

Politicians, Attorneys General, Justices—Parallels?

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In the home stretch of the 2004 presidential campaign, President Bush laid claim in every speech he gave to the legacy of President Franklin D. Roosevelt. President Bush invoked FDR's greatness as commander-in-chief: Bush, in the stump speech that he delivered many times, referred to Roosevelt's "confidence and resolve in times of crisis and in times of conflict." But President Bush's attorney general choices—Senator John Ashcroft in 2000 and White House Counsel Alberto Gonzales in late November 2004—also paralleled FDR's own appointments to that vital office in challenging times.

In November 1938, Democrat Frank Murphy, the governor of Michigan, was defeated in his bid for reelection. Murphy earlier had served as Roosevelt's appointed governor general of the Philippines. In 1936, Murphy (of Detroit) returned to Michigan and ran for governor. In that Democratic landslide year, Murphy won Michigan's statehouse while FDR was reelected to the presidency. Two years later, Murphy was a defeated politician in need of a job.

In FDR's Cabinet, the initial attorney general, Homer S. Cummings, was preparing to resign. Cummings had served for almost six years and, as principal architect of Roosevelt's failed 1937 plan to pack the Supreme Court, Cummings was damaged goods. Roosevelt, motivated to employ his loyalist Murphy, appointed him to succeed Cummings as attorney general.

Murphy, a lawyer and former trial court judge in addition to former governor, became attorney general in January 1939. Events soon showed that he was more politician than lawyer.

Attorney General Murphy brought his Michigan political team with him to the Department of Justice. They supplanted a management group of skilled lawyers and other career personnel who were relegated to the

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Department's lower echelons. DOJ morale, and its management of federal law enforcement, suffered.

As attorney general, Frank Murphy grabbed many headlines that described his Department of Justice leadership and successes. Murphy liked to announce in expansive terms, and thus to take personal and very public credit for, newly indicted federal cases across the country. He also would travel to cities to announce that new federal grand jury investigations had started or would start there, and he would predict publicly the significant charges that those juries soon would return.

Insiders, including DOJ's experienced personnel in Washington and the U.S. Attorneys and their prosecuting staffs throughout the country, knew that realities often did not match the attorney general's claims. But for a short time, at least until those gaps started to become visible and reported, Murphy looked like a very bold, energetic and competent attorney general.

Murphy had personal charm and political skill, but he was not a good fit in the country's top legal job. In the short term, this was no problem for FDR. His management style was to disregard organization charts. He worked instead, and very directly, with skilled "go to" people on particular issues even if they did not occupy official positions of top responsibility. On legal matters, he had excellent personal counsel—New York judge Samuel I. Rosenman—and, in the Department of Justice, a trusted number two officer who predated Murphy—Solicitor General Robert H. Jackson.

For those who wished for a new attorney general, the November 1939 death of Supreme Court Justice Pierce Butler was the opportunity. Butler's death created a vacancy in the Court's so-called "Catholic seat." Murphy, a Catholic and the visible, crusading attorney general, was an obvious candidate to succeed him.

Attorney General Murphy did not leave the Department of Justice easily. Although intrigued by the idea of Supreme Court service, he really wanted to become secretary of war—an idea that did not appeal to Roosevelt—and feared that a lifetime appointment to the Court would become his final government job. (It did.) FDR forced the matter by announcing Murphy's nomination to the Court and, after his confirmation, by scheduling his prompt swearing-in at the White House.

Roosevelt's effective firing of Murphy by appointing him to the Supreme Court was only half of a double move. The president also, at the same time, elevated Solicitor General Jackson to succeed Murphy as attorney general. Jackson had been, for FDR, carrying out many of the private advisory functions of attorney general for years (even under Cummings). In January 1940, Attorney General Jackson's title caught up with his actual role.

As Murphy's successor, Jackson lifted clouds that had enveloped the Department of Justice. He reassembled a team of competent legal professionals, including some of those who had been benched by Murphy. Putting himself in the crossfire, Jackson publicly dismissed some of the much-hyped Murphy investigations. Jackson, again taking public flack, even dismissed some of the cases that were less about law enforcement than about making the afternoon newspapers. Jackson publicly called for, and indeed required of all U.S. Attorneys, a return to ethical, apolitical prosecuting in a time when fear of subversives and impending military enemies generated huge pressures to do otherwise.

Within the year, President Roosevelt was reelected to his unprecedented third term. In January 1941, Jackson followed custom and sent a resignation letter to the president, in case he wanted to begin his new term with a new attorney general. FDR's immediate handwritten reply shows that he had, a year earlier, done all the attorney general-replacing he desired: "Dear Bob Thank you for your note. It can have only one answer: Stay put[.] Affec. FDR."

Frank Murphy, a fine politician but a misplaced attorney general, turned out to be a great Supreme Court champion of civil liberties. In 1944, for example, Murphy dissented powerfully from the Court's decision in Korematsu v. United States, which upheld Roosevelt's and the Army's orders excluding Japanese Americans from the West Coast and sending them to internment camps. (Jackson, who had joined Murphy on the Court in July 1941 after 18 months as attorney general, also dissented from that Court decision giving constitutional blessing to official, baseless racism.)

Attorney General Ashcroft has, we can assume, known and considered the examples of his predecessors Murphy and Jackson as he has occupied their former office for four years.

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For Attorney General-designate Gonzales, preparing to lead a Department of Justice that is focused on war-related issues and coming off a time of controversial leadership under Attorney General Ashcroft, Jackson's example in particular is a role model to consider.

And for reelected President Bush, the Supreme Court of course is one of many big topics on his mind. We can only speculate whether he sees John Ashcroft as a prospective justice.