

## The Role of U.S. Attorneys

By Amy E. Wong



Two Harvard Law professors are putting in their two cents with regard to the recent dismissal of eight U.S. Attorneys. Professors Charles Fried and Philip Heymann have given their expert opinions on the ethicality of these controversial dismissals.

Professor Charles Fried, former solicitor general in the Reagan administration and former justice on the Massachusetts Supreme Judicial Court, argued that U.S. Attorneys are presidential appointees. Thus, they serve at the pleasure of the president. They carry out the bidding of the president. If not, they are liable to be cut off.

Fried said that U.S. Attorneys are “presidential appointees named by the president and confirmed by the Senate.” Because the president appoints them to carry out his duties, “it is not up to the appointee to decide which she will or will not carry out,” even if these policies are “mistaken or wrong-headed or even cruel.”

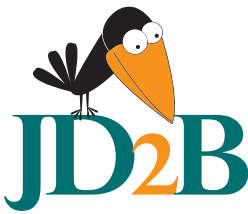
If a U.S. Attorney’s interests are not aligned with the president’s interests, then the appointee “should state his disagreement to his superiors [...], and if the administration insists on policies that the appointee cannot in conscience carry out, he should resign,” argued Fried.

Still, Fried asserted, the administration should not harass its political enemies. If it does, then it is politically accountable for their decisions. It should not tarnish an appointee’s experience by claiming that he is incompetent, especially if he has received positive performance reviews in the past. If clashing political interests prove to be a major roadblock, then the president can rightfully dismiss appointees on those grounds. His administration should not, however, defame an appointee’s character.

Fried elaborated, “By impugning their performance, the administration forced the departing U.S. Attorneys to defend themselves and, thus, to say things that would put the administration in the worst possible light.”

Professor Philip Heymann, former deputy attorney general in the Clinton administration, sided with Fried in his contention that the dismissals were not handled properly.

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Before their dismissals, he said, the U.S. Attorneys should have received a clear message about their priorities. Attorney General Gonzales did not explicitly say, during the year 2006, that voter fraud was a priority category. Thus, the U.S. Attorneys did not necessarily need to consider voter fraud a serious priority.

Furthermore, U.S. Attorneys are not expected to prosecute unless investigative agencies bring them triable cases. The attorney general is supposed to investigate available evidence to determine whether it is adequate for conviction. Professor Heymann noted that there is no sign that Gonzales reviewed the case. Technically, the U.S. Attorneys did not have to probe into voter fraud because it was (1) not a priority category, (2) not a triable case, and (3) not reviewed by the attorney general. These U.S. Attorneys were doing their job.

Additionally, the dismissed attorneys were not given prompt or fair warning about their performance. Prior to their dismissals, many of the U.S. Attorneys were commended for their excellent work both by their superiors and by investigative agencies. Officials attributed the attorneys' dismissals to poor work performance, a contradictory and ungrounded statement that raised many red flags. These facts simply do not add up.

Heymann argued "that politics be excluded from prosecution decisions and that no U.S. Attorney be held responsible or be encouraged to bring or refrain from bringing cases that would fail to meet normal standards."

Fried's contention was correct; U.S. Attorneys are political appointees. This has been established. It has also been established that the U.S. Attorneys did not go against directives. They were using clear judgment, working within expected parameters, and excelling in their jobs. Still, they got fired.

The gray area that is worth discussing is this: On what grounds can U.S. Attorneys be fired?

Can they be dismissed for hindering the president's objectives? They are, after all, parts of the executive branch, extensions of the president. In a way, they are like pawns acting upon their king's directives, even if the president's policies are "mistaken or wrong-headed or even cruel," as Fried said. If they are not team players, they can be ousted. Right?

Or do U.S. Attorneys "have an overriding responsibility to justice in individual cases and to pursue justice without fear of retribution from political operatives of any administration"?

What do you think?