

WHAT IF McCAIN, CLINTON, OR OBAMA WERE PRESIDENT?:
LECTURE ON THE JUSTICE DEPARTMENT AND AMERICAN POLITICS

Presented at University of Southern California, Unruh Institute,
March 25, 2008

by

Matthew Holden, Jr.

University of Virginia and Isaiah T. Montgomery Studies Project,
Inc.

Introduction:

I am deeply obliged and grateful to the University of Southern California for this opportunity to try out some thoughts. I am especially grateful to Professor Janelle Wong, the Interim Director of the Unruh Institute. She has been so cooperative, even to the point of calling last night to see if I needed help. She made that call, even as she was at home worrying - - her tone of voice revealed it - - about her young son who had a fever. I want to say in front of this public audience that I sing her praises, and wish the kid well as soon as nature, the doctors, juvenile resilience, and mother's love come together. I say that knowing that whatever disorder is going around has also caught her. She herself is sick today. In

multivariate analysis I think I know which will count the most.

I also must say a word about my long-time friend, and distinguished colleague, Michael Preston. Mike's scholarship, research and teaching are already known to you here at USC. But I want to add a little broader comment on his roles.

I suspect that it may not be known that Mike worked in the K-12 terrain. The successful teacher displays clarity. The successful principal takes care of things. He was also a school principal. That is a responsibility that is quite extraordinary, and a person carries it with himself or herself long after. Mike is excellent at clarity and at taking care of things.

Mike was a student of my good friend Aaron Wildavsky, that brilliant, inexhaustible, scholar who did not seem ever to think of what was his "field." The whole world was his field. He only concerned himself with what was "the problem." Mike worked in that terrain and learned that lesson.

Mike is a tower of strength, a citadel whose breadth of knowledge in scholarship, in public affairs across the country. He worked, for instance on the National Commission on Public Service, along with my friend the forward-thinking Governor William Winter.

And Mike knows, though he is not there yet, about old professors who are retired, but will not fade away. I am grateful, Mike.

Today's Agenda and Topic

My function today is that an intellectual missionary. It is

to encourage you, my colleagues of all levels, faculty and student, to join in a serious effort to bring the Justice Department from the shadows of folklore into the light of sustainable empirical knowledge.

I emphasize the predicate of political reasoning.
Politics

is a highly emotional activity. You see this especially in election campaigns. But I want to emphasize, knowing that some of you are believers in John McCain, some in Hillary Clinton, and some in Barack Obama, that there is always a need to enhance the people's capacity for reasoning about politics. (There are many definition of politics, but the definition used here is "the organization of power in human groups." (Holden, 2000, 1-19.)

With that in mind, I will ask you to think about the Justice

Department and American politics. If Senator John McCain becomes President, what will his Justice Department look like, be, and do? If Senator Hillary Clinton becomes President , what will her Justice Department look like, be, and do? If Senator Barack Obama becomes President what will his Justice Department look

like, be, and do?

William French Smith, a successful Northern California attorney, was Reagan's first Attorney General. Presumably he

went to the Department of Justice knowing a lot about it. Smith referred to the Department as "one of the most powerful [institutions] in Washington and one of the least understood." (Smith, 1991, xvii.)

Cornell W. Clayton and Nancy V. Baker have been the recent political science leaders in attempting to cope with the Department as a as a whole. But there is a remarkably small set works that try to put the Department as a whole in the context of the political system. Richard L. Pacelle and Rebecca M. Salokar have been the two political scientists whose work have added a lot to our understanding of the Solicitor General's office.

At this point the Justice Department is a highly topical, even a "hot button," subject. Someone may wish, or even believe, that we would be able to show exactly how (or even whether) Karl Rove controlled Alberto Gonzales and for what precise reasons the eight United States Attorneys were fired. Such hopes would be false. Various people have stated opinions on that topic. Many hours of television have been dedicated to it, and many hours of staff inquiry and study have preceded the television time. There has been an unusually extensive set of speeches in the Senate especially, and somewhat in the House. The question is not trivial .

Understanding the Department of the Justice

The Justice Department is fundamentally important because the politics of legal initiation is important. The Department's

role in American life is growing. It is nor likely to recede soon. We will have to cope with it even when the tumult of hearings and the shouting of campaigns shall have died away.

Political scientists should begin with a fundamental grasp of prosecution. The problem is better stated, perhaps, as the problem of legal initiation in criminal matters, in civil matters, and in advice to officials as to what they must do, may do, and may not do. Political scientists should also understand how this is part of the executive-bureaucratic process. THE JUSTICE DEPARTMENT AND ELECTION PRACTICES

The Department has a role in regulating state and local electoral competition. It is so important those who are mainly interested in state and local politics should have as much interest as those interested in national politics and world affairs. This take special force under the Voting Rights Act and resultant litigation. There have been hundreds of Voting Rights Act cases. Recently, the Department put a lot of effort - an unusual amount of effort-into one case in Noxubee County, Miss. I think the case was wrong to be brought, and that the trial judge decided it wrongly. The contention was of black officials' discriminating against white voters, and it has been horribly misreported in the national media. The chief effect is, in my opinion, to provide a threat of further white political

counterattack in rural local politics - and possibly elsewhere-
in the circumstances where blacks finally break through to
having

governing majorities.

On such matters what should we expect of a McCain
Department

of Justice, of a Hillary Clinton Department of Justice or of a
Barack Obama Department of Justice?

There have been other aspects, some of which go back a long
time. It would profit us to have a close study of the
prosecution of Huey Long's political heirs in Louisiana in the
late 1930s. I understand that the use of the Mail Fraud Act of
1872 as the basis for Federal charges against local politicians
got its workout in those prosecutions. O. John Rogge, an
Assistant Attorney General under Franklin Delano Roosevelt, was
according to my understanding, the leader in the use of the mail
fraud charge as a lever in otherwise difficult cases.

Decades before the post-Long prosecutions, back in 1876,
Attorney General Alphonso Taft gave strict instructions to the
United States Marshals for alertness to election fraud. I used
to think of this as an attempt to protect black voting, and
Republican votes, in the Deep South. Perhaps it was. But the
idea can also be stated that it was aimed at protecting

Republican candidates in the Democratic machine cities of the North. Again, repeat the question. What should political scientists predict of a McCain Department of Justice, of a Hillary Clinton Department of Justice or of a Barack Obama Department of Justice?

THE POLICING OF OFFICIALS' ETHICS

Nowadays, the role of the Public Integrity Section warrants

some extra attention. The Eliot Spitzer case brings this to the

forefront/the theatrical mass media effect. This case has been the subject of a number of emails on the listserv of the Law and Courts Section of the American Political Science Association.

(The moderator of that listserv for a long time was your own Dean

Howard Gillman, who conducted with discretion, courtesy and intellectual imagination.)

Some people, prominent among them Professor Kim Lane Scheppele (Princeton) wondered if catching Governor Spitzer had not been just too convenient. The implication was that of selective prosecution of Democratic officials. Others disagreed or had some other angle.

There was a formidable amount of discussion on the listserv.

In the wee hours of yesterday morning, I sent a message saying I was about to give this lecture today and said " thank you all for spicing it up." In the online exchange, one colleague suspected selective prosecution. A second said he saw no evidence of it, which was not the same as showing that it did not happen. I asked who, among the law professors, political scientists, sociologists and others on the list has developed a methodology for studying "investigations" and for studying the process of turning "investigations" into indictments, etc.?

The same question forces itself upon our minds. Its answer does not legitimately come from our emotions or what we want to believe. We have to think through what we should best predict of a McCain Department of Justice, of a Hillary Clinton Department of Justice or a Barack Obama Department of Justice.

There appears to be no answer yet, and even little academic willingness to confront what the problem is. One lawyer said "I think you're going to have trouble even operationalizing the variable. You could come up with a definition, maybe something like "If, under the exact same circumstances of venality, criminality and political position, members of one political party were prosecuted by members (or appointees) of another political party where members or appointees of the same political party were not prosecuted" but you are going to be very hard put to find the otherwise exact same circumstances."

In the first place, this what this is one more example of a problem where methodology stands as a barrier, not an asset. This means chiefly is that the path remains open for a solution of the intellectual problem, so as to give some answer to the practical problem.

THE JUSTICE DEPARTMENT AND THE ADVISORY OR INTERPRETIVE FUNCTION

Presidential power and the power of the Executive Branch is something to be understood in the work of the Office of Legal Counsel, to which there is room for better attention. This is especially so in light of the increased importance now given to signing statements. Long ago, Edward S. Corwin said that such statements had no meaning. But that really means they have no meaning for a court. They do have practical meaning as instructions to the Executive Branch as to how a President wants the law interpreted.

Again, the question of what to expect runs like a red thread through our mental fabric. In 2009, we should expect to find decision-making, at least by higher level officials, constrained by imperative loyalties. Imperative loyalties are active pressures or political demand that other people will enforce or attempt to enforce, whether the person upon whom they seek to act

likes it or not. They can be reduced to four.

The first is party, faction, or clique, or ideological linkage- despite constant professions that nothing "political" should be taken into account. Which form will be manifest will depend on whether the President is McCain, Obama, or Clinton. Some forms of politics may be excluded, but the idea of all politics being excluded is an illusion by some and a pretense by others. The really significant question is what forms of politics should be excluded, what can be excluded, and to what degree.

The second is public opinion and culture. The third is the legal profession itself. Finally, there is something to be said of cooperation and coordination with other agencies, especially in the world of "law enforcement."

We should also expect to find as internal beliefs and emotional commitments about how judgments should be made stand as latent pressures.

DEPARTMENTAL PROCESS AND STRUCTURE

In thinking about the Department of Justice, and how it would operate under McCain, Clinton, or Obama, the centrality of

administration to power and the role of both the executive entourage and the operating departments should be understood.

The Department's authorized leadership will speak of it as dealing in "law," or sometimes "the law." The leadership will constantly be faced as well with the question of "policy." The Department, with its subject matter specialty in law, is the prime specialist in the collection of information, withholding of information, and (at its discretion or under external pressure) the dissemination of information, the extraction of money, and the application of coercive force.

As students of the governing process, we need to have a strong sense of the simultaneity of bargaining and command. I especially emphasize that. The Department does not, nor does any department, operate in an undivided command system. There is some command from above and there is some bargaining from below.

I have sketched this view out some twenty years ago in an article in Social Science Journal. ((Holden, 1988, 255-276.))

Happily, this has sometimes been taken up by a psychiatrist named

Vamik Volkan and my friend and student James Pfiffner, and was the subject of nice letters from Dick Neustadt and Nelson

Polsby.

Whether simultaneous bargaining (explicit or tacit) and command at the same time is desirable or not, the messier reality is that is the way the system will work. But I was excited to see some new evidence of it Dale Van Atta's With Honor: Melvin Laird in War, Peace, and Politics, as I read parts of it on the plane from San Diego yesterday. (Especially see about 87 pages in Chapters 9-12.) That idea should be with us, accordingly, as we try to learn how the DOJ works as a system.

The next set of expectations is that we should look (a) to discover the paths by which praises, reassurances, demands, complaints and threats from the world outside the Department get into the Department, and (b) what the Departmental actors do in relation to these signals and results, favorable and unfavorable, come in its exchange with the rest of the world?

Political scientists need, in order to answer the questions about Obama, McCain, and Clinton, a clearer conception of the functions of the Attorney General. There is a special power and a special vulnerability to that job because of overlapping roles and demands that cannot be avoided.

The Attorney General's problem is to deal with the

President

and with those who can present themselves to the Attorney General

as being able to speak for the President. After that comes a set

of other problems: (1) formal line of oversight (and real lines of insight, if not oversight) into the Department; (2) formal and informal relations to the outside world; (3) relations with the various aspects of Congress; (4) relations with other agencies;

and (5) relations to the courts.

I will mention the Solicitor General because this is the person who controls the decision to allow or not to allow a case in which the Federal Government is a party to seek Supreme Court review. Some years ago, a man named Lincoln Caplan published a book called The Tenth Justice. In reality, the Solicitor General

is better described as a deputy attorney general for Supreme Court review.)

The vastly more important office is, in fact, almost as obscure as twilight, except for those who have to know. This is the Deputy Attorney General. As soon as the 2008 election is past, speculation through the mass media will begin about the makeup of the Cabinet, including the Attorney General. If I could

today ask Obama, Clinton, and McCain I would ask "whom will you choose as Deputy Attorney General?" and "what does your choice have to do with what the Deputy Attorney General really does?"

Here in the Los Angeles, one of your world famous citizens held the Deputy Attorney General position during the Johnson Administration. That was the Hon. Warren Christopher. From what I can gather from synopses in the New York Times index, his role as Deputy AG involved a great deal of legislative representation on the Hill, some work with the choosing or making of judges, and a great deal to do with the then high octane issue of race relations and urban revolt.

Perhaps no opportunity now presents itself, but if there were such an opportunity, a careful debriefing of Secretary Christopher (so far as can be sustained twenty years after the fact), with the most careful elite interviewing methods would be of great value.

Each of the candidates for President could, and probably would, prudently decline to answer on the basis that it would be premature. The prudence is understandable. The prematurity is probably not much more than a diplomatic rationale.

Clinton perhaps would know whom she would have, and - - if the record is right - - has had for more than enough experience

and exposure to know what the job is. She had the experience of a law partner, Webster Hubbell, who was to be Deputy Attorney General in the first Clinton Administration but had his career crash in personal troubles. She may be presumed to have known something about the next three people and their work, Philip Heymann, Jamie Gorelick, and Eric Holder.

McCain and Obama probably might not know or have thought about the Deputy Attorney General. McCain, if the record is correct, is not a "detail" person and neither is Obama, although the conduct of the primary campaign may provide evidence to the contrary. Both are concept people, if I read the public record correctly.

I will mention as well the question of how McCain, Obama, or Clinton will deal with the Inner Core (Top Level), that consists of the recently emergent Associate Attorney General (a job that Rudy Giuliani held for a little while), and the Assistant Attorneys General (AAGs) who perform crucial executive-centric work. These were the AAGs for Office of Legal Counsel, Office of Legal Policy, and Office of Legislative Affairs.

Whether you support McCain, Clinton, or Obama you should look analytically at the choices either of them will have to make about these positions and know that what is done by those whom they appoint will have profound effects on what the Government

does.

The same statement can be made about the second level appointments of the AAGs of the seven litigating divisions. When

I urge new study by political scientists, and their students, at all levels, it is because there is more to say and more to know. This group of top level officials, the second level officials, and the units they control or lead, are known colloquially as "Main Justice" (McGee and Duffy,).

The most significant factor about the litigating divisions is whether its constituency structure (Holden, 1966, 943-951). Three of these divisions are closely related to obvious partisan and interest group alignments in the country. These are the Environmental and Natural Resources Division, the Civil Rights Division, and the Anti-Trust Division.

Again, the bargaining-and-command point applies to the third level of the Department. Here I refer to the Presidential appointees designated United States Attorneys. They represent the Government throughout its territory. (James Eisenstein has been the acknowledged leader in writing on this subject. Other noteworthy contributors include his co-author Lisa L. Miller,

Todd Lochner, H. W. Perry, Andrew Whitford and Jeffrey Yates.)
The 2006-2007 US Attorneys controversy helps to illustrate the importance of this office.

CONCLUSION

I have tried above to make the point, as said before, that, in the context of 2008, people should try to reason about what the DOJ would be if John McCain were to become President, if Barack Obama were to become President, or if Hillary Clinton were to become President.

Whether Senator Clinton had decided much of anything or not, she has been near the center of the executive process with enough time to observe. Unless her own mental selection processes lead her to screen out the evidence, she will have had plenty of reason to see the simultaneity of bargaining and command. This will mean that she will know that, as President, she cannot be assured that her decision premises will be followed all the way through in the Department.

Senator McCain may or may not have seen this. The Navy, from which he has to have learned much of his life's lessons, is

the institution in the military that has often successfully resisted command that it deemed unwise. I would not now be able to guess what McCain's personal style may be. Being close to something does not mean that you see it. Henry H. Fowler, former

Treasury Secretary, told me that as Secretary fifty per cent of his time had been spent on international affairs. He found this a surprise because he and C. Douglas Dillon were good friends and

worked closely when Dillon was Secretary and Fowler Deputy Secretary. But he still had not realized the time demand until he moved up to Secretary.

The issue of what there is to learn would be there for McCain and it would be there for Senator Obama as well.

These are issues for some study, and some close reasoning, free as possible of emotional commitments. I know that Presidential practices about judicial appointments, especially Supreme Court appointments, are vital. But the overall direction and control of legal initiation, through the Department of Justice, may be far more indicative of future exercises of power.

In that light I assert my missionary appeal. The deficit of

knowledge is so great that course term paper, undergraduate theses, master's theses, doctoral dissertations, and books - both

scholarly and, popular are needed.

REFERENCES:

Matthew Holden, Jr., "Bargaining and Command by Heads of U. S. Government Departments," Social Science Journal (1988), 255-276.

-----, "The Competence of Political Science: 'Progress in Political Research' Revisited," American Political Science Review (2000), 1-19.

William French Smith, Law and Justice in the Reagan Administration: Memoirs of an Attorney General, Stanford: Hoover Institution Press/Stanford University, 1991.

Dale Van Atta, With Honor: Melvin Laird in War, Peace, and Politics, Madison: University of Wisconsin Press, 2008.