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Foreword: The Ethics of Lawyers in Government

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THE ETHICS OF LAWYERS IN GOVERNMENT

FOREWORD

*Roy Simon**

I. INTRODUCTION

This special symposium issue of the *Law Review* features six different articles on legal ethics, culled from three different sources—Hofstra Law School’s 2009 Legal Ethics Conference, the 2009-2010 Lichtenstein Lecture, and a fascinating essay by Professor Monroe Freedman, my treasured friend and colleague at Hofstra. In this Foreword, I will say some words about each source.

II. HOFSTRA’S 2009 LEGAL ETHICS CONFERENCE

We began planning for the 2009 Hofstra Legal Ethics Conference shortly after the tumultuous 2007 conference, which featured convicted and disbarred lawyer Lynne Stewart, attorney/talk-show host Ron Kuby, and more than a dozen others.¹ Many stories were coming out at that time about lawyers in government—the baseless Duke lacrosse prosecutions, the scandal over alleged political firings of eight U.S. Attorneys from around the country, the involvement of federal government lawyers in justifying torture and “enhanced interrogation” methods, and the never-ending tales of *Brady* violations by prosecutors.²

* Howard Lichtenstein Distinguished Professor of Legal Ethics at Hofstra University School of Law; Director of the Law School’s Institute for the Study of Legal Ethics. Roy Simon served as Director of the 2009 Hofstra Legal Ethics Conference.

1. See Paul Vitello, *Hofstra Polite as Lawyer Guilty in Terror Case Talks on Ethics*, N.Y. TIMES, Oct. 17, 2007, at B3; Hofstra Univ. Sch. of Law, *Lawyering at the Edge: Unpopular Clients, Difficult Cases, Zealous Advocates* 7 (Oct. 14-16, 2007), http://law.hofstra.edu/pdf/NewsAndEvents/Conferences/EthicsConference/coneth_program.pdf.

2. See, e.g., Duff Wilson, *Hearing Ends in Disbarment for Prosecutor in Duke Case*, N.Y. TIMES, June 17, 2007, at A21; Daphne Eviatar, *Memos Suggest Legal Cherry-Picking in Justifying Torture*, WASH. INDEP. (Aug. 27, 2009, 06:00 AM), <http://washingtonindependent.com/56772/memos-suggest-legal-cherry-picking-in-justifying-torture>; Adam Zagorin, *Why Were These U.S.*

We decided that our 2009 conference should focus on government lawyers, and eventually we picked a title: “Power, Politics, and Public Service: The Legal Ethics of Lawyers in Government.”³

A. Dual Themes: Government Lawyers as Prosecutors and as Advisors

The conference was held on October 18-20, 2009.⁴ It focused on two themes, reflecting two types of lawyers in government. First, we focused on identifying and discussing the most important regulatory and cultural reforms regarding the ethics of prosecutors. Second, we considered the ethical duties and limitations of government lawyers who advise public officials. I will elaborate a bit.

Alleged abuses by prosecutors fall into many categories, such as withholding *Brady* material,⁵ making “exploding offers” to defendants,⁶ offering false testimony by police officers,⁷ pressing cases not justified by the evidence,⁸ and ignoring evidence that a defendant was wrongfully convicted or has been proven innocent.⁹ Speakers identified the reforms that deserved top priority, and critiqued reforms proposed by others. However, we recognized that our nation’s strong and vital traditions of prosecutorial independence and discretion had hampered outside reform efforts. Break-out sessions moderated by respected professors complemented the speeches by objectively debating and fine tuning

Attorneys Fired?, TIME (Mar. 7, 2007), <http://www.time.com/time/nation/article/0,8599,1597085,00.html>.

3. Hofstra Univ. Sch. of Law, Power, Politics & Public Service: The Legal Ethics of Lawyers in Government (Oct. 18-20, 2009), http://law.hofstra.edu/pdf/NewsAndEvents/Conferences/EthicsConference/ethics_brochure.pdf.

4. *Id.*

5. See *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (holding that “the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material”).

6. Russell D. Covey, *Fixed Justice: Reforming Plea Bargaining with Plea-Based Ceilings*, 82 TUL. L. REV. 1237, 1281-82 (2008); Alexandra White Dunahoe, *Revisiting the Cost-Benefit Calculus of the Misbehaving Prosecutor: Deterrence Economics and Transitory Prosecutors*, 61 N.Y.U. ANN. SURV. AM. L. 45, 67, 70 (2005) (explaining that “exploding offers” are plea bargain offers that expire in a short time).

7. See Dunahoe, *supra* note 6, at 70; Aaron M. Clemens, Note, *Removing the Market for Lying Snitches: Reforms to Prevent Unjust Convictions*, 23 QUINNIPIAC L. REV. 151, 209-10 (2004).

8. See Mitchell Stephens, *Ignoring Justice: Prosecutorial Discretion and the Ethics of Charging*, 35 N. KY. L. REV. 53, 59-62 (2008).

9. See *Washington v. Wilmore*, 407 F.3d 274, 276-78 (4th Cir. 2005) (recounting murder conviction of innocent man based on fabricated evidence); Eric M. Freedman, *Earl Washington’s Ordeal*, 29 HOFSTRA L. REV. 1089, 1091-94, 1098-99 (2001) (account by professor who was a member of wrongfully convicted man’s legal team); see also *infra* notes 34-37 and accompanying text (discussing *Pottawattamie v. McGhee*, 547 F.3d 922 (8th Cir. 2008)). The website of the Innocence Project, <http://www.innocenceproject.org/>, features numerous stories of prisoners who were eventually exonerated.

various proposals and suggesting specific steps for implementing meritorious ideas.

Regarding the ethics of government lawyers who advise public officials, the central question the conference addressed was the extent to which political considerations should influence legal advice. What role should politics play when government lawyers evaluate judicial candidates, analyze legal problems, hire or terminate U.S. Attorneys or Department of Justice employees, draft legislation, subpoena or question witnesses at legislative hearings, and recommend executive actions or policies? Is it possible for a lawyer to be objectively neutral when advising public officials who were elected to their positions by a political majority or appointed to their positions by elected politicians? And if objective neutrality is possible, is it desirable, or even required?

The conference was dedicated to the memory of Thomas C. Wales, a Hofstra Law School graduate and former Assistant U.S. Attorney in Seattle who was murdered in 2001.¹⁰ Mr. Wales developed a reputation as one of the country's foremost prosecutors for major white collar and business fraud cases, and was a leader in professional circles serving as the head of various bar association committees. Mr. Wales received his B.A. from Harvard and his J.D. in 1979 from Hofstra, where he served as Editor-in-Chief of the *Hofstra Law Review*.¹¹ Among his many civic and professional activities, Mr. Wales served as president of Washington CeaseFire, a handgun control group. He was shot and killed while working in his suburban Seattle home on October 11, 2001.¹² He is one of the only federal prosecutors ever to be murdered while in office. His murder remains unsolved.¹³

B. *The Conference Faculty*

The conference faculty displayed a remarkable depth and range of knowledge and experience.

The keynote speaker was Cyrus Vance, a defense lawyer in private practice and a former Assistant District Attorney in the office of the

10. David N. Yellen, Dedication, *In Memory of Joni Cesta, Neil D. Levin, Thomas Crane Wales, Glenn J. Winuk*, 30 HOFSTRA L. REV. 1, 7 (2001).

11. See Hofstra Law Review Masthead, 7 HOFSTRA L. REV. (1978).

12. Yellen, *supra* note 10, at 7; Jeffery Toobin, *An Unsolved Killing*, NEW YORKER, Aug. 6, 2007, at 42.

13. SEEKING INFORMATION, FED. BUREAU OF INVESTIGATION, <http://www.fbi.gov/wanted/seekinfo/wales.htm> (last visited Aug. 23, 2010); see Yellen, *supra* note 10, at 7; Toobin, *supra* note 12, at 47-49, 51.

legendary Robert Morgenthau (whom Mr. Vance has since replaced as the Manhattan District Attorney).¹⁴

Two speakers were sitting federal judges—the Hon. D. Brooks Smith of the U.S. Court of Appeals for the Third Circuit, and the Hon. Mark Wolf, Chief Judge of the U.S. District Court for the District of Massachusetts.¹⁵ Both are former prosecutors. Judge Smith was a District Attorney in Blair County, Pennsylvania,¹⁶ and Chief Judge Wolf worked in the U.S. Department of Justice as a Special Assistant to the U.S. Attorney General, and later as Deputy U.S. Attorney for the District of Massachusetts, and Chief of that office’s Public Corruption Unit.¹⁷ Judge Wolf was also one of the founding attorneys at the Department of Justice’s Office of Professional Responsibility in the late 1970s.¹⁸

Robert Mundheim, the current Chair of the American Bar Association’s (“ABA”) Standing Committee on Ethics and Professional Responsibility and Of Counsel at Shearman & Sterling in New York, previously served in government as General Counsel to the U.S. Treasury Department, in the corporate world as General Counsel of Salomon Smith Barney, in the law firm world as Co-Chairman of Fried, Frank, Harris, Shriver & Jacobson, and in the academic world as Professor and Dean at the University of Pennsylvania Law School.¹⁹

Jeffrey Toobin, author of *The Nine: Inside the Secret World of the Supreme Court*, and a prolific staff writer at *The New Yorker*, wrote a lengthy *New Yorker* article in 2007 about the investigation into the murder of Tom Wales, to whose memory the entire conference was dedicated.²⁰

14. John Eligon, *Cyrus R. Vance Jr. Found His Own Way to Manhattan District Attorney’s Office*, N.Y. TIMES, Dec. 27, 2009, at A20; Carlin DeGuerin Miller, *Real Life “Law & Order” DA Robert Morgenthau Retires at 90*, CRIMESIDER (Dec. 31, 2009, 12:15 PM), http://www.cbsnews.com/8301-504083_162-6041975-504083.html.

15. Press Release, Hofstra Univ. Sch. of Law, *Cyrus Vance, Jr., Barry Scheck and Jeffery Toobin Among Speakers at Hofstra Legal Ethics Conference* (Sept. 18, 2009), http://law.hofstra.edu/NewsAndEvents/PressReleases/pressreleases_20090918_ethics.html (last visited Aug. 23, 2010).

16. *Biographical Directory of Federal Judges: Smith, D[avid] Brooks*, FED. JUDICIAL CTR., <http://www.fjc.gov/servlet/nGetInfo?jid=2213&cid=999&ctype=na&instat=na> (last visited Aug. 23, 2010).

17. *Biographical Directory of Federal Judges: Wolf, Mark Lawrence*, FED. JUDICIAL CTR., <http://www.fjc.gov/servlet/nGetInfo?jid=2629&cid=999&ctype=na&instat=na> (last visited Aug. 23, 2010).

18. John Gibeaut, *The “Roach Motel,”* A.B.A.J., July 2009, at 50, 51.

19. *Lawyers: Robert H. Mundheim*, SHERMAN & STERLING LLP, <http://www.shearman.com/rmundheim> (last visited Aug. 23, 2010).

20. *Anchors & Reporters: Jeffrey Toobin*, CNN.COM, http://www.cnn.com/CNN/anchors_reporters/toobin.jeffrey.html (last visited Aug. 23, 2010); Hofstra Univ. Sch. of Law, *Power, Politics & Public Service: The Legal Ethics of Lawyers in Government*, *supra* note 3.

John Bellinger, now a partner in the international and national security practices at Arnold & Porter, previously served as the Legal Adviser to Secretary of State Condoleezza Rice.²¹ He is a lawyer of enormous integrity who stood up for the policies of the Bush Administration when he thought they were right and spoke out forcefully against those policies when he thought they were wrong.

A distinguished group of law professors rounded out the speaker list—Barry Scheck (Benjamin N. Cardozo), Kathleen Clark (Washington University in St. Louis), Angela Davis (American University), Kevin McMunigal (Case Western Reserve University), Bruce Green (Fordham University), Peter Joy (Washington University in St. Louis), and Jamin Raskin (American University)—plus one novelist and stand-up comedienne, Karen Bergreen, a former federal court law clerk who describes herself as a “recovering lawyer.”²² In addition, three law professors served as Reporters for our break-out sessions—former federal prosecutor I. Bennett Capers (Hofstra University), defense lawyer Ellen Yaroshefsky (Benjamin N. Cardozo), and former state prosecutor Fred Klein (Hofstra University).²³

C. *The Conference Papers in this Symposium Issue*

Four of the six legal ethics papers in this symposium issue are based on speeches given at the 2009 legal ethics conference. Three of the papers grapple with the challenge of enforcing the law against prosecutors. Judge Smith, drawing on his personal experiences as a District Attorney, a federal district court judge, and nearly a decade as a federal appeals court judge, articulates his perspective in “Policing Prosecutors: What Role Can Appellate Courts Play?” Kevin McMunigal, who has had a longstanding interest in criminal law, expresses his frustration with prosecutors in his paper entitled “The (Lack of) Enforcement of Prosecutor Disclosure Rules.” Fred Klein, who spent nearly thirty years as an Assistant District Attorney in Nassau County, New York (including a dozen years as Chief of the Major Offense Bureau), and three years as an Assistant N.Y. Attorney General prosecuting organized crime and Medicaid fraud, provides “A View From Inside the Ropes: A Prosecutor’s Viewpoint on Disclosing Exculpatory Evidence.” Bruce Green and Karen Bergreen, in an unusual

21. *Biographies: John B. Bellinger III*, ARNOLD & PORTER LLP, <http://www.arnoldporter.com/professionals.cfm?u=JohnBBellingerIII&action=view&id=5300> (last visited Aug. 23, 2010).

22. Hofstra Univ. Sch. of Law, Power, Politics & Public Service: The Legal Ethics of Lawyers in Government, *supra* note 3.

23. *Id.*

blend of personal narrative and legal scholarship, develop the lessons from their service together on a civil jury in their paper entitled “The Civil Government Litigator: A View from the Jury Box.” These four papers are representative of the high quality of thinking and dialogue that was on display for three full days at Hofstra’s seventh major legal ethics conference.

III. THE LICHTENSTEIN LECTURE

The Howard Lichtenstein Distinguished Professor of Legal Ethics at Hofstra has the honor and pleasure each year to invite a dynamic and thoughtful speaker to deliver the annual Lichtenstein Lecture. Since its inception in 1991, when Monroe Freedman became the first Lichtenstein Professor, the speakers in this annual series have featured many of the great scholars and judges in the field of legal ethics—Stephen Gillers, Burnele Powell, Hon. John Noonan, William Simon, Carrie Menkel-Meadow, Chief Judge Judith Kaye, Larry Fox, and the late Mary Daly, to name a few.²⁴ This year, I reached into the world of private practice to invite one of the most remarkable lawyers in the country, Paul Clement.

Mr. Clement first came to my attention when I was planning the 2009 legal ethics conference. One of the most important but least understood positions in the world of government lawyers is the position of Solicitor General of the United States. (The public has learned more about this position during the confirmation hearings for Elena Kagan, who served as Solicitor General during the Obama Administration.)²⁵ Mr. Clement served as Principal Deputy Solicitor General, then Acting Solicitor General, and finally (from 2005 until 2008) as Solicitor General of the United States.²⁶ He has argued more than fifty cases before the U.S. Supreme Court. He is currently in private practice as a partner at King & Spalding, and is one of the most sought after Supreme Court advocates in the country.²⁷ Based on this distinguished record, I invited him to speak at the 2009 legal ethics conference about the role of the government lawyer as an appellate advocate.

24. See Hofstra Univ. Sch. of Law, *Lawyers’ Ethics in an Adversary System* (Oct. 30–Nov. 1, 2005), http://law.hofstra.edu/pdf/NewsAndEvents/Conferences/confer_ethics_brochure_2005.pdf; Press Release, Hofstra Univ. Sch. of Law, Simon Named Distinguished Professor of Legal Ethics (Nov. 12, 2003), http://law.hofstra.edu/newsandevents/pressreleases/pressreleases_simon_release.html (last visited Aug. 23, 2010); St. John’s Univ. Sch. of Law, *Faculty News and Activities* (Feb. 2007), <http://www.stjohns.edu/media/3/c27c459ac84d403e86d8de4522332812.pdf>.

25. Peter Baker & Jeff Zeleny, *Obama Picks Kagan as Justice Nominee*, N.Y. TIMES, May 10, 2010, <http://www.nytimes.com/2010/05/10/us/politics/10court.html>.

26. *Lawyers/Professionals: Biographies*, Paul D. Clement, KING & SPALDING, http://www.kslaw.com/bio/Paul_Clement (last visited Aug. 23, 2010).

27. See *id.*

Unfortunately, Mr. Clement is so much in demand as a Supreme Court advocate that he regretfully declined my invitation. The calendar for the Supreme Court's fall 2009 Term had just come out, and he was scheduled to deliver oral arguments in two different cases shortly after the conference dates.

I later learned that both cases involved legal ethics. The first case was *Perdue v. Kenny A.*,²⁸ a federal class action arising from the dismal abuse and neglect of foster children in Georgia.²⁹ The trial judge awarded the plaintiffs' attorneys a Lodestar fee of \$6 million, and then enhanced it to \$10.5 million because he said that the performance of the plaintiffs' attorneys was the best he had seen in twenty-seven years on the bench.³⁰ The Eleventh Circuit affirmed.³¹ Mr. Clement represented the plaintiffs in seeking to protect the enhanced fee award.³² (The Supreme Court, in a five-to-four vote, eventually reversed and remanded.)³³

The other Supreme Court case that Mr. Clement was handling was *Pottawattamie v. McGhee*,³⁴ in which two wrongfully convicted men (who were finally exonerated after twenty-five years in prison) sued two Iowa prosecutors who brazenly fabricated evidence and used it against them at trial.³⁵ The prosecutors were seeking immunity from a civil rights damages suit brought post-exoneration by the two wrongfully convicted men, and the Supreme Court had agreed to hear the case.³⁶ Mr. Clement wrote a convincing brief and delivered a brilliant oral argument—so powerful that the defendant County settled the case for \$12 million before the Supreme Court issued any decision.³⁷

When I realized that Mr. Clement had argued two legal ethics cases in the same Term—an extraordinary and perhaps unprecedented achievement—I invited him to deliver the Lichtenstein Lecture. This time he agreed. His article, entitled “Lawyering in the Supreme Court,”

28. 130 S. Ct. 1662, 1669 (2010).

29. *Id.* at 1669.

30. *Id.* at 1670.

31. *Id.*

32. *Id.* at 1669.

33. *Id.*

34. 547 F.3d 922 (8th Cir. 2008), *cert. granted*, 129 S. Ct. 2002 (2009) (mem.), and *cert. dismissed*, 130 S. Ct. 1047 (2010) (mem.).

35. 547 F.3d at 925.

36. 129 S. Ct. at 2002.

37. The Supreme Court dismissed the case on January 4, 2010, and the lawyers announced that the parties had arrived at a twelve million dollar settlement. *Pottawattamie*, 130 S. Ct. at 1047; Bobby G. Frederick, *Pottawattamie County Case Settled for \$12 Million*, S.C. CRIMINAL DEF. BLOG (Jan. 5, 2010), http://www.southcarolinacriminaldefenseblog.com/2010/01/pottawattamie_county_case_sett.html.

provides a firsthand account not only of the intricate and rarified world of advocacy before the Supreme Court, but also delves into the difficult ethical issues that arose in both cases.

One personal note about Mr. Clement's lecture. Because of his year in the Solicitor General's Office and his prominence in the elite group of lawyers who regularly represent clients before the Supreme Court, Mr. Clement was well acquainted with my friend Mark Levy, a former Assistant Solicitor General who also argued frequently before the Supreme Court. Mark and I were classmates in junior high school and high school, and were together in many classes over the years. Mark was always intelligent, thoughtful, polite, and kind. I watched from afar with pride as he attended Yale Law School, joined the crème-de-la-crème in the Solicitor General's Office, and became one of the most respected advocates in the Supreme Court, arguing sixteen cases there.³⁸ On April 30, 2009, Mark took his own life. This was a tragic moment in the history of our profession. We need more lawyers with Mark's dedication and professionalism. As a tribute to Mark, with the permission of his wife, I dedicated this Lichtenstein Lecture to Mark Levy. May he rest in peace.

IV. MONROE FREEDMAN

Monroe Freedman, who preceded me as the Howard Lichtenstein Distinguished Professor of Legal Ethics at Hofstra,³⁹ has been everywhere and done everything in the field of legal ethics. His work in the field spans more than four decades and is a luminous example of personal and professional courage and creativity. The opportunity to be his colleague and to benefit from his constant support and from his enormous and richly deserved reputation in the field of legal ethics has been the highlight of my career at Hofstra.

One of Professor Freedman's relatively unsung achievements was his work as Reporter for a project of the Roscoe Pound American Trial Lawyers Foundation that became known as the American Lawyers Code of Conduct ("ALCC").⁴⁰ The ALCC's Public Discussion Draft was published in 1980, but it was in many ways so far ahead of its time that it did not get the attention and respect that it deserved. Eventually,

38. See Richard B. Schmitt, *A Death in the Office*, A.B.A.J., Nov. 2009, at 30, 31-32.

39. Professor Freedman held the Lichtenstein Professorship from its inauguration in 1991 until he graciously stepped down in 2002. See Press Release, *supra* note 24. He did not have to give up this professorship, and no one asked him to do so. I am grateful to him for giving me the opportunity to follow in his footsteps.

40. AM. LAWYER'S CODE OF CONDUCT (Public Discussion Draft 1980) (listing Monroe H. Freedman as the reporter for the project).

however, between 1993 and 2002, the ABA incorporated numerous ideas from the ALCC into the ABA Model Rules of Professional Conduct. A number of these ideas relate to prosecutors. For example, the ALCC included provisions that forbid a prosecutor to invidiously discriminate against any person in investigating or prosecuting a criminal matter; forbid a prosecutor to intentionally interfere with the independence of a grand jury, preempt a function of a grand jury, or abuse the processes of a grand jury; forbid a prosecutor to condition a dismissal of criminal charges on the defendant's relinquishment of the right to seek civil redress; and generally forbid a prosecutor to make extrajudicial comments that have a substantial likelihood of heightening public condemnation of an accused.⁴¹

It took so long for the ABA to incorporate these provisions into the ABA Model Rules that most people forgot where they came from. In his article entitled "The Influence of the American Lawyers' Code of Conduct on ABA Rules and Standards," Professor Freedman offers a personal account of the history of the ALCC, and traces its profound influence on the ethical rules that guide lawyers today in nearly every jurisdiction. His piece, like the ALCC, goes far beyond the ethics of prosecutors or other government lawyers.

V. CONCLUSION

A three-day conference on legal ethics featuring more than twenty faculty members and hundreds of attendees requires the efforts and dedication of many people. I cannot possibly thank them all here. But I want to single out Hofstra's Director of Special Events, Kami Crary, and her predecessor Dawn Marzella, who attended to every detail of the planning for the 2009 legal ethics conference. I also want to thank the many staff members and editors of the *Hofstra Law Review*, who not only edited and cite-checked the articles in this special issue, but also attended the Lichtenstein Lecture and many hours of the ethics conference so that they could gain deeper insight into the subject matter. We all wish that you (our readers) could have joined us in person at the conference and Lichtenstein Lecture, especially to hear the lengthy interchange between the audience and the speakers that are the hallmark of ethics events at Hofstra. (We devote nearly half of each speaker's time to the question and answer session following each speech.) As Pink Floyd would say, "Wish You Were Here."⁴² But whether you were here

41. See Monroe H. Freedman, *The Influence of the American Lawyer's Code of Conduct on ABA Rules and Standards*, 38 HOFSTRA L. REV. 927, 928-29 & nn.7-14 (2010).

42. PINK FLOYD, WISH YOU WERE HERE (Columbia Records 1975). *Wish You Were Here*, the

or not, we hope this sampling of conference papers and the bonus pieces from the Lichtenstein Lecture and the pen of Monroe Freedman will give you a taste of the rich intellectual ferment at Hofstra in the field of legal ethics.

ninth studio album by English progressive rock group Pink Floyd, was recorded at the Abbey Road Studios made famous by the Beatles and was released in 1975. *Wish You Were Here Discography*, PINK FLOYD ONLINE, <http://www.pinkfloydonline.com/discography/wishyouwerehere/> (last visited Aug. 23, 2010).