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Archibald Cox: Teacher

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BOOK REVIEW

ARCHIBALD COX, TEACHER

ARCHIBALD COX: CONSCIENCE OF A NATION
By Ken Gormley.*
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Pp. 585. $30.00.

*Reviewed by David J. Seipp***

Archie Cox is a teacher. He taught generations of law students at Harvard Law School and, more recently, at Boston University School of Law. He left the classroom on three occasions, reluctantly, when first President Truman, then President Kennedy, then President Nixon's Attorney General called Professor Cox to Washington to play a part on the national stage. In his first weeks as Watergate Special Prosecutor, Cox carried with him a stack of blue books, Labor Law examinations he still had to grade (p. 263). In the public eye, his straight-backed demeanor, his familiar crew cut, half-glasses, bow tie, and tweeds were the very image of "The Professor." Each time a Washington job ended—and they ended in abrupt and unexpected ways—Cox returned to the classroom. Over a teaching career that has extended (thus far) from the Fall Semester of 1945 to the Spring Semester of 1997, he taught the most valuable lesson a constitutional democracy can learn: the limits of the rule of law.

One of Cox's students, Attorney General Elliot Richardson, appointed his old teacher to the position of Watergate Special Prosecutor. Another of Cox's students, Ken Gormley, has now given him a fine, rich biography. Readers interested only in the details of the Watergate debacle will be disappointed to find that the Watergate burglars do not stumble onto the scene until page 229. The vivid details of that oft-told story are enlivened with Cox's own recollections and those of many others newly interviewed for this book. But the book takes the whole man as its subject, bringing the same lively at-

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** Professor of Law, Boston University School of Law. I thank Carol F. Lee, Clark Byse, and Larry Yackle for their comments and suggestions, not all of which I have taken. I should disclose that I read this book in manuscript and contributed a bit of factual material to the final version.

tention to Cox's earlier adventures in the Truman, Kennedy, and Johnson administrations. The publishers are to be commended for allowing Gormley to include 100 pages of endnotes and an extensive bibliography of published and unpublished sources, fruitful fields for future analyses of Archie Cox's career. Much of the new information comes from Gormley's interviews with 141 sources named in his bibliography.

One ostensible theme of this book lies in a framing device Gormley uses at the book's beginning, middle, and end. It is a theme of missed opportunity. In the extended prologue, Gormley sketches the career of Archie's great-grandfather, William M. Evarts, who defended President Andrew Johnson in the impeachment trial of 1868 (pp. xv-xxii). Gormley concludes that Evarts "was a great man who never quite became great," who "never occupied a seat on the Supreme Court" (p. xxi). In the middle of the book, Gormley reflects on Cox's own nearest approach to a Supreme Court appointment in the early 1960's: "If fame could be visualized as a towering ladder to the stars of one's profession, Archibald Cox could now be viewed as securely perched on fame's second rung—largely by choice—losing his final chance to scale to the top" (pp. 197-98). In the epilogue, Gormley repeats the theme: "Archibald Cox had risen high in the world of name recognition and national acclaim, but he would never quite receive the top prizes of his profession," remaining instead "a footnote in American history" (p. 437).

It is hard to imagine Archie Cox's life and career as less than a full success. True, he would have liked to be a Supreme Court Justice (p. 437). Almost any lawyer or law teacher would. But appointment to the Supreme Court is not the only measure of success or greatness or fame. The compromises and politicking that it would have taken to "climb the last rung" of that ladder were a price that Archibald Cox would have been unwilling to pay. As a biographer said of his great-grandfather Evarts, Cox "did not seek office, but let it seek him" (p. xxii). He did not cling to public office, nor capitalize on public fame, nor parlay one appointment into a higher one. Instead, he served his country, he defended his principles, and, when his principles required that he end his public service, Cox returned to his life-long career as a teacher. The greatness of a teacher is achieved year by year, in articles and books written, lessons taught, skills honed, and virtues exemplified for students in the classroom.

The better theme underlying Ken Gormley's biography is a pattern implicit in the key episodes of Archie Cox's career: in different roles and in different ways he confronted the limits of the rule of law. For those who connect the name of Archibald Cox with nothing more than the Saturday Night Massacre of October 20, 1973, this biography portrays other occasions on which Cox traded the law school classroom for a government desk to teach larger lessons, with greater effect.

Cox's teaching career began in 1945. He had just returned from wartime jobs in Washington to the Boston firm of Ropes & Gray. Dean James M. Landis surprised him with an offer to teach Labor Law and Torts at Harvard

Law School (p. 59). Cox had graduated from Harvard College in 1934 with an indifferent record and from Harvard Law School in 1937 at the top of his class (pp. 21-23, 30). He began as a probationary Lecturer on Law and received a tenured professorship in 1946 (pp. 61, 63). He taught Labor Law and Torts.[1] In 1948, he "wrote the book," publishing *Cases on Labor Law* with Foundation Press. Labor law was a relatively new classroom subject in 1945, not far removed from the violent struggles between labor and management of the previous half-century. At that time, it was not an abstract question to inquire whether courts and agencies could compel both sides to obey the law.

In June 1952, President Harry Truman appointed forty-year-old Professor Cox, budding labor law scholar, to serve as chairman of a reconstituted Wage Stabilization Board (p. 66). His job, and that of Board members from organized labor and big business, was to impose guidelines limiting wage increases during this time of strikes in many major industries and war in Korea (p. 63). When John L. Lewis's United Mine Workers negotiated a $1.90 per day wage hike for coal miners, Cox's Board voted to allow a raise of $1.50 per day (pp. 69-70). The next day, 300,000 coal miners walked out, defying the official order of the Board. Cox was conscious that his Board would have to command respect for law. He announced:

> The foundation of a free society is voluntary acceptance of the decisions reached under the processes of democratic government. A Congress elected by the people made wage stabilization the law of the land. . . . Both the miners and their leaders must know that freedom—their freedom—cannot long survive when the supremacy of law is challenged by naked power (p. 70).

Cox insisted on enforcing the Board's decision and held firm during a six-week standoff (pp. 71-72).

Finally, President Truman himself bowed to union pressure, approved the full wage increase for the coal miners, and overruled the Board's order (p. 73). The next day, December 4, 1952, Cox resigned. His public letter to the President denounced "the use of economic power to compel a change of government policies" and called the decision to allow the wage increases "fundamentally wrong" (p. 76). As Gormley describes it, "[t]he whole point of his quitting was not to display anger or disrespect for the president; it was to illuminate the matter for the public, bring it into sharp focus for debate, so that such errors of government did not repeat themselves" (p. 75). Cox returned to teaching, and expected that his ventures into government service were over. He was not looking for future presidential appointments. Instead, he tried to teach a lesson that enforcement of a federal statute or administra-

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[1] See annual entries for "Cox, Archibald" in AMERICAN ASSOCIATION OF LAW SCHOOLS, DIRECTORY OF LAW TEACHERS (1946-1984). These and subsequent references to Professor Cox's courses at Harvard Law School are from this series.

tive order should not bow to union muscle or management stonewalling. To Cox, a law that cannot compel or command obedience is no law at all.

Professor Cox remained in the classroom until 1961. He was now teaching Administrative Law and Agency in addition to his specialty, Labor Law. He scheduled his classes early in the week to leave days aside for labor arbitrations and Supreme Court arguments (pp. 79, 81). Beginning in 1953, Massachusetts Senator John F. Kennedy sought Cox's advice concerning matters before the Senate Labor Committee (p. 98), and in 1960 appointed him chairman of an Academic Advisory Group (p. 115) responsible for drafting speeches for Kennedy's presidential campaign (p. 129). Cox wrote to his Harvard colleague Clark Byse, "political campaigns are so inconsistent with all our professional training that it will be a personal satisfaction to rejoin you all in November" (p. 136). This return to the classroom would last less than two months.

President Kennedy appointed Professor Cox Solicitor General in his new administration (p. 144). Cox resigned his Harvard professorship and moved to Washington. He selected a civil rights case, *Burton v. Wilmington Parking Authority*,[2] for his first argument and won it (pp. 149, 151). From 1961 to 1964, Cox presided over battles in the Justice Department over how to argue the "sit-in" cases.[3] The NAACP Legal Defense Fund sought to reverse convictions of protesters arrested for trespass or breach of the peace at privately segregated lunch counters, amusement parks, and the like. The Solicitor General joined in amicus curiae briefs. Attorney General Robert Kennedy and NAACP chief counsel Jack Greenberg favored a bold approach. They urged Cox to argue that when state courts enforced ordinary trespass and breach-of-peace laws in a way that furthered private discrimination, the courts were engaging in "state action" prohibited by the Fourteenth Amendment. The Supreme Court had adopted just such reasoning in 1948 in *Shelley v. Kraemer*,[4] a decision ending enforcement of racially restrictive covenants (p. 156).

According to Gormley, Solicitor General Cox opposed this line of argument not because he thought it would fail, but because he was afraid that it would succeed. Cox, like Robert Kennedy, wanted to end segregation and vindicate civil rights. Cox understood, however, that the Attorney General's approach called for the Court to reject the *Civil Rights Cases*[5] of 1883, which had sharply narrowed the Fourteenth Amendment. Perhaps a majority of Justices on the Supreme Court in 1963 or 1964 were likely to do so. But to

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[2] 365 U.S. 715 (1961) (holding that racial discrimination by a restaurant constitutes state action subject to the Fourteenth Amendment).

[3] This line of cases grappling with the interaction between private racial discrimination and state action included *Peterson v. Greenville*, 373 U.S. 244 (1963), *Griffin v. Maryland*, 378 U.S. 130 (1964), and *Bell v. Maryland*, 378 U.S. 226 (1964).

[4] 334 U.S. 1 (1948).

[5] 109 U.S. 3 (1883).

jettison such longstanding precedent, Cox feared, could weaken the Supreme Court's authority. Gormley summarized Cox's concerns: "Cox worried about the future of the American constitutional system if he pushed bad law on the Court and they bought it, [as] it could permanently damage the notion of stare decisis" (p. 157). Ultimately, Cox obeyed the lessons of "judicial restraint" taught by his old teacher, Felix Frankfurter, and by his first employer, Learned Hand (pp. 35-47). Instead of inviting the Court to build upon its *Shelley v. Kraemer* jurisprudence, Cox found narrower grounds to argue for the reversal of each "sit-in" case (p. 157).

Ken Gormley gives only a few pages to this internal Department of Justice debate, though it raises perhaps the most interesting questions—from a law teacher's perspective—in the entire book. Other historians have described the controversy in greater detail from different perspectives.[6] One further important circumstance was that Cox sought to avoid a Supreme Court decision that might complicate the Administration's efforts in Congress to enact what became the public accommodation provisions of the Civil Rights Act of 1964.[7]

Reduced to a classroom hypothetical, the hard question would be this: If an advocate predicts that the court would adopt a certain novel doctrine if it were argued, and believes as a matter of personal morality that the result in the particular case would be just if the doctrine were adopted, should that advocate nevertheless "protect the court from itself" and refrain from making the argument for fear that the court, by adopting that doctrine, would lose a measure of its legitimacy? Stated in that abstract way, the decision depends on how much legitimacy the court would lose. But is that a decision for the advocate to make, or for the court itself? If a majority of the court, with at least as full an appreciation of the risks and benefits as the advocate has, would be willing to adopt a new doctrine when it is argued before them, should the advocate save the court from itself?

An important aspect of Cox's actual decision, left out of this hypothetical, is the nature of the office of Solicitor General. The institutional reputation of the Solicitor General and the personal reputation of Archibald Cox would give the argument greater weight than it had when NAACP lawyers argued it. It was because Solicitor General Cox would be arguing the *Shelley v. Kraemer* point that it stood a chance of commanding a majority. If the argument were unsuccessful, it could decrease the reputation and hence the ef-

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[6] *See, e.g.*, JONATHAN D. CASPER, LAWYERS BEFORE THE WARREN COURT: CIVIL LIBERTIES AND CIVIL RIGHTS, 1957-66, at 65, 147-48 (1972); JACK GREENBERG, CRUSADERS IN THE COURTS: HOW A DEDICATED BAND OF LAWYERS FOUGHT FOR THE CIVIL RIGHTS REVOLUTION 309-13 (1994); VICTOR S. NAVASKY, KENNEDY JUSTICE 289-95 (1971); STEPHEN L. WASBY ET AL., DESEGREGATION FROM BROWN TO ALEXANDER: AN EXPLORATION OF SUPREME COURT STRATEGIES 312-15 (1977).

[7] *See* NAVASKY, *supra* note 6, at 292 (discussing Cox's concerns with advancing the *Shelley* rationale).

fectiveness of the Solicitor General in future cases before the Court. Regardless of the argument's success, however, the authority, reputation, and effectiveness of the Supreme Court should be matters for the Supreme Court to weigh in the balance, not for advocates before it.

With the benefit of hindsight, I regret Cox's decision, at least as Gormley portrays that decision in the biography. The Supreme Court's reluctance to carry out the implications of the *Shelley v. Kraemer* decision seems to me the real "missed opportunity" of this episode. Yes, in so doing, the Court would have repudiated a number of old and unfortunate precedents (as the Court had done in 1954 in *Brown v. Board of Education*[8]). But what new and fruitful lines of precedent would have been created? Our constitutional arrangements would have been profoundly different. Advocates and judges owe a duty not only to their institution's past, but also to its future and that of society.[9]

In the sit-in cases, the question for Cox was complicated in various ways, more complicated than Gormley's account or my simple hypothetical reflect. For example, as Cox later recalled in a conversation quoted in Victor Navasky's *Kennedy Justice*, the margin of success or defeat for the *Shelley* argument was very close indeed: "At one point the gossip was that they stood four and one fourth to four and three fourths, since one Justice was three fourths against expanding the state-action concept."[10] When Cox as Solicitor General thought about damage to the Supreme Court's authority, he had in mind the same issue he confronted on Truman's Wage Stabilization Board, the limits of the rule of law. Would the Court's order be obeyed? Jack Greenberg recounted Cox's concern that if a private discriminator could not call upon the police and courts to enforce ordinary trespass and breach-of-peace laws (because this would be unconstitutional "state action"), then "he might take it upon himself to throw the demonstrators out, leading to unpredictable levels of violence."[11] Burke Marshall, then head of the Justice Department's Civil Rights Division, summarized this consideration in a memorandum to Attorney General Kennedy:

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[8] 349 U.S. 294 (1955).

[9] When he argued *Baker v. Carr*, 369 U.S. 186 (1962), the legislative reapportionment case, Cox decided on the opposite course, asking the Supreme Court to reject a long tradition of reluctance to intervene in state political arrangements (pp. 166-69). Cox told the Justices: "Judicial inaction through excessive caution or a fancied impotence in the face of admitted wrong and crying necessity, might do our governmental system, including the judicial branch, still greater damage" than judicial activism. Gormley reports that Cox left the argument with "an ungodly fear that 'maybe I was going to win.' . . . Was he betraying the Court, as an institution, by telling the justices that they could meddle with state politics?" (pp. 167-68). Cox prevailed in a six-to-two decision, and the republic did not fall. *See Baker*, 369 U.S. at 237.

[10] NAVASKY, *supra* note 6, at 292.

[11] GREENBERG, *supra* note 6, at 309.

> [T]he most that would be decided is that the police cannot be called upon by the owner of the facility. Such a decision could, and undoubtedly would, in many places, invite the owner of the premises or mob—to take it upon themselves to deal with any Negroes demanding service.[12]

As Solicitor General, Cox was protecting the Supreme Court not merely from its inclination to reject old precedents, but also from the danger that its decisions would be disobeyed and disregarded so widely that the limits of the rule of law would be reached. A habit of voluntary acceptance and obedience is, in the end, the real guarantee of a court's authority. Advocates as well as judges can feel a legitimate obligation to protect a court from issuing judgments that would weaken or destroy that habit of obedience on which the rule of law rests. Exceptionally brave or reckless judges and advocates have tested these limits at times, and the courts have endured. But Cox's lesson about the limits of the rule of law is an important one.

In the midst of the sit-in cases, Archie Cox's friend President Kennedy was assassinated, and Lyndon Johnson took office. Cox could have entrenched himself as Solicitor General until President Johnson appointed him to the First Circuit Court of Appeals or the Supreme Court. Instead, on June 25, 1965, Cox resigned (p. 194) and Johnson appointed Thurgood Marshall as his successor. The teacher returned to the classroom.

Back at Harvard Law School, Cox taught Constitutional Law, and occasionally Criminal Law, as well as his old standby, Labor Law. On May 16, 1973, while he was delivering a series of lectures at the University of California at Berkeley, Cox received a telephone call from Elliot Richardson, who had just been appointed President Nixon's Attorney General. Richardson asked his old teacher to accept the position of Watergate special prosecutor (pp. 232-33). Cox reluctantly accepted. What he did not know, until the writing of this book, was that seven other eminent judges and lawyers had declined Richardson's offer of this job (p. 234).[13]

Cox had not sought the appointment and was reluctant to accept it because it meant leaving the classroom again. He worried that he was setting a bad example for his younger faculty colleagues "to view academic life as a temporary perch upon which to hang one's hat while looking to jump to the next government post" (p. 236). Nevertheless, he brought two young Harvard colleagues, James Vorenberg and Philip Heymann, to help establish the office in the summer of 1973 (p. 249). Another law teacher, Professor Charles

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[12] NAVASKY, *supra* note 6, at 293 (quoting a memorandum dated December 2, 1963).

[13] The seven were Judge J. Edward Lumbard of the Second Circuit, Judge Edward Thaxter Gignoux of the District of Maine, Chief Justice Joseph Weintraub of the New Jersey Supreme Court, Judge David W. Peck of New York, Justice William H. Erickson of the Colorado Supreme Court, Judge Harold R. Tyler, Jr. of New York, and Warren Christopher, then a former deputy attorney general. Lawrence Walsh and Leon Jaworski were also considered, but were not asked (p. 234).

Alan Wright of the University of Texas, would be Archie's opponent in the Nixon White House as special consultant on the Watergate case (p. 274).

Within a month after that first telephone call, Cox and his team were meeting with White House lawyers and requesting a "tape recording" of Oval Office conversations that an assistant attorney general had mentioned (pp. 255, 275). The President refused on grounds of executive privilege. In the District Court[14] and the D.C. Circuit Court of Appeals,[15] Cox won his point that the tapes must be turned over to his office. Friday, October 19, 1973, was the last day on which the President could petition for Supreme Court review of the order to furnish the tapes (p. 335). Cox's real fear was that President Nixon would *not* petition for certiorari. "What if the president simply did not comply with the court order? What if he challenged the law? What if he simply said, 'I won't turn over the tapes'? All these questions, in Cox's words, 'ate at my insides.'" (p. 315). While his lawyers debated how a court's order could be enforced against a recalcitrant, embattled president, Cox prepared for a last-minute compromise (pp. 315, 329). He had again come face to face with the limits of the rule of law.

The end of this story is well known. Late that Friday night, President Nixon ordered Special Prosecutor Cox to stop subpoenaing White House tapes. Archibald Cox refused. The next day, in a memorable televised press conference at the National Press Club, Cox said:

> I'm not looking for a confrontation. I've worried a good deal through my life about the problems of imposing too much strain on our constitutional institutions, and I'm certainly not out to get the President of the United States. I'm even worried, to put it in colloquial terms, that I'm getting too big for my britches, that what I see as principle could be vanity. I hope not. In the end I decided I had to try to stick by what I thought was right (p. 351).

Later on October 20, 1973, in what became known as the Saturday Night Massacre, President Nixon ordered Attorney General Richardson to fire Cox. Richardson refused and resigned. Deputy Attorney General William Ruckelshaus also refused to fire Cox and also resigned. Solicitor General Robert Bork, third in the line of command at the Justice Department, fired Archie Cox as Watergate Special Prosecutor (pp. 354-58). Professor Cox returned to the classroom a national celebrity, and in the minds of many, a national hero.

For over fifty years, Archie Cox's career has been measured out in the steady tread of classes, examinations, and grading. It has been enlivened by brief, intensive episodes in the public spotlight. In three of these episodes, which form a framework and an implicit theme in Ken Gormley's biography, Archie Cox stood at the edge of the law and saw its limits. When he stood up

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[14] *In re* Subpoena to Nixon, 360 F. Supp. 1 (D.D.C. 1973).

[15] Nixon v. Sirica, 487 F.2d 700 (D.C. Cir. 1973).

to John L. Lewis's coal miners, when he decided what the Supreme Court should be called upon to decide, and when he dared President Nixon to obey the rule of law, Cox was not a politician angling for his next position in government; he was a teacher ready at any time to return to the classroom. His were principled stands, not calculations of political or personal advantage. This was the lesson he taught his students and the nation. He was and is a role model for law students and young lawyers, and for all who would agree with Oliver Wendell Holmes, Jr., when he wrote that one "may live greatly in the law."[16]

Ken Gormley has written an appreciative, balanced biography. He has a light authorial touch, for the most part letting Archie Cox speak for himself and backing him up with details from interviews with others and from printed sources. Gormley has not shied away from thought-provoking issues, but rather than developing his own critique, he has laid the foundations for future interpretation, analysis, and criticism by others.

The cooperation of the Cox family has meant that Gormley's biography tells much more about the early years and private setting of Archie Cox's life than even his closest teaching colleagues have guessed. Archie, as we have known him at Boston University, is a reserved fellow; not aloof, but certainly shy, and much more ready to enter into wrangling about the legal issues of today than to reminisce about his own role in national events. This new book has given us the whole Archie Cox, a teacher, colleague, and friend we admire and respect all the more with this greater knowledge of him.

[16] OLIVER WENDELL HOLMES, COLLECTED LEGAL PAPERS 30 (1920).