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THE IMPACT OF A TRUMP PRESIDENCY ON CRIMINAL LAW

*Don Samuel**

INTRODUCTION

When asked to comment on my views of the impact of a Trump presidency, my initial questions were, “Do you mean as a criminal defense attorney? As a citizen of the United States? Or as a citizen of the world?” My answers would differ depending on the lens through which I try to predict what might happen in the next four years.

Within this Article, I will elaborate on my views on the Trump Administration in the following three capacities: (1) as a criminal defense attorney; (2) as a United States citizen; and (3) as a citizen of the world. Under each of the three sections, I will discuss sub-topics where I foresee substantial change coming under the Trump Administration. I will also comment on Trump’s Administration’s possible effect on corporate governance.

I. AS A CRIMINAL DEFENSE ATTORNEY

As a criminal defense attorney, I anticipate dramatic changes in the Department of Justice (and local U.S. Attorney’s offices) and on the Supreme Court, though the impact on the latter will be more gradual.

A. Developments within the Department of Justice

I suspect that the Department of Justice will no longer brag, as it currently does, about being a “kinder, gentler” law enforcement agency. Candidate Trump promised a return to strict law and order, which generally implies

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longer prison sentences, an increase in mandatory minimum prison sentences, and fewer diversionary programs for non-violent offenders with mental health or drug problems. I fear that the efforts at criminal justice reform which have slowly been making progress—albeit snail-like in the past couple years—will come to an abrupt halt. Forget the record number of pardons granted by President Obama. I assume that most of the appointments to the United States Attorney posts will reflect the Trump-inspired demand for more “order” and less moderation in the criminal justice system. Certainly, Trump’s choice for Attorney General, Jeff Sessions, augurs ill for any further criminal justice reform progress.

B. Developments within the Supreme Court

Developments in the Supreme Court are more complicated. First, I think we can assume that the nomination of Merrick Garland will either be withdrawn or will evaporate by January 2017. So, the first question is: who will fill the Scalia seat? From a criminal law perspective, this is considerably more interesting than might first be imagined. Justice Scalia was, to be sure, a very conservative Justice on issues involving affirmative action, marriage equality, abortion, voting rights litigation, and a host of other social issues. His replacement, we can assume, will mirror his jurisprudence on these issues. But in the field of criminal law, Justice Scalia was among the most “pro-defense” in many areas of the law, including the right to counsel,¹ the right to trial by jury,² the need for clarity and certainty in criminal laws,³ the necessity of a clear *mens rea* requirement in criminal statutes,⁴ the Confrontation Clause,⁵ and, perhaps most notably, in various aspects of the Fourth Amendment.⁶ He is far more protective of the Fourth Amendment right of privacy than Justice Breyer,⁷ for example; despite the conventional wisdom that Justice Breyer is a

¹ See *United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006).

² *Apprendi v. New Jersey*, 530 U.S. 466, 498–99 (2000) (Scalia, J., concurring); *Blakely v. Washington*, 542 U.S. 296, 305–06 (2004); see also *United States v. Booker*, 543 U.S. 220 (2005) (Scalia, J., dissenting in part).

³ *Skilling v. United States*, 561 U.S. 358, 415 (2010) (Scalia, J., concurring in part); *Johnson v. United States*, 135 S. Ct. 2551, 2562–63 (2015).

⁴ *Bryan v. United States*, 524 U.S. 184, 201–05 (1998) (Scalia, J., dissenting); *Cheek v. United States*, 498 U.S. 192, 207–09 (1991) (Scalia, J., concurring).

⁵ *Crawford v. Washington*, 541 U.S. 36, 42–43 (2004).

⁶ *Arizona v. Hicks*, 480 U.S. 321, 328 (1987); *United States v. Jones*, 565 U.S. 400, 430–31 (2012); *Kyllo v. United States*, 533 U.S. 27, 40 (2001); *Florida v. Jardines*, 133 S. Ct. 1409, 1419 (2013); *Maryland v. King*, 133 S. Ct. 1958, 1989–90 (2013) (Scalia, J., dissenting).

⁷ *Maryland v. King*, 133 S. Ct. 1958 (2013); *Missouri v. McNeely*, 133 S. Ct. 1552 (2013); *Florida v. Jardines*, 133 S. Ct. 1409 (2013); *Bailey v. United States*, 133 S. Ct. 1031 (2013) (in the four Fourth

solid member of the “liberal” wing of the Court. Judge Merrick Garland, a Judge who spent considerable time in the Department of Justice and whose prior opinions on the appellate bench revealed no particular inclination to rein in prosecutorial or law enforcement over-reach, was probably going to be more in the mold of Justice Breyer, had he been confirmed.

Thus, if President-elect Trump were to choose a Supreme Court Justice whose jurisprudence truly mirrored Justice Scalia’s, one could reasonably argue that the criminal defense bar (in my capacity only as criminal defense lawyer), might be pleased with the choice of a Justice who cared more about personal privacy than criminal law enforcement and “the ends justify the means” approach to criminal justice issues.

But Justice Scalia was one-of-a-kind. Most socially conservative Justices (such as Justice Thomas and Justice Alito, and often Chief Justice Roberts) are also pro-prosecution in their criminal law decisions. Thus, we really do not know whether the Justice chosen for the Scalia seat will resemble his or her predecessor or tend to be more pro-prosecution. As the years go by, however, it is likely that President-elect Trump will have as many as two or three more appointments. Again, assuming his appointments are in the mold of Justice Alito or Justice Thomas (and many of his announced list of potential appointments do seem to be of that ilk), there will be a dramatic change in the criminal law decisions.

C. Eight Anticipated Impacts on Criminal Law

Here are eight changes I anticipate President-elect Trump’s administration to make concerning criminal law.

First, I anticipate that there will be significant limitations on the exclusionary rule that forbids the use of evidence obtained in violation of the defendant’s Fourth Amendment rights. Second, I would expect that the right to privacy in the area of new technology and the decisions that are prompted by the government’s use of new technologies to discover digital evidence would be supportive of law enforcement’s quest to catch criminals (and terrorists). Third, I would assume that it would be rare that convictions would be overturned based on what the public might describe as “technicalities,” but which criminal defense attorneys describe as “basic constitutional rights.”

Amendment cases in the 2013 Supreme Court term, Justice Breyer sided with the prosecution in all four cases, while Justice Scalia sided with the defense).

Fourth, I believe that the writ of habeas corpus will continue on its slide to the nether world. Fifth, I fear that deference to state court criminal trials will become more important, institutionally, than “getting it right,” which has always been the paramount role of federal appellate and habeas review. Sixth, the death penalty will stay alive. Seventh, tolerance for long sentences—for juveniles, for recidivists, for non-violent offenders—will supplant any serious Eighth Amendment considerations of cruel and unusual punishment. But then again, do not forget that Chief Justice Earl Warren, Justice William Brennan, Justice David Souter and Justice John Paul Stevens were all appointed by Republicans and they all defied expectations. Likewise, Justice Byron White was appointed by a Democrat. Finally, we can comfortably assume that, with Republican majorities in both houses of Congress, Congress will enact harsher laws with longer sentences for most criminal offenses, including more mandatory minimum sentences and longer sentencing guidelines.

D. Impacts on Corporate Governance

Perhaps Congress will take a different view of corporate crime, or will address some of the *mens rea* issues that have become the darling of the conservative bar, including the Federalist Society⁸ and the Heritage Foundation.⁹ Possible changes to the Dodd-Frank Act might also impact white collar criminal laws, but it is hard to predict the direction that Congress will head or, for that matter, what the President’s views will be on regulating Wall Street. He attacked Wall Street during the campaign. Whether he will pander to the banking and financial industries after he moves into the White House or will continue with his populist assault on business remains to be seen.

II. AS A CITIZEN OF THE UNITED STATES

A. Effect on International Relations

As a citizen of the country, like most people who associate themselves with a liberal viewpoint, I am naturally fearful that President Trump will most closely resemble the person he was on the campaign trail. But there may be reason for hope. After all, what would be the point? He can scream at Putin,

⁸ E.g., John S. Baker & William J. Haun, *The “Mens Rea” Component Within the Issue of the Over-Federalization of Crime*, 14 ENGAGE 24 (2013).

⁹ E.g., John Malcolm & Michael B. Mukasey, *The Importance of Meaningful Mens Rea Reform*, THE HERITAGE FOUNDATION (Feb. 17, 2016), <http://www.heritage.org/research/commentary/2016/2/the-importance-of-meaningful-mens-rea-reform>.

insult Merkel, and belittle President Nieto of Mexico, but what good would that do? He can threaten to sue Xi Jinping and to prosecute Ayatollah Ali Khamenei, but pointless threats do not work in world affairs. He has already managed to corral a majority (at least an electoral college majority). He will not be running for office—or even for popularity contests—in Iran, China, Russia, or Germany. If he hopes to compel allies, adversaries, or opponents to do what he wants, he may quickly find them unresponsive to insults, threats of lawsuits, or tweets. He will be forced to engage in international policy-making, which he will do with the advice of seasoned professionals.¹⁰ I simply cannot picture President Trump calling up the President of North Korea and yelling, “You are a lying corrupt ugly little man” or tweeting about “Lyin” Kim.”

Then again, maybe he will. Maybe he will rely on people with no experience in international affairs. Maybe he will pick a fight with everybody. Maybe he will refuse to negotiate. Maybe he will sue Germany. Maybe he will refuse to pay our debts to China. Maybe he will start billing Mexico for wall-construction. But I would assume that he will quickly learn that these nations will not respond like the electorate who championed his candidacy in the United States.

B. Domestic Policies

Putting aside international affairs, we are sure to see a revolution in the domestic policies of the United States. Health care, environmental protection, immigration reform—these are all areas of domestic policy that will be significantly changed. But we have been through these evolutionary cycles before. Even when one party holds both houses of Congress, Congress does not move quickly. It is unlikely that President Trump will have time enough to turn the ship of state so radically, despite Candidate Trump’s guarantees of all the things he would accomplish “on Day One.”

True enough, the mid-terms, from a Democratic perspective, do not look that promising, given the two dozen Democratic seats that are up for election in 2018. Nevertheless, if President Trump fails to deliver to his constituency by the mid-term elections, how many of them will turn out to vote for Republican federal and state candidates? By 2018, will the huge border wall financed by pesos stand for all to see? Will Obamacare have been killed off, stripping 20

¹⁰ As I am writing this Paper, I have been hearing about how all the world leaders were calling him the night of the election and the next day, and I have been picturing him with an advisor as each call came in, asking, “Now who is this guy, again? What am I supposed to say to him? Whose side is he on?”

million citizens of health insurance? Will millions of people have been torn from their families and deported? Will abortions have been eliminated from the American landscape? Will there really be millions of people newly employed in Akron and Toledo and Detroit making refrigerators and laptops and neckties? Will the “war on coal” have been halted, even as the months of the year heat up and the waters rise in coastal cities? If Trump fails to deliver on his wild promises—or even if he does—he may be hard-pressed to demonstrate how his new actions and policies have improved peoples’ lives. The victorious coalition of November 8, 2016, may not surge back to the polls, as it begins to dawn on some voters that they might have been taken for a ride. By 2020, perhaps a challenger will arise from the alt-right, questioning whether Trump was really born in America.

C. Effects on Corporate Governance

I also find it rather hard to believe that Trump will go to war with American corporations that rely on cheap foreign labor to increase their profits. Trump is the consummate corporate leader. He is not known as someone who sacrificed profits to benefit his employees, or someone who cared more about “buying America” than “buying cheap.”

So I remain today, a few weeks after the election, both stunned at what happened and curious about the future. What will President Trump try to do and how will he accomplish his stated aims? Chance are that the “Washington swamp”—despite his pledges to drain it—will remain just as wet and muddy and hard to navigate as it has been for the past 20 years. Though a self-promotor of the first order, Trump probably lacks the skills to take a gridlocked Washington—pandering to special interests and kowtowing to big money—and smooth it into a level playing field of fairness, ethics, and collaboration.

III. AS A CITIZEN OF THE WORLD

A. Climate Change

As a citizen of the world, I believe that the threat of climate change will no longer be a problem for the future. It is a problem now. The decades of stalling and kicking the can down the road cannot continue as the future calamity becomes a current calamity. Anybody can claim that a prediction is a hoax. Nobody can argue, however, that current reality is mythical. I assume that if an

architect told Trump that a building he was about to construct was on terrain that could not sustain the building, Trump would not have responded that architecture is a hoax.

CONCLUSION

It is my fervent hope that President Trump will figure out, sooner rather than later, what exactly *is* so great about America. You can wear, manufacture (abroad), and market all the red billed caps you want, but if you do not know that greatness arises from adherence to principles of justice and humanity, and that all people—those who look, act, and pray (or not) like the Trumps and those who do not look or act like Trumps—deserve to feel secure and respected, then wearing a cap about how great America is, or was, will not suffice. Greatness means respecting all people, here and abroad, and supporting and assisting those subject to brutality, genocide, starvation, and displacement. Trump is about to become the leader of the Free World, the head of the world's strongest economy, whose democratic institutions are the envy of many nations. It will not be enough for him to tell his own constituencies how great they were or will be again. His responsibilities are not limited to people with American birth certificates or to people all of whose grandparents were born in America. If he really wants to do something great, he should use his self-proclaimed omnipotent power to help all the world's inhabitants.