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COMMENTARY

Prosecutors owe loyalty to the public

By Patrick M. Collins

April 17, 2007

When Atty. Gen. Alberto Gonzales testifies before the Senate Judiciary Committee to explain his role in the firing of eight U.S. attorneys, it is important to keep in mind that what is really at stake goes far beyond Gonzales' own fate as the country's top law official. At root, this inquiry poses a fundamental question, one that every attorney general in every presidential administration must squarely confront: To whom, or to what interests, does a U.S. attorney -- or, for that matter, any prosecutor -- owe professional loyalty?

This is a question that needs to be discussed openly throughout the hearing process, for all parties to the justice system -- be they subjects of investigations, victims, prosecutors or defense lawyers, and whether they reside in Chicago, New Mexico or Durham, N.C. -- are entitled to know exactly how the Department of Justice leadership would answer the question.

The "loyalty" question is not some abstract concept about politics and ideology. Rather, it is a question with important practical consequences that are tied to the central role of prosecutors in our justice system. Prosecutors alone have the power to present an indictment to a grand jury, an awesome power that, once executed, typically changes the course of lives forever.

Further, given that law enforcement agencies have limited resources, the way in which prosecutors and agencies such as the FBI allocate those resources goes a long way in determining which types of offenses and offenders will have to face the justice system.

Finally, an effective justice system requires the support and confidence of the community at large. If the public perceives that prosecutions are influenced by partisan affiliations or political agendas, it will quickly -- and appropriately -- lose confidence in its prosecutors. In recent published comments, Gonzales said, "[F]aith and confidence in our justice system are more important than any one individual."

In e-mails and documents released in recent weeks, we have learned that certain high-ranking Justice

officials, when considering particular top prosecutors to terminate and others to replace them, answered the loyalty question in partisan political terms. Distressingly, these Justice officials appear to have placed a premium on installing prosecutors with established partisan political resumes.

A DOJ process that exalts partisan political loyalty over independence and fairness is a fundamentally flawed one. Political blinders are critical to a prosecutor because, without them, important decisions about how cases are investigated and prosecuted can be hijacked by improper considerations with tangible (even tragic) consequences. Naturally, this is most critical in political corruption cases, the legitimacy of which hinges

on the political independence of the prosecutive team's work.

In corruption cases, the potential for partisan shenanigans may arise in two different ways, each of which disservices the interests of justice. First, partisan prosecutors might ignore credible allegations of corruption because they fear embarrassing their political party or patron. Second, partisan prosecutors might pursue flimsy allegations for political purposes.

Here in Illinois, we recently had the unfortunate example of the secretary of state's inspector general reminding investigators that their job was to protect their political boss, not to find and resolve internal corruption.

By contrast, in the U.S. attorney's office where I have worked for 12 years as an assistant U.S. attorney, I've had the privilege of working with dozens of prosecutors and agents on myriad city, county, state and federal public corruption investigations. I am proud to say that I never saw any indication of any such shenanigans. In fact, I could not tell you the political preferences of most of my fellow prosecutors or agents. Whether they were "loyal Bushies" or "Clintonistas" or something in-between was not ascertainable by word or deed.

What I did come to learn, however, and what was obvious during our work sessions, was that agents and prosecutors simply did not care about the political affiliation of the targets of the corruption investigation. Instead, they were focused on scrupulously scrubbing the facts and the evidence, and on bringing the case if and only if the facts and evidence had been revealed.

We have heard as a defense of the summary dismissal of eight U.S. attorneys that all U.S. attorneys "serve at the pleasure of the president." And that, of course, is true. But they must never serve only to please the president. U.S. attorneys serve the people of the United States.

If we replace non-partisan public service with blind political loyalty, we will have sacrificed one of the core values of our judicial system.

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Libby commutation undermines sentencing process

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Author: Patrick Collins

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In explaining why he commuted the 30-month prison sentence of Lewis "Scooter" Libby, President Bush resorted to language that defense lawyers often invoke during sentencing hearings. Bush said prison time was "excessive" punishment, and that the other consequences Libby suffered – a felony conviction, a \$250,000 fine and a soiled reputation – were sufficiently "harsh" punishments for his crimes.

The president didn't rely on the obvious political rationale for helping a former top aide of his own vice president. Bush instead cloaked his decision in the language of the criminal justice system. That choice has two troubling consequences. First, the president, by disputing the judgment of Libby's sentencing judge, raises implications for the federal sentencing process as a whole. Second, Bush created for Libby a rationale unlikely to benefit other defendants in comparable cases. Thus, the Libby commutation contradicts principles of fairness and uniformity that the Department of Justice is mandated to uphold.

Fairness and uniformity need to be coins of the sentencing realm. Is prison time "excessive" punishment for a defendant such as Libby? There are ways to answer that question: Lawyers are trained to analogize or distinguish other cases to suit their clients' interests, and to argue that judges should depart from sentencing guidelines. But that's not what happened here. The president pointed to no other arguably similar case where the defendant received a lesser (or no) prison term. Nor did he explain why those guidelines shouldn't apply to Libby.

Ironically, the president's judgment of Libby's sentencing judge already is a point of reference for other defendants who want preferential treatment. Last week, at the sentencing of Troy Ellerman, who pleaded guilty to obstructing justice by leaking the grand jury testimony of baseball players in the Bay Area Laboratory Co-Operative (BALCO) steroids scandal, Ellerman's lawyer cited the Libby commutation in requesting leniency. Unmoved, U.S. District Judge Jeffrey White sentenced Ellerman to 30 months in prison, exactly what Libby received. Addressing commutation directly, White, with apparent sarcasm, stated: "If Mr. Ellerman is dissatisfied with his sentence, he should seek a commutation from the president."

Yes, defendants must have the opportunity to demonstrate that leniency is appropriate. Typically the key parties (defendant, prosecutor and probation officer) present their respective positions to the judge, within the framework established by Congress and federal sentencing guidelines. Part of that process: analogizing the defendant's case to prior, similarly situated defendants.

As a prosecutor, I often participated in this solemn process and observed careful judges making these difficult decisions. The justice system demands that the court not just accept the input of prosecutors and crime victims, but also consider the redeeming attributes of the defendant, as expressed through often heartfelt testimonials from his family and friends.

The sentencing hearing affords the defendant the opportunity to speak on his own behalf – quite literally, to have the last word before sentence is pronounced.

Many times, it is difficult to reconcile a defendant's crimes with the goodness he otherwise has displayed. And imposing sentence becomes even more difficult when a defendant shows genuine remorse. This process doesn't eliminate the risk of an "excessive" sentence. But it does let the judge impose sentence objectively, based on the defendant, the offense, the law and the analogous cases.

It was under this individualized and comprehensive sentencing regime that U.S. District Judge Reggie Walton sentenced Libby. After weighing the aggravating and mitigating factors, the judge imposed the 30-month prison term. That happened to be the shortest sentence called for by the advisory sentencing guidelines.

Last week, in a Chicago federal courtroom, a similar process led U.S. District Judge Amy St. Eve to a somewhat different conclusion. Muhammad Salah had been convicted of obstruction of justice for false sworn testimony. After

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hearing his impassioned plea, St. Eve sentenced Salah to 21 months of imprisonment, a sentence substantially lower than the term prosecutors wanted. Like Walton, St. Eve balanced the competing considerations and pronounced the sentence she deemed fair.

This scene – a federal judge considering all the relevant factors for a defendant convicted of perjury or obstruction of justice – plays out regularly in courtrooms across the country. As a former prosecutor, and now as a private lawyer who will be requesting mercy from the court on behalf of clients, I regard the fairness of that sentencing process to be of paramount importance.

Bush, by commuting Judge Walton's prison sentence of Scooter Libby with a legal (not political) justification, damaged the perception of fairness and uniformity we need in order to inspire confidence in our criminal justice system.

And that is a shame. If the Department of Justice is to conform to the ideals to which it owes its name, there must be more than the mouthing of the language of justice. There must be strict adherence to universal principles that apply to all, irrespective of their particular lot in life.

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Ryan's judge, jury deserve thanks, not condemnation

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After a long and vigorous appeal, George Ryan and Lawrence Warner began serving their prison sentences last week. As former prosecutors who were members of the Ryan prosecution team, we take no joy in seeing the men imprisoned. But we are heartened that the judicial process has confirmed that the evidence against them was overwhelming and that they received a fair trial.

To our regret, however, during defense arguments and public discourse about the Ryan trial, contributions that the trial judge and jury made in the pursuit of justice have been distorted. As firsthand witnesses, we offer our personal perspectives of the conduct and character of Judge Rebecca Pallmeyer and the Ryan jury, none of whom volunteered for their difficult assignments.

Well before the trial, Pallmeyer signaled her desire that Ryan and Warner receive their days in court. Over our strenuous objection, she agreed to delay the trial -- wreaking havoc on her entire docket -- to ensure that Ryan's first choice of counsel was available to try the case.

Throughout the trial, Pallmeyer routinely chose fairness to the defendants over trial efficiency or expediency. During the long cross-examination of the trial's first witness, Scott Fawell, we complained mightily when the Ryan team suggested that we prolonged Fawell's prison transport to persuade him to cooperate against Ryan. We argued that such cross-examination was meritless and unfair to the government -- the people of the United States. Pallmeyer nonetheless allowed the defense to explore this area in substantial detail.

Such scenes repeated themselves over the trial. And, yes, the trial was long. It was long because we presented evidence of misconduct spanning 10 years, but it was also long because Pallmeyer permitted a wide berth to the defense to contest the government's evidence and present its own. Ryan and Warner each had defense teams that included some of the best trial lawyers in Chicago, and these lawyers brought it all. We pointed out to Pallmeyer that defense cross-examinations often exceeded the prosecution's direct examinations in duration by a ratio of 3 to 1 and asked her to consider setting time limits. She denied our request and permitted the defendants to continue to question aggressively.

In trials, there is always a tension between moving quickly and allowing a full airing of issues and arguments. The public record demonstrates that, time and again, Pallmeyer chose fairness to the defendants as her guiding principle. She did so even though we argued that such broad deference to the defendants was unfair to the government. It is ironic that the length of the trial is being discussed as a reason the trial was unfair to the defendants.

In addition to being fair, Pallmeyer was compassionate. When a juror departed for health reasons, the judge ensured that it was done in a manner avoiding embarrassment. When a defendant slipped and injured himself outside the courthouse, Pallmeyer made sure he was OK and accommodated his needs before resuming the trial. She was even nice to the lawyers! She gave us the benefit of the doubt when we got lost in the moment and gave us a clean slate every day.

She worked nights and weekends to keep up with the onslaught of motions. One night, she worked until 4 a.m. to resolve a motion. At 9:30 a.m., the jury was back in the box and the trial moved forward without delay.

One barometer for measuring the quality of a judge is to ask yourself: If you, a family member or a beloved friend were a defendant fighting for your liberty, would you want that judge to hear the case? For us, with regard to Pallmeyer, the answer is a resounding yes.

An equally disturbing component of the criticism of this trial is the attacks levied against the citizens who served on the jury. They deserve thanks, not scorn. They made tremendous sacrifices (both family and financial) to serve.

Though we acknowledge that jurors made errors in the questionnaire process, jurors are human and make mistakes. For a trial of this length and difficulty, these jurors did exceedingly well. They were attentive even during the most arduous stretches. They listened. They took notes. They deliberated. They did not complain about the lawyers or the length of the trial.

And in the wake of discoveries that two dismissed jurors had knowingly lied on their questionnaires and did not deserve to be on the jury, all the jurors suffered. In the defense arguments and ensuing public debate, they have been accused of dishonesty and bias. If there is an injustice in this case, it is that those good people have been dragged through the mud, on the record, for performing an extraordinary civic duty.

Though we concede that the trial and deliberative process was far from perfect, the two key players -- the judge and the jury -- made sure it was fair to the defendants.

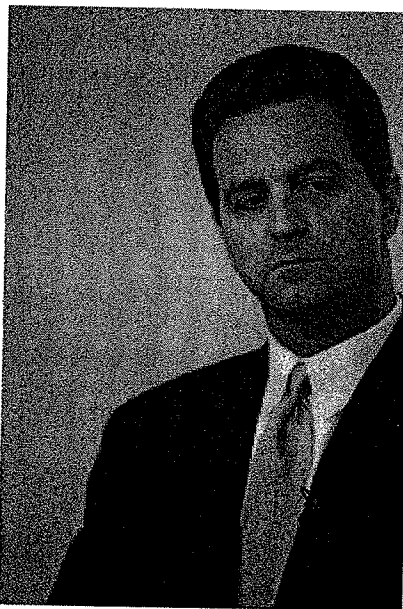
Hard cases present hard challenges for everyone -- judges, jurors, lawyers, witnesses, defendants and families. In the face of those hard challenges, some people respond nobly and others falter. Pallmeyer and the Ryan jurors were noble. They deserve the public's respect and appreciation. They certainly have ours.

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Former prosecutor Pat Collins: Convictions aren't enough

Former Asst. U.S. Atty. Patrick Collins, who sent Gov. George Ryan to prison, says it will take more than the conviction of Tony Rezko to halt public corruption.



By Patrick M. Collins

Wednesday, a group of citizens made the latest in a series of recent declarative statements about the state of Illinois government and politics.

The Antoin "Tony" Rezko jury reaffirmed that the Illinois way of doing business for far too many public officials and their associates is unacceptable. What remains to be seen is whether the verdict will change the systemic public corruption that demoralizes citizens and ultimately disengages them from their government.

Sadly, there is ample reason to be pessimistic.

One of the many disheartening facts coming from the Rezko trial was this: At the same time that a high-profile corruption investigation—culminating in the conviction of former Illinois Gov. George Ryan and some of his high-ranking cronies—was exposing the corrupt underbelly of our state government, a number of people affiliated with the Blagojevich administration were engaging in similar, if not more brazen, acts. The Rezko trial showed that Illinois' bipartisan corruption virus is a particularly resistant strain.

When I served as federal prosecutor in Operation Safe Road, an eight-year

