

A NEW JUDGE FOR THE GIFFORDS CASE AND AN EARLY PROBLEM FOR HIM

As you may know, [every member of the Arizona Federal Judiciary has been recused](#) in full from further participation in the criminal case against Jared Lee Loughner. This was inevitable in light of the fact the top line murder victim in the case was their friend, and Chief Judge, John Roll. We now know who has been appointed from outside of the Arizona District to handle all further proceedings in the matter. By [Order of 9th Circuit](#) Chief Judge Alex Kozinski, that would be Judge Larry A. Burns of the California Southern District (CASD).

From [Ginny LaRoe at The Reporter](#), comes the pertinent information:

Burns' experience with the federal death penalty – both as a prosecutor and judge – factored into Burns' selection, Kozinski said today.

"I wanted a judge who [was] well-respected, and had the reputation of being fair and well thought of by both sides," Kozinski said, "and I wanted to have a judge who had some experience with the federal death penalty because that's a possible situation here."

As a practical matter, Kozinski said, he also considered proximity to Arizona, though a change of venue isn't out of the question.

Burns is a 2003 Bush appointee who was a career prosecutor before ascending to the federal bench. He was an assistant U.S. attorney for California's Southern District from 1985 to 1997 and before that was a deputy district attorney in

San Diego. He became a magistrate before his promotion to an Article III spot.

Burns is, as you might expect from his prosecutorial background, a fairly no-nonsense law and order kind of judge. In addition to death penalty experience, Burns has big case experience in matters familiar to most readers here, the [Duke Cunningham case](#) and the [Tommy "Special K" Kontogiannis case](#).

Judge Burns is out of San Diego as are, conveniently, the specially appointed Federal Public Defenders that have been assigned to Jared Loughner, Judy Clarke and Mark Fleming; they will be familiar with each other and that should makes things smoother than would be expected for such a cobbled together court process.

One other thing, as you can see from the [above link regarding Kontogiannis](#), Judge Burns doesn't take kindly to any gruff or shenanigans by the DOJ/US Attorneys appearing in front of him.

In a highly unusual move, U.S. District Judge Larry Burns sent [a 15-page brief of his own](#) to the 9th U.S. Circuit Court of Appeals, curtly noting that the court filings of prosecutors "mischaracterizes substantial, relevant portions" of the case.

The reason I relate the ability of Larry Burns to hold government attorneys to some base level of credibility and propriety is that there is already a very meaty and germane issue percolating in the Loughner prosecution. Namely, is Judge John Roll a proper victim so that Federal court even has jurisdiction against Loughner for a murder count involving Roll as the victim?

As [Josh Gerstein has pointed out](#), the facts may not really support Federal jurisdiction:

The actions and motivations of U.S.

District Court Judge John Roll just before he was shot dead at Rep. Gabrielle Giffords's campaign event in Tucson on Saturday are important for the public narrative about the tragedy, but they're also vital to the federal criminal charge for his murder.

The criminal complaint federal prosecutors filed Sunday against the alleged shooter, Jared Loughner, goes to some lengths to demonstrate that Roll didn't show up at the Giffords event just to say hello to the congresswoman, or on some whim after attending mass, as reports Saturday suggested. That storyline was fueled by Pima County Sheriff Clarence Dupnik, who said "because [Roll] knows Gabrielle very well, [he] came around the corner to say hi. Unfortunately he was in the wrong place at the wrong time."

By contrast, FBI agent Tony Taylor argues that Roll was at the event to talk to Giffords about ongoing problems related to a surge in the federal judicial caseload in Arizona—a problem which the judge has attributed to a boost in the number of federal agents sent to the area to address immigration and border-related crime.

Under federal law, the murder or attempted murder of a U.S. official, such as a judge, is only considered a federal crime if committed "while such officer or employee is engaged in or on account of the performance of official duties." In other words, if Roll simply stopped by the event to greet Giffords, who he's said to have been friendly with, or due to idle curiosity about what was happening there, his killing probably wouldn't be a federal offense.

This is exactly right. And, as [Josh noted last](#)

[night](#), even President Obama's words last night in Tucson militated in favor of Judge Roll not being particularly "in the course and scope" of his judicial duties when shot and killed. I only knew Judge Roll professionally from appearing in front of him (decent man and very good judge), going back to when he was on Division Two of the Arizona Court of Appeals, but the word on the ground here, from those that did know him well personally (as well as Pima County Sheriff Clarence Dupnik), is that Roll did know about the Giffords event, but was simply on his way back home, which is near the Safeway Store at Ina and Oracle roads, where the shooting occurred, from Saturday Mass downtown and decided to stop by the store and say hi to Giffords.

There may well have been no big mission to talk to Giffords about the overcrowding of the Arizona District docket. Perhaps Roll may have mentioned that as small talk chit chat with someone while standing there, but it is quite possible, perhaps actually likely, the Fed story that Roll was on substantive judicial business when killed is manufactured extrapolation to create Federal jurisdiction where it may not lie.

There is another problem with the "Judge Roll was on official judicial business" meme being pitched by Federal authorities. It doesn't make sense. Think about it, what real "business" could John Roll have had with Gabby Giffords on the court docket overcrowding issue? She is in the House of Representatives, not the Senate – she cannot help get desperately needed judges confirmed faster. Even in the House, Giffords is not on the Judiciary Committee. Gabby and Judge Roll were friends, and I am sure she was supportive of his quest on easing the docket, but there was simply not that much, if anything, she could directly do about it. The story that this was a big judicial mission by Judge Roll, on a Saturday morning after church, not only does not comport with what people who should know say, it does not make sense politically.

Not at all.

So that is a substantial issue on Judge Burns' plate from day one. And it is an important one because the Feds only have jurisdiction to prosecute for the five crimes/victims with a federal nexus, and one of those, of course, is Judge John Roll. And of those five, Judge Roll is the top line count that is their greatest motivation; excising Judge Roll from the case would put a serious rain on their parade.

Which, of course, begets the question as to why the Federal government has so aggressively seized primary prosecutorial position, when the State of Arizona, which has just as onerous (death penalty/life in prison) penalties as the Federal government (and is much more fluent in using them), and has jurisdiction to prosecute Loughner for offenses against ALL the victims, was available and ready to take the lead. A question the DOJ really ought to answer in this unique case.