

Following the Fired Prosecutors:

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A non-story with legs:

The saga of the fired eight U.S. Attorneys (USA's) has many strange twists and turns, but perhaps the strangest is why this story won't die. Republican loyalists keep saying, there is no story, nothing happened. They say it over and over, a tactical mistake. The Bush White House lacks the skill of letting a scandal expire naturally. A Clinton advisor once said: "Tell it early, tell it all, and tell it yourself—or let it dribble out and pay the price."

Every denial is a story, and the running drama of whether the Attorney General stays or goes is what the press and political partisans like—maybe another scalp on the Democrats' belt—but this blog will argue that Gonzales is a distraction, and fundamental issues of public policy underlie this non-story that keeps on telling us . . . something. This has become the biggest justice related narrative of the Bush administration.

Alberto Gonzales testifies before the Senate Judiciary Committee April 17, a happening, but for whom? Journalists are paying the most attention, while the public reaction is minimal. The Project for Excellence in Journalism (PEJ) has a news coverage index which measures it as the second biggest story of the year behind only Iraq, and number one the past two weeks. It fills 18-21% of the overall news hole in newspapers, network TV, cable TV, radio, and talk shows.

Yet, according to the Pew Research Center for the People and the Press, only 8% of the public said they were following it closely. Apparently, those attentive are outraged, and a reality of democratic politics is that the conscientious few have the most influence. But to what are they attentive? There's the story with sizzle of when will Bush cut his protégé lose; and the Constitutional showdown over executive privilege and the legislative branch (they will probably make a deal); and the law school seminar question of whether any laws were broken (don't look for an underlying crime, but for a cover up); but to me what is most important is the public policy question of the recruitment of U.S. Attorneys and their storied independence. They come from the political clubhouse, of course, but are expected to leave it behind.

“The Watchdog Growls,”

So said a National Journal headline! The Congressional oversight role has been asleep for many years, essentially since the era of Jimmy Carter. Congress and its

committees have the power of subpoena, for witnesses and documents, in contemplation of a hearing, which in turn is in contemplation of legislation, but that has not been part of the culture. During Republican control from 1994 – 2006 they used it only to get at Clinton over sex. They missed, and thereafter subpoenas were considered illegitimate. For a generation Congressional hearings have been exercises in the executive telling what a great job they were doing and each Congress person using their five minutes of questioning to make a four and a half minute speech. There has been no Congressional oversight!

During their successful congressional election campaign last fall Democrats promised to use it, and indeed so far they have, but how far they will go remains to be seen. The Democrats on the House Judiciary Committee employ nine full time counsels, in keeping with two-thirds of the committee's \$8 million budget going to the majority party. Furthermore, the chair, John Conyers, has gone outside the salary line and hired three private sector lawyers to oversee the committee's ongoing investigation of why the eight were fired. They are pouring over thousands of pages of material—in which there are such nuggets as “loyal Bushies” are to be rewarded—and those hired guns are trying to find a less than totally loyal Bushie to cooperate, and make history.

One of them will not be Monica Goodling, a Justice Department liaison to the White House, who has promised to assert the Fifth Amendment, which is not a recommended method on how to let a story die. They can subpoena her, listen to her not talk; or they have the power to grant her immunity, which strips her of the privilege. Then if she maintains it she can be held in contempt of court and jailed indefinitely, with a little help from the U.S. District Court down the street. The political fall out from that is beyond my imagination; but the Democrats have the gun, will they shoot it? If so, what more secrets might fall from the trees?

Staffs from both the House and Senate are all over this, and private interviews with beleaguered officials have already begun. We'll be watching.

Testimony on the Hill:

On March 6, six of the eight USA's testified before Judiciary Committee hearings on Capital Hill., the Senate in the morning and the House in the afternoon. Subpoenas had given them cover—they could say they had no choice but to testify—but I felt they were rather willing, at least at first. A subpoena won't make witnesses say what they don't want to say, but if they are so inclined, they have an excuse.

At the outset they all said they had no advance inkling of why they were fired (except Bud Cummings from Arkansas, the exception, to allow Karl Rove to call in a favor), had good evaluations, and were locking up the “worst of the worst.” Then they talked of pressure from both home state Senators and Justice Department supervisors on matters of immigration (for more prosecutions), the death penalty (again more, and even on specific cases), pornography (crack down), corruption (more on Democrats, less on Republicans), and they wanted more vigorous prosecution of election fraud cases. Now there is an irony!

Cummings told of a telephone call telling him not to testify, or “we will take the gloves off.” The context of that metaphor was that at the time the issue had been simmering, but had not jumped to the front pages. Dutiful to the culture of going quietly, the eight had made no public statements, but started to read about how the firings didn't

look good because six of the eight were involved with ongoing political corruption cases, and Justice Department officials responded that the firings were for *performance related* reasons. As the issue began to percolate, Democrats started talking about hearings, which led to the breaking of silence by the eight. They didn't like reading about their performance shortcomings in the press, began denying it, and hence started getting telephone calls.

After a couple of hours that morning, the Senators called a break of 15 minutes. Before then, "take the gloves off" referred to testifying before Congress. After the break, it meant talking to the press, their testimony sanitized. The former would be an obstruction of justice, the later meant that if you criticize us, we'll criticize you. I wonder if anybody would like to talk about that 15 minute break!

Actually, those hearings were about legislation, and Congress will forthwith delete the provision buried in the USA Patriot Act that allows the President to appoint interim U.S. Attorneys indefinitely and not have to bother with confirmation.

The politics and policy distinction:

Kyle Sampson, the deputy A.G., who was in charge of the firings and who then fired himself, hoping to deflect the heat, unsuccessfully, said in his testimony that the distinction between political and performance related reasons for the firings is "largely artificial." What he meant was that political firing—and indeed political hiring—in policy level positions, which includes U.S. Attorneys, is acceptable, part of doing business in government. Electoral winners get to govern, which means the Executive branch gets to appoint people to carry out their policy agendas. The same applies to federal judges, although they can't be fired. This has clearly been part of the Republican-conservative long range plan since the administration of Ronald Reagan, and before.

In fact, there is a Republican National Lawyers Association (with no comparable Democratic lawyers' group). The RNLA's promotional materials reveals a strategy of how to get Republican lawyers appointed to the federal and state bench, and other appointive positions, and get them confirmed. The route to the federal bench is through a U.S. Attorney position to burnish a resume. Republican spokespersons are unapologetic about that.

During the March 6 Senate hearing, Lindsay Graham, Republican Senator from South Carolina, asked the four fired USA's before him how long they had been in their positions. All had been appointed early in Bush's first term, about six years in their job, and clearly all expected to remain there for the eight year incumbency of the President, their patron. The partisan and patronage nature of that job is undisputed. I was told, "There is no merit in the hiring of U.S. Attorneys."

"Six years is a long time," said Graham. "How long did you want? In South Carolina, we look for bright young Republican lawyers and cycle them through as U.S. Attorneys every few years, on their way to the federal bench. That's how we build a conservative judiciary."

He did not have the slightest notion that there was anything wrong with that. One might ask, what is a *Republican attorney*?"

What does "performance related" mean?

We have lived so long with the policy-politics paradox of patronage appointments of prosecutors that we tend to take it for granted. At the federal level access is controlled by the senior senator of the President's party, or the most influential congress person of that party. Campaign contributions are anticipated but not a major factor. Still, once appointed, debts are expected to be paid, which include putting agency resources behind the kinds of crimes in the President's domestic and values agenda. In this case, immigration, capital punishment, and pornography should be targets in every USA's sights. Although some of us may disagree with those priorities, it is a spoil of electoral victory.

Still, according to prosecutorial culture and bar association ethics, once confirmed, the USA enjoys independence. They are the "bedrock servants of the law," said Chuck Schumer, the New York bulldog senator who is leading the Democratic charge. Independence, so said the fired USA's, is the main incentive to take an obviously temporary job like that. The pay is around \$180,000, but varies.

The most unseemly part of this issue has been a discussion of what kind of *performance* criteria USA's are evaluated for, which has largely been spared by the press, but has been exposed in hearings. "We go after all the bad guys," said Carol Lam of the San Diego office. How are they expected to do that, independently react to cases while pursuing broad policy goals? Some insights have emerged.

For one, performance meant convictions, measured by numbers. Carol Lam had numbers, but not high enough. A decision not to prosecute, in the interest of fairness, or questionable evidence, is not in the least respected. Furthermore, performance means long sentences. The evidence of that is overwhelming. Only *time* is respected.

For another, at the appointment level, there is a disdain for the career prosecutor. There aren't very many at that level, and that's how this Justice Department likes it. They don't want USA's to have their own base of support, with all power centered in Washington. In fact, they wanted to get rid of Patrick Fitzgerald, a rare appointed career prosecutor, but feared his popular image was a shield they could not crack.

This does not appear to be unique to the Ashcroft-Gonzales Justice Department, but politicizing seems to be growing. An American Constitution Society forum heard about how the hiring interviews of lawyers for the DOJ's Civil Rights Division included questions whether the job applicant belonged to the conservative American Federalism Society. If the answer was no, they weren't hired. The same applies to nominations to the federal bench.

There are about 30,000 career prosecutors as deputy USA's, who of course do the work and try the cases, and have a pay scale from \$46,000 to \$139,000. They too are judged by their numbers. The appointed USA's are expected to keep their mouths shut when hired and fired, and in every confirmation hearing they chant that they only believe in "the rule of law." The DOJ is a citadel.

The only real meaning of oversight:

Congressional oversight rarely leads to significant legislation, nor does it find out much beyond agency aggrandizement. The DOJ culture of centralized control is a tough nut to crack. After all, real reform means changing a culture, which takes a great deal of power. Conclusions from hearings like "wrongdoing," "inappropriate," or "improper," are meaningless. Even more compelling phrases like "violation of a public trust" mean

nothing, although dreaded is “widening probe.” That one has some juice! “Ethical violations” mean little, for Tom Delay was admonished by the House Ethics Committee four times without a dent in his power. Only *indictment* drove him from office.

Indictment carries weight, but it only really counts with conviction, especially with *time*, or at least the serious threat thereof. There are now two investigations underway, one an internal investigation by the Justice Department itself (I will have a heart attack if they indict themselves), and by several Congressional committees from both houses. A committee chair can pick up the phone, and there are career prosecutors in the U.S. District Court in D.C.; but Congress has an eye on sound bites and partisan advantage—the Democrats want the head of Alberto Gonzales—and it’s not a good law enforcement investigation agency. Its’ staff are young lawyers, not cops.

There may well be crimes waiting to be found, like misrepresentations to congress, obstruction of justice, witness tampering, or corruptly influencing or impeding an official proceeding, all found in the federal obstruction of justice statute. What is needed is a special prosecutor, with real independence. Patrick Fitzgerald was a “special counsel” appointed from within the DOJ by the Deputy A.G., James Comey, who subsequently left the department. Fitzgerald could have been fired, but was protected only by the fear of political fallout. Is there a James Comey there now?

The stake:

Prosecutorial independence sounds good, and politicizing the Justice Department sounds bad, but neither has any remedy without an understanding of what is good policy. The prosecutors’ role has always been bifurcated—both an officer of the court and a vigorous advocate—and when one is appointed for political reasons that fairness-advocate balance is even more tenuous. But that is exactly what we have a right to expect. It is not all right to *cycle through* United States Attorneys as stepping stones on the way to being a judge.

We need federal prosecutors to be free from the numbers game that dominates, for sometimes not prosecuting is the professional choice. Once appointed, USA’s must have primary loyalty to the law. If they are going to be a *Republican lawyer* to get the job, that must be the end of it.

It’s hard to imagine how legislation can evoke this culture change. Exposure in the press and high profile firings are unlikely to bring much change either. Firing a fall guy is damage control only. The next election is a year and a half away, and this issue is unlikely to be a consequence; and a change of administrations will only change the names on the door, not the way of doing business.

Calling the criminal justice system! Indictments, convictions, and especially prison, even if only for a short sentence, will get the attention of both parties, and this will be a rare instance when the threat of imprisonment, if credible, will really be a deterrent. Yes, they would be convicted of covering up an underlying crime of which there is no proof that it was committed. Yes, they will go to the slammer for policy reasons, not criminal retribution, although that will technically be there. I see no other remedy.

The Democrats from the judiciary committees of both houses of Congress are primarily the ones up at bat. Will they keep their eye on the ball?

