contingency plans, so was relieved by Bush's victory not to have to make any sudden decisions. Now completing his third year in the office, Cummins, 45, said that, with four children to put through college someday, he'll likely begin exploring career options. It dn't be "shocking," he said, for there to be a change in his office before the end of 1's second term.

COMMITTMENT TO
FILLING VACANCIES

THIS ADMINISTRATION IS COMMITTED TO FILLING U.S. ATTORNEY VACANCIES THROUGH NOMINATION AND SENATE CONFIRMATION

Every single time that a United States Attorney vacancy has arisen, the President either has made a nomination or the Administration is working, in consultation with home-State Senators, to select candidates for nomination.

- There have been **124 confirmations** of new U.S. Attorneys since January 20, 2001.
- Since March 9, 2006, when the AG's appointment authority was amended, the Administration **has continued to nominate individuals, and has submitted 16 nominations** for U.S. Attorney vacancies (12 have been confirmed to date).
- Since March 9, 2006, when the appointment authority was amended, **18 new vacancies have been created and the Administration has already nominated 6 candidates for those positions – so nominations to fill one-third of those vacancies have been submitted.** In addition to the 6 nominations (3 have been confirmed to date), the Administration has interviewed candidates for 8 more vacancies and has several individuals in background investigations, and is waiting to receive names to set up interviews for the remaining positions – all in consultation with home-state Senators.
- It takes time to develop a nomination. The **average number of days between the resignation of one Senate-confirmed U.S. Attorney and the President's nomination of a candidate for Senate consideration is 273 days** (including 250 USAs during the Clinton Administration and George W. Bush Administration to date). The **average number of days between the nomination of a new U.S. Attorney candidate and Senate confirmation has been 58 days for President George W. Bush's USA nominees** (note - the majority were submitted to a Senate controlled by the same party as the President). Altogether, this demonstrates that it has taken a **combined average of 331 days from resignation of one USA to confirmation of the next.**

The 18 Newest Vacancies Were Filled on an Interim Basis Using a Range of Authorities, in Order To Ensure an Effective and Smooth Transition:

- **In 7 cases, the First Assistant was selected** to lead the office and took over under the Vacancy Reform Act's provision at: 5 U.S.C. § 3345(a)(1). That authority is limited to 210 days, unless a nomination is made during that period.
- **In 1 case, the First Assistant was initially selected** to lead the office and took over under the Vacancy Reform Act's provision, **but then retired, at which time the Attorney General selected another Department employee to serve as interim** under AG appointment until such time as a nomination is submitted to the Senate.
- **In 10 cases, the Department selected another Department employee to serve as interim** under AG appointment until such time as a nomination is submitted to the Senate. **In 1 of those 10 cases, the First Assistant had resigned at the same time as the U.S. Attorney, creating a need for an interim** until such time as a nomination is submitted to the Senate.

Altogether, the Attorney General Has Made 14 Interim Appointments Since the Law's Amendment:

- **In 2 cases, the FAUSA had been serving as acting United States Attorney** under the Vacancies Reform Act (VRA), **but the VRA's 210-day period expired** before a nomination could be made. Thereafter, the **Attorney General appointed that same FAUSA** to serve as interim United States Attorney until such time as a nomination is submitted to the Senate.

- **In 1 case, the FAUSA had been serving as acting United States Attorney** under the VRA, **but the VRA's 210-day period expired and the Attorney General appointed another Department employee to serve as interim** United States Attorney until a nomination can be submitted.

- **In 1 case, the First Assistant was initially selected** to lead the office and took over under the Vacancy Reform Act's provision, **but then retired, at which time the Attorney General selected another Department employee to serve as interim** under AG appointment until such time as a nomination is submitted to the Senate.

- **In 10 cases, the Department originally selected another Department employee to serve as interim** under AG appointment until such time as a nomination is submitted to the Senate. **In 1 of those 10 cases, the First Assistant had resigned at the same time as the U.S. Attorney, creating a need for an interim** until such time as a nomination is submitted to the Senate.

EARS REPORTS

EARS REPORTS ARE NOT EVALUATIONS OF U.S. ATTORNEYS

- The Attorney General and the Deputy Attorney General are responsible for evaluating the performance of the United States Attorneys and ensuring that they are leading their offices effectively.

- Because United States Attorneys are appointed by the President and confirmed by the Senate, they do not have formal evaluations or annual performance reviews by their supervisors like other Department employees.

- An "EARS" report is not an evaluation of the performance of a United States Attorney by his or her supervisor. It is a peer review of the legal and administrative procedures and internal controls of the overall United States Attorney's Office that occurs once every three to five years.

- The Evaluation and Review Staff (EARS) of the Executive Office for United States Attorneys (EOUSA) conducts periodic peer reviews of each United States Attorney's Office (USAO) in order to evaluate the overall performance of the entire USAO, make reports, and allow the USAO to take corrective action where needed.

- The EARS program serves as a mechanism by which the USAO and the evaluators can share ideas and innovations, in addition to serving as a means of enhancing communication between EOUSA and the USAO. Evaluation teams are generally comprised of Assistant United States Attorneys and administrative staff from other USAOs who volunteer to evaluate their peers -- they are not professional auditors nor inspectors. The teams do not include other United States Attorneys.

Additional Background:

- Evaluators make recommendations for improving the operation of the USAO, analyzing the legal and administrative operations of the office and providing feedback and recommendations to the United States Attorney. The evaluation team relies on experienced AUSAs and USAO staff from all over the country, and is led by an AUSA. The evaluators are in an office for a maximum of one week, during which they interview all civil and criminal AUSA's at the USAO, as well as the administrative staff and some members of the support staff. In addition, the evaluation team interviews the district judges, some circuit judges, magistrate judges, bankruptcy judges, the Clerk of Court, the Probation Officer, other court personnel, the United States Marshal, representatives of the district's major civil and law enforcement agencies, the OCDETF Regional Coordinator, and any other federal officials or persons that appear appropriate to the USAO point-of-contact and the team leader. Employees at non-federal agencies, such as local prosecutors and police chiefs, may also be interviewed.

- The evaluation team produces a draft report, which is sent to the United States Attorney of the reviewed district for a response. Approximately three to four months after the response has been received, a follow-up evaluator or team visits the USAO review corrective measures, provide assistance to the district, assess the performance of the evaluation team, and produce a follow-up report. Once that report has been received, the EARS staff prepares a final evaluation report, which is approximately 6-12 pages in length. The final report is a narrative summary of the assessments and evaluations from the draft report that have been verified during the response and follow-up process, and of the corrective actions taken by the USAO regarding those recommendations. Completion of a final report takes between 235-265 days after the completion of the evaluation team's visit.

PUBLIC CORRUPTION

PUBLIC CORRUPTION

Issue: What has the Department done to enforce federal laws against public corruption?

Talking Points:

I. OVERALL COMMITMENT TO COMBATING PUBLIC CORRUPTION

- Ensuring the integrity of government is very important to me, and the Department endeavors to do that both here and abroad. At the outset, I would like to thank Congress for ratifying the U.N. Convention Against Corruption, which is an important new tool in the fight against global corruption.

- The Department's anti-corruption efforts include supporting the President's Kleptocracy initiative. And of course, the Department is pursuing officials who violate the laws Congress has put in place to combat public corruption, wherever it is found.

- Our citizens are entitled to honest services from all of their public officials, regardless of their political affiliation. Our citizens are also entitled to know that their public servants are making their official decisions based upon the best interests of the citizens who elect them and pay their salaries, and not based upon the public official's own financial interests.

- Whether public officials are responsible for protecting our national security, running our schools, or hiring the best contractor, citizens are entitled to know that the government is not for sale.

- Prosecutors in the United States Attorneys' Offices and the Criminal Division's Public Integrity Section work with the FBI and the Offices of Inspector General to combat public corruption on a daily basis.

- In order to protect the integrity of our government institutions and processes, I will continue the Department's commitment to aggressively investigate and prosecute public corruption wherever it is found.

- I consider it one of my paramount responsibilities to ensure that the Department continues to handle such investigations and prosecutions in a consistent, non-partisan, and appropriate manner throughout the nation.

II. RECENT DEVELOPMENTS AND ONGOING EFFORTS

- Within the past year, the Department has convicted the former governor of Illinois, the former governor of Alabama, the former Chief Executive Officer of HealthSouth, and the former mayor of Atlanta on a wide range of fraud and public corruption charges.

- The Department of Justice is also pursuing congressional corruption on several fronts. Within the past year, one Member of Congress and one former Member of Congress have been convicted of substantial public corruption charges.

- Additionally, the Department's continuing investigation into the activities of Washington lobbyist Jack Abramoff has netted a total of seven convictions to date, including the jury conviction of former General Services Administration official David Safavian.

- The Department continues to seek out corrupt law enforcement officers through its "Operation Lively Green" in Arizona. This once covert investigation has obtained a total of fifty-five (55) convictions of law enforcement officers that are current and former members of the United States Army, the United States Air Force and the Arizona Army National Guard.

- Finally, the Criminal Division of the Department of Justice is pursuing fraud and corruption among contractors and government officials in the rebuilding of Iraq. Several defendants have been charged to date. Three have pleaded guilty to substantial bribery and money laundering charges involving millions of dollars in contracts, and four have recently pled guilty to wire fraud for obtaining unauthorized pay by embezzling monies intended for troops deployed to Iraq.

- [IF ASKED REGARDING CONGRESSMAN JEFFERSON]: As you know, I cannot comment regarding that matter because the investigation is pending, and because litigation related to the investigation is pending before the courts.

Background

- Significant State and Local Convictions:

  - Former Governor of Illinois George Ryan, was convicted by a jury in April, 2006, on numerous charges including racketeering and honest services fraud. (United States Attorney for the Northern District of Illinois).

- Former Governor of Alabama Don Siegelman and former HealthSouth CEO Richard Scrushy, were convicted by a jury in June, 2006, of conspiracy, bribery, and mail fraud. (Public Integrity Section, Criminal Division, and United States Attorney for the Middle District of Alabama).

- Former Mayor of Atlanta Bill Campbell, was convicted by a jury in March, 2006, on tax evasion charges. (United States Attorney for the Northern District of Georgia).

- Congressional Cases:

  - Former Congressman Randall Cunningham pleaded guilty to bribery and was sentenced in March, 2006, to more than 8 years in prison. (United States Attorney for the Southern District of California).

  - Congressman William Jefferson is currently under investigation (DOJ has confirmed investigation). In connection with that investigation, Jefferson's former Legislative Assistant pleaded guilty to conspiracy and bribery and was sentenced in May, 2006, to 8 years in prison. Also, the president of a telecommunications firm that sought business in West Africa, pleaded guilty in May, 2006, to bribing congressman Jefferson. He was sentenced in September 2006 to 87 months in prison. (Criminal Division and the United States Attorney for the Eastern District of Virginia).

    - Jefferson's appeal from the order enforcing in part the grand jury subpoena directed to his former chief of staff, Nicole Venable, is still pending before the Fourth Circuit. That appeal was argued on September 18, 2006. Jefferson claims that enforcement of the subpoena will violate his Fifth Amendment privilege against self-incrimination. – THIS MATTER IS UNDER SEAL.

    - The D.C. Circuit has set an expedited briefing schedule on Jefferson's appeal from the district court's order denying his motion to return everything seized during the warrant search of his congressional office. Jefferson's brief is due on February 28, 2007; the government's answering brief is due on March 30, 2007. Jefferson argues that the search violated the Speech or Debate Clause. The Circuit initially stayed the prosecution team's review

of the seized evidence pending appeal, and directed Jefferson to identify which evidence is legislative in nature and therefore protected by the Speech or Debate Clause. The Court lifted the stay in part on November 14, and has allowed the prosecution team to "immediately begin reviewing any documents Congressman William Jefferson has conceded on remand are not privileged under the Speech or Debate Clause." PER EDVA, EXCEPT FOR JUDGE HOGAN'S ORDER OF JULY 10th RULING THE SEARCH WAS LEGAL, THE FILINGS BEFORE THE DISTRICT COURT REMAIN UNDER SEAL.

- The ongoing Abramoff Investigation is headed by the Public Integrity Section of the Criminal Division, and has netted the following convictions to date:

  - Ohio Congressman Robert Ney pleaded guilty in September 2006 to conspiracy to commit multiple offenses – including honest services fraud, making false statements, and violations of his former chief of staff's one-year lobbying ban – and to making false statements to the U.S. House of Representatives.

  - Former lobbyist Michael Scanlon pleaded guilty in November, 2005, to conspiracy to commit bribery and honest services fraud.

  - Former lobbyist Jack Abramoff pleaded guilty in January, 2006, to conspiracy, honest services fraud, and tax evasion.

  - Former lobbyist Neil Volz pleaded guilty in May, 2006, to honest services fraud and violating the one-year lobbying ban.

  - Former lobbyist Tony C. Rudy pleaded guilty in March, 2006, to conspiring with Jack Abramoff, Michael Scanlon and others to commit honest services fraud, mail and wire fraud, and a violation of conflict of interest post-employment restrictions

  - Department of the Interior employee Roger G. Stillwell pleaded guilty in June, 2006, to falsely certifying his Executive Branch Confidential Financial Disclosure Report.

  - David Safavian, former Chief of Staff to the Administrator of the GSA was convicted by a jury in June, 2006 of submitting false

statements to an ethics official, Inspector General agents, and a Senate committee, and of obstructing the Inspector General's investigation.

- Operation Lively Green

On Thursday, December 14, 2006, Darius W. Perry, a former First Sergeant in the Arizona Army National Guard, pleaded guilty in connection with the FBI's Operation Lively Green. The one-count information charged the defendant with participating in a conspiracy to commit bribery of a public official and Hobbs Act violations arising from an undercover investigation conducted by the FBI. The defendant conspired to enrich himself by obtaining cash bribes from persons he believed to be narcotics traffickers, but who were in fact Special Agents of the FBI, in return for the defendant and others using their official positions to assist, protect, and participate in the activities of an illegal narcotics trafficking organization engaged in the business of transporting and distributing cocaine from Arizona to other locations in the southwestern United States. In order to protect the shipments of cocaine, the defendants wore official uniforms and carried official forms of identification, used official vehicles, and used their color of authority, if necessary, to prevent police stops, searches, and seizures of the narcotics.

- Iraqi Reconstruction:

The Criminal Division is investigating corruption in Iraqi reconstruction. The three convictions to date are:

Philip Bloom, a contractor who resided in Romania and Iraq, pleaded guilty in March, 2006, to conspiracy, bribery and money laundering in connection with a scheme to defraud the Coalition Provisional Authority - South Central Region (CPA-SC) in Al-Hillah, Iraq.

Robert Stein, former Comptroller and funding officer for the CPA-SC in Al-Hillah, Iraq, pleaded guilty in February, 2006, to bribery, money laundering, and firearms charges.

Bruce Hopfengardner, Lieutenant Colonel, U.S. Army Reserve, pleaded guilty in August, 2006, to conspiracy and money laundering charges.

Jennifer Anjakos, Lomeli Chavez, Derryl Hollier and Luis Lopez each pleaded guilty to conspiracy to commit wire fraud. After they returned from their deployment in Iraq, the defendants accessed a computer system to input over $340,000 in unauthorized pay to themselves.

Additional information regarding procurement fraud in the Iraq reconstruction process provided in the procurement fraud briefing paper.

Author (CRM): Raymond Hulser
Phone: 616-0387; Cell phone:
JMD Owner: Nik Apostolides
Phone: 616-3761

U.S. Department of Justice

Office of the Deputy Attorney General

Washington, D.C. 20530

March 6, 2007

The Honorable Charles E. Schumer
Chairman, Subcommittee on Administrative
Oversight and the Courts
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

Given the testimony that you heard this morning, I thought it was important for you to hear from me personally. I currently serve as chief of staff to the Deputy Attorney General, but I first joined the Department in 1999 as a career prosecutor in the Northern District of Illinois. In April 2002, I transferred to the U.S. Attorney's Office in the Eastern District of Virginia, where I served as a cybercrime prosecutor, appellate supervisor and, ultimately, counsel to the U.S. Attorney. Before joining the Department, I served as a law clerk to a federal circuit court judge and spent several years in private practice in Kansas City, Missouri.

I have had only three or four phone conversations with former U.S. Attorney Bud Cummins. All of them occurred after he left office, and all of them were cordial and professional. As far as I can recall, I did not have any conversations with him on any subject while he was employed by the Department. I heard his testimony this morning and have reviewed the e-mail he sent to several other U.S. Attorneys, and all I can tell you is that I am shocked and baffled. I do not understand how anything that I said to him in our last conversation in mid-February could be construed as a threat of any kind, and I certainly had no intention of leaving him with that impression. At no time did I try to suggest to him what he or any other former U.S. Attorney should or should not say about their resignations.

It is important and fair to note that Mr. Cummins stated today that he did not view any of my comments as an attempt to discourage him from testifying. In fact, on two prior occasions, Mr. Cummins had called me and asked me whether he should testify voluntarily in response to invitations he had received from Members of Congress. I told him that the Department had no position on whether he should testify, and that he should testify if he wanted to testify or decline to testify if he did not want to testify. I told him the same thing the second time he asked. I respect the role of Congress in our constitutional system, and I have never suggested to anyone that it would be appropriate to withhold information or testimony from Congress.

I regret that Mr. Cummins read into our last conversation anything that could be construed as a threat of any kind. I had no intention of communicating anything to him about what he or the other former U.S. Attorneys should say or not say about their resignations.

Very truly yours,

Michael J. Elston
Chief of Staff
Office of the Deputy Attorney General

cc: The Honorable Jeff Sessions

From: H.E. Cummins [mailto:bc_pers@yahoo.com]
Sent: Tue 2/20/2007 5:06 PM
To: Dan Bogden; Paul K. Charlton; David Iglesias; Carol Lam; McKay, John (Law Adjunct)
Subject: on another note

Mike Elston from the DAG's office called me today. The call was amiable enough, but clearly spurred by the Sunday Post article. The essence of his message was that they feel like they are taking unnecessary flak to avoid trashing each of us specifically or further, but if they feel like any of us intend to continue to offer quotes to the press, or organize behind the scenes congressional pressure, then they would feel forced to somehow pull their gloves off and offer public criticisms to defend their actions more fully. I can't offer any specific quotes, but that was clearly the message. I was tempted to challenge him and say something movie-like such as "are you threatening ME???", but instead I kind of shrugged it off and said I didn't sense that anyone was intending to perpetuate this. He mentioned my quote on Sunday and I didn't apologize for it, told him it was true and that everyone involved should agree with the truth of my statement, and pointed out to him that I stopped short of calling them liars and merely said that IF they were doing as alleged they should retract. I also made it a point to tell him that all of us have turned down multiple invitations to testify. He reacted quite a bit to the idea of anyone voluntarily testifying and it seemed clear that they would see that as a major escalation of the conflict meriting some kind of unspecified form of retaliation.

I don't personally see this as any big deal and it sounded like the threat of retaliation amounts to a threat that they would make their recent behind doors senate presentation public. I didn't tell him that I had heard about the details in that presentation and found it to be a pretty weak threat since everyone that heard it apparently thought it was weak

I don't want to stir you up conflict or overstate the threatening undercurrent in the call, but the message was clearly there and you should be aware before you speak to the press again if you choose to do that. I don't feel like I am betraying him by reporting this to you because I think that is probably what he wanted me to do. Of course, I would appreciate maximum opsec regarding this email and ask that you not forward it or let others read it.

Bud

McNULTY STATEMENT
SENATE HEARING

Department of Justice

STATEMENT

OF

PAUL J. MCNULTY
DEPUTY ATTORNEY GENERAL
UNITED STATES DEPARTMENT OF JUSTICE

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

CONCERNING

"PRESERVING PROSECUTORIAL INDEPENDENCE:
IS THE DEPARTMENT OF JUSTICE
POLITICIZING THE HIRING AND FIRING
OF U.S. ATTORNEYS?"

PRESENTED ON

FEBRUARY 6, 2007

Testimony
of

Paul J. McNulty
Deputy Attorney General
U.S. Department of Justice

Committee on the Judiciary
United States Senate

"Is the Department of Justice Politicizing the Hiring and Firing of U.S. Attorneys?"

February 6, 2007

Chairman Leahy, Senator Specter, and Members of the Committee, thank you for the invitation to discuss the importance of the Justice Department's United States Attorneys. As a former United States Attorney, I particularly appreciate this opportunity to address the critical role U.S. Attorneys play in enforcing our Nation's laws and carrying out the priorities of the Department of Justice.

I have often said that being a United States Attorney is one of the greatest jobs you can ever have. It is a privilege and a challenge—one that carries a great responsibility. As former Attorney General Griffin Bell said, U.S. Attorneys are "the front-line troops charged with carrying out the Executive's constitutional mandate to execute faithfully the laws in every federal judicial district." As the chief federal law-enforcement officers in their districts, U.S. Attorneys represent the Attorney General before Americans who may not otherwise have contact with the Department of Justice. They lead our efforts to protect America from terrorist attacks and fight violent crime, combat illegal drug trafficking, ensure the integrity of government and the marketplace, enforce our immigration laws, and prosecute crimes that endanger children and families—including child pornography, obscenity, and human trafficking.

U.S. Attorneys are not only prosecutors; they are government officials charged with managing and implementing the policies and priorities of the Executive Branch. United States Attorneys serve at the pleasure of the President. Like any other high-ranking officials in the Executive Branch, they may be removed for any reason or no reason. The Department of Justice—including the office of United States Attorney—was created precisely so that the government's legal business could be effectively managed and carried out through a coherent program under the supervision of the Attorney General. And unlike judges, who are supposed to act independently of those who nominate them, U.S. Attorneys are accountable to the Attorney General, and through him, to the President—the head of the Executive Branch. For these reasons, the Department is committed to having the best person possible discharging the responsibilities of that office at all times and in every district.

The Attorney General and I are responsible for evaluating the performance of the United States Attorneys and ensuring that they are leading their offices effectively. It should come as no surprise to anyone that, in an organization as large as the Justice Department, U.S. Attorneys are removed or asked or encouraged to resign from time to time. However, in this Administration U.S. Attorneys are never—repeat, never—removed, or asked or encouraged to resign, in an effort to retaliate against them, or interfere with, or inappropriately influence a particular investigation, criminal prosecution, or civil case. Any suggestion to the contrary is unfounded, and it irresponsibly undermines the reputation for impartiality the Department has earned over many years and on which it depends.

Turnover in the position of U.S. Attorney is not uncommon. When a presidential election results in a change of administration, every U.S. Attorney leaves and the new President nominates a successor for

confirmation by the Senate. Moreover, U.S. Attorneys do not necessarily stay in place even during an administration. For example, approximately half of the U.S. Attorneys appointed at the beginning of the Bush Administration had left office by the end of 2006. Given this reality, career investigators and prosecutors exercise direct responsibility for nearly all investigations and cases handled by a U.S. Attorney's Office. While a new U.S. Attorney may articulate new priorities or emphasize different types of cases, the effect of a U.S. Attorney's departure on an existing investigation is, in fact, minimal, and that is as it should be. The career civil servants who prosecute federal criminal cases are dedicated professionals, and an effective U.S. Attorney relies on the professional judgment of those prosecutors.

The leadership of an office is more than the direction of individual cases. It involves managing limited resources, maintaining high morale in the office, and building relationships with federal, state and local law enforcement partners. When a U.S. Attorney submits his or her resignation, the Department must first determine who will serve temporarily as interim U.S. Attorney. The Department has an obligation to ensure that someone is able to carry out the important function of leading a U.S. Attorney's Office during the period when there is not a presidentially-appointed, Senate-confirmed United States Attorney. Often, the Department looks to the First Assistant U.S. Attorney or another senior manager in the office to serve as U.S. Attorney on an interim basis. When neither the First Assistant nor another senior manager in the office is able or willing to serve as interim U.S. Attorney, or when the appointment of either would not be appropriate in the circumstances, the Department has looked to other, qualified Department employees.

At no time, however, has the Administration sought to avoid the Senate confirmation process by appointing an interim U.S. Attorney and then refusing to move forward, in consultation with home-State Senators, on the selection, nomination, confirmation and appointment of a new U.S. Attorney. The appointment

of U.S. Attorneys by and with the advice and consent of the Senate is unquestionably the appointment method preferred by both the Senate and the Administration.

In every single case where a vacancy occurs, the Bush Administration is committed to having a United States Attorney who is confirmed by the Senate. And the Administration's actions bear this out. Every time a vacancy has arisen, the President has either made a nomination, or the Administration is working—in consultation with home-state Senators—to select candidates for nomination. Let me be perfectly clear—at no time has the Administration sought to avoid the Senate confirmation process by appointing an interim United States Attorney and then refusing to move forward, in consultation with home-State Senators, on the selection, nomination and confirmation of a new United States Attorney. Not once.

Since January 20, 2001, 125 new U.S. Attorneys have been nominated by the President and confirmed by the Senate. On March 9, 2006, the Congress amended the Attorney General's authority to appoint interim U.S. Attorneys, and 13 vacancies have occurred since that date. This amendment has not changed our commitment to nominating candidates for Senate confirmation. In fact, the Administration has nominated a total of 15 individuals for Senate consideration since the appointment authority was amended, with 12 of those nominees having been confirmed to date. Of the 13 vacancies that have occurred since the time that the law was amended, the Administration has nominated candidates to fill five of these positions, has interviewed candidates for nomination for seven more positions, and is waiting to receive names to set up interviews for the final position—all in consultation with home-state Senators.

However, while that nomination process continues, the Department must have a leader in place to carry out the important work of these offices. To ensure an effective and smooth transition during U.S. Attorney

vacancies, the office of the U.S. Attorney must be filled on an interim basis. To do so, the Department relies on the Vacancy Reform Act ("VRA"), 5 U.S.C. § 3345(a)(1), when the First Assistant is selected to lead the office, or the Attorney General's appointment authority in 28 U.S.C. § 546 when another Department employee is chosen. Under the VRA, the First Assistant may serve in an acting capacity for only 210 days, unless a nomination is made during that period. Under an Attorney General appointment, the interim U.S. Attorney serves until a nominee is confirmed the Senate. There is no other statutory authority for filling such a vacancy, and thus the use of the Attorney General's appointment authority, as amended last year, signals nothing other than a decision to have an interim U.S. Attorney who is not the First Assistant. It does not indicate an intention to avoid the confirmation process, as some have suggested.

No change in these statutory appointment authorities is necessary, and thus the Department of Justice strongly opposes S. 214, which would radically change the way in which U.S. Attorney vacancies are temporarily filled. S. 214 would deprive the Attorney General of the authority to appoint his chief law enforcement officials in the field when a vacancy occurs, assigning it instead to another branch of government.

As you know, before last year's amendment of 28 U.S.C. § 546, the Attorney General could appoint an interim U.S. Attorney for the first 120 days after a vacancy arose; thereafter, the district court was authorized to appoint an interim U.S. Attorney. In cases where a Senate-confirmed U.S. Attorney could not be appointed within 120 days, the limitation on the Attorney General's appointment authority resulted in recurring problems. Some district courts recognized the conflicts inherent in the appointment of an interim U.S. Attorney who would then have matters before the court—not to mention the oddity of one branch of government appointing officers of another—and simply refused to exercise the appointment authority. In those cases, the Attorney General was consequently required to make multiple successive 120-day interim appointments. Other district

courts ignored the inherent conflicts and sought to appoint as interim U.S. Attorneys wholly unacceptable candidates who lacked the required clearances or appropriate qualifications.

In most cases, of course, the district court simply appointed the Attorney General's choice as interim U.S. Attorney, revealing the fact that most judges recognized the importance of appointing an interim U.S. Attorney who enjoys the confidence of the Attorney General. In other words, the most important factor in the selection of past court-appointed interim U.S. Attorneys was the Attorney General's recommendation. By foreclosing the possibility of judicial appointment of interim U.S. Attorneys unacceptable to the Administration, last year's amendment to Section 546 appropriately eliminated a procedure that created unnecessary problems without any apparent benefit.

S. 214 would not merely reverse the 2006 amendment; it would exacerbate the problems experienced under the prior version of the statute by making judicial appointment the only means of temporarily filling a vacancy—a step inconsistent with sound separation-of-powers principles. We are aware of no other agency where federal judges—members of a separate branch of government—appoint the interim staff of an agency. Such a judicial appointee would have authority for litigating the entire federal criminal and civil docket before the very district court to whom he or she was beholden for the appointment. This arrangement, at a minimum, gives rise to an appearance of potential conflict that undermines the performance or perceived performance of both the Executive and Judicial Branches. A judge may be inclined to select a U.S. Attorney who shares the judge's ideological or prosecutorial philosophy. Or a judge may select a prosecutor apt to settle cases and enter plea bargains, so as to preserve judicial resources. *See* Wiener, Inter-Branch Appointments After the Independent Counsel: Court Appointment of United States Attorneys, 86 Minn. L. Rev. 363, 428 (2001) (concluding that court appointment of interim U.S. Attorneys is unconstitutional).

Prosecutorial authority should be exercised by the Executive Branch in a unified manner, consistent with the application of criminal enforcement policy under the Attorney General. S. 214 would undermine the effort to achieve a unified and consistent approach to prosecutions and federal law enforcement. Court-appointed U.S. Attorneys would be at least as accountable to the chief judge of the district court as to the Attorney General, which could, in some circumstances become untenable. In no context is accountability more important to our society than on the front lines of law enforcement and the exercise of prosecutorial discretion, and the Department contends that the chief prosecutor should be accountable to the Attorney General, the President, and ultimately the people.

Finally, S. 214 seems to be aimed at solving a problem that does not exist. As noted, when a vacancy in the office of U.S. Attorney occurs, the Department typically looks first to the First Assistant or another senior manager in the office to serve as an Acting or interim U.S. Attorney. Where neither the First Assistant nor another senior manager is able or willing to serve as an Acting or interim U.S. Attorney, or where their service would not be appropriate under the circumstances, the Administration has looked to other Department employees to serve temporarily. No matter which way a U.S. Attorney is temporarily appointed, the Administration has consistently sought, and will continue to seek, to fill the vacancy—in consultation with home-State Senators—with a presidentially-nominated and Senate-confirmed nominee.

Thank you again for the opportunity to testify, and I look forward to answering the Committee's questions.

OTHER WITNESS
STATEMENTS
SENATE HEARINGS

PREPARED STAEMENT OF THE HON. STUART M. GERSON
REGARDING PRESERVING PROSECUTORIAL INDEPENDENCE

UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY

February 6, 2007

Mr. Chairman and distinguished members of the Senate Judiciary Committee. It is an honor for a former Justice Department senior official, one who began his legal career as a line Assistant United States Attorney, to be invited back to testify before this Committee on the subject of prosecutorial independence and whether the Department of Justice is unduly politicizing the hiring and firing of U.S. Attorneys.

This is not a new subject, either to this Committee or to me. Indeed, I understand that I have been invited to testify in significant measure because I have substantial direct experience dealing with the issue of the tenure of United States Attorneys in several different capacities during several different administrations.

Accordingly, I shall address the issue from a historical and constitutional perspective but from a practical standpoint as well. This duality of approach suggests several conclusions:

1. Separation of powers concerns inform both the President's appointments authority and the Congress's oversight role with respect to the selection and retention of constitutional officers and "inferior" officers such as United States Attorneys. To the extent that "independence" is a virtue, and that is a term the vitality of which depends upon its definition, it derives from the President's Article II responsibility to "take care" that the law "be faithfully executed." Clearly both common sense and experience,

especially recent history, involving the conduct of so-called Independent Counsels responsible to courts, punctuates the need for separating prosecutorial authority from judicial authority, even as to the issue at hand: filling vacancies caused by the resignation or dismissal of U.S. Attorneys. With respect to said vacancies, one must note that, pursuant to Article II, Congress has the power to assign at least some appointment responsibility to the judiciary, and has done so in the past. My argument, therefore, is addressed to congressional discretion, not its authority. The exercise of that discretion should be tempered by separation of powers concerns.

2. The selection and retention process for United States Attorneys is, and always has been, a "political" matter both because these activities are properly partisan and because their conduct is best confined to the elected, political branches of government.

3. S. 214, while understandably motivated and representative of a situation that might otherwise effectively be addressed, at least through congressional oversight, is misguided because the vacancy problems that it seeks to solve are neither unprecedented nor pervasive, and because the remedy offered, *i.e.*, an exclusive judicial role in dealing with vacant United States Attorneys' positions, contradicts an appropriate executive function, is anomalous and unwelcome to the judiciary and, most importantly, will have the unintended effect of hampering the Senate's proper oversight role of executive functions.

4. The "independence" that should be sought from United States Attorneys is independence of judgment in areas properly consigned to their areas of delegated authority. While that means that a United States Attorney must be free to prosecute wrongdoing, even on the part of the administration that has selected him or her, it does not mean that a United States Attorney must be politically independent of the President and Attorney General in regard to their legal agendas and in rendering appropriate legal advice. There are several checks that insure judgmental independence including congressional oversight and the presence of a capable and distinguished corps of career prosecutors in the various United States Attorneys' offices. In my direct experience, running from the Watergate prosecutions during the Nixon Administration in the 1970's to several matters of note during the Clinton Administration in the 1990's, if there has been any presidential abuse of the prosecutorial function, and that is questionable, it has had nothing to do with vacancies in U.S. Attorneys' offices and any problems were quickly and effectively addressed.

The Law Governing the Appointment of U.S. Attorneys and the Separation of Power Issues That Are Implicated in the Process

Under the Appointments Clause, Art. II, sec. 2, cl. 2, the President is vested with the responsibility of appointing all officers of the United States, subject to Senate confirmation. Art. II, sec. 3 describes the President's fundamental responsibility to "take care" that the laws of the nation "be faithfully executed."

In support of that function, Section 35 of Judiciary Act of 1789 provided for the appointment of an Attorney General who, among other things shall "give his advice and

opinion upon questions of law when required by the President of the United States" or by the heads of the executive branch departments of the government. The same section also provided for the appointment of United States Attorneys:

> And there shall be appointed in each district a meet person learned in the law to act as attorney for the United States in such district, who shall be sworn or affirmed to the faithful execution of his office, whose duty it shall be to prosecute in such district all delinquents for crimes and offences, cognizable under the authority of the United States, and all civil actions in which the United States shall be concerned . . . .

Through 28 U.S.C. §§ 516 and 519, Congress has given the Attorney General supervisory authority over United States Attorneys, commanding that litigation on behalf of the United States be conducted "under the direction of the Attorney General." *See United States v. Hilario*, 218 F. 3d 19, 25 (1st Cir. 2000). Because United States Attorneys are supervised in significant part (though not completely) by the Attorney General, the case law suggests that they are "inferior" officers whose appointment constitutionally could be assigned by the Congress to a department head like the Attorney General or to a court. *Id.; see Edmond v. United States*, 520 U.S. 651, 659-60 (1997); *compare Morrison v. Olson*, 487 U.S. 654 (1988).

We are not concerned today with the nomination and confirmation of regular United States Attorneys but with the question of how interim United States Attorneys shall be selected (and how long they may serve) when the regular occupant of the office resigns or is terminated. From 1986 until approximately a year ago, the procedures for the appointment of interim U.S. Attorneys were set forth in a version of 28 U.S.C. § 546, which provided:

> (c) A person appointed as United States attorney under this section may serve under section 541 of this title; or

(1) the qualification of a United States attorney for such district appointed by the President under section 541 of this title; or

(2) the expiration of 120 days after appointment by the Attorney General under this section.

(d) If an appointment expires under subsection (c)(2), the district court for such district may appoint a United States attorney to serve until the vacancy is filled. . . .

On March 9, 2006, the Patriot Act Reauthorization Bill was signed into law by the President, and this law amended Section 546 of Title 28 by striking subsections (c) and (d), *supra*, and adding a new subsection (c), which provides that a person appointed as an interim U.S. Attorney "may serve until the qualification of a United States Attorney for such District appointed by the President under section 541 of this title." The Patriot Act Reauthorization thus struck the 120 day limit on the service of presidentially-appointed interim U.S. Attorneys and eliminated the courts from the process. Critics opined that this procedure effectively could extend the terms of interim U.S. Attorneys to the end of the term of the President that appoints them and circumvent the Senate's confirmation process..

However, the number of interim U.S. Attorneys appointed by the current administration is not uncharacteristically high and, except where such persons were not able to serve, virtually all of them had been First Assistant United States Attorneys or similar senior supervisory officials in their offices. In other words, they would appear to be qualified to serve in the office, are generally have career status, and are typical of the persons who have been selected as interim U.S. Attorneys in past administrations. And to

the point of the confirmation process, it is my understanding that the current administration has pledged timely to nominate regular replacements where there have been vacancies and to assure that they are promptly subjected to the confirmation process.

Nevertheless, this Committee is considering S. 214, which would amend § 546 of Title 28, this time to eliminate the President from the vacancy filling process by repealing the section (c) that was included in the U.S. Patriot Act Reauthorization law and assigning exclusively to "The United States district court for a district in which the office of the United States attorney is vacant [the authority to] appoint a United States attorney to serve until that vacancy is filled."

One notes with irony that a criticism of the 2006 version of § 546 was that, by Executive Branch fiat, the confirmation process could be thwarted, and that a criticism of the S. 214 version of § 546 is that, by Legislative Branch fiat, the confirmation process could be thwarted. Rather that engage in that kind of hypothesizing, I respectfully suggest that the Committee focus on the fact that, in the American experience it is a constitutional anomaly to include prosecution as part of the judicial power. *See* Prakash, S. B., "The Chief Prosecutor," 73 Geo. Wash. L. Rev. 521 (2005). Where we have transgressed that principle, particularly in the case of court-empowered "independent" counsel, fair minded people of both parties have regretted it. Where other countries, particularly the Soviet bloc states, refused to separate the executive and judicial powers the result was disastrous.

In sum, though U.S. Attorneys are "inferior" officers, an interpretation that is embodied in all iterations of § 546, including the proposal of S. 214, and though an

earlier version of § 546 had an alternative judicial appointment provision, it would be a mistake from a separation of powers standpoint to cut the Executive Branch out of the appointment process for interim United States Attorneys and, unless a compelling need for it were shown, it would seem unnecessary to restore the judiciary to the program, especially in view of evidence that the judiciary is not desirous of the role and has not used it efficaciously on all occasions in the past. I do believe, however, that, if the retention of § 546 as it currently is formulated is unsatisfactory to a majority of the Committee, that the restoration of the previous version is superior to S. 214.

The Appointment of United States Attorneys is Properly a Political Function

When I was acting Attorney General in the first months of the Clinton Administration, a number of my conservative Republican erstwhile colleagues questioned how, on one hand, I could strongly recommend to the Democratic President in whose accidental service I found myself that he continue various Bush administration policies and initiatives implicating the Executive's war powers and foreign affairs powers, but on the other hand proceeded with a certain alacrity to assure that all Republican U.S. Attorney holdovers had to resign or be involuntarily replaced. The answer was a simple one: both hands were working to allow what Madison called an "energetic executive" to exercise his constitutional powers.

While many of the U.S. Attorneys that President Clinton was prepared to appoint, having begun to consult with the Senators from various states, hardly would represent my choices, he had the right, indeed the duty, to set up a legal mechanism to get the legal advice that he would need and position people to carry out his prosecutorial and litigation priorities throughout the country. And it was my obligation to set up a Justice Department

that my confirmed successor might step into and direct, assured that the administration's legal affairs were in the hands of capable attorneys of its choice.

While my personal situation was historically unique, there was nothing at all novel about United States Attorneys being replaced for political reasons. The Reagan administration, for example, acted in its own interests much the same as the Clinton administration had in its when it sought the prompt removal of all U.S. Attorneys from the previous administration, notwithstanding the fact that most of the persons whose nominations were to be submitted had not been selected and many interim persons would be required. One indeed would expect that the next administration will do the same thing and will have every right to act politically as to a task that is properly political – calling for the execution of policy choices accepted by the majority who voted for the new President.

Independence of Legal Judgment Does not Require the Elimination of Politics, but Independence is Sometimes not in the Interest of Justice

When in the early 1970's I was an Assistant United States Attorney in the District of Columbia, I litigated the first case involving the Watergate affair, thwarting an effort by a county district attorney to invade an area of federal prosecutorial prerogatives. Our office undertook a vigorous investigation that led to successful prosecutions and would have led to more, but for the appointment of a special prosecutor who supplanted the line prosecutors. In any event, one had good reason to believe that President Nixon was not at all happy with the energetic conduct of a United States Attorney that he appointed. A little earlier in my public career I prosecuted a sitting United States Senator whose case engendered vigorous comment and attempts to influence the course of litigation by certain of his colleagues. In these and other cases, and in many others in which my co-

workers prosecuted, we enjoyed steadfast support from both our politically-appointed United States Attorney and from the senior career staff in the office and at Main Justice, people like the legendary Henry Peterson, who taught us that our job was to do justice, to prosecute the cases in which we found merit and to decline the cases that we believed should not be brought – and to do both irrespective of outside pressure. That ethic was and is pervasive throughout the Department and the traditionally great United States Attorneys' offices such as the District of Columbia, the Southern District of New York and most others.

But I say with respect that maintaining that ethic, as important as it is, is not contradicted by a President and an Attorney General making political decisions, often in consort with members of the Senate, as to the appointment of U.S. Attorneys and their evaluations and (infrequent) terminations as well. In fact, one might argue that there are areas where the Department does not exercise strong enough control upon United States Attorneys. I offer several examples of matters in which I have been involved to make this point.

By statute, regulation and custom, the oversight and authority exercised by the Civil Division of the Justice Department over United States Attorneys is considerably greater than that generally exercised in the criminal area. During the Savings & Loan debacle of the late '80's and early '90's, the Civil Division, which I headed at the time, with substantial input from our oversight committees on the Hill, was able to undertake a fairly extensive and successful litigation program in consort with Federal thrift regulatory authorities and the civil divisions of various U.S. Attorneys' offices. Until we set up task forces and working groups that sent lawyers and agents from Washington and elsewhere

into to certain key districts, we were less successful on the criminal side, largely because some United States Attorneys did not think that pursuit of this kind of case should be a priority.

Several years later, an investigation produced substantial evidence that Salomon Brothers had misconducted itself in connection with the U.S. Treasury long bond market and that the impropriety was sponsored at the highest levels of the company. A United States Attorney and his senior staff were highly desirous of undertaking a massive prosecution under the securities laws a course of action that was not without legal merit but which also would have ended up depriving the company of most of its assets and employees and ultimately closing it down. That course had an analog in the earlier case of Drexel, Burnham. The Secretary of the Treasury, however, strongly believed that while the management of Salomon brothers had to be removed, sanctioned and replaced, an early settlement that would allow a restructured company to participate in the bond market, offering needed competition and financial stability, was greatly in the public interest. Ultimately this view prevailed, although the United States Attorney believed that his independence had been compromised.

During my service in the Clinton administration, I was presented with what I concluded was persuasive evidence that a United States Attorney and his staff had at least condoned racial discrimination in the selection of a jury about to sit in the trial of a nationally-known minority politician. While the prosecution was clearly in the public interest, discriminatory jury selection was not. I ordered the U.S. Attorney to confess error and, believing that I was interfering with his independence, he resigned. I

immediately appointed a lawyer to serve as Interim U.S. Attorney whom I knew would carry out what I thought to be the policy that justice commanded and he did so.

In all three of these cases, the "independence" of United States Attorneys was severely limited; in all three, I suggest, justice was done.

S. 214 Could Have Unintended and Unacceptable Consequences

The last of my examples is particularly instructive. The pursuit of what I thought was a just prosecutorial decision ended up causing a vacancy in a U.S. Attorney's office. An interim prosecutor was required immediately not only because the trial was imminent but because the underlying matter was controversial, and because the President's party didn't control the Senate, a body which then might not have confirmed a permanent nominee, assuming that the President even had one in mind at that point.. The court in the district in question was extremely hostile to what I was doing. Like the U.S. Attorney who resigned, the chief judge of the court in question saw my action as an unnecessary intrusion from Washington and never would have appointed a suitable interim prosecutor. And even if an unacceptable judicially-appointed prosecutor could be fired, and the Office of Legal Counsel Opinion on the subject generated during the Carter administration and still in force says that he could, that would have been utterly impracticable given the speed of events. In short, a judicial appointment, like that envisioned in S. 214, would have been counterproductive.

The judiciary in various districts has on a number of occasions in the past refused to appoint interim United States Attorneys under the pre-2006 law, and in other cases has appointed unqualified or unsuitable persons. Perhaps this reticence or ineffectiveness

suggests discomfort in the judiciary with respect to undertaking an executive function. It should suggest something else.

This Committee, in particular, but the Senate and the House of Representatives more generally, frequently are interested in what Main Justice and the United States Attorneys are doing in a number of areas of interest including health care fraud, public corruption and the exploitation of children, to name a few. Direct congressional oversight of the Justice Department and U.S. Attorneys offices presents certain difficulties and disputes, but is usually manageable. I respectfully suggest that it is far less likely that effective oversight of a judicially-appointed interim U.S. Attorney, or the court that appointed him or her, could be achieved. I think the Committee and the public would be better served by retaining in the Executive, an inherently Executive Branch prerogative, *i.e.*, the appointment of interim chief prosecutors.

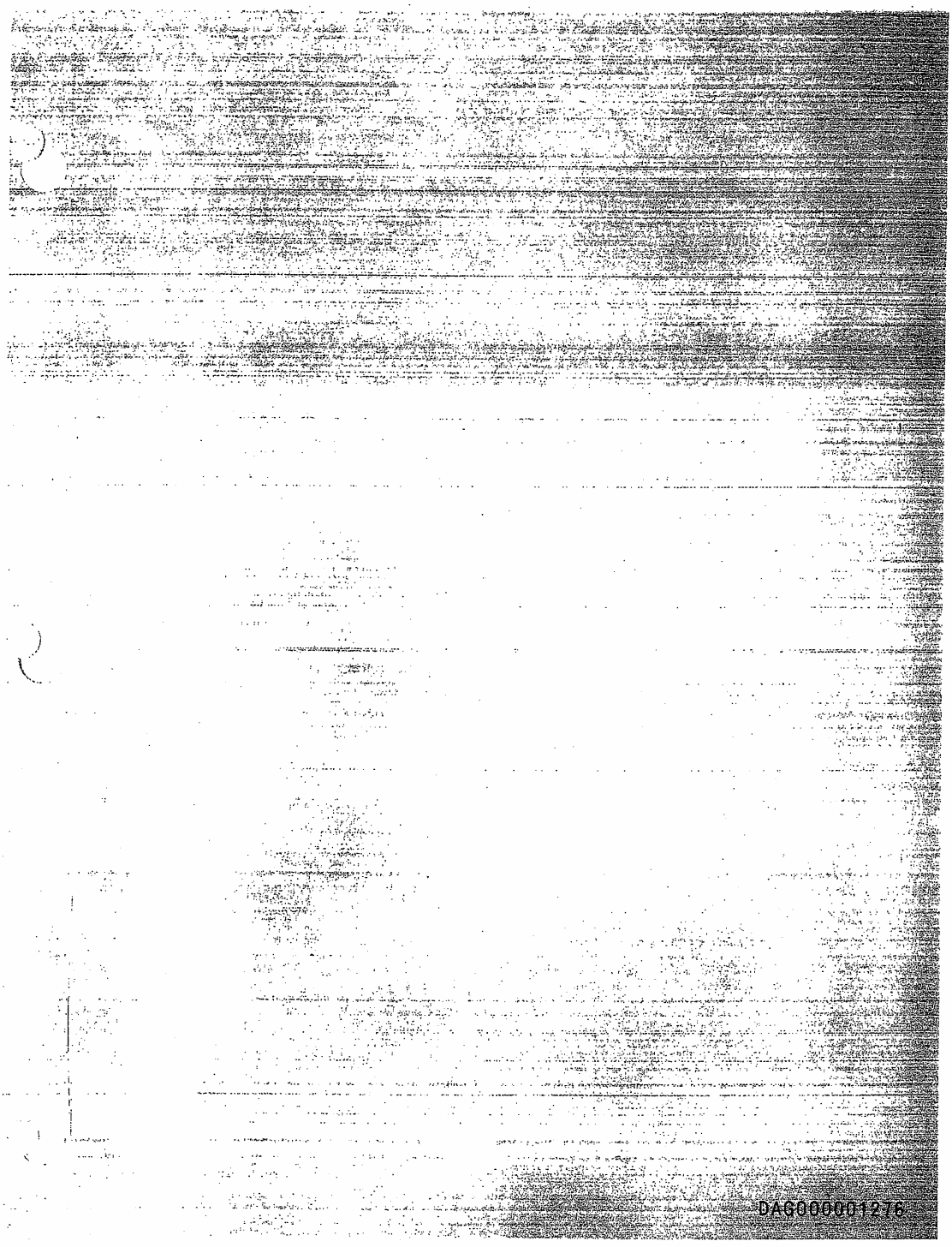
Conclusion

As a reader of or listener to this testimony easily can gather, I do not see a problem with respect to the conduct of the Department of Justice, either in this administration or previously, that necessitates legislation to alter the current method of selection of interim United States Attorneys, or to change the way in which any administration selects, evaluates or replaces its officials. Many problems can be avoided or solved by rigorous adherence to the confirmation process both in terms of the President's promptly submitting U.S. Attorney nominations when vacancies are created, and this Committee's promptly conducting hearings.

Nor do I think that there is a federal prosecutorial system improperly influenced by political decision making. However, without reference to party, effectively separated

constitutional powers allow and require meaningful congressional oversight. Both the majority and minority members of this Committee are fully capable of conducting such inquiries of the Justice Department and need no new legislative tools to do so.

Mr. Chairman, I thank you and the Committee for listening to my comments and I am happy to answer whatever questions you have to the best of my ability.



Statement of Mary Jo White

Senate Committee on the Judiciary
Hearing: "Preserving Prosecutorial Independence:
Is the Department of Justice Politicizing the Hiring and Firing of U.S. Attorneys?"
February 6, 2007

My name is Mary Jo White. I am providing this written statement and testifying at this hearing at the invitation of Senator Patrick Leahy, the Chairman of the United States Senate Committee on the Judiciary.

By way of background, I spent over fifteen years in the Department of Justice (the "Department"), both as an Assistant United States Attorney and as United States Attorney. I served during the tenures of seven Attorneys General: Griffin B. Bell, Benjamin R. Civiletti, William French Smith, Richard L. Thornburgh, William P. Barr, Janet Reno and John Ashcroft. I was twice appointed as an Interim United States Attorney, first in the Eastern District of New York in 1992 by Attorney General Barr and then in 1993 by Attorney General Reno in the Southern District of New York. Most recently, I served for nearly nine years as the Presidentially-appointed United States Attorney in the Southern District of New York from September 1993 until January 2002. I was the Chair of the Attorney General's Advisory Committee from 1993-1994. Since April 2002, I have served as the Chair of the Litigation Group of Debevoise & Plimpton LLP, the law firm at which I started my legal career.

Maintaining the prosecutorial independence of the United States Attorneys, which is the subject of this hearing, is vital to ensuring the fair and impartial administration of

justice in our federal system. Concerns have recently been raised as to whether that independence is being compromised by the reported installation by the Department of Justice of Interim United States Attorneys in replacement of a number of sitting Presidentially-appointed United States Attorneys who have allegedly been asked to resign in the absence of misconduct or other compelling cause. It has been variously suggested that at least some of these resignations have been sought from qualified United States Attorneys in favor of appointees who may be more politically and behaviorally aligned with the Department's priorities; to replace a United States Attorney because of public corruption or other kinds of sensitive cases and investigations brought or in process; as a result of a Congressman's criticism; or just to give another person the opportunity to serve and have the high-profile platform of serving as a United States Attorney. These allegations, in my view, raise legitimate concerns for this Committee about the fair and impartial administration of justice, both in fact and in appearance. If the allegations were true, the actions being taken by the Department would appear to pose a threat to the independence of the United States Attorneys and to diminish the importance of the jobs they are entrusted to do. There would be, at a minimum, a significant appearance issue.

A related concern has been raised about a recent change in the statutory framework for the appointment of Interim United States Attorneys embodied in the re-authorized USA Patriot Act.[1] Under the new provision, the Attorney General is accorded unilateral power to make appointments of Interim United States Attorneys for an indefinite period of time, without the necessity of obtaining the advice and consent of the

United States Senate, which is required for every Presidentially-nominated United States Attorney. Previously, the law empowered the Attorney General to appoint Interim United States Attorneys for a period up to 120 days; thereafter, if no successor was nominated by the President and confirmed by the Senate, the chief judge of the relevant district court was accorded the power of appointment until a Presidentially-appointed successor was confirmed by the Senate.

For whatever assistance it may be to the Committee, I will provide my personal perspective on these issues. Before doing so, let me make very clear up front that I have the greatest respect for the Department of Justice as an institution and have no personal knowledge of the facts and circumstances regarding any of the reported requests for resignations of sitting United States Attorneys. And, with one exception, I do not know any of the United States Attorneys in question or their reported replacements. The one exception is the United States Attorney for the Southern District of California, a career prosecutor, whom I know and first came to know of when she was an Assistant United States Attorney doing very impressive work in the area of healthcare fraud. Because I do not know the precipitating facts and circumstances, I am not in a position to support or criticize the reported actions of the Department and do not do so by testifying at this hearing. I can and will speak only about my views about the importance of the United States Attorneys to our federal system of criminal and civil justice, the importance of preserving the independence of the United States Attorneys, and how I believe that casual

or unwisely motivated requests for their resignations could undermine our system of justice and diminish public confidence.

My views on the issues I understand to be before the Committee are as follows:

- United States Attorneys are political appointees who serve at the pleasure of the President. It is thus customary and expected that the United States Attorneys generally will be replaced when a new President of a different party is elected. There is also no question that Presidents have the power to replace any United States Attorney they have appointed for whatever reason they choose.

- In my experience and to my knowledge, however, it would be unprecedented for the Department of Justice or the President to ask for the resignations of United States Attorneys during an Administration, except in rare instances of misconduct or for other significant cause. This is, in my view, how it should be.

- United States Attorneys are, by statute and historical custom, the chief law enforcement officers in their districts, subject to the general supervision of the Attorney General.[2] Although political appointees, the United States Attorneys, once appointed, play a critical and non-political, impartial role in the administration of justice in our federal system. Their selection is of vital national and local interest.

- In his well-known address to the United States Attorneys in 1940, then Attorney General Robert H. Jackson, although acknowledging the need for some measure of centralized control and coordination by the Department, eloquently emphasized the importance of the role of the United States Attorneys and their independence:

> It would probably be within the range of that exaggeration permitted in Washington to say that assembled in this room is one of the most powerful peace-time forces known to our country. The prosecutor has more control over life, liberty, and reputation than any other person in America. His discretion is tremendous.
> . . . .
> These powers have been granted to our law-enforcement agencies because it seems necessary

> that such a power to prosecute be lodged somewhere. This authority has been granted by people who really wanted the right thing done—wanted crime eliminated—but also wanted the best in our American traditions preserved.
>
> . . . .
>
> Because of this immense power to strike at citizens, not with mere individual strength, but with all the force of government itself, the post of [United States Attorney] from the very beginning has been safeguarded by presidential appointment, requiring confirmation of the Senate of the United States. You are thus required to win an expression of confidence in your character by both the legislative and the executive branches of the government before assuming the responsibilities of a federal prosecutor.
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> . . . .
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> Your responsibility in your several districts for law enforcement and for its methods cannot be wholly surrendered to Washington, and ought not to be assumed by a centralized Department of Justice.
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> . . . .
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> Your positions are of such independence and importance that while you are being diligent, strict, and vigorous in law enforcement you can also afford to be just.
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> . . . .
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> The federal prosecutor has now been prohibited from engaging in political activities. I am convinced that a good-faith acceptance of the spirit and letter of that doctrine will relieve many [United States Attorneys] from the embarrassment of what have heretofore been regarded as legitimate expectations of political service. . . . I think the Hatch Act should be utilized by federal prosecutors as a protection against demands on their time and prestige. . . .[3]

- Justice Jackson's remarks capture well the importance of both the role of United States Attorneys and the independence that is necessary to successfully fulfill their role. The Department of Justice should guard

carefully against acting in ways that may be perceived to diminish the importance of the office of United States Attorney or of its independence.

- Changing a United States Attorney invariably causes disruption and loss of traction in cases and investigations in a United States Attorney's Office. This is especially so in sensitive or controversial cases and investigations where the leadership and independence of the United States Attorney are often crucial to the successful pursuit of such matters, especially in the face of criticism or political backlash. Replacing a United States Attorney can, of course, be necessary or part of the normal and expected process that accompanies a change of the political guard. But I do not believe that such changes should, as a matter of sound policy, be undertaken lightly or without significant cause. In this and most previous Administrations, the United States Attorneys appointed by the prior Administration were replaced in an orderly and respectful fashion over several months after the election to allow for a smooth transition. If wholesale change in the United States Attorneys is to occur, it should be done in this way. In my view, wholesale replacement of the United States Attorneys should not be done immediately following an election, as occurred at the outset of the Clinton Administration—such abrupt change is not necessary and can undermine the important work of the United States Attorneys' Offices. In some instances, the President of a different party has allowed some of his predecessor's appointees to remain, as happened in New York, with the support of Senator Daniel Patrick Moynihan, when Jimmy Carter was elected President.

- If United States Attorneys are replaced during an Administration without apparent good cause, the wrong message can be sent to other United States Attorneys. We want our United States Attorneys to be strong and independent in carrying out their jobs and the priorities of the Department. We want them to speak up on matters of policy, to be appropriately aggressive in investigating and prosecuting crimes of all kinds and wisely use their limited resources to address the priorities of their particular district. The United States Attorneys are generally closest to the problems and needs of their districts and thus use their discretion and judgment as to how best to apply national initiatives and priorities. One size seldom fits all. There isn't one right answer or rigid plan that can be applied to achieve optimal justice in each district. The federal system has historically counted on the independence and good judgment of the United States Attorneys to carry out the Department's mission, tailored to the specific circumstances of their districts.

- In my opinion, the United States Attorneys have historically served this country with great distinction. Once in office, they become impartial public servants doing their best to achieve justice without fear or favor. As Justice Sutherland said in *Berger v. United States*: "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice be done. As such, he is in a peculiar and very definite sense the servant of the law. . . ."[1] I am certain that the Department of Justice would not want to act in such a way or have its actions perceived in such a way to derogate from this model of the non-political pursuit of justice by those selected in an open and transparent manner.

- Finally, as to the issue of the optimal appointment mechanism for Interim United States Attorneys, I defer to Congress and the constitutional scholars to find the right answer. For what it is worth, as a practical matter, I believe that the Department of Justice, in the first instance, is ordinarily in the best position to select an appropriate Interim United States Attorney who will ensure the least disruption of the business of the United States Attorney's Office until a permanent successor can be selected and confirmed. I can, however, also appreciate the concern with permitting such appointments to be made for an indefinite period of time without the necessity of Senate confirmation. I personally thought the structure of allowing the Attorney General to appoint Interim United States Attorneys for a period of 120 days and then giving that power to the chief judge of the district generally worked well and achieved an appropriate balance.

Thank you for giving me the opportunity to share my perspective with the Committee. I would be happy to answer any questions.

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[1] USA Patriot Improvement and Reauthorization Act of 2005, Pub. L. 109-177, §502, 120 Stat. 192, 246-47 (2006); 28 U.S.C. § 546 (2006).

[2] 28 U.S.C. §§ 519 & 521-50 (2006); *Nadler v. Mann*, 951 F.2d 301, 305 (11th Cir. 1992); United States Attorneys Mission Statement ("Each United States Attorney exercises wide discretion in the use of his/her resources to further the priorities of the local jurisdiction and needs of their communities. United States Attorneys have been delegated full authority and control in the areas of personnel management, financial

management, and procurement."), http://www.usdoj.gov/usao/index.html (last visited Feb. 4, 2007); U.S. Attys' Manual § 3-2.100 ("the United States Attorney serves as the chief law enforcement officer in each judicial district. . . ."); U.S. Attys' Manual § 3-2.140 ("They are the principal federal law enforcement officers in their judicial districts."), http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title3/2musa.htm#3-2.100 (last visited Feb 4, 2007).

[3] Robert H. Jackson, *The Federal Prosecutor*, Address at the Second Annual Conference of United States Attorneys (Apr. 1, 1940), reprinted in 24 *J. Am. Judicature Soc'y* 18, 19 (1940); *also available at* http://www.roberthjackson.org/Man/theman2-7-6-1/ (last visited Feb. 4, 2007).

[4] 295 U.S. 78, 88 (1935).

Testimony of Professor Laurie L. Levenson
Senate Judiciary Committee Hearing
"Preserving Prosecutorial Independence: Is the Department of Justice Politicizing the Hiring and Firing of U.S. Attorneys?"

Feb. 6, 2007

Thank you for the opportunity to testify before your committee. I am currently Professor of Law, William M. Rains Fellow, and Director of the Center for Ethical Advocacy at Loyola Law School. I am the author of several books and dozens of articles, many of which address law enforcement and the criminal justice system. For eight years, from 1981 to 1989, I proudly served as an Assistant United States Attorney for the Central District of California in Los Angeles. As an Assistant U.S. Attorney, I worked as a trial attorney in the Major Crimes and Major Frauds Section, Chief of the Appellate Section and Chief of Training for the Criminal Division. I received the Attorney General's Director's Award for Superior Performance and commendations from the Federal Bureau of Investigation, United States Postal Inspectors, and other federal investigative agencies.

I was hired as an Assistant U.S. Attorney by Andrea S. Ordin, a Democrat appointed by President Jimmy Carter. When she left, I served for three Republican U.S. Attorneys during my tenure in the office. First, I worked for the Honorable Stephen S. Trott, who was appointed by President Ronald Reagan. Next, I worked for interim U.S. Attorney Alexander H. Williams, III , another Republican, who was appointed by the chief judge of our district. Finally, I worked for U.S. Attorney Robert C. Bonner, who was appointed by President George H.W. Bush. The transition from one U.S. Attorney to the next was seamless, and did not carry with it the controversy that has now developed about changes in U.S. Attorneys. I remain in regular contact with current and former federal prosecutors throughout the country. I hear their concerns and try to address them in my articles and books on the role and responsibilities of federal prosecutors.

As a former Assistant United States Attorney who served under both Democratic and Republican administrations, I am deeply concerned about the recent firings of qualified and demonstrably capable United States Attorneys and their replacement with individuals who lack the traditional qualifications for the position. The perception by many, including those who currently serve and have served in U.S. Attorneys Offices, is that there is a growing politicization of the work of federal prosecutors. Asking qualified U.S. Attorneys to leave and replacing them with political insiders is demoralizing; it denigrates the work of hardworking and dedicated Assistant U.S. Attorneys and undermines public confidence in the work of their offices.

Recently, seven United States Attorneys were fired by the Attorney General during the middle of a presidential term. Several of them have excellent reputations for being dedicated, experienced and successful U.S. Attorneys. Nonetheless, they were given no reason for their dismissals and, in at least one case, have been replaced by

someone who does not have the professional qualifications for the position, but comes from a deeply political, partisan background. Perhaps not so coincidentally, all of this is occurring on the heels of the Attorney General securing new statutory power to make indefinite interim appointments of U.S. Attorneys without review by the Senate or any other branch of government.

In my opinion, the new appointment procedures for interim U.S. Attorneys have added to the increasing politicization of federal law enforcement. Under the prior system, the Attorney General could appoint an interim U.S. Attorney for 120 days, giving the President a full four months to nominate and seek confirmation of a permanent replacement. If this was not done, the Chief Justice of the District would appoint an interim U.S. Attorney until a successor U.S. Attorney was nominated and confirmed. This system gave an incentive to the President to nominate a successor in a timely fashion and gave the Senate an opportunity to fulfill its constitutional responsibility of evaluating and deciding whether to confirm that candidate.

Under the present system, the Executive Branch can – and appears determined to – bypass the confirmation role of the Senate by making indefinite interim appointments. The result is a system where political favorites may be appointed without any opportunity for the Senate to evaluate those candidates' backgrounds and qualifications to serve as the chief federal law enforcement officer of their districts. Even if the Attorney General can explain the recent round of firings and replacements, the current statutory system opens the door to future abuses. The public should not have to rely on the good faith of individuals over sound statutory authority to ensure the accountability of key federal law enforcement officials.

In my testimony, I would like to address three key issues: First, the dangers of the politicization of the U.S. Attorneys Offices; second, why the recent actions of this administration are different from those of prior administrations, and third, why it is both constitutional and preferable to have the Chief Judges of the district, not the Attorney General, appoint interim U.S. Attorneys.

The recent perceived purging of qualified U.S. Attorneys is having a devastating impact on the morale of Assistant United States Attorneys. These individuals work hard to protect all of us by prosecuting a wide range of federal crimes. In recent years, AUSAs have struggled with many challenges, including a lack of resources. In Los Angeles (where I served as a federal prosecutor), there have been times recently when there was insufficient paper for the AUSAs to copy documents they were constitutionally required to turn over in discovery. Nonetheless, these professionals persevered at their jobs because of their commitment to pursuing justice on behalf of the people they serve. It is deeply demoralizing for them to now see capable leaders with proven track records of successful prosecutions summarily dismissed and replaced by those who lack the qualifications and professional backgrounds traditionally expected of United States Attorneys.

Moreover, the dismissal of competent U.S. Attorneys and their replacement with interim U.S. Attorneys unfamiliar with local law enforcement priorities and the operation of the offices poses risks to ongoing law enforcement initiatives. Many U.S. Attorneys Offices are engaged in joint task forces with state and local law enforcement agencies. Appointing an interim U.S. Attorney unfamiliar with the district gives the appearance that the ship has lost its rudder, undermines public confidence in federal law enforcement, creates cynicism about the role of politics in all prosecutorial decisions, and makes it more difficult to maintain such joint law enforcement operations.

Although this is not the first time in history that U.S. Attorneys have been asked to submit their resignations, the Attorney General's actions at this time are unlike anything that has occurred before. In my experience, one could expect a changeover in U.S. Attorneys when there was a change in Administrations. United States Attorneys serve at the pleasure of the President and a new President certainly has the right to make appointments to that position. However, we have never seen the type of turnover now in progress, where the Attorney General, not the President, is asking mid-term that demonstrably capable U.S. Attorneys submit their resignations so that Washington insiders may be appointed in their place.

Moreover, we have never seen an Administration accomplish this task by bypassing the traditional appointment process. Under the prior system, the rules for interim appointments limited the Attorney General's power to install a U.S. Attorney for lengthy periods of time without the advice and consent of the Senate. Under the current system, the Attorney General is free to make indefinite interim appointments of individuals whose background, qualifications and prosecutorial priorities are not subjected to Congressional scrutiny.

The issue is one of transparency and accountability. If interim U.S. Attorneys may serve indefinitely without undergoing the confirmation process, the Senate simply cannot fulfill its constitutional "checks and balances" role in the appointment of these officers. The confirmation process serves an important purpose in the selection of U.S. Attorneys. It gives the Senate an opportunity to closely examine the background and qualifications of the person poised to become the most powerful federal officer in each district and to evaluate the priorities that nominee is setting for law enforcement in his or her jurisdiction.

The prior system -- in which the Chief Judge appointed interim U.S. Attorneys if the Administration did not nominate and obtain confirmation for one within four months of the vacancy opening -- had advantages that the current system does not. First, in my experience, the Chief Judges of a district often have a much better sense of the operation of the U.S. Attorney's office and federal agencies in their jurisdiction than those who are thousands of miles away in Washington, D.C. Indeed, in my district and many others, several district judges are themselves former U.S. Attorneys, intimately familiar with the requirements of the office. Their goal is to find a U.S. Attorney who will serve the needs of the local office and the constituents it serves. Chief Judges are generally familiar with the federal bar in the district and with those individuals who could best fulfill the interim

role. The Chief Judges are in an excellent position to find an appointee, often someone from the office itself, who will serve as a steward until a permanent successor is found.

Second, interim appointments by Chief Judges are less likely to be viewed as political favors, because it is understood that the judge's selection can be superseded at any time once the Administration nominates and obtains Senate confirmation of an appointee of its choice. Chief Judges generally have the respect and confidence of those in their district. There is a greater belief that the Chief Judge will have the best operations of the justice system in mind when he or she makes an interim appointment.

In my opinion, the role of judges under the prior system in making interim appointments of United States Attorneys is constitutional and consistent with separation-of-powers principles. In *Morrison v. Olson*, 487 U.S. 654 (1988), the United States Supreme Court held that the role of the courts in appointing independent counsel pursuant to the Ethics in Government Act of 1978 did not violate Article III of the Constitution or separation-of-powers principles. Chief Justice William Rehnquist recognized that the Constitution permits judges to become involved in the appointment of special prosecutors. *See* U.S. Const., Art. II, §2, cl. 2 ("excepting clause" to "Appointments clause"). He then noted that that lower courts had similarly upheld interim judicial appointments of United States Attorneys. *See United States v. Solomon*, 216 F.Supp. 835 (S.D.N.Y. 1963).

Like the role of judges in making appointments of special prosecutors, the role of Chief Judges in making interim appointments of U.S. Attorneys is authorized by the Constitution itself. U.S. Attorneys can be properly considered "inferior officers" for purposes of the Appointments Clause. They have less jurisdiction and overall authority than the Attorney General and rely on the Attorney General for resources and Justice Department policies. The "Excepting Clause" allows judges to be involved in the appointment process of inferior officers. The court's role in appointment of interim U.S. Attorneys does not unnecessarily entangle the judicial branch with the day-to-day operations of the Executive Branch. Moreover, if the Executive Branch disagrees with the court's appointment, it has a ready remedy by nominating and obtaining confirmation of its own candidate.

Nor does the role of judges in appointing a prosecutor violate separation-of-powers principles. The Chief Judge's power to appoint an interim U.S. Attorney does not come with the right to "supervise" that individual in his or her investigative or prosecutorial authority. *Morrison* at 681. The interim U.S. Attorney does not report to the judge and there is no reason to believe that he or she will change prosecutorial policies at the whim of the court. For the reasons the Supreme Court authorized judges to appoint independent counsel in *Morrison*, I believe it is constitutional for Congress to adopt a rule giving judges a role in appointing interim U.S. Attorneys.

The public has great confidence in appointments made by the bench, whether they be of the Federal Public Defender, Magistrate Judges or interim prosecutors. Indeed, the Supreme Court itself has noted the benefits of having judges involved in the appointment

of prosecutors. In *Morrison*, Chief Justice Rehnquist wrote, "[I]n light of judicial experience with prosecutors in criminal cases, it could be said that *courts are especially well qualified* to appoint prosecutors." *Id.* at 676 n.13 (emphasis added).

Last week, in a letter dated February 2, 2007, to Senator Patrick J. Leahy, Chairman of the Senate Judiciary Committee, Acting Assistant Attorney General Richard A. Hertling, claimed that it would be "inappropriate and inconsistent with sound separation of powers principles ... to vest federal courts with the authority to appoint a crucial Executive Branch office such as a United States Attorney." He cited no authority in support of this principle; indeed, the case law, as represented by *Morrison*, goes against him on this point. The Supreme Court has made it quite clear that judges may properly have a role in appointing prosecutors and that such a procedure does not violate constitutional proscriptions or principles of separation of powers.

I was further surprised when Mr. Hertling's letter claimed that an interim U.S. Attorney appointed by the court could not be sufficiently independent because he or she would be "beholden" to the court for making his or her appointment. I am unaware of any situation in which an interim U.S. Attorney failed to do his or her duties because of some supposed indebtedness to the court, nor does Mr. Hertling cite any such example. Moreover, if there ever were to be such a situation, the President could fire that individual and nominate a successor U.S. Attorney who would be subject to the confirmation process.

The recent actions of the Attorney General give the appearance that there is an ongoing effort by the Attorney General to consolidate power over U.S. Attorneys Offices and insulate their actions from the scrutiny of Congress. It is very hard to otherwise explain why a U.S. Attorney like Bud Cummins III would be terminated after receiving sterling evaluations and replaced by a political adviser who doesn't have nearly the same qualifications. Such actions are likely to work against the interest of federal law enforcement and of the American public.

Ultimately, the debate today is about what we want our U.S. Attorneys Offices to be. If they are to be professional law enforcement offices responding to the needs of the citizens of their districts, they must be led by independent professionals with the support of the Justice Department. If and when they become mere rewards or resume builders for those in the good graces of the Attorney General, they will quickly lose their credibility and thus their ability to perform their jobs effectively. U.S. Attorneys Offices which become – or are perceived to have become – politicized will cease to attract the best and the brightest of lawyers committed to serving the public as dedicated, politically independent professionals. The new Act authorizing appointment of interim U.S. Attorneys for an indefinite period of time creates a serious risk this will occur, because it undermines the Senate's role in evaluating and confirming candidates. As such it poses a much greater risk to constitutional principles, including the separation of powers, than does the role of judges in making interim appointments.