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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MARY JO WHITE

PARTNER

When Mary Jo White left her post as US Attorney for the Southern District of New York in January, 2002, she was acclaimed for her nearly nine years as the leader of what is widely recognized as the premier US Attorney's office in the nation. She had supervised over 200 Assistant US Attorneys in successfully prosecuting some of the most important national and international matters, including complex white collar and international terrorism cases. She is a Fellow in the American College of Trial Lawyers and the International College of Trial Lawyers. Ms. White is the recipient of numerous awards and is regularly ranked as a leading lawyer by directories that evaluate law firms. In addition, Ms. White served as a Director of The Nasdaq Stock Exchange, and on its Executive, Audit and Policy Committees (2002 to February 2006). She is also a member of the Council on Foreign Relations.

Ms. White rejoined Debevoise in 2002, and was made Chair of the firm's over 225-lawyer Litigation Department. Ms. White's practice concentrates on internal investigations and defense of companies and individuals accused by the government of involvement in white collar corporate crime or Securities and Exchange Commission (SEC) and civil securities law violations, and on other major business litigation disputes and crises. For her criminal work, she leads a Debevoise team that includes ten former Assistant US Attorneys with extensive experience in major commercial investigations and prosecutions.

Ms. White served as the United States Attorney for the Southern District of New York from 1993 to 2002. She is the only woman to hold the top position in the more than 200-year history of that office, which has the responsibility of enforcing the federal criminal and civil laws of the nation. Ms. White also served as the first Chairperson of Attorney General Janet Reno's Advisory Committee of United States Attorneys from all over the country. Prior to becoming the United States Attorney in the Southern District of New York, Ms. White served as the First Assistant United States Attorney and Acting United States Attorney in the Eastern District of New York from 1990 to 1993.

Under Ms. White's leadership, the United States Attorney's Office for the Southern District of New York successfully investigated and prosecuted numerous cases of national and international significance. These include cases involving large scale white collar and complex securities and financial institution frauds as well as cases involving corporate criminal liability, international

terrorism, international money laundering, police and other public official corruption, organized crime, civil rights, environmental law violations, narcotics trafficking and major racketeering cases that dismantled the largest, most violent gangs in New York City. Prominent among those cases were the prosecution of those responsible for the bombing of the WTC in 1993; the terrorists who planned to blow up the United Nations, the FBI Building in Manhattan, and the Lincoln and Holland Tunnels; the terrorists who plotted to simultaneously blow up a dozen jumbo jets over the Pacific Ocean; those responsible for the bombings of the US Embassies in Nairobi, Kenya and Tanzania in 1998, including Osama Bin Laden; and the investigation of the terrorist attacks of September 11, 2001 on the WTC and the Pentagon.

Ms. White has received numerous awards and honorary degrees for her professional accomplishments, including the George W. Bush Award for Excellence in Counterterrorism and the Agency Seal Medallion given by the CIA; the Director of the FBI's Jefferson Cup Award for Contributions to the Rule of Law in the Fight Against Terrorism and Crime; the Sandra Day O'Connor Award for Distinction in Public Service; the John P. O'Neill Pillar of Justice Award given by the Respect for Law Alliance; the Edward Weinfeld Award for Distinguished Contributions to the Administration of Justice given by the New York County Lawyers' Association; the "Prosecutor of the Year" Award given by the Respect for Law Alliance; the "Community Leadership Award" given by the Federal Law Enforcement Foundation; the "Law Enforcement Person of the Year" Award given by the Society of Professional Investigators; the "Magnificent 7" Award given by the Business and Professional Women USA; the "Human Relations Award" given by the Anti-Defamation League Lawyer's Division; the "Women of Power and Influence Award" given by the National Organization of Women; the "American Prosecutor's Award" given by St. John's University Criminal Justice Program; the "Medal for Excellence" given by the Columbia University School of Law Association; the "Outstanding Women of the Bar Award" given by the New York County Lawyers' Association; the Milton S. Gould Award for Outstanding Oral Advocacy; the "Law & Society Award" given by the New York Lawyers for the Public Interest; and the "Most Influential Women in the Law Award" given by the Benjamin N. Cardozo School of Law.

From 1983 to 1990, Ms. White was a litigation partner at Debevoise, where she focused on white collar defense work, SEC enforcement matters, and commercial and professional civil litigation. From 1978 to 1981, Ms. White served as an Assistant United States Attorney in the Southern District of New York, where she became Chief Appellate Attorney of the Criminal Division. Prior to that, she worked as an associate at Debevoise from 1976 to 1978. Ms. White served as a law clerk to the Honorable Marvin E. Frankel, US District Court for the Southern District of New York and was admitted to the bar in New York in 1975.

Ms. White graduated from William & Mary, Phi Beta Kappa with a B.A. in Psychology in 1970, The New School for Social Research with an M.A. in Psychology in 1971 and Columbia Law School with a J.D. in 1974, where she was an officer of the Law Review.

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

Feb. 6, 2007

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

LAURIE L. LEVENSON

Professor of Law and William M. Rains Fellow
Director, Center for Ethical Advocacy

Laurie L. Levenson is Professor of Law and William M. Rains Fellow at Loyola Law School where she teaches criminal law, criminal procedure, ethics, anti-terrorism, and evidence. She served as Loyola's Associate Dean for Academic Affairs from 1996-1999. In addition to her teaching responsibilities, Professor Levenson is also the Director of the Loyola Center for Ethical Advocacy. Professor Levenson was the 2003 recipient of Professor of the Year from both Loyola Law School and the Federal Judicial Center.

Prior to joining the Loyola Law School faculty in 1989, Professor Levenson served for eight years as an Assistant United States Attorney in Los Angeles. While a federal prosecutor, Professor Levenson tried a wide variety of federal criminal cases, including violent crimes, narcotics offenses, white collar crimes, immigration and public corruption cases. She served as Chief of the Training Section and Chief of the Criminal Appellate Section of the U.S. Attorney's Office. In 1988, she received the Attorney General's Director's Award for Superior Performance. Additionally, she received commendations from the FBI, IRS, U.S. Postal Service, and DEA.

Professor Levenson attended law school at UCLA School of Law and received her undergraduate degree from Stanford University. In law school, she was the Chief Article Editor of the Law Review. After graduation, she clerked for the Honorable Judge James Hunter, III, of the U.S. Court of Appeals for the Third Circuit.

Professor Levenson is the author of numerous books and articles, including: *California Criminal Procedure* (2003); California Criminal Law (2003), *Handbook on the Federal Rules of Criminal Procedure* (2003); *Roadmap of Criminal Law* (1997); *Police Corruption and New Models for Reform,* 35 Suffolk L. Rev. 1 (2001); *Working Outside the Rules: The Undefined Responsibilities of Federal Prosecutors* (1999); *Ethics of Being a Legal Commentator,* 69 So. Cal. L. Rev. 1303 (1996); *Good Faith Defenses: Reshaping Strict Liability Crimes,* 78 Cornell L. Rev. 401 (1993); *Change of Venue and the Role of the Criminal Jury,* 66 So. Cal. L. Rev. 1533 (1993); *The Future of Civil Rights Prosecutions: The Lessons of the Rodney King Trial,* 41 U.C.L.A. L. Rev. 509 (1994); and *Media Madness or Civics 101: The Lessons of "The Trial of the Century,"* 26 U.W.L.A. 57 (1995).

Professor Levenson has served as a volunteer counsel for the "Webster Commission" and as a Special Master for the Los Angeles Superior Court and United States District Court. She has served as a member of the Los Angeles County Bar Association Judicial Appointments Committee and Judiciary Committee.

Professor Levenson lectures regularly throughout the country and internationally for the Federal Judicial Center, National Judicial College, international bar associations, bar review courses, community groups and legal societies.

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

UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY

February 6, 2007

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Appointment of United States Attorneys is Properly a Political Function

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

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

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

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

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

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

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

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

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

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

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

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

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

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

S. 214 Could Have Unintended and Unacceptable Consequences

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

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

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

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

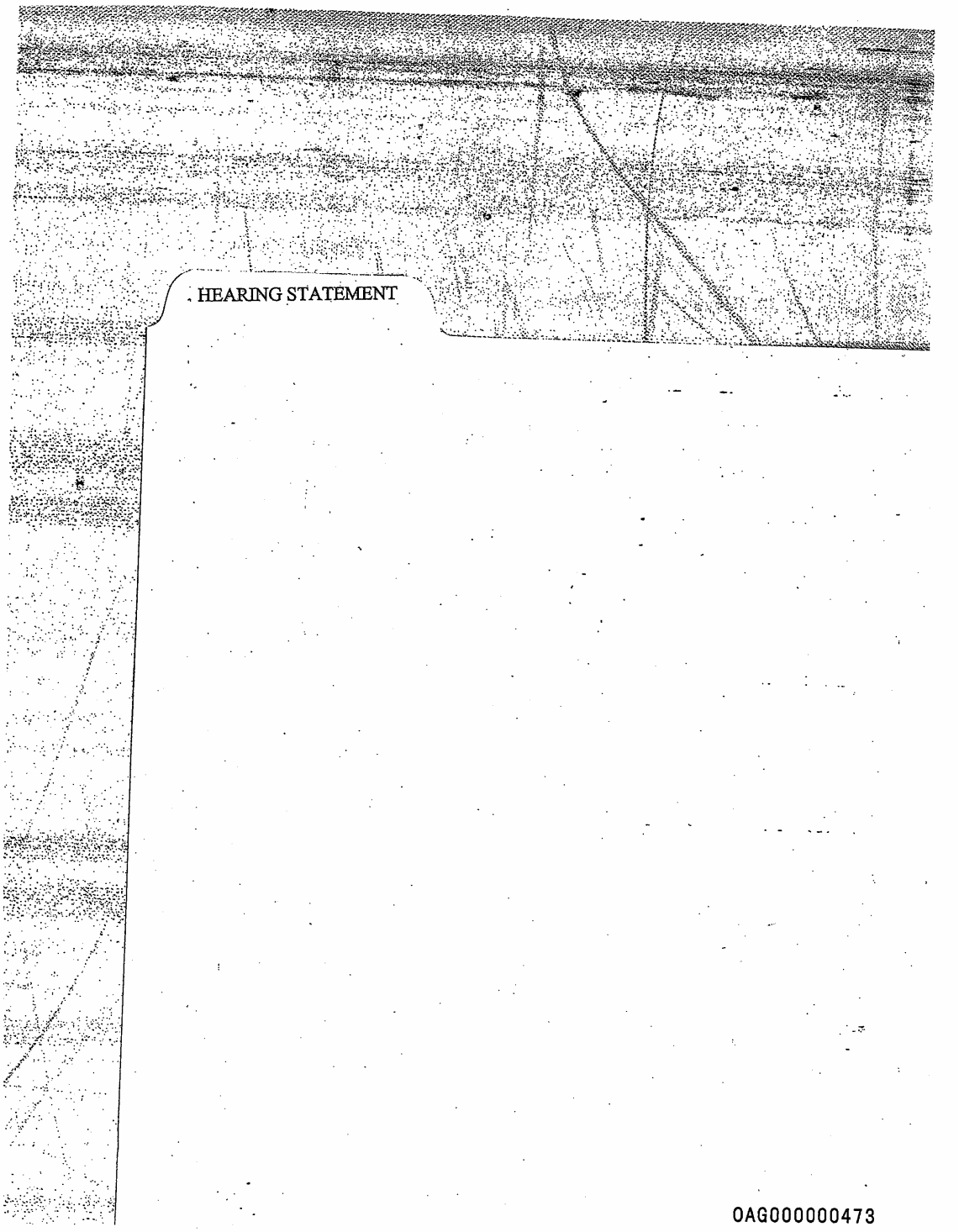
Conclusion

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

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

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

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


HEARING STATEMENT

Department of Justice

STATEMENT

OF

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

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

CONCERNING

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

PRESENTED ON

FEBRUARY 6, 2007

Testimony
of

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

Committee on the Judiciary
United States Senate

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

February 6, 2007

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

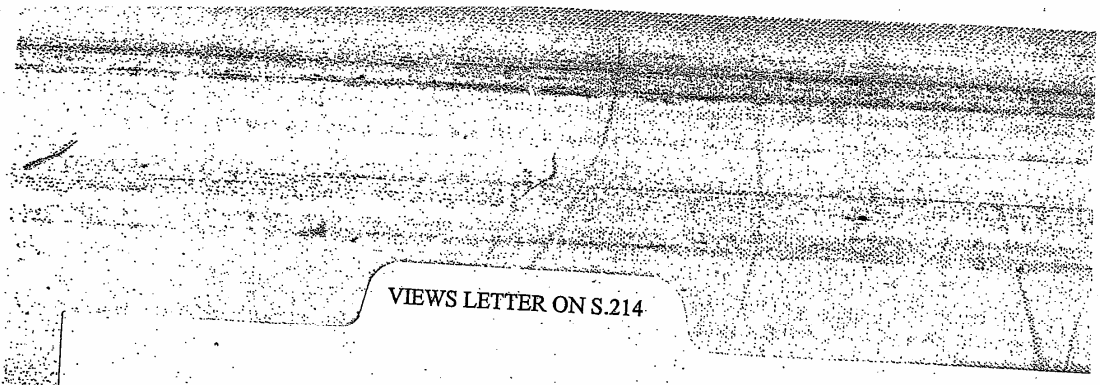
In most cases, of course, the district court simply appointed the Attorney General's choice as interim U.S. Attorney, revealing the fact that most judges recognized the importance of appointing an interim U.S. Attorney who enjoys the confidence of the Attorney General. In other words, the most important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

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

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

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

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


VIEWS LETTER ON S.214

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.

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.

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.

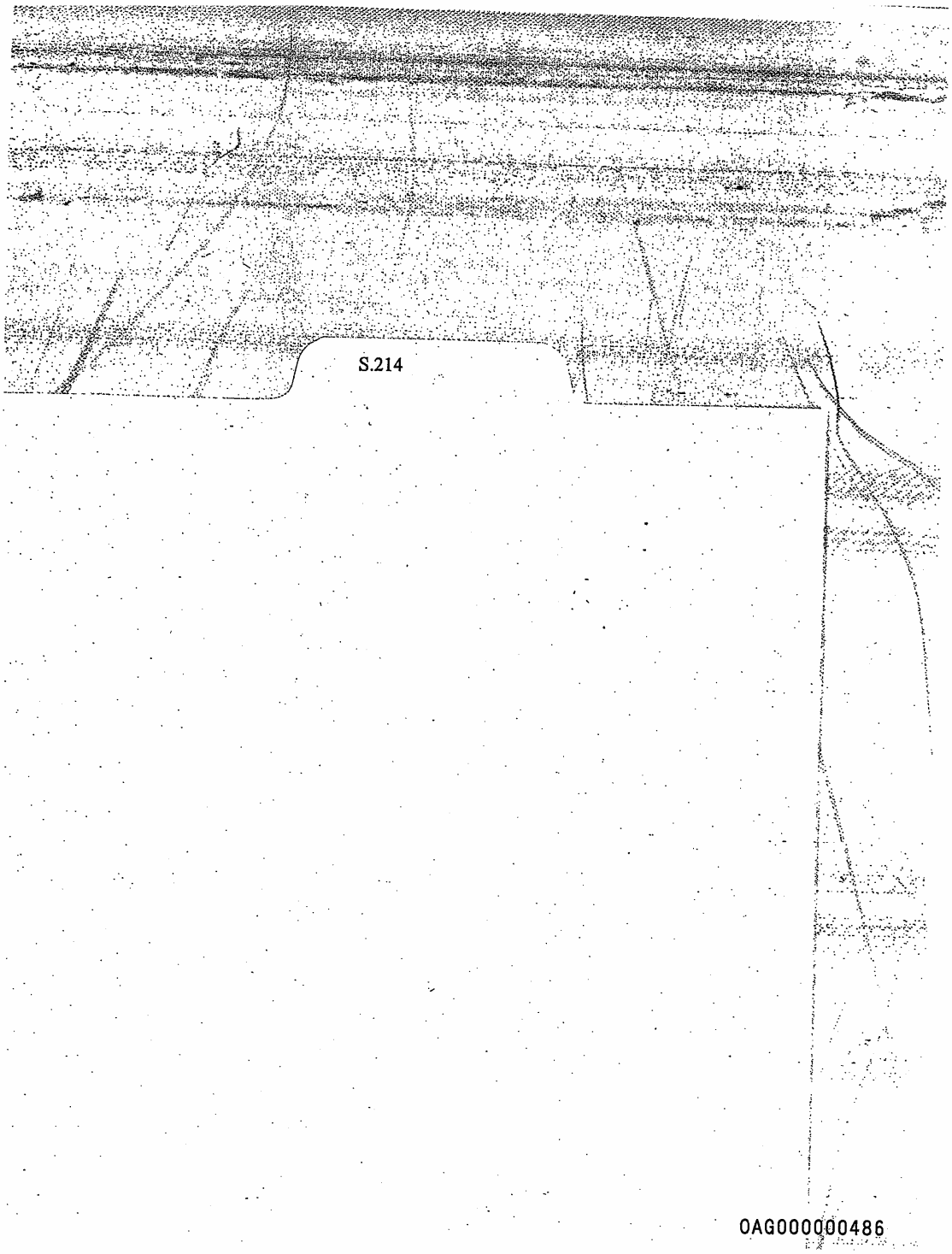
Sincerely,

Richard A. Hertling

Richard A. Hertling
Acting Assistant Attorney General

cc: The Honorable Arlen Specter
Ranking Minority Member

The Honorable John Cornyn


S.214

II

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

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A BILL

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

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

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

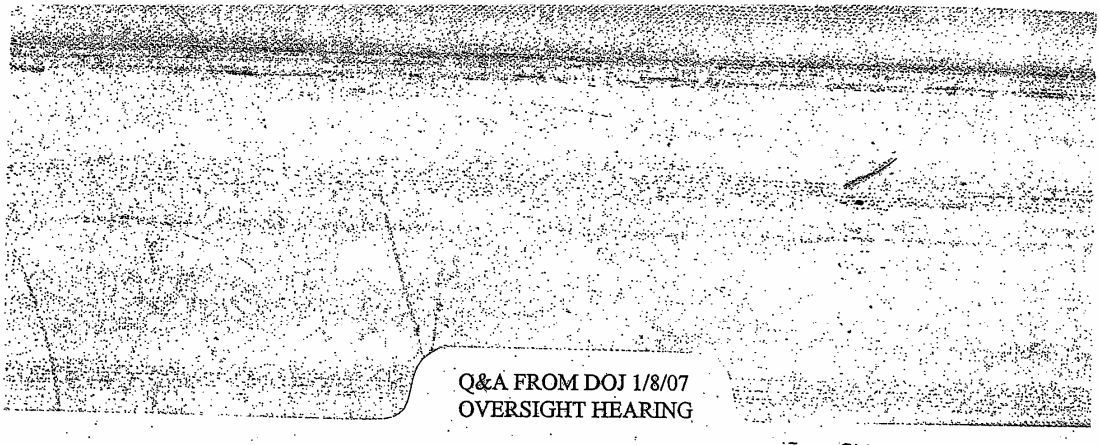
SEC. 2. VACANCIES.

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

"§ 546. Vacancies

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

O


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

FEINSTEIN:

Thank you.

You and I talked on Tuesday about what's happening with U.S. attorneys. And it spurred me to do a little research. And let me begin. Title 28, Section 541 states: "Each United States attorney shall be appointed for a term of four years. On the expiration of his term, a United States attorney shall continue to perform the duties of his office until his successor is appointed and qualified."

Now, I understand that there is a pleasure aspect to it. But I also understand what practice has been in the past.

We have 13 vacancies. Yesterday, you sent up two nominees for the 13 existing vacancies.

GONZALES:

We've now nominated, I think -- there have been 11 vacancies created since the law was changed; 11 vacancies in U.S. Attorneys' Offices. The president has now nominated as to six of those. As to the remaining five, we're in discussions with home-state senators.

And so let me publicly sort of preempt perhaps a question you're going to ask me, and that is: I am fully committed, as the administration's fully committed, to ensure that, with respect to every United States attorney position in this country, we will have a presidentially appointed, Senate-confirmed United States attorney.

GONZALES:

I think a United States attorney who I view as the leader, law enforcement leader, my representative in the community -- I think he has greater imprimatur of authority, if in fact that person's been confirmed by the Senate.

FEINSTEIN:

Now, let me get at where I'm going. How many United States attorneys have been asked to resign in the past year?

GONZALES:

Senator, you know, you're asking me to get into a public discussion about personnel...

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:

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:

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:

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 recanvassed, 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:

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

Thank you.

CORNYN:

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.

CORNYN:

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.

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.

CORNYN:

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 ti reflects the policy decision, the will of the Congress, yes.

CORNYN:

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.

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:

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.

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.

SESSIONS:
You're exactly right.

WHITEHOUSE:

(OFF-MIKE)

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

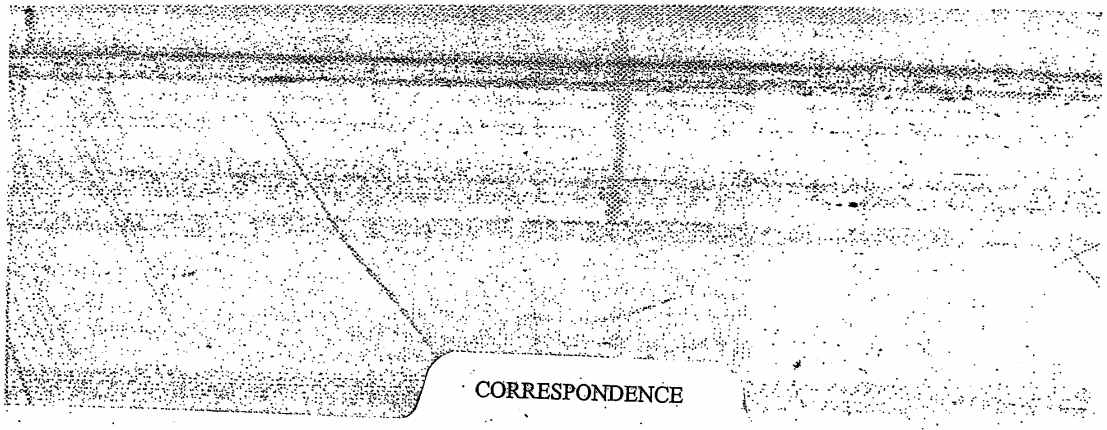
I'd like to start with an observation in response to the colloquy between you and Senator Feinstein. As a former United States attorney and somebody who as U.S. attorney had very active investigations into public corruption in Rhode Island, I share a bit the concern of the removal of U.S. attorneys under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



U.S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

January 31, 2007

The Honorable Mark Pryor
United States Senate
257 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Senator Pryor:

This is in response to your letter to the Attorney General dated January 11, 2007, regarding the Attorney General's appointment of J. Timothy Griffin to serve as interim United States Attorney for the Eastern District of Arkansas.

As the Attorney General informed you in his telephone conversations with you on December 13, 2006, and December 15, 2006, Mr. Griffin was chosen for appointment to serve as interim United States Attorney because of his excellent qualifications. To be clear, Mr. Griffin was not chosen because the First Assistant United States Attorney was on maternity leave and therefore was not able to serve as your letter states. As you know, Mr. Griffin has federal prosecution experience both in the Eastern District of Arkansas and in the Criminal Division in Washington, D.C. During his service in the Eastern District of Arkansas, Mr. Griffin established that district's successful Project Safe Neighborhoods initiative to reduce firearms-related violence. In addition, Mr. Griffin has served for more than a decade in the U.S. Army Reserve, Judge Advocate General's Corps, for whom he has prosecuted more than 40 criminal cases, including cases of national significance. Mr. Griffin's military experience includes recent service in Iraq, for which he was awarded the Combat Action Badge and the Army Commendation Medal. Importantly, Mr. Griffin is a "real Arkansan" with genuine ties to the community. Based on these qualifications, Mr. Griffin was selected to serve as interim United States Attorney.

As the Attorney General also has stated to you, the Administration is committed to having a Senate-confirmed United States Attorney for all 94 federal districts. At no time has the Administration sought to avoid the Senate confirmation process by appointing an interim United States Attorney and then refusing to move forward, in consultation with home-State Senators, on the selection, nomination and confirmation of a new United States Attorney. Not once.

The Eastern District of Arkansas is not different. As the Attorney General stated to you again two weeks ago, in a telephone conversation on January 17, 2007, the Administration is committed to having a Senate-confirmed United States Attorney in that district too. That is why the Administration has consulted with you and Senator Lincoln for several months now regarding possible candidates for nomination, including Mr. Griffin. That is why the Attorney General has sought your views as to whether, if nominated, you would support Mr. Griffin's confirmation. The Administration awaits your decision.

If you decide that you would support Mr. Griffin's confirmation, then the President's senior advisors (after taking into account Senator Lincoln's views) likely would recommend that the President nominate him. With your support, Mr. Griffin almost certainly would be confirmed and appointed. We are convinced that, given his strong record as a federal prosecutor and as a military prosecutor, Mr. Griffin would serve ably as a Senate-confirmed United States Attorney. If, in contrast, you decide that for whatever reason you will not support Mr. Griffin's confirmation, then the Administration looks forward to considering any alternative candidates for nomination that you might put forward. In any event, your views (and the views of Senator Lincoln) will be given substantial weight in determining what recommendation to make to the President regarding who is nominated.

Last year's amendment to the Attorney General's appointment authority was necessary and appropriate. Prior to the amendment, the Attorney General could appoint an interim United States Attorney for only 120 days; thereafter, the district court was authorized to appoint an interim United States Attorney. In cases where a Senate-confirmed United States Attorney could not be appointed within 120 days, the limitation on the Attorney General's appointment authority resulted in numerous, 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 United States Attorney who would then have many matters before the court – refused to exercise the court appointment authority, thereby requiring the Attorney General to make successive, 120-day appointments. In contrast, other district courts – ignoring the oddity and the inherent conflicts – sought to appoint as interim United States Attorney wholly unacceptable candidates who did not have the appropriate experience or the necessary clearances. Contrary to your letter, nothing in the text or history of the statute even suggests that the Attorney General should articulate a national security or law enforcement need for making an interim appointment. Because the Administration is committed to having a Senate-confirmed United States Attorney for all 94 federal districts, changing the law to restore the limitations on the Attorney General's appointment authority is unnecessary.

Enclosed is information regarding the exercise of the Attorney General's authority to appoint interim United States Attorneys. As you will see, the enclosed information establishes conclusively that the Administration is committed to having a Senate-confirmed United States Attorney in all 94 federal districts. Indeed, every single time

that a United States Attorney vacancy has arisen, the President either has made a nomination or – as with the Eastern District of Arkansas – the Administration is working, in consultation with home-State Senators, to select a candidate for nomination. Such nominations are, of course, subject to Senate confirmation.

Sincerely,

Richard A. Hertling

Richard A. Hertling
Acting Assistant Attorney General

cc: The Honorable Blanche L. Lincoln

Enclosure