



Right and Left Join Forces on Criminal Justice

By ADAM LIPTAK
Published: November 23, 2009

WASHINGTON — In the next several months, the [Supreme Court](#) will decide at least a half-dozen cases about the rights of people accused of crimes involving drugs, sex and corruption. Civil liberties groups and associations of defense lawyers have lined up on the side of the accused.

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Edwin Meese III, a former attorney general, once referred to the American Civil Liberties Union as part of the "criminals' lobby," but on this issue, he says, he is willing to work with the group.

But so have conservative, libertarian and business groups. Their briefs and public statements are signs of an emerging consensus on the right that the criminal justice system is an aspect of big government that must be contained.

The development represents a sharp break with tough-on-crime policies associated with the [Republican Party](#) since the Nixon administration.

"It's a remarkable phenomenon," said Norman L. Reimer, executive director of the National Association of Criminal Defense Lawyers. "The left and the right have bent to the point where they are now in agreement on many issues. In the area of criminal justice, the whole idea of less government, less intrusion, less regulation has taken hold."

Edwin Meese III, who was known as a fervent supporter of law and order as attorney general in the Reagan administration, now spends much of his time criticizing what he calls the astounding number and vagueness of federal criminal laws.

Mr. Meese once referred to the [American Civil Liberties Union](#) as part of the "criminals' lobby." These days, he said, "in terms of working with the A.C.L.U., if they want to join us, we're happy to have them."

Dick Thornburgh, who succeeded Mr. Meese as attorney general under President [Ronald Reagan](#) and stayed on under President George Bush, echoed that sentiment in [Congressional testimony](#) in July.

"The problem of overcriminalization is truly one of those issues upon which a wide variety of constituencies can agree," Mr. Thornburgh said. "Witness the broad and strong support from such varied groups as the [Heritage Foundation](#), the Washington Legal Foundation, the National Association of Criminal Defense Lawyers, the A.B.A., the [Cato Institute](#), the Federalist Society and the A.C.L.U."

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In an interview at the Heritage Foundation, a conservative research group where he is a fellow, Mr. Meese said the “liberal ideas of extending the power of the state” were to blame for an out-of-control criminal justice system. “Our tradition has always been,” he said, “to construe criminal laws narrowly to protect people from the power of the state.”

There are, the foundation says, more than 4,400 criminal offenses in the federal code, many of them lacking a requirement that prosecutors prove traditional kinds of criminal intent.

“It’s a violation of federal law to give a false weather report,” Mr. Meese said. “People get put in jail for importing lobsters.”

Such so-called overcriminalization is at the heart of the conservative critique of crime policy. The U.S. Chamber of Commerce made the point in a recent friend-of-the-court brief about a federal law often used to prosecute corporate executives and politicians. The law, which makes it a crime for officials to defraud their employers of “honest services,” is, the brief said, both “unintelligible” and “used to target a staggeringly broad swath of behavior.”

The Supreme Court will hear three cases concerning the honest-services law this term, indicating an exceptional interest in the topic.

Harvey A. Silverglate, a left-wing civil liberties lawyer in Boston, says he has been surprised and delighted by the reception that his new book, “Three Felonies a Day: How the Feds Target the Innocent,” has gotten in conservative circles. (A Heritage Foundation official offered this reporter a copy.)

The book argues that federal criminal law is so comprehensive and vague that all Americans violate it every day, meaning prosecutors can indict anyone at all.

“Libertarians and the civil liberties left have always had some common ground on these issues,” said Radley Balko, a senior editor at Reason, a libertarian magazine. “The more vocal presence of conservatives on overcriminalization issues is really what’s new.”

Several strands of conservatism have merged in objecting to aspects of the criminal justice system. Some conservatives are suspicious of all government power, while others insist that the federal government has been intruding into matters the Constitution reserves to the states.

In January, for instance, the Supreme Court will hear arguments in *United States v. Comstock*, about whether Congress has the constitutional power to authorize the continued confinement of people convicted of sex crimes after they have completed their criminal sentences.

Then there are conservatives who worry about government seizure of private property said to have been used to facilitate crimes, an issue raised in *Alvarez v. Smith*, which was argued in October.

“A joint on a yacht, and the whole thing is forfeited,” said Paul Cassell, a law professor at the [University of Utah](#) and a former federal judge appointed by President [George W. Bush](#).

Some religious groups object to prison policies that appear to ignore the possibility of rehabilitation and redemption, and fiscal conservatives are concerned about the cost of maintaining the world’s largest prison population.

“Conservatives now recognize the economic consequences of a criminal justice leviathan,” said Erik Luna, a law professor at Washington and Lee University.

The roots of the conservative re-examination of crime policy might also be found in the jurisprudence of Justices [Antonin Scalia](#) and [Clarence Thomas](#). The two justices, joined by liberal colleagues, have said the original meaning of the Constitution required them to rule against the government in, among other areas, the rights of criminal defendants to

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“Scalia and Thomas are vanguards of an understanding by the modern right that its distrust of government extends all the way to the criminal justice system,” said Douglas A. Berman, a law professor at [Ohio State University](#).

The court will hear another confrontation clause case, *Briscoe v. Virginia*, in January. It is a sequel to a [decision](#) in June that prosecutors may not use crime lab reports without live testimony from the analysts who prepared them.

The conservative re-evaluation of crime policy is not universal, of course. Two notable exceptions to the trend, said Timothy Lynch, director of the Cato Institute’s criminal justice project, are Chief Justice [John G. Roberts Jr.](#) and Justice [Samuel A. Alito Jr.](#)

“Roberts and Alito are coming down consistently on the side of the government in these criminal justice cases,” Mr. Lynch said.

Some scholars are skeptical about conservatives’ timing and motives, noting that their voices are rising during a Democratic administration and amid demands for accountability for the economic crisis.

“The Justice Department now acts as a kind of counterweight to corporate power,” said Frank O. Bowman, a law professor at the [University of Missouri](#). “On the other side is an alliance between two strands of conservative thinking, the libertarian point of view and the corporate wing of the Republican Party.”

Mr. Meese acknowledged that the current climate was not the ideal one for his point of view. “We picked by accident a time,” he said, “when it was not a very popular topic in light of corporate frauds.”

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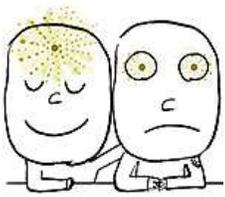
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