
THE PHILOSOPHER IN ACTION: A TRIBUTE TO THE HONORABLE EDWIN MEESE III

By William J. Hawn*

In December 2011, former U.S. Attorney General Edwin Meese celebrated his 80th birthday. While his accomplishments are hardly unknown to the Federalist Society, Mr. Meese's work in the Reagan Administration provides more than merely a list of accolades relegated to history. Through several interviews with Mr. Meese's colleagues in the Reagan Administration, and presently at the Heritage Foundation's Center for Legal and Judicial Studies, one finds that his achievements reveal a commitment to the realization of principles that transcend the politics of any period. Rather than simply concern himself with instant political advantage, Mr. Meese embodied Edmund Burke's characterization of a politician: a "philosopher in action," committed to taking rarefied intellectual concepts and transforming mainstream politics by implementing those ideas through government institutions. Interviews with Mr. Meese, Justice Samuel Alito, Judge Douglas Ginsburg, Judge Loren Smith, the Honorable T. Kenneth Cribb, Jr., Todd Gaziano, and Thomas Jipping reveal how the former U.S. Attorney General found a legal profession with little room for conservative analysis, and used the confluence of an inclined boss (Ronald Reagan) and Meese's own personal commitment to conservatism to create a political movement that will outlast them both. Meese's congenial leadership continues to facilitate new avenues of substantive growth for the conservative legal movement, including combating the growth of federal criminal law, and limits on congressional power. For these, and his many other achievements detailed herein, Americans owe him their thanks through analyzing his experiences in public life. This tribute strives to do just that.

Meese recalled being "not particularly interested" when then-Governor-elect Ronald Reagan called him about a job interview in 1966 while serving as a deputy district attorney. As Heritage Foundation scholar Lee Edwards notes, "Ed Meese had never been political—he thought of himself as a disinterested public servant."¹ While it is common for political actors to downplay their inner Machiavelli, Meese's distinction between politician and public servant was different. "Ed was not interested in immediate political payoffs," said T. Kenneth Cribb, Jr., who served as counselor to Meese during his tenure as Attorney General. As Judge Loren Smith of the U.S. Court of Federal Claims, who worked with Meese on President Reagan's 1980 transition team, recalled, "[Ed's] focus was on the future—how Americans would view the Constitution, and how the courts would apply it, well after President Reagan left office." Meese ultimately worked for Reagan because of their shared policy ideas—particularly on legal issues like the death penalty and judicial selection. What Cribb called Meese's "laser-like" loyalty to Reagan kept his focus on long-term impact, rather than achieving political goals.

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Meese's loyalty to Reagan, especially on legal issues, was cemented as the two encountered the depth of political power that progressive legal groups possessed in California. During Reagan's governorship, the California Rural Legal Assistance group thwarted his efforts to reform "MediCal," California's health insurance program. When the administration, in recognition of a discovered 135 instances of misconduct, sought to deny the group state funding, the judiciary ruled the administration's attempts "unfounded"—a reflection of a politicized judiciary.² Meese also recalled how Governor Reagan made combating judicial politics a top priority. "Reagan developed a new system of [judicial nominee] evaluation which included assessment of candidates by people knowledgeable about the legal profession in California's fifty-eight counties, as well as the state bar." Nevertheless, having served as a law professor at the University of San Diego, Meese knew full well that few conservative legal academics—outside his colleague Bernard Siegan, or Robert Bork at Yale—existed to craft intellectual responses to the Left's legal efforts. This not only limited the crop of potential judicial nominees, it exacerbated the Left's influence on public policy through the state and, ultimately, federal judiciary. During Reagan's governorship, Meese recalled, they began to develop concerns about the federal judiciary's overreach into democratic decisions: "Many of the decisions of the Supreme Court, particularly about the criminal law," along with "activist lower court decisions," interfered "with the legitimate governmental decisions of the states."

Federal interference into state prerogatives, and the politicization of the state judiciary, inspired Meese (along with many others, as Meese humbly notes) to begin organizing a conservative legal response. One initial response was the Pacific Legal Foundation, where Meese served as a board member. It wouldn't be until Reagan's 1980 presidential election, however, that the conservative movement fully embraced judicial reform. Cribb recalled:

Law, as a profession, didn't receive a modern conservative analysis until the 1970's. So, the notion that there should be an interest in how lawyers inhibited conservatives' political priorities was relatively new. The generation of Republicans that Reagan and Meese found in 1980 simply didn't grasp the issue. Judicial restraint to them was merely a prudential question, not about the boundaries of the Constitution, or its structural components.

In his position in the Reagan White House, informed by his California experiences, Meese would begin to change this mentality by using conservative political action and conservative legal theory to mutually reinforce their respective developments.

When Meese led Reagan's 1980 presidential transition team, he helped him first reform executive branch decision-making so as to maximize the effect of Reagan's agenda within the bureaucracies. Meese wanted a presidential cabinet focused on the President's agenda, rather than pressure from outside groups. "Cabinet secretaries frequently based decisions on the

influence of constituencies within their department, rather than by considering the President's agenda," Meese said. Using the California governor's office as a model, Meese instituted "cabinet councils" composed of different department heads that met directly with the President more often than the full cabinet. Judge Smith remembered how this began to improve inefficiencies within federal departments as subdivisions of specific departments could finally speak to their counterparts. More profoundly, as Cribb points out, "by increasing Reagan's involvement within the executive branch, [Meese] encouraged bureaucrats to support Reagan's interest in streamlining government." Yet despite Meese's work in the White House, President Reagan knew that Meese's deep interest in law enforcement made the Attorney General post his "life-long dream."³ That point might not have been intuitive, however. According to Cribb, there was some speculation that Meese was under consideration for a judicial nomination, to which Meese responded, "Ken, I'm not ready to retire." Meese's Attorney General confirmation hearing foreshadowed the contentious judicial confirmations later in his tenure.

Many Senate Democrats used Meese's confirmation hearing to attack the Reagan Administration on criminal law and civil rights, especially in light of his history in helping shape the conservative legal movement in California. To many liberals, and even some conservatives, Meese was a reminder of the President's close contact to conservative principles, rather than just the Republican Party. One White House aide even described Meese as "more Reagan than Reagan" during the first term.⁴ "Ed Meese rode point for the Reagan Revolution," said Cribb. "Reagan was untouchable politically, so the Left's tactics instead were to attack anyone around the president, and Ed Meese, because of how close he was to Reagan and the conservative movement, was the most important target." Thus, senators opposed to President Reagan saw Meese's confirmation as an opportunity to superimpose their criticisms of Reagan's temperament and conservatism onto a close aide.⁵ Meese's nomination was held over for more than a year, with Senator Edward Kennedy vociferously attacking the Reagan Administration on civil rights, and Senator Robert Byrd saying that "I don't believe the nominee in this instance meets the standards of this office."⁶ To those who actually worked with Meese, the criticisms were unfounded. As Steven Calabresi, who would serve as a special assistant to Meese, said in *Transformative Bureaucracy: Reagan's Lawyers and the Dynamics of Political Investment*, "[Meese] was unusual in that he was very interested in ideas as well as in action and accomplishing things."⁷ Despite such strong attacks, the Judiciary Committee voted him to the full Senate 12-6, and the Senate confirmed him. Meese began his service as Attorney General on March 20, 1985.

"In leading the Department of Justice," Meese recalled, "I believed that this was an opportunity to provide constructive change and improvement in the Nation's justice system as a whole." Meese began with specific goals at his swearing-in ceremony:

First, the protection of the law abiding from the lawless with due and careful deference to the Constitutional rights of all citizens; secondly, the safeguarding of individual

privacy from improper governmental intrusion; third, the vigilant and energetic defense of the civil rights of all Americans; and fourth, the promotion of legal regulatory structures designed to conserve and expand economic freedom.⁸

Many of Meese's initial changes to the Department were internal, reorienting the Department past short-term political priorities toward long-term legal change. He relied upon many of the organizational experiences he developed in the Reagan White House: "[W]e established a strategic planning board, comprised of the Deputy Attorney General, the Associate Attorney General, and all the Assistant Attorneys General. Their mission was to develop ideas that would lead to long-range improvements in the work of the Department of Justice and justice system generally." And Meese preferred being personally involved in the administration of DOJ policies. "To avoid any tensions resulting from new policies in the lower-levels of DOJ," Cribb recalled:

Ed was very active in Department functions. He loved to start early with 7 a.m. breakfasts with different DOJ constituencies—law enforcement heads, litigators, etc. He reached out them, and tried to show the DEA, the FBI, and other Department entities that he knew their issues first-hand. It seemed to be appreciated.

These structural adjustments complemented the Department's deepened philosophical orientation during the first Reagan term through the creation and evolution of the Office of Legal Policy ("OLP").

Like Meese, whose focus was on judicial issues and law reform, OLP began as the "joint White House-Justice Department Judicial Selection Committee" that ensured "that Reagan judicial nominees were compatible with the philosophical and policy orientation of the President."⁹ Meese and Reagan's efforts in this regard, and former Attorney General Bill Smith's ultimate creation of the OLP as a result of the committee, were further than any prior White House's effort to seek philosophical and political vindication from judicial selection.¹⁰ While Meese notes that this increased focus on judicial philosophy and selection was the result of many individuals, Meese's own interest partly came from his background in criminal prosecution.

Meese experienced the 1960s "revolution" in criminal procedure while prosecuting college protestors as a deputy district attorney in California. Cribb recalled that Meese's experience as a prosecutor "developed in Ed a life-long interest in law enforcement not just in lofty terms, but the challenges that come with actual policing."

As Attorney General, he did much to combat what he considered to be this "revolution's" detrimental effects in both constitutional interpretation and on the victims of crime. In the latter context, Meese is most proud of overseeing the installation of victim coordinators in every U.S. Attorney's Office during his tenure, while numerous commissions on victim protection, and deleterious social conduct connected to crime (like pornography), continues to have an impact on Justice Department policy. But it is in constitutional interpretation where Meese's most enduring legacy began to cement itself.

As Justice Samuel Alito (then an Assistant Attorney General to Meese) observed, “In addition to the separation of powers, General Meese ensured that a sound approach to criminal justice would be an instrumental part of explaining originalism.” After becoming Attorney General, Meese would argue that “[a] drift back toward the . . . civil libertarianism of the Warren Court [in criminal procedure] would be . . . a threat to the notion of limited but energetic government.”¹¹ His attempt to refute the underlying judicial supremacy within cases like *Miranda v. Arizona* and *Mapp v. Ohio* shaped Meese’s—and in turn, the Department’s—focus on constitutional law. Meese used the practical effects of judicial activism on criminal prosecutions to re-educate prosecutors. As he recalled, “[w]e also developed a series of seminars on critical legal topics, such as the exclusionary rule, in which top officials in the department, both appointed and career, participated.” To Meese, turning the DOJ into an “in-house think tank” as well as a place for law enforcement and judicial vetting, allowed the Department to keep a long-term focus. Proof of Meese’s impact in this regard lies in the changed description of the OLP from its 1984-85 report to its 1986-87 report. The 1984-85 report described the office as “the principal policy staff reporting to the Attorney General and Deputy Attorney General . . .” The latter report, however, calls the OLP “a strategic legal ‘think tank’ serving as the Attorney General’s principal policy development staff . . . OLP’s long-term planning responsibilities require its attorneys to anticipate and to help shape the terms of national debate on forthcoming legal policy questions.”¹²

“Ed’s emphasis on originalism within the Department of Justice brought a nascent development from the legal academy into the real world of legal policy,” commented D.C. Circuit Judge Douglas Ginsburg, an Assistant Attorney General in the Meese Justice Department. And as the OLP description demonstrates, the “real world of legal policy” did not simply include the Justice Department’s internal policies. While the first Reagan term saw the nomination of some former academics to the federal bench who agreed with originalism, like Ralph Winter, Robert Bork, and Antonin Scalia, Judge Ginsburg observed that “Ed was the first to bring the idea to the broader public.” Yet there is a tension between the view of originalism articulated by Alexander Hamilton in *Federalist 78*, where he wrote that the judiciary is the “least dangerous branch”¹³ of government, and the Court’s modern view, as stated in *Cooper v. Aaron*, that “the federal judiciary is supreme in its exposition of the Constitution.”¹⁴ Meese thus concluded that he had “to explain to the legal profession that the scope of the federal judiciary, even if it had benevolent motives, was threatening the separation of powers and individual liberty.”

Meese’s goals, to “protect that original [Constitutional] design . . . dust off the Federalist Papers . . . and point out also that . . . [f]ederalism is not a quaint canard of the 18th century,”¹⁵ shook up the Justice Department’s public affairs. In a 1985 letter from Meese’s former chief spokesman, Terry Eastland, to Pat Buchanan, Eastland said:

Ed Meese and I want to reorganize Public Affairs, which is now mainly a press office. Speechwriting will be under me, as will a “public liaison” effort designed to reach

out to academics and laymen. I will be the department’s communications strategist, mapping plans for doing battle in the war of ideas. Mr. Meese wants to emphasize federalism and separation of powers. I intend to design public initiatives in these areas, as well as in some others, including judicial restraint, victims’ rights, religious freedom, and “Baby Doe.”¹⁶

Meese himself would lead the charge by taking his case to the country. In a series of speeches, Meese would pose a controversial distinction between the Constitution and constitutional law, and ignite a public debate over originalism that would refine it intellectually.

In a 1986 speech to Tulane University, Meese famously contended that, regardless of how the Supreme Court interprets constitutional provisions, the only “supreme law” is the meaning each provision possesses at the time of its ratification.¹⁷ Meese allowed that the Court’s decisions were binding on the parties to the action and the executive branch for enforcement purposes. “But such a decision does not establish a supreme law of the land that is binding on all persons and parts of government henceforth and forever more.”¹⁸

Meese’s argument, in his words, “brought to public attention that fact which had been largely ignored up until that time both in the legal profession and in the law schools.” But the reactions to his speech suggested that many prominent members of the profession did more than ignore Meese’s view, they despised it. University of Chicago law professor Geoffrey Stone remarked that the “disturbing implications” of Meese’s view could “create a situation of enormous chaos.”¹⁹ The then-president of the American Bar Association, Eugene Thomas, disputed Meese’s argument: “Supreme Court rulings are the law of the land . . . Public officials and private citizens alike are not free simply to disregard that legal holding.”²⁰ Yet despite misgivings from these professors and practitioners, history was on Meese’s side. If the Supreme Court’s holdings, “henceforth and forever more,” bound the president, then President Andrew Jackson was remiss in vetoing the Bank of the United States on constitutional grounds despite the Supreme Court affirming such grounds in *McCulloch v. Maryland*.²¹ President Lincoln was also thus wrong to undermine the Supreme Court’s 1857 decision *Dred Scott v. Sanford*, affirming a right to own slaves.²² The rationale Lincoln cites for his efforts tracks what Meese would argue over a century later: if every branch of government outsourced any and all constitutional questions to the Supreme Court, henceforth and forever more, “the people will have ceased to be their own rulers, having to that extent practically resigned their government into the hands of that eminent tribunal.”²³ For Meese, he thinks the resurgence of the Federalist Papers has helped, for now, cement this view’s legitimacy in both legal academic and professional life. The view certainly impacted policy development and judicial selection within the Justice Department.²⁴

As Judge Ginsburg notes, “Ed’s public addresses informed the public about developments at the Justice Department, where he appointed people who shared his views on original meaning and would shape the department’s policies accordingly.” Many

of Meese's appointments allowed him to begin mentoring a new generation of conservative lawyers. Cribb recalled:

Our need to get credible people advocating originalism led Ed to say to me, "Ken, bring me people with gray hair." But there was no one with gray hair that agreed with us—the profession was too wedded to legal realism. So we appointed a lot of bright, young lawyers with outstanding accomplishments to think outside the box.

"Thinking outside the box" led to a publication called *Guidelines for Constitutional Litigation* that instructed prosecutors how to incorporate originalist arguments into government briefs, and panel discussions at the Justice Department about originalist thought. Such efforts were pursued out of not just commitment to principle, but out of necessity to originalism's survival and legitimacy. Outside of Robert Bork's 1971 law review article, *Neutral Principles and Some First Amendment Problems*,²⁵ and Raoul Berger's 1978 book *Government By Judiciary*, few sources existed that developed originalism as an interpretive method. The discussions Meese organized at the Justice Department on such topics had the effect of refining originalism now that it was in public use. For example, when Meese initially defined originalism publicly in 1985, he characterized it as a "jurisprudence of original intent."²⁶ This view had its origins in the view of Joseph Story, who said "The first and fundamental rule in the interpretation of all instruments is, to construe them according to the sense of the terms, and the intention of the parties."²⁷ Yet Meese's public addresses provided the opportunity for further debate on his words, and refined this conception of originalism into one of "original public meaning" through talks at Federalist Society events. Meese himself would confirm this later in 1985 when he spoke to the Society.²⁸

Meese's interest in both interacting with and mentoring young lawyers facilitated opportunities for grooming potential future members of the judiciary. "General Meese was very supportive of my work in [the Office of Legal Counsel]," recalled Justice Alito. "He was instrumental in my candidacy to become U.S. Attorney." Similarly, Judge Ginsburg said, "My stint as Assistant Attorney General for Antitrust was surely instrumental in Ed's recommending that the President nominate me for the D.C. Circuit." Meese's commitment to mentoring in this regard was another manifestation of his primary interest in judicial selection. "Despite the importance of other issues," Cribb said, "[judicial selection] was the ball game. Ed took the issue directly into his office, and wanted younger, accomplished attorneys that could be readied for nomination."

The focus on young attorneys for judicial selection was fitting, considering how novel Meese's emphasis on it was. The first recorded instance of expanded White House interest in judicial selection came from a young Richard Nixon aid, Charles Houston, who summarized the concept to President Nixon:

Through his judicial appointments, a President has the opportunity to influence the course of national affairs for a quarter of a century after he leaves officeIn approaching the bench, it is necessary to remember that the decision as to who will make the decisions affects what decisions will be made. . . . The President [should]

establish precise guidelines as to the type of man he wishes to appoint—his professional competence, his political disposition, his understanding of the judicial function—and establish a White House review procedure to assure that each prospective nominee recommended by the Attorney General meets the guidelines.²⁹

Yet despite the fact that the concept originated in the Nixon years, it would not be until the Reagan years that the concept manifested into reality.³⁰ "The problem with the Nixon approach," Cribb said, "was that it was still slogan-focused. If originalism was going to be taken seriously as an idea, and not just a political tool, then we needed principals to apply and not just slogans. So, we used scholarship written in the 1970's on the role of a judge, and Ed made developing those ideas at Justice a priority."

Meese remembered, "[P]rimarily, we were looking for long-term constitutional fidelity in our judicial selection." This was not, as critics would suggest, a simple litmus test that rewarded political supporters. As Cribb recalled, "[W]e would not, and could not, simply green-light result-oriented conservatives. We wanted individuals who would interpret the law with the Constitution's structural limits in mind—even if that led to conclusions we didn't like as a policy matter." This turned away some candidates who failed to live up to the department's review process. "Simply asking 'do you believe in judicial restraint?' or other such slogans was unenlightening," recalled Meese. "We would not ask how individuals would rule on a particular case, but we tried to probe constitutional principles carefully." Echoing his disinterest in pure politics, Meese is careful not to characterize judicial selection as a partisan affair. "The 'evolving constitution' approach of activist judges is not simply a political threat, it evades self-government." To Judge Ginsburg, Meese's philosophical commitment to originalism transformed judicial selection: "There's little political reward in most judicial nominations because, in our constitutional system, a judge has to be independent of politics, but Ed was committed to persuading politicians of the value of rigorous judicial selection."

Sometimes, judicial selection did not just lack political reward, it also required refuting the preferences of political allies. In 1984, members of Colorado's congressional delegation wanted the Reagan Administration to nominate federal district court judge Sherman G. Finesilver to the U.S. Court of Appeals for the Tenth Circuit.³¹ In another Administration, the support of one's congressional allies, the fact that the judge took some positions that were favorable to the President's party, and the fact that the judge was nominated by a prior President of the same political party (in this case, Richard Nixon), might have been sufficient for a non-Supreme Court judicial post. But the Justice Department closely analyzed his prior judicial opinions, and were troubled by Judge Finesilver's analysis of constitutional rights regarding a law requiring parental consent before a minor has an abortion.³² Combined with his rationales in other areas of law, DOJ's analysis resulted in Finesilver not receiving a nomination from President Reagan.³³

The process of judicial selection under Meese entailed more than nominee recruitment. "Our networking with young

conservatives helped bring in allies into staff roles on the Senate Judiciary Committee,” Cribb remembered. Meese wanted the Senate to continue the intellectual rigor in judicial selection that the Department emphasized, so he developed relationships between DOJ and Senate staff to relay originalist principles to members (a now-famous example is Meese hiring future United Nations Ambassador John Bolton to serve as Assistant Attorney General for Legislative Affairs). Meese, working with the Federalist Society, helped develop an outside network of supporters to educate the public on these issues. As Meese observed:

We were fortunate to have the establishment of the Federalist Society at that time, as a source of young, talented conservatives for high level positions within the Department of Justice. We also had a network that supported Ronald Reagan both before and during the 1980 election. It is a combination of these sources that brought to our attention many people who were loyal to the principles of constitutionalism and justice, rather than just a political party.

The relationship was mutual. Justice Alito remembered, “Attorney General Meese’s support focused attention on the debate about originalism that the [Federalist] Society helped to foster. And Attorney General Meese’s willingness to bring some of the Society’s leaders into the Justice Department helped promote originalist arguments within the department.” Even after a judicial nominee was selected, the Reagan White House continued to emphasize its interest in smart, predictable judges. “After the department presented a possible nominee to President Reagan,” Meese said, “he would call the nominee personally advising them of the news. At every point we wanted to make plain the high expectations we had for what an individual does with life tenure.”

Introducing originalism into the public debate inevitably invited a response—one that began shortly after Meese’s July 1985 speech to the American Bar Association. Given mere months after Meese was sworn in, this speech was the first public defense of originalism by a sitting Attorney General. It thus became, as Professor Steven Calabresi would say, “part of the originalist creed.”³⁴ The speech introduced the themes Meese was emphasizing in judicial selection and Department policy to the broader public: he called for jurists who would “judge policies in light of principles, rather than remold principles in light of policies.”³⁵ He emphasized “that the Constitution is a limitation on judicial power as well as executive and legislative powers,”³⁶ and castigated judicial activism in the areas of criminal procedure and religious liberty.³⁷ While future speeches, such as his speech to Tulane University, would unpack originalism more thoroughly, no other speech sparked a public response from a sitting Supreme Court Justice. When Justice William Brennan took to the podium, he retorted, “It is arrogant to pretend that from our vantage we can gauge accurately the intent of the framers on application of principle to specific, contemporary questions.”³⁸

Brennan’s response was the first, and most prominent, of many. Meese subsequently entered an op-ed duel with the *Washington Post* editorial board over his Tulane speech.³⁹

Thomas Jipping, Counsel to Senator Orrin Hatch, notes that “Senate Democrats awoke to the threat Meese’s arguments posed after Brennan’s response. Confirmation hearings became more contentious.” As Meese continued to persuade Americans toward originalism, Democrats prompted⁴⁰ Harvard Law Professor Laurence Tribe to write *God Save This Honorable Court*, intended for political opponents of originalism to explain why the Supreme Court “should put meaning into the Constitution.”⁴¹ Tribe was inspired by a feeling that Meese was disingenuous: “Meese was successful in making it look like he and his disciples were carrying out the intentions of the great founders, where the liberals were making it up as they went along. It was a convenient dichotomy, very misleading, with a powerful public relations effect.”⁴² When Democrats took control of the U.S. Senate in 1986, they now possessed the political levers to respond to Meese’s advances by attacking judicial nominees. Senator Patrick Leahy made clear in the defeat of Professor Bernard Siegan’s judicial nomination that “[n]o ‘iffy’ nominees are going to get through now. The Administration knows it has to send us consensus candidates.”⁴³

To Meese, “the Left’s response . . . put out into the open what had been a clandestine and subversive effort to direct judicial decisions away from the Constitution. This controversy became increasingly public as groups on the left became more organized and more vicious in attacking constitutionally faithful nominees. . . .” All of Meese’s associates who were asked, and Meese himself, agree that no one within the Reagan Administration was goading or surprised by the Left’s reaction; this was merely an extension of what Meese and Reagan had encountered since they took on judicial politicization in California. Now, it went national. What the Federalist Society later termed “the Great Debate” between originalists and living constitutionalists opened a new front outside the battlefields of law reviews and judicial opinions. D.C. Circuit Judge Robert Bork’s nomination to the U.S. Supreme Court would be one of the first prominent casualties.

Despite being unanimously confirmed to the D.C. Circuit during the first Reagan term, the efforts of Professor Tribe in responding to Meese’s arguments helped torpedo Bork’s Supreme Court nomination in 1987. Bork, as noted above, was one of a handful of scholars critiquing the law from a conservative perspective. The need to enhance originalism’s intellectual credibility, Cribb recalled, made Bork—along with his impressive scholarship in antitrust law—“unquestionably qualified” to be a judge. Bork was initially passed up for a Supreme Court position due to Antonin Scalia being younger, but with another opening, Bork became the obvious choice, said Cribb. However, liberals saw a successful Bork nomination as a near-irrevocable rightward shift in the Court. Thus, unprecedented sums of money and political activism were employed to defeat his nomination.⁴⁴ Senator Kennedy again took the Senate floor to lambast what “Robert Bork’s America” would look like with a parade of horrors, including back-alley abortions and segregated lunch counters.⁴⁵ Bork’s nomination was defeated 58-42 in the full Senate, and then-Ninth Circuit Judge Anthony Kennedy was ultimately nominated and confirmed for the Supreme Court seat.

As Cribb related, “Despite all the politics, we simply assumed that because Bork was, truly, overqualified to be a Justice, he would trump the power play. But even Democrats sympathetic to his nomination were threatened with primary battles if they supported him.” Ann Lewis, a Democratic political advisor who later worked on now-Secretary of State Hillary Clinton’s presidential campaign later stated, “If this were carried out as an internal Senate debate, we would have deep and thoughtful discussions about the Constitution, and then we would lose.”⁴⁶ An OLP memorandum released after then-Judge Kennedy’s nomination to the Supreme Court examined in detail how the failure of the Bork nomination impacted judicial independence. “Instead of examining the judicial philosophy [of Judge Bork and, subsequently, Judge Anthony Kennedy,] . . . some Senators focused upon the nominees’ political views” by asserting that the reasoning of a judicial decision and the policy effect achieved are the same.⁴⁷ Some would say that the perceived need to caricature originalism and its adherents, rather than respond to it and them, is perhaps the greatest testament to the impact of Meese and his Justice Department in mainstreaming the philosophy. At the conclusion of Meese’s term as Attorney General in 1988, conservative grassroots legal groups had rapidly emerged, ready to respond to future confirmation battles.

Since leaving the Justice Department, Meese now uses his position at The Heritage Foundation as Chairman of the Center for Legal and Judicial Studies to apply the lessons from his work in the Reagan Administration. Todd Gaziano, Director of the Legal Center, said that “Ed turned the Center into a proper place for constitutional discourse,” coordinating conservative public interest law groups that will now preempt political attacks on judicial nominees whose fidelity to the Constitution stands in the way of activist legal philosophies. “His considerable talent at bringing respected people together also makes our projects more effective.” One particular example is *The Heritage Guide to the Constitution*—a clause-by-clause originalist analysis of the U.S. Constitution that Senate Judiciary Committee members have used during confirmation hearings. Another is the Center’s work against the growth of federal criminal law (called “overcriminalization”), an issue that, like originalism in the 1980s, many credit Meese with bringing to prominence. Jipping suggested, “[T]he core takeaway from Meese’s legacy is that a judicial nomination desiring to have a substantive impact on constitutional interpretation requires more than nominating a candidate for their political loyalty, gender, or race, and then hoping for the best.” The Meese strategy of rigorous selection, developing a network of supporters, and explaining the substantive stakes to the public has proven to be a successful path for originalist advancement.

Gaziano sees Meese’s personality as key to coordinating originalist efforts to keep confirmation battles focused on ideas. “We don’t want anyone to politicize the confirmation process, and so we make more of an effort to stop false attacks on nominees from the outset. The respect Ed incurs makes sure the debate stays on ideas.” Judge Ginsburg expressed a sentiment about working with Meese that was shared by everyone interviewed: “Ed has great management skills: he

listens carefully, considers all points of view, and thereby gets everyone invested in the decisions he makes.”

It is ultimately fitting that Meese returned to, and in many ways shepherds, the conservative legal movement after his time in government, not only because he was instrumental in building it, but because he continues to prove that it is issues, rather than operatives, that shape political change.⁴⁸ He first showed this fact in California, working with Reagan to combat judicial politics, and then he expanded upon it later by working with others in the White House to enact similarly-motivated changes. Meese’s work provides one of the most successful examples of how the Reagan Revolution sought to change the focus from political priorities to political principles in all of public policy.⁴⁹ The continued impact of Meese’s work on judicial selection to this day is a function of how ideas have longer staying power than instant political goals. As Meese himself said ultimately:

I believe it is important that lawyers, as well as public officials generally, think beyond short-term goals or political objectives, and base their decisions and actions on the enduring principles, particularly the Constitution. I believe that this view is particularly important for young conservatives since it is only by constitutional fidelity and acting on principle that people can maintain their personal integrity as well as the highest values of our profession.

“General Meese began the process of refining and developing originalist theory in the public eye,” recalled Justice Alito. “This not only improved legal scholarship and public discourse, it continues to have a profound effect on judicial decisions.” While that is an impressive legacy, its most indelible part comes from Meese himself. Nearly everyone interviewed for this article shared an admiration for their former (or current) boss that was personal, as well as professional. Cribb summarized the sentiment best: “Ed’s heart is as big as the room he’s in, and we’re all better for having been in a room with him at some point.”

Endnotes

- 1 LEE EDWARDS, TO PRESERVE AND PROTECT: THE LIFE OF EDWIN MEESE III 12 (2005).
- 2 Bennett Beach, *One More Narrow Escape*, TIME, Nov. 23, 1981.
- 3 RONALD REAGAN, THE REAGAN DIARIES 213-14 (Douglas Brinkley ed., 2007).
- 4 See Nicholas M. Horrock, *More Reagan Than Reagan: Meese Was Loathed By the Left But Loved By the Right*, CHI. TRIB., July 6, 1988, available at http://articles.chicagotribune.com/1988-07-06/news/8801130015_1_edwin-meese-white-house-disclosures.
- 5 See Roger Simon, *Ed Meese Sets New Standard*, CHI. TRIB., Feb. 4, 1985, available at http://articles.chicagotribune.com/1985-02-04/news/8501070496_1_ed-meese-edwin-meese-senators.
- 6 See Glen Elsasser, *Meese Clears 1st Hurdle As Panel OKs Nomination*, CHI. TRIB., Feb. 6, 1985, available at http://articles.chicagotribune.com/1985-02-06/news/8501070883_1_edwin-meese-senate-judiciary-committee-dedication-and-integrity.
- 7 See S.M. Teles, *Transformative Bureaucracy: Reagan’s Lawyers and the Dynamics of Political Investment*. STUD. IN AM. POL. DEV., Apr. 2009.

8 The Hon. Edwin Meese, III, Remarks upon Installation as the Seventy-Fifth Attorney General of the United States (Mar. 20, 1985) (on file with author).

9 See Sheldon Goldman, *Judicial Confirmation Wars: Ideology and the Battle for the Federal Courts*, 39 U. RICH. L. REV. 871, 880 (2004).

10 See SHELDON GOLDMAN, PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN 291-93 (1997); see also judicial selection discussion *infra*.

11 The Hon. Edwin Meese, III, Attorney General of the United States, Speech Before the American Bar Association, Washington, D.C. (July 9, 1985).

12 See S.M. Teles, *Transformative Bureaucracy: Reagan's Lawyers and the Dynamics of Political Investment*. STUD. IN AM. POL. DEV., *19, Apr. 2009.

13 THE FEDERALIST NO. 78, at 490 (Alexander Hamilton) (Henry Cabot Lodge ed., 1902).

14 See 358 U.S. 1, 18 (1958).

15 The Hon. Edwin Meese, III, Remarks upon Installation as the Seventy-Fifth Attorney General of the United States (Mar. 20, 1985) (on file with author).

16 Letter from Terry Eastland to Pat Buchanan, April 10, 1985, quoted in S.M. Teles, *Transformative Bureaucracy: Reagan's Lawyers and the Dynamics of Political Investment*. STUD. IN AM. POL. DEV., *16, Apr. 2009.

17 See Edwin Meese, III, Attorney General of the United States, Address at Tulane University: The Law of the Constitution (Oct. 21, 1986).

18 *Id.*

19 See Howard Kurtz, *Meese's View on High Court Prompts Varied Responses*, HOUSTON CHRON., Oct. 24, 1986, available at http://www.chron.com/CDA/archives/archive.mpl/1986_275047/meese-s-view-on-high-court-prompts-varied-response.html.

20 *Id.*

21 See Steven G. Calabresi, *Text v. Precedent in Constitutional Law*, in ORIGINALISM: A QUARTER-CENTURY OF DEBATE 200-03 (Steven G. Calabresi, ed. 2007).

22 See Joel Alicea, *Gingrich, Desegregation, and Judicial Supremacy*, PUB. DISCOURSE, Jan. 5, 2012, available at <http://www.thepublicdiscourse.com/2012/01/4491>.

23 *Id.*

24 See *supra* note 19.

25 47 IND. L. J. 1 (1971).

26 See Edwin Meese, III, Attorney General of the United States, Speech Before the American Bar Association, Washington, D.C. (July 9, 1985).

27 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 383 (1833).

28 See Edwin Meese, III, Attorney General of the United States, Speech Before the D.C. Chapter of the Federalist Society Lawyers Division (Nov. 15, 1985):

Where the language of the Constitution is specific, it must be obeyed. Where there is a demonstrable consensus among the Framers and ratifiers as to a principle stated or implied by the Constitution, it should be followed. Where there is ambiguity as to the precise meaning or reach of a constitutional provision, it should be interpreted and applied in a manner so as to at least not contradict the text of the Constitution itself.

Id. (emphasis added).

29 See Sheldon Goldman, *Judicial Confirmation Wars: Ideology and the Battle for the Federal Courts*, 39 U. RICH. L. REV. 871, 878-79 (2004).

30 See SHELDON GOLDMAN, PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN 291-93 (1997).

31 See *supra* note 29 at n.103 (and accompanying text).

32 See *supra* note 29 at n.106 (and accompanying text). The decision reasoned that parents were no more than "third parties" in the context of a minor child having an abortion.

33 *Id.*

34 See Steven G. Calabresi, *Introduction to ORIGINALISM: A QUARTER CENTURY OF DEBATE 2* (Steven G. Calabresi ed., 2007).

35 See Edwin Meese, III, Attorney General of the United States, Speech Before the American Bar Association, Washington, D.C. (July 9, 1985).

36 *Id.*

37 *Id.*

38 See Lynette Clemetson, *Meese's Influence Looms in Today's Judicial Wars*, N.Y. TIMES, Aug. 17, 2005, available at <http://query.nytimes.com/gst/fullpage.html?res=9E0DEED6123EF934A2575BC0A9639C8B63&pagewanted=all>.

39 Compare Editorial, *Why Give That Speech?*, WASH. POST, Oct. 29, 1986, at A18 (condemning Meese's speech as "an invitation to constitutional chaos and an expression of contempt for the federal judiciary and the rule of law") with Edwin Meese III, *The Tulane Speech: What I Meant*, WASH. POST, Nov. 13, 1986, at A21.

40 See Orrin G. Hatch, *Judicial Nomination Filibuster Cause and Cure*, 3 UTAH L. REV. 803, 815 n.64 (2005).

41 See *id.* at 816.

42 See *supra* note 38.

43 See Margalit Fox, *Bernard Siegan, 81, Legal Scholar and Reagan Nominee, Dies*, N.Y. TIMES, Apr. 1, 2006, available at <http://www.nytimes.com/2006/04/01/us/01siegan.html>.

44 See ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 282-93 (1990).

45 See Tobin Harshaw, *Kennedy, Bork, and the Politics of Judicial Destruction*, posted Aug. 28, 2009, available at <http://opinionator.blogs.nytimes.com/2009/08/28/weekend-opinionator-kennedy-bork-and-the-politics-of-judicial-destruction/>.

46 See Joe Nocera, *The Ugliness Started with Bork*, N.Y. TIMES, Oct. 21, 2011, available at <http://www.nytimes.com/2011/10/22/opinion/nocera-the-ugliness-all-started-with-bork.html>.

47 DEPT OF JUSTICE OFFICE OF LEGAL POLICY, BY AND WITH THE ADVICE AND CONSENT OF THE SENATE: THE BORK AND KENNEDY CONFIRMATION HEARINGS AND THE IMPLICATIONS OF JUDICIAL INDEPENDENCE, Executive Summary (1989).

48 See MORRIS P. FIORINA ET AL., CULTURE WAR? THE MYTH OF A POLARIZED AMERICA 33-50 (2005).

49 See L.A. Powe, Jr., *The Not-So-Brave New Constitutional Order*, 117 HARV. L. REV. 647, 664-66 (2003) (reviewing MARK TUSHNET, THE NEW CONSTITUTIONAL ORDER (2003)).

