

How good is Fitzgerald's case against Blagojevich?

Contributed by William H. Freivogel, Special to the Beacon
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Former U.S. Attorney Stephen Higgins looks at the case U.S. Attorney Patrick Fitzgerald (pictured) has outlined against the Illinois governor. Higgins thinks it's compelling. What about other legal maneuvers the state's attorney general or legislature might try?

Governor's chief of staff resigns. | Crain's Chicago Business

Attorney General Madigan asks Illinois Supreme Court to declare Blagojevich unfit to hold office. | Chicago Sun-Times

A former federal prosecutor in St. Louis says the government has an "extremely strong case" against Gov. Rod Blagojevich that could send him to prison for the rest of his life if the Illinois governor insists on going to trial.

Stephen B. Higgins, a partner at Thompson Coburn, prosecuted white-collar cases here as an assistant U.S. attorney in the 1970s and U.S. attorney from 1990-93. "If Blagojevich pleads, he's going to spend a lot of time in prison. If he goes to trial he is never going to see daylight. Is there any defense lawyer who can convince a jury that this is all puffery and just the way Chicago politicians talk?"

Higgins recalled one of his local corruption cases from 25 years ago when federal authorities had placed a bug in St. Louis City Hall. A lot of the conversation collected by the bug was so inarticulate that Higgins was able to convict only a deputy license collector, not the head of the office.

But the Blagojevich case is different. "This is very direct, crassly direct. It is an almost incredible combination of stupidity and arrogance and greed," he said.

Higgins was struck that the federal judge who approved U.S. Attorney Patrick Fitzgerald's surveillance request was Chief Judge James F. Holderman, who was a leading prosecutor of white collar criminals in Chicago when Jim Thompson was U.S. attorney in the 1970s.

More Information

For an example of an "honest service" case prosecuted by Holderman before he was a judge, [click here](#) .

For the Federal bribery statute, [click here](#) .

To read a blog on white-collar crime analyzing possible weaknesses in the case, [click here](#) .

For other stories: [Chicago Tribune story on what comes next](#) ,
[AP story on legal sufficiency of tapes](#) , [State Journal-Register on legal questions raised by the case](#)

In fact, Higgins said, one of the crimes that Blagojevich is charged with developed out of those prosecutions and similar ones in St. Louis. The crime is the failure of a public official to provide "honest services" to the people.

Thompson and Holderman tried to use the federal mail and wire fraud statutes not only against schemes that defrauded people of property, but also against public officials who defrauded the people of their "intangible right" to honest government.

The U.S. Supreme Court eventually rejected this approach, but Congress passed a clarification, Section 1346, which embeds the prosecutors' approach into law. Section 1346 is one of the laws that Fitzgerald has accused Blagojevich of violating.

It's likely, Higgins said, that when Fitzgerald substitutes an indictment for the criminal information filed this week, he will allege a conspiracy or some sort of a scheme. "That way you get to tell a story to the jury; and if you tell a story, you get to put a lot of stuff into evidence that you might not be able to use otherwise."

Higgins said that the long affidavit attached to the criminal information against Blagojevich was an early attempt to tell a story. "They put all of that in there to crush him as a defendant. There is absolutely no way to get out of this."

A number of legal commentators noted that most of the allegations against Blagojevich were "attempts" that had not come to fruition. Some defense lawyers suggested that this might be a weakness in Fitzgerald's case.

But Higgins noted that "attempting to commit a crime is the same under federal law as committing it." Proving a case based on an attempt can be difficult, but won't be with the graphic tapes, he said.

Moves in Springfield

The attempt to remove Blagojevich from office is raising other legal questions. One hazy area is how Illinois Attorney General Lisa Madigan might follow up on her threat to ask the Illinois Supreme Court to decide Blagojevich is unfit.

A provision of the state constitution gives the legislature the power to pass a law providing procedures for determining whether a governor has the "ability" to serve. The legislature has not exercised that authority, leaving it up to Supreme Court rules that never have been used.

If the state House, when it convenes next week in special session, decides to impeach Blagojevich it will have unbridled discretion to determine what is impeachable. The state constitution does not include a standard such as the U.S. Constitution's high crimes and misdemeanors. Instead the state constitution states simply that the House has "sole power to conduct legislative investigations to determine the existence of cause." The House can impeach on majority vote. An impeached governor would be tried in the Senate where a two-thirds vote is required for removal.

Options in D.C.

While still in office, Blagojevich could name a Senate replacement for President-elect Barack Obama, if he can find anyone to take the job. Congressional leaders have warned the governor that he should not take that route because his choice would not be seated. But it is not that simple.

Stanley Brand, former lawyer for the House of Representatives, said on National Public Radio on Thursday that a landmark U.S. Supreme Court decision involving the late Adam Clayton Powell would seem to keep the Senate from barring a Blagojevich appointee.

In the 1960s, the U.S. House had sought to keep Rep. Powell from taking his seat because of criminal allegations against him. In *Powell v. McCormack*, the court said that while the House was the judge of the qualification of its members, it could apply only the qualifications set out in the Constitution - age, citizenship and residence. Powell had to be seated.

A Blagojevich appointee would have an even stronger case than Powell because the appointee would have done nothing wrong.

The legislature has threatened to take away Blagojevich's power to make this appointment, but the governor could veto the law or could let it sit on his desk for 60 days.

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William H. Freivogel is director of the school of journalism at the University of Southern Illinois University at Carbondale. To reach him, contact Beacon features and commentary editor Donna Korando.