

BOOK REVIEW

The Thirty-Fifth Law Clerk

THE TENTH JUSTICE: THE SOLICITOR GENERAL AND THE RULE OF LAW. By Lincoln Caplan.* Alfred A. Knopf, New York, New York, 1987. Pp. 340. \$19.95.

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The advocate must learn to live in the tension between what the legal precedents are and what he and his client would like them to be. For the Solicitor General, who briefs and argues the United States cases before the Supreme Court, every aspect of this tension is heightened: his client is the United States, his court is the Supreme Court, and his precedents are the Court's own. Moreover, his responsibility is greater. Because he speaks for the executive branch, the Court weighs his words more heavily. Someday a thoughtful and intelligent book will be written about the Solicitor General and this tension. Lincoln Caplan's *The Tenth Justice: The Solicitor General and the Rule of Law*¹ is not it.

The Tenth Justice has three themes. The first is that the Office of the Solicitor General, until quite recently, has been largely "independent." Caplan's definition of "independent" as applied to the Solicitor General is somewhat obscure, but it seems to have two elements: first, that the Solicitor General should have only limited contact with top administration officials; and second, that the Solicitor General need respond in only a limited way to the goals of the administration. Thus, Caplan believes that the Solicitor General historically has acted as a

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† B.A., Rice University, 1977; J.D., Yale Law School, 1981. The author worked in the Solicitor General's office under Charles Fried from July 1985 to April 1987, after which he became one of William Bradford Reynolds' deputies in the Civil Rights Division, where he works now. Accordingly, he has worked for the two chief villains in Caplan's book—Fried and Reynolds—and even earned from Caplan a disparaging note of his own. See L. CAPLAN, *THE TENTH JUSTICE: THE SOLICITOR GENERAL AND THE RULE OF LAW* 130 (1987). The opinions in this review are Mr. Clegg's own.

1. L. CAPLAN, *THE TENTH JUSTICE: THE SOLICITOR GENERAL AND THE RULE OF LAW* (1987).

thirty-fifth law clerk to the Court,² uncritically summarizing the state of the current jurisprudence and its bearing on the case at hand. Caplan argues, however, that under the Reagan administration this has all changed, and that now the Solicitor General is shamelessly limiting and attacking the Court's precedents in pursuit of the President's agenda.

Overarching this first, descriptive theme is a second, normative one: that the Solicitor General *should* be less an advocate before the Court and more a servant of it. Accordingly, the Solicitor General generally should be insulated from the policymaking concerns of the rest of the executive branch. In making this point, Caplan develops his third theme: for the Solicitor General to act otherwise ignores "the rule of law," especially when he undertakes to limit or directly attack Court precedents with which he disagrees.

Caplan is wrong on all counts. He is wrong in concluding that the office is in any substantial way less "independent" now than it was in the past. He is wrong in his presumption that the Solicitor General's office essentially should be a servant of the Court. And he is wrong in assuming that by not supporting current precedent the Solicitor General undermines the rule of law. Caplan reaches these untenable conclusions because he objects not to the means used by the Reagan administration, but to the administration's legal views themselves.

I

Caplan's argument that the Solicitor General's independence suddenly has eroded is necessarily anecdotal; it would of course be impossible to quantify. But even if we do not look beyond his book, Caplan's evidence is unconvincing. *The Tenth Justice* thoroughly collects evidence relating to the "independence" of the Solicitor General's office, and its failure to draw the obvious conclusion is indeed puzzling.

Caplan recounts, for instance, that President Eisenhower actually edited the Solicitor General's brief in *Brown v. Board of Education*.³

2. According to the Supreme Court's public affairs office, the Court's active Justices currently employ 34 law clerks.

3. L. CAPLAN, *supra* note 1, at 31-32. Indeed, according to Caplan, Attorney General Herbert Brownell "shift[ed] responsibility for the [*Brown v. Board of Education*] case from the [Solicitor General's] office to his own." *Id.* at 28. Prior to the Eisenhower administration, the White House—and perhaps President Truman himself—was involved in the decision to file an amicus brief for the United States in *Shelley v. Kraemer*, 334 U.S. 1 (1948), challenging racially restrictive covenants. See Elman, *The Solicitor General's Office, Justice Frankfurter, and Civil Rights Litigation, 1946-1960: An Oral History*, 100 HARV. L. REV. 817, 818 (1987) (interview by Norman Silber). Elman even speculates that the decision to file may have been motivated in part by the fact that "Truman's Gallup poll ratings at that time were very low" and his Attorney General and Solicitor General "were political animals, very much aware of the Negro vote." *Id.*

Within the Kennedy administration, Solicitor General Archibald Cox was constantly caught in a pincers movement by Civil Rights Division chief Burke Marshall and Attorney General Robert Kennedy. While Caplan recounts Victor Navasky's documentation of Cox's predicament,⁴ apparently he is unimpressed by it; nevertheless, he is horrified by the thought that pressure might be brought on the current Solicitor General by Civil Rights Division head Brad Reynolds " 'running to the [Attorney General].' " ⁵

Caplan further discusses that, under Presidents Nixon and Ford, Solicitor General Robert Bork "regularly found means to carry the Administration's message to the Court. He was a more enthusiastic advocate of Nixon's legal notions than [Solicitor General Erwin] Griswold had been . . . and he was equally forthright about making arguments favored by Ford."⁶ Similarly, Caplan tells how in the course of preparing the government's brief in *Regents of the University of California v. Bakke*⁷ during the Carter administration, suggestions from various parts of the White House were collected by Attorney General Griffin Bell. Bell mixed these suggestions in with his own, and passed them along to the Solicitor General "without saying who made which ones."⁸ Somehow, this system demonstrates to Caplan the great independence the Solicitor General's office had during the Carter administration. Bell's own book, however, points out that the Solicitor General's office made some of the White House's suggested changes, and that the brief was not filed until President Carter himself had approved it.⁹ Joseph Califano, one of the Cabinet officers who, along with Vice President Mondale, also kibitzed on the *Bakke* case, concluded, " 'Our arguments and persistence had made a difference. Although I was sorry to have ruffled the feelings of Bell and [Solicitor General Wade] McCree, both of whom I liked, they could be soothed.' " ¹⁰

As to the current independence of the office, it has been a rare case in the Reagan administration that the Solicitor General has been overruled; indeed, it is a rare case that the Attorney General—the Solicitor

4. L. CAPLAN, *supra* note 1, at 188-94; *see also* V. NAVASKY, *KENNEDY JUSTICE* 277-323 (1977).

5. L. CAPLAN, *supra* note 1, at 88.

6. *Id.* at 38.

7. 438 U.S. 265 (1978).

8. L. CAPLAN, *supra* note 1, at 47.

9. G. BELL & R. OSTROW, *TAKING CARE OF THE LAW* 30, 32 (1982).

10. L. CAPLAN, *supra* note 1, at 48 (quoting J. CALIFANO, *GOVERNING AMERICA: AN INSIDER'S REPORT FROM THE WHITE HOUSE AND THE CABINET* 243 (1981)).

General's boss—becomes involved at all.¹¹ Further, the White House in this administration has played no appreciable role whatsoever in the Solicitor General's business—unlike, for example, the Carter administration's interference in the preparation of the *Bakke* brief. There is no evidence that the filings of the current Solicitor General are more reflective of this administration's opinions than other Solicitor General filings have been of their administrations' views. Caplan is able to conclude that the Solicitor General is less independent than he used to be only because *The Tenth Justice* exaggerates the independence the Solicitor General has had in the past and understates it in the present.

Doubtless many career attorneys told Caplan that an erosion of the Solicitor General's independence was taking place, but one suspects it was not the Solicitor General's loss of power that they viewed with alarm, but rather their own. For instance, Caplan cites as "the first hard evidence" of the "transform[ation]" of the office the creation of a deputy slot to be filled with an appointee of the Solicitor General's own choice—i.e., a noncareer appointee.¹² This reform could not possibly erode the Solicitor General's independence from anyone; its principal effect could only be to enhance the Solicitor General's independence from the career staff in his own office. The government's career lawyers of course would like to blame someone besides the Solicitor General—preferably a sinister (to them) figure like the Attorney General or the President—for the fact that they no longer hold the same sway, but the fact of the matter is that their own superior wants to hear from someone besides them. Such a revelation is never pleasant: "Why am I here at 2 a.m. if I'm not appreciated?" one assistant is quoted as complaining.¹³ But it underscores that the real complaint is that the Solicitor General has become *too* independent—at least from his staff—and that Caplan and his sources long for the days when "the Office operate[d] pretty much the same way no matter who [was] Solicitor General."¹⁴

II

Nor is it a bad thing that the Solicitor General may sometimes choose to listen to voices besides his own staff's. The simple truth is that the Solicitor General *is* the President's "mouthpiece"¹⁵ to the Supreme

11. One of the unnamed sources relied on by Caplan indicates that this is so: "I can't think of a recent case where [Fried] was overruled [by Meese] . . ." *Id.* at 234.

12. *Id.* at 62.

13. *Id.* at 223.

14. *Id.* (quoting Stern, *The Solicitor General's Office and Administrative Agency Litigation*, 46 A.B.A. J. 154 (1960)).

15. *Id.* at 18.

Court; he is a "‘tool of the administration.’"¹⁶ The Solicitor General is not serving two masters, no matter how frantically those inside or outside his office want to find a master for him besides Ronald Reagan. The Constitution empowers only three branches of government; it does not create a fourth called the Office of the Solicitor General that works for both the judiciary and the President.¹⁷ Instead, the Solicitor General's office is firmly located within the executive branch of a President who was, in this instance, elected in part because many people were unhappy with the direction the Supreme Court had taken in certain areas. Accordingly, it is entirely appropriate that the rest of the executive branch should have some say—and that the President and the Attorney General should have, when necessary, the final say—in what the Solicitor General tells the Supreme Court on the administration's behalf.

Does this mean that the Solicitor General's office should file political tracts rather than briefs, do sloppy research, miscite precedents, or lie to the Supreme Court? Of course not. The Court should be able to rely on the Solicitor General to represent accurately the government's interests, and the Solicitor General should hold himself to a higher standard of scholarship and honesty than other advocates—both as a matter of inter-branch comity and because the stakes are higher in the government's cases. In short, the Solicitor General must be honest with the Court and respectful to it as a coequal branch of government, just as the President should be.

But the Solicitor General's place in the executive branch also means that he must listen to the policy concerns of others within the administration in deciding what cases are important enough to take to the Court and what legal principles must be most vigorously defended. It also means that when the President or the President's principal legal officer, the Attorney General, tells the Solicitor General that he has gotten it wrong, the Solicitor General must listen. He is not the Court's tenth Justice; even less is he the Court's thirty-fifth law clerk; he is, instead, the advocate for a separate branch of government.

The Tenth Justice does not really dispute that the Solicitor General is ultimately responsible to the Attorney General and the President.¹⁸ Rather, the book's point seems to be a more practical one: if there is too

16. *Id.* at 234 (quoting unnamed source).

17. Caplan acknowledges that Chief Justice Rehnquist himself is "skeptical of the notion of the [Solicitor General's] dual responsibility." *Id.* at 265. So was Chief Justice Burger. Lauber, *An Exchange of Views: Has the Solicitor's Office Become Politicized?*, *Legal Times*, Nov. 2, 1987, at 24, col. 1 (quoting letter from Chief Justice Burger). See generally Note, *Mixing Politics and Justice: The Office of the Solicitor General*, 4 *J.L. & POLITICS* 379 (1987) (The Solicitor General has always been and cannot be too "political.").

18. See L. CAPLAN, *supra* note 1, at 18, 48-50.

much interference, the independent judgment of the Solicitor General can be clouded. As a practical matter, however, any “nonindependence” within the Solicitor General’s office will in fact sharpen its work product for the Court. An argument *should* be tested and analyzed by more than two or three people in the Solicitor General’s office, none of whom may be experts in the particular area, before it is presented to the Supreme Court. The argument may then be discarded or reworked and tested again. Obviously, there are limits: at some point, the cliché that two heads are better than one is outstripped by too many cooks spoiling the broth. But the notion that for the Solicitor General’s office to work properly it must be able to tell the rest of the executive branch to go to hell is absurd. Again, *The Tenth Justice* flirts with recognition of this fact, when it concedes that “[b]eing independent . . . [does] not require [the Solicitor General to] rid[e] roughshod over the rest of the government”;¹⁹ rather, “a skillful [Solicitor General uses] the government to help make a reasoned decision about the law.”²⁰ Unfortunately, however, the larger ramifications of the point are once again ignored.

It should be noted that there are two kinds of “interference” in the Solicitor General’s work by those outside his office: by those who cannot overrule him, and by those who can.²¹ *The Tenth Justice* blurs the two. The former can threaten his independence only derivatively, by threatening to invoke the latter. As to the latter, while the Attorney General clearly has the power to intervene whenever he likes, he *ought* to be sparing in his intervention. The Solicitor General is generally better situated to make the legal and tactical calls; if he is not making them satisfactorily, there should probably be another Solicitor General appointed. But *The Tenth Justice* never explains how the current Attorney General has ever abused—or even used—his power. The closest it comes is an assertion that Brad Reynolds has been assigned by Attorney General Meese

19. *Id.* at 211.

20. *Id.*

21. One could make a separate criticism—based on management and morale considerations—of the Solicitor General relying on those outside his office rather than on those in it. Not surprisingly, Caplan and especially his unnamed sources within the Solicitor General’s office make it. *Id.* at 224-26. Whatever the merits of this argument (and they are limited), it hardly bears on whether the Solicitor General’s authority—as opposed to that of his staff—has been eroded. See *supra* text accompanying notes 11-13. In any event, there is no reason to suppose that there is anything unprecedented or sinister about the Solicitor General talking with those outside his office (Caplan’s own anecdotes of decisionmaking in earlier administrations belie this), and it is worth noting that the Solicitor General’s staff members have regularly consulted their own contacts elsewhere in the Department of Justice. See L. CAPLAN, *supra* note 1, at 113 (Solicitor General’s staff often talked about cases with career civil-rights lawyers); V. NAVASKY, *supra* note 4, at 309-11 (example of member of Solicitor General’s staff consulting with lawyers in the Civil Rights Division of Justice about a case).

“to monitor Charles Fried’s submissions as Solicitor General,”²² but there is never any explanation of how this “monitoring” works. Later, one of Caplan’s own unnamed sources concedes that he cannot recall any recent instances when Meese has overruled Fried.²³

The Tenth Justice’s accounts of the process of give-and-take between the Solicitor General and other components of the executive branch is gossipy, misleading and one-sided; still, it is true that this process can be painful and frustrating for all concerned. Nonetheless, in the most important cases—and make no mistake about it, some cases are more important than others, even among those before the Supreme Court—any wrangling and hassle between members of the Solicitor General’s office and other administration policymakers has, in the final analysis, yielded better briefs and better decisions by the executive branch.

III

For the first time, at least since Franklin Roosevelt, we have a Solicitor General whose view of the law in some of the Supreme Court’s high-profile cases has been consistently at odds in fundamental ways with the view of a bare minority or bare majority of the Justices. Thus, in one respect, Caplan’s misperception of the Solicitor General’s role would be an easy one to make, even if Caplan were an unbiased observer. The Solicitor General’s office may well appear to be less “independent” and more “politicized” now than it has been before. When the views of the Solicitor General and other executive branch officials are in lockstep with those of the Court, the legal establishment, and media critics like Lincoln Caplan, it will be hard to discern the office’s responsiveness to an administration’s goals. Similarly, if the Solicitor General is arguing against precedent or for novel (or forgotten) principles, but no jurists, professors, or reporters kick up a fuss, the responsiveness of the Solicitor General to an administration is rather hard to detect—and if detected, will not seem particularly interesting. *The Tenth Justice* may be right that, “[i]n the past, the Justices had counted on the [Solicitor General] as a kind of partner”;²⁴ it would not be surprising if some of the Justices are unhappy that the Solicitor General is no longer endorsing their approach to the law. But it is hardly sinister that there has come this parting of the ways; indeed, the notion of partnership is itself a troubling one, given the principle of separation of powers.²⁵ An activist judiciary makes it inevitable

22. L. CAPLAN, *supra* note 1, at 154.

23. See *supra* note 11 and accompanying text.

24. L. CAPLAN, *supra* note 1, at 255.

25. Caplan at one point concedes that “[t]he ties between the Solicitor General and the Supreme Court confound the textbook notion of checks and balances exercised by each branch of

that there will be conflict between it and the executive branch once their policy goals diverge.

The problem of perceived politicization of the Solicitor General's office is, of course, aggravated by the sources *The Tenth Justice* draws upon: career government lawyers who are disgruntled because they disagree with the present administration, recently graduated law clerks, and members of the civil rights and legal establishments longing for the "good old days" when they ran the show. All these sources, as well as Caplan himself, *want* to see the politicization. It allows them to turn a substantive objection into a procedural one, giving them an aura of objectivity, and hiding the fact that they are nothing more than sore losers from the presidential elections of 1980 and 1984.

Here we come to the crux of the matter. Lincoln Caplan is not an unbiased observer. There is a hint of this early on, in the second chapter, when the best description he can provide of Alger Hiss—interestingly, an alumnus of the Solicitor General's office—is "the central figure in a perjury trial of the nineteen-fifties."²⁶ Caplan's bias is later betrayed in more direct ways, some petty and some not so petty: making fun of Fried's haircuts²⁷ and accent,²⁸ and dropping innuendos of racism about Reynolds.²⁹ By the last chapter, there is no doubt. It is, for instance, "hard not to see a chain linking" President Reagan's anti-abortion position, Edwin Meese's criticism of judicial activism, and a clergyman's prayer for the death of Justice Brennan.³⁰

In light of this bias, it is unsurprising that there should be a fundamentally disingenuous quality to Caplan's third theme: that the current administration and its Solicitor General have attacked "the rule of law." First, *The Tenth Justice* asserts—or quotes others as asserting—that the government now systematically distorts facts and law in its briefs. This

government on the others," but apparently accepts and endorses the abrogation of that "textbook notion." *Id.* at 33. Caplan also recounts at length the story of how one of the Solicitor General's assistants, Philip Elman, worked secretly with Justice Frankfurter to persuade the rest of the Court to adopt the government's position in *Brown v. Board of Education*. *Id.* at 25-32. While obliquely acknowledging the unethical quality of this episode, *id.* at 29-30, Caplan characterizes it only as "amazing." *Id.* at 25. See generally Elman, *supra* note 3, at 817, 828-30, 844 (1987) (discussing conversations with Justice Frankfurter relating to *Brown*); Kennedy, *A Reply to Philip Elman*, 100 HARV. L. REV. 1938, 1938 n.2 (1987) (noting media response to disclosure of conversations with Justice Frankfurter); Elman, *Response*, 100 HARV. L. REV. 1949, 1956-57 (1987) (rebutting charges of unethical conduct with respect to the Frankfurter conversations).

26. L. CAPLAN, *supra* note 1, at 15.

27. *Id.* at 135-36.

28. *Id.* at 235.

29. *Id.* at 60, 87, 109.

30. *Id.* at 271. More recently, Caplan characterized Meese as "an impresario of corruption" and Reynolds as "a trusted crony." Caplan, *Legal Difficulties*, L.A. Times, Jan. 10, 1988, pt. V, at 1, col. 3 & at 2, col. 2.

merits only a perfunctory response: the assertion is false. The Solicitor General would have to be crazy to distort facts or law in a Supreme Court brief when he knows that nine Justices, their law clerks, opposing counsel, as well as the legal press, will be scrutinizing every word. Not only are most of these people very good lawyers, but they are likely to be skeptical of anything asserted by a conservative administration. Suffice it to say that the few examples given by Caplan are at worst no more than hard advocacy—and that he makes no attempt to collect similar examples from earlier administrations, though he undoubtedly could have. Furthermore, all objective evidence indicates that the Court still affords great weight to the Solicitor General's arguments: in the 1985 Term—the last which Caplan discusses in detail—he concedes that eighty-three percent of the government's petitions were granted³¹ and that it won seventy-one percent of its cases.³² Moreover, the Court has continued to request, and follow, the Solicitor General's views in a large number of cases in which the United States is not a party.³³ All this is quite odd if the Court views the Solicitor General as untrustworthy.

The second way that Caplan sees the rule of law being undermined is more interesting. He argues that to question Supreme Court precedent is to undermine the rule of law. The paradigmatic example of this, of course, is the current administration's attempts to limit or overturn the landmark abortion ruling in *Roe v. Wade*.³⁴

At the outset, it should be stressed again that one suspects that Caplan and others who make similar protestations really care little for "the rule of law," except perhaps insofar as they define the rule of law to be conducive to the substantive ends they want. Had *Roe v. Wade* denied women the right to obtain an abortion and had the Carter administration urged the Court to reconsider its decision, Caplan doubtlessly would not have devoted an entire chapter in his book to the matter. Were the Solicitor General attacking wholesale other precedents with which he disagreed, Caplan would have written no book at all. It should also be noted, as Caplan mentions in passing,³⁵ that the abortion statute the administration most recently attacked was upheld by only a five to four vote: hardly the decisive rebuff one would expect to be given an attack on the rule of law.

Nonetheless, the current Solicitor General has challenged the constitutional underpinning of *Roe v. Wade*, and this, concludes *The Tenth*

31. L. CAPLAN, *supra* note 1, at 257.

32. *Id.* at 251.

33. Lauber, *supra* note 17, at 25, col. 4.

34. 410 U.S. 113 (1973).

35. L. CAPLAN, *supra* note 1, at 248.

Justice, evinces his contempt for the rule of law. The implausibility of this thesis, however, is first demonstrated by the lack of any credible motive ascribed to the administration officials Caplan vilifies. Why, for instance, would Charles Fried abandon the rule of law and destroy the institutional credibility of his office? To what end? He was not eagerly awaiting his chance to implement some political agenda when he was asked to come to work in the Solicitor General's office. On the contrary, as *The Tenth Justice* acknowledges,³⁶ his interests at Harvard Law School ran to common law and philosophy, not constitutional law and civil rights. And why would he *not* stand up to the threat to the rule of law that Caplan hypothesizes? Fried would not starve if he went back to Harvard after resigning his post to uphold the rule of law, nor would he be disgraced—indeed, Harvard law professors probably dream of being the hero in such a drama. Has Archibald Cox been left destitute and humiliated? The fact is that Fried agreed to serve and continues to serve because he wants to *defend* the rule of law.

It is, indeed, *The Tenth Justice's* hostility to the substance of the administration's agenda that so fills its secondary title—*The Solicitor General and the Rule of Law*—with irony. For if this administration is trying to do something radical, it is that it is trying to *restore* the rule of law. The fact is that there can be no rule of law unless it is rooted in the written text and discernible intent of those who drafted it. For Fried and Reynolds to have done anything less than they have to reinstate a jurisprudence rooted in text, structure, and intent—the only legitimate sources for precedent—would have been precisely to abandon the rule of law.

This is not to say that difficult problems will not arise for the committed executive branch lawyer, especially when he is confronted with precedents that do not honor the rule of law. After all, the judiciary has the final say—aside from constitutional amendment or congressional clarification—as to what the law is. Nor is it always easy to determine what the text and original intent require; it is especially difficult to determine the level of generality with which constitutional principles are to be interpreted. Fortunately, the Supreme Court and the executive branch are not at loggerheads very often; each, as an institution, generally shares the same view of what the rule of law requires.

Surely, however, there is nothing dishonorable about the highest advocate of the executive branch occasionally and respectfully asking, explicitly or implicitly, that the nation's highest court reconsider its past

36. *Id.* at 135.

decisions.³⁷ It was not "humility" when other Solicitors General in good faith declined to do so, and it is not "arrogance" when the Solicitor General now does not decline to do so.³⁸ It is, instead, the fulfillment of the highest responsibility of the Solicitor General, or of any government official: to defend the Constitution.

This is not an extreme view. Dean Paul Brest of Stanford, who hardly shares the administration's views on most legal matters, has recently written, "I agree with the essence of Attorney General Edwin Meese's recent statement that the Court is not the Constitution," and "we surely retain the right to criticize—to say that [the Justices] got it wrong."³⁹ Two of Caplan's heroes also provide implicit support for this view: Archibald Cox, who pointed out that the Warren Court's activism itself "undermined the rule of law,"⁴⁰ and former Deputy Solicitor General Andrew Frey, who Caplan acknowledges deliberately chipped away at the decision in *Miranda v. Arizona*.⁴¹ And the Court, Caplan concedes, has reversed itself more in recent years, and decides cases by closer and more fragmented votes.⁴² Under these circumstances, who can fault an advocate for asserting that the Court's precedents and the rule of law may sometimes diverge?

In what may be the most disingenuous passage in his disingenuous book, Caplan suggests that the Reagan administration is largely to blame for the Court's divisions, reversals, and "rootless activism,"⁴³ castigating the administration especially for criticizing the Court's abortion ruling. Such criticism, Caplan argues, defeats "law as a means for building consensus."⁴⁴ In our republic, however, law *is* the consensus, and the responsibility for forging it does not devolve upon courts. That is a fundamental premise of our rule of law and, as another branch's advocate, the Solicitor General should not hesitate to remind the Court—carefully

37. Several Justices have already gone on record as disputing Caplan's assertions that they have said they do not view Fried as an honorable advocate. See, e.g., Legal Times, Nov. 2, 1987, at 2-3; Lauber, *supra* note 17, at 25, cols. 1-3.

38. See L. CAPLAN, *supra* note 1, at 170-71 (discussing remarks by former Deputy Solicitor General Louis F. Claiborne).

39. Brest, *Affirmative Action and the Constitution: Three Theories*, 72 IOWA L. REV. 281, 281 (1987).

40. L. CAPLAN, *supra* note 1, at 188 ("[D]ecisions seem to turn on intuitive judgments of right and wrong rather than the impartial application of principle" (quoting A. COX, *THE WARREN COURT: CONSTITUTIONAL DECISION AS AN INSTRUMENT OF REFORM* 22-23 (1968))).

41. *Id.* at 216-17.

42. *Id.* at 268-69.

43. *Id.* at 268-73 (quoting Blasi, *The Rootless Activism of the Burger Court*, in *THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T* 198, 210-17 (V. Blasi ed. 1983)).

44. *Id.* at 273.

and respectfully, but firmly—of this fact from time to time as necessary, even if it makes him less useful and welcome as a “thirty-fifth law clerk.”

