Crisis and the Pursuit of Conservatism: Liberty, Security, and the Bush Justice Department

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George W. Bush took over the reins of the presidency as a result of one of the most controversial Supreme Court decisions in U.S. history, Bush v. Gore. This unprecedented conclusion to the 2000 presidential election quickly raised questions about the forthcoming relationship between the Bush administration and the law. More specifically, many in the legal community began to ask about the extent to which the new administration would use the resources of the executive branch to solidify the federal courts’ conservative slant. While many will undoubtedly look to President Bush’s judicial appointments to answer this question, in this chapter, I consider it from another angle; namely through an exploration of the Bush Justice Department, particularly its activities following the September 11th attacks on America. In doing so, I make two arguments. First, I argue that such an investigation reveals much about the Bush administration’s approach toward the law, and helps clarify the guiding principles underlying its policies. Second, I suggest that by analyzing the Bush presidency in “political time,” we can more fully understand why its Justice Department’s record in court was initially “decidedly mixed” and why some of the harshest critics of its antiterrorism policies have been conservative Republicans.

The Presidency and the Law

Elsewhere, by focusing on Franklin D. Roosevelt’s administration, I suggest that presidents enter office intent on using their policy toward the judiciary to help them secure a lasting legacy. Building on this research, I carry out a similar—albeit more immediate—analysis of the second Bush administration in this chapter in an attempt to understand its approach to the law. I do so by arguing that presidential judicial policy is not only driven by ideology, as scholars often suggest, but that presidents are motivated by a complexity of factors in constructing their “judicial policy.” The most important of these
motivations include: (1) the consolidation or expansion of an electoral coalition; (2) the achievement of a president’s immediate legislative policy preferences; and (3) the implementation of a president’s “constitutional vision,” defined as his image of an institutional order best designed to advance his values.

Yet, an analysis of these motivations reveals only part of the story. In order to understand the likelihood of presidential success in altering legal doctrine, it is also necessary to gauge the amount of political authority a particular president possesses during his time in the White House. Borrowing from Stephen Skowronek’s work, I suggest that “reconstructive” presidents would, in theory, have the most authority to alter the terms of legal doctrine. Presidents in other moments of “political time” would either have less desire to challenge the existing legal order or confront greater opposition in their efforts to do so.

In Skowronek’s terms, President George W. Bush governs during a “politics of articulation.” This “moment in political time” is “when established commitments of ideology and interest are relatively resilient, providing solutions, or legitimate guides to solutions, to the governing problems of the day.” Yet, “to dismiss presidents in such situations as presiding over a stable, ‘normal’ period of politics-as-usual is a mistake.” Indeed, although George W. Bush could rely on the dominant conservative principles shepherded by the near reconstructive presidency of Ronald Reagan, the terrorist attack on America and the divided nature of the American electorate required a different set of tools to advance conservative interests and values. In turn, understanding President Bush’s place in political time reveals much about the forces both supporting and resisting his administration’s attempts to alter the contours of the law, especially with regard to the Justice Department’s efforts to combat terror in America.

THE APPOINTMENT OF ASHCROFT

It wasn’t supposed to be this way. John Ashcroft was not George W. Bush’s first—even second—choice for the post of attorney general. During initial discussions about the contours of his cabinet, the recently declared president-elect favored former governor of Montana, Marc Racicot, as the man to head the Justice Department. While Racicot had attracted a great deal of attention because of his leading role in the Florida election dispute, the Bush team did not believe his nomination would draw much fire from Democrats. In fact, “Racicot had more problems on the right than on the left,” with members of the Republican right complaining “about his allegedly shaky conservative credentials.” In the end, Racicot made it easy on his conservative critics by removing his name from consideration, although “some boasted privately that they had forced him out.” Indeed, as Tom Edsall of Washington Post writes, one of the leaders of the Federalist Society—a conservative group devoted to transforming judicial interpretation—“was crucial in killing” Racicot’s bid for the spot. In a memorandum, Princeton Professor Robert George had described the “fears in the conservative religious community