US V. Blagojevich: What Happens Next?

John F. Schomberg

In July, a three-judge panel from the United States Court of Appeals for the Seventh Circuit vacated five of the 18 criminal counts on which former Illinois Gov. Rod Blagojevich was convicted. In continuing to fight all counts of his conviction, Blagojevich's attorneys recently filed a petition for his appeal to be heard en banc. Below is a brief summary of Blagojevich's conviction, of the portions of the Seventh Circuit's appellate opinion vacating the five counts, and of what could happen next:

Blagojevich's Conviction

In August 2010, at the conclusion of his first trial, Blagojevich was convicted on one count of lying to a federal agent, with the jury deadlocking on the remaining 23 counts of the 24-count indictment. According to the count and the evidence at trial, in March 2005, Blagojevich lied to the FBI, stating that he "tried to maintain a firewall between politics and government" and that he "does not track, or want to know, who contributes to him or how much they are contributing to him."

The U.S. Attorney's Office dropped three of the remaining 23 counts before the second trial.

In June 2011, at the conclusion of the second trial, Blagojevich was convicted on 17 of the remaining 20 counts, including on charges for wire fraud, attempted extortion, bribery, extortion conspiracy and bribery conspiracy. The three counts on which Blagojevich was not convicted related to Blagojevich allegedly (1) demanding that then-Rep. Rahm Emanuel's, D-Ill., brother put on a fundraiser for Blagojevich, in exchange for Blagojevich releasing $2 million in grant funds for Chicago Academy, a school in Emanuel's district (count 14) and (2) demanding $500,000 in donations from a construction executive and trade group representative, in exchange for announcing major road construction programs for the Illinois Tollway Authority and the Illinois Department of Transportation (counts 19 and 20).

Blagojevich's original 18 conviction counts fall into four major categories:

1. Lying to Federal Agents (one count)

See above.

2. The U.S. Senate Seat Appointment (11 counts)

What is often referred to as the "sale" of the then-soon-to-be-vacant U.S. Senate seat of Barack Obama was the basis for 11 of the 18 total counts on which Blagojevich was convicted. (As discussed, below, it is five of these 11 "Senate seat" counts that were vacated by the Seventh Circuit.)

At trial, evidence — much of it in the form of tape recordings of Blagojevich phone calls — showed that Blagojevich, through intermediaries, offered to appoint several candidates to the U.S. Senate, including Valerie Jarrett, now senior adviser to the president and former Rep. Jesse Jackson Jr., D-Ill., in exchange for (1) a high-level federal appointment, including cabinet secretary for health and human services or an ambassadorship, (2) a highly paid private sector position, or (3) in the case of Jesse Jackson Jr., $1.5 million in campaign contributions.

3. Children's Memorial Hospital (three counts)

When Children's Memorial Hospital, in Chicago, sought an increase in the state of Illinois' reimbursement

rates for Medicaid patients, Blagojevich, through intermediaries, agreed to do so, so long as the hospital made a $50,000 campaign contribution. Blagojevich first approved, then delayed, and ultimately rescinded the reimbursement rate increase, waiting for the contribution.

4. Illinois Racetrack Owner (three counts)

Blagojevich, through intermediaries, informed a racetrack owner that he would not sign a bill providing for a portion of casino taxes to go to racetracks, until the owner made a $100,000 campaign contribution. Blagojevich was arrested before the bill was signed or any campaign donation was made.

The Appellate Opinion, Vacating Five of Blagojevich's 18 Conviction Counts

For five of the 11 "Senate seat" counts, both the U.S. Attorney's Office's indictment and the court's jury instructions treated the trading of the U.S. Senate seat for a public office the same as trading the seat for a private position or private monies. However, the Seventh Circuit held that "a proposal to trade one public act for another, a form of logrolling, is fundamentally unlike the swap of an official act for a private payment." Slip op., at 5. In other words, the Seventh Circuit found that while a jury can convict a government official for demanding private payment or private employment in exchange for a public act, that jury cannot convict that same government official for demanding one public act for another.

Logrolling — more familiarly known as horse-trading — is a trade of official acts. In Blagojevich's case, the proposed logroll was the trade of a U.S. Senate appointment for his own appointment to a cabinet position or an ambassadorship.

By way of example, to logroll or horse-trade, and thereby achieve their own legislative objectives, two legislators might agree: If you vote for my anti-abortion bill, I'll vote for your anti-death penalty bill. The Seventh Circuit states, "Governance would hardly be possible without these accommodations, which allow each public official to achieve more of his principal objective while surrendering something about which he cares less, but the other politician cares more strongly." Slip op., at 6. The logrolling in the Blagojevich case is much more attenuated than the type of vote-swapping, legislative logrolling/horse-trading that people generally think of. Instead of a trade of votes, Blagojevich was proposing a trade of appointments between two different levels of government, between the federal executive branch (President Obama appointing Blagojevich to his cabinet or an ambassadorship) and the state executive branch (then-Gov. Blagojevich appointing Valerie Jarrett to the vacant U.S. Senate seat.)

Digging deeper, the Seventh Circuit found that logrolling could not be viewed as extortion, bribery or fraud, the underlying crimes for which Blagojevich was convicted. Extortion requires "the obtaining of property" through threatened or actual acts. A public office — such as a cabinet position or an ambassadorship — is not "property" since it belongs to the amorphous "people," not to the appointing official. Likewise, the Seventh Circuit found that a trade of public acts could not be considered bribery as "[i]t would not be plausible to describe a political trade of favors as an offer or attempt to bribe the other side." Slip op., at 8. Finally, as to fraud, the Seventh Circuit could not find any fraud in Blagojevich's demand to swap appointments, as Blagojevich "did not try to deceive Sen. Obama." Slip op., at 9.

The Seventh Circuit dramatized the high-level nature and frequency of logrolling and horse-trading, speculating on President Obama's appointment of John Kerry as secretary of state, stating, "it wouldn't surprise us if this happened at least in part because he had performed a political service for the President." Slip op., at 9. The Seventh Circuit also cited the historic case of then-President Dwight Eisenhower and then-California Gov. Earl Warren (denied by Earl Warren), in which Eisenhower is alleged to have appointed Warren to the U.S. Supreme Court in exchange for Warren delivering the California delegation at the 1952 Republican National Convention. Finding that the U.S. Attorney's Office's indictment and the trial court's jury instructions went too far, the Seventh Circuit stated, "If the prosecutor is right, and a swap of political favors involving a job for one of the politicians is a felony, then if the standard account is true both the President of the United States and the Chief Justice of the United States should have gone to prison." Slip. op., at 10.

What Could Happen Next

As to what's next, three major questions are: (1) will the Seventh Circuit rehear Blagojevich's case en

banc, (2) assuming the Seventh Circuit does not rehear the case en banc, will the U.S. Attorney's Office retry Blagojevich on the five counts vacated by the court, and (3) assuming the five counts remain vacated, what will the trial judge do at resentencing.

Will Blagojevich's Case Be Reheard En Banc?

As to whether the Seventh Circuit will rehear Blagojevich's appeal en banc, the very likely answer is "no."

By rule, rehearings en banc are "not favored and ordinarily will not be ordered." Federal Rule of Appellate Procedure 35(a). Such rehearings are not intended to be a "do-over" appeal or to take place simply because other judges disagree with the three-judge panel's opinion. Rather, rehearings en banc are only to take place to resolve (1) an internal conflict in Seventh Circuit case opinions or (2) a "question of exceptional importance." Unless a majority of the Seventh Circuit's active status judges believes that the finding that political logrolling or horse-trading cannot be a crime is a "question of exceptional importance," a rehearing en banc seems very unlikely.

The unlikeliness is reflected not only in the appellate rules and the Blagojevich opinion, but in precedent as well. The Seventh Circuit's own "Practitioner's Handbook" states that rehearings en banc "are very rare." By way of example, the handbook states that more Seventh Circuit cases are accepted and heard by the U.S. Supreme Court than are reheard en banc by the Seventh Circuit. (In the 2012 term, the U.S. Supreme Court granted 92 petitions for oral argument out of 7602 filed, for a 1.21 percent success rate.) Seventh Circuit Judge Richard Posner noted the rarity in a 1983 Seventh Circuit en banc opinion, citing that there had been only 19 rehearings en banc in the five years before — or less than four per year. Similarly, the D.C. Circuit had only 28 rehearings during the entire 1990s. These numbers become even more stark when you look at the scarcity of successful petitions for rehearings arising out of unanimous opinions — with none of the three judges dissenting — such as Blagojevich's.

However, even if Blagojevich is unsuccessful in getting his case reheard en banc by the Seventh Circuit, he still has the last option of asking the U.S. Supreme Court to hear his case.

Will There Be a Third Blagojevich Trial?

It is extremely unlikely that the U.S. Attorney's Office would retry the five counts vacated by the Seventh Circuit. To do so, the U.S. Attorney's Office would retry Blagojevich on the conduct in those counts, excluding the logrolling allegations that were rejected by the Seventh Circuit.

The Seventh Circuit, itself, said in its opinion, "Because many other convictions remain and the district judge imposed concurrent sentences, the prosecutor may think retrial unnecessary[.]" Slip op., at 12. Likewise, the Seventh Circuit noted that "[r]emoving the convictions on the Cabinet counts does not affect the [sentencing] range calculated under the guidelines." Slip op., at 22-23.

The U.S. Attorney's Office has already been through two long and expensive trials, the first of which resulted in a near-total jury deadlock, causing some embarrassment (not necessarily deserved) to the office, and the second of which concluded more than four years ago. Blagojevich was tried under then-U.S. Attorney Patrick Fitzgerald. On that basis, one could argue that this doesn't have to be current U.S. Attorney Zachary Fardon's case to fight. (Although it is unlikely, even if Patrick Fitzgerald was still in office, that he would seek a third trial either.) Although a new trial team could certainly be created, there is also the logistical complication that the three lead assistant U.S. attorneys for the two Blagojevich trials have all since left the office for either private practice or a Cook County judgeship.

Blagojevich has already served more than three years in prison (since March 2012) and is very likely, even after resentencing, to serve many more. (Under his current sentence, he's projected to be released in May 2024.) Knowing that the trial judge is neither obligated nor likely to significantly reduce Blagojevich's sentence (see below), if the U.S. Attorney's Office pursued another trial, it could potentially be viewed by the press and public as both wasteful and vindictive — turning Blagojevich into a sympathetic figure instead of an example of public corruption. The U.S. Attorney's Office is not likely to take that chance or to dedicate those resources.

What Will The Trial Judge Do at Resentencing?

As noted above, the vacating of the five counts relating to the "sale" of the U.S. Senate seat does not change the sentencing range set out in the U.S. Sentencing Guidelines. As U.S. District Judge James Zagel stated at Blagojevich's original sentencing in December 2011, the official sentencing guideline was 30 years to life in prison, the U.S. Attorney's Office sought 15 to 20 years, and the probation officer proposed 15-plus to 19-plus years. Judge Zagel, after giving Blagojevich credit for accepting responsibility for his actions, looked at an effective guideline of 12-plus to 15-plus years. He ultimately sentenced Blagojevich to 14 years on 15 counts and to three years and five years on the three remaining counts, with all sentences to be served concurrently (i.e., at the same time — as opposed to consecutively, where each sentence is served one after the other, which would have totaled 223 years in the Blagojevich case).

Most would argue that Judge Zagel would be hard-pressed — although it's neither beyond his powers nor precedent — to not reduce the 14-year sentence in some way. The argument would be that when you take five counts and conduct (the trading of public offices) off the table, the sentence should be reduced. As the Seventh Circuit noted, "the judge may have considered the sought-after Cabinet appointment in determining the length of the sentence, so we remand for resentencing across the board." Slip op., at 12.

The counter to the argument for sentence reduction is that, even with the Seventh Circuit's opinion, Blagojevich was still found guilty on 13 counts, 11 of which resulted in original sentences of 14 years each. Likewise, many practitioners felt that Judge Zagel was generous in crediting Blagojevich with acceptance of responsibility — when Blagojevich denied (and continues to deny) that anything that he did rose to the level of criminal conduct. Finally, the judge could find that the five counts were only vacated on a technicality, for having included the logrolling (trading an appointment for an appointment) allegations. Those same five counts also incorporated allegations on which Blagojevich was explicitly convicted in other counts, including selling the U.S. Senate seat for campaign donations and selling the seat in exchange for being made the highly paid head of a new not-for-profit.

Judge Zagel would still remain within and likely influenced by the 12-plus to 15-plus year effective guideline he found at the Blagojevich trial, providing for a likely maximum sentence reduction of less than two years. Zagel may also look to the sentencing of Tony Rezko — as highlighted in the U.S. Attorney's Office's November 2011 sentencing memorandum — for both comparison and a sentencing floor. The U.S. Attorney's Office notes that while Rezko was sentenced by a different judge, he received a 10.5-year sentence for conduct that he engaged in with Blagojevich or with Blagojevich's tacit approval. The U.S. Attorney's Office states that Rezko received a 10.5-year sentence when he "(a) held no elected office of trust; (b) was not involved in any of Blagojevich's 2008 criminal activity; (c) provided some cooperation to the government that proved valuable; (d) endured harsh conditions of confinement; and (e) ultimately accepted full responsibility for all of his criminal conduct." In light of these positives, distinguishing Rezko from Blagojevich and Rezko still receiving a 10.5-year sentence, it seems very unlikely that Judge Zagel would ever go below that 10.5-year threshold.

Finally, if Judge Zagel's statements at Blagojevich's original December 2011 sentencing are any indicator, if we see any sentence reduction, it is not likely to be a significant one. Zagel stated that the "abuse of the office of Governor ... is more damaging than the abuse of any other office in the United States except president[]" and that "[w]hen it is the Governor who goes bad, the fabric of Illinois is torn and disfigured and not easily or quickly repaired."

—By John F. Schomberg, Clark Hill PLC

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