

1989

Book Review: The Tenth Justice. by Lincoln Caplan.

Brian K. Landsberg

Follow this and additional works at: <https://scholarship.law.umn.edu/concomm>



Part of the [Law Commons](#)

Recommended Citation

Landsberg, Brian K., "Book Review: The Tenth Justice. by Lincoln Caplan." (1989). *Constitutional Commentary*. 92.
<https://scholarship.law.umn.edu/concomm/92>

This Article is brought to you for free and open access by the University of Minnesota Law School. It has been accepted for inclusion in Constitutional Commentary collection by an authorized administrator of the Scholarship Repository. For more information, please contact lenzx009@umn.edu.

the right to vote and to use public accommodations. But as soon as the government bureaucracy was created, something went disastrously wrong, and feminists, leftists, spokesmen for sundry ethnic constituencies, not to mention homosexuals and others, all leaped on the "civil rights" bandwagon. The result is a monstrous machinery of preferential treatment, quotas, and discrimination-as-revenge. The "civil rights society" is a thicket of contradictory and often incomprehensible legal and bureaucratic regulations that require everyone—employers, university deans, school admissions committees, and citizens themselves—to classify people on the basis of sociologically dubious categories of oppression. The Rehnquist Court is trying to change some of this, but it remains to be seen how much mere judges can do. Given the universities' willingness to employ the "diversity" subterfuge, and Congress's power to grant outright racial set-asides, it seems likely that our racial spoils system will endure.

The end result is to make all Americans far more cynical about civil rights. Some people have always been successful because they cut corners and used connections, but now the government itself explicitly and unashamedly cuts corners and makes connections for those who come from certain racial groups. Young people today know that more than ever success is a question of belonging to the right category—sex, race, ethnic group—and that such stacking of the decks is not only common but legal. That is the real tragedy that has resulted from the failure of the "civil rights society," but the full accounting of that tragedy has not been written.

THE TENTH JUSTICE. By Lincoln Caplan.¹ New York, N.Y.: Alfred E. Knopf. 1987. Pp. x, 340. \$19.95.

*Brian K. Landsberg*²

This is a book with a split personality. Dr. Jekyll provides a slightly romanticized but basically sound history, description, and analysis of the role of the Solicitor General. Mr. Hyde transforms the book into a polemic against the Reagan-era solicitors general, relying on journalistic techniques popularized by Woodward and Armstrong in *The Brethren*. Combining the two detracts from a generally informative book. One comes to feel the Dr. Jekyll por-

1. J.D., Harvard Law School.

2. Professor of Law, University of the Pacific, McGeorge School of Law. Chief, Appellate Section, Civil Rights Division, United States Department of Justice, 1974-1986.

tion being overwhelmed by Mr. Hyde; the otherwise insightful analysis becomes somewhat distorted in order to buttress the attack on the Meese Justice Department. This is unfortunate, because both stories are worth telling. The story of the Meese Department of Justice was in the press daily. Solicitor general's briefs on such issues as abortion, affirmative action, and tax exempt status of segregated private schools elicited a firestorm of criticism. Readers of this journal, however, will want to consider more enduring questions: Who is the solicitor general and what is his place in American law? What, if any, constraints govern him?

The solicitor general is the chief advocate for the federal government in the Supreme Court. The United States differs significantly from other litigants in the federal courts. First, it is the primary user of those courts. Second, federal courts are themselves instrumentalities of the United States. Finally, there is a tradition which says that the United States should not be as partisan as other litigants.

Representation of the interests of the United States in legal matters is vested in hundreds of legal offices, with responsibility divided by subject matter, by geography, and by function. Each department and agency employs a general counsel. Regional offices abound in the departments and agencies, including the Department of Justice (which maintains ninety-three United States Attorney offices). Generally speaking, general counsels of departments and agencies provide internal legal advice and appear in administrative proceedings, while the Department of Justice performs court litigation. At the apex of the litigation pyramid are the attorney general and his assistant for appeals, the solicitor general, who controls all the government's Supreme Court litigation. Congress established this centralized model in preference to dispersion of litigating authority.³ Such a structure enhances uniformity of legal positions among government agencies, enhances the quality of government representation in the courts, and confers great power on the solicitor general. The Supreme Court has endorsed "the wisdom of requiring the chief law officer of the Government to exercise a sound discretion in designating the inquiries to enforce which he shall feel justified in invoking the action of the court. . . . [T]he exercise of this discretion will greatly relieve the court and may save it much

3. Under 28 U.S.C. § 518(a) (1982), "Except when the Attorney General in a particular case directs otherwise, the Attorney General and the Solicitor General shall conduct and argue suits and appeals in the Supreme Court . . . in which the United States is interested." The Supreme Court views the term "in which the United States is interested" as encompassing the interests of all branches, not just the executive branch. *United States v. Providence Journal Co.*, 108 S. Ct. 1502 (1988).

unnecessary labor and discussion."⁴

Lincoln Caplan contends that although the solicitor general is located in the executive branch he figuratively holds a unique position on the Supreme Court. That position, Caplan argues, invests the solicitor general with equally unique responsibilities to the Court. Caplan supports his thesis with a rich melange of anecdote, law, and policy. Applying an elevated standard of responsibility to President Reagan's two Solicitors General, Rex Lee and Charles Fried, Caplan not surprisingly finds them lacking. The book concludes on this bitter note:

To understand how the Reagan Administration views the law, it is only necessary to know what it did to the office of the Solicitor General. . . . [O]ne of the great misdeeds of the Reagan Administration was to diminish the institution that, to lawyers at the highest reaches of the profession, once stood for the nation's commitment to the rule of law.

Of course, the solicitor general is not literally the tenth Justice of the Supreme Court, nor should he be.⁵ He acts as an advocate for a client with interests adverse to those of other litigants before the Court. He is a member of the executive branch, who may not exercise article III judicial powers.⁶ Like any litigant, his ultimate power is the power of persuasion. Moreover, he is a political appointee, serving at the pleasure of the president, as President Nixon's abrupt removal of Solicitor General Griswold in 1973 reminded us. On the other hand, it is hardly surprising that the Court has come to rely heavily on the solicitor general. The United States appears in forty percent of the cases submitted to the Court and in about sixty percent of the cases the Court hears on the merits.⁷ The statistics are simply a reflection of who the solicitor general's client is and what types of cases the Supreme Court hears. The Supreme Court primarily reviews decisions of federal courts.⁸ It may review

4. *FTC v. Claire Furnace Co.*, 274 U.S. 160, 174 (1927).

5. Arthur Schlesinger, Jr. draws a different connotation from the metaphor, the tenth justice. Speaking of Archibald Cox, he says "like all the best solicitors general, he entered so intimately into decisions as to become, at times, a sort of tenth justice." A. SCHLESINGER, JR., *ROBERT KENNEDY AND HIS TIMES* 396 (1978). I take that to mean that Cox carefully considered the facts and the law to decide what position was right, much as a justice would, and then presented it as the position of the United States. Justice Kennedy recently made a similar point: "[E]very lawyer every day is a judge in his or her own office," evaluating and acting on legal issues presented by clients or potential clients. Address by Justice Anthony Kennedy, McGeorge School of Law Commencement (May 21, 1988).

6. See *United States v. Nixon*, 418 U.S. 683, 704 (1974) ("the 'judicial Power of the United States' vested in the federal courts by Art. III, § 1, of the Constitution can no more be shared with the Executive Branch than the Chief Executive, for example, can share with the Judiciary the veto power . . .").

7. 1986 ATT'Y GEN. ANN. REP. 5-7.

8. In the October 1986 term the Court rendered full opinions in one hundred fifty-two cases, of which forty-four came from state courts, one hundred seven from federal courts, and

decisions of state courts only if they raise a federal question.⁹ The Court pays punctilious deference to the other branches of government which the solicitor general represents. The solicitor serves the Court by serving his client. That the carefulness and thoughtfulness of the solicitor's arguments is motivated primarily by concern for his client rather than for the Court does not detract from the Court's appreciation of the solicitor's positions.¹⁰ So the Court provides an office for other lawyers appearing before it and a separate office for the solicitor general. It allows the solicitor general to file *amicus curiae* briefs without obtaining consent of the parties or showing cause, a privilege granted to no other advocate except one representing a state. It regularly invites the solicitor general to express the views of the United States in cases involving construction of laws or regulations or practices of the government—while seldom inviting views of other advocates.

I doubt that the historical record reveals the pure tradition of apolitical solicitors general that Caplan suggests. What ultimately distinguishes the solicitor general from other political appointees in the executive branch is what distinguishes any good lawyer from his or her client: the ability to evaluate a case objectively, to sort out policy and legal issues, and to consider competing arguments and interests. Theodore Sorenson's testimony about the attorney general applies as well to the solicitor general:

We should expect a certain amount of partisan advocacy, not judicial judgment, from our Attorneys General as we do from ordinary lawyers. But quality members of the bar, even while serving as partisan advocates, can and should and generally do retain a certain and necessary degree of independence from their clients; and the same should be true of the Attorney General¹¹

The best solicitors general have provided their clients with sound, disinterested advice, without concern for personal advancement. They stand at sufficient distance from their client, so their advice takes the long view. And they have generally but not always succeeded in convincing their clients to take responsible litigating posi-

one was an exercise of original jurisdiction. *The Supreme Court, Leading Cases, 1986 Term*, 101 HARV. L. REV. 119, 367-70 (1987).

9. 28 U.S.C. § 1257 (1982).

10. Kathryn Werdegar notes "the 'permanency' of the Government's relation to the Court—its repeated appearances term after term, a relation which has led some to characterize the solicitor general as the Court's 'ninth-and-a-half' member." Werdegar, *The Solicitor General and Administrative Due Process: A Quarter-Century of Advocacy*, 36 GEO. WASH. L. REV. 481, 482 (1968).

11. *Removing Politics from the Administration of Justice: Hearings on S.2803 and S.2978 Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 93d Cong., 2d Sess. 16 (1974) [hereinafter *Senate Hearings*] (statement of Theodore Sorenson, Former Special Counsel to President Kennedy).

tions in the Supreme Court—not because of a heightened responsibility to the Court but because that is effective lawyering. As Chief Justice Rehnquist puts it, “the lawyers in the office of the solicitor general must be closely attuned to the current mood of the Court, and yet at the same time they must vigorously urge upon the Court the position adopted by the government.”¹²

The solicitor general confronts the same core issue as any high ranking law enforcement official: how to enforce the law while adhering to administration policy. The obvious way to reconcile the two functions is to determine that the law and policy are in harmony. Given the ambiguity of the law, the law enforcer may harmonize law and policy through interpretation. Caplan relies on the law-policy dichotomy as the guidepost to determine when the solicitor general should follow the wishes of the president or attorney general; quoting a legal opinion of the Office of Legal Counsel, he concludes that the solicitor general should decide matters of law, while the attorney general should decide matters of policy. Moreover, the solicitor general should decide whether an issue is one of law or of policy. But as the leading recent study of the Department of Justice observes, “the inseparability of law and policy in the conduct of litigation makes the line between proper and improper political considerations difficult to draw.”¹³ Not only is the law-policy dichotomy questionable, but even if accurate it ignores the fact that the legal issues usually raise policy issues.

The solicitor general is a lawyer with a client. The client is not the president, the FTC, the “people,” or any interest group. It is the United States.¹⁴ Since federal agencies normally do not sue one another (arguably article III or lack of statutory authorization precludes them from doing so),¹⁵ it falls to the solicitor general to be

12. W. REHNQUIST, *THE SUPREME COURT* 74 (1987).

13. D. MEADOR, *THE PRESIDENT, THE ATTORNEY GENERAL AND THE DEPARTMENT OF JUSTICE* 28-29 (1980). This book includes a perceptive paper by Professor Daniel J. Meador, who served as Assistant Attorney General, Office for Improvements in the Administration of Justice, in the Carter administration. It also reproduces the edited transcript of a conference in which former Attorneys General Levi and Bell and former Solicitors General Griswold and McCree participated, along with other highranking departmental officials and two former counsels to the President. Caplan's analysis might have been improved by examining the insights this book provides.

14. A committee of the District of Columbia Bar suggests that in normal circumstances the client of the government lawyer is the agency which employs the lawyer. *Report by the District of Columbia Bar Special Committee on Government Lawyers and the Model Rules of Professional Conduct*, 3 *THE WASHINGTON LAWYER* 53, 54 (1988). However, the Committee's thoughtful analysis does not address the unique responsibilities of the solicitor general.

15. In some cases the government may nominally be on both sides. For example, the government as a shipper may have challenged an order of the Interstate Commerce Commission setting rates. There, the real parties in interest are the United States and the carrier. See, e.g., *United States v. ICC*, 337 U.S. 426 (1949). But see *S & E Contractors, Inc. v.*

the "judge" when issues on which federal agencies are in dispute reach the Supreme Court. Caplan misses this point, as shown by his endorsement of Archibald Cox's remarkable abdication of responsibility in *St. Regis Paper Company v. United States* where in the guise of representing the Department of Justice as appellee he argued to the Court that "on balance" the St. Regis Paper Company, supported by the Bureau of Census, should prevail.¹⁶ As reported by Victor Navasky and repeated by Caplan, Cox's oral argument presented both sides of the case and then presented his personal views.¹⁷ Caplan, setting up a contrast between Cox and Fried, says:

Cox rarely made an argument as Solicitor General until he was convinced it was the logical solution to a legal problem, and when he could not make up his mind, he refused to choose a position just to have one.

So much for Canon 7, "A lawyer should represent a client zealously within the bounds of the law."¹⁸ So much, too, for Justice Frankfurter's plaint, "the Government speaks with many voices."¹⁹ The Supreme Court, notwithstanding Cox's personal views to the contrary, upheld the position of the United States. I relate this episode not to denigrate Cox, who was an outstanding solicitor general, but to stress that the solicitor general should not be called the tenth justice; his duty is to set the position of the United States and vigorously present it to the Court.

If an independent regulatory agency insists on a contrary position, the solicitor general may allow the agency to represent itself in the Supreme Court. For example, in two cases the ICC appeared in the Supreme Court to defend rulings that railroads' unequal treatment of blacks did not offend the Interstate Commerce Act, but Solicitors General Francis Biddle and Philip B. Perlman appeared for the United States and argued that the black plaintiffs should prevail.²⁰

United States, 406 U.S. 1, 13 (1972) (attorney general may not challenge decision of Atomic Energy Commission because "[n]ormally, where the responsibility for rendering a decision is vested in a coordinate branch of Government, the duty of the Department of Justice is to implement that decision and not to repudiate it"); cf. *INS v. Chadha*, 462 U.S. 919, 931 (1983) ("The agency's status as an aggrieved party under § 1252 is not altered by the fact that the Executive may agree with the holding that the statute in question is unconstitutional.").

16. 368 U.S. 208, 217 (1961).

17. L. CAPLAN, *THE TENTH JUSTICE* 189-90 (1987); V. NAVASKY, *KENNEDY JUSTICE* 295-96 (1971).

18. MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 7 (1980).

19. Dean, *The Lawyer and the Courts*, 50 A.B.A. J. 462, 464 (1964) (quoting Address by Solicitor General Cox before N.Y. County Lawyers Ass'n (Dec. 14, 1961) (transcript at 37-39)).

20. *Henderson v. United States*, 339 U.S. 816 (1950); *Mitchell v. United States*, 313 U.S. 80 (1941). Both the United States and the ICC were considered appellees.

After leaving the government, Archibald Cox found

all through the Department questions that affect the Solicitor General, the Civil Rights Division, the Antitrust Division and also questions that come up somewhat expectedly in some of the other divisions, where the narrowly defined lawyer's function simply cannot be separated from policymaking functions. Often, of course, the policymaking function is exercised by the lawyer. . . . Still, they are questions on which there should be empathy between the Attorney General, Solicitor General, and the Assistant Attorneys General and those who are elected to be responsible for policy.²¹

Cox's formulation, while not as neat as Caplan's, captures the essence of the office. It also points up the relationship between policy and procedure, a point I would now like to address.

The solicitor general has traditionally followed fairly rigid procedures to formulate the position of the United States in the Supreme Court. In the typical case, an agency of the United States was a party in the lower courts and was defended by one of the litigating divisions of the Department of Justice. The agency will have taken a position and the Department of Justice will have reviewed the position and decided whether to advance it in the lower courts. If the agency lost below, it will forward to the litigating division a recommendation whether to seek Supreme Court review. The division will forward that recommendation to the solicitor general, along with its own evaluation and recommendation. The solicitor general will ask a member of his or her staff for an independent evaluation. Often the staff member will determine that other agencies or divisions have an interest in the issues presented, and will seek their views. The staff member will draft a recommendation, which a deputy solicitor general will review and forward to the solicitor. Where conflicting views are received, the solicitor may convene a conference with interested agencies and Department of Justice officials. Thus, the hallmark of the procedure is extensive consultation, in order to ensure careful consideration of facts, law, and policy. At each stage both political appointees and career government lawyers will take part in formulating the views. In difficult cases, positions will cover a spectrum, and participants may hotly debate what the solicitor should do. The final decision is the solicitor's, but before deciding he may consult with the attorney general.²² This process, as much as any other factor, ensures that the

21. *Senate Hearings*, *supra* note 11, at 204 (statement of Archibald Cox, Williston Professor of Law, Harvard University and Former Special Prosecutor of the Department of Justice). See also D. MEADOR, *supra* note 13, at 33, quoting the assertion of Barbara Babcock, Assistant Attorney General, Civil Division during the Carter administration "that approximately one-third of the cases handled by that Division involve significant policy issues—that is, 'issues that relate to the way this Administration is running the government.'"

22. Caplan's description of the Solicitor's filings in *Brown v. Board of Education*, 347

Supreme Court will treat the position of the United States with deference.

Perhaps it is this decision-making process that gives rise to the myth of the independence of the solicitor general. The solicitor, bound by the Constitution and laws of the United States, exercises independent judgment in mediating the positions of staff and politicians on issues of law and policy. But, as former Solicitor General Rex Lee has said: "He is a lawyer, an *advocate*, whose first duty is to see that his client, the federal government, prevails in the case at hand." Joe Rauh put the point less delicately:

The independence of the Solicitor is crap. The Attorney General is the top legal officer. If the Solicitor General doesn't agree he has every legal right not to argue it, but the Attorney General and the President have to make the decision.²³

The solicitor general's decision-making process centers around his relations with his career assistants, other agencies, and other departmental officials. His staff consists of a small number of highly capable lawyers with impressive credentials. Most of them come there for a few years of public service and then leave for other pastures. Alumni of the solicitor's office are the cream of Supreme Court practitioners. A small number of dedicated public servants treat the solicitor's office as their career. Those who reach the pinnacle of that career serve as deputy solicitors general. Caplan is rightly impressed with the caliber of the career deputies and the assistants to the solicitor general. While recognizing that their job is to present to the solicitor legal and policy options, Caplan fails to see how seductive that assignment can be. Thus, he quotes approvingly a "confidential informant" who hopes to work in the solicitor general's office: "It's the only spot, besides a judgeship, where your job is to figure out what *you* think is the right answer for the law and then to present your argument to the highest court in the land."

Those career attorneys are not policy eunuchs. For instance, Philip Elman, an assistant to the solicitor in the 1940s and 1950s, explains that the career lawyers in office in the 1940s took very seri-

U.S. 483 (1954), vividly demonstrates interactions of career lawyers, the solicitor, the attorney general, and the president in deciding whether and what to file as *amicus curiae*. An intriguing recent example is described in B. CRAIG, CHADHA: THE STORY OF AN EPIC CONSTITUTIONAL STRUGGLE 86-87 (1988). At the outset of the Carter administration the Civil Division recommended taking an appeal in a legislative veto case, *Clark v. Valeo*, 559 F.2d 642 (D.C. Cir. 1977). An assistant to the Solicitor, agreeing that the veto provision was unconstitutional, nonetheless recommended against appeal because "I suspect (and my conversations with the Attorney General's assistants support this suspicion) that the administration either is not ready to take a position with respect to the constitutional propriety of the mechanism of the legislative veto or already has decided to acquiesce in its use. In either event, it would not be appropriate to pursue this case further at this time."

23. V. NAVASKY, *supra* note 17, at 287.

ously recommendations of President Truman's Committee on Civil Rights "urging an end to racial discrimination in all its forms . . ." So Elman and a sympathetic Interior Department lawyer "cooked up the idea that [Secretary of Interior Oscar] Chapman should write to the Attorney General requesting the Department of Justice to file an amicus brief in [*Shelley v. Kraemer*]."24

The paradigm non-eunuch, Louis Claiborne, a long-time lawyer in the solicitor general's office, describes himself as an adherent of the Old Humility, who left his job rather than "take up the New Arrogance that now prevails." He is the only one of the solicitor general's lawyers to whom Caplan devotes a chapter. Caplan provides a fascinating mini-biography of this scion of old Louisiana, and the chapter leads up to a marvelous punch-line. But what is most interesting is to compare Louis Claiborne with the adherents of the so-called New Arrogance. What does he mean by this phrase? It is left to us to infer. The phrase is a play on Justice Brennan's speech about original intent, delivered nine days before Claiborne's farewell banquet. Brennan had said that the argument of those who espouse original intent "is little more than arrogance cloaked as humility." Claiborne was unhappy with the frequency with which the solicitor general overruled "careerists" rather than "say no to the political appointees." But note that Claiborne himself "was sometimes accused by colleagues of taking liberties with the law to see justice done." In short, former Attorney General Levi was correct when he observed that "to the extent political or inappropriate considerations are thought influential, one cannot assume this might not also occur at the staff level We must not have an image of a pyramid in which inappropriate considerations are taken in account of at the top, and only at the base of the pyramid are appropriate considerations taken account of."25

An effective solicitor general must possess power. Such power may stem from personal prestige, as with Solicitor General Griswold, from dispensation of favors, or even from sheer competence. Much of the story of the Reagan administration solicitors general may be explained by the struggle for power. One further point bears mention. In a democratic society, power must rest primarily with the political appointees, not the mandarins. Where the winds of political change blow strong, the career civil servants are understandably likely to resist. The wise political appointee must differentiate advice from civil servants based on reflexive adherence to

24. Elman, *The Solicitor General's Office, Justice Frankfurter, and Civil Rights Litigation, 1946-1960: An Oral History*, 100 HARV. L. REV. 817, 817-18 (1987).

25. D. MEADOR, *supra* note 13, at 95.

the old way of doing business and advice based on the merits. Rejection of such advice is not *prima facie* proof that improper political motives prevailed. But wholesale rejection of sound advice does reflect poor judgment.

The conduct of solicitors general can be appraised by any of several neutral criteria, but since the criteria sometimes point in different directions the ultimate criterion cannot be more precise than "good judgment." Former Attorney General Richardson suggested that while the Department should follow general policy directives of the president, "the President cannot without undermining the integrity with which the law is enforced tell the legal officers of the government what to do or not to do in handling a particular case."²⁶ He spoke in the aftermath of President Nixon's instruction to "drop the God damn" *ITT* case. Former Solicitor General McCree, while agreeing with Richardson's general point, has argued that "sometimes a White House expression in [a particular case] will be appropriate"; namely, in cases with far-reaching policy implications.²⁷ The current administration's view is represented by Bruce Fein, whom Caplan quotes as saying that the solicitor general "should be a foremost promoter of the policies of the President before the Court."

Another possible criterion emphasizes the solicitor's duty to uphold statutes and agency regulations, guidelines, and actions. The solicitor's duty to his client seems clearest here, where client actions have the force of law. Unless reasonable arguments in support of them are simply unavailable,²⁸ the solicitor should ordinarily seek to uphold statutes and rules.²⁹ If the statute or rule conflicts with administration policy, the administration may take the necessary steps to change it. While it is on the books, it should be followed. But it is not so clear that this principle should apply to arguably invalid statutes which the administration opposes for fundamental structural or policy reasons. In such cases the solicitor could legitimately leave defense of the statute to Congress.³⁰

26. *Id.* at 30 (quoting E. RICHARDSON, *THE CREATIVE BALANCE* 27 (1976)).

27. *Id.* at 90.

28. *See, e.g.,* *Utah v. United States*, 394 U.S. 89, 94-95 (1969) (since the Solicitor General "believes he can advance no colorable argument which could conceivably vindicate the Federal Government's *Basart* interest if the Government's right to the other disputed property is not upheld. This being so, the Solicitor General, acting under his broad authority to conduct the Federal Government's litigation in this Court . . . was surely entitled to remove the issue from the case.").

29. 28 U.S.C. § 2403 (1976) requires that the attorney general be informed of any suit in federal court "wherein the constitutionality of any Act of Congress affecting the public interest is drawn in question." *See also* FED. R. APP. P. 44.

30. *See, e.g., Chadha*, 462 U.S. at 940 ("Congress is the proper party to defend the validity of a statute when an agency of government, as a defendant charged with enforcing

Another criterion is adherence to procedural regularity. Does the solicitor general seek the views of affected agencies? Does he hire assistants without regard to politics? Does he enjoin them to analyze cases without partisan interference? Does he examine each case with an open mind? Perhaps procedural regularity also requires regard for consistency, a kind of internal *stare decisis* which disfavors taking positions which contradict prior positions. I would also include under this rubric the necessity to file credible briefs. Credibility is an essential part of a lawyer's stock. Lawyers who appear frequently before the Court develop reputations as to credibility and ability. A former supreme Court clerk explained the solicitor's high success rate: The government "petitions the Supreme Court in clear, straightforward terms, informs it at the outset why a case is or is not significant, gives an orderly and concise rendition of the facts and the most potent and direct arguments for its position."³¹ Credibility stems from workmanship and honesty.

Another possible principle relates to amicus briefs. At mid-century, government amicus briefs in the Supreme Court were exceedingly rare; the solicitor general filed only one amicus brief on the merits in the Supreme Court in 1950.³² The number stayed in single digits throughout the 1950s, except when the solicitor filed in the *Brown* cases. The filings increased to double digits under Archibald Cox (twenty-eight in the 1963 Supreme Court term) and have stayed there ever since. They reached their highest level under the Reagan solicitors general. Caplan notes that during this same period private interest groups increasingly turned to the amicus brief as a form of advocacy, not as a vehicle for helping the Court. In his view, however, the Reagan administration was the first actively to embrace the amicus brief "as a tool of change."

Caplan's view of the solicitor general as a tenth justice initially seems most attractive when applied to amicus briefs, because when the government is not a litigant it seems more realistic to expect a government brief to be balanced, in the way we expect judicial opinions to be written. But that view ignores the reasons for the solicitor general to file as amicus. Most amicus briefs support a clearcut federal interest in defending federal statutes or programs or in enforcing federal law. In those cases the government, while nominally an amicus, is analogous to an intervenor. There are, however, cases lacking any direct federal statutory interest. An early example is

the statute, agrees with plaintiffs that the statute is inapplicable or unconstitutional."); *United States v. Lovett*, 328 U.S. 303, 306-07 (1946).

31. J. WILKINSON, *SERVING JUSTICE* 30 (1974).

32. 1959 ATT'Y GEN. ANN. REP. 43.

the brief of the United States in *Shelley v. Kraemer*, signed by Attorney General Tom Clark and Solicitor General Perlman—the first U.S. amicus brief in a civil rights case.³³ The brief was filed in response to pressure from the NAACP, and Philip Elman, who wrote it, believes Attorney General Clark made the decision to file.³⁴ Two points strike the reader today. First, although the Supreme Court rules of the day were silent on the point,³⁵ the solicitor obviously felt compelled (perhaps by 28 U.S.C. § 518(a), which authorizes the solicitor to appear in the Supreme Court in appeals in which the United States is interested) to explain convincingly what interest the United States held in the outcome of the case. The brief spends twenty-five pages presenting the interest of the United States, complete with statements of the President, the Administrator of the Housing and Home Finance Agency, the Surgeon General, the Under Secretary of the Interior, the acting Secretary of State, and the President's Committee on Civil Rights.³⁶ Second, the brief was very much an advocate's brief, strenuously arguing that judicial enforcement of racially restrictive covenants was unconstitutional. The brief reinforced the legal argument with a section headed "ENFORCEMENT OF RACIAL RESTRICTIVE COVENANTS IS CONTRARY TO THE PUBLIC POLICY OF THE UNITED STATES."³⁷ *Shelley* is thus an early example of a case in which the United States had an articulable interest despite the lack of direct impact on any law which the federal executive enforces, and refutes any notion of a general policy against filing amicus briefs as a tool of change. Normally the solicitor should file as amicus in cases that directly bear on federal enforcement of the law; it does not follow that he should never file in other cases. Indeed, if the executive branch has a strongly held position, one suspects the Justices of the Supreme Court would like a definitive statement of the position and the reasons for it.

All of these criteria are inexact and potentially conflicting. But they seem to be about as neutral as can be fashioned. They are not entirely neutral, however, because they tend to favor the mainstream of the law. Beyond that, most of us want the solicitor to embrace the substantive positions which we think right; to that extent, we are anything but neutral in judging his performance.

33. R. KLUGER, *SIMPLE JUSTICE* 251 (1976).

34. *Id.* at 251-53.

35. Sup. Ct. R. 27 (1939).

36. 46 *LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW* 233-57 (P. Kurland & G. Casper eds. 1975) [hereinafter *LANDMARK BRIEFS*].

37. *Id.* at 324.

Another criterion is success rate. The solicitor general typically wins most of his cases in the Supreme Court. Comparison of one solicitor's success rate with that of others is, again, not wholly neutral, for it favors those who support the status quo and disfavors those who seek change. Should we equate caution with virtue in a solicitor general? This problem infects efforts to evaluate the solicitor general's position in individual cases. Does the fact that the position of the solicitor general prevailed in *Lynch v. Donnelly* validate his filing? Does his loss in *Wallace v. Jaffree* render that filing improper? One's answer to those questions will depend in part on one's view of the merits. Perhaps it will also turn on one's view of what kinds of cases call for amicus participation by the United States. Certainly the briefs in those cases do not convincingly show that the United States has any statutory interest in preserving creches in Pawtucket or moments of silence in the Mobile public schools.

Loose though they are, the above criteria provide a possible standard for analysis of the record of a solicitor general. *The Tenth Justice* lacks such a standard. This becomes clear early in the book, when Caplan discusses the *Bob Jones University* case.³⁸ The University had lost its tax-exempt status because of its racially discriminatory practices. The solicitor general had acquiesced in certiorari, during the Carter administration, because of the importance of the question whether Internal Revenue Service rules denying tax-exempt status to such institutions were authorized by law. The solicitor had plainly stated his position that the rules were authorized. The Reagan administration filed a brief on the merits which agreed with the University on the statutory issue. Caplan adopts three criticisms which he attributes to unnamed lawyers in the solicitor general's office. First, the position "was wrong on the law." Second, "the change didn't appear to serve the Administration's interests." Third, "the flip-flop in position . . . had no serious precedent."

Caplan's premises about *Bob Jones* are shaky; his reasoning is shaky; his conclusion is correct. Of course, in hindsight we know that the Reagan administration was "wrong on the law," because the Court has said so. But when the government filed its brief the best one could say was that reasonable arguments could be made on

38. *Bob Jones University v. United States*, 461 U.S. 574 (1983). Strictly speaking, this case tells us little about the Reagan solicitors general, since Rex Lee recused himself from the case. The Acting Solicitor General responsible for the case was Lawrence Wallace, a career civil servant mistakenly identified in another chapter as a "holdover[] from the Nixon administration" hired in 1969; Wallace had joined the solicitor general's office during Lyndon Johnson's presidency, and his brief in *Green v. County School Board*, 391 U.S. 430 (1968) established his credentials as a civil rights lawyer.

both sides, and that the weight of argument tended to favor the validity of the IRS rule. Caplan, however, adds as his clincher that "the Supreme Court summarily upheld [the IRS] position in 1971," citing *Coit v. Green*.³⁹ This "clincher" was at best misleading, since the Supreme Court had said three years later that "the Court's affirmance in *Green* lacks the precedential weight of a case involving a truly adversary controversy."⁴⁰ On the other hand, given the history of litigation, prior government positions and congressional acquiescence in the regulation, the attorney general surely knew that the rule could at least be defended in good faith. All else being equal, he was obligated to do so.

Second, the administration thought its position did serve its interest. Caplan fails to identify the attorney general's underlying concern, which was fear that the reasoning which would uphold the rule would undermine the administration's general policy of deregulation. The fatal flaw in the attorney general's consideration of *Bob Jones* was his failure to recognize the impact of the revised position on the policy against racial discrimination. If we are to credit the government's words,⁴¹ the United States "recogniz[es] and fully subscrib[es] to the strong national policy in this country against racial discrimination in any and all forms . . ."⁴² That policy, combined with the strong legal position of the IRS, should have led the United States to support the IRS rule.

Third, it is hyperbolic to claim that the flip-flop was unprecedented. There have been other cases in which later solicitor general filings contradicted earlier ones.⁴³ And it is common practice, approved by both the Court and Caplan, for the solicitor general to confess error if he reaches the "considered judgment . . . that reversible error has been committed."⁴⁴ Other aspects of the flip-flop are more troubling. The decision to switch sides was reached by a cabal from which career attorneys were excluded. It went against the prior advice of lawyers in the solicitor's office, the Tax Division and the Treasury Department. The attorney general overruled the acting solicitor general prior to giving him an opportunity to be heard. It is clear that procedural regularity, consistency of position, the

39. 404 U.S. 997 (1971).

40. *Bob Jones University v. Simon*, 416 U.S. 725, 740 n.11 (1974).

41. Critics, far from crediting the administration, "widely [saw the brief] as an endorsement of racism."

42. Brief for the United States, *Goldsboro Christian Schools, Inc. v. United States of America and Bob Jones University v. United States of America*, No. 81-1 and 81-3, O.T. 1981, 11, reproduced in 136 LANDMARK BRIEFS, *supra* note 36, at 103, 113.

43. See, e.g., *Rosengart v. Laird*, 405 U.S. 908 (1972).

44. *Young v. United States*, 315 U.S. 257, 258 (1942); see also L. CAPLAN, *supra* note 17, at 9-10.

commitment to non-discrimination, and the obligation to advance good faith arguments to uphold agency rules were all swept aside in a stunning display of tunnel vision in which all that mattered was the abstract commitment to deregulation. Thus, an overwhelming case can be made against the wisdom of the *Bob Jones* filing, but Caplan fails to make it.

Caplan correctly characterizes *Bob Jones* as an "agenda case." He says that "the cases that marked [Rex Lee's] tenure were" the agenda cases. He passes an even harsher judgment on Fried, whom he accuses of having "bent reason and spurned restraint in order to try for results. . . . Instead of envisioning the law as a means for building consensus, as Cox did, Charles Fried advanced the President's positions without regard to the divisions they deepened in American Society." Caplan's real complaint is not that the president sets policy, but that the policy is extremist, not centrist. He complains, not that the solicitor general carries out an agenda, but that it is the wrong agenda. This complaint inevitably leads to the question of how to differentiate Reagan's solicitors general from Roosevelt's and Kennedy's. The Roosevelt administration sought change in Supreme Court doctrine regarding federal power, but always as the champion of legislation which Congress had enacted. The Kennedy administration engaged in a cooperative, mutually reinforcing dance with the Congress and the Supreme Court to develop equal protection doctrine. By contrast, the Reagan administration sought to roll back Supreme Court decisions, legislative enactments, and administrative rules. Such an agenda inevitably places more strain on the solicitor general, because it is not rooted in law but in political preference. The Reagan administration's challenge to the Court was less acceptable primarily because the Court was more in tune with contemporary views than was the attorney general. As the defeat of Robert Bork's nomination to the Court demonstrated, the country does not accept shrill condemnation of the record of the Warren and Burger Courts. But this is not to say that such an agenda fairly can be characterized as lawless.⁴⁵ Solicitor General Fried, by seeking to enlist the Supreme Court in the Reagan agenda, deferred to the instruments of law rather than disregarding them.

While the Reagan solicitors were not lawless, the question of their effectiveness remains. As Rex Lee himself has suggested, "it would be bad lawyering" for the solicitor general to "rail against

45. Walter Dellinger makes a similar point, in his review of *THE TENTH JUSTICE*. Dellinger, *D.C. Law* (Book Review), *THE NEW REPUBLIC*, Feb. 5, 1988, at 36, 38. See also Clegg, *The Thirty-Fifth Law Clerk* (Book Review), 1987 *DUKE L.J.* 964.

the perceived excesses and errors of the Supreme Court." Still, it seems unlikely that the filing of agenda briefs led to a fallout in non-agenda cases. True, the Reagan legal agenda transformed into agenda cases many cases which prior administrations would have regarded as routine. However, Caplan does not directly suggest either that the Court has ruled against the government in non-agenda cases because of the solicitor general's agenda cases, or even that the Court's rulings in agenda cases are influenced by annoyance with the solicitor general, rather than by the merits. Probably the Court expressed its pique, if at all, in denying some traditional privileges, such as participation in oral argument as amicus, or invitations to file as amicus in some cases. These were hardly dire consequences.

Caplan devotes his longest chapter to *The Shadow Solicitor*, Assistant Attorney General William Bradford Reynolds, who became the *eminence grise* to the solicitor's office. Reynolds often ran to the Attorney General. Sometimes the tactic failed, as with his efforts to convince the Attorney General to order the filing of briefs in the *Guardians* case⁴⁶ and *Vasquez v. Hillery*.⁴⁷ But his influence soared when Ed Meese became attorney general. What Caplan describes as the compromising of the solicitor general's office was simply a Washington power struggle. Caplan also seems to misunderstand the relationship between the solicitor general and assistant attorneys general. He quotes a Justice Department memorandum as saying "it should normally be the Solicitor General who decides when to seek the advice of the Attorney General or the President in a given case." He continues: "Rarely, however, had Reynolds waited for Rex Lee to call on him for counsel." But the solicitor general normally does not initiate action by the litigating divisions. The divisions routinely initiate solicitor general review by sending recommendations to the solicitor.

I was no admirer of Ed Meese, and I agree that Solicitor General Fried's first year in office (the book focuses on this period) provided cause for concern. Caplan's case against Meese and Fried, however, rests on questionable sources and on conclusory statements rather than careful legal analysis. The sources are, to begin with, largely confidential.⁴⁸ When a confidential source says, "my

46. *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582 (1983).

47. *Vasquez v. Hillery*, 474 U.S. 254 (1986).

48. *THE TENTH JUSTICE* also bears some resemblance to Victor Navasky's earlier muckraking book, *KENNEDY JUSTICE*. It is Caplan's extensive use of "confidential interviews" with anonymous "sources" which places the book firmly in the Woodward and Armstrong genre. Caplan explains that "some of the many people I spoke with did so on the record about subjects that they considered uncontroversial, but otherwise insisted on terms

government lies to me," fairness demands that we be told the basis of that serious charge. When a confidential source (we don't know whether this is the same or a different clerk) charges that a solicitor general "omits key cases" and "sneaks around precedents," we are entitled to know what key cases and what precedents. If such lies, omissions, and evasions existed, the written record of solicitor general briefs and oral arguments would document them. Thus, the justification for relying on confidential sources in other contexts is largely absent here. Moreover, many of the confidential sources work in the solicitor general's office. Caplan heaps praise on career lawyers in the office almost as much as he condemns Fried. While much of that praise is warranted, Caplan should recognize that even career lawyers do not always speak impartially—especially off the record. Uncritical reliance on unattributed sources detracts from the credibility of both the praise and the condemnation.⁴⁹

Similarly, Caplan would do well to take with a grain of salt criticisms from Supreme Court clerks. Chief Justice Rehnquist, a former clerk himself, says "it would be all but impossible to assemble a more hypercritical, not to say arrogant, audience than a group of law clerks criticizing an opinion circulated by one of their employers."⁵⁰ Finally, one would like to see Caplan evaluate the fairness of charges more carefully. One section of the book describes the selection of the "embarrassment of the month" by career lawyers in the solicitor's office, during the tenure of Charles Fried. Caplan says the embarrassment in November 1985 was Fried's oral argument in *Davidson v. Cannon*.⁵¹ Fried began his argument by

that would allow them to tell their stories without incurring the distrust of their colleagues or jeopardizing at least their ability to perform their jobs, if not the jobs themselves, through unwanted publicity." Many of the citations to "confidential interview" simply support attributions of opinions. But too often confidential interviews also purport to supply facts. Some of those "facts" are readily verifiable. For example, one confidential interviewee said that "Guardians was the only major civil-rights case in the last ten years where the Department of Justice sat out." Yet even the most cursory examination would have shown the Department's absence, for example, from *City of Memphis v. Greene*, 451 U.S. 100 (1981); *New York City Transit Auth. v. Beazer*, 440 U.S. 568 (1979); *Castaneda v. Partida*, 430 U.S. 482 (1977); *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977). Judge Frank Easterbrook tells me that he was interviewed entirely on the record, but believes he is nonetheless cited as a confidential interviewee several times in the book.

49. Thirteen percent, or one hundred nineteen footnotes, rely on confidential interviews. Caplan, *Commentary*, LEGAL TIMES, Nov. 2, 1987, at 22. Here Caplan reminds one of that "certain kind of reporter . . . [who holds] the notion that what is obtained in secret is somehow most surely true." R. ADLER, RECKLESS DISREGARD 18 (Vintage ed. 1986). See also Dershowitz, Book Review, 73 A.B.A. J. 144-45 (1987) ("In reading [James Stewart's] *The Prosecutors* one strongly begins to suspect that the heroes tend to be the prosecutors who provided Stewart with inside information and some of the villains are the ones who refused.").

50. W. REHNQUIST, *supra* note 12 at 37.

51. 474 U.S. 344 (1986).

referring to Holmes's famous distinction between "being stumbled over and being kicked." Holmes had said even a dog knows the difference. *Davidson* involved a prisoner. Caplan says the comment was "jarring and crude," and sounded insensitive, although Fried won the case. But if the Court had considered the reference to the Holmes passage inappropriate it surely would not have cited that very passage in its opinion in a companion case: "More important, the difference between one end of the spectrum—negligence—and the other—intent—is abundantly clear. O. HOLMES, *THE COMMON LAW* 3 (1923)."⁵²

Caplan criticizes Fried for his filing in *Thornburgh v. American College of Obstetricians and Gynecologists*.⁵³ The filing, which urged that *Roe v. Wade* be overruled, may have been unwise, because it advanced no new arguments and was unlikely to convert any Justices. The filing also reflects failure to weigh the impact of overruling *Roe v. Wade*, either in terms of *stare decisis* or in terms of the values served by making abortion available. However, Caplan presents a distorted and unfair picture of the brief. To begin with, his chapter on *The Abortion Brief* never mentions that *Thornburgh* was decided by a five-to-four margin; Caplan waits until page two hundred forty-eight to disclose that fact. Two Justices, White and Rehnquist, predictably agreed with Fried's argument. Caplan also accuses Fried of "a bold misrepresentation of the facts and law." Part of the so-called misrepresentation was Fried's argument that the "courts of appeal betrayed unabashed hostility to state regulation of abortion" Caplan's refutation of the argument represents that "the Court of Appeals had struck down parts of only six of twenty sections in a twenty-four page statute" He concludes: "Fried's brief did not say so, but most of the statute's provisions were left intact. They were as significant to the law as were the sections struck down." This is balderdash. Even assuming that such quantification has any meaning whatsoever, Caplan is simply wrong to imply that the court of appeals rejected challenges to fourteen sections of the statute. The court noted that it was not at liberty to invalidate the entire act based on "a pervasive invalid intent." Instead it examined *seriatim* only ten sections of the act which plaintiffs claimed were independently unconstitutional. The court upheld four of those sections.⁵⁴ Caplan never acknowledges that Justice White's dissent levels much the same charge against the

52. *Daniels v. Williams*, 474 U.S. 327, 335 (1986).

53. 476 U.S. 747 (1986).

54. *American College of Obstetricians v. Thornburgh*, 737 F.2d 283 (3d Cir. 1984).

majority⁵⁵ that Fried leveled at the court of appeals. Indeed, each dissent employs strong language in characterizing the course of the abortion decisions.⁵⁶

If the law is increasingly shaped in the appellate courts—especially the Supreme Court—and if an attorney general wishes to pursue an activist agenda seeking changes in the law, the appellate business of the Department of Justice will inevitably play the key role in advancing the agenda. Thus it was under President Roosevelt and thus it was under President Reagan. No one should be surprised that this substantive agenda has been pursued at a cost: the loss of some able advocates from government service, the deterioration of procedural regularity within the Department, and the loss of some of the luster of the Office of the Solicitor General.

It should be stressed, however, that these costs seem to have brought the Reagan administration few of the gains it sought. Arguably a less tendentious approach to its agenda might have been more successful, while costing less. One hopes that the costs are only temporary; much depends on the new solicitor general and attorney general.

THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925-1950. By Mark V. Tushnet.¹ Chapel Hill, N.C.: The University of North Carolina Press. 1987. Pp. xiv, 166. Cloth, \$29.95; paper, \$9.95.

*John Cary Sims*²

Are you ready to read more about the School Desegregation Cases? You probably thought that you had this topic well in hand after reading Richard Kluger's *Simple Justice*, the chapter in Bernard Schwartz's *Superchief* dealing with *Brown v. Board of Education*, and Dennis Hutchinson's ambitious article.³ Maybe you've even kept up with the recent firefight between Philip Elman and

55. *Thornburgh*, 476 U.S. at 814.

56. *E.g.*, Chief Justice Burger ("undermines" limitations of *Roe* "astonishingly"; renders them "shallow rhetoric"), *id.* at 782-84; Justice White ("nonsensical," "mysterious" findings, "linguistic nit-picking," "baffling," "inexplicable," "warped," and "tortuous"), *id.* at 802-14; and Justice O'Connor ("major distortion," "mischaracterizes," "dangerous extravagance"), *id.* at 814-29.

1. Professor of Law, Georgetown University Law Center.

2. Associate Professor of Law, McGeorge School of Law, University of the Pacific.

3. Hutchinson, *Unanimity and Desegregation: Decisionmaking in the Supreme Court, 1948-1958*, 68 GEO. L.J. 1 (1979).