On November 13, 2013, David F. Levi (Dean and Professor of Law at Duke University School of Law), Jack Fuller (former Editor and Publisher of the Chicago Tribune), Virginia A. Seitz (Assistant Attorney General for the Office of Legal Counsel in the U.S. Department of Justice), Harold Hongju Koh (Sterling Professor of International Law at Yale Law School), and Mark L. Wolf (Senior Judge of the U.S. District Court for the District of Massachusetts) discussed the legacy of Attorney General Edward H. Levi. The program included a welcome from Leo L. Beranek, former President of the American Academy. The discussion served as the Academy’s 2001st Stated Meeting. The following is an edited transcript of the presentations.

We have a wonderful group of panelists who will talk about the book that Jack Fuller edited, Restoring Justice: The Speeches of Edward H. Levi, which collects many of the speeches when my father was attorney general. Our speakers include Jack Fuller, who is the former editor and publisher of the Chicago Tribune. He is a Pulitzer Prize-winning journalist and author of a number of novels and other pieces. He was a special assistant to Attorney General Levi from 1975 to 1977. Virginia Seitz, whom I may call General Seitz, is the Assistant Attorney General in the Office of Legal Counsel in the U.S. Department of Justice. Prior to her appointment in 2011 she was a partner in the Supreme Court and Appellate practice of Sidley Austin, and she was also a law clerk for Supreme Court Justice William J. Brennan, Jr. Harold Koh, my good friend, is the Sterling Professor of International Law at Yale Law School. From 2009 to 2013 he was the Legal Adviser to the U.S. Department of State. He has served as Dean of Yale Law School and is a very distinguished scholar, having written many influential works, particularly in the area of international law. Mark Wolf is a Senior Judge of the United States District Court for the District of Massachusetts. He was appointed to the Court in 1985. He served as Deputy United States Attorney for the District of Massachusetts from 1981 to 1985, and was a special assistant to Attorney General Levi from 1975 to 1977.

It is not hard to draw certain parallels when we compare events today to what we remember experiencing in the mid-1970s. Attorney General Edward Levi came to office right after Watergate. You may remember that at that time many of his predecessors were being prosecuted. The head of the FBI and two former attorneys general of the United States had been indicted. And there was a general loss of confidence in all establishments. There was a belief that the Department of Justice’s prosecutorial and enforcement activities were too partisan. And there was an acrimonious feeling in public discourse that was unprecedented at the time.

Tonight we are going to explore some of the themes that were of concern to my father as he was coming in to the Department of Justice. Jack Fuller will address “Government by Discussion.” General Seitz will discuss “A Ministry of Justice.” Harold Koh will speak about “The Government and the University/Academy.” And Judge Wolf will address the “Attorney General as a Teacher.”
The challenge that Levi set for himself, for the people around him in the Justice Department and for government in general, was not the repeal of human nature, but the improvement of human behavior by spirited conversation and rigorous mental effort.

Atorney General Levi attributed the phrase “government by discussion” to Walter Bagehot. Bagehot had written that government by discussion would break the bonds of the ages and set free the originality of mankind. He was thinking mostly about free discussion as a nurturer of discovery and creativity. Attorney General Levi believed in that too, but the reason that the phrase attracted him when he was attorney general was that he saw government by discussion as a way to generate understanding and consensus around very difficult, even tragic, policy choices that had to be made. There were many barriers then as there are now to realizing the ideal of a government by discussion. Secrecy in the interest of national security was one of them. The need for discretion about advice privately given or confidentially shared was another. A third is the simple desire within government to hold knowledge close, because knowledge is only power when it’s not generally known.

Levi defended confidentiality in government, something that was then, under the name of executive privilege, discredited during the Nixon administration. And in fact, there’s a talk in the book devoted to the idea of confidentiality. He defended not only national security and secrecy in appropriate circumstances but also the use of executive privilege. Yet at the same time he insisted on sharing information—particularly about such things as electronic surveillance and intelligence investigations by the FBI—more information than had never been shared before. He did this because he understood that one of the drawbacks of secrecy is that it makes it impossible to generate public consensus.

But it was not only consensus that Levi sought in the idea of government by discussion. He also liked to cite Cicero’s quote that if you couldn’t understand your opponent’s position you didn’t understand your own. He believed vigorous discussion improved thought. Discussion was the way he made decisions. In fact, sometimes when everyone around him seemed to be in agreement in one direction he would often swing to the other side with such vigor, such intellect, that he would scare you into believing that he might actually go in the direction he was arguing. He did that to motivate us to argue our positions forcefully, but also so that he would understand his own position better. Levi was not naïve about pursuing government by discussion. Long before he became attorney general he said the following in a speech to the American Jewish Committee (those of you who knew Levi well will recognize this voice):

While I suppose all of us like to talk, few of us like to listen, to have our thoughts jarred, or to reshape our ideas. My grandfather, who was a well-known rabbi, and who certainly liked to talk, came home one day and announced he was feeling very empty. “I have been exchanging thoughts,” he explained, “with Rabbi X—.” My grandfather, if not Rabbi X—, would forgive me this quotation. It aptly illustrates what goes on in most discussions, except that probably we don’t feel empty; we feel full with the same old thoughts we always had.¹

Government by discussion is an ideal. Like all ideals, it is hard to realize. And the things that made it hard, including this eagerness to speak and unwillingness to listen, are in some sense just human nature. The challenge that Levi set for himself, for the people around him in the Justice Department and for government in general, was not the repeal of human nature, but the improvement of human behavior by spirited conversation and rigorous mental effort.

It is an honor to be here and to speak about the continuing influence of Edward Levi from the point of view of an Assistant Attorney General currently serving in the Department of Justice. I would like to describe Edward Levi’s vision of a Department of Justice that “acts judicially.” I have been at the Department for two and a half years and I have been married to a career lawyer who served more than a quarter-century there. So I know that Edward Levi’s vision of the Department is the rule by which its career lawyers work every day and the gold standard to which its political appointees aspire.

I want to start with a quick symbolic point about Attorney General Levi’s continuing influence. Each new Attorney General and all Assistant Attorneys General at the Department may select the portrait of a former AG to hang in their offices. Of course, the Attorney General chooses first, and so each morning at the senior leadership gathering in the Attorney General’s historic conference room, it is Edward Levi’s portrait we all see.

As the location of his portrait illustrates, Attorney General Levi is seen as the person who restored not only justice but the Department of Justice in the wake of events that eroded public trust in many government institutions.

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The speeches in Restoring Justice illustrate his judicious approach in confronting the difficult legal and legal-policy issues of his day – which are astonishingly similar to the issues that confront the Department today. To read Edward Levi’s testimony about a Proposed National Security Surveillance Statute is to read about the competing interests in privacy and security at stake in last year’s FISA Amendments Act, and many other statutes that involve information gathering and national security. At the end of a masterful discussion of the relevant constitutional principles, the dignitary, privacy, and law enforcement concerns at issue, and the need to arrive at a solution that balances all these concerns across shifting expectations of privacy and differing threats to security, Levi noted that according to the New York Times, his proposal was full of loopholes that would extend the government’s powers, while others were saying that it would “cripple our national intelligence effort.” By explaining the concerns on both sides, he sought to persuade the public that the Department was engaged in a serious, thoughtful attempt to balance competing concerns and to do so fairly and judicially.

Similarly, to read Edward Levi’s essay on the separation of powers is to read a
thorough and balanced treatment of the doctrine of executive privilege, all the more powerful because it was written at the time when the doctrine’s legitimacy was under attack for abuse by the President. He acknowledged the importance of the public’s right to know the workings of government and the potential for abuse in secrecy, but then he built—step by step—a proof of the importance and legitimacy of the doctrine. He explained what he called a “basic truth about human beings”—that they needed privacy in order to give and receive the “candid, objective, blunt and harsh opinions” that he believed were necessary to good government decision making.

These essays are timeless, careful expositions of relevant considerations and competing interests—expositions that candidly acknowledge Attorney General Levi’s reasoned judgment about the appropriate balance and the recognition that others may, legitimately, believe that a different balance is preferable.

And as significant as the content of these essays is to their judicial nature, their tone is equally important. Attorney General Levi was careful to describe, recognize, and value all competing interests. And while he sought to demonstrate that his judgments were correct, he allowed for the possibility of discussion and compromise. He valued and accepted nuance and complexity—in one of the passages I personally found most significant, he said, “Powerful tools have been developed to tell us less about more, to simplify what is complex, to substitute immediate impressions for a deeper judgment.”

These are words for the Department and all those seeking to act judicially to live by.

Having been at the Office of Legal Counsel for more than two years, I have a much deeper understanding of the place of the Department in the Executive Branch: it is part of the administration and yet it is tasked with making balanced, careful legal decisions that are not political. The Department’s career lawyers take this task seriously and, with each change of administration, they help ensure that the Department’s political appointees understand and uphold this standard and the culture that supports it. I have never been at a farewell event for a political employee at the Department where sincere tribute is not paid to the long-term career employees of the division.

Attorney General Levi was legendary for his appreciation of these lawyers and for the judicial nature of their conduct. He understood that nurturing a deep appreciation for their advice and judgment would help ensure that the Department did not lose its way. He rejected the claim that “the struggle for power is what is truly and only genuine.” As he explained, this claim “diminishes reason, disparages the ideal of the common or public good, and adds legitimacy to the notion that law is only one more instrument among many to be manipulated.”

Despite what had come before, Attorney General Levi had and frequently expressed a powerful hope for the Department whose integrity he helped restore—that among the people of the United States, there is still a “great trust [in their government] waiting to be reawakened.” That is my experience of the Department of Justice, and the experience of many friends and colleagues who over the years and across many administrations have served there. The Department is not perfect, but it strains to achieve Edward Levi’s vision for it.

1 Fuller, ed., Restoring Justice, 12.

2 Fuller, ed., Restoring Justice, 45.
Harold Hongju Koh

Harold Hongju Koh is Sterling Professor of International Law at Yale Law School. He was elected a Fellow of the American Academy of Arts and Sciences in 2000.

This is a brilliant book edited by Jack Fuller. To be honest, it made me nostalgic, and I don’t get nostalgic for Watergate that often! When you read these speeches you remember there was a time when people in politics in Washington acted like adults, when our government was committed to transparency and working out hard problems together, when attorneys general wrote their own speeches, and when public officials tried to explain complicated ideas to the public. David Levi asked me to say something about what Ed Levi’s book means for a professor who goes in and out of the government. I have served for 10 years in the government in my 30 years as a lawyer. What this book gives me is faith that if you are a professor, some of what academics know matters. At a time of national crisis, a professor can make things better. If you have engaged in a life-long quest for knowledge and truth, you might actually be not just influential but wise. And finally, that universities do have something to teach the government about restoring justice, and that someone who has spent his life teaching and studying law can actually restore the confidence of the rule of law for a battered nation. This was a very inspirational message to me.

There are many interesting things about academia in this book. The most interesting statement that Edward Levi makes is that scholars must have the freedom to be wrong, so they may be right. By contrast, policy-makers don’t really have the freedom to be wrong; that’s one reason why there is a difference between being a professor and being a policy-maker. The policy-makers need to get it right the first time. On the other hand, I was very struck by the fact that Edward Levi, even after he was at the Justice Department, convened a group of constitutional law professors, including Phil Kurland and Paul Freund, to advise him on the Fourth Amendment questions raised by the NSA surveillance issue. It shows that even to this day, academics may contribute valuable ideas to public debate – for example, today’s discussion about having a privacy advocate representing the private interest in the debate about the NSA surveillance.

Let me highlight three ideas in the book that jumped out at me as being particularly relevant to things that I had to work on in my recent time at the State Department. The first is the passage that Jack mentioned about the relationship between confidentiality and privacy. This is an idea that we tried to express and Secretary Clinton tried to express during WikiLeaks. Everyone was excited that Julian Assange and Snowden were leaking huge amounts of information and nobody was talking about the corrosive effect that it was having within the government in terms of confidentiality. In every organization I have been in, particularly in academic life, confidential discussions are absolutely critical, so that in fact the individual right to privacy and governmental confidentiality flow from the same source. This is something that Ed Levi saw and expressed really masterfully in his speech in 1975 and it’s something I wish we would say more about publicly now.

The second is about NSA surveillance. Jack Fuller recalls that when he asked the NSA about the Fourth Amendment, their reply was, “Actually we hadn’t thought about it.” While I’m sure they thought about it more now than then, it is pretty clear that our intelligence agencies have become more focused on their technological capacities than on the rights affected by what they do. Technology moved ahead of law and oversight structures. That might have been bearable for 12 years but now that we are trying to move to a new phase, to a sounder footing, we need to harmonize the structures of security and liberty in a more satisfactory way. That is something that I think Ed Levi saw very clearly.

The final point is about the relationship between cynicism and belief in the rule of law. The word “cynicism” appears a lot in Edward Levi’s book, because when he came...
After 9/11 we built very extensive structures to protect security and we did not develop structures to protect liberty and privacy that were of equivalent strength. Technology moved ahead of law and oversight structures. . . . Now that we are trying to move to a new phase, a sounder footing, we need to harmonize the structures of security and liberty in a more satisfactory way.

In to the Department of Justice, people were understandably pretty cynical. There had been five attorneys general in six years, and a couple of them had been indicted. It was not a great moment for people who said that we are lawyers or we believe in the rule of law. And he even said at his own swearing-in, “We have lived in a time of change and corrosive skepticism and cynicism concerning the administration of justice. Nothing can more weaken the quality of life or imperil the realization of those goals we all hold dear than our failures to make clear by word and deed that our law is not an instrument of partisan purpose.” And so he put forward as an antidote to this cynicism the notions of evenhandedness in the law, a commitment to decency, a suggestion that law is part of life, that a good legal system is like a good family or a good religious institution. It embodies the values that are common to many.

And maybe the most touching speech of all was the one that he gave to the graduating class of the FBI National Academy, to people who are going off to be police officers. He said to them, “You stand where fear and cynicism now meet. But there is also a great trust waiting to be reawakened. By your conduct and skill – and I hope in part by virtue of what you have learned at this Academy – I am sure you will show the people of America that they may trust in the law and in you.” And that, I think, is the key to Ed Levi’s contribution to American life. He believed that the law could be an antidote for even the most pervasive national cynicism. As Lincoln would say, he was calling all of us as lawyers and academics to the “better angels of our nature.” That is why even today, 40 years later, we should still be listening to him.

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1 Fuller, ed., Restoring Justice, vii.

2 Fuller, ed., Restoring Justice, 4.
Mark L. Wolf

Mark L. Wolf is Senior Judge of the United States District Court for the District of Massachusetts. He served as a Special Assistant to Attorney General Edward Levi in the U.S. Department of Justice from 1975 to 1977.

I would like to offer a more personal perspective because Edward Levi had a very profound effect on me as an individual. In doing so, I will share some thoughts about how I think his history as a teacher substantially contributed to his most admirable legacy.

One of the things that was very striking to people about Edward, and I think it would strike this audience, too, is that his personal staff consisted exclusively of young assistants. In 1975, when he came to the Department of Justice, his staff included Jack Fuller, Douglas Marvin, John Buckley, Ron Carr, and me. We were all 28 years old. We knew that Edward had been a young assistant to Attorney General Francis Biddle during World War II. Nevertheless, we wondered why he only hired people to work closely with him who were each under 30 themselves.

I got some direct insight into this eleven years later, in 1986, when Edward spoke at the memorial for my friend and colleague, a member of this Academy, Judge Charles E. Wyzanski. Charlie Wyzanski had a remarkable career in Washington in the administration of Franklin Roosevelt before he was 30 years old. In a eulogy for Charlie, Edward said that when he became Attorney General he agreed with the judge that he should surround himself with youthful assistants because “the young . . . bring to government a flexibility of mind, an intensity of effort, and an enthusiasm of spirit.” Edward very much valued and wanted these qualities to test what was, fairly or unfairly, characterized as the conventional wisdom of the career officials in the Department of Justice, and to complement the experience and wisdom of presidential appointees like Assistant Attorney General Antonin Scalia and Solicitor General Robert Bork.

Edward fully engaged us in his government by discussion. I could use all my time regaling you with anecdotes concerning Edward’s conversations with John Dunlop of Harvard on immigration reform, with many experts on the proposed special prosecutor legislation, which he opposed, and on national no-fault automobile insurance with Secretary of Transportation William Coleman and John Hart Ely, his general counsel, who went on to become dean of Stanford Law School.

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Edward taught all of his young assistants, and many others, by his example of always being thoughtful, thorough, open, balanced, and, above all else, honorable. He had a profound and enduring influence on me. It is interesting to be reminded of the aspirations he expressed at the FBI Academy because I would say that the most obvious influence Edward had on me was manifest in the case involving James “Whitey” Bulger.

Edward had a portrait of Attorney General Harlan Fiske Stone, a dean of Columbia Law School, hanging in a conference room. In 1924, when Stone created the modern FBI and appointed J. Edgar Hoover as its director, Stone warned that “there is always the possibility that a secret police may become a menace to free government and free institutions because it carries with it the possibility of abuses of power, which are not always quickly apprehended or understood. It is important that its agents not be above the law or beyond its reach.”

As a young man, Edward had seen Attorney General Biddle, whose portrait also hung in his conference room, try to restrain Hoover during World War II when he thought Hoover was a threat to civil liberties. And, as Jack and others have men-
ognized the need for confidentiality even within the Department of Justice. Ordinarily the FBI was not required to tell a prosecutor or any Department of Justice official the identity of a confidential informant. However, if the FBI learned that an informant, without authorization, had committed a crime, the agency was required to give that information to the Assistant Attorney General for the Criminal Division, who would decide whether to continue that person as an informant or instead make him a subject for possible prosecution.

The guidelines were an exemplar of Edward’s concept of the Executive Branch “acting judicially.” As I wrote in a decision in 1999 concerning Whitey Bulger: “[A]lthough no judicial officer is involved, the guidelines are similar in the approach to the warrant requirement of the Fourth Amendment which requires that decisions concerning whether to authorize invasions of privacy be made by neutral magistrates rather than by those engaged in the competitive business of law enforcement, who do not have sufficient objectivity to be trusted to assess correctly the relative strength of the interest which must be weighed.” As I also wrote in 1999, and again in 2001, when I sentenced Bulger’s partner, Stephen Flemmi, these guidelines were issued in December 1976, about a month before Edward left office, and were subsequently utterly ignored. The Department has since acknowledged that if the guidelines had been obeyed, the abuses revealed in the Bulger case, including multiple murders for which Bulger will soon be sentenced, would have been prevented and an FBI agent would not now be in prison for being complicit in some of those murders.

I have quoted Edward frequently since I have become a judge. Two weeks ago in Turkey, I spoke to several hundred judges and lawyers from 36 countries about how to balance the interests of security and liberty at a time of terror. I noted that as John Adams, the founder of this Academy, famously said, “A democracy is a government of laws and not men.” I then added that in his remarks when he was sworn-in that Harold quoted, and very consistent with what General Seitz mentioned, Edward said that “if we are to have a government of laws and not men, then it particularly takes dedicated men and women to accomplish this through their zeal and determination, and also their concern for fairness and impartiality.”

I also quoted Edward last week in Prague when I was speaking to young judges seeking to establish honest judiciaries in many former Soviet bloc countries. They found Edward’s insights inspiring. And to my law clerks, who are very well represented here today, I express my aspirations in a memorandum I give them the first day they come to work, by quoting what Edward said about Judge Henry Friendly at an event in 1976:

“The dimensions of the law can be narrow, its directions can be erratic, responsive to whims and fads. The law can be lost in technicality, confused in its purposes. This is not true when law finds its proper spokesman, when the craftsman is combined with the humanist, when the issues of public policy are seen in the light of history, when the spokesman speaks within the defined conception of the role of law, lawyers, and the function of the courts.

Edward brought all of these qualities to the Department of Justice, which he regarded as a ministry of justice. When he died in 2000, the New York Times wrote, “In the two brief years that he led the Justice Department Mr. Levi set an example of respect for the Constitution and the rights of Americans that remains a benchmark for distinguished public service today.” We are unanimous on this jury and, if you read the book that Jack so brilliantly edited, I am confident you will concur that it provides convincing evidence that this verdict was just and true.

Discussion

Levi

Several of our speakers mentioned that maybe this was a moment in time when one could still give a fireside chat or give a talk to FBI agents or address the nation in a fairly complex way, and people would actually pay attention. Of course, we don’t know that they were paying attention then but we like to think maybe they were. But could that moment come again? How do we advise the nation so that we can have this kind of dialogue at a more complex level?

Fuller

It is much more difficult today to get and hold people’s attention on anything, let alone something complex and difficult. So in that respect the rhetorical effort has to be even greater. I think that there are certain things that one could do, particularly in the areas of national security and freedom, that get people’s attention. I remember the very first day I arrived at the Department. I walked in and the secretary said, “It’s about time. They have been waiting for you.” I had my bags with me because I didn’t even have a place to stay. “Who are they?” I asked. “The attorney general and the FBI director,” she said. I went in to Edward’s office and he said, “Good, you’re here. We can get started. Friday (or whatever day it was) I’m going to be revealing the contents of J. Edgar Fuller
Hoover’s secret files to the Congress and I want you to write the testimony.” Though we know now what the contents of the secret files were, which were a lot less interesting than people imagined them to be, I think openly revealing things that had not been talked about before still gets attention and I would be in favor of doing that now.

Levi

Harold, is there a real role here for the academy?

Koh

I think the academy can demand government transparency and I think the attorney general can demand government transparency. And the attorney general can explain his reasoning to the people. This is what is amazing about these speeches. Edward Levi obviously wrote these speeches himself and he explains very complex ideas in a way that makes you understand the subtleties. I don’t see that today. I see a lot of unnecessary concealing of legal analysis, which damages trust, and I see situations where when the choice is to be either more transparent or less transparent, the decision always tends toward the less transparent. Many of the internal opinions are presented in extracted form, when in fact it would be better if they were brought forward through the analysis of the attorney general in a speech somewhere or in testimony somewhere. I think when trust is damaged it is a time for more transparency to heal that damage. To be clear, my experience in the government is that the government does a pretty good job. Real corruption, real incompetence, is more rare than the pundits like to claim. In fact, there is a higher and more impressive level of internal discussion in government than I have seen in other parts of my life, and if people saw that they would feel better about the government.

Wolf

Let me give you an example: the NSA surveillance issue versus the health care website issue. The exact same people who think that the website designers are totally incompetent are terrified about what the NSA will do with all the information they have gathered. In one area ordinary citizens assume total incompetence on the part of the government; in another they assume total competence.

Koh

In the last ten years, how many speeches by a cabinet member do you remember? And how many were written by the cabinet member from the beginning to the end? In my view, it would be far better if we had more cabinet members who have coherent philosophies and can express them themselves in as clear a fashion as Ed Levi did.

Fuller

It is hard today to recognize alternative arguments and that people of good will might see things differently. But it was hard then, too, and we have to remember that. One of the talks that I find most remarkable was testimony on electronic surveillance that Edward gave to the Senate Select Committee on Intelligence. The testimony goes for 60 pages in the book, and he declined the generous offer of the chairman to do a shorter version. He delivered all 60 pages to whoever was in the room at the time. He delivered this talk at a time when significant courts were questioning the constitutionality of all electronic surveillance without a warrant. We were doing electronic surveillance without a warrant in counter-espionage and in foreign intelligence matters, and we were doing it regularly. This was a very nervous-making time, and you might think that his testimony would therefore be a ringing endorsement of the absolute overwhelming evidence and constitutional argument that supported doing such things. The testimony was not like that. It was about the tensions embodied in the Constitution and the Fourth Amendment. They were hard to resolve then. And it may be even harder now, but just as important.

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