

REMARKS OF VICE PRESIDENT WALTER F. MONDALE  
AT THE UNIVERSITY OF MINNESOTA  
October 22, 1981

THE PRESIDENT'S LAWYERS

*By the way*

I. INTRODUCTION

A. I have been asked to speak with you today about the people who give the President of the United States legal advice -- the Attorney General and the Counsel to the President. What is the relationship between them and how do they help or hinder the work of the President and of the White House? I also understand that you are interested in how the unique job of the Special Prosecutor fits into this.

B. With all the books that have been written about Presidents, the personalities surrounding them, and interest groups, few people know much about the role of the legal advisors to the President in establishing national policy. *Constitution* In a democracy, that is the way it should be, because while legal advisors are important to internal decision-making, public acceptance of policies must rise or fall on the ability of the President to persuade the public and build consensus. In a democracy, we cannot use the sledgehammer of the law to provide the authority for Presidential action.

*Cra*  *Cumbelet & Carter*

C. Because we are also "a government of laws, and not of men" (original draft of Massachusetts Constitution, 1779), however, Presidents do need legal advisors. Law today so pervades Presidential decision-making that at least one of two lawyers will be involved in most major policy pronouncements -- the Attorney General or the Counsel to the President. It is critical to an effective Presidency that both officials have a powerful place in the Administration because each of the two Presidential counselors properly brings to bear a different legal perspective.

## II. THE ATTORNEY GENERAL.

An Attorney General is the helmsman and spokesman for a Department of Justice with varied roles in Executive Branch decision-making. Leaving aside the Attorney General's behemoth roles as criminal prosecutor and administrator of the federal criminal justice system, the Attorney General and his staff counsel the Executive Branch on what the law is; they arbitrate disputes between agencies and either have the final say or recommend a means of resolution to the President; the Department advocates the views of the Executive Branch in court, and; the Department formulates independent positions on policy questions within its areas of administrative responsibility.

The most difficult challenge for an Attorney General is to become sensitive to the circumstances in which the Department should act out one of its neutral roles as an officer of the courts and those in which it should actively participate in formulating the government's policies. While some legal positions the government should take in administering the laws or defending them in court are mandated by precedent or legislative history, other positions are more matters of policy. The Bakke reverse discrimination case presents a good example of the latter. Perhaps the best example of actions by the Attorney General where the legal and policy issues were not separable were the preparation of the FBI Guidelines and the Intelligence Charter.

### III. THE COUNSEL TO THE PRESIDENT

The job description of the Counsel to the President is not defined as much by historic precedent or institutional interests as it is by the particular President a counsel served. The position was established by Franklin Roosevelt and nearly every counsel since that time has previously been a close associate of the President. President Carter broke with tradition when he brought in highly-respected Washington lawyer Lloyd Cutler as his counsel for the last year and a half of his Administration. Nevertheless, President Carter gave Lloyd Cutler wide-ranging responsibilities to bring to bear the analytical abilities of a lawyer to a broad range of foreign and domestic policy issues. He acted as a lawyer, however; he was not also a speech writer as was Ted Sorenson

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The Counsel to the President is most valuable when he both counsels and represents the President from the primary perspective of strengthening the Office of the Presidency. As any good lawyer knows, one's client is not best served by an attorney who always says what the client wants to hear. A good counsel will bring to bear keen, independent analysis and judgment. Obviously, he must also respect the bounds of the law. A good counsel will also, however, be the backbone of executive privilege, the President's constitutional powers to act in certain cases without congressional authorization, and other elements of Presidential power. The Counsel to the President is critical in aiding the President develop the law in new directions in cases where courts have not spoken but the Attorney General feels constrained by the precedent of past actions by the Department he administers. If the counsel does this well,

he will be relied upon heavily at an early stage by White House staff and other government officials so that the appropriate legal mechanisms for accomplishing major policies are considered.

#### IV. DO LAWYERS NARROW OR BROADEN A PRESIDENT'S OPTIONS?

Many people tend to think of lawyers as naysayers; and there are a lot of people in government who think that whenever you get the Attorney General or the Counsel to the President involved in a problem they are going to tell you why you can't do what you want to do, rather than how you can accomplish your goal.

Sometimes law does act as a restraint on policy-making because as you well know it is a system based on precedent. Just as it is important for a President to know what has been said to other countries in the past in conducting foreign policy, so it is important for him to know what rights and rules have been created by Congress and the courts in the past so that he can follow them or reverse them through the channels appropriate to our system of government. This conservative role of the law provides the moderating influence that helps people know what to expect from their government and thus leads to greater social peace.

Because the Executive Branch is co-equal with the Judicial Branch, the courts give a President great deference and he therefore has a special responsibility to insure that his actions are legally responsible.

It has been my experience, however, that good lawyers in government more often come up with creative ways of accomplishing the President's goals than they inhibit his ability to carry out his duties. The Attorney General and Counsel to the President can vastly expand a President's range of options in responding to a problem because they have a global view of his authority rather than simply the perspective brought to bear by a single agency. The Attorney General, importantly, can help develop a strategy for bringing an appropriate issue before the courts or he and the Counsel can advise how to frame a decision so that the government will have the greatest chance of prevailing if a legal challenge is brought.

Think back to the taking of the hostages in Iran. It was the Counsel to the President working with the Attorney General who coordinated our response to that crisis. There were diplomats to be expelled, people to be deported whose visas had expired, certain demonstrations to be stopped because it was feared television coverage of them in Iran would incite the Iranian students, there were Iranian assets in

this country to freeze before they were pulled out of our banks, there were questions of whether the War Powers Resolution imposed a responsibility on the President to report to Congress before he took any surprise military moves in Iran, and there were papers to be filed with the International Court of Justice at The Hague seeking condemnation in the world court of Iran's actions. Many of these responses were suggested by the lawyers and all of them required the balancing of legal powers and constitutional considerations by the Attorney General and the Counsel to the President, and ultimately by the President. In today's world, economics, politics, diplomacy, individual rights and social policy are highly interrelated through a complex system of domestic and international law.

Another example of where the Attorney General through his lawyers at the Justice Department and the lawyers in the White House facilitated a major Presidential decision was the establishment of the Synthetic Fuels Corporation through the Energy Security Act. President Carter believed we needed to get an instant infusion of federal support behind development of alternative domestic energy sources such as coal gasification and solar energy. To do this, a team of lawyers went to work on drafting a statute that would keep the red tape of government, which had built up over years through various laws and regulations, from inhibiting the rapid start-up of this program.

Another important example of how the Attorney General and the Counsel broadened the President's range of options was the response to the Cuban-Haitian refugee problem. These lawyers counselled on the legality of the Cuban government's actions, the actions we could take in international waters and the leeway we had under our immigration laws.

V. DO THESE LAWYERS ALSO PROVIDE AN INDEPENDENT BASIS FOR A DECISION OTHER THAN THAT POLICY MAKERS MIGHT PUT FORTH?

The perspectives an Attorney General or a Counsel to the President bring to bear on a problem are often different than those of policy-makers because of their experience as lawyers. They can often add the strength of the law behind a policy choice.

As I have said, the President has got to persuade to prevail -- but he needs tools to act. Last year, when Congress attached a rider to the Justice Department's appropriations bill making it illegal to expend any funds on an action that might result in school busing, we wanted to veto the bill. It was an attack on the years of forward movement in civil rights that Democrats have stood for. The Counsel's office got involved and drafted a veto message which said not only that the rider was reversing two decades of progress, but also that it was an unconstitutional infringement on the power of the President to determine how to



enforce the civil rights laws as part of his responsibility to take care that the laws are faithfully executed, including the Constitution of the United States. This additional rationale -- based on the legal system of precedent -- will make it more difficult for those who do not share our policy perspectives on civil rights to enact this kind of legislation.

VI. DOES THE SPECIAL PROSECUTOR HAVE ANY ROLE IN ALL OF THIS?

The Special Prosecutor is a senior legal officer in the Executive Branch, but his job is very different from that of the Counsel to the President. It is closer to the role of the Attorney General when he acts as criminal prosecutor. The Special Prosecutor is a one-time appointment to investigate allegations of misconduct by a senior White House staff or a member of the President's cabinet. As you know, debate over establishing some sort of permanent Special Prosecutor mechanism developed after the firing of Archibald Cox by President Nixon. All involved concurred that there were certain kinds of prosecutorial decisions which the Attorney General could not make without an apparent or real conflict of interest. The Attorney General is, after all, a part of the President's cabinet and therefore has a strong interest in the success of the Administration. Any embarrassment to that Administration caused by criminal prosecution of a senior official is inconsistent with that interest.

Therefore, when the Attorney General receives information of even questionable credibility that a covered official has committed a crime, after a very cursory investigation if he essentially cannot disprove the allegation, he must appoint a Special Prosecutor to investigate. There are many problems with this system and though it has been triggered several times, no charges have been brought in court by any Special Prosecutor.

The Special Prosecutor operates independently of both the Attorney General and the White House and is not part of the government's lawyering as we have been discussing it.

## VII. SUMMARY

The Counsel to the President is really the President's lawyer. He can put to work his skill and years of training as an advocate and negotiator for a client to significantly expand the range of options the President has available to implement his programs. The Attorney General also acts as legal advisor and as a cabinet officer of a political branch of government, and he can bring to bear the knowledge and skills of the lawyers of the Justice Department as a whole. But the Attorney General has a more difficult task of also preserving the Justice Department's independence

and credibility in the courts. That is an important responsibility within our legal system that survives from Administration to Administration.

As good a job as these legal officers do, we must recognize that ultimately it is the President who has the constitutional responsibility to take care that the laws are faithfully executed.

WALTER F. MONDALE

Talking Points

University of Minnesota  
Law School Class: "The Lawyers Role in Washington"  
Professor Victor Kramer

DATE: Friday, October 23, 1981, 10:15 AM

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This class is an honors seminar for third-year students. The subject of the seminar is the role of lawyers in Washington.

This particular class has already met with Ben Civiletti and Lloyd Cutler... you are the last top level Washington official they will meet with.

You have been asked to address the importance of having lawyers serve in the federal government in general, and the White House specifically. Your talking points (see attached) make special reference to the role of the President's Counsel and the numerous interactions between the White House and the Justice Department.

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