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Archibald Cox and the Genius of Our Institutions In Memoriam - Celebration of the Life of Archibald

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ARCHIBALD COX AND THE GENIUS OF OUR INSTITUTIONS

FREDERICK M. LAWRENCE*

I am confident that historians will write that the trend of decisions during the 1950's and 1960's was in keeping with the mainstream of American history – a bit progressive but also moderate, a bit humane but not sentimental, a bit idealistic but seldom doctrinaire, and in the long run essentially pragmatic – in short, in keeping with the true genius of our institutions.¹

In the dedication of his classic work *Democracy and Distrust*² to Chief Justice Earl Warren, the late John Hart Ely wrote “You don’t need many heroes if you choose carefully.”³ For several generations of lawyers and legal academics, Archibald Cox was a hero. We chose him carefully and we chose him easily.

Archie Cox was one of my heroes long before I became his colleague when I joined the Boston University Law Faculty in 1988. In the spring of 1973 he had been appointed Special Prosecutor to investigate charges of wrongdoing by officials of President Nixon’s Committee to Re-Elect the President with respect to the break-in at the Democratic Party National Committee Watergate offices. The mere six months he spent in that position saw him forever etched in time as the paragon of integrity and courage. I was a freshman in college during that fall. I vividly recall sitting in a dorm room with a group of friends on the night of October 20, known thereafter as the “Saturday Night Massacre.” A group of friends in a dorm room, likely as not talking about the Watergate crisis that continued to dominate the news with a seemingly new extraordinary development each day, were astonished when another of our number burst in to say that he had just heard on the radio that President Nixon has fired Attorney General Elliot Richardson, Deputy Attorney General William Ruckelshaus, and the Watergate Special Prosecutor, Archibald Cox.⁴

* Law Alumni Scholar and Professor of Law, Boston University School of Law. © 2005. My appreciation to my colleague Andrew Kull for his careful reading and thoughtful comments, and to Jordon Scott, a member of the Boston University School of Law class of 2006, for his research assistance.

¹ ARCHIBALD COX, *THE WARREN COURT: CONSTITUTIONAL DECISION AS AN INSTRUMENT OF REFORM* 133-34 (1967).

² JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980)

³ *Id.* at v (dedication).

⁴ In fact, President Nixon had accepted the resignation of Richardson; there is some

At the center of the events that culminated in the Saturday Night Massacre were the celebrated White House Watergate tapes, sought both by Cox and the Senate Watergate committee. On the previous night – as we later learned – Cox had refused to accept an arrangement worked out between the President and the Senate Committee by which the White House would not turn over the tapes but rather summaries of their contents. Nixon thereupon ordered Cox not to make any further efforts to obtain the tapes. Cox refused. He informed the President of the United States that he could not comply with his direct order.

It is only with benefit of hindsight that it appears as if things all had to come out the way they did. The following June, the Supreme Court would order Nixon to turn over the tapes;⁵ in August, Nixon would resign the Presidency. Cox had no way of knowing in October 1973 that his decision to stand firm in the face of a Presidential directive would be so thoroughly, splendidly, and quickly vindicated. His decision was based instead on two outstanding traits of his character: his integrity and his belief in the American people and their system of justice. When he was appointed as Special Prosecutor, Cox had told the Senate Judiciary Committee that he would pursue the Watergate matter wherever it led, even to the office of the President.⁶ On the night of the Saturday Night Massacre itself, he said “Whether ours shall continue to be a government of laws and not of men is now for Congress and ultimately the American people.”⁷

It would be hard to overstate how inspirational Cox’s words, courage and commitment were to that group of college freshmen that night. Several of us went on to become lawyers. I am sure that similar scenes were played out all across the country that night, and indeed around the world. Cox had demonstrated that values such as integrity and love of country were paramount and abiding, even in the face of a Presidential order. He had also demonstrated that at times of great crisis for their country, lawyers had a critical role to play. Lawyers, asserting and upholding the rule of law, were essential for orderly social change, and for the defense of a system of rights and liberties in the face of powerful challenges. Law was not merely an honorable profession; it was a vital calling that could place one at the epicenter of great events. Cox had become our hero.

I first met Archie fourteen years later. After retiring from his extraordinary career at Harvard Law School, he had begun in 1984 what would turn out to be another impressive teaching career of thirteen years at the Boston University School of Law. When I met him in the fall of 1988 he was already a well-

dispute as to whether, as White House Press Secretary Ronald Ziegler maintained, Ruckleshaus was fired, or, if as Ruckleshaus himself stated, he too resigned. Solicitor General Robert Bork, who then became acting Attorney General, fired Cox.

⁵ *United States v. Nixon*, 418 U.S. 683 (1974).

⁶ See ARCHIBALD COX, *THE COURT AND THE CONSTITUTION* 3 (1987).

⁷ Carroll Kilpatrick, “Nixon Forces Firing of Cox; Richardson, Ruckelshaus Quit,” *WASH. POST* Oct. 21, 1973, p. A1.

established figure in the classroom and the faculty lounge at BU. He was generous with his time, a careful and insightful reader of drafts of our articles, and an engaging and thoughtful participant in conversation, not only with the most senior among us, but with a first year member of the faculty as well. In his second teaching career with us at BU, he was not only a valued colleague, but, as ever, an inspirational and accomplished teacher. Through his final semester with us, in the fall of 1996, he received strong student evaluations. "It has been an honor to study under Professor Cox. This class has been a unique experience that I'll be grateful for having long after I graduate," wrote one student. Another stated that "The professor's enthusiasm (and humility) in conveying the intricacies of Constitutional Law certainly inspired and made for a much more rigorous class, where students were internally motivated to answer questions / examine the ambiguities." Perhaps most revealing and striking about the student evaluations for Cox's last Constitutional Law class in 1996, half a century after he began teaching, was this: for "instructor's level of preparation for class," Archie received a 4.9 out of a possible 5.0. A consummate professional who asked no more of others than he was prepared to do himself, he was a deeply dedicated teacher throughout his long career. In this regard too, he was our hero.

In describing the Warren Court, Archie Cox in many ways provided us with his own epitaph. He wrote of a time in which the Supreme Court was at the forefront of most social movements in the United States in the quarter century following the Second World War. The Court's influence was deeply felt on matters of race relations, civil rights and civil liberties; the very contours of what it means to be a member of the American polity. Its opinions probed for the proper role of law enforcement in a free society, the proper means by which a democratic institution elected its officials and governed itself, and the proper allocation of powers between a Federal Government bent on enforcing federal rights and constituent State governments that were sometimes resistant of that trend. As scholar, teacher, and for over five years Solicitor General, Cox himself played a significant role in this entire movement. I would say of Archie what he himself, with characteristic concision and grace, said of the Warren Court: that the trend of his life work "was in keeping with the mainstream of American history – a bit progressive but also moderate, a bit humane but not sentimental, a bit idealistic but seldom doctrinaire, and in the long run essentially pragmatic – in short, in keeping with the true genius of our institutions."⁸

⁸ COX, *THE WARREN COURT: CONSTITUTIONAL DECISION AS AN INSTRUMENT OF REFORM*, at 133-34.

LARRY YACKLE*

We all of us have personal memories of Archibald Cox. I often fell in with him early in the morning. As I rode my scooter up to the Law Tower, he would be making his way afoot from his truck. I remember watching him brave the fierce breeze on Commonwealth Avenue clad only in that scruffy blue windbreaker he used to wear. He would read his newspaper in the faculty common room before ducking back to his desk to prepare (copiously) for class. Archie wrote out his notes longhand on legal-size yellow pads. When the Law School decided to put computers in faculty offices, I stopped by to ask what model he preferred. Archie gazed at me for a minute, searched for just the right words, and then explained ever so graciously that he really didn't want one of those gadgets at all. At his age, he said, he had decided to spare himself the bother of some modern "conveniences." A supply of pens and yellow pads would suit him perfectly well.

Archie spent long hours in the building, discussing ideas great and small with faculty colleagues, but mostly making himself available to students. Once when I was working late, I looked up to find him at my door asking if I wanted to run out for a sandwich. He had arrived at his usual early hour and was now waiting around until the middle of the evening to listen to a first-year moot court argument. Over the sandwiches, I wondered whether the students would appreciate what he was giving them. I hope and trust they did. Archie enjoyed those sessions as much as class. He loved oral argument and everything about it—the challenge of pounding complex ideas into a form that could be intelligible in conversation, framing issues, organizing a coherent presentation, and, above all, anticipating questions and formulating answers.

I confess that I took advantage of Archie. When I was writing one of my own appellate briefs, preparing for an argument, or trying to develop an article, I routinely asked what he thought and tailored my efforts to his response. I remember in particular his reaction to one draft brief. I thought the argument was complicated, and I had worked very hard to capture its details. Truth is, I was pretty proud of myself when I left the draft on his chair. The next morning, standing at the coffee pot, Archie said he had digested what I had written pretty well and thought he understood where I wanted to go. But, no, he really couldn't "argue it that way." It had to be simpler, something on the order of "two-plus-two-equals-four." I had to understand, he explained, that the justices knew very little about the issues, really. I had to reach them at the level of common sense. I swallowed my pride and started over.

I was shameless in stealing examination questions from Archie. He always got started long before I did, then passed his questions to me both to see what I

* Professor of Law, Boston University.

thought and (mostly) to let me use them rather than preparing my own. It was in connection with exams that I had my best glimpse of Archie's approach to constitutional law. I was puzzling over one of his questions, trying to decide whether it would give students a chance to bring some fancy theoretical model to bear. Archie shrugged and said he really had nothing of the sort in mind. He said he was a "case man" and meant that he had little interest in the kind of academic abstractions on which so many of us concentrate these days. He only wanted students to grapple sensibly with problems that might actually occur in the world. He wanted them to think in the way that good lawyers and justices think, shaping arguments and counterarguments bearing on the case at hand and on similar cases that might arise in the future. As I think back on it now, I only hope my own aims for what we were doing were half so ambitious.

Others report that Archie exercised a conservative or, better said, a prudent influence as Solicitor General. He shared Robert Kennedy's political values and goals, but he was unwilling simply to promote that agenda in the form of legal argument. He understood well enough that law, particularly constitutional law, is constantly changing underfoot. And he was perfectly content to help the Court move things along. Yet he preferred incremental progress and hesitated to advocate quantum leaps from the past. For example, he was uncomfortable with the arguments he offered in *Baker v. Carr*⁹ and *Reynolds v. Sims*.¹⁰ Of course, he later concluded that the decisions in *Baker* and *Reynolds* were perfectly appropriate, even godsend. Still, he regarded constitutional law as more neutral, independent, and autonomous than many of us now believe it to be. To Archie, law was not an instrument by which private actors seek advantage, but rather an institution by which the community develops peaceably. Or maybe Archie was only less cynical (and more hopeful) about our ability to live with each other under a common public law.

When the occasion called for it, Archie was prepared to offer a bold argument meant to establish new and better holding ground. I was thinking in that vein only last year when the Supreme Court held in *Grutter* that race may validly play a role in law school admissions.¹¹ The only precedent in view was *Bakke*.¹² I am just old enough to remember the successful argument advanced by the University of California back then. It was careful, measured, and eminently sensible. And it was presented, of course, by Archibald Cox. It may be, it just may be, that the result in *Grutter* was made possible by Archie's wise original counsel, which had only gathered strength with time and reflection.

Shortly after he resigned his position as Solicitor General, Archie wrote a

⁹ 369 U.S. 186 (1962).

¹⁰ 377 U.S. 533 (1964).

¹¹ *Grutter v. Bollinger*, 539 U.S. 306 (2003).

¹² *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

Foreword for the Harvard Law Review.¹³ It's remarkable now to read his words and to appreciate the power of his insights. The Warren Court's then-recent decisions, rendered on the basis of Archie's arguments, established beyond question that constitutional adjudication *can* and *should* promote human freedom. Archie hailed both the Court's decisions recognizing personal constitutional rights and its decisions sustaining Congress' power to enact federal civil rights legislation grounded in Section Five of the Fourteenth Amendment. Sadly, the latter decisions must be contrasted with cases in which the modern Court has drastically curtailed Congress' authority. I didn't ask Archie what he thought of the Rehnquist Court's curbs on federal civil rights law. But I can imagine his thinking. Let my last words here be the words Archie used to begin his Foreword a quarter century ago: "Once loosed," he wrote, "the idea of Equality is not easily cabined."¹⁴

STEVEN M. ZIOLKOWSKI*

"It's a hard book, but it's the best book." That's what I recall Professor Cox saying about our Constitutional Law casebook. The broader import of those words has obvious relevance as an approach to living, and I imagine that is how Professor Cox approached his own life: with courage, never turning away from a task because it was difficult but accepting the challenge, not for its own sake but because it was the right thing to do. How else would one explain his confrontation in 1973 with those in power for the greater good at the expense of his own career in government? Fortunately, after the "Saturday Night Massacre" Professor Cox returned to the profession of teaching law, a decision from which many law students, including me, benefited greatly.¹⁵

¹³ Archibald Cox, *Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91 (1966).

¹⁴ *Id.* at 91.

* Mr. Ziolkowski took constitutional law with Archibald Cox at Boston University School of Law during the first semester of 1992-93, and received his *Juris Doctor summa cum laude* in May 1994. Mr. Ziolkowski currently practices commercial litigation as Counsel with Lowenstein Sandler PC, in Roseland, New Jersey, and he lives in Greenwich Village, New York City.

¹⁵ Archibald Cox took over the Watergate investigation of the Nixon Administration on May 18, 1973, and was dismissed 5 months later by Robert H. Bork on the President's orders in what is known as the "Saturday Night Massacre." Professor Cox then returned to his previous profession of teaching, first at Harvard Law School and eventually at Boston

When it came time to apply for a particular class for Constitutional Law, I felt that there was no choice other than to request the course taught by Archibald Cox. What an opportunity, to be able to learn from a person who actually lived some of this nation's most important cases, which explains the numerous references to "Archie" or "Cox" in the margins of my casebook! Professor Cox brought a personal side to his teaching not only as a consequence of this experience, however, but also as a result of his emphasis on the more personal aspects of the law. For example, it was not the more formal "Roe *versus* Wade,"¹⁶ but "Roe *against* Wade" or "Roe *and* Wade," subtle but important distinctions that reminded me that these cases that implicated issues of national significance were, at first and at bottom, real disputes involving real people. It is a lesson that, when put into practice, has helped me serve my clients well.

As Professor Cox grew older he also became more soft spoken; I believe our class was the first to ask him to wear a microphone, and he kindly obliged so we could hear every word. And that is how I ultimately remember Archibald Cox, as a thoughtful man, dedicated to imparting his vast wealth of knowledge and wisdom.

The book has now closed on Professor Cox's life. The meaning of his words should also bear on how we look at his story and what we can learn from it, full of difficult pages but with both his and our lives being the better for his having gone through them. Thank you, Professor Cox, for showing us how to learn and grow from using only the best book no matter how hard. It really is the only way.