

Criminal Justice Washington Letter, 108th Congress, 2nd Session, # 16;

Mike Israel, Editor: israelmike@crimeletter.net, November 12, 2004.

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The Justice Department in the Second Term Bush Administration:

I was going to predict that Attorney General John Ashcroft would soon leave the Justice Department, but his “resignation” beat me to it. His successor, nominated by the President, is the President’s chief counsel, Alberto Gonzales. Whenever a cabinet member leaves a Presidential administration, there is the question: did he jump or was he pushed? His handwritten five page resignation letter to the President simply said it was time for a change. He said he will remain until his successor is confirmed, which, given the present climate, may be awhile. The same could be said about his successor.

Ashcroft is 62, and he has been ill twice in the last year with gallbladder surgery and pancreatitis. But he has always been controversial. He was confirmed by the Senate in February, 2001, by a 58-42 vote, the closest for a cabinet member in decades, and several Republicans crossed over to vote against him. A close friend said that the White House always wanted him to be a lightning rod who drew criticism away from President Bush, and “He was something to offer to evangelicals,” and then “they used him, and now they’re done with him and he’s being tossed aside.”

It was said that he never developed a close relationship with Bush, who had been annoyed that Ashcroft acted like a grandstander and overly politicized the Justice Department. One Republican close to the White House said that Ashcroft had received a “strong signal” from the administration that his resignation would be accepted.

If it was up to Congress, they also would have accepted his resignation. The Judiciary Committees of both houses have at different times requested information from him on the implementation of the USA Patriot Law, and to both he claimed a form of executive privilege. No one knows if cabinet members have executive privilege—the Democrats let that one slide—but now there is no need for a test in the Bush second term.

Ordinarily, AG’s appear regularly before the Senate Judiciary Committee for oversight in the implementation of acts of Congress on crime policy, but Ashcroft rarely appeared, drawing the ire of many of the 19 Senators on that committee. The leading Republican critic of Ashcroft has been Arlen Specter from Pennsylvania, who would rant about the Patriot Act: “Ever hear of probable cause!”

A major agenda item for the second Bush term will be the renewal, and possibly enhancing, of the USA Patriot Act which expires next year. Ashcroft drew a lot of fire from that, not only by Democrats, but considerably from Specter.

Ashcroft had a contentious career, and as a U.S. Senator he was actually defeated for re-election by a dead man. His opponent, Missouri Governor Mel Carnahan, died in a plane crash before the election, but won anyway, and his wife was appointed to serve an abbreviated term. In his first year, before 9-11, his agenda was an anti pornography campaign. He brought 43 such cases to trial and lost every one. Then, about a month after the terrorist attack, he was a prime mover to push the Patriot Act through a shell-

shocked Congress. The Senate voted for it 99-1, with the proviso that it expire at the end of 2005 unless renewed. That was all the opponents could get, at the time.

In the last year, however, all of the Democrats and some Republicans on the Senate Judiciary Committee have showed distinct signs of disapproval of the act and a battle is expected in the coming year. The leading Republican critic has been Arlen Specter, just re-elected. Just about everybody has indicated that they will approve parts of the act, but other parts, like detentions without a hearing or counsel, and roving administrative wiretaps are targets. The administration wants to at least renew it as is, possibly strengthen it, and Ashcroft, who has been identified with it, had become, in the eyes of Congress, baggage.

The President's Lawyer, and Friend:

Alberto Gonzales, 49, if confirmed, will be the first Hispanic AG. He not only was counsel to the George Bush White House but had the same job when Bush was Governor of Texas. In between he served a brief stint on the Texas Supreme Court, during which time he joined the majority in upholding a teenager's right to an abortion without parental notification. He wrote a concurring opinion on that case attacking the conservative dissent as "unconscionable judicial activism." This will now come back to him. [*An irony: one of the dissenters was Priscilla Owen, a Bush nominee to the U.S. Court of Appeals, who was blocked by the Democrats.*] Bush, of course, claims he is appointing judges who will not be judicial activists.

Gonzales is in the strange position of being attacked by both the right and the left, although his image is as a moderate. Certainly his personal style is softer than Ashcroft. The right views him with suspicion because he is not an ideologue on social issues, including affirmative action; and the left remembers that he had pushed for gun possession as an absolute right, and that the infamous torture memos of 2002 had his tracks all over them. He first argued that torture methods for interrogating al Qaeda was outside the Geneva Convention, and then he re-defined torture of prisoners to exclude humiliation and fear. He has tried to distance himself from those memos (he had participated in the *drafting*), but he has also publicly defended the administration's policy of detaining "enemy combatants" without lawyers or a hearing, a position rejected by the U.S. Supreme Court in June.

The Senate's tradition is to be deferential toward Presidential appointments to his cabinet, partly because they are not lifetime appointments, but this may be an exception. Gonzales may also have a problem because he has at least been interviewed by the FBI concerning the outing of the CIA agent, Valerie Plame, which is a federal crime. As Attorney General, he would be investigating himself. His confirmation hearings will be in January by the Senate Judiciary Committee. Interest group pressure from liberal and conservative groups has begun. Until then, Ashcroft will remain.

The Senate Judiciary Committee Gets a New Chair:

Both parties in Congress govern themselves with something called "The Caucus." What is most important in their caucuses is the election of committee and subcommittee chairs, and both will do that for the 109th Congress next week. The Democrats are somewhat discretionary but respect seniority; while the Republicans have a much stronger tradition of seniority. To them, seniority is virtually inviolate, although not a

rule. Also, the Republicans have a rule that no chair can serve more than six years. [They don't want their committee chairs to become more powerful than their House and Senate leadership.]

For the past six years the chair of the Senate Judiciary Committee has been Orrin Hatch (R-Utah), a hard line law-'n-order conservative. Now, by their rules, he has to give up this post. He will remain on the committee with senior status, and he may get a chairmanship of another Committee. (Senators serve on more than one committee, but can be chair of only one.) The next most senior Republican is Chuck Grassley of Iowa, a rare non-lawyer on Judiciary, but he is already a committee chair of the powerful Finance Committee and wants to keep it. The Judiciary chairmanship is open.

The next Republican in seniority is Arlen Specter. He may be the leading Republican moderate in the Senate, especially on civil liberties issues (but there are only five Republican moderates). As chair, probably his biggest power is scheduling of hearings and votes, or not scheduling, or using scheduling as a bargaining tool. With Specter in charge, the renewal of the USA Patriot Act is in trouble. But will he be in charge? Is seniority a sure thing?

The Supreme Court Issue:

It is well known that the Supreme Court's Chief Justice, William Rehnquist, has thyroid cancer and is undergoing radiation. For that reason, and the advanced ages of most of the justices, the re-elected President Bush is likely to nominate several justices in the next four years. Nominations to the lower federal bench have been probably the most polarizing relationship between the President and Congress in the last four years, and 10 times nominations to the U.S. Court of Appeals were blocked by Senate Democrats with a filibuster. This infuriated Bush and the Senate Republicans.

During the past election campaign, in the third televised debate, the two candidates were asked if homosexuality is a choice. [We have subsequently seen the saliency of that question.] Bush answered that he didn't know, but used his precious time to go on to say that he would only appoint to the Supreme Court justices who would follow the Constitution and not their personal opinions.

When it was Kerry's turn to respond, he by-passed the homosexuality question and talked about his criteria for nominations to the Supreme Court. He literally said that he would not appoint anyone who would overturn Roe v. Wade, the dreaded "litmus test," which in the past Democrats have been against for Supreme Court nominees. All of this plays into what exit-polling research has shown as the so-called "morals issue" as the most powerful issue in the election. One of, if not *the* most important agenda item on the plate for the second Bush administration is the overturning of the abortion precedent. Bush has said after the election that he would do "What I have been sent here to do." Translation: aggressively.

That means, target number one is to turn around the 5-4 Supreme Court's pro-choice majority. The road to the new Supreme Court, however, must go through the Senate Judiciary Committee. The full Senate can filibuster an appointment and the Republican 55-44-1 Senate majority still lacks the 60 votes needed to over-come a filibuster, but politically the Democrats on the Senate can't do that very often. They need an alliance with moderate Republicans. Such an alliance, between over 50 (hopefully)

steadfast Democratic votes against cloture and Republican control of the Judiciary Committee could play havoc with Bush's Supreme Court agenda.

Inside the Republican Caucus:

The day after the election, Arlen Specter faced the press, knowing about Rehnquist's illness. After 24 years in the Senate he had been re-elected to a fifth term, but this year he had faced stiff opposition in the Republican Primary and barely squeezed by. His opposition was a hard right winger named Patrick Toomey who charged that Specter was a "Ted Kennedy liberal" who would block conservative judges if he ascended to the chairmanship. In order to win the nomination, Specter moved to the right, and subsequently he was supported by the other Pennsylvania Senator, the prominent, evangelical conservative Rick Santorum, who happens to be chair of the Republican Caucus. The President also chipped in his support, and he survived the primary, barely.

Specter won the general election easily, but reportedly he has harbored some ill feelings toward conservatives in his party for running such a well financed primary campaign against him. He is well known to be pro-choice, so now he was asked in a news conference what he would do as chair if the President nominated pro-life abortion opponents.

"When you talk about judges who would change the right of a woman to choose, overturn Roe v. Wade, I think that is unlikely," he said, that they would be approved. Then he added, "The President is well aware of what happened when a number of his nominees were sent up, with the filibuster."

That comment has been analyzed to death for a week. Usually only the first sentence is quoted. Specter has tried to explain it, which has been seen as a retreat from a promise that he would not allow pro-choice judges to come to a vote. He said there would be no litmus test. Others have defended him by saying that he was only predicting what the Democrats would do, not making any threat. Still others saw it as "payback to the conservative right for making him go through a punishing primary." This was his "declaration of independence," from his party's conservatives, said one liberal lobbyist.

"Welcome back, Senator Specter," said the interim president of Naral Pro-Choice America."

The first battle of the new Congress will start next week when the Republican Senate caucus votes to decide who will chair the Judiciary Committee. The formal decision will not be made until the new committee convenes in January, but the caucus is the critical point. If Specter is quashed, next in line is the arch conservative, Jon Kyl of Arizona.

The White House gave Specter tepid support. A spokesman said that the chairmanship was "a matter for the Senate to decide." Santorum has reportedly stood by his Pennsylvania colleague. At this writing it is unclear if the seniority custom will hold and Arlen Specter will chair Judiciary. Meetings are being held as I write. Specter is being asked by conservatives for assurances. The future of the USA Patriot Act may well be decided now, as well as the Roe majority on the Supreme Court, among other issues, including an unknown number of crime policy initiatives.

Notes from the Election:

When voters left their polling places in strategic places throughout America on Election Day, thousands were asked to complete a questionnaire for various media groups. These were the famous or infamous “exit polls,” which not only asked them who they voted for but also a range of socio-economic questions. They were also given a choice of seven issue areas and asked “which ONE (sic) issue mattered most in deciding how you voted today?” It was widely assumed that Terrorism would be number one. It was number three, while the Economy/jobs was number two.

The number one issue deciding how voters voted was called “Moral Values.” (about 22 %) This, and the big turnout in rural areas, plus the fact that ballot measures banning same-sex marriage in 11 states were all approved, led to the widely held conclusion that the election turned on the moral values of homosexuality, abortion, and fundamentalism in religion. “Values” has become the hot button word in American politics.

But let’s pause. Exit polling is voluntary, for one, and the exit polls actually wrongly pointed to John Kerry as the winner during the day. Since “values” beat the “economy” by one point, and “terrorism” by two points (22-21-20 %, or close variations), the post election emphasis on values may be quite exaggerated. And remember, respondents were given a choice of seven (Iraq, 15 %, health care 8 %, taxes, 5 %, and education 4 %), from which they could only choose one.

A bigger problem than sampling error, however, is the ambiguous meaning of the term “moral values.” That phrase can mean anything, or nothing. Maybe every vote is on moral values. Other data found 25 % supporting gay marriage and another 35 % supporting civil unions. There is a big middle on the so-called moral issues, even if defined in homophobic terms.

Why bother with this ambiguity which is created to satisfy the press’ cravings for some news the day after the election, and then all but party strategists plotting next year forget it? Notice what is not there: crime, public safety, even guns. Those issues weren’t there because the closed-ended questions didn’t give voters that choice. Wonder what would have happened if the voters had “gun control” as a choice! There is only a small step between moral values and crime. If anybody in a policy making position bothers to break down moral values into specific policies, there is a fearful chance that crime will rise in salience. When crime becomes an election issue, the result is simplistic, superficial moral distinctions between getting tough (good) versus being soft (bad), and rational policy is the loser.

What should we Learn from this Election?

This country is conservative, but with a big middle. Polls show 34 % of voters to be self described conservatives, 21 % are liberals, and 45 % described themselves as moderate. (Kerry won the moderates and “independents.”) There was almost no mention of crime issues during the campaign, except briefly during the third televised debate (Bush would lengthen sentences, Kerry would vigorously prosecute, Bush reminded us that he opposed the International Criminal Court), but more in-depth surveys may find again the salience of the gun issue as it was in 2000. Kerry almost never mentioned that he had been a prosecutor.

We should of course note the defeat of a referendum in California to somewhat rationalize their three-strikes sentencing law (Proposition 66). Polls showed nearly two-

thirds were in favor of the reform before Governor Arnold Schwarzenegger blitzed the media in the final weeks with his “letting dangerous criminals on the street” photogenic appeals. The initiative failed with 47 %, an amazing turn-around, reminding us of the volatility of the crime issue and what money and slogans can do.

In West Virginia a state Supreme Court Justice named Warren McGraw was defeated for re-election by 53-47 % in a usually barely visible judiciary election when his opposition spent \$2.5 million, \$1.7 million from one donor. Some of their TV spots were shown in the Washington, D.C. area and I was able to see this throw-back to the days of Willy Horton. This judge had joined a 3-2 majority extending probation for a man convicted of sexually molesting a half brother, but the man had himself been the victim of childhood sexual abuse. The spots showed a black and white grainy photo of McGraw, looking like a deranged maniac, superimposed with pictures of children playing, and the menacing voice over told how this judge had allowed a convicted child molester loose to prey on children, with no specific harm to anyone mentioned. The \$1.7 million donor is the CEO of an energy company that will have several cases on appeal before the state Supreme Court. “West Virginia Supreme Court seats were for sale,” said a consumer advocate.

A public opinion still vulnerable to hysterical appeals using fear of crime was only rarely seen in this election, but we should be reminded that it is still not far away. A culture war over moral issues is ominous to rational crime policy, but if there is to be one our community of researchers and experts ought to be ready with a political agenda that can appeal to the large, soft middle of American public opinion.

There will be one more CJWL this year, reporting on the lame duck session of Congress, the new leadership as it pertains to crime policy, and what appears to be the Bush Presidency’s’ second term crime policy agenda.