LANNY BREUER REWARDS DOJ LAWYERS FOR WINNING IMPUNITY FOR PROSECUTORIAL MISCONDUCT

I always like reading DOJ's various expressions of their investigative and prosecutorial priorities—because they usually show a disinterest in prosecuting banksters, a thorough waste of resources on entrapping young Muslims, and an ongoing fondness for Anna Chapman.

Lanny Breuer's choice of DOJ lawyers to recognize yesterday was, in some ways, an improvement over the trend. I'm happy to see prosecutors rewarded for taking down the "Lost Boy" website. Rather than fixating on Anna Chapman and entrapping young Muslims, Breuer recognized prosecutors who entrapped older Muslims who attempted to smuggle someone they believed to be a Taliban member into the US. And Breuer even celebrated the rare prosecution of a bankster, Lee Bentley Farkas.

And while Breuer's multiple awards to people seemingly making it easier to shut down the InterToobz in the guise of IP violations concerns me, it's this bit that I found disgusting.

> The Assistant Attorney General's Award for Distinguished Service was presented to Kirby Heller and Deborah Watson of the Criminal Division's Appellate Section for their exceptional work in the successful appeal of sanctions imposed upon federal prosecutors in the case of Dr. Ali Shaygan.

Effectively, Lanny Breuer is rewarding two appellate section lawyers for winning an 11th Circuit Court decision overturning sanctions

imposed on DOJ for gross prosecutorial misconduct. Breuer's priorities, it seems, include ensuring that DOJ pays no price when it abuses its prosecutorial power.

The case goes back to February 2008, when Ali Shaygan was indicted for distributing controlled substances outside the scope of his medical practice; one charge tied that distribution to the death of one of Shaygan's patients. Shaygan ended up hiring a defense team that included one attorney who had had a run-in with the prosecutors in his case. In addition, the lead prosecutor, Sean Paul Cronin, was admittedly buddies with the lead DEA Agent, Chris Wells. After Shaygan's lawyers attempted (ultimately, successfully) to suppress a DEA interview with Shaygan on Miranda grounds, Cronin threatened the team.

> AUSA Cronin warned David Markus, Shaygan's lead attorney, that pursuing the suppression motion would result in a "seismic shift" in the case because "his agent," Chris Wells, did not lie.

Nine months later, during the trial, one of the prosecution's witnesses alluded in cross-examination that he had tapes of conversations—failed attempts to bribe Shaygan's lawyer—at home.

> During the cross-examination of Clendening on February 19, 2009, Shaygan's counsel, Markus, asked Clendening if he recalled a telephone conversation in which Clendening told Markus that he would have to pay him for his testimony, and Clendening responded, "No. I got it on a recording at my house."

This revelation led to exposure of the government's collateral, failed investigation of Markus for witness tampering, as well as a significant number of discovery violations. In

short, it became clear the government tried, unsuccessfully, to catch Markus bribing witnesses for favorable testimony and then hid all evidence they had tried. The prosecutor in the case was not properly firewalled form that investigation and even personally claimed to give authorization to tape the conversations. And in the days before the trial, the prosecutor checked in on the witness tampering investigation, apparently hoping to force Markus to withdraw from the case just as it went to trial. In the end, Shaygan was acquitted of all 141 charges against him.

After the trial, Miami District Court Judge Alan Gold held a sanctions hearing against the government for its gross misconduct. He held the government in violation of the Hyde Amendment. He had them pay all reasonable costs after a superseding indictment he judged was filed as part of the "seismic shift in strategy." And he publicly reprimanded the prosecutors involved in the case.

Now, the government admitted that it committed significant errors.

> The United States acknowledges that it initiated a collateral investigation into witness tampering and authorized two witnesses, Carlos Vento and Trinity Clendening, to tape their discussions with members of the defense team in violation of United States Attorney's Office policy; that, although there were efforts made to erect a "taint wall," the wall was imperfect and was breached by the trial prosecutors, AUSA Sean Paul Cronin and Andrea Hoffman, at least in part, because the case agent, DEA Special Agent Christopher Wells, was initially on both sides of the wall; and that, because the United States violated its discovery obligations by not disclosing to the defense "(a) that witnesses Vento and Clendening were cooperating with the government by

> recording their conversations with members of the defense team, and (b) Vento's and Clendening's recorded statements at the time of their trial testimony." Finally, the United States "acknowledges and regrets" that, "in complying with the Court's pre-trial order to produce all DEA-6 reports for in camera inspection on February 12, 2009 (Court Ex. 6), the government failed to provide the Court with the two DEA-6 reports regarding the collateral investigation, specifically Agent Wells' December 12, 2008 report (Court Ex. 2) and Agent Brown's January 16, 2009 report (Court Ex. 3)."

After the sanctions hearing, the government agreed to pay some legal fees associated with their misconduct. They just objected, and appealed, to the public reprimand and the requirement they pay for all fees after the superseding indictment.

But the appeals court not only threw out the entire financial sanction, it also vacated the public reprimands of the lawyers.

The Appeals Court opinion, written by William Pryor and joined by Rhesa Barksdale, read more like an attempt to override the jury's verdict than a recitation of the facts as determined by the District and Magistrate Judges. From their new interpretation of the facts, they effectively ruled the Hyde Amendment could not apply to prosecutorial misconduct undertaken after an initial objectively reasonable prosecution started.

> The starting point for a potential award of attorney's fees and costs under the Hyde Amendment is an objectively wrongful prosecution: that is, a prosecution that either is baseless or exceeds constitutional constraints. If the prosecution is objectively reasonable, as was the case here, then a

> district court has no discretion to award a prevailing defendant attorney's fees and costs under the Hyde Amendment.

In addition, in the name of "separation of powers," the Circuit effectively abdicated its role in policing prosecutorial misconduct.

> Respect for the separation of powers also informs our understanding that the Hyde Amendment provides an objective standard for bad faith. "In our criminal justice system, the Government retains 'broad discretion' as to whom to prosecute." Wayte v. United States, 470 U.S. 598, 607, 105 S. Ct. 1524, 1530 (1985) (quoting United States v. Goodwin, 457 U.S. 368, 380 n.11, 102 S. Ct.2485, 2492 n.11 (1982)). The Attorney General and United States Attorneys "have this latitude because they are designated by statute as the President's delegates to help him discharge his constitutional responsibility to 'take Care that the Laws be faithfully executed.'" Armstrong, 517 U.S. at 464, 116 S. Ct. at 1486 (quoting U.S. Const. art. II, § 3). "This broad discretion rests largely on the recognition that the decision to prosecute is particularly ill-suited to judicial review." Wayte, 470 U.S. at 607, 105 S. Ct. at 1530. "It also stems from a concern not to unnecessarily impair the performance of a core executive constitutional function." Armstrong, 517 U.S. at 465, 116 S. Ct. at 1486. In the light of this constitutional framework, we cannot read the Hyde Amendment to license judicial second-guessing of prosecutions that are objectively reasonable.

As James Edmondson noted in his dissent, the government didn't even ask the Circuit to weigh in on this as a separation of powers issue.

> I disagree with the idea that, if the Department of Justice and its lawyers are under the supervision, in some way, of federal judges — when the Department of Justice and its lawyers are actively engaged in litigating a case before a United States Court — a violation of the separation of powers is looming. I am inclined to think just the opposite. For me, it is the instances of the treating of the Department of Justice and its prosecutors differently from — and better than — other litigants that threaten the separation of powers between the Judicial Branch and the Executive Branch.
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> By the way, the phrase "the separation of powers" never appears in the Department of Justice's brief, and the Department has never argued anything about that kind of issue.

He goes on to note that Judge Gold was just following a statute passed by Congress.

But in William Pryor's opinion, asking the government to avoid gross misconduct when it's prosecuting people against whom it has legitimate evidence is too much to ask of the Executive Branch.

No wonder Lanny Breuer celebrated this result. A hack Republican judge just gave Breuer's prosecutors wide latitude to engage in prosecutorial misconduct in the 11th Circuit! To hell with due process!

Now, as Gold noted in his ruling, this gross misconduct was exposed in the wake of DOJ's gross misconduct in the Ted Stevens case. This kind of misconduct is in no way isolated. Breuer's prosecutors—including, potentially, the high profile William Welch, whom Breuer backs unquestioningly, are still on the hook for such misconduct in the DC Circuit.

But preventing such behavior seems not to be Breuer’s plan. Rather, he’s going to reward DOJ members who successfully protect their own.

Sort of like the mafia.