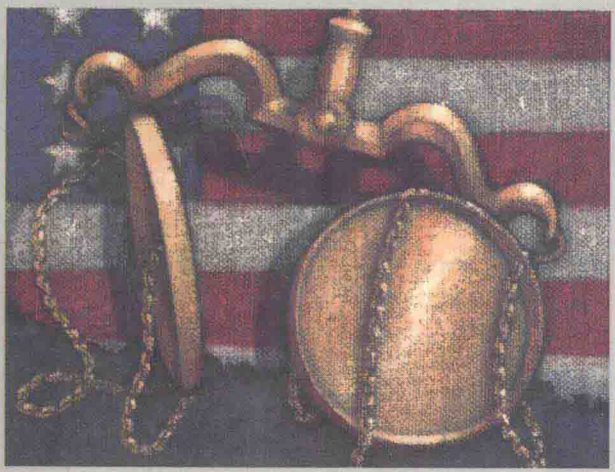
WITH A NEW FOREWORD ON THE BORK CONTROVERSY

# THE TENTH JUSTICE

## The Solicitor General and the Rule of Law



LINCOLN CAPLAN

"Important....At issue is the nation's political agenda and the role the courts and other institutions play in shaping it."—*The New York Times Book Review*

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## THE SOLICITOR GENERAL AND THE RULE OF LAW

BY

LINCOLN CAPLAN

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# The Tenth Justice

*For Susan*

# Solicitors General of the United States

| *Name* | *Term* | *President* |
|---|---|---|
| Benjamin H. Bristow | October 1870–November 1872 | Grant |
| Samuel F. Phillips | November 1872–May 1885 | Grant |
| John Goode | May 1885–August 1886 | Cleveland |
| George A. Jenks | July 1886–May 1889 | Cleveland |
| Orlow W. Chapman | May 1889–January 1890 | Harrison |
| William Howard Taft | February 1890–March 1892 | Harrison |
| Charles H. Aldrich | March 1892–May 1893 | Harrison |
| Lawrence Maxwell, Jr. | April 1893–January 1895 | Cleveland |
| Holmes Conrad | February 1895–July 1897 | Cleveland |
| John K. Richards | July 1897–March 1903 | McKinley |
| Henry M. Hoyt | February 1903–March 1909 | Roosevelt |
| Lloyd Wheaton Bowers | April 1909–September 1910 | Taft |
| Frederick W. Lehmann | December 1910–July 1912 | Taft |
| William Marshall Bullitt | July 1912–March 1913 | Taft |
| John William Davis | August 1913–November 1918 | Wilson |
| Alexander C. King | November 1918–May 1920 | Wilson |
| William L. Frierson | June 1920–June 1921 | Wilson |
| James M. Beck | June 1921–June 1925 | Harding |
| William D. Mitchell | June 1925–March 1929 | Coolidge |
| Charles Evans Hughes, Jr. | May 1929–April 1930 | Hoover |
| Thomas D. Thacher | March 1930–May 1933 | Hoover |
| James Crawford Biggs | May 1933–March 1935 | Roosevelt |
| Stanley Reed | March 1935–January 1938 | Roosevelt |
| Robert H. Jackson | March 1938–January 1940 | Roosevelt |
| Francis Biddle | January 1940–September 1941 | Roosevelt |
| Charles Fahy | November 1941–September 1945 | Roosevelt |
| J. Howard McGrath | October 1945–October 1946 | Truman |

| *Name* | *Term* | *President* |
|---|---|---|
| Philip B. Perlman | July 1947–August 1952 | Truman |
| Walter J. Cummings, Jr. | December 1952–March 1953 | Truman |
| Simon E. Sobeloff | February 1954–July 1956 | Eisenhower |
| J. Lee Rankin | August 1956–January 1961 | Eisenhower |
| Archibald Cox | January 1961–July 1965 | Kennedy |
| Thurgood Marshall | August 1965–August 1967 | Johnson |
| Erwin N. Griswold | October 1967–June 1973 | Johnson |
| Robert H. Bork | June 1973–January 1977 | Nixon |
| Wade H. McCree | March 1977–August 1981 | Carter |
| Rex Lee | August 1981–June 1985 | Reagan |
| Charles Fried | October 1985– | Reagan |

# Author's Note

This paperback edition contains a new Foreword, some additional comments in A Note on Sources, and other minor changes to the original text. Otherwise, the edition presents the book as it first appeared in hardcover. I researched and wrote the book during most of 1985, 1986, and part of 1987. It reflects my findings and points of view during that period.

—Lincoln Caplan
August 1988

# Foreword to the Vintage Edition

DURING 1987, THE rule of law was of paramount concern in the United States. The celebration of the Constitution's bicentennial was energetic and widespread, and it was deepened by the unexpected and, for many Americans, riveting events of the Congressional hearings about the Iran-Contra affair and on Robert Bork's nomination to the Supreme Court. The outcomes of those hearings—the conclusion by the majority of the members of the Iran-Contra committees that the Reagan Administration had displayed "disdain for the law" in the affair, and the Senate's rejection of the Bork nomination by a vote of fifty-eight to forty-two, the largest margin in American history—prompted many contradictory reactions. But whatever one's views of these outcomes, it seems safe to observe that the intensity of these responses underscored how much the law matters in this country.

Of the year's developments in the law, it is difficult to pick which was the most notable. The Iran-Contra affair is a prime candidate, because of the corruption of the processes of government that it revealed and the renewed pledge to honor democratic principles that it prompted. Corruption can take many forms, whether the old-fashioned kind involving misuse of influence and office, abuse of the processes by which laws are made, enforced, and interpreted, or gross distortion of ideas at the heart of constitutional law. Under this broad definition, the Iran-Contra affair can be grouped with the Wedtech affair. These cases, together with the extraordinary number of Reagan officials involved in scandal of all kinds, begin to suggest our contemporary experience of lawlessness and its social costs. Seen in this light, I believe, the

Iran-Contra affair ranks with Watergate in the gravity of its challenge to the American system of government.

But in some ways, the debate over the Bork nomination and the public clamor about it were even more important. That controversy can be analyzed from many vantage points, but one seems especially significant now, some months after the defeat of the nomination. For the first time, the Bork controversy revealed to citizens outside the legal world a breakdown in legal consensus—a breakdown that had become familiar to legal scholars in recent years. This public revelation goes to the heart of the meaning of the rule of law in our democracy, and to issues at the core of this book.

THE RULE OF LAW has had three key dimensions since the start of the Republic. To begin with, there is the structure of the government as established by the Constitution. Its three branches were designed to check and balance each other, for the Framers of the Constitution recognized that unbridled power in any one branch would jeopardize the government's overall equilibrium. As the third and "least dangerous" branch, in Alexander Hamilton's phrase, the Supreme Court came to be judged especially responsible for shaping the law, as the final arbiter in legal disputes between the branches and between the citizens and the government.

Then, there are the substantive contents of the Constitution. Besides establishing the structure of the government, that document provides the ultimate authority for resolving legal differences. The traditional view about the contents of the Constitution—that its meaning is neither fixed nor self-explanatory—was explained in 1949 by Edward Levi (who became Attorney General in the Ford Administration) in a legal classic called *An Introduction to Legal Reasoning*. "The Constitution in its general provisions embodies the conflicting ideals of the community," Levi wrote. "Who is to say what these ideals mean in any definite way?" Not the Framers, because words they chose were often "ambiguous." Not any one Supreme Court, because "an appeal can always be made back to the Constitution." Levi concluded that the Constitution's "words change to receive the content which the community gives them."

This change in "words" has occurred through legal reasoning—through the Supreme Court's interpretation of the text, structure, and history of the Constitution, and of prior Court rulings, and of the experience of the nation. Because the meaning of the Constitution is neither fixed nor self-explanatory, it has been vital that legal reasoning be marked by its own integrity. Without the law's internal accountability, the whole system of government would have collapsed long ago.

Legal reasoning is the black box of the law. As scholars often note, it is sometimes possible to have two able judges apply the same law to the same set of facts and reach opposite conclusions about the proper outcome in the case at hand. But, to Levi, each field of the law, including constitutional law, is made up of different rules of reasoning that give it some coherence and enable it to contribute to the law's general purpose of lending predictability and stability to society. It is no exaggeration to say that consistent legal reasoning has been essential to American governance. Whether one is liberal or conservative, being true to a vision of a lawful society has required that lawyers express their commitment through careful legal reasoning. Legal reasoning has supplied the third essential ingredient to the rule of law.

THESE ELEMENTS of the rule of law have always been subject to evolution in this country. Two hundred years ago, the Constitution was seen as a document with contradictory effects: it established the government of the United States, but severely constrained the government's actions. If the government sought to do something that would impinge on the lives of citizens, it had to justify its action by citing the constitutional passage that gave it the authority to do so. In the past generation, when we have long since taken for granted the Constitution's energizing force, the government has confirmed one of James Madison's deep fears. The power of Congress and of the President have spread enormously, and in a profound shift in the burden of responsibility, those powers have usually been checked only when a citizen convinces a court that one of the political branches has violated a constitutional right.

The Supreme Court is charged with the duty of protecting

citizens from unlawful coercion by the government—and especially of protecting unpopular minorities from the tyranny of the majority—by applying the guarantees in the Bill of Rights. As the political branches expanded their authority, the Court could be expected to be asked to resolve an increasing number of cases dealing with civil rights and liberties, and it was. When the political branches failed to solve major social problems affecting civil rights—racial discrimination is the most prominent example—it also followed that the Court would be asked to tackle them, and it did.

To address these problems, the Court relied on what Justice Lewis Powell in 1987 called "an evolving concept" of the Constitution. In the heyday of this activism, as I describe in more detail in this book, conservatives like Felix Frankfurter cautioned the Court about expanding its authority too far, and tried to restrain the Court by promoting conservative practices of legal reasoning. But Frankfurter and other conservatives joined their liberal colleagues in believing that the Constitution was a living charter relevant to these social problems, and that its meaning had to grow as the country faced and tried to solve its contemporary social dilemmas.

Contrary to what some contemporary legal conservatives contend, the techniques of reasoning that traditional conservatives favored did not compel blind obedience to liberal judicial precedents. Traditional legal reasoning was often used to challenge liberal precedents, and in recent years has been relied on by the Burger Court to moderate some Warren Court decisions. (A good example of this is the series of subsequent rulings that limit the effect of the 1966 Miranda decision, guaranteeing certain rights to criminal suspects.) But these techniques of legal reasoning have reflected the judgment that once a basic question in the law has been resolved and has become part of the legal fabric, and is supported by a national consensus, it should be widely honored. (In the case of Miranda, the Court's ruling was originally criticized by the police; by and large, it is now welcomed.)

THE VIEWS about constitutional law that Robert Bork presented to the Senate were at odds with long-dominant assump-

tions about each of these key ingredients of the rule of law. As a critic of the "Imperial Judiciary," he had contended that the Supreme Court must always defer to the will of the majority, as that will is expressed in Presidential decisions, Congressional statutes, and state law, except where the Constitution clearly states differently, or else it robs the majority of the most basic liberty in a democracy—the liberty to enact the will of the majority. As a believer in "original intent," Bork had argued that, when justices look outside the text and structure of the Constitution to find the meaning of that document, their judgments are constrained by nothing but personal values—constrained, in his view, by nothing at all.

As to legal reasoning, while Bork told the Senate that a "judge must give great respect for precedent," he made clear that his expressions of this respect were likely to be quite limited if he became a justice. He might not have aggressively overturned precedent, but he was unlikely to extend the reasoning and reach of prior decisions as traditional conservatives had done. His grounds for this reluctance were identical with the arguments often stated by the Reagan Administration in its attacks on the "liberal" judiciary: if the Court were strictly bound by established law, it would end up only strengthening decisions of the past generation that Ronald Reagan and Robert Bork considered wrong.

If the Constitution's provisions were as clear-cut as some of the language used by Bork to state his views, it would be hard to understand the gap between his model of constitutional government and the one that has prevailed for the last thirty years. During his testimony before the Senate Judiciary Committee, however, Bork indicated the extent to which his view of "original intent" was not so much a formula for interpreting the Constitution as it was a theory about the balance of power in American government.

In response to questioning by Senator Arlen Specter, a Republican from Pennsylvania, Bork acknowledged that the Constitution's key provisions and amendments, like the Fourteenth Amendment's guarantees of equal protection and due process, are rarely plain about their meaning. In effect, Bork admitted that all

jurists, conservative or liberal, must look beyond the Constitution's words to help determine the document's meaning.

Given this acknowledgment, it is not surprising that a liberal like Justice William Brennan used language similar to Bork's in describing how the Supreme Court should draw meaning from the Constitution. "We never consciously put something there that shouldn't be there," Brennan told an interviewer in 1987. "We find it in the Constitution or within the basic purpose of a given clause."

The difference between a Brennan and a Bork is marked by how they would use the various tools and techniques of reasoning about the Constitution. For Brennan, especially where the intent of the Framers about a provision is ambiguous, the acceptable and useful guides for interpreting it must include the provision's purpose, the Court's prior decisions, and the experience of the nation.

For Bork, this evolutionary approach to the law—what Felix Frankfurter called the need to put meaning *into* the Constitution—has led American law to a dangerous impasse—"a tipping point for democracy," Bork has called it. He sought to save the American government from what he described as the "tyranny of the minority," and return the government to the balance that he contended the Framers designed. To this end, he advocated cutting back the role of the Supreme Court and the lower federal courts.

Between 1982 and 1987, Bork tried to do just this in some of his opinions as an appeals-court judge. He challenged basic doctrines (about the separation of powers, for example) and more technical-sounding ones (about access of individuals to the courts). With another colleague in the majority for whom he wrote the opinion, he put aside forty years of sustained precedent that led to an outcome he didn't like (in a case about rate-setting by utilities). He chose to reach far beyond the issue before him as a judge, "to conduct a general spring-cleaning of constitutional law," according to the disapproving judges who otherwise concurred with his decision about the narrow question before them (whether the Navy could exclude homosexuals from its ranks). For seventy-five years, the debate about the constitutional right of privacy focused on the scope of that right. Bork set himself apart as a jurist by

questioning the right's very existence. In his academic theorizing and his actions as a judge, Bork, in effect, called for a major redefinition of the rule of law.

THE BORK HEARINGS may have exaggerated the differences of opinion in current constitutional thinking. Congressional hearings have their limits, and heated ones often underscore discord rather than harmony. The Bork hearings were treated by some as a referendum on the Reagan Administration's extreme arguments on the need to redress the balance of power in government. In speeches by Attorney General Edwin Meese, the Administration gave short shrift to the authority of Congress, expanded the power of the President by fiat, and challenged the accepted premise that it is the province and duty of the Supreme Court to interpret statutes and the Constitution, and say what the law is. Robert Bork's writing about constitutional law is plentiful and, as even Bork supporters observed, filled with invective. His writings seemed to make it hard for participants to follow the judge's own advice that they should "lower their voices" in discussion of the law.

Despite the disagreements expressed at the hearings, there were participants, including members of the Senate Judiciary Committee, who concluded that the outcome of the Bork hearings was a form of consensus; they saw the "country" as having expressed general agreement about the importance and good sense of the civil-rights laws passed by Congress in the 1960s, and of some civil-rights decisions made by the Supreme Court during the Warren Court era and after. As a distinguished witness later put it, "The constitutional center held."

In that view, the nomination had been defeated because Robert Bork had opposed the one-person, one-vote standard that brought democratic reform to elections, especially in the South. He had opposed the Court's decision striking down poll taxes and its grounds for finding that women must be given equal protection under the law. He had opposed the Court's broad protection of free speech and offered a far more restrictive standard. He had opposed the Supreme Court decision allowing public institutions

to use affirmative-action remedies to redress the effects of racial discrimination.

Attorney General Meese later asserted that only "anti-intellectualism" could account for the Senate Judiciary Committee's rejection of these views. Senators on the committee and in the full house of Congress who opposed the Bork nomination reached a different conclusion. Above all, many regarded the vote as a judgment about ideas, and considered it an affirmation of moral and social consensus.

THIS AFFIRMATION of consensus was significant, because it was in part about a dimension of the rule of law that Robert Bork had vigorously challenged—the role of the Supreme Court in American governance. Yet the consensus was also limited in an extremely important way. When particular Court decisions were at issue in the Bork hearings, what were agreed upon were results in social policy rather than constitutional reasoning, outcomes rather than the legal logic by which the Justices interpreted the Constitution to arrive at them.

Until the hearings, Edward Levi's description of how constitutional law is made might have been said to define the mainstream of American thinking. The Bork hearings were so divisive on so many substantive issues of constitutional law that they left the wide impression that a mainstream no longer existed—that it had broken into many different currents. Bork's supporters (including Edward Levi) claimed the opposite, and declared Bork's views to be in the mainstream of legal thinking. But, at a minimum, the wide range of opinions about the issues raised at the Bork hearings indicated that the reach of the premises underlying mainstream ideas, summed up almost two generations before by Levi, was increasingly limited, as was the group of adherents to those ideas; that other streams had broken off to the left and right; and that Bork was plainly to the right rather than in the center.

At the hearings, questions about the meaning of liberty in the Constitution were superseded by questions about whether that concept includes a general right to privacy, and panels of academic experts squared off about each of these disputes. By the time the

hearings ended, it seemed that there was far more disagreement than agreement among the nation's legal scholars about how to read and apply the Constitution. Every time a question was raised about some key provision of the document, it seemed answerable only in stark, contradictory terms.

THE POLARIZATION over proper legal reasoning and the meaning of the rule of law at its most abstract, yet fundamental, level reflected the polarization that Robert Bork's ideas had helped to create about the role of the Supreme Court. To key members of the Reagan Administration, this split was desirable, for it offered the American people a choice between boldly differentiated formulations of the role of law in our democratic society.

The Administration favored what it considered a required cutback in the role of the Court and a narrow reading of the Constitution. In the Administration's view, the only alternative approach was found in the prevailing commitment to an "imperial" Court, whose activities had expanded so far beyond what was contemplated in the Constitution that some of its landmark decisions were, in Robert Bork's terms, "lawless" and "pernicious."

To others—liberals, moderates, and some traditional conservatives—what the Administration judged anathema was merely the current state of the Court and its jurisprudence, in the normal, if sometimes combative, evolution of the constitutional order. What the Administration described as an approach mandated by "original intent" was in reality the expression of a divisive ideology.

Inadvertently, the Reagan team provided evidence that the latter view was correct. Early in 1988, the *Washington Post* reported, the Attorney General's office distributed a memorandum to senior officials at the Justice Department urging them to maintain the practice of provocation during the Administration's last months, to "polarize the debate" on prominent legal issues. "We must not seek 'consensus,' we must confront," the memorandum stated. To the Reagan team, polarization was a means and an end, not merely a negative side effect.

This was one reason Robert Bork appealed so strongly to the President's followers as a candidate for the Court, and why, after