

FITZ ON FIRING

In their Questions for the Record submitted after he testified, HJC managed to ask Patrick Fitzgerald one obvious question they didn't manage to ask when he testified at their hearing on Special Counsels (h/t MadDog). What would have happened—or would happen to John Durham, investigating the torture tapes destruction—if a Special Counsel got fired during the course of the investigation? Actually, in the QFRs Fitzgerald got asked about 5 different versions of the question, only one of which elicited a really useful answer (at least as it might reflect on John Durham's investigation):

13. If you had been fired as a U.S. Attorney, what impact would that have had on the CIA leak investigation? What impact would that have had on your appointment as Special Counsel?

During my tenure, this question did not present itself. It is not clear to me what the legal implications would have been had I been relieved of command as United States Attorney while serving as Special Counsel. (This might be an issue that should be specifically addressed if there is a delegation of power to a sitting United States Attorney in the future as it is entirely possible that a United States Attorney could be asked to resign after a change in administration.) It would appear that unless the United States Attorney were specifically retained in some other capacity (such as a Special Assistant United States Attorney), he or she could no longer serve as a Special Counsel who was employed by the Department of Justice and whose authority had been delegated by the Attorney General. It would be possible that a new appointment could be made for such a former United States Attorney which would provide that

he or she would serve as a Special Counsel from outside the Department of Justice pursuant to the appropriate regulations.

Had I been relieved of command as United States Attorney while conducting the CIA leak investigation, even if a legal basis were established for me to continue as Special Counsel or in some other proper capacity, I would nevertheless have had to determine whether it would be appropriate for me to continue representing the government under all of the circumstances. I would have had to consider whether my ability to be effective had been undercut and whether any decision I made to prosecute or not prosecute a case (or whether to further investigate any matter) might reasonably subject the investigative team to the criticism that I (or others on the team) might harbor a bias against the administration which had relieved the prosecutor of his Presidential appointment. This would be a determination heavily dependent on the particular factual circumstances which led to the termination of my appointment as United States Attorney.

That is, since Rove never managed to get him fired, Fitzgerald never had to think these things all the way through. But if he had been fired as USA, he would have had to be reappointed to some other position to continue the investigation in a constitutional manner. In any case, though, the threat of firing would present the difficulty that, even if he were appointed to some other position, his investigation might be tainted by the appearance that his prosecutorial decisions might be biased because he had been fired.

In other words, the threat of firing a prosecutor investigating top Administration officials does present a possible problem.

But that's not the version of the "what if you got fired" question that I find most interesting. Rather, there's a question that asks specifically if Fitzgerald became aware of efforts to fire him during the course of the CIA Leak investigation. Fitzgerald refuses to answer ... because of the ongoing Rezko case.

11. When one U.S. Attorney concurrently serves as a Special Counsel, is it appropriate for the Justice Department or the White House to consider firing all 93 U.S. Attorneys? Please explain.

National Public Radio has reported that, according to "someone who's had conversations with White House officials, the plan to fire all 93 U.S. Attorneys originated with political adviser Karl Rove. It was seen as a way to get political cover for firing the small number of US Attorneys the White House actually wanted to get rid of." Ari Shapiro, Documents Show Justice Ranking US Attorneys, NPR, April 13, 2007. Many have speculated that Mr. Rove's goal in proposing the U.S. Attorney firings was to pressure and intimidate you. When Mr. Rove made the suggestion to fire the U.S. Attorneys, he had already been before the grand jury several times in the Scooter Libby case. To your knowledge, is this account correct? Please explain why or why not.

During the CIA leak investigation, were you aware of any conversations that you might be asked to resign? If so please describe all such conversations, including the substance of the conversations, when they occurred, and the names of those who participated.

I do not know if the referenced account of events is correct or not.

As to whether I was aware during the relevant time period of the

investigation that I might be asked to resign, I will respectfully decline to discuss matters currently at issue in a trial ongoing in the Northern District of Illinois.

Fitzgerald is referring, of course, to the multiple times during the Rezko trial when a witness has testified that Rezko and Bob Kjellander talked about having Rove fire Fitzgerald to scuttle the investigation into Chicago corruption. But that's not, of course, what HJC asked him—they asked him about the CIA Leak case, and they made a reference specifically to coverage of the USA Purge.

To understand why this is interesting, consider the timing. These QFRs almost certainly went out within a week of February 26, when Fitzgerald testified before HJC. While there had been speculation that Rezko and Kjellander might have tried to get Fitzgerald fired, that speculation wasn't confirmed during the Rezko trial until April 23. Now, the date on Fitzgerald's response (which went through DOJ's minder) is May 2—after, but not long after, the revelations in the Rezko trial. And here HJC has it, conveniently before the closing arguments finish in the Rezko trial, so Fitzgerald can't legitimately answer when he learned—over the course of the Rezko investigation—that Kjellander was working with Rove to get him fired.

But unless Fitzgerald learned that fact "during the CIA leak investigation," the answer wouldn't be on point at all. That is, as Fitzgerald suggests with his other answers, he didn't learn he was on the USA Purge list until the media started asking DOJ about it last year:

I first learned about an evaluation of me by Mr. Sampson at the time of an inquiry by the media to the Department of Justice indicating that the media was aware of such evaluation. A colleague from the Department of Justice told me

about the media inquiry and the substance of the document inquired about.

But, by his answer to this question, Fitzgerald suggests he **did** learn of efforts by Kjellander and Rove "during the CIA Leak investigation." Now, I'm not convinced that means Fitzgerald learned of Kjellander's efforts before he gave Rove the all-clear in June 2006—but it sure suggests that's a possibility.

Update: fixed basic grammar per watercarrier.