



Remembering Attorney General *Edward H. Levi* Through His Own Words

*By John Beal*¹

The Department of Justice has recently gone through a period in which public confidence in the Department has been challenged. We also live in a time of great partisanship and divisiveness in government and politics. Edward Levi's stewardship of the Department of Justice from 1975 through 1977, although short, provides a model that would be well emulated today. He was selected by President Gerald Ford to restore public confidence in the Department of Justice after the era of Watergate, President Nixon's enemies list, and the FBI's COINTELPRO program that targeted domestic dissidents. This is a good time to remember Edward Levi and to reflect on his tenure as United States Attorney General and that for which he stood.

Edward Levi attended college and law school at the University of Chicago, graduating from the law school in 1935, and in 1938 receiving a post-graduate degree from the Yale Law School. From 1936 to 1940, he was Assistant Professor of Law at the University of Chicago. From 1940 to 1945 he went to Washington, where he served as Special Assistant to Attorney General Francis Biddle and as first assistant in the Antitrust Division. In 1945, he returned to the University of Chicago Law School. He was the Dean from 1950 to 1962. In 1962, he was named Provost of the University. Six years later he became President of the University until 1975, when President Ford named him Attorney General.

Examples of his wide-ranging outside activities included serving in 1950 as counsel to the Subcommittee on Monopoly Power of the United States House Judiciary Committee and conducting the committee's hearing on the steel and newsprint industries; to being a member of the White House Task Force on Education in 1967-1968; to being elected as president of the American Academy of Arts and Sciences in 1986, and serving as vice-president of the American Philosophical Society.

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In writing about the recent crisis of leadership at the Department of Justice, David Brooks in his August 28, 2007, column in the New York Times drew a comparison with, "the man everybody points to as the superlative attorney general...Edward Levi...Everybody mentions that he was a highly respected legal scholar with a detached, dignified leadership style and that he brought exceptionally smart lawyers to Justice to serve with him." And University of Chicago Law School Professor Geoffrey Stone made a similar observation in an op ed essay in the Chicago Tribune on August 29, 2007, writing that Mr. Levi was a man "of great intellectual distinction, integrity and character" who as attorney general represented "the highest ideals of public service and the true spirit of the legal profession."

At Mr. Levi's memorial service on April 6, 2000, President Ford described him as "the rabbi's son from Chicago who has been called, justifiably, the greatest lawyer of his time." President Ford went on to say that when he became President, "I hoped to restore popular confidence even as we drew off the poisons that had infected our public life because of Vietnam and Watergate." In appointing an attorney general "the situation demanded someone of towering intellect and spotless integrity. No campaign managers need apply, nor members of the family, official or political." President Ford continued, "I didn't know his politics when I appointed him. All I knew was that he shared my reverence for the Constitution - along with a view that America's greatness lies not in the power of its government, but in the freedom of its people. Thanks to Ed Levi, American citizens protesting the policies of their government no longer had to fear illegal surveillance, improper wiretaps or outright harassment. Indeed, it is no exaggeration to say that Attorney General Levi helped give us back our government."

How Mr. Levi came to be held in such esteem is evident from both his actions and his words as attorney general. For example, under Mr Levi's direction, guidelines were implemented controlling the FBI's domestic security and civil disturbance investigations.

The guidelines tied domestic security investigations closely to the enforcement of federal criminal statutes, and they provided a series of legal standards that had to be met before various investigative techniques could be used. Mr. Levi told the Los Angeles County Bar Association on November 18, 1976, "As a result of the guidelines and the Bureau's own reassessments, the number of domestic security investigations has dramatically dropped....In July 1973, the FBI had more than 21,000 open domestic security cases. By September of this year (1976), that number had been reduced to 626." By 1982, the number of open domestic security investigations was down to five, as related in a March 4, 1982, memorandum to Attorney General William French Smith from Special Assistant Hank Habicht, entitled Overview of FBI Guidelines. That memorandum also stated "The guidelines which have been most controversial are the Domestic Security Guidelines - the 'Levi Guidelines' criticized by many conservatives." This memorandum was released by the National Archives as a part of the confirmation process of Chief Justice John Roberts, who was another of the special assistants to Attorney General Smith. In the Chicago Tribune op ed piece referred to above, Professor Stone wrote that Attorney General Alberto "Gonzalez helped eviscerate the Levi Guidelines during the Bush presidency."

In the area of domestic electronic surveillance for foreign intelligence purposes, Mr. Levi was involved in the development of legislation and executive regulations. He noted that this was a topic on which open and informed public discussion was difficult because of secrecy requirements. In the address quoted above before the Los Angeles County Bar Association, Mr. Levi recounted the efforts to fashion the legislation that was finally enacted in the Carter Administration as the Foreign Intelligence Surveillance Act, which established the Foreign Intelligence Surveillance (FISA) Court. Proposed legislation was introduced early in 1976, and a bill passed both the Senate Judiciary and Intelligence Committees, but there was not time for action by the House of Representatives before the end of the Ford Administration. Mr. Levi stated, "During the course of negotiations between the (Justice) Department and the two Senate Committees and between the Department and the intelligence agencies in the executive branch, several specific concerns were worked out by revision of the bill."

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The legislation later enacted had the same basic provisions as described by Mr. Levi in 1976. He further depicted the operation of the proposed FISA court as follows. "The judge is given the responsibility for determining whether there is probable cause to believe the subject of the surveillance is a foreign power or agent. The appropriate executive official is given the responsibility of certifying that the information sought is foreign intelligence information. This distinction is based upon a regard for whether a judge or an executive branch official with responsibility for foreign relations or foreign intelligence ought to be held accountable for the decision. The bill provides for executive accountability where a judicial determination would be inappropriate, but gives the judge the duty to determine whether executive certification has been given, and it always places upon the judge the determination that there is probable cause to find the existence of the requisite foreign agency." The legislation applied to same principles to terrorism, although that topic received much less focus than it does today.

What is most remarkable about this account is that it is a public discussion of the decision being made jointly and cooperatively by the Congress and the executive branch about how responsibility should be divided between the executive and the judiciary for authorization of electronic surveillance in the field of foreign intelligence. There was no sign of the supposed prerogatives of an Imperial Presidency that we have seen asserted of late.

As befitted a former law professor at and President of the University of Chicago, Mr. Levi's speeches as attorney general served as a tutorial for the American public on the role of law, of law enforcement, and of lawyers in a democratic society. He started by addressing first principles, in particular the foundations of democratic government. At the Boston College Bicentennial Convocation on September 28, 1975, he stated,

A larger, older nation perhaps can never relive the excitement of its birth. Yet the unity of our diversity is perhaps just as extraordinary and just as difficult to achieve. A free society, a government by discussion, requires mutual respect. It requires mutual understanding. It requires a culture held in common – a culture not unitary but composed of many differences. The base for understanding must be built and rebuilt over time.

Today's stark political divisions in the United States make these sentiments seem almost utopian. Mr. Levi elaborated on this theme at the Conference on the Place of Philosophy in the Life of the American Nation at the Graduate School of the City University of New York on October 8, 1976,



Our country was founded with a belief in education. Reason was to break the bonds which held mankind back; the sharing of education would make real the participation of the citizenry essential to a republic or a democracy...the faith was that a government by discussion would break the bonds of the ages and set free man's originality...The frequent criticism of democracy was that it would lack the exemplifications of ideals and the vision of excellence. Education was to be the answer – an education which was imbued with and would inculcate a respect for the individual and a conception

of higher truth widely shared...The founders of our republic were concerned by the enormous swings and latent hostility in factions which could destroy a government by discussion. On the political side they created a system of checks and balances to recognize these cycles but to curb their corrosiveness. But they also looked forward to a period of enlightenment where the recognition of the dignity of men would make possible the tact and cohesiveness essential for a learning society.

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However, at the Boston College Bicentennial Convocation he added a caution that was prescient for one speaking at the very beginning of the era of electronic information transmission:

Voltaire once observed that the real scourge of mankind has not been ignorance but rather the “pretense of knowledge.” Today there may be more pretense of knowledge, a vice which most of us share, because there are more bits of knowledge widely distributed.

Attorney General Levi also addressed himself to many specific areas of the law, civil and criminal, in which the Department of Justice has responsibilities. With respect to criminal law enforcement, Mr. Levi, who was by no means viewed as being politically liberal, said at his confirmation hearing on January 28, 1975, before the U.S. Senate Committee on the Judiciary:

In dealing with criminal law enforcement, I must say I think there has to be a combination of determination and, I must say, to some extent a certain kindness. I don’t think the enforcement of the criminal laws should be done in a kind of, if one can avoid it, bitter, hostile way. This creates all kinds of repercussions in society.

The rate of serious crime in the United States was higher during Mr. Levi’s time in office than it is today, yet it is hard to imagine that kind of statement today. Indeed, American criminal justice is now notable for the harshness of the length of the penalties of imprisonment it imposes and the conditions of incarceration, particularly in comparison to other Western, democratic countries.

Mr. Levi elaborated further on this theme. Speaking before the American Bar Association on August 11, 1976, he observed,

A legal system that fails to generate the confidence of the people loses one of its most important strengths. If the criminal law is to be effective, individuals must conform their behavior to it voluntarily. This voluntary adherence -- which can and must be supplemented by the deterrence of the criminal law’s sanctions but can never be replaced by it -- depends in large measure upon the faith the people have in the efficacy and fairness of the legal

process. For this reason it is extremely important that attention be paid to those areas of the system which, for one reason or another and perhaps sometimes incorrectly, are thought to invite or enforce unfairness.

Then, in an address in Milwaukee on February 2, 1976, specifically addressing the importance of rehabilitation, he said:

Decent treatment of prisoners is itself a kind of rehabilitation, and decency should remain as one of our ideals. Decency can reinforce decency in return just as much as substandard, inhumane conditions of confinement can reinforce a negative effect. Especially with the young, we simply cannot give up on the effort to bring those who have broken the law back into harmony with the society.

Mr. Levi continued,

Through the criminal justice system (society) imposes on individuals the dramatic loss of liberty that is involved in imprisonment. Society must insist that the system operate with fairness and decency. But its responsibility is much greater. Society must itself be prepared to reunite with the ex-offender if he is to have a chance of succeeding outside the walls.

I have often said that the high crime rate will exist as long as society stands for it. I mean by this more than simply that citizens must cooperate with law enforcement officials in reporting crime and doing their part in the criminal justice process. I mean also that crime rates will continue to be high so long as society does not realize that it cannot treat as outcasts the persons whose liberty it has once curtailed in the name of the law.

Time and again he returned to the theme of the importance of the non-partisan administration and enforcement of the law in a democratic society. In his farewell remarks to the employees of the Department of Justice on January 17, 1977, he stated,

we have lived in a time of...corrosive skepticism and cynicism concerning the administration of justice. Nothing can more weaken the quality of life or more imperil the realization of the goals we all hold dear than our failure to make clear by words and deed that our law is not an instrument of partisan purpose.

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Of course, during his time as attorney general, Mr. Levi spoke of many other matters, including many aspects of civil law. He was an expert in antitrust law and had been involved early on in the development of the Chicago School of Economics. But his continual theme was that fairness and integrity were essential in the formulation and administration of the law.

Mr. Levi also spoke of the importance lawyers, as well as the law, in American society. At the dedication of the Texas Bar Center in Austin, Texas, on the seminal date of July 4, 1776, he pronounced:

A nation of law – the phrase commends itself to us as an antidote to tyranny..It is now difficult to see how our complex society could operate without (the law). Perhaps (the nation’s) diversity and complexity explain the phenomenon which Tocqueville noticed, and which surely persists today, that most questions of importance in American society end up as legal issues before the courts.

At the same time, Mr. Levi warned on that day,

when courts assume responsibility this sometimes encourages other political institutions to hold back from making the difficult decisions or taking the unpopular steps which are required of elected officials in a democracy.

Finally, he also discussed the special obligations that lawyers have:

Without the lawyer as the intermediary our complex society could not function....The bar...becomes the interpreter of the rules and regulations of governance....At a time in which non-governmental social institutions that give us stability have gone into decline, this puts a heavy burden on the law...It is a complicated duty lawyers have; it looks both to the individual client’s interests and also to the interests of society, which are the law’s. This requires a special honesty and objectivity. Cicero said that if you couldn’t state your opponent’s case you did not know your own. Beyond that, as every lawyer knows, arguments can be stated in such a way as to mislead or inflame. This is not the road to problem

solving which is at the center of the bar’s responsibility....Finally, it is essential that the bar hold fast to what we have that is good and strong and wise and valuable – not afraid to be alone in asserting that the value abides – for that is what the American vision 200 years ago was about.

Edward Levi was an attorney general with a remarkable appreciation of the role of the law in American society and the role of the Department of Justice in enforcing the law. And while he did not suffer fools, he was personally considerate. At Mr. Levi’s memorial service, Jack Fuller, one of Attorney General Levi’s special assistants, who went on to become the editor and then the publisher of the Chicago Tribune, recounted the following incident. When he was asked to be one of the special assistant’s, he called University of Chicago Law School professor Philip Kurland to ask what he was getting into. Mr. Kurland responded, "You may hear that Edward is cold and calculating. This is not the case. He is warm and calculating."

Mr. Levi died on March 7, 2000.

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