DOJ BIGFOOTS OVER A BRIDGE TOO FAR ON LOUGHNER INDICTMENT

Friday, at 12 noon local time, the Arizona United States Attorneys Office held a press conference to announce new charges against Jared Loughner in the Gabby Giffords shooting spree. From the official press release:

> "This was an attack on Congresswoman Giffords, her constituents, and her staff," said U.S. Attorney Dennis K. Burke. "We will seek justice for the federal officials, Judge Roll and Gabriel M. Zimmerman, and for Dorothy J. Morris, Phyllis C. Schneck, Dorwan C. Stoddard, and C-T G. These final four Arizonans' lives were extinguished while exercising one of the most precious rights of American citizens, the right to meet freely and openly with their Member of Congress. The deceased are not the only ones whose rights are being defended. Those citizens who were peaceably assembled to speak to their Member of Congress are also named victims in this indictment. This indictment involves potential death-penalty charges, and Department rules require us to pursue a deliberate and thorough process. That process is ongoing, and we will continue to
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> work diligently to see that justice is done."

The press release, at the end, contains a nice summary chart of the various crimes charged and potential sentences. What is notable is that the new superseding indictment, although the press release is somewhat vague about it, is that the federal government has effectively seized jurisdiction of the entire case, including on

the presumptively state law victims. As the Washington Post describes it:

> But, employing a novel legal argument, prosecutors persuaded a federal grand jury to indict him on 46 new charges, on the theory that the shootings occurred on protected federal ground, as if it happened in Congress. Six people, including a chief federal district judge, were killed, and 13 — including Giffords — were injured.
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> U.S Attorney Dennis K. Burke told reporters in Phoenix that he wants to seek justice for all the victims and make no distinction between those who were federal employees and those who were merely attending the congresswoman's event.
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> "These victims were exercising one of the most precious and fundamental rights of American citizens: the right to meet freely, openly and peaceably with their member of Congress," Burke said. "It is a civil right. And their safety in participating in this federal activity is protected by federal law."

"Novel legal argument" is one of the larger understatements of this still young century. A better description would be overreaching rubbish. This is something you are not likely to see often, but I am in complete agreement with Andrew McCarthy, who opined at the NRP Corner:

> I think the Justice Department's strategy in the Loughner case is legally suspect (to say the least) and tactically foolish. There are federal charges that apply to the shootings of the federal officials. That's the federal case here. To the contrary, shooting people who are not federal officials in a mall is not a federal offense — such shootings are state

> crimes, for which Arizona provides very severe sentences, including death if death has resulted.
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> Justice is hanging its jurisdictional hat on the "federally protected activity" aspect of the civil rights laws. The purpose of this provision is to give the feds a vehicle to go after people who purposely try to stop someone from enjoying the benefits of a federal program. So if some misguided soul tried to vent his disagreement with, say, the "cash for clunkers" program by standing outside the car dealership and intimidating would be participants, he would be interfering with a federally protected activity even though this sort of menacing, ordinarily, would be a state offense, not a federal offense. The idea is to protect obvious federal interests. The idea is not to create federal cases whenever the commission of a state crime has some incidental, attenuated federal consequence.

That is exactly correct although, again, it is somewhat of an understatement. What is going on here is a power grab, pure and simple. And not just in the Loughner case, but in a much broader federal versus state sense. As McCarthy intimates, this reading of the law behind the DOJ power grab would make just about any activity attachable under the federal penumbra. It is absurd and, frankly, troubling.

I also agree with Andrew that it is a tactical mistake. A huge one. Which makes this an across the board assessment, as McCarthy is a former AUSA prosecutor and I spent the better part of a career in and around criminal defense. I can flat out tell you, what the DOJ has done here is a defense lawyer's wet dream on a tough case. If your client is dead to rights guilty, you get on your knees and pray for bunk like overreaching, overcharging, legally disingenuous trickeration and abuse of authority from the government. This

plays right into the hands of a defense attorney trying to garner some sympathy from a jury for a diminished mental capacity defense. Toss onto all that the fact that Arizona, without question, has a much tougher, narrower and harder to obtain insanity defense than the federal one. In fact, it is effectively nearly impossible to win on insanity under Arizona state law. And for those interested in the death penalty (I am not particularly), AZ has, by light years, more experience in seeking, obtaining and, erm, executing it than the federal government does (the federal government has executed a grand total of three people in the last fifty years).

The statute the DOJ has twisted to reach this result in *Loughner* is 18 USC 245 and it is was created and designed to provide a mechanism for federal prosecution of suspect class related and other civil rights violations. The operative part of the statute being relied on here by the government is 18 USC 245(b)(1)(B) which provides:

> (b) Whoever, whether or not acting under color of law, by force or threat of force willfully injures, intimidates or interferes with, or attempts to injure, intimidate or interfere with—
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> > (1) any person because he is or has been, or in order to intimidate such person or any other person or any class of persons from—
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> > (B) participating in or enjoying any benefit, service, privilege, program, facility, or activity provided or administered by the United States;

But do take a look at the whole statute, and you will quickly see the hard civil rights nexus of the legislative intent. As opposed to the wild

stretch made in *Loughner*. It is a critical and unnecessary expansion of the federal domain in criminal law, and at the direct expense of presumed state jurisdiction. As McCarthy intimated, if you become a federal protectee simply because you are in the vicinity of a Congress member, even in the curtilage of a supermarket, then about anywhere is good enough for the federal government to seize jurisdiction of. It is an unwanted and unnecessary expansion of Executive Branch power, something that has become more than a distressing trend with Mr. Obama and his administration.

It is not the only area of the *Loughner* case where brother Fed has belligerently spread its wings. No, as Josh Gerstein has reported (see here and here), the DOJ has sought to seal the autopsy records and gag the Pima County coroner as to the deceased Loughner victims. There are two problems with this. First off, there is no compelling reason for it. Secondly, it flies directly in the face of Arizona's public records law and state case precedent. As Josh explained, so far the *Loughner* judge, Larry Burns, has been non-plussed with the attempt.

There is, of course, no federal law on secrecy of autopsy records, the government just decided that is what they would do because it felt good and some of the victims' families said they would prefer it. With all due sympathy to the families, of course they would; most all crime victims would love to not have any of the details of the crimes that made them victims be put on public display. But that is not how America works; public records are presumed to be just that – public. That is how the citizenry keeps an eye on what elected officials, civil servants, police, prosecutors and courts are doing in their name. But DOJ just decided to step on Arizona's presumptive openness of autopsy records as public records and opt instead for secrecy.

And, of course, there still exists the very germane issue of the chance, if not likelihood,

that DOJ ginned up the scenario that Judge John Roll was “in the course of his judicial duties” when he casually stopped by the supermarket by his house on the way home from church to say hi to Gabby.

Which leads back to the bigger question – why is the federal government so aggressively and completely bigfooting on the State of Arizona in the *Loughner* case? Why is the DOJ just grabbing and dictating everything in sight on what is truly, at heart, very much a state and local crime? Because they can and they undoubtedly see it as an easy and glossy win. The Loughner case is very much a local affair in Arizona, but the Obama DOJ is willing to grab that ring, even if it doesn’t make legal, tactical or moral sense.

Despite the extra notoriety of the crime because Gabby Giffords was a US Congresswoman, everything about this case is really local in nature. Loughner did not set out to shoot Giffords because of profound policy disagreements or out of partisan zealot factors; no, he went after Gabby because he felt she snubbed him on a basically non-political metaphysical nonsense question he tried to ask her nearly four years before his January 8 shooting spree, and his hatred and anger toward Giffords metastasized over time. The rage focused from his deteriorating world and mental condition could have focused on any number of people – a friend or girlfriend who dumped him, a teacher or school official, or even one of his parents. It just happened that it was Gabby Giffords.

This was a local crime. The uncontroverted evidence to date is the attack was the act of a single individual, Jared Loughner, a 22 year old disaffected youth from Tucson. He was not particularly politically motivated. All victims were, at root, citizens and residents of Tucson. The act took place in Tucson. Most all of the initial primary investigation was done by the Pima County Sheriff’s Office. Loughner was arrested on the spot, booked into jail and

properly within the criminal process of the Pima County court system, which has a very good record. Pima County could easily and properly prosecute Loughner for *all* the crimes, against *all* the victims, and do so without disingenuous contortion and stretching of nearly arcane, little used and inappropriate civil rights provisions. It could be done without propagating a giant and wild jurisdictional power expansion by the federal government.

So why are we where we are?

Because the Obama/Holder DOJ has taken a lot of lumps in high profile legal matters such as their feckless indecision about what to do with the Guantanamo detainee due process rights and trials and the near acquittal of the defendant in the Ghailani terror trial (unlike the Gitmo trial issue, the blame on Ghailani is completely misplaced). They could use some good publicity on a huge legal case, that is a sure fire conviction, and that captures the public's interest and passion. And, of course, there is an election coming.

The Giffords shooting case has squarely captivated the American public in a visceral way and, for all the shouting, appears to be a strikingly simple crime at its root. Disaffected local youth buys gun, shoots up a public place. It is an easy "win" for the Federal government to glom onto. But it is hard to imagine that Gabrielle Giffords, born and bred in Tucson, would want this matter sucked into a Federal preening show so the DOJ can score some PR points. Same goes for John Roll, who was nearly a native, having moved permanently to Tucson nearly 60 years ago as a child, and spent a career as a prosecutor and judge in the local state court system prior to joining the Federal Bench. These leaders would almost certainly want all their fellow Tucsonian victims to be addressed and considered in the prosecution without stretching the law into a huge federal power grab from the states, and without giving Loughner a better defense mechanism.

But, sadly, there really appears to be no other equally compelling explanation for why we are where we are after the astounding superseding indictment filed last Friday in the *Loughner* case. There was a better, and higher road the DOJ could have, and should have travelled. But the DOJ did not; they so rarely do anymore.