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TO ALL GOVERNMENT LAWYERS, ROGER LEFT YOU A NOTE

TRIBUTE TO ROGER C. CRAMTON

Susan P. Koniak†

Roger's contribution to the field of legal ethics cannot be overstated. A prolific scholar, first class teacher, and energetic participant in many important debates at the ALI, ABA, and other fora on what the law governing lawyers should be, there are few, if any, who have contributed more. But when asked to write about Roger's contribution to the field of legal ethics—a field still much maligned but which Roger did all he could to elevate—I was not lost in a sea of this and that; one article of his immediately came to mind.

It is a short piece: fifteen law review pages, no more. And it is published not in any of the many top-tier law reviews that were Roger's normal stomping grounds, but by invitation in the *John Marshall Law Review*, although you may also find it online at Cornell's Digital Repository of its faculty's work.¹ It is in this all-but-orphan bit of work that I most hear Roger's voice—a voice that elevates him above other scholars as prolific, other teachers as devoted, and other public servants who also sacrifice to serve the state. In this piece Roger bares his character: a spine of steel wrapped in gentility. For Roger was a man of moral courage, as all who aspire to instill virtue in others must be and so few who teach ethics are (a fact Roger bemoaned as do I).² But I digress. The article that leapt to mind was not about teaching ethics, but living them out. It is both a celebration of and missive to all government lawyers. Lawyers who,

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¹ I hasten to add that of the articles I have written, not nearly as many as Roger has, the one I would most like to be remembered for is published in the equally, if not more, obscure *Roger Williams University Law Review*. Susan P. Koniak, *The Other Way Round*, 5 *ROGER WILLIAMS U. L. REV.* 145 (1999). And unlike Cornell, Boston University has no digital repository for its professors' works, which makes it near impossible to find.

² See Cramton and Koniak, *Rule, Story, and Commitment in the Teaching of Legal Ethics*, 38 *WM. & MARY L. REV.* 145, 189–98 (discussing who is fit to teach ethics and how the moral quality of a candidate for an ethics job should be questioned in the hiring process, including suggestions on how such inquiries should be made).

Roger reminds us, have a special obligation, not imposed on other lawyers, to see that justice is not undone.

The article describes the actions of some lawyers at the Department of Justice, during Watergate. Roger was head of the Office of Legal Counsel for a brief period in that most trying time, and he speaks directly and candidly to the conduct of lawyers at the Department of Justice, including his own, when confronted by a president who saw the Department of Justice as an instrument to effect not justice, but his own personal and too often corrupt ends. Roger left these words for you, Attorney General Sessions; for you lawyers—all of you—serving at the EPA, Homeland Security, HUD, or any of our many other federal agencies and departments; for all our state Attorneys General, Eric Schneiderman of New York, Pam Bondi of Florida, Ken Paxton of Texas, Xavier Becerra of California, and all your colleagues in all our other states; for all who serve in those state Attorneys General offices; and for all the countless other lawyers that serve in all the other state and local agencies that populate our fifty states, territories, and protectorates.

He left this note for you, for ordinary times and for extraordinary ones, like the times of which Roger wrote. It is the true story about how even good men failed to do justice, what they might have done instead, and about some, or at least one—Roger—rock-ribbed Republican who served Richard Nixon, who did right.

The article is titled "On the Steadfastness and Courage of Government Lawyers."³ And that choice of title itself reflects much about Roger as a man. Because while the article acknowledges the diligence and dedication to justice that has always characterized most of the many men and women who are government lawyers, then and now, particularly in the Department of Justice, which is the focus of Roger's piece, Roger does not flinch from noting that among those mostly nameless upstanding lawyers of the bureaucracy, there were and always will be those who fall short and serve not justice, but false gods.

The article begins with Roger describing the overwhelming sense of pride he felt when, during his brief tenure at the Department of Justice, he would walk by these words on the Department's "massive walls": "The United States wins its point whenever justice is done its citizens in the courts."⁴

³ Roger C. Cramton, *On the Steadfastness and Courage of Government Lawyers*, 23 J. MARSHALL L. REV. 165 (1990).

⁴ *Id.* at 165.

Many walk past those words without giving them a thought. Others who toil in the Department of Justice, like Roger, look up at those words and feel a sense of pride. But few, all too few I am afraid, are willing to stand on those words, if so standing puts them at odds with their superiors, interferes with their ambition, or risks losing their job. Roger did that. And this article tells that tale, but not first, and the order of presentation as well as the tone is important because it reveals the humility that is essential to all who dare to stand on principle: an ability to understand that one might be wrong, followed by the fortitude to say after careful reflection "but not this time." And then to act.

Before Roger describes the stand that he took, which did cost him his job, he does something as rare and in its own way as courageous: he calls out the failure of a man, if not a friend, someone for whom Roger had genuine respect.⁵ Richard Kleindienst, much maligned by the time Roger wrote of his abiding respect for the man—an act of courage in itself—served first as President Nixon's Deputy Attorney General and then as Attorney General of the United States.

Roger is scrupulously fair to Kleindienst, beginning with a story demonstrating not Kleindienst's moral weakness but his strength—a story that occurred while John Mitchell was Nixon's Attorney General and Kleindienst Mitchell's Deputy. Roger begins by explaining that while it may surprise many readers, Kleindienst brought to the Justice Department a greater willingness to oppose large corporate mergers than had characterized the tenure of his predecessor, Dan Turner, who had served in President Lyndon Johnson's administration.⁶ Roger did not have to add that he sided with Nixon's much more narrow view of the antitrust laws than Kleindienst, but always candid, Roger did.⁷

The good Kleindienst story with which Roger begins, explains how Kleindienst handled a direct and improper order (by phone call) from President Nixon to summarily drop an appeal

⁵ Roger describes Richard Kleindienst as "intelligent, energetic, and personable," and states "I believe Kleindienst was and is a good man" who fell into error. *Id.* at 168, 171.

⁶ *Id.* at 168–69.

⁷ "I believe that Nixon . . . had the better view [than Kleindienst] on the underlying merits of applying the antitrust law to conglomerate mergers. What is the harm in the same company owning both hotels and rental cars provided there is competition in each of the separate industries?" *Id.* at 169–70 (internal citations omitted). While no expert on antitrust laws, I side with Kleindienst and against my Roger and Nixon, but then again, as I explain later, Roger and I had many disagreements on policy.

to the Supreme Court of an antitrust case, involving ITT, a Nixon-friendly company, and to fire Richard McLaren, the head of the Department's Antitrust Division, who was handling the case. Kleindienst did not comply. He enlisted the assistance of Attorney General Mitchell, who convinced the President to back down. And Roger quotes Kleindienst on this matter at some length, as Kleindienst's reflections on this incident exemplify the approach one would hope any Deputy Attorney General would have. Words worth repeating in full, especially in today's trying times:

Simply put, I could not have functioned effectively as deputy attorney general [if I had acceded to the President's request] . . . granted, the President heads the Department of Justice and we are to effect *his* policies. But how these policies are arrived at in the first place, and how they are therefore changed are essential matters. . . . If the attorney general's approach to antitrust enforcement was to be altered, that change should be the result only of thoughtful policy discussions at the highest level, not of impulse.⁸

And that warning about "impulse" was issued well before presidents announced policy in early morning missives of 140 characters each. Good on Kleindienst, as we Brooklynites say.

The greater ITT scandal, which those investigating the wrongdoing of President Nixon did not manage to get enough evidence to establish with certainty, involved not this phone call but the later settlement of the case that was the subject of that call, as well as other antitrust charges then pending against ITT. The suspicion was that the settlement had been bought by a \$400,000 donation from ITT to fund the 1972 Republican National Convention.⁹ More on that in a moment, but first we return to the good Kleindienst story, which did not end well.

As Roger explains, having deftly and appropriately handled Nixon's heavy-handed attempt to interfere with a pending Justice Department case with aplomb, Kleindienst fell down. He lied about that Nixon order call in his confirmation hearing to become Attorney General. He was asked not once, but over and over again, if "anyone"—Roger puts that word in quotation—at the White House had contacted him about the ITT

⁸ *Id.* at 169 (quoting Kleindienst).

⁹ See Ciara Torres-Spelliscy, *The I.T.T. Affair and Why Public Financing Matters for Political Conventions*, BRENNAN CTR. JUST. (Mar. 19, 2014), <https://www.brennancenter.org/blog/itt-affair-why-public-financing-matters-political-conventions> [https://perma.cc/6ZGR-9YMW].

matter, and Kleindienst said no. As Roger puts it, this was a good man falling into error by succumbing to his ambition to become Attorney General and to the tug of loyalty to Nixon, a man Kleindienst had known and believed in for a very long time.

Kleindienst would not be my pick of a basically good person falling into error. I watched every moment of the Ervin hearings and the many misleading press statements Kleindienst later made, not to mention my many viewings of *All the President's Men*, which includes a clip of Kleindienst, lying and looking like he is lying to boot. I would have picked John Dean, but Roger knew Kleindienst and that makes me give Kleindienst some benefit of the doubt. More important than who the exemplar is, however, is Roger's point. It is good people doing evil that we must most worry about. There are simply not enough evil people to account for all the wrongs done. We must concentrate on understanding and reaching good people who go, or may go, astray, as truly evil people are not likely to hear or be interested in our words. It is with decent folks that hope must abide. All people, as the Bible teaches, have feet of clay. But on those feet of clay it is nonetheless possible to hold one's ground. And when one falters, to get up again one must understand and admit one's mistake. Kleindienst alas fails that test.

Long after the event, as Roger points out, Kleindienst sought to justify his lie to Congress, and Roger quotes him on this too:

"In the charged political environment that mesmerized my confirmation hearing, if that impulsive call from the President had been revealed, certain segments of the press would have exploded it into a 'scandal' that never in fact existed."¹⁰

Taking Roger's judgment that Kleindienst was not a malevolent actor here, this quote allows us to add to the list of things that led this presumably good man astray. Hubris. For he appointed himself the arbiter of whether there was scandal or not when he had no reason to believe he was privy to all the facts. And as it turns out, there was scandal there, and whether Kleindienst knew that is unclear. Some seven years after Roger published his article, transcripts of tapes were released from the huge Nixon trove, showing there was some back-door deal between Nixon and ITT to settle the antitrust cases in exchange for donations to Nixon or the RNC.¹¹ Upon

¹⁰ Cramton, *supra* note 3, at 171.

¹¹ George Lardner Jr., "On Tape, Nixon Outlines 1971 'Deal' to Settle Antitrust Case Against ITT," WASH. POST, Jan. 4, 1997, at A3. Released at the end of 1996 or

release of those transcripts, Kleindienst continued to maintain that he knew nothing of the apparently corrupt deal and also seemed to scoff at the idea that the settlement was not on the up and up, transcripts notwithstanding. That last bit does not help his credibility, at least in my eyes.¹²

Whatever your ultimate judgment on Kleindienst, Roger explains that the man paid dearly for his dishonesty. For refusing to fully answer questions put to him by a congressional committee, Kleindienst pled guilty in 1974. While this plea was only to a misdemeanor offense, Roger points out that it nonetheless "irreparably damaged Kleindienst's reputation and future career."¹³

Roger points out that Kleindienst was not the first, nor surely the last, lawyer to "shade" the truth to protect a client at the risk of a perjury charge, but is clear that the "others do it" excuse—the go-to justification used by "good" folks to justify their wrongful acts—is no excuse at all.

And what of Kleindienst's loyalty to a client and a friend, which Roger plausibly posits was part of Kleindienst's motive to lie? Roger takes that on next, showing how loyalty to client or friend is not synonymous with acquiescing to that person's wishes, no less assisting that person in misguided, wrongful, or corrupt plans. The role of a lawyer as well as a friend is to help another avoid mistakes, however uncomfortable that role may be. This is always an obligation of the good lawyer and the good friend, (and yes, I do realize that those roles are not the same, but in this instance the duties are closer than in most) and this is true whether the intended wrong by the client or friend is great or small. Small wrongs here and there lead almost inevitably to bigger ones. But whether you agree with the need to worry about "small" wrongs, Nixon's failings were not small. And the nation suffered greatly as a consequence.

As Roger tells the tale, "Richard Kleindienst had the opportunity to save Richard Nixon from the fateful consequences of Nixon's worst instincts."¹⁴ Indeed, Roger suggests that if Kleindienst's loyalty had been worthy of the name and not mere subservience, the easy way, Kleindienst might have even saved Nixon from the disgrace of having to resign the presidency. If

beginning of 1997, these same transcripts also suggest what Roger could not have known in 1990 when he wrote his piece: that Kleindienst might have been more involved in the shadier aspects of the ITT deal. *Id.*

¹² *Id.*

¹³ Cramton, *supra* note 3, at 171.

¹⁴ *Id.*

true, that would have been loyalty. But Kleindienst's form of loyalty, if anything, helped guarantee Nixon's decline. According to Roger, that story is this:

Five days after being sworn-in as Attorney General, Kleindienst learned of the Watergate break-in. That same day, he was told by Gordon Liddy¹⁵ that the Watergate burglars had been working for the reelection committee and that former Attorney General John Mitchell, then heading the reelection committee, wanted the burglars, who had been apprehended, "out of jail at once."¹⁶ Kleindienst exploded, telling Liddy he did not believe this message came from Mitchell, who knew how to reach Kleindienst if he had anything to relay. "What the [expletive deleted] did you people think you were doing in there?" Then he told Liddy to get out of his sight.¹⁷

To paraphrase Roger: so good so far, but not nearly enough. And here Roger suggests a bold move, what Kleindienst, if he were serving justice and had been truly loyal in the deep sense of that word, should have done. He says Kleindienst should have told Liddy to come see him later, arranged to have that conversation (legally) recorded, and asked Liddy, who apparently was willing to spill the beans to Kleindienst, to tell him everything he knew about the break-in, including information about Mitchell's and anyone else's involvement in this illegal act.¹⁸ With that information in hand, Roger says the Justice Department could have secured enough confirming evidence from reelection staffers to have had a complete picture of who did what and when in the Watergate affair well before any cover-up could have gotten underway. The criminal investigation could thus have been substantially completed before the President or his aides had a chance to obstruct the investigation. Kleindienst could early on have presented Nixon with a "fait accompli." "In the face of a steadfast Attorney General, armed with the fruits of a solid criminal investigation, no President could prevent the process from going forward other than by use of the pardon power." Words that echo even louder today.

Kleindienst did none of that. But Roger would have. Of that, I have no doubt. Roger, ever humble, does not state that,

¹⁵ Also a lawyer, now disbarred, who was convicted of conspiracy, burglary, and illegal wiretapping for his role in the Watergate affair. See *Revisiting Watergate*, G. Gordon Liddy, WASH. POST (Apr. 20, 2018), <http://www.washingtonpost.com/wp-srv/onpolitics/watergate/liddy.html> [<https://perma.cc/T38U-8R52>].

¹⁶ Cramton, *supra* note 3, at 172.

¹⁷ Cramton, *supra* note 3, at 171-72.

¹⁸ *Id.* at 172-73.

but the rest of the article detailing his own brief tenure serving Nixon makes that abundantly clear. Roger served in Nixon's Justice Department as the head of the Office of Legal Counsel (OLC). The ethical struggle Roger faced in that position did not involve Watergate, but a seemingly smaller matter, one that, like all the nefarious acts we bundle into the name Watergate, sounded of abuse of power. The issue was impoundment: the refusal of a president to spend funds appropriated by Congress. A tug-of-war over power and another area in which Nixon overstepped. Roger lays out his legal theory of the case, nuanced and well-reasoned, more open to presidential prerogative than I would be, but fair as fair could be. And Roger, as head of OLC, laid out his position clearly to his superiors at Justice and to the President. Nixon wanted more. In effect, he wanted what amounted to unlimited ability to ignore congressional dictates on spending even when they were expressed by Congress as clear mandates in the strongest and most unequivocal terms. With that position, Roger could not—and did not—go along. Roger stood firm, stood up to the President, and Nixon fired him—a badge of honor in my eyes at least as great as any of the many others Roger received, all richly deserved.

Roger said no to the President. Roger, this model of gentility, this man who laughed so easily and well, this man with a soft and loving heart that all could see reflected in his kind and gentle face. He said no when it mattered. He said no to a president. And then he wrote down what he had done and why and stated the consequence. For to live a life of principle has costs. Costs worth paying for honor, for one's soul, and most of all for justice, which all government lawyers have a special obligation to serve.

To all government lawyers, a great man has passed, but he left you a note.

Let his model inspire all of you who serve today.