

Professor Laurie Levenson is currently the professor of law and William M. Rains Fellow at Loyola Law School in Los Angeles. She teaches criminal law, criminal procedure, ethics, anti-terrorism and evidence. Prior to joining the faculty at Loyola Law School, Ms. Levenson spent eight years as an assistant U.S. attorney where she prosecuted violent crimes, narcotic offenses, white-collar crimes, immigration and public corruption cases. She's a graduate of Stanford and the UCLA Law School where she was chief articles editor for The Law Review.

Stuart Gerson is currently head of litigation -- the litigation practice at the law firm of Epstein Becker & Green. He joined as a partner in 1980. Prior to his return to private practice, Mr. Gerson served as assistant attorney general for the Civil Division at the Department of Justice under both President H.W. Bush -- George H.W. Bush -- and later as acting attorney general under President Clinton. He served as an assistant U.S. attorney in the District of Columbia and is a graduate of Penn State and the Georgetown University Law Center.

(The witnesses are sworn.)

Ms. White, you may proceed.

MS. WHITE: Thank you very much, Senator Schumer, Senator Specter.

I'm honored to appear before you today. I've spent over 15 years in the Department of Justice both as an assistant United States attorney -- the best job you could ever have -- and as United States attorney. I served during the tenures of seven attorneys general of both political parties, most recently John Ashcroft. I was twice appointed as an interim U.S. attorney, first in the Eastern District of New York in 1992 by Attorney General William Barr -- and I heard from Mr. Gerson that he also had a hand in signing those papers -- and then in 1993, appointed as interim U.S. Attorney in the Southern District of New York by Attorney General Janet Reno. Most recently, as Senator Schumer indicated, I served for nearly nine years as the presidentially appointed U.S. attorney in the Southern District of New York from 1993 until January 2002.

Before I comment substantively on the issues before the committee, let me make very clear up front that I have the greatest respect for the Department of Justice as an institution, and I have no personal knowledge of the facts and circumstances regarding any of the reported requests for resignations of sitting United States attorneys. Because I do not know the precipitating facts and circumstances, I'm not in a position to either support or criticize the particular reported actions of the department and do not do so by testifying at this hearing.

I am, however, troubled by the reports that at least some United States attorneys, well regarded, have been asked by the department to resign without any evidence of misconduct or other apparent significant cause. And I -- you know, I do find that troubling. I think that the appearance -- if it happened, in particular -- but even the appearance of that tends to undermine the importance of the office of the United States attorney, their independence and the public sense of evenhanded and impartial justice.

Casual or unwisely or insufficiently motivated requests for U.S. attorney resignations -- or the perception of such requests -- diminish our system of justice and the public's confidence in it. United States attorneys are political appointees who do serve at the pleasure of the president. It is thus

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customary and expected that the U.S. 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 U.S. attorneys during an administration, except in rare instances of misconduct or for other significant cause. This is, in my view, how it should be.

U.S. attorneys are the chief law enforcement officers in their districts, subject to the general supervision of the attorney general. Although political appointees, the U.S. attorneys once appointed play a critical and nonpolitical, impartial role in the administration of justice in our federal system.

Senator Schumer alluded to this, but 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, emphasized the importance of the role of the U.S. attorneys and their independence. He said, "The prosecutor has more control over life, liberty and reputation than any other person in America. His discretion is tremendous. Because of this immense power, 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. 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. 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."

In my view, the Department of Justice should guard against acting in ways that may be perceived to diminish the importance of the Office of United States Attorney or of its independence, taking nothing away from the career assistant United States attorneys and other career attorneys in the Justice Department.

Changing a United States attorney invariably causes disruption, and often loss of traction in cases and investigations. This is especially so in sensitive or controversial cases where the leadership and independence of the U.S. attorney are often crucial to the successful pursuit of such matters, particularly in the face of criticism or political backlash.

Replacing a U.S. 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.

If U.S. attorneys are replaced during an administration without apparent good cause, the wrong message can be sent to other U.S. attorneys. We want our U.S. 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 and broad discretion to address the priorities of their particular districts.

In my opinion, the United States attorneys have historically served this country with great distinction. Once in office, they become impartial

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public servants, doing their best to achieve justice without fear or favor. 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 nonpolitical pursuit of justice by those selected in an open and transparent manner.

Thank you very much. I'll be happy to answer questions.

SEN. SCHUMER: Thank you, Ms. White.

Professor Levenson.

MS. LEVENSON: (Off mike.) Does that work now?

SEN. SCHUMER: Yes.

MS. LEVENSON: Okay. I served in the United States attorney's office for four different United States attorneys of both parties and one interim United States attorney. I believe that we, in fact, have the best prosecutorial system in the world. But I'm here because I fear that the operation of that system and its reputation for excellence is jeopardized because of the increased politicization of the United States attorney's offices.

As this committee knows, the most recent concerns have focused on a rash of dismissals of experienced and respected United States attorneys across the country. There's at least a strong perception by those in and outside of the United States attorney's office that this is not business as usual, that qualified United States attorneys are being dismissed and their replacements who are being brought in do not have the same experience and qualifications for the position.

Moreover, there's a deep concern that the interim appointments by the attorney general will not be subject to the confirmation process, and therefore there will be no check on those qualifications and the interests of the offices will be sacrificed for political favors.

I want to make three basic points in my testimony today. One, politicizing federal prosecutors does have a corrosive effect on the federal criminal justice system. It is demoralizing to AUSAs. These are the best and the brightest, who go in there because they are dedicated public servants. And they expect their leaders to be the same.

It's also, as we've heard, disruptive to ongoing projects. It creates cynicism among the public. It makes it harder in the long run to recruit the right people for those offices. And as Mr. McNulty said, if you lose the AUSAs, you lose the greatest assets of all.

Second, although there's always been a political component to the selection of United States attorneys, what is happening now is categorically different. Traditionally we saw changeover when there was a new administration. Thus when President Clinton came in, he had every right and did ask for those resignations.

But we have never seen what we're seeing today, which is, in quick succession, seven U.S. attorneys who have excellent credentials, successful records and outstanding reputations being dismissed midterm. And we've never seen their interim replacements, at least some of them, coming in with the lack

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of experience and qualification they have and being put in on an interim basis indefinitely without the prior process that we had for evaluation.

We all recognize that federal prosecutors serve at the pleasure of the president, and the Department of Justice controls many of the policies and the purse strings. But it has been a strong tradition of local autonomy and accountability and continuity that has made these district U.S. attorneys successful, not the arbitrary dismissals in order to give others a fresh start. This is an important tradition. With local autonomy and continuity comes a greater ability to serve the needs of the district.

Third, and finally, in my opinion the prior system, which allowed the attorney general to indeed appoint the interim U.S. attorney for 120 days, and then if there's no confirmed U.S. attorney have the chief judge make an interim appointment, was not only constitutional, but frankly had advantages over the most recently placed provisions.

First, it's constitutional because, under the appointments clause and the accepting clause to that, inferior officers, which U.S. attorneys are, may be appointed by the president, courts of law or heads of department. And under the Supreme Court's decision written by Chief Justice Rehnquist in Morrison versus Olson, the role of judges in appointing prosecutors has been held to be constitutional. In that case, which dealt with independent counsel, the court cited a lower court case dealing with interim U.S. attorneys, and cited it favorably.

I don't think any of the panelists today and any of the witnesses I heard today, in fact, challenge the constitutionality of having judges in the process. But as Mr. Gerson eloquently states in his written testimony, it's one of congressional discretion.

As a matter of discretion, I think that the prior system, the one that Senators Specter and Feinstein are talking about returning to, has strong benefits in comparison to the new approach. Under that approach, the attorney general makes the initial appointment. It gives plenty of time to the department to come up with a nominee and present that nominee. And then, if that is not able to happen in a timely fashion, the chief judge starts making appointments.

And can chief judges do this in a fair way? Not only can they, but they have for decades. And that's because, in my experience, frankly the chief judges know the district often better than the people thousands of miles away in the Department of Justice. They know the practitioners in their courtrooms. They care about the cases in their courtroom. And those judges have the credibility and confidence of the public in making their appointments. They appoint magistrate judges and they even appoint federal public defenders, while not government officials, nonetheless, readily and regularly appear before those judges.

I personally have never heard and seen of a case where a judge exerted any pressure on the appointment of an interim U.S. attorney or when that person appeared before them because he had made that appointment. And I think we have to compare it to the current system under the Patriot Act, where only the attorney general is involved in the process and those interim appointments can be forever. And there may be no or little oversight by the Senate because there is not the traditional confirmation process.

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So in conclusion, I'd like to say that whether or not the current attorney generals' recent actions have been in good or bad faith, their impact has been the same. It has demoralized the troops. It has created the perception that politics is playing a greater role in federal law enforcement. And it has stripped the Senate of its important role in evaluating and confirming the candidates.

In my opinion, the healthiest thing to do is not to rely just on what I'm sure are the sincere promises of the Department of Justice officials of what they're not going to do with this interim power, but to put in some statutory scheme that allows flexibility of interim appointments but still has accountability. That would mean the attorney general could make some interim appointments but would restore the Senate's role as a check and balance.

With that, I welcome any questions from the committee. Thank you.

SEN. SCHUMER: Thank you, Professor Levenson.

Mr. Gerson.

MR. GERSON: Mr. Chairman, Senator Specter, it's a great delight always to testify before this committee, especially as an old Justice Department hand. I'll concur. My wife thinks the best job I've ever had is being her husband. But in terms of what I got paid to do, certainly being an assistant United States attorney was a terrific job.

And let me talk to a couple of contrarian issues.

But first, Senator Schumer, given the lateness of the hour, I ask your parliamentary discretion in incorporating my written testimony as if read here and in full.

SEN. SCHUMER: You are indeed an old Justice Department hand. Thank you.

Without objection, Mr. Gerson's entire statement will be read into the record.

MR. GERSON: Thank you.

I came here different, perhaps, from anybody else, with an agenda. And coming last, I have the pleasure of having seen that agenda satisfied. I thought and think that S. 214 is a very bad idea. I thought that Senator Feinstein's reaction, while understandable, was not finely enough drawn. And certainly returning to the previous method of appointments serially of interim United States attorneys is vastly superior to what was being proposed, which was taking the executive branch out of an executive function. But that battle now has been won.

I urge you, though, to have hearings on it, because it's not -- the idea of including the judiciary at all is not without problems. Different from Ms. Levenson, I actually know and have experienced some cases where judicial intervention has proved ill-advised and badly directed.

But at the end of the day, I came here to speak for the Constitution, and I think the Constitution has gotten a good break out of the day, that we function best when the executive does things that are committed to the executive

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branch, the legislature does things that are committed to the legislative branch, and the judiciary fulfills a judicial function, and that those roles, when stuck to, create the right kind of dynamic tension that the framers had in mind and which has made our written Constitution the oldest written constitution in the world.

There's a certain sense of deja vu in all of this. One of the reasons, perhaps, that I was invited is I probably superintended the most dismissals of United States attorneys that anybody ever did, and I did it accidentally when, by force of circumstances -- and Senator Schumer and Senator Specter remember my unusual circumstance when I ended up as the long-term acting attorney general. That had never happened in American history, where a president was saddled for more than a few days with an attorney general of the other party. There's something to be said for that, by the way.

And in this case, it was easy to support President Clinton's decision to dismiss U.S. attorneys, many of them on the same day, many of them that had served full terms, and many of them that were involved in ongoing investigations, because it was a presidential prerogative.

And I just note with some irony that I was accused by some of my colleagues of being involved in the termination of the United States attorney in Arkansas, who was in the midst of -- actually she had recused herself, but the office was in the midst of the Whitewater investigation, and that was alleged to have been a cover-up on behalf of President Clinton.

Of course, pressure then turned that occupation over to a judicially selected officer and created the situation where a prosecutor responsible to the judicial branch caused a great deal of discomfort both to the president and to what is now the Democrat majority. And I urge everyone to remember that in looking at the role of the judiciary in a restored context to the one that Senator Schumer, I think, accurately described.

The greatest value of the judiciary is it tells the other -- not just the executive branch, but the legislative branch -- to get on with their constitutional business and move on to permanent United States attorneys with due speed. That's the value of the judicial part of it, not judges picking prosecutors, because that's an anomalous role for the judiciary.

Let me also address one other point, and that's -- I'm as great an admirer of Justice Jackson as anyone and have learned a lot about what the political branches should do and shouldn't do from reading Justice Jackson. But I want to say a word on behalf of centralization and the proper role of politics.

I've seen much of this before. I've dealt with problems between senators and presidents for many years. Senator Specter and I and Senator Heinz resolved an issue in the Reagan administration where there was a dispute of who should be the United States attorney for the eastern district of Pennsylvania.

These disputes are old and oftentimes difficult. But it should be remembered that there were many valid reasons why the main Justice component of the Justice Department ought to be able to exert its will over United States attorney's offices in a prudent way and why perhaps it hasn't happened enough.

I cite several instances of where I myself felt compelled to act and think that I did justice. I'm of an age where some of the things I remember

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best perhaps didn't happen and I'm informed that at least one of my examples may be flawed. Although what I state is true, I attribute something to the then-U.S. attorney for the southern district of New York that perhaps I shouldn't have. I apologize to him, and will personally if I have contradicted his memory.

But several cases immediately came to mind where I know that United States attorneys were not adequately attending to national priorities. One was in the savings-and-loan crisis. It was very clear that a centrally directed civil system was vastly outperforming the dispersed, decentralized way that the criminal cases in the savings-and-loan area were being handled, and there were many U.S. attorneys that didn't do a good job. And it wasn't until main Justice imposed task forces on them that that situation improved.

And then I pointed out, lastly, a situation that I had where, if I had listened to the United States attorney and indeed to the chief judge of the district in which the case was being tried, I would have been complicit in what I thought was an act of racial discrimination in jury selection, albeit involving a minority public official of the opposite party to me. I felt it important to impose my will on the United States attorney.

I think that justice was done. It didn't matter to me that it was criticized. It was fairly illuminated in the public record, and that's all that really mattered. But it was certainly something that was warranted no matter how many people I displeased and no matter what an ill effect I might have had on the morale in the given office.

I don't know that morale generally in the United States attorney's offices is being challenged. I haven't seen it. And I do work that involves a lot of United States attorneys. I subscribe to Mary Jo White's analysis of what a United States attorney's office ought to be. I hope that my career, in retrospect, will be reviewed and held as consistent with that tradition.

I know that I got a great deal of support from main Justice when I was a prosecutor of cases that weren't generally popular, including the prosecution of a United States senator, including being involved in one of the more controversial Watergate cases. And it was people like Henry Petersen, the legendary figure who was then the head of the criminal division, who provided a lot of support for what a rookie line assistant, assistant U.S. attorney, thought needed to be done. And that tradition still is present.

Somebody I got to know in my early days the first time I was in the Justice Department is Dave Margolis. You heard about him earlier, and I know he's a person who is familiar to you. It's not the practice of the Justice Department to throw career people to the winds of political judgments and political testimony, but he and so many other people are the folks who make this system go. They're there whoever are United States attorneys. Every office has them. And Ms. White and I have been honored, as has Ms. Levenson, been honored to serve with people like that. So I happily conclude my remarks noting that what I came here to do was achieved when Senator Feinstein took her seat and announced what I think is a beneficial compromise.

Thank you.

SEN. SCHUMER: Thank you, Mr. Gerson. And we did say we'd try to wrap up by 12:30, so I'll keep my questions brief. And we may submit some others in writing.

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First to Mary Jo White. Do you think -- first, what should be the standard for firing a presidentially appointed U.S. attorney? What have you understood the historical standard to be? And is it ever wise or appropriate to fire a Senate-confirmed U.S. attorney simply to give another person a chance?

MS. WHITE: Senator, in answer to that, clearly the president has the power to remove any U.S. attorney for any reason or no reason, but as a matter of policy and as a matter of precedent as well, that, in my experience during an administration, has not been done and I don't believe should be done, absent evidence of misconduct or other significant cause. And I think we have to be careful about the slippery slope of performance-related, because I don't think a U.S. attorney is like any other employee in the sense that it's a presidential appointee. It should be for serious significant cause. It does cause disruption, it does cause a tremendous appearance problem, it can disrupt cases. So I think the historical pattern has been absent misconduct or significant cause that you don't unseat a sitting U.S. attorney.

SEN. SCHUMER: What you say makes a great deal of sense. Even assuming that some people were unhappy with the priorities, say, of Miss Lamb -- I mean, the problems that this has created, I'll bet the Justice Department wishes they hadn't done what they did. And we don't know the record. Maybe there's some smoking gun, but it's hard -- it's difficult to believe that, given the external reports.

Professor Levinson, I just want to ask you since I read your testimony last night and heard it again here with care, did you find the statement -- I won't call it an admission -- of Deputy Attorney General McNulty that he -- that they removed the Arkansas U.S. attorney -- well, I was going to say troubling, shocking, unprecedented. Would you disagree with any of those words?

MS. LEVINSON: No, I wouldn't. I mean, in some ways it was refreshing to hear him say outward that --

SEN. SCHUMER: You bet.

MS. LEVINSON: -- he fired him not because he had done anything wrong, but because they wanted to give somebody else a political chance. That's precisely the problem. The job of U.S. attorney should not be a political prize. There's too much at stake for the district and for the people who work in that office.

SEN. SCHUMER: Right. And finally, to Mr. Gerson, in your time at the Justice Department, which is extensive, did you ever see a U.S. attorney asked to resign for no reason other than to give someone else a shot? MR. GERSON: Yes.

SEN. SCHUMER: Want to give us the example?

MR. GERSON: Well, I can't give you a name, and I've tried to think back over this. It was certainly suggested to individuals during my time at the midterm that perhaps it was time to do something else. I --

SEN. SCHUMER: In the two-year or the four-year?

MR. GERSON: Four-year.

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SEN. SCHUMER: Four-year.

MR. GERSON: Four-year. But I note that all of -- it would seem -- I don't want to be an apologist for anybody here, and I agree with you that the situation in San Diego is worth examining. I know that the person who was deposed, I thought her to be a very fine lawyer, but I don't know any of the circumstances. I dealt with her in health care cases, where she was quite vigorous, not in immigration cases that I have nothing to do with.

But all of the individuals involved seemed to have served four years and were in a subsequent term, and I think that's worth knowing. They'd been allowed to serve that time, and I guess I'm taking a contrarian view, which is I don't want to adopt some categorical vision that there's anything inherently wrong with looking at an organization while it's healthy and making a change. I don't carry any presumption that if someone is doing a good job, they're automatically entitled to continue. On the other hand, I'm a conservative in most every way, and I believe in least action, and I generally try to do something for a reason. And I don't conceive that I'd have made a change without a reason to do so.

SEN. SCHUMER: Final question to you, sir. Given the fact that the replacement in the seven we talked about was probably contemplated before the day they were actually dismissed, isn't 120 days enough?

MR. GERSON: It should be. Yeah, I'd -- it should be, but it should be -- let me make it clear. I -- Senator Specter and I have argued with each other over almost three decades now on separation questions. I knew him when he was the D.A., so I go back a ways.

SEN. SPECTER: (Off mike.)

MR. GERSON: (Laughter.) We were both very young.

I think that it should be a notice both to the executive branch and to the legislature. I don't think that we benefit from having interim anything for a long period of time, and that ought to move expeditiously to having permanent people who whether or not it's constitutionally required, as a matter of constitutional custom, have their nominations submitted to the Senate, and the Senate give advice and consent.

SEN. SCHUMER: Thank you.

Senator Specter:

SEN. SPECTER: I thank you -- I thank Mr. Chairman. I haven't been in a situation like this. The chairman wants to end this hearing at 12:30. It's now 12:29-and-a-half.

SEN. SCHUMER: You can speak as long as you wish.

SEN. SPECTER: I haven't been in a situation like this since I was invited in 1993 to be the principal speaker at the commissioning of the Gettysburg in Maine. And when I looked at the speaker's list, I was ninth. There was an admiral from Washington, there was an undersecretary of State, there was the governor, there was Senator George Mitchell, there was Senator Bill Cohen, and I was called upon to speak at 4:32. And I was told as I walked to the podium that the commissioning had to be at 4:36 -- (laughter) -- because

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that's when the tide was right. So this brings back fond recollections to be called upon after all the time has expired.

SEN. SCHUMER: Well, I just want to remind my colleague a rising tide lifts all boats. (Laughter.)

SEN. SPECTER: I only wish there were a rising tide in Washington. (Laughter.) But we have the power in the Senate to change the clock. I was on the Senate floor one day when we had to finish activity by midnight, and we stopped the clock at 10 minutes to 12 --

SEN. SCHUMER: I heard about that.

SEN. SPECTER: -- until we finished our work.

But on to the serious questions at hand for no more than three minutes. Mr. Gerson, it's been a very important subject today as to what was a person's best job. Now you testified that your wife thought being her husband was your best job, but it seems to me that begs the question. Did you think that was your best job? (Laughter.)

MR. GERSON: I'd darn well better.

SEN. SPECTER: Well, that clears the air on that.

In Morrison v. Olson, the appointment of a special prosecutor was up, and the special prosecutor statute provided that the appointing judge could not preside over any case in which a special prosecutor was involved. Ms. White, do you think we might bring that rule to bear so that if we have the chief judge make the appointment after 120 days that the prosecutor ought not to be able to appear before that judge? MS. WHITE: Certainly, I think that's wise particularly from an appearance point of view, whether dictated as a matter of constitutional law. And again, I did not go into the subject of the best mechanism for appointing interim U.S. attorneys because I think the solution that seems to be on the table -- not perfect, at least in my view -- is probably the best one, achieving the best balance. Not without its issues, though.

SEN. SPECTER: Professor Levinson, don't you think it would be a good idea when there is a change of administration to at least make some sort of an inquiry as to whether the firing of all -- there were only 92 U.S. attorneys fired by Attorney General Gerson, as I understand it. I understand they kept Chertoff in North ---- in Jersey at the request of Senator Bradley to put to -- not that that wasn't political, but don't you think there ought to be some inquiry as to what's happening, and whether there's some politically sensitive matter so that you just don't have a carte blanche rule?

MS. LEVINSON: Well, I do --

SEN. SPECTER: Whoa, wait a minute. I haven't finished my question. And don't you think that Attorney General Gerson acted inappropriately in firing all of those people when Clinton took office? After all, Ruckle's (ph) house resigned and Richardson resigned. They wouldn't fire Archibald Cox. Do you think that Gerson was the Bork of his era? (Laughter.)

MS. LEVINSON: I think the record speaks for itself, Senator.

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SEN. SPECTER: He's already had his turn. I want an answer, Professor Levinson. (Laughter.)

Just kidding, just kidding. How about it, Mr. Gerson--- former Attorney General Gerson?

MR. GERSON: Well, I don't criticize Mr. Bork, either. I mean, the buck had to stop at some point in order to have a Justice Department. But there's a difference. I also think that the process worked well, even though it had a negative --

SEN. SPECTER: It had to stop at some point to have justice, you say?

MR. GERSON: To have a Justice Department. Somebody's got to run the place. I don't think everybody --

SEN. SPECTER: What was wrong with Cox?

MR. GERSON: Well, I don't think anything was wrong with Cox, and I think the upshot -- I think the system worked. I mean, ultimately the wrongdoing of that administration was exposed, and the president resigned in the wake of a continuation of the special prosecutor's function. You can't escape it, and I think that's the point that good oversight makes, and why when all the political branches -- both political branches do their job, justice will be served.

SEN. SPECTER: Oh, I think this question has been very thoroughly aired. Very thoroughly aired. I can't recall a three-hour and 36-minute hearing under similar circumstances, and I await the day when Chairman Schumer is chairman of the full committee to see us progress in our work.

Thank you all very much.

MS. LEVINSON: Thank you.

SEN. SCHUMER: Thank you. And I want to thank Senator Specter and all three witnesses for their excellent testimony. I think it's been an excellent hearing, and I have a closing statement that I'll submit to the record -- for the record.

Thank you.

END.

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HEARING FOLLOW-UP
QFRS

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Questions for the Record. Senator Edward M. Kennedy
Questions for Deputy Attorney General McNulty

1. You stated in your testimony that the periodic performance evaluations (EARS) of the U.S. Attorneys who were forced to resign would not necessarily reveal the basis for their dismissals. In your subsequent briefing, that certainly seemed to be the case. Are there flaws in the design or execution of the EARS that make them an inadequate management device? Please provide your recommendations for revising the EARS process.
2. You stated in the briefing on February 14 that in the fall of 2006 a decision was made to identify seven or eight U.S. Attorneys for removal. Who participated in that decision? Did anyone from the White House participate in that decision or in any way communicate to the Department of Justice that U.S. Attorneys should be targeted for removal?
3. Why would the Department decide that it was time to remove a group of U.S. Attorneys? Did anyone involved in the process suggest that it might be politically advantageous to do so? If so, who? Did anyone suggest that it would be helpful to open positions so that they could be filled by new people? If so, who?
4. Why were the removals done in bulk, rather than dealing with each allegedly problematic U.S. Attorney as problems arose? Is this a reflection of poor management of the Department of Justice?
5. How many other U.S. Attorneys have been asked to resign or otherwise involuntarily removed during this Administration? Please identify each such U.S. Attorney and his or her replacement.
6. Please identify each individual who served as an interim U.S. Attorney during this Administration and the dates during which he or she served. Please also identify whether each such interim U.S. Attorney served as an Assistant U.S. Attorney before his or her appointment.
7. You have stated that Bud Cummins was asked to resign in Arkansas so that Tim Griffin could be appointed in his place. You have also acknowledged that Harriet Miers, then White House Counsel, called the Department about the replacement of Mr. Cummins with Mr. Griffin. With whom did she speak? What was her stated rationale for the change? Given the commitment of the Attorney General to have the best possible people serving as U.S. Attorneys, did the Department resist Ms. Miers suggestion? If not, how is the Department's behavior consistent with its commitment to merit selection of U.S. Attorneys?
8. Please describe the background investigation and vetting process to which Mr. Griffin was subjected before he was appointed as interim U.S. Attorney.

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9. Was any analysis made of the impact on the Eastern District of Arkansas of the proposed change in U.S. Attorneys prior to asking Mr. Cummins to step down? Please provide any and all documents relevant to that analysis.

10. When Mr. Griffin served with the Republican National Committee, files were taken without authorization from Democratic Members of the Senate Judiciary Committee and disseminated to the public. Did you inquire of Mr. Griffin whether he had any role in the dissemination of those files? Has Mr. Griffin been interviewed as part of the investigation into the theft of those files?

11. You suggested in your briefing that career employees were involved in the selection of interim U.S. Attorneys. You mentioned David Margolis, but no others. What other career employees have been involved?

12. You stated that Carol Lamm was removed in part because she emphasized prosecution of large smuggling rings over individual re-entry cases. Please provide the empirical basis for that allegation. Given the volume of illegal entries in that district, does it not make sense to devote resources to prosecution of large cases that will have the biggest impact? How would you measure the relative impact of prosecuting large-scale smugglers as opposed to individuals who cross the border unlawfully.

13. You stated that Ms. Lamm was informed that she should prosecute more individual re-entry cases, but you did not know if she had done so. Did you or anyone examine whether she had complied with your directive before you removed her? Please provide statistics on prosecutions of individual re-entry cases in her district and identify the date on which she was told to increase the number of such prosecutions.

14. As you know, Michael Sullivan, the U.S. Attorney for Massachusetts, has been serving for several months as the acting head of ATF, which has left Massachusetts without a full-time U.S. Attorney. What are the intentions of the Administration regarding these two positions? When can we expect there again to be a full-time U.S. Attorney in Massachusetts?

DAG000001359

Written Questions to DAG Paul McNulty from Senator Charles Schumer
Preserving Prosecutorial Independence:
Is the Department of Justice Politicizing the Hiring and Firing of US Attorneys?
February 6, 2007

1. Has the Department of Justice ever taken the position, in any brief, position paper, or application to any court, that United States Attorneys or interim United States Attorneys are "inferior officers" within the meaning of the Constitution?
 - a) If so, please explain the position taken and provide any such brief, position paper, or application.
2. Has the Department of Justice ever taken a position, in any brief, position paper, or application to any court, on the Constitutionality of prior statutory provisions allowing the District Court to appoint interim United States Attorneys?
 - a) If so, please explain the position taken and provide any such brief, position paper, or application.
3. According to a recent report in the Associated Press, Attorney General Gonzales said that district court judges should not appoint U.S. Attorneys because they "tend to appoint friends and others not properly qualified to be prosecutors." Apart from the one instance in South Dakota in 2005, which you brought to my staff's attention, is there any other example of an inappropriate interim appointment by a District Court judge in the last century?
4. To your knowledge, is there any precedent for an Administration's simultaneously asking for a dozen or more resignations from sitting United States Attorneys in the middle of a Presidential term, as you acknowledged was done on December 6, 2006? Please identify those precedents, if any.
5. Prior to December 7, 2006, how many United States Attorneys were asked to resign in this Administration? Please identify them.
6. To your knowledge, is there any precedent for an Administration's replacing a well-performing United States Attorney with a politically-connected substitute, as you acknowledged was done in the replacing of Arkansas's Bud Cummins with Tim Griffin? Please identify those precedents, if any.
 - a) Please describe with particularity who in any way advocated on behalf of Tim Griffin, whether inside or outside of the Administration, either to become the interim United States Attorney or the permanent replacement.
 - b) Please explain why Bud Cummins was told to resign in June of 2006, when the other dismissed officials were told in December of 2006? Was the reason to give the replacement, Tim Griffin, a chance to become

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ensconced at the U.S. Attorney's Office in Arkansas before making the appointment?

- c) Please provide a written explanation of the reasons that the First Assistant in the Eastern District of Arkansas was not selected as the interim United States Attorney upon the departure of Bud Cummins.
 - d) In light of the unprecedented nature of the appointment, I am especially interested in understanding the role played by Karl Rove. In particular, what role did Karl Rove, with whom Griffin was closely associated, play in the decision to appoint Griffin? In answering this question, please make inquiries within the Justice Department and the White House.
7. At our private briefing on February 14, 2007, you indicated that most of the so-called "performance"-based issues relating to the fired United States Attorneys were not reflected in any document, report, or evaluation.
- a) Please explain why this is so.
 - b) Please explain your view of whether firing presidentially-appointed federal prosecutors in the complete absence of a record of performance problems undermines public confidence in the neutral administration of justice.
8. You have indicated that a group of individuals at the Justice Department attempted to identify United States Attorneys about whom there were "serious questions" about their performance.
- a) Please identify with more concreteness the time frame of this evaluation.
 - b) Please identify with more concreteness the individuals involved in this evaluation.
 - c) Please identify and provide any documents or records generated in connection with this evaluation.
 - d) Please explain why this evaluative process was undertaken at all. Why was such an evaluation not undertaken at the end of the natural four-year term of the identified United States Attorneys?
 - e) Was there any involvement by the President, the White House Counsel's Office, or anyone else at the White House, prior to the time a list of dismissals was sent over to the White House Counsel's Office for review?

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9. You have acknowledged that the so-called EARS evaluations of several fired United States Attorneys might not reflect any of the "performance" problems that ultimately resulted in their dismissal.

a) Please describe with particularity the EARS evaluation process, with attention to the length of the evaluation, the type of people who participate, the types of interviews conducted, and the typical length of a final EARS report. -

10. While it is true that United States Attorneys serve at the pleasure of the President and may be dismissed for any reason, do you believe that there should be some higher standard for the termination of a Presidentially-appointed and Senate-confirmed federal prosecutor? If so, what should that standard be?

DAG000001362

2/22/07 CRS REPORT
ON U.S. ATTORNEYS

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CRS Report for Congress

U.S. Attorneys Who Have Served Less than Full Four-year Terms, 1981-2006

February 22, 2007

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Congressional
Research
Service

Prepared for Members and
Committees of Congress

DAG000001364

U.S. Attorneys Who Have Served Less than Full Four-year Terms, 1981-2006

Summary

United States attorneys, who prosecute violations of federal law and defend the federal government in civil suits, are nominated by the President and confirmed by the Senate, and, once confirmed, serve four-year terms. The President may terminate the appointment of a U.S. attorney at any time. Recent controversy over the termination of seven U.S. attorneys, and the method by which the interim appointments were made to replace them, has focused attention on reasons for departure of U.S. attorneys.

This report provides data on U.S. attorneys who did not complete their full four-year term after confirmation by the Senate and whose terms did not carry over a change in presidential administration. The data collected employ records of presidential appointment and Senate confirmation of U.S. attorneys, and rely on secondary sources to provide information on reasons U.S. attorneys left office before completion of their four-year terms.

At least 54 U.S. attorneys appointed by the President and confirmed by the Senate left office before completion of a four-year term between 1981 and 2006 (not counting those whose tenure was interrupted by a change in presidential administration). Of those 54, 17 left to become Article III federal judges, one left to become a federal magistrate judge, six left to serve in other positions in the executive branch, four sought elective office, two left to serve in state government, one died, and 15 left to enter or return to private practice.

Of the remaining eight U.S. attorneys who left before completing a four-year term without a change in presidential administration, two were apparently dismissed by the President, and three apparently resigned after news reports indicated they had engaged in questionable personal actions. No information was available on the three remaining U.S. attorneys who resigned.

Interim U.S. attorneys are appointed by the Attorney General and serve until the President nominates, and the Senate confirms, a successor. Legislation has been introduced in the 110th Congress (H.R. 580; S. 214) to revert the system of appointment of interim U.S. attorneys to the system in place from 1986 to 2006. Under that system, the appointment of an interim U.S. attorney by the Attorney General expired after 120 days. After that appointment expired, district courts could appoint interim U.S. attorneys who could serve until the President nominated, and the Senate confirmed, a permanent replacement.

This report will be updated as events warrant.

DAG000001365

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U.S. Attorneys Who Have Served Less than Full Four-year Terms, 1981-2006

Introduction

The primary responsibilities of United States attorneys are twofold: the prosecution of violations of federal criminal and civil law, and defense of the United States in civil actions brought against the federal government in the districts to which they are assigned.¹ By law, U.S. attorneys are appointed by the President with the advice and consent of the Senate for terms of four years.² There are 93 U.S. attorneys, generally one for each of the 94 U.S. district courts (Guam and the Northern Mariana Islands district courts share one U.S. attorney.)

Appointment of U.S. Attorneys

Presidential nominations to the position of U.S. attorney are referred to the Senate Judiciary Committee; if the Judiciary Committee reports the nomination, then the nomination may be considered by the entire Senate. If the Judiciary Committee does not report the nomination before the end of a Congress, the nomination is returned to the President, who may resubmit the nomination. As is the case with nominations for Article III federal judgeships and U.S. marshals, nominations to the position of U.S. attorney are the subject of "blue slips," where Senators who represent the state that includes the district to which an individual is nominated are invited to offer their approval or disapproval of the nominee. If a home state Senator returns a negative blue slip or fails to return a positive blue slip, the chair of the Senate Judiciary Committee, by tradition and in deference to the Senator, may decline to schedule a hearing or other committee action on the nomination.³

Interim U.S. Attorneys

Once confirmed by the Senate, U.S. attorneys can have their appointments terminated at any time by the President.⁴ Upon completion of a four-year term, and in the absence of a successor, "a United States attorney shall continue to perform the

¹ 28 USC § 547.

² 28 USC § 541 (a).

³ See CRS Report RL32013, *The History of the Blue Slip in the Senate Committee on the Judiciary, 1917-Present*, by Mitchel A. Sollenberger.

⁴ 28 USC § 541 (c).

duties of his office until his successor is appointed and qualifies.⁵ If the U.S. attorney resigns or has his or her appointment terminated by the President, an interim U.S. attorney may be appointed by the Attorney General to fill the position until the President nominates, and the Senate confirms, a replacement to the position. As discussed below, legislation has been introduced in the House of Representatives and the Senate in the 110th Congress to alter the mechanism by which interim U.S. attorneys are appointed and how long interim appointees may serve. The two legislative proposals take as their starting point earlier mechanisms for appointing interim U.S. attorneys.

Statutory Changes. In the past 21 years, there have been two changes in how vacant U.S. attorney positions may be filled on an interim basis, pending nomination and Senate confirmation of a permanent successor. In 1966, Congress enacted 28 U.S.C. 541,⁶ which governs the appointment of U.S. attorneys. The language for filling vacancies with interim U.S. attorneys enacted at that time reflected existing language.⁷ That language read as follows:

The district court for a district in which the office of United States attorney is vacant may appoint a United States attorney to serve until the vacancy is filled. The order of appointment by the court shall be filed with the clerk of the court.⁸

In 1986, Congress amended the language to allow for the district court to continue to make an interim appointment, but first allowed the Attorney General to make an interim appointment of no more than 120 days. The revised language read as follows:

- (a) Except as provided in subsection (b), the Attorney General may appoint a United States attorney for the district in which the office of United States attorney is vacant.
- (b) The Attorney General shall not appoint as United States attorney a person to whose appointment by the President to that office the Senate refused to give advice and consent.
- (c) A person appointed as United States attorney under this section may serve until the earlier of —
 - (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.

⁵ 28 USC § 541 (b).

⁶ P.L. 89-554, § 4(c), Sept. 6, 1966, 80 Stat. 617.

⁷ Before 1966, 28 USC § 506 (62 Stat. 909) used the same language as enacted in P.L. 89-554.

⁸ P.L. 89-554, § 4(c), Sept. 6, 1966, 80 Stat. 618. This language, and all amending language, refers to 28 USC § 546.

(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. The order of appointment by the court shall be filed with the clerk of the court.⁹

In 2006, as part of the reauthorization of the USA PATRIOT Act, the method for filling vacancies was again altered, allowing the Attorney General to fill a vacancy indefinitely, not for just 120 days. The current language reads as follows:

(a) Except as provided in subsection (b), the Attorney General may appoint a United States attorney for the district in which the office of United States attorney is vacant.

(b) The Attorney General shall not appoint as United States attorney a person to whose appointment by the President to that office the Senate refused to give advice and consent.

(c) A person appointed as United States attorney under this section may serve until the qualification of a United States Attorney for such district appointed by the President under section 541 of this title.¹⁰

As a result of the 2006 law, district courts now play no role in appointing interim U.S. attorneys to fill vacancies. Supporters of the 2006 law have argued that district courts occasionally failed to appoint individuals put forward by the Department of Justice to interim U.S. attorney positions,¹¹ and that allowing federal judges to appoint interim U.S. attorneys raises separation-of-powers concerns.¹² Critics of the 2006 law have claimed that the new law allows U.S. attorneys to be dismissed for "political reasons"¹³ and that interim replacements for terminated U.S. attorneys may serve indefinitely without presidential nomination or Senate confirmation to four-year terms.¹⁴

Identification of U.S. Attorneys Serving Less than Four Years

The recent dismissal of seven U.S. attorneys has raised interest in patterns in departures of U.S. attorneys not related to completion of a four-year term or a change in presidential administration. The dismissal has also renewed focus on how interim U.S. attorneys are appointed, with several Members of Congress asserting that the

⁹ P.L. 99-646, § 69, Nov. 10, 1986, 100 Stat. 3616.

¹⁰ P.L. 109-177, § 502, Mar. 9, 2006, 120 Stat. 246.

¹¹ Marcia Coyle, "In Wake of Seven Firings, Branches Clash Over Interim U.S. Attorney Nominees," *National Law Journal*, Feb. 13, 2007.

¹² *Ibid.*

¹³ Sen. Charles Schumer, "Unanimous-Consent Request — S. 214," remarks in the Senate, *Congressional Record*, daily edition, vol. 153 (Feb. 15, 2007), p. S1995.

¹⁴ Sen. Dianne Feinstein, "Unanimous-Consent Request — S. 214," remarks in the Senate, *Congressional Record*, daily edition, vol. 153 (Feb. 15, 2007), p. S1995.

2006 change was "slipped into"¹⁵ the reauthorization of the USA PATRIOT Act. CRS attempted to ascertain how often, prior to 2007, U.S. attorneys left office before completing their four-year terms without a change in presidential administration.

Methodology

In order to determine how many U.S. attorneys had served less than four years with tenure uninterrupted by a change in presidential administration, CRS began by contacting the Executive Office for United States Attorneys (EOUSA), which serves as the liaison between U.S. attorneys and the Department of Justice. CRS first contacted the EOUSA January 24, 2007, to seek records on the appointment and termination dates for U.S. attorneys. As of February 20, 2007, EOUSA had not provided the requested data. CRS also contacted the Office of Personnel Management (OPM), which maintains the Central Personnel Data File (CPDF). CRS spoke with a representative in OPM's Congressional Liaison Office and was told that the database could not produce the information needed. The OPM representative referred CRS to the Department of Justice.

Absent direct information on starting and termination dates of U.S. attorneys, as well as reasons for their termination, CRS collected data on presidential nomination and Senate confirmation of U.S. attorneys during the 97th (1981-1982) through 109th (2005-2006) Congresses. The Legislative Information System (LIS)¹⁶ provides a searchable database of all nominations submitted to the Senate for consideration, which allowed CRS to build records of succession for Senate-confirmed occupants of the 93 U.S. attorney positions. Using the LIS database, CRS identified each U.S. attorney who was nominated to the position less than four years after his or her predecessor was confirmed to the same position. Nomination of a successor less than four years after the confirmation of a predecessor suggests that the predecessor had served less than four years in the office.¹⁷ Excluded from these calculations were U.S. attorneys appointed after a change in presidential administration; U.S. attorneys have typically been removed from office by a new President so that the new President could appoint his own U.S. attorneys.¹⁸

Two examples may prove illustrative. In 1991, President George H.W. Bush nominated, and the Senate confirmed, Maurice Ellsworth to the position of U.S. Attorney for the District of Idaho. In September 1993, President Clinton appointed, and the Senate confirmed, Betty Richardson to the same position. Although Maurice Ellsworth served less than four years, CRS did not conduct further analysis of this

¹⁵ Ibid.

¹⁶ [<http://www.congress.gov/nomis>]. LIS only provides this data in electronic format for the 1981-2006 time period.

¹⁷ The President may nominate a successor before the term of a U.S. Attorney expires, anticipating the incumbent's departure at the end of his or her term. Of the 54 cases identified and listed in the appendix, CRS found no instances where the U.S. Attorney served a full four-year term.

¹⁸ Dan Eggen, "U.S. Attorney Firings Set Stage for Congressional Battle," *Washington Post*, Feb. 4, 2007, p. A07.

incomplete term because different Presidents made the initial and new appointments. By contrast, President George W. Bush appointed (and the Senate confirmed) Michael Mosman to the position of U.S. Attorney for the District of Oregon in 2001. President George W. Bush then appointed (and the Senate confirmed) Karin Immergut to the same position in 2003. Given that Michael Mosman left office before the completion of his four-year term, and his replacement was appointed by the same President, CRS attempted to ascertain the reason for his departure.

Using this methodology, CRS identified 54 instances from 1981 through 2006 in which the tenure of a U.S. attorney fell short of the four-year term specified by statute (see the appendix). This approach likely underestimates the number of U.S. attorneys who departed office before completion of their four-year terms. A U.S. attorney would not have been included in the appendix if the individual resigned (of his or her own initiative or at the President's request) before completing a four-year term, was replaced by someone appointed by a district court or the Attorney General, and the President did not make a nomination to replace the individual until after four years from the start of the resigned U.S. attorney's term. If, for example, a U.S. attorney confirmed in 1993 resigned in 1996, but a nomination to replace that individual was not made until 1998, the data collection method utilized by CRS would not have captured the individual who resigned in 1996.

Once CRS identified all U.S. attorneys who met these criteria, CRS used secondary sources, including Martindale Hubbell Lawyer Locator,¹⁹ Nexis news searches,²⁰ and the LIS nominations database²¹ to ascertain the dates and the reasons that the identified U.S. attorneys left office.²²

Findings

The appendix identifies 54 U.S. attorneys who were appointed between 1981 and 2006, left office before completing their four-year terms, and whose terms did not extend beyond one President's tenure in office. The entries in the appendix are sorted in ascending order of confirmation date. In each case, CRS has annotated the results of secondary source searches regarding the approximate date of departure and the reason for departure from the position. Seventeen of the 54 U.S. attorneys left office early to take positions as Article III federal judges. For each of those individuals, the appendix provides the month that the individual was confirmed to the federal judgeship as the departure date from the position of U.S. attorney. One additional U.S. attorney, Paul Michael Warner, left in January 2006, before the completion of his second term, to become a U.S. magistrate judge. Six U.S. attorneys left their posts early to take other positions in the executive branch; all but one of those (Jim J. Marquez, who left in February 1984 to become General Counsel

¹⁹ [<http://lawyers.martindale.com/marhub>].

²⁰ [<http://www.nexis.com/research>].

²¹ [<http://www.congress.gov/nomis/>].

²² Heather Negley and Maureen Bearden, CRS Information Research Specialists, performed these searches.

to the Department of Transportation) took positions elsewhere in the Department of Justice. Four other individuals appear to have left office to seek elective office; two more left to serve in state government. One U.S. attorney died while in office. All of the above categories account for 31 of the 54 U.S. attorneys listed in the appendix:

Of the remaining 23 U.S. attorneys, the secondary sources indicate that 15 left to enter or return to private practice. Included in this category are individuals who explicitly indicated (in news reports or elsewhere) that their intent was to take a position with a law firm or as house counsel for a business. Of the remaining eight individuals, two were apparently dismissed by the President. Those two were:

- **William Kennedy, U.S. Attorney for the Southern District of California.** Kennedy, appointed by President Reagan, was reportedly dismissed in 1982 "for charging that the Justice Department, at the request of the Central Intelligence Agency, was blocking his attempt to prosecute Mr. [Miguel] Nassar [Haro], because he had been a key CIA informant on Mexican and Central American affairs."²³
- **J. William Petro, U.S. Attorney for the Northern District of Ohio.** Petro, appointed by President Reagan, was reportedly dismissed in 1984 because the Department of Justice was "investigating allegations that Mr. Petro disclosed information about an indictment pending from an undercover operation and that the information reached a subject of the investigation."²⁴ Petro was later convicted on the charges.²⁵

For the remaining six U.S. attorneys, the only information available was that they had resigned from office. News reports suggested that, in at least three of those cases, their resignations were the result of questionable conduct. Briefly, those three cases were as follows:

- **Larry Colleton, U.S. Attorney for the Middle District of Florida.** Colleton, appointed by President Clinton, according to news reports, "had been U.S. attorney for Florida's middle district for only five months on May 6 [1994] when he was videotaped grabbing Jacksonville television reporter Richard Rose by the throat. The newsman had been trying to question him about recent decisions in his office."²⁶ He resigned in July 1994.

²³ "Mexican Security Official Held on Auto Theft Charge," *Christian Science Monitor*, Apr. 26, 1982, p. 2 (Midwestern Edition).

²⁴ Leslie Maitland Weber, "U.S. Attorney in Cleveland Is Discharged by President," *New York Times*, Oct. 3, 1984, p. A16.

²⁵ "Conviction Clouding Future for Ohio Republican," *New York Times*, Mar. 10, 1985, p. A23.

²⁶ Anne Groer, "Colleton Resigns as U.S. Attorney, Gets Another Post," *Orlando Sentinel*, (continued...)

- **Kendall Coffey, U.S. Attorney for the Southern District of Florida.** Coffey, appointed by President Clinton, resigned on May 12, 1996, according to news reports, "amid accusations that he bit a topless dancer on the arm during a visit to an adult club after losing a big drug case."²⁷
- **Frank L. McNamara, Jr., U.S. Attorney for the District of Massachusetts.** McNamara, appointed by President Reagan, reportedly resigned on January 30, 1989, because he had "been the focus of heated dispute since the Justice Department announced in November [1988] that he was the target of an internal probe."²⁸ That probe sought to identify "whether he had lied to federal officials when he accused his predecessor as U.S. attorney, William F. Weld, of smoking marijuana. McNamara also admitted experimenting with the drug."²⁹ The same news story reported that had McNamara not resigned of his own accord, he would have been suspended by Attorney General Richard Thornburgh.³⁰

For the remaining three individuals, CRS was unable to locate additional information on the reasons for their resignations. In one of these cases, Humberto Garcia, the tenure was nearly four full years (from March 2003 to January 2007).

Legislation in the 110th Congress

Companion legislation has been introduced in the House and the Senate to change the method of appointing interim U.S. attorneys. Both the House bill, H.R. 580, sponsored by Representative Berman, and the Senate bill, S. 214, sponsored by Senator Feinstein, as amended, would allow the Attorney General to make an interim appointment that would expire after 120 days. After 120 days, the district court would be empowered to appoint an interim U.S. attorney whose tenure would last until the President nominates, and the Senate confirms, a successor. These proposals would return the method for appointing interim U.S. attorneys to the system used between 1986 and 2006.

S. 214 contains an additional provision not currently in H.R. 580 that would terminate the appointments of any existing interim U.S. attorneys 120 days after the legislation is enacted (or a successor is confirmed by the Senate, whichever comes

²⁶ (...continued)
July 30, 1994, p. A1.

²⁷ Associated Press, "U.S. Attorney Resigns Amid Turmoil," *Tulsa World*, May 18, 1996, p. A13.

²⁸ Elizabeth Neuffer and Stephen Kurkjian, "McNamara Resigns as US Attorney; Prosecutor Cites Swirl of Controversy," *Boston Globe*, Jan. 31, 1989, p. 1.

²⁹ *Ibid.*

³⁰ *Ibid.*

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earlier.) Under S. 214, vacancies created by the expiration of the term of an interim U.S. attorney would be filled by the district court. A hearing was held on S. 214 on February 6, 2007, and the bill, as amended, was approved by the Senate Judiciary Committee on February 8, 2007. The chairman reported the bill, as amended, on February 12, 2007. H.R. 580 was referred to the Commercial and Administrative Law Subcommittee of the House Judiciary Committee on February 2, 2007.

DAG000001374

Appendix. U.S. Attorneys Who Left Office After Serving Less than Full Four-Year Terms
During the Tenure of One President (1981-2006)

District	U.S. Attorney	Nomination Date	Confirmation Date	Departure Date	Departure Reason
N.OK	Francis Anthony Keating II	05/14/81	06/10/81	1983	Sought Elective Office
W.OK	David L. Russell	05/14/81	06/10/81	12/81	Federal Judge
S.IN	Sarah Evans Barker	06/25/81	07/15/81	03/84	Federal Judge
W.TX	Edward C. Prado	06/16/81	07/15/81	03/84	Federal Judge
NH	W. Stephen Thayer III	07/29/81	09/16/81	1984	State Government
N.IL	Dan K. Webb	09/22/81	10/21/81	02/01/85	Private Sector
ID	Guy Gordon Hurlbutt	09/17/81	10/29/81	1984	Private Sector
S.CA	William H. Kennedy	09/17/81	11/10/81	04/05/82	Dismissed
CT	Alan H. Nevas	10/07/81	11/18/81	10/83	Federal Judge
KS	Jim J. Marquez	09/17/81	11/24/81	02/84	Executive Branch
DC	Stanley S. Harris	11/04/81	12/16/81	11/83	Federal Judge
NV	Lamond Robert Mills	12/04/81	02/08/82	1985	Private Sector
C.CA	Stephen S. Trott	12/09/81	02/08/82	07/83	Executive Branch
N.OH	J. William Petro	12/11/81	03/04/82	10/02/84	Dismissed
E.OK	Gary Loy Richardson	03/29/82	04/21/82	1984	Private Sector
E.NY	Raymond J. Dearie	07/28/82	08/20/82	03/86	Federal Judge
N.FL	William Thomas Dillard III	12/14/82	02/23/83	1986	Private Sector
S.IN	John D. Tinder	06/04/84	06/15/84	08/87	Federal Judge
M.GA	Joe D. Whitley	03/17/86	04/23/86	1987	Executive Branch
E.WI	Joseph P. Stadtmueller	05/14/86	06/06/86	05/87	Federal Judge
N.FL	K. Michael Moore	04/23/87	05/19/87	05/19/87	Executive Branch
W.OK	William S. Price	04/23/87	07/01/87	1989	Sought Elective Office

District	U.S. Attorney	Nomination Date	Confirmation Date	Departure Date	Departure Reason
MA	Frank L. McNamara, Jr.	04/02/87	11/05/87	01/30/89	Resigned
NJ	Samuel A. Alito, Jr.	08/03/87	12/08/87	04/90	Federal Judge
W.VI	Patrick J. Fiedler	11/19/87	02/25/88	01/91	State Government
SC	E. Bart Daniel	05/16/89	06/22/89	1992	Private Sector
UT	Dee V. Benson	05/31/89	06/22/89	09/91	Federal Judge
W.OK	Vicki Lynn Miles-LaGrange	07/29/93	09/21/93	11/94	Federal Judge
N.AL	Claude Harris Jr.	09/07/93	09/30/93	10/02/94	Died
S.OH	Edmund A. Sargus, Jr.	09/07/93	09/30/93	08/96	Federal Judge
SC	Joseph Preston Strom, Jr.	08/06/93	09/30/93	1996	Private Sector
S.FL	Kendall Brindley Coffey	10/13/93	11/20/93	05/17/96	Resigned
M.FL	Larry Herbert Colleton	11/19/93	02/10/94	07/94	Resigned
M.GA	James Lamar Wiggins	11/19/93	02/10/94	1996	Sought Elective Office
N.GA	Kent Barron Alexander	01/26/94	03/25/94	1997	Private Sector
W.KY	Stephen Beville Pence	08/03/01	09/14/01	2003	Sought Elective Office
DC	Roscoe Conklin Howard, Jr.	08/02/01	09/14/01	05/28/04	Resigned
S.LA	Steven M. Colloton	09/05/01	10/12/01	09/03	Federal Judge
OR	Michael W. Mosman	08/01/01	10/12/01	09/03	Federal Judge
W.NC	Robert L. Conrad Jr.	08/03/01	10/23/01	2004	Private Sector
MD	Thomas M. DiBiagio	09/05/01	10/23/01	2005	Resigned
E.MO	Raymond W. Gruender	08/02/01	10/23/01	05/04	Federal Judge
W.AR	Thomas C. Gean	08/02/01	10/23/01	06/07/04	Private Sector
N.GA	William S. Duffey, Jr.	09/05/01	11/06/01	06/04	Federal Judge
E.MI	Jeffrey Gilbert Collins	09/05/01	11/06/01	08/22/04	Private Sector
S.GA	Richard S. Thompson	10/25/01	11/30/01	2004	Private Sector
W.NY	Michael A. Battle	11/15/01	01/25/02	06/05	Executive Branch
S.NY	James B. Comey	03/04/02	04/12/02	12/09/03	Executive Branch

CRS-11

District	U.S. Attorney	Nomination Date	Confirmation Date	Departure Date	Departure Reason
N.TX	Jane J. Boyle	12/20/01	04/12/02	06/04	Federal Judge
S.IL	Miriam F. Miquelon	05/23/02	07/29/02	09/01/03	Private Sector
S.FL	Marcos D. Jimenez	04/15/02	07/29/02	05/20/05	Private Sector
W.WI	J.B. Van Hollen	05/15/02	08/01/02	01/31/05	Private Sector
PR	Humberto S. Garcia	11/19/02	03/07/03	01/07	Resigned
UT	Paul Michael Warner	07/14/03	08/01/03	01/06	Magistrate Judge

Source: Nomination and Confirmation data from Legislative Information System (LIS), at [<http://www.congress.gov/nomis>]. CRS obtained information for departure dates and departure reasons from secondary sources.

DAG000001377

S.214 SUBSTITUTE
AMENDMENT ADOPTED
IN COMMITTEE

DAG000001378

AMENDMENT NO.

Calendar No.

Purpose: To restore the procedures for the appointment of interim United States attorneys.

IN THE SENATE OF THE UNITED STATES—110th Cong., 1st Sess.

S. 214

To amend chapter 35 of title 28, United States Code, to preserve the independence of United States attorneys.

Referred to the Committee on _____ and
ordered to be printed

Ordered to lie on the table and to be printed

AMENDMENT intended to be proposed by Mrs. FEINSTEIN
(for herself, Mr. SPECTER, and Mr. LEAHY)

Viz:

1 On page 1, strike line 7 and all that follows and in-
2 sert the following:

3 Section 546 of title 28, United States Code, is
4 amended by striking subsection (c) and inserting the fol-
5 lowing:

6 "(c) A person appointed as United States attorney
7 under this section may serve until the earlier of—

DAG000001379

1 “(1) the qualification of a United States attor-
2 ney for such district appointed by the President
3 under section 541 of this title; or

4 “(2) the expiration of 120 days after appoint-
5 ment by the Attorney General under this section.

6 “(d) If an appointment expires under subsection
7 (e)(2), the district court for such district may appoint a
8 United States attorney to serve until the vacancy is filled.
9 The order of appointment by the court shall be filed with
10 the clerk of the court.”.

11 **SEC. 3. APPLICABILITY.**

12 (a) **IN GENERAL.**—The amendments made by this
13 Act shall take effect on the date of enactment of this Act.

14 (b) **APPLICATION.**—

15 (1) **IN GENERAL.**—Any person serving as a
16 United States attorney on the day before the date of
17 enactment of this Act who was appointed under sec-
18 tion 546 of title 28, United States Code, may serve
19 until the earlier of—

20 (A) the qualification of a United States at-
21 torney for such district appointed by the Presi-
22 dent under section 541 of that title; or

23 (B) 120 days after the date of enactment
24 of this Act.

1 (2) EXPIRED APPOINTMENTS.—If an appoint-
2 ment expires under paragraph (1), the district court
3 for that district may appoint a United States attor-
4 ney for that district under section 546(d) of title 28,
5 United States Code, as added by this Act.

VIEW LETTERS ON S.214

DAG000001382



U.S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

February 2, 2007

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

This is to advise you of the Department of Justice's strong opposition to S. 214, the "Preserving United States Attorney Independence Act of 2007." S. 214 would significantly alter the manner in which U.S. Attorney vacancies are filled by completely removing the Attorney General's authority to appoint interim U.S. Attorneys and allocating that authority to an entirely different branch of government. Under S. 214, the Attorney General would have no authority whatsoever to fill a U.S. Attorney vacancy on an interim basis—even one of short duration. Instead, only the district court would have this authority.

United States Attorneys are at the forefront of the Department of Justice's law-enforcement efforts. They lead the charge to protect America from acts of terrorism; to reduce violent crime, including gun crime and gang crime; to fight illegal drug trafficking; to enforce immigration laws; to combat crimes that endanger children and families, including child pornography, obscenity, and human trafficking; and to ensure the integrity of government and of the marketplace by prosecuting corrupt government officials and perpetrators of corporate fraud. In pursuit of these objectives, U.S. Attorneys play a pivotal role coordinating with federal, State, and local law enforcement officials on many of these law enforcement issues. Additionally, they have significant administrative responsibilities, such as managing large offices of federal prosecutors and reporting directly to the Deputy Attorney General and the Attorney General. Importantly, U.S. Attorneys represent the Attorney General as the chief federal law enforcement officer in their respective communities. For these reasons, the Department is committed to having the best person possible discharging the responsibilities of the U.S. Attorney at all times and in every district.

DAG000001383

The Department's principal objection to S.214 is that it would be inappropriate, and inconsistent with sound separation of powers principles, to vest federal courts with the authority to appoint a critical Executive Branch officer such as a United States Attorney under the circumstances described in the bill. Indeed, the Department is unaware of any other federal agency for which federal judges have such authority. As soon as a vacancy occurs, the federal court would be enabled to appoint a person of its choosing whose tenure would continue through the entire period needed for both a Presidential nomination and Senate confirmation. That judicial appointee would have authority for litigating the entire federal criminal and civil docket for this period before the very district court to whom he was beholden for his appointment. Such an arrangement at a minimum gives rise to an appearance of potential conflict that undermines the performance of not just the Executive Branch, but also the Judicial one. Furthermore, prosecutorial authority should be exercised by the Executive Branch in a unified manner, with consistent application of criminal enforcement policy under the supervision of the Attorney General. The U.S. Attorneys, unlike the court-appointed independent counsel whose appointment survived separation of powers challenge in *Morrison v. Olson*, 487 U.S. 654 (1988), have wide-ranging, extensive authority over any number of matters. Among other things, they have played, and continue to play, a crucial role in investigations and prosecutions in the ongoing war on terrorism, where close coordination is critical. S. 214 would tend to fragment the exercise of such authority, thereby undermining the effort to achieve a unified and consistent approach to prosecutions and federal law enforcement.

S. 214 would supersede last year's amendment to 28 U.S.C. § 546 that authorized the Attorney General to appoint an interim U.S. Attorney to serve until a person fills the position by being confirmed by the Senate and appointed by the President. Last year's amendment was intended to ensure continuity of operations in the event of a U.S. Attorney vacancy that lasts longer than expected. S. 214 would institute a new appointment regime without allowing the Attorney General's authority under current law to be tested in practice.

Before last year's amendment, the Attorney General could appoint an interim U.S. Attorney for only 120 days; thereafter, the district court was authorized to appoint an interim U.S. Attorney. In cases in which a Senate-confirmed U.S. Attorney could not be appointed within 120 days, the limitation on the Attorney General's appointment authority resulted in several recurring problems. For example, some district courts—recognizing the oddity of members of one branch of government appointing officers of another and the conflicts inherent in the appointment of an interim U.S. Attorney who would then have many matters before the court—refused to exercise the court's statutory appointment authority. Such refusals required the Attorney General to make multiple 120-day appointments. In contrast, other district courts—ignoring the oddity and inherent conflicts—sought to appoint as interim U.S. Attorney wholly unacceptable candidates who did not have the appropriate qualifications or the necessary clearances. S. 214 fails to ensure that such problems do not recur and, indeed, would exacerbate those problems by making appointment by the district court the exclusive means of filling U.S. Attorney vacancies.

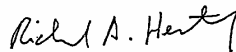
DAG000001384

The Honorable Patrick J. Leahy
Page Three

S. 214 appears to be aimed at addressing a problem that has not arisen. The Administration has repeatedly demonstrated its commitment to having a Senate-confirmed U.S. Attorney in every federal district. To be sure, when a U.S. Attorney vacancy occurs, the Department must first determine who will serve temporarily as interim U.S. Attorney until a new Senate-confirmed U.S. Attorney is appointed. 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 a temporary, interim basis. When neither the First Assistant U.S. Attorney 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 the Senate and the one that the Administration follows.

Thank you for the opportunity to present the Department's views on S. 214. The Office of Management and Budget advises that it has no objection to the presentation of this response from the standpoint of the Administration's program and that enactment of S. 214 would not be in accord with the program of the President. If we may be of additional assistance, please do not hesitate to contact this office.

Sincerely,



Richard A. Hertling
Acting Assistant Attorney General

cc: The Honorable Arlen Specter
Ranking Minority Member

The Honorable John Cornyn

DAG000001385

S.214

DAG000001386

110TH CONGRESS
1ST SESSION

S. 214

To amend chapter 35 of title 28, United States Code, to preserve the independence of United States attorneys.

IN THE SENATE OF THE UNITED STATES

JANUARY 9, 2007

Mrs. FEINSTEIN (for herself and Mr. LEAHY) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To amend chapter 35 of title 28, United States Code, to preserve the independence of United States attorneys.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 SECTION 1. SHORT TITLE.

4 This Act may be cited as the "Preserving United
5 States Attorney Independence Act of 2007".

6 SEC. 2. VACANCIES.

7 Section 546 of title 28, United States Code, is
8 amended to read as follows:

DAG000001387

1 "§ 546. Vacancies

2 "The United States district court for a district in
3 which the office of the United States attorney is vacant
4 may appoint a United States attorney to serve until that
5 vacancy is filled. The order of appointment by the court
6 shall be filed with the clerk of the court."

○

Q & A FROM DOJ 1/8/07
OVERSIGHT HEARING

DAG000001389

FEINSTEIN:

No, I'm just asking you to give me a number. That's all. I'm asking you to give me a number. I'm asking...

GONZALES:

You know, I don't know the answer to that question. But we have been very forthcoming...

FEINSTEIN:

You didn't know it on Tuesday when I spoke with you. said you would find out and tell me.

GONZALES:

I'm not sure I said that, but...

FEINSTEIN:

Yes, you did, Mr. Attorney General.

GONZALES:

Well, if that's what I said, then that's what I will do. But we did provide to you a letter where we gave you a lot of information about...

FEINSTEIN:

I read the letter.

GONZALES:

OK.

FEINSTEIN:

DAG000001390

It doesn't answer the questions that I have.

I know of at least six that have been asked to resign. I know that we amended the law in the Patriot Act and we amended it because if there were a national security problem, the attorney general would have the ability to move into the gap.

We did not amend it to prevent the confirmation process from taking place. And I'm very concerned. I've had two of them asked to resign in my state from major jurisdictions with major cases ongoing, with substantially good records as prosecutors.

And I'm very concerned, because, technically, under the Patriot Act, you can appoint someone without confirmation for the remainder of the president's term. I don't believe you should do that. We are going to try to change the law back.

GONZALES:

Senator, may I just say that I don't think there was any evidence that is what I'm trying to do. In fact, to the contrary, the evidence is quite clear that what we're trying to do is ensure that for the people in each of these respective districts we have the very best possible representative for the Department of Justice and that we are working to nominate people and that we are working with home state senators to get U.S. attorneys nominated.

So the evidence is just quite contrary to what your possibly suggesting.

Let me just say...

FEINSTEIN:

Do you deny that you have asked -- your office has asked United States attorneys to resign in the past year?

GONZALES:

Senator, that...

FEINSTEIN:

Yes or no?

GONZALES:

DAG000001391

Yes.

No, I don't deny that. What I'm saying is -- but that happens during every administration during different periods for different reasons.

And so the fact that that's happened, quite frankly, some people should view that as a sign of good management. What we do is we make an evaluation about the performance of individuals, and I have a responsibility to the people in your district that we have the best possible people in these positions.

And that's the reason why changes sometimes have to be made, although there are a number of reasons why changes get made and why people leave on their own.

I think I would never, ever make a change in a United States attorney for political reasons or if it would in any way jeopardize an ongoing serious investigation. I just would not do it.

FEINSTEIN:

Well, let me just say one thing. I believe very strongly that these positions should come to this committee for confirmation.

GONZALES:

They are, Senator.

FEINSTEIN:

I believe very strongly we should have the opportunity...

GONZALES:

I agree with you.

FEINSTEIN:

... to answer (sic) questions about...

GONZALES:

DAG000001392

I agree with you.

FEINSTEIN:

And I have been asked by another senator to ask this question, and I will: Was there any other reason for asking Bud Cummings of Arkansas to resign other than the desire to put in Tim Griffin?

GONZALES:

Senator, again, I'm not going to get into a public discussion about the merits or not with respect to personnel decisions.

I will say that I've had two conversations -- one as reconvened, I think, yesterday -- with a senator from Arkansas about this issue. He and I are in a dialogue. We are -- I am consulting with the home state senator so he understands what's going on and the reasons why, and working with him to try to get this thing resolved; to make sure for his benefit, for the benefit of the Department of Justice that we have the best possible person manning that position.

LEAHY:

I'm just wondering, during the -- when we take our break for lunch, would it be possible to get the numbers that Senator Feinstein has asked for?

GONZALES:

I think it's possible. I will certainly...

FEINSTEIN:

U.S. attorneys asked to resign.

GONZALES:

Senator, that's a number that I would like to share with you. I don't want to have a public discussion about personnel decisions. It's not fair, quite frankly, to the people.

LEAHY:

DAG000001393

I'm just curious as to the numbers. I don't care who they are. I want to know the numbers.

Thank you.

CORNBYN:

Thank you, Mr. Chairman.

Welcome, Attorney General Gonzales.

I want to talk a minute about the questions that Senator Feinstein raised about the process by which interim United States attorney are appointed, so that we can understand this better and perhaps put it in context.

My understanding that was prior to the reauthorization of the Patriot Act the attorney general had the authority to appoint an interim United States attorney for a period up to 120 days, wafter which the courts before the U.S. attorney would appear would make a longer-term interim appointment until such time as the president nominated and the Senate confirmed a permanent United States attorney.

CORNBYN:

Is that correct?

GONZALES:

That is correct. And as you might imagine, Senator, that created some issues that we were worried about. It would be like a federal judge deciding who was going to serve on your staff.

A U.S. attorney, of course, serves on my staff. And the other problems that we had is that there's an inherent conflict where you've got a U.S. attorney appearing before a court where he's been appointed by the judge.

And so that created a problem. We had, also, a problem, of judges, recognizing the oddity of the situation, who, kind of, would refuse to act.

And so we'd have to take action or give them a name or something. But it created some discomfort among some judges. Other judges were quite willing to make an appointment.

DAG000001394

Regrettably, though, you have a potential for a situation where someone is appointed who's never worked at the Department of Justice, doesn't have the necessary background check, can't get the necessary clearances.

And so that's a serious problem, particularly when you're at war, during a time of war.

And so, for these reasons, quite frankly, I think the change that was made in the re-authorization of the Patriot Act makes sense. And I've said to the committee today, under oath, that we are fully committed to try to find presidentially appointed, Senate-confirmed, U.S. attorneys for every position.

But they're too important to let go unfilled for any period of time, quite frankly. And it's very, very important for me, even on an interim basis, the qualification, the judgment of the individuals serving in that position.

QUESTION:

Well, Mr. Attorney General, this was not just, sort of, an odd arrangement before the re-authorization of the Patriot Act. It raised very serious concerns with regard to the separation powers doctrine under our Constitution, did it not?

GONZALES:

It does in mind. Again, it would be like a federal judge telling you, I'm putting this person on your staff.

CORNBYN:

The chief law enforcement officer for the district concerned. And the process that Senator Feinstein asked questions about that is now the norm, after the re-authorization of the Patriot Act -- that is something Congress itself embraced and passed by way of legislation and the president has signed into law.

Is that correct?

GONZALES:

I believe it reflects the policy decision, the will of the Congress, yes.

CORNBYN:

DAG000001395

And I find it a little unusual that some of our colleagues are critical of the Justice Department replacing Bush appointees with interim appointments, until such time as we can get a permanent United States attorney nominated by the president and confirmed by the committee.

I just want to raise three quick examples of delays, unfortunately not caused by the administration but by this committee itself in terms of confirming high-level nominees at the Justice Department: for example, Alice Fisher (ph) whose nomination waited a period of 17 months before this committee actually confirmed her nomination.

Then there's Kenneth Weinstein (ph), who was appointed to a brand new position, as you know, the head of the Counterterrorism (ph) Division at the Department of Justice.

This was a recommendation by the WMD commission and others. This nomination was obstructed for six months, until September 6, 2006, which allowed this new, important position to remain vacant for a half a year.

And then there's the inexplicable, to me, anyway, the case of Steve Bradbury, who serves in a very important position as head of the Office of Legal Counsel, acting, who's yet to be confirmed, even though he was nominated June 23, 2005.

And as you know, Mr. Bradbury was very integral to our efforts to deal with this issue of how do we try terrorist like Khalid Sheikh Mohammed, consistent with the Supreme Court's decisions and our Constitution.

So I appreciate your willingness to make sure that the administration nominates U.S. attorneys on a timely basis. Hopefully, this committee and the Congress, the Senate, will meet the administration more than halfway and schedule up-or-down votes on the nominees that the president sends forward.

SESSIONS:

There have been some complaints about replacements of United States attorneys. I served as a United States attorney for 12 years. I'm sure some people would like to have removed me before that.

But I am well aware that United States attorneys serve at the pleasure of the president. The United States attorneys that are being replaced here all, as I understand it, have served four years or more -- had four-year terms.

And we're now in the second term of this president. And I think, to make seven changes, I think, that's involved here, is not that many, and that the office of the United States attorney is a very important office, and it has tremendous management responsibilities and law enforcement responsibilities that cannot fail to meet standards.

DAG000001396

And if someone is not producing, I think the president has every right to seek a change for that or other reasons that may come up.

GONZALES:

Can I just interrupt here?

SESSIONS:

Yes.

GONZALES:

I mean, there are constant changes in the ranks of our U.S. attorneys.

SESSIONS:

Absolutely. I...

GONZALES:

They come and go. And they leave for a variety of reasons. And so the fact that someone is leaving -- again, I don't want to get into personal details of individual attorneys.

I do want to say, however, that -- and I've said this publicly a lot, recently, it seems -- the U.S. attorney positions are very, very important to me, personally.

They are my representative in the community. They are the face of the administration, quite frankly. They're often viewed as the leader of the law enforcement effort within a community, not just by state and local but by other federal components.

And so I care very much about who my U.S. attorney is in a particular district. That's very, very important to me.

And so decisions with respect to U.S. attorneys are made on what's best for the department but also what's best for the people in the respective district.

SESSIONS:

DAG000001397

I fully understand that. And I know, in my district, where I used to be United States attorney, there was a vacancy occurred and someone left. And an interim was appointed. She was a professional prosecutor from -- in San Diego, Deborah Rhodes. She won great respect in the office and brought the office together when there had been problems.

And I'm pleased to say that Senator Shelby and I recommended to you, and you appointed her permanently, somebody who had never lived in the district before.

But I know you want the best type persons for those (inaudible), I would just note, though, that there have been complaints about United States attorneys. I'm aware some of them are not very aggressive. And they don't need to stay if they're not doing their job.

Here we had 14 House members expressing concerns about the U.S. attorney, Carol Lam, in San Diego, on the board of there, saying that they -- in effect, that she had a firm policy not to prosecute criminal aliens unless they have previously been convicted of two felonies in the district.

Well, I don't think that's justifiable.

GONZALES:

Senator...

SESSIONS:

Because I don't know if that had anything to do with her removal, but I know there were a series of 19 House members who wrote letters complaining about that performance.

And if that's so, I think change is necessary. Go ahead.

(LAUGHTER)

GONZALES:

Well, I was going to say, I'm not going to comment on those kind of reports, quite frankly.

SESSIONS:

I'm sure you're not.

DAG000001398

GONZALES:

It's not fair to individuals. It's not fair to their privacy. And quite frankly, it's not fair to others who may have left for different reasons.

SESSIONS:

And with regard to the proposal that would change the United States attorney appointment that we discussed earlier -- I think the Feinstein amendment is not just re-establishing previous law; it goes beyond the previous law.

And I think, at this point, we don't have a basis to make that change. But would you agree it goes beyond the previous law?

GONZALES:

Quite frankly, Senator, I don't know what her amendment would do.

GONZALES:

I would have concerns if her amendment would require or allow a judge to make a decision about who's going to serve on my staff.

(CROSSTALK)

SESSIONS:

And if a United States attorney is appointed by the power -- and the U.S. attorney's part of the executive branch -- you would bring that nomination to the Senate for an up-or-down vote, would you not?

GONZALES:

Again -- I've said it before, but I'll say it again: I am fully committed to work with the Senate to ensure that we have presidentially appointed, Senate-confirmed U.S. attorneys in every district.

Now, these are, of course, very, very important. And I don't have the luxury of letting vacancies sit vacant. And so I have an obligation to the people in those districts to appoint interims.

And, of course, even though there may be an interim appointment, their judgment, their experience or qualifications are still, nonetheless, very, very important to me.

DAG00001399

SESSIONS:

You're exactly right.

WHITEHOUSE:

(OFF-MIKE)

Attorney General, it's nice to see you. Thank you for being here.

I'd like to start with an observation in response to the colloquy between you and Senator Feinstein. As a former United States attorney and somebody who as U.S. attorney had very active investigations into public corruption in Rhode Island, I share a bit the concern of the removal of U.S. attorneys under these circumstances.

And in your response you indicated that you would never do anything for -- I think you said -- political reasons, and you would certainly never do anything that would impede the ongoing investigation.

I would suggest to you that in your analysis of what the department's posture should be in these situations you should also consider the potential chilling effect on other United States attorney when a United States attorney who was involved in an ongoing public corruption case is removed from office. They are not easy cases to do technically, as you know. They are fraught with a lot of risk. And I think that U.S. attorneys show a lot of courage when they proceed with those cases, and any signal that might be interpreted or misinterpreted as discouraging those kinds of activities I think is one you'd want to be very, very careful about.

So I would propose to you that that's a consideration you should have in mind as you make those removal and reappointment decisions.

GONZALES:

It already is, but thank you, Senator. I appreciate that.

DAG000001400

DAG000001401

ODAG QFRS
Jill Wade

LEAHY:

37 "Press reports say that seven or more United States Attorneys have recently announced their resignations, and these reports suggest that you and the Administration have asked them to step down. These include well-regarded prosecutors like Kevin Ryan in San Francisco, who is leading investigations into corporate backdating of employee stock options, and Carole Lam in San Diego, who led the successful Duke Cunningham corruption investigation. These U.S. Attorneys are being replaced under a new provision inserted by the Republican Congress into the PATRIOT Act reauthorization, which allows you to name interim U.S. Attorneys, without any Congressional input or confirmation, who will serve indefinitely.

Why have you asked such a large and unprecedented number of U.S. Attorneys – appointed by this Administration and well-regarded in their communities – to step down?

38 Isn't there a threat to the independence of U.S. Attorneys when groups of them are fired en masse and replaced indefinitely by people of your choosing without any Senate input?

39 Wouldn't a system where interim U.S. Attorneys were appointed by the federal district court – which is how it used to be done – help ensure that qualified and independent prosecutors held the job until a permanent appointee could be confirmed?

SPECTER

119 The McNulty Memo provides that prosecutors may still negatively weigh a corporation's refusal to disclose factual, privileged "Category I" information. Such information includes copies of key documents, witness statements, and reports containing investigative facts documented by counsel. To make such a request, a prosecutor must establish a "legitimate need" for the information and must obtain authorization from the United States Attorney, who must "consult" with the Assistant AG for the Criminal Division. What is the consultation that must take place for the prosecutor to make such a request, and may the request be made even without the Assistant AG's assent?

120 Can the Assistant Attorney General overrule the U.S. Attorney's decision?

ODAG QFRS
Jill Wade

121 Is there a standard for this type of review?

122 May the corporation appeal the DOJ's decision to request the information or its possibly subsequent finding of noncooperation as a result?

KENNEDY:

190 Please provide the employment application or current resume of each individual appointed as an interim United States Attorney during the past two years.

191 What will you do to assure Congress that the removal of Ms. Lam and others is not an effort to terminate uncomfortable public corruption investigations? Will you consider as a principal factor in each interim appointee the ability and willingness of the appointee to pursue public corruption investigations? What abilities and experience do you consider important in a public corruption prosecutor?

197 How many interim United States Attorneys are now serving?

198 Please state the date that each was appointed to his or her current position, and the time that elapsed between the departure of the confirmed United States Attorney and the appointment of the interim United States Attorney.

199 Please state whether a replacement has been nominated for each position and when each replacement nomination was sent to the Senate.

ODAG QFRS
Jill Wade

SCHUMER:

352 "12: Some have recently expressed concern about the possible politicization of the hiring and firing of United States Attorneys.

a. How many United States Attorneys have been asked to resign prior to the ends of their terms? For each, please provide the name, the district, the date of confirmation, the date of resignation or termination, and the name of the proposed replacement.


353 b. Do you believe that there is any constitutional infirmity in allowing (as was done prior to the PATRIOT Act change), in certain circumstances, federal judges to make interim appointments of United States Attorneys? If so, please provide a detailed explanation of your constitutional concerns. Are you aware of any legal challenges, prior to 2006, to the method of interim U.S. Attorney appointments. If so, please provide the details of those legal challenges and the resolution of the litigation.

Scott-Finan, Nancy

From: Wade, Jill C
Sent: Monday, February 05, 2007 10:19 AM
To: Scott-Finan, Nancy
CC: Chambers, Shane P; Seidel, Rebecca
Subject: RE: AG QFRS

Attachments: SHCQFRS-011807-USA Atty Issues - ODAG.doc

We rec'd QFRs on this issue from Schümer (below, assigned to EOUSA) and others (see attached, assigned to ODAG).


-SHCQFRS-011807-
USA Atty Issues...

Schumer:

11. Some have expressed concern about the level of relevant experience of various top level Department of Justice officials and United States Attorneys around the country. Please answer the following questions to fill in the record on the backgrounds of our most important law enforcement officials:

a. How many United States Attorneys have been nominated during the Bush Administration to date?

b. How many of those nominated had any prosecutorial experience before their nominations?

c. Of those, how many had prosecutorial experience at the local level?

d. How many had prosecutorial experience at the federal level?

From: Scott-Finan, Nancy
Sent: Monday, February 05, 2007 9:26 AM
To: Wade, Jill C
Subject: RE: AG QFRS

Thank you.

From: Wade, Jill C
Sent: Monday, February 05, 2007 9:21 AM
To: Scott-Finan, Nancy
Subject: RE: AG QFRS

Yes I will get them for you.

From: Scott-Finan, Nancy
Sent: Sunday, February 04, 2007 10:31 PM
To: Seidel, Rebecca; Wade, Jill C; Chambers, Shane P
Subject: AG QFRS

Were there any questions about the USA firings in the AG QFRS that we received last week? If so, may I have a copy.
Thanks.