeller said, "It is 'undersight' when they tell us what they want us to know . . . it's 'oversight' when we know enough to ask our own questions."² Under the Bush administration, we had undersight. Although the committees have often seemed passive, they are crucial. So we have to continue to work on ensuring that the committees function as the legislative arm of oversight, as intended.

Over the years, I have developed some principles that I believe should be applied to this great challenge of liberty versus secrecy. First, I believe that both security and liberty are essential. There is no evidence that the exercise of liberty undermines security. Rather, the story of America is to be found precisely in sustaining both principles. Nevertheless, the idea that somehow our legal system weakens us against real threats continues to linger and continues to be heard. I remember in one hearing, then-FBI Director testified: We must remember that "we have to give up some liberties to protect others." And I asked him, will you give us a list of the ones you're going to give up? And he didn't have an answer, but this indicates an unexplored assumption in America that despite the stature we give to our system of law, "when you're in trouble, it doesn't work."

I know that we live in a dangerous world, that we must organize ourselves to fully protect America, that we need a strong President and strong intelligence agencies, and I have always supported those goals. But, we must also find practical ways to protect us while guaranteeing American liberties.

That challenge is center stage, again, in Congress, in yet another fierce debate over FISA. The Senate, with the Bush administration's support, and the House have adopted different versions of the Protect America Act, and it remains unresolved. The biggest issue is whether American telecommunications companies can, at the request of our Government, conduct broad sweeps of international calls, emails, and other electronic materials,

² See Dan Eggen & Walter Pincus, *Ex-Justice Lawyer Rips Case for Spying*, WASH. POST, Mar. 9, 2006, at A03.

and be declared immune from criminal or other legal proceedings, even when they act illegally.³ I do not believe that we can have an approach in America that allows our Government, without authority, to tell American businesses or Americans that they can violate our laws.

Since FISA never sought to protect conversations between foreign persons located abroad, we should be able to find a fix for such conversations, which often go through major American communication centers. Blanket court orders, with follow up court review, should solve these issues without abandoning the principle of accountability.

Moreover, we must have checks and balances. They are crucial to liberty and security. If you cannot examine the facts, politicians will hide behind slogans and fear mongering to avoid accountability. After a long career in the federal government, I can testify that the “trust us” argument is very dangerous and unreliable. As President Reagan once said: “Trust, but verify.”

A wonderful book that explores how this works is by Former Chairman of the Senate Intelligence Committee, Bob Graham, titled *Intelligence Matters*. Graham recounts an appalling record of executive arrogance and deceit. He knew all the information that was classified and opposed the war in Iraq, even though he is a conservative from Florida. I believe that if Americans had known the full facts in the possession of our Government at that time, we might not have entered the Iraq war, it's that serious. Furthermore, it should disturb us that the most alarming public disclosures came to us through leaks to news sources: the secret torture policies, destruction of filmed torture evidence, Abu Ghraib, warrantless wiretapping, extraordinary rendition, and the political compromises of U.S. Attorneys' offices.

When our Nation was founded, we said we would be different than other nations. We would show: “A decent respect for the opinions of mankind.”⁴ Our Founders also warned that men were

³ The Protect America Act expired in February 2008 due to a 180-day sunset provision. Protect America Act of 2007, Pub. L. No. 110-55, 121 Stat. 552. It was replaced by a 2008 amendment that did not change the law's effect on surveillance. Indeed, in 2008 a FISA court enforced the surveillance legislation. See James Risen & Eric Lichtblau, *Court Affirms Wiretapping Without Warning*, N.Y. TIMES, Jan. 16, 2009, at A13, available at http://www.nytimes.com/2009/01/16/washington/16fisa.html?_r=1.

⁴ THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

not angels and should be subject to “auxiliary power,” or checks and balances. They were right. American power depends on domestic public trust and respect abroad. Military might, although necessary at times, is not enough.

We have an answer for this problem, and it is found in the words of the President’s oath of office, in our laws, and in our Constitution. That is where America’s real power and security are to be found. Let’s find it again.
