

you put your relations, everything on the line to come in and be a witness. If somebody in Arkansas were a witness to Republican political corruption, do you think it would have any affect on their willingness to come forward to have the new U.S. attorney be somebody who assisted Karl Rove and worked for the Republican National Committee? Do you think it would give any reasonable hesitation or cause for concern on their part that maybe they should keep this one to themselves until the air cleared?

MR. MCNULTY: Well, again, U.S. attorneys over a period of long history have had political backgrounds, and yet they've still been successful in doing public corruption cases. I think it says a lot about what U.S. attorneys do when they get into office.

One thing, Senator, as you know as well as I do, public corruption cases are handled by career agents and career assistant United States attorneys. U.S. attorneys play an important role, but there is a team that's involved in these cases. And that's a nice check on one person's opportunity to perhaps do something that might not be in the best interest of the case.

So my experience is that the political backgrounds of people create unpredictable situations. We've had plenty of Republicans prosecute Republicans in this administration, and we've had Democrats prosecute Democrats. Because once you put that hat on to be the chief prosecutor in the district, it transforms the way you look at the world. It certainly --

SEN. WHITEHOUSE: We hope.

MR. MCNULTY: -- yes.

SEN. SCHUMER: Senator --

SEN. WHITEHOUSE: Mr. Chairman, is it clear that we will be receiving the EARS evaluations for these individuals?

SEN. SCHUMER: We will get them one way or another, yes. SEN. WHITEHOUSE: Thank you.

SEN. SCHUMER: Senator Hatch.

SEN. HATCH: Well, first of all, Mr. McNulty, thanks for your testimony. I also concur with the chairman that you're a great guy and you've served this country very, very well in a variety of positions --

MR. MCNULTY: Thank you, Senator.

SEN. HATCH: -- and we all have great respect for you, having served up here in the Congress.

Are these really called "firings" down at the Department of Justice?

MR. MCNULTY: No.

SEN. HATCH: Were the people removed?

MR. MCNULTY: The terminology that's been assigned to these -- firings, purges and so forth -- it's, I think, unfair.

Certainly the effort was made to encourage and --

SEN. HATCH: Well, basically, my point is, they're not being fired. You're replacing them with other people who may have the opportunity as well.

MR. MCNULTY: Correct. And Senator, one other thing I wanted to say to Senator Whitehouse --

SEN. HATCH: And that's been done by both -- by Democrats and Republican administrations, right?

MR. MCNULTY: Absolutely.

SEN. HATCH: Is this the only administration that has replaced close to 50 percent of the U.S. attorneys in its six years in office?

MR. MCNULTY: I haven't done an analysis of the --

SEN. HATCH: But others have as well, haven't they?

MR. MCNULTY: Well, it's a routine thing to see U.S. attorneys come and go, as I said. And --

SEN. HATCH: Well, I pointed out at the beginning of this that President Clinton came in and requested the resignation of all 93 U.S. attorneys. Are you aware of that? MR. MCNULTY: Yes, I am. I was, in fact --

SEN. HATCH: I didn't find any fault with that. That was his right.

MR. MCNULTY: Right.

SEN. HATCH: Because they serve at the pleasure of the president, right?

MR. MCNULTY: Right.

SEN. HATCH: Well, does the president always -- or does the department always have to have a reason for replacing a U.S. attorney?

MR. MCNULTY: They don't have to have cause. I think in responding to Senator Schumer's question earlier --

SEN. HATCH: They don't even have to have a reason. If they want to replace them, they have a right to do so. Is that right or is that wrong?

MR. MCNULTY: They do not have to have one, no.

SEN. HATCH: Well, that's my point. In other words, to try and imply that there's something wrong here because certain U.S. attorneys have been replaced is wrong, unless you can show that there's been some real impropriety. If there's real impropriety, I'd be the first to want to correct it.

Let me just ask you this: the primary reason given for last year's amendment of 28 USC 546 was the recurring -- happened to be from the recurring problems that resulted from the 120-day limitation on attorney general appointments. Now, can you explain some of these programs and address the

concerns of the district courts that recognize the conflict in appointing an interim U.S. attorney?

MR. MCNULTY: Senator, just prior to that change being made -- as Senator Specter set forth in his opening statement -- we had a serious situation arise in South Dakota. And that situation illustrates what can happen when you have two authorities seeking to appoint a U.S. attorney. In that case in South Dakota, the Public Defenders Officer actually challenged an indictment brought by the interim U.S. attorney, claiming that he didn't have the authority to indict someone because the judge there had appointed someone else to be the U.S. attorney at about the same time.

The individual that the judge appointed was somebody outside the Department of Justice, hadn't gone through a background check. We couldn't even communicate with that individual on classified information until a background check would have been done. And so it was a rather serious problem that we faced and lasted for a month or more. There have been other problems like that over the history of the department where someone comes in, perhaps, and has access to public corruption information who's completely outside of the Department of Justice --

SEN. HATCH: Would you be willing to make a list of these types of problems?

MR. MCNULTY: Well, we've been asked to do that in the questions that were submitted for the record --

SEN. HATCH: Okay. I figured that. So if you'll get that list to us so that we understand that these are not simple matters. And that, you know, in your testimony you mentioned with great emphasis that the administration has at no time sought to avoid the Senate confirmation process by appointing an interim United States attorney, and then refuse to move forward in consultation with home-state senators on the selection, nomination and confirmation of a new United States attorney.

Can you explain the role of the home-state senator in this process, and confirm that it has been done for the vacancies that have arisen since this law was amended?

MR. MCNULTY: Thank you, Senator.

We've had 15 nominations made since the law was amended. All 15 of those nominations could have been held back if we wanted to abuse this authority and just go ahead and put interims in. We've had 13 vacancies. All told, there have been about 23 situations where a nomination is necessary to go forward. Fifteen nominations have gone forward, and the eight where they haven't, we're currently in the process of consulting with the home-state senators to send someone here.

And one thing, Senator, I have to say -- because Senator Whitehouse referred to it -- in the case of individuals who were called and asked to resign, not one situation have we had an interim yet appointed who is -- falls into some category of a Washington person or an insider or something. The -- in the cases where an interim has been appointed in those most recent situations, they've both been career persons from the office who are the interims, and we are working with the home-state senators to identify the nominee who will be sent to this committee for confirmation.

SEN. HATCH: Thank you, Mr. Chairman.

SEN. SCHUMER: Senator Feinstein.

SEN. DIANNE FEINSTEIN (D-CA): Thank you very much, Mr. Chairman, and thank you for holding these hearings.

Mr. McNulty, I believe it was in the 2006 reauthorization of the Patriot Act when this amendment was slipped into the law, too. And it was slipped into the law in a way that I do not believe anyone on this committee knew that it was in the law. At least to my knowledge, no one has come forward and said, "Yes, we discussed this. I knew it was in the law." No Republican, no Democrat. I'd like to ask this question. Did you or any Justice staff make a series of phone calls in December to at least six United States attorneys telling them they were to resign in January?

MR. MCNULTY: I think I can say yes to that because I don't want to be -- talk about specific numbers. But phone calls were made in December asking U.S. attorneys to resign. That's correct.

SEN. FEINSTEIN: And how many U.S. attorneys were asked to resign?

MR. MCNULTY: Because of the privacy of individuals, I'll say less than 10.

SEN. FEINSTEIN: Okay, less than 10. And who were they?

MR. MCNULTY: Senator, I would, following the Attorney General's response to this question at his committee, in a public setting, I don't want to mention the names of individuals -- not all names have necessarily been stated, or if they have, they've not been confirmed by the department of Justice. And information like that can be provided to the committee in a private setting. But in the public setting, I wish to not mention specific names.

SEN. FEINSTEIN: And in a private session, you would be willing to give us the names of the people that were called in December?

MR. MCNULTY: Yes.

SEN. FEINSTEIN: Thank you very much.

Mr. Chairman, I think just by way of -- my own view is that the Patriot Act should not have been amended to change, and I know Senator Specter felt -- I know Senator Specter feels that we should simply return the language to the way it was prior to the reauthorization in 2006. And I am agreeable to this. So I think we have found a solution that, in essence, would give the United States attorney an opportunity to make a truly temporary appointment for a limited period of time, after which point if there -- no nominee has come up for confirmation or been confirmed, it would go to a judge. And I believe that -- we'll mark that up tomorrow and hopefully that would settle the matter.

In my heart of hearts, Mr. McNulty, I do believe -- I could not prove in a court of law -- but I do believe, based on what I was -- heard, is there was an effort made to essentially put in interim U.S. attorneys to give, as one person has said, bright young people of our party to put them in a position where they might be able to shine. That, in itself, I don't have an objection

to; I think you're entitled to do that. But I think to use the U.S. attorney spot for this is not the right things to do, and that's why I think we need to put the law back the way it is.

Let me just ask just one --

MR. MCNULTY: Senator, may I respond real briefly?

SEN. FEINSTEIN: Sure, sure.

MR. MCNULTY: And I respect your position on that. But I don't want it -- to just want to make it clear that that premise has to be looked at in light of the process we go through to select the new U.S. attorneys because if that were the case, that we were doing this just to give a sort of a group that had been pre-identified or something an opportunity to serve, it would not square with the process that exists in virtually every state in one way or another to work with the home-state senators to come up with the list of names of individuals.

In California, for example -- you know well because you've led the way -- in which the system we've set up to identify qualified people, and that's been a bipartisan process. It's worked very well. It's -- we respect that process. We will follow that process for vacancies that occur in California. So there won't be any way -- any effort to try to force certain individuals into these positions since we go through a pre-established nomination, identification and then confirmation process.

SEN. FEINSTEIN: I appreciate that.

Could I ask a question? There -- one last question? There are currently 13 vacancies, and this number does not include the recent additional seven vacancies like the ones in my state that have developed. Now there are only two nominees pending before the United States Senate at this time. When do you intend to have the other nominees sent to us?

MR. MCNULTY: I think we're higher than two out of the current vacancies that you know of. Well --

SEN. FEINSTEIN: No.

MR. MCNULTY: Okay, I will -- I'll defer to your numbers on it.

MR. : (Off mike.)

What's that? (Off mike.) Two is right, sorry. We will make every effort possible to identify nominees to submit for your consideration here in the committee. Sometimes the process takes a little longer because there is something going on in this home state for a selection process. We move quickly when we receive names to have interviews. So we don't -- the process doesn't get delayed there. But it is a complicated process to develop a final list in consultation and get them up here. But we're committed to doing that as quickly as possible for every vacancy we have.

SEN. SCHUMER: Thank you.

Senator Specter wanted to say a brief word before Senator Feinstein left, and then we'll go to Senator Sessions.

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SEN. SPECTER: Well, I just wanted to comment to Senator Feinstein that I thank her for her work on this issue. I had said before you arrived in my opening statement that I did not know of the change in the Patriot Act until you called it to my attention on the floor. And I said to you at that time, "This is news to me, but I'll check it out." And then checked it out with Mike O'Neill (sp), who advised that Brett Tolman (ph), a senior staff member, had gotten the request from the department of Justice because of a situation in South Dakota where a judge made an appointment which was not in accordance with the statute. And there -- got an issue arising with other courts questioning the separation of powers. But when you and I have discussed it further and -- continuously, including yesterday, we came to the conclusion that we would send it back to the former statute, which I think will accommodate the purpose of this.

SEN. FEINSTEIN: Thank you very much. Thank you. SEN. SCHUMER:
Senator Sessions.

SEN. JEFF SESSIONS (R-AL): Thank you.

And Senator Feinstein, I am troubled by the mushiness of our separation of powers and the constitutional concepts of executive branch and confirmation in your proposal. I think it goes too far. I think the administration's -- the proposal that passed last time may need some reform. I would be inclined to suggest, Mr. Chairman, that the reform needed may be to some sort of expedited or ensured confirmation -- submission and confirmation by the Senate rather than having the executive branch, which constitutionally has not been ever considered a part of this process, to be appointing U.S. attorneys. But whatever.

You know, I don't know how I got to be United States attorney. I see Senator Whitehouse. Maybe they thought he would be a bright young star one day if they appointed him United States attorney. I recall Rudy Giuliani -- there was a dispute over his successor when he was United States attorney in Manhattan, and he said he thought it would be nice if he ever were appointed -- was able to contribute to the discussion every now and then. We do have U.S. attorneys to preside over a lot of important discussions, and they generally put their name on the indictments of important cases -- at least they're responsible whether they sign the indictment or not -- so it's a very significant position, and it's difficult sometimes to anticipate who would be good at it and who would not. Some people without much experience do pretty well. Some with experience don't do very well at all.

We had a situation in Alabama that wasn't going very well, and Department of Justice recently made a change in the office and was reported as being for performance reasons. You filled the interim appointment with now Assistant United -- U.S. Attorney Debra Rhodes, a professional from San Diego -- professional prosecutor who'd been in the Department of Justice. She was sent in to bring the office together -- did a good job of it. Senator Shelby and I recommended she be made -- be a permanent United States attorney and we did that.

My personal view is that the Department of Justice is far too reticent in removing United States attorneys that do not perform. United States attorneys

are part of the executive branch. They have very important responsibilities. I recall seeing an article recently about wonderful Secretary of Labor Elaine Chao -- she's the last member of the Cabinet standing was part of the article. I mean, Cabinet members turn over. They're appointed and confirmed by the Senate at the pleasure of the president, and I think the Department of Justice has a responsibility of your 92 United States attorneys to see that they perform to high standards, and if they do not so perform, to move them.

I don't see anything wrong with taking -- giving an opportunity to somebody who's got a lot of drive and energy and ability, and letting them be a United States attorney and seeing how they perform. But they ought to have certain basic skills in my view that indicate they're going to be successful at it, and otherwise you as the president gets judged on ineffectual appointments and failing to be effective in law enforcement and related issues. I just wanted to say that.

Seven out of 92 to be asked to step down is not that big a deal to me. I knew when I took the job that I was subject to being removed at any time without cause, just like a secretary of State who doesn't have the confidence of the president, or the secretary of Transportation. If somebody had called and said, "Jeff, we'd like you gone," you say, "Yes, sir," and move on I think than be whining about it. You took the job with full knowledge of what it's all about.

With regard to one of -- I know you don't want to comment about these individual United States attorneys and what complaints or performance problems or personal problems or morale problems within the office may have existed. I would just note that one has been fairly public, and Carol Lamb has been subject to quite a number of complaints. Have you received complaints from members of Congress about the performance of United States Attorney Carol Lamb in San Diego on the California border?

MR. MCNULTY: Well, we've received letters from members of Congress. I don't want to go into the substance of them although the members can speak for them. But I -- again, I want to be very careful about what I say concerning any particular person.

SEN. SESSIONS: Well, on July 30th, 14 House members expressed concerns with the Department of Justice current policy of not prosecuting alien smugglers -- I don't mean people that come across the border -- I mean those who smuggle groups of them across the border -- specifically mentioning that Lamb's office to -- had declined to prosecute one key smuggler. Are you familiar with that -- June 30th, 2004?

MR. MCNULTY: I'm familiar with the letter.

SEN. SESSIONS: On September 30th -- 23rd, 2004, 19 House members described the need for the prosecution of illegal alien smugglers -- these are coyotes -- in the border U.S. Attorney offices, and they specifically mentioned the United States attorney in San Diego. Quote -- this is what they said -- quote, "Illustrating the problem, the United States Attorney's office in San

Diego stated that it is forced to limit prosecution to only the worst coyote offenders, leaving countless bad actors to go free," closed quote. Isn't that a letter you received that said that?

MR. MCNULTY: I'm familiar with the letter.

SEN. SESSIONS: On October 13th of 2005, Congressman Darryl Issa wrote to U.S. Attorney Lamb complaining about her, saying this: "Your office has established an appalling record of refusal to prosecute even the worst criminal alien offenders," closed quote. And then on October 20th, '05, 19 House members wrote, quote -- to the Attorney General Gonzalez, to express their frustration, saying, quote, "The U.S. attorney in San Diego has stated that the office will not prosecute a criminal alien unless they have previously been convicted of two felonies in the District -- two felonies in the District," closed quote, before they would even prosecute, and do you see a concern there? Is that something that the attorney general and the president has to consider when they decide who their U.S. attorneys are?

MR. MCNULTY: Well, anytime the members of Congress, senators, House members, write letters to us we take them seriously and would give them the consideration that's appropriate.

SEN. SCHUMER: Thank you, Mr. McNulty. We'll have a second round if you want to pursue with Senator Sessions. Okay. I'm going to go into my second round, and I want to go back to Bud Cummins. First, Bud Cummings has said that he was told he had done nothing wrong and he was simply being asked to resign to let someone else have the job. Does he have it right?

MR. MCNULTY: I accept that as being accurate as best I know the facts.

SEN. SCHUMER: Okay. So in other words, Bud Cummins was fired for no reason. There was no cause --

MR. MCNULTY: No cause provided in his case as I'm aware of.

SEN. SCHUMER: None at all. And was there anything materially negative in his evaluations? In his EARS reports or anything like that? From the reports that everyone has received, he had done an outstanding job -- had gotten good evaluations. Do you believe that to be true?

MR. MCNULTY: I don't know of anything that's negative, and I haven't seen his reports or one that -- probably only one that was done during his tenure but I haven't seen it. But I'm not aware of anything that --

SEN. SCHUMER: Would you be willing to submit those reports to us even if we wouldn't make them public?

MR. MCNULTY: Right. Well, other than -- I just want to fall short of making a firm promise right now, but we know that you're interested in them and we want to work with you to see how we can accommodate your needs.

SEN. SCHUMER: So your inclination is to do it but you don't want to give a commitment right here?

MR. MCNULTY: Correct.

SEN. SCHUMER: Okay. I will -- as I said in my opening statement, if we can't get them I will certainly discuss with the chairman my view that we should subpoena them if we can't get them. This is serious matter. I don't think they should be subpoenaed. I think we should get them -- certainly a report like this which is a positive evaluation. Your reasoning there, at least as far as Cummings is concerned -- obviously you can make imputations if others are not released -- wouldn't hurt his reputation in any way.

MR. MCNULTY: I'd just say, Mr. Chairman, if you get a report, see a report, and it doesn't show something that you believe is cause, to me that's not an a-ha moment, because as I say right up front, those reports are written by peers --

SEN. SCHUMER: Understood. MR. MCNULTY: -- and they may or may not contain (cross talk) --

SEN. SCHUMER: But you did say earlier -- and this is the first we've heard of this -- that he was not fired for a particular reason -- that when he said he was being fired simply to let someone else have a shot at the job, that's accurate as best you can tell.

MR. MCNULTY: I'm not disputing that characterization.

SEN. SCHUMER: Okay. That's important to know. Now -- so then we go on to the replacement for Mr. Cummins. And again, as Senator Feinstein and others have said, there are all kinds of reasons people are chosen to be U.S. attorneys. But I first want to ask about this. Senator Pryor talked about allegations -- I think they were in the press he mentioned -- about his successor, Mr. Griffin, quote, "Being involved in caging black votes," unquote.

First, if there were such an involvement, if he did do that at some point in his job -- in one of his previous jobs -- do you think that could be -- that should be a disqualifier for him being U.S. attorney in a state like Arkansas, where there are obviously civil rights suits?

MR. MCNULTY: I think any allegation or issue that's raised against somebody has to be carefully examined, and it goes into the thinking as to whether or not that person is the best candidate for the job.

SEN. SCHUMER: Was Mr. Griffin given a thorough, thorough review before he was asked to do this job? And are you aware of anything that said he was involved in, quote, "caging black votes"?

MR. MCNULTY: First of all, in terms of the kind of review, there are different levels of review, depending upon what a person's going to be doing. If you're an interim, you're already, by definition, in the Department of Justice in one way or another, either in the office or in the criminal division or some other place. You already have a background check; you're already serving the American people at the Department of Justice. And so you may -- at that point, that has been sufficient, historically, to serve as an interim.

Then there's a background check for purposes of nomination. That brings in more information.

SEN. SCHUMER: Yup.

MR. MCNULTY: We look at the background check carefully and decide, based upon that, whether or not it's appropriate to recommend to the president to nominate somebody.

SEN. SCHUMER: So I have two questions. Would such a background check have come up with the fact that he was involved in, quote, "caging black votes," if that were the fact?

MR. MCNULTY: Presumably -- I'm not an expert on how the background check process works entirely, but I think they go out and look at press clippings and other things. They might -- they go interview people. Maybe something comes up that relates to a person's activities; I'm pretty sure things come up relating to a person's activities apart from what they've done in the office.

SEN. SCHUMER: But let me get -- if he was involved in such -- such an activity, would it be your view, would you recommend to the attorney general that Mr. Griffin not become the U.S. attorney for Arkansas, if he were involved? And that's a big assumption, I admit. It's just something that Senator Pryor mentioned -- I think that was mentioned in a newspaper article.

MR. MCNULTY: And I don't want to sound like I'm quibbling. It's just that all I know here is that we have an article. Even Senator Pryor said that the explanation given was very different from what the article was.

SEN. SCHUMER: Mm-hm.

MR. MCNULTY: I don't know anything about it personally --

SEN. SCHUMER: Right.

MR. MCNULTY: -- and so I'm -- I don't want to say that if I knew some article was true that that would. I'd have to know more about what that -

SEN. SCHUMER: I didn't ask about the article, if he was doing something that would prevent black people from voting --

MR. MCNULTY: Oh, of course. Well, if that's what it comes down to after all the facts are in --

SEN. SCHUMER: Even if that was a legal political activity?

MR. MCNULTY: That sounds like a very significant problem.

SEN. SCHUMER: Okay. All right. Now, second, I just want to get to this one, too, in Senator Pryor's testimony. Again, there were allegations that the first assistant was passed over because of maternity leave. I believe she said that?

MR. MCNULTY: (No audible response.)

SEN. SCHUMER: Okay. Do you dispute that?

MR. MCNULTY: No, it's just that in my briefings on what occurred, there is definitely some factual difference as to whether or not that really was a factor or not. It shouldn't be a factor and, therefore, I've been told --

SEN. SCHUMER: What if it was? What if it was a factor?

MR. MCNULTY: I'm sorry?

SEN. SCHUMER: What if it was a factor? I mean, she said it. She's a person of a degree of integrity. She was the first assistant in an important office --

MR. MCNULTY: Right, but -- SEN. SCHUMER: -- and she's saying she was told she was passed over because of maternity leave. I'd have to check with my legal eagles, but that might actually be prohibited under federal law.

MR. MCNULTY: I don't know, but --

SEN. SCHUMER: I think that's probably true.

MR. MCNULTY: It should not be a factor in consideration of whether or not she would serve as the interim. And so I don't -- but I don't know if that is accurate.

SEN. SCHUMER: Can you, again, if you choose to -- I don't see any reason to do this in private, because this doesn't -- the reason you gave of not wanting to mention the EARS reports or others is you don't want to do any harm to the people who were removed. But would you be willing to come back to us and give us an evaluation as to whether that remark was, that that comment was true and whether she was fired because of -- passed over because of maternity leave? Could you come back to the committee and report to that?

MR. MCNULTY: Yes, I mean -- at this point I can say, to the best of my knowledge, that is not the case. In fact, Mr. Griffin was identified as the person who would become the interim and possibly become the nominee before the knowledge of her circumstances was even known.

SEN. SCHUMER: Okay. Again, I would ask that you come back and give us a report in writing as to why what she is saying is not true or is a misinterpretation, okay?

MR. MCNULTY: Okay.

SEN. SCHUMER: All right, now let me ask you this. You admitted, and I'm glad you did, that Bud Cummins was fired for no reason. Were any of the other six U.S. attorneys who were asked to step down fired for no reason as well?

MR. MCNULTY: As the attorney general said at the - his oversight hearing last month, the phone calls that were made back in December were performance-related.

SEN. SCHUMER: Mm-hm. All the others?

MR. MCNULTY: Yes.

SEN. SCHUMER: But Bud Cummins was not one of those calls, because he had been notified earlier.

MR. MCNULTY: Right. He was notified in June of -

SEN. SCHUMER: Okay, so there was a reason to remove all the other six? MR. MCNULTY: Correct.

SEN. SCHUMER: Okay. Let me ask you this. I want to go back to Bud Cummins here. So here we have the attorney general adamant; here's his quote, "We would never, ever make a change in the U.S. attorney position for political reasons." Then we have now -- for the first time, we learn that Bud Cummins was asked to leave for no reason and we're putting in someone who has all kinds of political connections -- not disqualifiers, obviously, certainly not legally -- and I'm sure it's been done by other administrations as well. But do you believe that firing a well-performing U.S. attorney to make way for a political operative is not a political reason?

MR. MCNULTY: Yes, I believe that's it's not a political reason.

SEN. SCHUMER: Okay, could you try to explain yourself there?

MR. MCNULTY: I'll do my best. I think that the fact that he had political activities in his background does not speak to the question of his qualifications for being the United States attorney in that district. I think an honest look at his resume shows that while it may not be the thickest when it comes to prosecution experience, it's not insignificant either. He had been assistant United States attorney in that district to set up their Project Safe Neighborhoods program --

SEN. SCHUMER: For how long had he been there?

MR. MCNULTY: I think that was about a year or so.

SEN. SCHUMER: Yeah, I think it was less than that, a little less than that.

MR. MCNULTY: And he -- but he did a number of gun cases in that period of time. He's also done a lot of trials as a JAG attorney. He'd gone and served his country over in Iraq. He came back from Iraq and he was looking for a new opportunity. Again, he had qualifications that exceed what Mr. Cummins had when he started, what Ms. Casey had, who was the Clinton U.S. attorney in that district before she became U.S. attorney. So he started off with a strong enough resume, and the fact that he was given an opportunity to step in -- and there's one more piece of this that's a little tricky, because you don't want to get into this business of what did Mr. Cummins say here or there, because I think we should talk to him. But he may have already been thinking about leaving at some point anyway.

There are some press reports where he says that. Now, I don't know, and I don't want to put words in his mouth; I don't know what the facts are there completely. What I've been told, that there was some indication that he was thinking about this as a time for his leaving the office or in some window of time. And all those things came together to say in this case, this unique situation, we can make a change and this would still be good for the office.

SEN. SCHUMER: So you can say to me that you -- you put in your testimony you want somebody who's the best person possible.

MR. MCNULTY: Well, I didn't --

SEN. SCHUMER: Do you think Mr. Griffin is the best person possible? I can't even see how Mr. Griffin would be better qualified in any way than -- than Bud Cummins, who had done a good job, who was well respected, who had now had years of experience. There's somebody who served a limited number of months on a particular kind of case and had all kinds of other connections. It sure doesn't pass the smell test. I don't know what happened, and I can't -- you know, we'll try to get to the bottom of that. And I have more questions, but --

MR. MCNULTY: I didn't say "best person possible." If I used that as a standard, I would not become U.S. attorney.

SEN. SCHUMER: You did.

MR. MCNULTY: I said "well qualified."

SEN. SCHUMER: Okay.

MR. MCNULTY: And that was -- those words were purposely chosen to say that he met the standards that are sufficient to take a job like that, and I have no hesitancy of that.

SEN. SCHUMER: I just want to -- I don't want to pick here with my friend Paul McNulty. Quote from your testimony, "For these reasons, the department is committed to having the best person possible discharging the responsibilities of that office at all times in every district."

I find it hard to believe that Tim Griffin was the best person possible. I find it hard to believe that anyone who did an independent evaluation in the Justice Department thought that Tim Griffin was a superior choice to Bud Cummins.

MR. MCNULTY: Well, I guess I was referring to my opening statement -- (cross talk) --

SEN. SCHUMER: Yeah, okay.

Let me ask you this: Can you give us some information how it came to be that Tim Griffin got his interim appointment? Who recommended him? Was it someone within the U.S. Attorneys Office in Arkansas? Was it someone from within the Justice Department?

MR. MCNULTY: Yeah. I don't know the answers to those questions.

SEN. SCHUMER: Could you get us answers to that in writing? And I'd also like to ask the question, did anyone from outside the Justice Department -- including Karl Rove -- recommend Mr. Griffin for the job? Again, I'm not saying there's anything illegal about that, but I think we ought to know.

MR. MCNULTY: Okay.

SEN. SCHUMER: Okay. But you don't have any knowledge of this right now?

MR. MCNULTY: I don't.

SEN. SCHUMER: Okay.

Again, when Bud Cummins was told in the summer of 2006 that he was to leave, was the -- did those who told him have the idea of a replacement in mind?

MR. MCNULTY: I don't know for a fact, but I'm assuming that -- and being straightforward about this -- that the notion here was to install Mr. Griffin as an interim, give him an opportunity to go into that district, and then to work with the home-state senators on identifying the nominee who would be sent to the committee for the confirmation process. So if you want to assume that when Mr. Cummins was contacted there was already a notion that Mr. Griffin would be given an opportunity --

SEN. SCHUMER: You are assuming that.

MR. MCNULTY: -- is, I think, a fair assumption.

SEN. SCHUMER: All right.

Let me ask you this. Let's -- because we'll get some of these answers in writing about outside involvement and what specifically happened in the Bud Cummins case. It sure doesn't smell too good, and you know that and I know that, but maybe there's a more plausible explanation than the one that seems to be obvious to everybody.

But let's go onto these questions. Did the president specifically approve of these firings?

MR. MCNULTY: I'm not aware of the president being consulted. I don't know the answer to that question.

SEN. SCHUMER: Okay. Can we find out an answer to that?

MR. MCNULTY: We'll take it back.

SEN. SCHUMER: Yeah. Was the White House involved in anyway?

MR. MCNULTY: These are presidential appointments --

SEN. SCHUMER: Exactly.

MR. MCNULTY: -- so the White House personnel, I'm sure, was consulted prior to making the phone calls.

SEN. SCHUMER: Mm-hmm. Okay, but we don't know if the resident himself was involved, but the White House probably was.

When did the president become aware that certain U.S. attorneys might be asked to resign?

MR. MCNULTY: I don't know.

SEN. SCHUMER: Okay. Again, I would ask that you get back to us on that.

And fourth question, which I'm sure you cannot answer right now, was there any dissent over these firings? Do you know if there was any in the Justice Department -- did some people say, well, we shouldn't really do this?

MR. MCNULTY: I'm not aware of that. To the contrary, actually, you know Dave Margolis. He's -- SEN. SCHUMER: I do.

MR. MCNULTY: -- been involved in all of the interviews for every interim who's been put in in this administration. He's been involved in every interview for every U.S. attorney that's been nominated in this administration. We have a set group of people and a set procedure that involves career people. Dave actually takes the lead role for us in that. And Dave was well aware of this situation.

And -- so apart from objections, I know of folks who believed that we had the authority and the responsibility to oversee the U.S. Attorneys Office the way we thought was appropriate.

SEN. SCHUMER: Right.

Okay, let me get to the EARS evaluations. Now, you agree that the EARS evaluations address a broad range of performance criteria that's pretty good. You said it's not the sole reason -- it's not the only criteria, but it's a pretty good basis to start with. Is that fair to say?

MR. MCNULTY: It can be in some instances. It just depends on what was going at that office at that time that those evaluators might have been able to spot.

SEN. SCHUMER: Okay.

Have you seen each -- for each of the seven fired U.S. attorneys, have you seen the EARS evaluations?

MR. MCNULTY: I have not seen all the evaluations involved in these cases, no.

SEN. SCHUMER: Okay. Well, you had said you'd be willing to talk over with us what was in those evaluations in private so you would protect the reputations of the U.S. attorneys. Can we do that this week?

MR. MCNULTY: Sure. We can try and make --

SEN. SCHUMER: Great. Thank you. I very much appreciate that.

And do you have any objection, in private, of providing these evaluations to the committee -- the EARS evaluations?

MR. MCNULTY: The only reason why I'm hesitating on that is because evaluations like that are what we would normally call deliberative material. And Senator Specter and I've discussed this -- you know, about the committee's oversight responsibilities. And I respect the committee's ability to get information, but often the committee shows comity to the department by appreciating the sensitivity of certain things. And we've appreciated your respect for that. And these evaluations are done by career U.S. attorney office staff who go into an office and look at it. It's deliberative. It provides information that could be prejudicial to some people. And so that's the only reason why I'm not sitting here saying, "Sure." I want to go back and want to think about what our policies --

SEN. SCHUMER: I understand. But don't you agree it probably, given the sensitivities that you have, and given the questions we have, it seems to me logical we could work out something that would protect the reputations of those you wish to protect, and still answer our questions.

MR. MCNULTY: My goal is to give you as much information as we possibly can to satisfy your concerns that nothing was done wrong here.

SEN. SCHUMER: Good. Okay. And we will have our -- we will endeavor to have the meeting this week. And the legislation is moving, maybe we can clear the air on all of this or figure out what happened anyway, soon.

Let me just ask you this, in terms of more shoes that might drop: Is the job of Dan Dzwilewski -- now this is the special agent in San Diego. He defended Carol Lam. He called the firing political. He's the head FBI man over there. Is his job in any danger?

MR. MCNULTY: No.

SEN. SCHUMER: Good.

Next, are there any --

MR. MCNULTY: Certainly -- let me just put this -- not for reasons related that --

SEN. SCHUMER: As of today?

MR. MCNULTY: If the FBI has some other matter and I don't know --

SEN. SCHUMER: I understand.

MR. MCNULTY: Okay.

SEN. SCHUMER: We don't want him to have a carte blanche. We just don't want him to be fired for speaking his mind here, okay?

Are there anymore firings that might be expected? Any other U.S. attorneys who are going to be asked to resign in the very near future before the law that Senator Feinstein and Senator Specter are reinstating, I guess, is the right, takes effect? MR. MCNULTY: I am not aware of any other plans at this point to do that.

SEN. SCHUMER: Would you be willing to let the committee know if there were any plans -- or at least the home-state senators -- to know if there are any further plans in this regard, before those kinds of firings could occur?

MR. MCNULTY: That seems rather broad.

SEN. SCHUMER: Okay. Why don't you get back to us.

MR. MCNULTY: I just have to think about what you're asking there, okay? We want to consult with the home-state senators on filling those seats. I'm not sure if it's good policy for the executive branch to consult with the home-state senator before removing somebody from a position.

SEN. SCHUMER: It really has not -- I don't know if it's happened in the past. At least it hasn't -- I mean, I've had good consultations with the Justice Department on the four U.S. attorneys in New York. By the way, none of them are going to be asked to resign in the next month or so, are they?

MR. MCNULTY: We have no -- no one is currently being contemplated right now.

SEN. SCHUMER: Okay. But it's something maybe you should consider, given everything that's happening here. And you know, if there's a legitimate reason that somebody should be removed, it might clear the air if the home-state senators, or someone outside of the executive branch, were consulted. And the most logical people are, given the tradition, are the home-state senators. So I'd ask you to consider that, but you don't have to give me an answer here.

MR. MCNULTY: (Cross talk.)

SEN. SCHUMER: Let me ask you about one further person.

There's a U.S. attorney in Texas -- Senator Cornyn has left, he might have more to say about this -- but Johnny Sutton has come under considerable fire for prosecuting two border agents who shot an alien smuggler. There have been public calls for his ouster by more than one Congressman. Is his performance in any danger?

MR. MCNULTY: No.

SEN. SCHUMER: Okay. I mean, is his position in any danger? Okay.

I'd now like to go on to Carol Lam. We talked a little bit about this. Senator Sessions mentioned all the Congresspeople who had written letters. I'd just ask Senator Sessions when -- was that -- were -- was that -- were those bipartisan letters? Do you know? I don't know who the 13 or 18 --

SEN. SESSIONS: (Off mike.)

SEN. SCHUMER: Okay. Well, if you could submit those letters to the record, we could answer that question.

SEN. SESSIONS: I would be glad to.

SEN. SCHUMER: Great. Without objection.

Now given the velocity -- the heat of the investigations that have gone on in southern California, did the Justice Department consider the chilling effect on those -- the potential chilling effect on those prosecutions when Carol Lamb was fired? I mean, wasn't it -- should it have been a factor as -- in --

MR. MCNULTY: Certainly.

SEN. SCHUMER: To be weighted? Do you know if that did?

MR. MCNULTY: Yes. It -- we are -- I have to be careful here because, again, I'm trying to avoid speaking on specifics. But we would be categorically opposed to removing anybody if we thought it was going to have either a negative effect in fact, or a reasonable appearance. Now we can be accused of anything.

We can't always account for that. But as far as the -- a reasonable perception and the factual, that would be a very significant consideration. I mean, we wouldn't do it if we thought it would, in fact, interfere with a case.

SEN. SCHUMER: So you thought it would -- so there were discussions about this specific case, and people dismissed any --

MR. MCNULTY: Any time we ask for someone to resign --

SEN. SCHUMER: Chilling effect, or even as Senator Whitehouse mentioned, the break in the continuity of important ongoing prosecutions. Was that considered in this specific instance?

MR. MCNULTY: Any time we do this, we would consider that. And may I say one more thing about it? What happened in the prosecution of Congressman Cunningham was a very good thing for the American people, and for the department of Justice to accomplish. We are proud of that accomplishment, and any investigation that follows from that has to run its full course. Public corruption is a top priority for this department, and we would only want to encourage all public corruption investigations, and in no way want to discourage them. And our record, I think, speaks for itself on that.

SEN. SCHUMER: Were you involved in the dismissal -- in the decision to dismiss Carol Lamb?

MR. MCNULTY: I was involved in all of this, not just any one person. But I was consulted in the whole decision process.

SEN. SCHUMER: Okay. And did you satisfy yourself that -- I mean, it would be hard to satisfy yourself without an appearance problem --

MR. MCNULTY: Right.

SEN. SCHUMER: -- because there obviously was going to be an appearance problem. On the other hand, certain factors, at least in the Justice Department, must have outweighed that. It would be hard to believe that Carol Lamb was dismissed without cause in your mind. You must have had some cause.

MR. MCNULTY: All of the changes that we made were performance-related.

SEN. SCHUMER: Mm-hmm. Okay. And we'll discuss that privately towards the end of the week. So I'm not going to try to put you on the spot here.

But I do want to ask you this. Did anyone outside the Justice Department, aside from the letters we have seen that Senator Sessions mentioned, urge that Carol Lamb be dismissed?

MR. MCNULTY: I don't -- I don't know.

SEN. SCHUMER: Could you get an answer to that?

MR. MCNULTY: You mean anyone said -- because those letters --

SEN. SCHUMER: Those are public letters.

MR. MCNULTY: -- may not be the only letters we've received. We may have received --

SEN. SCHUMER: I know, but phone calls, any other -- I'd like you to figure out for us and get us answers on whether there were other people, other than the people who signed -- I don't know who they were -- who signed the letters that Senator Sessions mentioned outside the Justice Department who said -- obviously, given the sensitivity of this this is an important question -- who said that Carol Lamb should be dismissed. Can you get back to us on that?

MR. MCNULTY: Yes.

SEN. SCHUMER: Thank you.

MR. MCNULTY: I'm only not giving you a definitive answer now because I'm trying to avoid talking about any one district --

SEN. SCHUMER: Okay.

MR. MCNULTY: -- but I -- but the suggestion of your question would be whether there might have been some -- let's just say on a general matter, not referring to any one district, any undue influence on us from some unnamed --

SEN. SCHUMER: Oh, no. I didn't ask that.

MR. MCNULTY: (Cross talk.)

SEN. SCHUMER: I didn't ask whether it was undue.

MR. MCNULTY: Generically, I can say that with any change we made, they weren't subject to some influence from the outside.

SEN. SCHUMER: All right. I would just ask that when you meet with us, we get an answer to that question. Who from the outside urged, whether appropriately or inappropriately -- it might be appropriate. It's certainly your job, if you think a U.S. attorney isn't doing a good job, to let that be known, that she be dismissed.

Okay, let me just ask you this. We're going to hear from a fine U.S. attorney from the southern district former, and she says in her testimony -- she quotes Robert Jackson as Attorney General, and he gave a noted speech to U.S. attorneys. He said this, "Your responsible in your several districts for law enforcement and for its methods cannot wholly be surrendered to Washington and ought not to be assumed by a centralized Department of Justice." Do you agree with that?

MR. MCNULTY: I'm not sure if I can say that I appreciate -- I agree with everything being said in that. You know, what's tricky about this is that -- Senator, you or any other senator in this committee might call us on another day and say to us, "I want to see more health care fraud cases done. You people have turned your back on that problem." And we would get back to you and say, "Absolutely, Senator. We'll take that seriously." But how could we do that if we didn't have some confidence that if we turned around and said to our U.S. attorneys, "We need you to prioritize health care fraud. It's a growing problem in our country and you need to work on it?" Now that's a centralized Washington responsibility going out to the field. So I believe in a Department of Justice that does act with some control over its priorities and its -- use of its

resources. I don't believe, however, that that should go to the question of the integrity or the judgment --

SEN. SCHUMER: And he uses the words -- in all fairness, he uses the word "wholly." He doesn't say Washington should have no influence. He says "cannot be wholly surrendered to Washington."

MR. MCNULTY: Well then, I would agree with that.

SEN. SCHUMER: Yeah. Okay.

Final question, and I appreciate the indulgence of my colleagues here, and I'll extend to them the same courtesy. On the Feinstein-Specter bill, does the administration -- unless you want to answer that -- (off mike.) No? Okay.

I was --

SEN. SPECTER: No, wait a minute. Were you saying I only have 23 minutes and 28 seconds left? (Laughter.)

SEN. SCHUMER: Yeah, double that, if you wish.

Let's see -- then I'll ask it. What objection do you have to Feinstein's bill, the one that Senator Feinstein -- Senator Specter put in which restores a system which seemed to be perfectly adequate for 20 years, including in the Reagan administration, the Bush administration, and the first six years of this administration? Are you aware of any legal challenges prior to 2006 to the method of appointing U.S. interim attorneys?

MR. MCNULTY: Well, there are two issues or two legislative proposals that we seem to be talking about. One I think is, the bill I have in front of me, which is S. 214 -- if I'm reading it correctly, it goes beyond what was existed prior to the amendment in the Patriot Act. It gives the appointment authority to the district court -- the chief judge of the district -- completely. That -- and if I'm wrong, someone can correct me on that, but that's my reading on the legislation.

Now there's another idea on the table, which is to restore to what it was prior to the Patriot Act, which gave the Attorney General the authority to appoint someone for 120 days, and then the chief judge would appoint that person afterwards. Are you asking me about the latter more than the --

SEN. SCHUMER: Yeah, I'm asking you, would you have objection? Because as I understand it, the sponsors simply want to restore what existed before the Patriot Act changed. Would the administration be opposed to that? MR.

MCNULTY: Our position, I think, would be opposition. But we recognize that that's better than what the original legislation is. And the reason is because we supported what was done in the Patriot Act because we think it cleaned up a problem that though it only came up occasionally, and in the great majority of cases the system did work out okay, when it does come up, it can create some very serious problems.

SEN. SCHUMER: But you used the new Patriot angle -- Patriot Act language to go far beyond the specific problem that occurred in South Dakota.

MR. MCNULTY: Well, that's kind of what we're here today to talk about. I don't think that's true, but I understand your perspective on it. And I think

that if Arkansas -- if that Patriot Act provision had never passed, what would have happened in Arkansas? Would we have been prohibited from going in and asking someone to step aside and placing a new person in? No. It's just that the person would have served for 210 days, and then the chief judge would have had to re-up the person. So we may still be talking about what happened in Arkansas, and there's a linkage being made to that provision, and some initiative that we took afterwards. And there isn't any linkage in our minds.

SEN. SCHUMER: I would argue to you -- and this will be my last comment -- that knowing that there's an outside independent judge of an interim appointment is -- has a positive prophylactic effect, and makes you more careful as to -- make -- would make any executive more careful about who that interim appointment should be.

Senator Specter.

SEN. SPECTER: Thank you. Are you saying that the Department of Justice will not object to legislation which returns status quo antebellum, because this has been a war, prior to the amendments of the Patriot Act?

MR. MCNULTY: I'm not saying we will or we won't object because, sitting here at the table today, I can't take apposition on that legislation. I have to go back and have that decision made. I'm saying, though, that we support the law as it currently stands, and if we come back and object to the legislative idea that you have talked about here today, that would be the reason. But I'm not specifically saying today that we're going to object. We have to make a decision the appropriate way.

SEN. SPECTER: That's a "don't know."

MR. MCNULTY: Correct.

SEN. SPECTER: Would you be willing to make a commitment on situations where the attorney general has an interim appointment to have a presidential appointment within a specified period of time?

MR. MCNULTY: Don't know.

SEN. SPECTER: Well, that clarifies matters more --

MR. MCNULTY: I mean, I'd have to go back and think about that, but I understand the idea.

SEN. SPECTER: I like -- I like brief answers and brief lines of questioning.

Would you consult with a home-state attorney -- home-state senator -- before the selection of an interim U.S. attorney?

MR. MCNULTY: We have not done that to date. It's --

SEN. SPECTER: I know that. Would you?

MR. MCNULTY: Well, it's something that's worth considering, and it can be a very helpful thing if --

SEN. SPECTER: Will consider.

MR. MCNULTY: Will we consider doing that? SEN. SPECTER: Well, that's what you're saying. I'm trying to find your answer here. Will consider.

MR. MCNULTY: Right. Yes, we'll consider that possibility.

SEN. SPECTER: All right, I have 24 more questions, but they've all been asked twice. (Laughter.) And I would like --

SEN. SCHUMER: It's good to be the chairman, isn't it? (Laughter.)

SEN. SPECTER: -- and I would like to -- I certainly enjoyed it. The gavel was radioactive when I had it. (Laughter.) And I would like to hear the next panel, so I will cease and desist. Thank you.

SEN. SCHUMER: Thank you, and I will still call you Mr. Chairman, out of respect for the job you did.

Senator Whitehouse.

SEN. WHITEHOUSE: Thank you. Sorry to step out for a while. We have the Iraq budget down on the Budget Committee, so we're called in many directions here.

SEN. SCHUMER: (Off mike.)

SEN. WHITEHOUSE: Mr. McNulty, you said that the firings were performance-related and that there was a set procedure that involved career people that led to this action. To go back to The Washington Post, one administration official, says the Post, who spoke on the condition of anonymity in discussing personnel issues, said the spate of firings was the result of, and here's the quote from the administration official, "pressure from people who make personnel decisions outside of Justice" -- capital J, the department -- "who wanted to make some things happen in these places."

MR. MCNULTY: Whoever said that was wrong. That's -- I don't know where they'd be coming from in making a comment like that, because in my involvement with this whole process, that's not a factor in deciding whether or not to make changes or not. So I just don't know --

SEN. WHITEHOUSE: What is not a factor?

MR. MCNULTY: Well, that quote suggests agendas, political or otherwise, outside of the Department. And in looking at how to -- or who should be called or encouraged to resign or changes made they are based upon reasons -- they weren't based upon cause, but they were based upon reasons that were Department-related and performance-related, as we said. And so I don't ascribe any credibility to that quote in a newspaper. SEN. WHITEHOUSE: Okay. Would you agree with me that when you're in the process of selecting a United States attorney for a vacancy, it makes sense to cast your net broadly, make sure you have a lot of candidates, choose among the best and solicit input from people who are sort of outside of the law enforcement universe? Would you agree with me that it's different when you have a sitting United States attorney who is presently exercising law enforcement responsibilities in a district, how and whether you make the determination to replace that individual?

MR. MCNULTY: I think that's a fair concern, and one distinction that's important to keep in mind.

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SEN. WHITEHOUSE: You wouldn't want to apply the same process to the removal of a sitting U.S. attorney that you do when you're casting about for potential candidates for a vacancy?

MR. MCNULTY: I'm not sure I fully appreciate the point you're making here. Could I ask you to restate it so I make sure if I'm agreeing with you that I know exactly what you're trying to say?

SEN. WHITEHOUSE: Yeah. I think what I'm trying to say is that when there's an open seat and you're looking for people to fill it --

MR. MCNULTY: Yes.

SEN. WHITEHOUSE: -- you can cast your net pretty broadly, and it's fair to take input from all sorts of folks. It's fair to take input from people in this building --

MR. MCNULTY: Oh, I see what you're saying.

SEN. WHITEHOUSE: -- it's fair to take input from people, you know, in law enforcement. It's fair to take input from people at the White House. It's fair to take input from a whole variety of sources. But it's different once somebody is exercising the power of the United States government and is standing up in court saying, "I represent the United States of America." And if you're taking that power away from them, that's no longer an appropriate process, in my view, and I wanted to see if that view was shared by you.

MR. MCNULTY: I think I appreciate what you're saying there, and I think that when it -- you know, there's two points. The first is that we believe a U.S. attorney can be removed --

SEN. WHITEHOUSE: Of course.

MR. MCNULTY: -- for a reason or for no reason, because they serve at the pleasure of the president. But there's still a prudential consideration. There's got to be good judgment exercised here. And when that judgment is being exercised, there have to be limitations on what would be considered; I think that's what you're suggesting. And there's going to be some variety of

factors that may or may not come out in an EARS report or some other kind of well- documented thing. But it comes down to a variety of factors that have to do with the performance of the job, meaning --

SEN. WHITEHOUSE: But they're truly performance-related, you don't just move around, because, you know, somebody in the White House or somebody in this building thinks, "You know what? I'd kind of like to appoint a U.S. attorney in Arkansas. Why don't we just clear out the guy who's there so that I can get my way." That person might very well, with respect to a vacancy, say, "I want my person there," and that's a legitimate conversation to have, whether you choose it or not. But it's less legitimate when there's somebody in that position, isn't it?

MR. MCNULTY: Yeah, I hear the distinction you're trying to make there. I'm not sure I -- I agree with it. The change that is occurring by bringing a new person in versus the change that's occurring by bringing a person in to replace an interim, I'm not sure if I appreciate the dramatic distinction between them. If the new person is qualified and if you're satisfied that it's not going to interfere with an ongoing case or prosecution, it's not going to have some general disruptive effect that not good for the office --

SEN. WHITEHOUSE: Well, there's always some disruptive effect --

MR. MCNULTY: There is always some, right. The question is is it undue or is it substantial beyond the kind of normal turnover things that occur? I think that there needs to be flexibility there to make the changes that need to be made.

SEN. WHITEHOUSE: Finally, have the EARS evaluations changed since I had the pleasure of experiencing one? Do you still go and talk to all the judges in the district? Do you still go and talk to all the agencies that coordinate with the U.S. attorney's office in the district? Do you still go and talk to community leaders, like the attorney general and police chiefs who are regular partners and associates in the work of the Department of Justice in those areas?

MR. MCNULTY: That's right. And I don't know if you were in the room when I was having this exchange with Senator Schumer, but I want to say it one more time to make it clear. We are ready to stipulate that the removal of U.S. attorneys may or may not be something supported by an EARS report because it may be something performance-related that isn't the subject of what the evaluator saw or when they saw it or how it came up, and so forth. And I -- I go back to this point because I know that your and Senator Schumer's interest in seeing them is because you want to see -- you want to try to identify the thing and say, "Well, there's justification," or there's not, right? And if there's not,

the assumption should not be made that therefore we acted inappropriately or that there wasn't other performance-related information that was important to us.

SEN. WHITEHOUSE: No, but given the scope of the EARS evaluations -- which really went into every nook and cranny of the operational scope of my U.S. attorney's office -- the idea that there is something else somewhere that might appear and justify the removal of a United States attorney, and yet the -- something that all of the judges in the district -- all of the federal law enforcement agencies in the District, the police chiefs and other coordinating partners with that U.S. attorney -- that all of them were completely unaware of and that never surfaced in the EARS evaluation would be somewhat of an unusual circumstance, and I think would require a little bit of further exploration.

MR. MCNULTY: Well, I appreciate the need for further explanation, and I -- and that's where we're committed to working with you to get the answers you're looking for. But maybe EARS reports have changed a bit, but there -- maybe the management of the Department of Justice has changed a bit too, because when we announce priorities, we mean it. And priorities, and how an office has responded to those priorities, may not be measured by the evaluators the way that other things -- the more nuts and bolts things -- are, and that's where those reports are very valuable, but they don't always tell the full story.

SEN. WHITEHOUSE: We'll follow up.

Thank you, Mr. Chairman.

SEN. SCHUMER: Senator Sessions?

SEN. SESSIONS: Thank you. It's a most interesting discussion. I do have very, very high ideals for United States attorneys. I think that's a critically important part of our American justice system. I think sometimes that the Department of Justice has not given enough serious thought to those appointments -- has not always given the best effort to selecting the best person.

President Reagan, when he was elected and crime was a big problem, he promised experienced prosecutors, and I think that was helpful. I'd been an assistant for two years and -- two-and-a-half years and that's how I got selected. And I did know something about prosecuting cases. I'd tried a lot of cases, and I was -- I knew something about the criminal system. So I think Giuliani is correct -- you need to have somebody to contribute to the discussion -- that knows something about the business. With regard to Arkansas, I just took a quick look. I don't think that Mr. Cummins had any prior prosecutorial experience before he became U.S. attorney, did he?

MR. MCNULTY: That's correct. He did not.

SEN. SESSIONS: But Mr. Griffin had at least been a JAG prosecutor in the military and been to Iraq and he tried people there, had he not?

MR. MCNULTY: Tim Griffin had actually prosecuted more cases than a lot of U.S. attorneys who go into office. A lot of people come from civil backgrounds or policy backgrounds, and he actually had been in court, whether it's as a JAG here in Ft. Campbell, where he tried a very high profile case, or

over in Iraq or as a special assistant in that office. And I don't think we should look lightly upon his experience as a prosecutor.

SEN. SESSIONS: And he spent a good bit of time with General Petraeus, I guess -- well, the 101st in Mosul, Iraq with the -- as an Army JAG officer. So anyway, he had some skills and experience beyond politics. But I just -- I want to join with Senator Schumer and my other colleagues in saying I think we need to look at these appointments maybe in the future more carefully. It's a tough job. You have to make tough decisions. I remember -- I guess I took it as a compliment -- people said that Sessions would prosecute his mother if he -- she violated the law. I guess that was a compliment; I took it as -- tried to take it as that. So I wanted to say that.

With regard to the problem of a judge making this appointment, you end up, do you not, with a situation in which the judge is appointing the prosecutor to try the poor slob that's being tried before him?

MR. MCNULTY: Right.

SEN. SESSIONS: In other words, here he's appointing the guy to try the guy, and that really is not a healthy approach for a lot of reasons, and it's not consistent with the Constitution, to my way of thinking, which gives the oversight to U.S. attorneys to the Senate in the confirmation process, and to some degree the House because they got financial responsibilities and so forth. Is that a problem in your mind -- that a judge would actually be choosing the person and vouching for the prosecutor who will try the defendant that he's required to give a fair trial to?

MR. MCNULTY: We've cited that as one of the issues that justified the provision that was in the Patriot Act.

SEN. SESSIONS: And is there any other circumstances which federal judges appoint other agencies -- other officers of other federal agencies that you know of? MR. MCNULTY: I'm not aware of a situation where someone in another agency -- I know certainly situations where someone from private practice was appointed, and that creates difficulties because of --

SEN. SESSIONS: No, I'm really talking about do they ever -- do they have any authority if there's a uncertainty over a Department of Treasury official or a Department of Commerce official -- that a federal judge --

MR. MCNULTY: Oh, I see your question.

SEN. SESSIONS: -- would appoint those appointments?

MR. MCNULTY: No, this is unique actually, and I think that's another argument --

SEN. SESSIONS: Yeah. I don't think it's a -- I think it's a serious matter. Now Senator Schumer, let's think about this. Would it help -- and I'll ask you your comments, Mr. McNulty -- if we had some sort of speedy requirement to submit the nominee for confirmation and that gives the oversight to the Senate where the Constitution seems to give it? How would you feel about that?

MR. MCNULTY: I appreciate what you're trying to do there, and we agree with the spirit of that -- that we want to get the names up here as fast as possible. The problem is we don't control completely the process for getting

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the names, because when we're working with home state senators or some other person to provide names to us for us to look at, that's a step that's beyond our control, and it could create problems if there's a set timetable --

SEN. SESSIONS: Well, it could create problems for you, but you're going to have some sort of problems because you're not unilaterally empowered to appoint United States attorneys. You don't have any unilateral right, so somebody's going to have some oversight.

MR. MCNULTY: Yeah.

SEN. SESSIONS: In the other system you had 120 days and the federal judge had the responsibility. So you can't have it like you'd like it.

MR. MCNULTY: Well, I appreciate that and I'm not trying to sound greedy. I'm just saying that there -- if we're talking specifically about the idea of a timetable that's what we'd have to look at. I'd actually like to see the committee just judge us on our track record, and look at the openings -- look at the interims, look at the nominees, and how long it takes to get to a nomination and then the confirmation. And based upon the track record, that's the oversight -- that's the accountability. And I think the record we have is pretty good. I'd like to say one other thing, Senator. Your experience in Alabama and Senator Schumer's experience in New York I think illustrates how appointing somebody to come into a district as an interim who may eventually get nominated and confirmed can be a very positive thing. Both in Senator Schumer's case, where my predecessor, Jim Comey, was actually an assistant United States attorney in my office in eastern Virginia, and he came up as an assistant to New York to be the interim, sent by main Justice to New York, but he had connections there and a root there as a -- where he started his career. And he was an interim, and then he got nominated for that position later. And then the same thing happened in south Alabama. And it can be a very positive way of dealing with a vacancy and putting a competent person in place that doesn't come from within that same office.

SEN. SESSIONS: I do think that we have a responsibility to at some point confirm United States nominees if there's time sufficient to do so because -- but the position cannot go vacant. Somebody's got to hold the job in every district at some point in time because the work of the office can't continue without somebody as the designated United States attorney. So I would note that I don't know Arkansas -- I think you've learned that you got to be careful with these offices. They -- there are perceptions out there.

Senator Pryor's concerned about this appointment. He's a good man -- former attorney general. It would have been better I think had you been a little more careful with that appointment, although the nominee I think is -- got a far better track record than some would suggest -- the new U.S. attorney. I would note that we could give -- I'll just say it this way. Most of us in the Senate do not review the U.S. attorney appointee -- appointments personally. Staff reviews that and we hear if there are objections and get focused on it if there's a problem.

I think we all probably should give a little more attention to it. And we hold the administrations, as they come forward, to high standards about appointments, because it's a very important office.

MR. MCNULTY: Senator Sessions, to be clear on Arkansas, Tim Griffin is an interim appointment. And consulting with Senator Pryor and Senator Lincoln

has been going on for some time. And a nomination in that district will be made in consultation with them. In fact, we'll even take his statement that he made here today and look at it closely and see what it is.

He said today he's going to Attorney General Gonzales. That's the process that we're committed to following. There's no effort there to go around Senator Pryor or Senator Lincoln and find a nominee that they wouldn't support. And so that approach in Arkansas has been the same that we've used in all the other places where we seek the guidance and the input from the home-state senators as we look for someone we can get confirmed by the Senate.

SEN. SESSIONS: I would just conclude by noting that there is a danger when politicians get involved in appointments, and particularly when United States attorneys have to make a tough-charging decisions like the border patrol shooting and other things like that. And we've got to be real careful about that.

I would just say, though, when it comes to priorities of an assistant United States attorney or the Department of Justice or a U.S. attorney, then I think if -- I think the political branch does have a right to question whether the right priorities are being carried out.

Thank you, Mr. Chairman.

SEN. SCHUMER: Well, thank you.

And I want to thank you, Mr. McNulty. This is not an easy thing for you to come and testify to. And I appreciate your candor, admitting that Bud Griffin (sic/Cummins) was not fired for any particular reason.

Your willingness to come and talk with us so we can figure out exactly what went on this week -- as well as your inclination to both submit the EARS reports and give us information about any outside influences on this -- that will be very helpful not only here, but in establishing a smooth working relationship between this committee and the Justice Department and the new Congress. And the proof of the pudding, obviously, is going to be in the eating, but I think we look forward to getting real information about what happened here.

Thank you.

Okay. Let me call our next three witnesses and appreciate them for their patience.

The first is Mary Jo White. She's currently a partner at the New York law firm of Debevoise & Plimpton, the first and only woman to have served as the U.S. attorney for the Southern District, which many view as the best federal prosecutor's office in the country. Ms. White has a lot to do with the fine reputation of that office, and her own reputation for excellence and integrity is unparalleled. A graduate of William & Mary and Columbia Law School. She was an officer of The Law Review. And I also owe her a personal debt of gratitude, because my chief counsel, who's done a great job here, Preet Bharara, sort of worked under her when she lured him away from private practice and he's still there.

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

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

(The witnesses are sworn.)

Ms. White, you may proceed.

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

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

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

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

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

customary and expected that the U.S. attorneys, generally, will be replaced when a new president of a different party is elected. There is also no question that presidents have the power to replace any United States attorney they have appointed for whatever reason they choose. In my experience and to my knowledge, however, it would be unprecedented for the Department of Justice or the president to ask for the resignations of U.S. attorneys during an administration, except in rare instances of misconduct or for other significant cause. This is, in my view, how it should be.

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

Senator Schumer alluded to this, but in his well-known address to the United States attorneys in 1940, then-Attorney General Robert H. Jackson, although acknowledging the need for some measure of centralized control and coordination by the department, emphasized the importance of the role of the U.S. attorneys and their independence. He said, "The prosecutor has more control over life, liberty and reputation than any other person in America. His discretion is tremendous. Because of this immense power, the post of United States attorney, from the very beginning, has been safeguarded by presidential appointment, requiring confirmation of the Senate of the United States. Your responsibility in your several districts for law enforcement and for its methods cannot be wholly surrendered to Washington and ought not to be assumed by a centralized Department of Justice. Your positions are of such independence and importance that while you are being diligent, strict and vigorous in law enforcement, you can also afford to be just."

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

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

Replacing a U.S. attorney can, of course, be necessary or part of the normal and expected process that accompanies a change of the political guard. But I do not believe that such changes should, as a matter of sound policy, be undertaken lightly or without significant cause.

If U.S. attorneys are replaced during an administration without apparent good cause, the wrong message can be sent to other U.S. attorneys. We want our U.S. attorneys to be strong and independent in carrying out their jobs and the priorities of the department. We want them to speak up on matters of policy, to be appropriately aggressive in investigating and prosecuting crimes of all kinds and wisely use their limited resources and broad discretion to address the priorities of their particular districts.

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

public servants, doing their best to achieve justice without fear or favor. I am certain that the Department of Justice would not want to act in such a way or have its actions perceived in such a way to derogate from this model of the nonpolitical pursuit of justice by those selected in an open and transparent manner.

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

SEN. SCHUMER: Thank you, Ms. White.

Professor Levenson.

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

SEN. SCHUMER: Yes.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

SEN. SCHUMER: Thank you, Professor Levenson.

Mr. Gerson.

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

And let me talk to a couple of contrarian issues.

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

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

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

MR. GERSON: Thank you.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Thank you.

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

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

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

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

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

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

SEN. SCHUMER: You bet.

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

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

SEN. SCHUMER: Want to give us the example?

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

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

MR. GERSON: Four-year.

SEN. SCHUMER: Four-year.

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

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

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

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

SEN. SPECTER: (Off mike.)

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

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

SEN. SCHUMER: Thank you.

Senator Specter.

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

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

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

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

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

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

SEN. SCHUMER: I heard about that.

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

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

MR. GERSON: I'd darn well better.

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

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

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

MS. LEVINSON: Well, I do --

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

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

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

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

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

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

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

SEN. SPECTER: What was wrong with Cox?

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

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

Thank you all very much.

MS. LEVINSON: Thank you.

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

Thank you.

END.

DAG

not assigned

Rec list:

* memo for recording statements (AZ)

(*)

* SDCA - dealing w/ Carol

* AVSA phone call project

* ✓
* ✓

*

*

* Kevin Rexin - EARS - Margolis

* ✓

*

*

Deke's column

Handwritten notes on the left margin, including "10/10/44" and "10/11/44".

Handwritten notes at the top of the page, including "10/10/44" and "10/11/44".

Main body of handwritten notes, separated by a horizontal line. Includes phrases like "10/10/44", "10/11/44", and "10/12/44".

Bottom section of handwritten notes, separated by a horizontal line. Includes phrases like "10/10/44", "10/11/44", and "10/12/44".

Moschella, William

From: Sampson, Kyle
Sent: Wednesday, December 13, 2006 2:25 PM
To: Battle, Michael (USAEO)
Cc: McNulty, Paul J; Elston, Michael (ODAG); Moschella, William; Mercer, William W; Goodling, Monica; Sutton, Johnny K. (USATXW)
Subject: USA replacements

Mike, Bill Kelley called to report that they are weathering two main complaints: in making the calls, Battle (1) wasn't clear whether the USAs in question would be permitted to resign, or instead were being fired; and (2) was too abrupt. Bill seemed nonplussed by the complaints, but nevertheless passed them on to me.

Perhaps a second round of calls from you, Mike, to the relevant USAs is in order? Talkers would be something like:

- I wanted to be sure you understood that DOJ intends not to say anything about your leaving, but instead allow you to announce your resignation and the reasons for it;
- We want to work with you over the next six weeks to ensure a smooth transition; and
- It's in our interest for you to land on your feet and maintain our good relations with the Department -- how can I help?

Perhaps this is a bad idea? Thoughts?

Kyle Sampson
Chief of Staff
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530
(202) 514-2001 wk.
(202) 305-5289 cell
kyle.sampson@usdoj.gov

Moschella, William

From: McNulty, Paul J
Sent: Wednesday, December 13, 2006 6:42 PM
To: Sampson, Kyle; Battle, Michael (USAEO)
Cc: Elston, Michael (ODAG); Moschella, William; Mercer, William W; Goodling, Monica; Sutton, Johnny K. (USATXW)
Subject: RE: USA replacements

I generally think this is a good idea. The more communication, the better. They are probably slowly adjusting and some hand-holding may calm things down.

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To: Battle, Michael (USAEO)
Cc: McNulty, Paul J; Elston, Michael (ODAG); Moschella, William; Mercer, William W; Goodling, Monica; Sutton, Johnny K. (USATXW)
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Washington, D.C. 20530
(202) 514-2001 wk.
(202) 305-5289 cell
kyle.sampson@usdoj.gov

Moschella, William

From: McNulty, Paul J
Sent: Thursday, December 14, 2006 1:03 PM
To: Sampson, Kyle; Battle, Michael (USAEO)
Cc: Elston, Michael (ODAG); Moschella, William; Mercer, William W; Goodling, Monica; Sutton, Johnny K. (USATXW)
Subject: RE: USA replacements

Just had a lengthy chat with Margaret and she is fine, although she has an issue on which I need to get back to her..

From: Sampson, Kyle
Sent: Wednesday, December 13, 2006 2:25 PM
To: Battle, Michael (USAEO)
Cc: McNulty, Paul J; Elston, Michael (ODAG); Moschella, William; Mercer, William W; Goodling, Monica; Sutton, Johnny K. (USATXW)
Subject: USA replacements

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Washington, D.C. 20530
(202) 514-2001 wk.
(202) 305-5289 cell
kyle.sampson@usdoj.gov

Moschella, William

From: Goodling, Monica
Sent: Thursday, December 14, 2006 1:21 PM
To: Sampson, Kyle; McNulty, Paul J; Mercer, William W; Elston, Michael (ODAG); Moschella, William; Battle, Michael (USAEO)
Subject: FW: Happy Trails

FYI - Looks like McKay's ok.

From: McKay, John (USAWAW) [mailto:John.McKay@usdoj.gov]
Sent: Thursday, December 14, 2006 1:02 PM
To: USAEO-USAttorneysOnly
Subject: Happy Trails

Dear Friends,

This may NOT be the greatest job I've ever had.

It must be, however, a close second to my 6th Grade paper route, and only because I got a box of Butterfingers (Bonus Size) at Christmas from the newspaper's owner.

Still, I HAVE made the most friends, worked and played with wonderfully talented colleagues and had the opportunity to serve a great President in challenging times for our Country.

What a privilege this has been.

I will wrap up my service here in Seattle next month, and after leaving office will pursue new opportunities. As always, you are welcome to visit or call when you are in my neck of the woods.

All the best,

- JOHN

John McKay
United States Attorney
Seattle, Washington



U.S. Department of Justice

United States Attorney
Western District of Washington

700 Stewart Street, Suite 5220
Seattle, Washington 98101-1271

Tel: (206) 553-7970
Fax: (206) 553-0882

FOR IMMEDIATE RELEASE

December 14, 2006

UNITED STATES ATTORNEY JOHN MCKAY ANNOUNCES RESIGNATION

*Lead Reorganization and Refocusing of Federal Law Enforcement Resources
Following 9-11 Attacks*

United States Attorney John McKay announced today that he will resign as U.S. Attorney for the Western District of Washington effective January 26, 2007. After more than five years as the top federal law enforcement official in Western Washington, McKay will be returning to the private sector.

"I have been privileged to serve President Bush, and the people of Western Washington as United States Attorney. Our work in the United States Attorney's Office has increased the safety and security of our community, while carefully safeguarding civil rights," McKay said.

John McKay was nominated by President Bush to be United States Attorney for the Western District of Washington on September 19, 2001, just days after the attacks of September 11th. He was confirmed by the United States Senate on October 24, 2001, and began his tenure October 30, 2001. McKay's tenure as United States Attorney has been marked by a number of key initiatives designed to enhance law enforcement efforts in the Western District of Washington. McKay reorganized the office to address priorities such as terrorism, organized crime, identity theft and methamphetamine abuse. McKay initiated and lead efforts to establish Northwest LInX, (Law Enforcement Information Exchange) an innovative computer network that allows state, local and federal law enforcement agencies to share information. The LInX system now connects 113 law enforcement agencies and has been instrumental in solving countless crimes, and is being copied by numerous jurisdictions around the country.

United States Attorney McKay spearheaded efforts to reach out to minority communities concerned about racial and ethnic profiling following the September 11th attacks. McKay organized meetings between law enforcement leaders and leaders in the Arab-American and Muslim communities to promote better understanding and cooperation.

Under McKay's leadership the United States Attorney's Office has significantly improved productivity, despite declining budgets. The office has established itself as a national leader in prosecuting computer crimes, identity theft and multi-national criminal drug organizations. McKay has worked to build bridges between Canadian and U.S. law enforcement to combat cross border crime, and has enhanced federal law enforcement resources in the fast growing counties of Southwest Washington.

DAG00000948

During McKay's tenure, he personally prosecuted important cases, including the sentencing and appeals of Ahmed Ressam, the first terrorist captured on U.S. soil with an explosive device. McKay was a lead negotiator in the \$35 million settlement between the Department of Justice and the University of Washington over illegal billing by doctors at UW Physicians. At McKay's urging the FBI continues to make the investigation of the assassination of Assistant United States Attorney Tom Wales a top priority.

Prior to his appointment, McKay served as President of Legal Services Corporation (LSC) in Washington D.C. Congress established LSC in 1974 as a private non-profit corporation to ensure justice under the law for all low income Americans. From 1989 to 1990 McKay served as a White House Fellow, where he worked as Special Assistant to the Director of the FBI. Following his graduation from Creighton Law School in Nebraska, McKay was a litigation partner at Lane Powell Spears Lubersky in Seattle, and later was a managing partner at the Seattle law firm of Cairncross & Hempelmann.

Crediting the success of the United States Attorney's Office to his staff, McKay said, "I am privileged to work with so many outstanding lawyers, staff and agents in this district," and added he is looking forward to seeking new challenges after his departure in January.

United States Attorney General Alberto Gonzalez has the authority to appoint an interim United States Attorney whose term lasts until a new United States Attorney is nominated by President Bush and confirmed by the U.S. Senate.

For interviews with John McKay or additional information please contact Emily Langlie, Public Affairs Officer for the United States Attorney's Office, at (206) 553-4110. A full biography of John McKay is available on the U.S. Attorney's website at:
http://www.usdoj.gov/usao/waw/about/mckay_bio.html

Moschella, William

From: Goodling, Monica
Sent: Friday, December 15, 2006 8:25 PM
To: Moschella, William
Subject: FW: It has been a great ride...

From: Cummins, Bud (USAARE) [mailto: Bud.Cummins@usdoj.gov]
Sent: Friday, December 15, 2006 12:57 PM
To: USAEO-USAttorneysOnly
Subject: RE: It has been a great ride...

Friends and Colleagues:

Next Wednesday, December 20, will be my final day as United States Attorney in the Eastern District of Arkansas. Simply put, this is the best job I have ever had. It may be the best job there is. I am very grateful that President Bush gave me this opportunity to serve. Perhaps the best aspect of this job has been getting to know each of you and establishing contacts all over the country with such special and talented people.

I could write a long essay about my feelings about this job and my experience here over the past five years, but I know you could write the same essay. Suffice to say that it has been an honor to serve in this way and at this time and with you.

My contact information can be found below. I have not completely committed to the "next endeavor." Jody and I have four kids and the youngest is only five, so I know that whatever I do next may need to last awhile, so I am being a little picky. Maybe greedy is a better word. When Alexander Hamilton left the Department of the Treasury, he supposedly said "Having taken care of the nation's finances, I go to take a little care of my own which need my care not a little." I am currently thinking along those lines as well.

In the meantime I will be working on some individual cases and other projects.

I hope that you would never hesitate to contact me if I can be of service to you at any time.

Best Regards,

Bud



*Office of the United States Attorney
District of Arizona*

FOR IMMEDIATE RELEASE
December 19, 2006

For Information Contact Public Affairs
WYN HORNBUCKLE
Telephone: (602) 514-7625
Cell: (602) 525-2681

U.S. ATTORNEY PAUL CHARLTON TO STEP DOWN AT END OF JANUARY

PHOENIX – U.S. Attorney Paul K. Charlton has announced he will resign his position as the U.S. Attorney for the District of Arizona and take a position as a partner with the firm of Gallagher and Kennedy, P.A. Charlton will step down at the end of January after more than five years as U.S. Attorney in which his office addressed many pressing challenges posed by terrorism, public corruption, illegal immigration, methamphetamine, and ensuring the rights of victims of federal crimes, among many others.

“Paul Charlton has been an extraordinary public servant during a time of grave challenge to our national security,” said U.S. Senator Jon Kyl. “We will miss his strong and principled leadership.”

USA Charlton made the announcement to his staff Monday afternoon. “I am immensely proud of what the men and women of this office have accomplished over the past five years,” Charlton stated. “I am grateful to the President, the Department of Justice and Arizona’s dedicated law enforcement community for this incredible opportunity to serve. I’m excited to open a new chapter in my career, and to face the very new and different challenges of private practice.”

Paul K. Charlton was appointed U.S. Attorney by President George W. Bush on November 12, 2001 and confirmed by the United States Senate. In the wake of the 9/11 terrorist attacks, Charlton established the Anti-Terrorism Task Force (now called ATAC - the Anti-Terrorism Advisory Council), which has improved statewide law enforcement communication and coordination to fight terrorism and explored how to better secure nuclear power plants, water supply, air travel, rail transportation, and computer security. In 2006, Charlton established a National Security Division within the U.S. Attorney’s Office to actively work with law enforcement agencies on terrorism related criminal cases.

FBI Special Agent in Charge of the Phoenix Division John E. Lewis stated: “Paul Charlton has supported the FBI’s investigative efforts on many fronts and has been most proactive concerning the Bureau’s number one priority, protecting the United States from terrorist attacks. As the FBI works with many law enforcement agencies concerning terrorism matters, USA Charlton has dedicated resources to support terrorism investigations and other national security issues. I applaud and appreciate USA Charlton’s work as he has served the District of Arizona.”

“Paul Charlton has served Arizona exceptionally well over the last five years,” said Arizona Attorney General Terry Goddard. “He has forged partnerships across state, local and federal jurisdiction, and this has made Arizona a safer place to live.”

Another chief goal of USA Charlton has been to advocate for the rights of federal crime victims. He expanded the Victim Advocate staff in his office to better serve crime victims. In 2002, the

-MORE-

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U.S. Attorney's Office Victim Witness Program was awarded the Federal Service Award and this December the U.S. Department of Justice announced that the Arizona U.S. Attorney's Office would serve as a national "Model Program."

In an effort to address the growing problems posed by methamphetamine, in the summer of 2005, Charlton met with Arizona federal and tribal law enforcement agencies to discuss how to confront the methamphetamine problems in Indian Country. After gaining commitments for assistance from federal and tribal law enforcement, he consulted with and invited Arizona's 21 tribes to participate in the Arizona Indian Country Methamphetamine Eradication Initiative. Since then, numerous Indian tribes have engaged in the Initiative, resulting in multiple arrests of methamphetamine dealers in the Navajo Nation, the Salt River Pima-Maricopa Indian Community, the San Carlos Apache and the White Mountain Apache tribal communities.

"Paul has proven time and time again to be an outstanding law enforcement leader for the people of Arizona," said DEA Special Agent in Charge Timothy J. Landrum. "I have developed a strong personal and professional relationship with Paul. His innovative initiatives to combat crime on tribal lands and to battle the scourge of methamphetamine will leave a standing legacy that other federal districts will strive to emulate. His dedication to protecting the people of Arizona and the United States will be missed, but never forgotten."

In 2004, USA Charlton joined U.S. Attorneys in Utah, New Mexico, and Colorado to address Indian tribal concerns over the damage, theft, and trafficking in cultural patrimony and archeological resources. Together they initiated a 90-day amnesty from federal prosecution, resulting in telephone tips and returns of cultural patrimony belonging to tribes throughout the Southwest.

"It is with regret that the Inter Tribal Council of Arizona extends its heart felt good wishes to Paul Charlton," said Inter Tribal Council Executive Director John Lewis. "Paul has proven to be very responsive to the law enforcement needs of tribal governments in Arizona. He understands the sovereign status of the tribes and the U.S. Government's commitment to recognize this status and at the same time the need to carry out the U.S. Government's constitutional directed responsibility of Trust for Indian tribes. He will be greatly missed."

U.S. Attorney Charlton made public corruption cases a priority, sending a clear message that the U.S. Attorney's Office would hold public officials to the highest standards of ethical conduct. He joined with federal, state, and local law enforcement to identify, investigate, and aggressively prosecute corrupt public officials. This included several successful prosecutions of corrupt border officials, such as Fernando Arango and Michael Anderson, who received stiff penalties for taking bribes from and assisting narcotics traffickers.

"U.S. Attorney Paul Charlton has been a steadfast supporter of law enforcement and has played a tremendous part in the United States Border Patrol's efforts in bringing control to our nation's borders," stated National Border Patrol Chief David V. Aguilar, the chief Border Patrol officer for the United States. "The void left by U.S. Attorney Charlton's departure will be one that will be felt by the entire law enforcement community. Arizona can and should be proud of Mr. Charlton for what he has done for his country and state during his tenure."

-MORE-

DAG000000952

USA Charlton also worked to build the capacity of the U.S. Attorney's Office to address pressing issues of illegal immigration, drug trafficking, and crimes in Indian Country. In 2002, Charlton made temporary offices in Yuma and Flagstaff permanent, and during his tenure he brought on 16 new Assistant U.S. Attorney positions. Under his leadership, the U.S. Attorney's Office expanded prosecutions, increasing the number of criminal cases charged in federal district court from 3,979 in fiscal year 2001 to 5,026 in FY 2005.

Arizona Department of Public Safety Director Roger Vanderpool stated: "The law enforcement community is losing a great partner. Paul has shown he is a man of great integrity. He is a proven leader and will be missed."

Cochise County Sheriff Larry A. Dever stated: "I was saddened to hear Paul is leaving us. He has served Arizona law enforcement and the people of the State of Arizona in the highest traditions of the office. It has been a great honor to work with him over the past several years and I will miss my friend. We wish him the best in his new endeavor."

The Attorney General will appoint an interim U.S. Attorney who will serve until such time as the President nominates and the Senate confirms a new U.S. Attorney. In the interim, USA Charlton pledged to work with the Department of Justice and Arizona's law enforcement community to ensure a smooth transition.

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Moschella, William

From: Elston, Michael (ODAG)
Sent: Sunday, January 14, 2007 1:21 PM
To: Sampson, Kyle; Moschella, William; Goodling, Monica
Subject: Fw: Re:

FYI, Kevin's positive response to my request for a letter Tuesday. Announcement now expected on Friday.

-----Original Message-----

From: Ryan, Kevin (USACAN) <Kevin.Ryan@usdoj.gov>
To: Elston, Michael (ODAG)
CC: Ryan, Kevin (USACAN)
Sent: Sat Jan 13 11:37:31 2007
Subject: RE: Re:

It does.

Thank you,

K

Sent from my GoodLink synchronized handheld (www.good.com)

-----Original Message-----

From: Elston, Michael (ODAG)
Sent: Friday, January 12, 2007 09:13 PM Eastern Standard Time
To: Ryan, Kevin (USACAN)
Subject: Re:

Kevin:

After consultation with others (which I inadvertently forwarded to you as well -- sorry), we are fine with your proposal. However, we would like to have a copy of your resignation letter by fax on Tuesday. We will not begin the transition process until after your announcement, but it will allow us to put certain things in motion on Tuesday.

Let me know if that works for you.

Thanks,
Mike

-----Original Message-----

From: Ryan, Kevin (USACAN) <Kevin.Ryan@usdoj.gov>
To: Elston, Michael (ODAG)
CC: Ryan, Kevin (USACAN)
Sent: Fri Jan 12 18:30:25 2007
Subject:

Mike,

Just checking in. We talked about the timing of my announcement and departure, and I am happy to abide by the time frame but would only ask if it is possible for me to make the announcement next Friday instead of this Monday since it is a federal holiday and I would like to get a few things in order before making the public announcement. The time frame for departure however is fine-- I see that the 15th is a Thursday, how about Friday the 16th?

Thanks,

Kevin

Moschella, William

From: Goodling, Monica
Sent: Tuesday, January 16, 2007 4:06 PM
To: Sampson, Kyle; Elston, Michael (ODAG); Moschella, William
Subject: Jeff Taylor called

Says that he is hearing from people in the office that Carol Lam is telling people she is resigning.

Moschella, William

From: Elston, Michael (ODAG)
Sent: Tuesday, January 16, 2007 4:10 PM
To: Goodling, Monica; Sampson, Kyle; Moschella, William
Subject: Re: Jeff Taylor called

Vy interesting.

-----Original Message-----

From: Goodling, Monica
To: Sampson, Kyle; Elston, Michael (ODAG); Moschella, William
Sent: Tue Jan 16 16:05:48 2007
Subject: Jeff Taylor called

Says that he is hearing from people in the office that Carol Lam is telling people she is resigning.

Moschella, William

From: Roehrkasse, Brian
Sent: Tuesday, January 16, 2007 7:57 PM
To: Goodling, Monica; Sampson, Kyle; Elston, Michael (ODAG); Moschella, William
Subject: FW: Statement

Attachments: LAMPR.pdf

From: Smith, Kimberly A
Sent: Tuesday, January 16, 2007 7:47 PM
To: Roehrkasse, Brian; Scolinos, Tasia; Ablin, Erik
Subject: FW: Statement

FYI--this just in.

From: Hartman, Debra (USACAS) [<mailto:Debra.Hartman@usdoj.gov>]
Sent: Tuesday, January 16, 2007 7:45 PM
To: Smith, Kimberly A
Subject: Statement



LAMPR.pdf (46 KB)

NEWS RELEASE



OFFICE OF THE UNITED STATES ATTORNEY SOUTHERN DISTRICT OF CALIFORNIA

San Diego, California

*United States Attorney
Carol C. Lam*

For Immediate Release

NEWS RELEASE SUMMARY - January 16, 2007

United States Attorney Carol Chien-Hua Lam announced today that she will be leaving her position as the United States Attorney for the Southern District of California, which includes San Diego and Imperial Counties, effective February 15, 2007. "It has been both a great honor and a great privilege to have served the nation and the Southern District of California as United States Attorney for the past four and one-half years," said U.S. Attorney Lam. "The dedication shown by the men and women of the U.S. Attorney's Office can be seen every day in the important cases they prosecute, including cases relating to terrorism, immigration, narcotics, public corruption, and fraud."

"I thank the President for giving me the opportunity to serve as United States Attorney."

Lam, a graduate of Yale University and Stanford Law School, was sworn in as the United States Attorney on September 4, 2002, having previously served as a Superior Court judge in San Diego. Prior to her appointment to the bench, Ms. Lam was an Assistant United States Attorney in the San Diego office from 1986 to 2000, where she was Chief of the office's Major Frauds Section. Ms. Lam has extensive experience

DAG00000959

in the prosecution of health care fraud and white collar crime cases in San Diego. She served as the Chairperson on the San Diego Medical Fraud Task Force, as well as a member of the National Health Care Fraud Working Group. Ms. Lam began her legal career as a law clerk in the Department of Justice Appellate Tax Division in 1984. Later that year, she began an internship in San Diego with United States District Judge Earl B. Gilliam and later served as a law clerk to the Honorable Irving R. Kaufman, Judge of the U.S. Court of Appeals, Second Circuit, in New York. Ms. Lam also taught conversational English and American literature at the Jiao Tong University in Shanghai, China in 1982. During her tenure as United States Attorney, she served as a member of a number of the Attorney General's Advisory Committee's Subcommittees on Health Care Fraud, Controlled Substances, Terrorism/National Security, Border and Immigration, and White Collar/Fraud.

Adele Fasano, San Diego Director of Field Operations, U.S. Customs and Border Protection, said, "U.S. Customs and Border Protection has enjoyed a strong, collaborative relationship with the U.S. Attorney's Office to combat smuggling activity through the ports of entry. This focused effort has been particularly effective in the area of alien smuggling and has resulted in the aggressive prosecution of serious violators and organizations. Such efforts by the U.S. Attorney's Office have been an integral part of our enforcement program to combat cross-border smuggling."

Michael Unzueta, Special Agent in Charge, Immigration and Customs Enforcement (ICE) said, "There is no greater challenge than that of public service. Carol Lam is truly an example of a dedicated public servant and a law enforcement professional. We will miss her leadership and we wish her well in any future endeavor. I will personally miss her."

Naval Criminal Investigative Service (NCIS) Southwest Field Office Special Agent in Charge John Cooper said, "The departure of Ms. Lam will be a great loss, as our offices have consistently worked closely and successfully during her tenure. Ms. Lam is the consummate law enforcement executive who leads by example, continually demonstrating tremendous conviction, integrity, and the highest of professional standards. It has truly been an honor to work with her."

Alan Poleszak, Acting Special Agent in Charge, Drug Enforcement Administration, San Diego Field Division, stated, "Over the past four years DEA enjoyed a productive and proactive relationship with United States Attorney Carol Lam and her team of dedicated and talented prosecutors. The ongoing prosecution of the Javier Arellano Felix drug trafficking organization is both historic and noteworthy, adding to a legacy which includes aggressive regional methamphetamine enforcement and the prosecution of marijuana dispensaries. The United States Attorney is an integral part of the close-knit San Diego law enforcement community. As such, her commitment to federal law enforcement in this judicial district, county and city will be missed. DEA wishes her the very best."

Internal Revenue Service, Criminal Investigation, Special Agent in Charge Kenneth Hines stated, "It is a loss to the law enforcement community to lose such a respected and dedicated prosecutor that has served the citizens of San Diego County throughout her career. The Internal Revenue Service Criminal Investigation has worked well with her as a prosecutor and as the United States Attorney."

Chief William Lansdowne, San Diego Police Department, said, "Carol is one of the best U.S. Attorneys I have had the pleasure of working with. She is always available, very responsive and makes tough decisions quickly. I believe crime is down in our city because of her aggressiveness, especially with the gang challenges we experience. I am impressed with her recent handling of the case against the Arellano-Felix cartel members. Carol gets high marks from all of our assistant chiefs as well. I admire Carol for her assertiveness in going after elected officials who have broken the law. She certainly isn't shy when it comes to these types of cases and that is a quality we need in a U.S. Attorney."

United States Attorney Lam said, "During the past four years, we have obtained higher sentences for illegal aliens with serious criminal histories, and the violent crime rate has declined in San Diego. We have prosecuted serious cases involving public corruption, dismantled the leadership of large narcotics cartels and prison gangs, and protected the public fisc in civil litigation. I want to take this opportunity to thank the talented attorneys and staff of the U.S. Attorney's Office for serving the people of the Southern District of California so well."

Moschella, William

From: Elston, Michael (ODAG)
Sent: Thursday, January 18, 2007 10:58 AM
To: Sampson, Kyle; Moschella, William; Goodling, Monica
Cc: Mercer, William W; McNulty, Paul J
Subject: USAO-NDCA

Kyle:

Kevin Ryan's FAUSA, Eumi Choi, just called to let us know that Kevin is not returning calls from Sen. Feinstein or Carol Lam and doing his best to stay out of this. He wanted us to know that he's still a "company man." I gave her my talkers for McKay and Charlton and asked her to convey them to Kevin.

Mike

Moschella, William

From: Goodling, Monica
Sent: Thursday, January 25, 2007 8:07 PM
To: Sampson, Kyle; Elston, Michael (ODAG); Moschella, William; Battle, Michael (USAEO); Nowacki, John (USAEO); Scolinos, Tasia; Roehrkasse, Brian
Subject: FW: My Contact Information
Attachments: MCKAY -1-25-07.wpd

Apparently, McKay put this out today. FYI.

From: McKay, John (USAWAW) [mailto:John.McKay@usdoj.gov]
Sent: Thursday, January 25, 2007 8:05 PM
To: USAEO-USAttorneysOnly
Subject: My Contact Information

Colleagues,

My contact information and office press release is below. All the best.

- JOHN McKAY

Seattle University School of Law
901 - 12th Avenue
P. O. Box 222000
Seattle, WA 98122-1090
Cell Number: 206-697-2053
E-mail: jmckay@seattleu.edu

"UNITED STATES ATTORNEY JOHN McKAY JOINS SEATTLE UNIVERSITY LAW SCHOOL"

<<MCKAY -1-25-07.wpd>>

Department Of Justice
Office Legislative Affairs
Control Sheet

Date Of Document: 01/30/07
Date Received: 01/30/07
Due Date: 01/31/07 3 pm

Control No.: 070131-13228
ID No.: 435231

From: ODAG (SENATE JUDICIARY COMTE) (S.214) ((110TH
CONGRESS))

To: SENATE JUDICIARY COMTE

Subject:

ATTACHED FOR YOUR REVIEW AND COMMENT IS A COPY OF THE DRAFT STATEMENT OF
PAUL MCNULTY, DEPUTY ATTORNEY GENERAL, REGARDING PRESERVING
PROSECUTORIAL INDEPENDENCE: IS THE DEPARTMENT OF JUSTICE POLITICIZING
THE HIRING AND FIRING OF U.S. ATTORNEYS?, BEFORE THE SENATE JUDICIARY
COMTE, TO BE GIVEN ON FEBRUARY 6, 2007

Action/Information:

Signature Level: OLA

Referred To:

Assigned: Action:

EOUSA, FBI, ATF, USMS,
DEA, CIV, ASG, CRM

01/31/07 COMMENTS DUE TO OLA/BLACKWOOD BY 3 PM
01/31/07. CC: OAG, ODAG, OLP,
OLA/SCOTT-FINAN/SEIDEL

Remarks:

Comments:

File Comments:

Primary Contact: KRISTINE BLACKWOOD, 514-2113

DAG000000964

Moschella, William

From: Clifton, Deborah J
Sent: Wednesday, January 31, 2007 9:23 AM
To: Benderson, Judith (USAEO); Nowacki, John (USAEO); Smith, David L. (USAEO); Voris, Natalie (USAEO); Beth Beers; Carol Keeley; Denyse Coates; Erin Sanford; Kristan Mack; Rene Morton Nevens; Theresa Spinola; Ficaretta, Teresa; Rubenstein, Steve R.; Alexander, Robert (USMS); Conway, Janice (USMS); Edgar, Eliza (USMS); Mayer, Diana (USMS); McNulty, John (USMS); Noory, John (USMS); Brown, Jason F.; Dudley, John A.; Flaherty, Connor; Jameson, Dana B; Kripp, Joseph W.; Newman, Yvette; Shoemaker, Sheldon R; Whelan, Colleen; Cummings, Holly (CIV); Gunn, Currie (SMO); Katsas, Gregory; Shaw, Aloma A; Lofton, Betty; Massie, Patricia; Opl, Legislation; Samuels, Julie
Cc: Sampson, Kyle; Moschella, William; Elston, Michael (ODAG); Bounds, Ryan W (OLP); Goodling, Monica; Caballero, Luis (ODAG); Davis, Valorie A; Jackson, Wykema C; Wilcox, Matrina (OLP); Scott-Finan, Nancy; Seidel, Rebecca; Blackwood, Kristine
Subject: DAG McNulty draft testimony for a 02/06/07 hearing re Preserving Prosecutorial Independence
Importance: High
Attachments: S214control.pdf; DRAFT Testimony -- US Attorneys Hearing.doc

**YOU WILL NOT RECEIVE A HARD COPY OF THIS REQUEST.
PLEASE PROVIDE COMMENTS TO KRISTINE BLACKWOOD,
OLA, NO LATER THAN 3 pm 01/31/07.**



S214control.pdf (12 KB)



DRAFT Testimony -- US Attorney...

DRAFT TESTIMONY FOR
DEPUTY ATTORNEY GENERAL PAUL MCNULTY

Hearing before the Subcommittee on the Courts
Committee on the Judiciary
U.S. Senate

Wednesday, February 7, 2007

Chairman Schumer, Senator Sessions, and members of the Subcommittee, thank you for the invitation to discuss the importance and the independence 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 and Daniel Meador wrote, 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. 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 discharging the responsibilities of that office at all times and in every district.

When a U.S. Attorney submits his or her resignation, the Administration 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-nominated, Senate-confirmed United States Attorney. In some cases, the First Assistant U.S. Attorney is the appropriate person to serve in that capacity, but there are reasons he or she may not be, including: an impending retirement; an indication that the First Assistant has no desire to serve as an Acting U.S. Attorney, an IG or OPR matter in his or her file, which may make elevation inappropriate; an unfavorable recommendation by the outgoing U.S. Attorney; or that the individual does not enjoy the confidence of those responsible for ensuring ongoing operations and an appropriate transition. In those

situations, the Attorney General has appointed another individual to lead the office during the transition.

In every single case where a vacancy occurs, it is the goal of the Bush Administration to have a United States Attorney that is confirmed by the Senate. Every single time that 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 refused to move forward in consultation with home-state Senators on the selection, nomination, and confirmation of a new U.S. Attorney. Consultation and confirmation is the method preferred by the Senate, and that is the method preferred by the Administration.

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 seven positions, and is waiting to receive names to set up interviews for one position—all in consultation with home-state Senators.

However, while that process continues, the Department must continue to manage the important prosecutions and work of these offices. In order to ensure an effective and smooth transition during those vacancies, the office of the U.S. Attorney was filled on an interim basis using a range of authorities.

In four cases, the First Assistant was selected to lead the office and took over under the provisions of the Vacancy Reform Act, at 5 U.S.C. § 3345(a)(1). That authority is limited to 210 days, unless a nomination is made during that period. In a fifth case, the First Assistant was selected under that provision of the Vacancy Reform Act but took federal retirement a month later. The Department then selected another Department employee to serve as an interim U.S. Attorney under an Attorney General appointment until a nomination is submitted to the Senate.

In one case, the First Assistant resigned at the same time as the U.S. Attorney, creating a need for an interim until such time as a nomination is submitted to the Senate.

In the eight remaining cases, the Department selected another Department employee to serve as interim U.S. Attorney under an Attorney General appointment until such time as a nomination is submitted to the Senate.

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 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 may be removed, or asked or encouraged to resign. However, U.S. Attorneys are 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 simply irresponsible.

With 93 U.S. Attorneys across the country, the Department often averages between eight to 15 vacancies at any given time. Given this occasional turnover, career investigators and prosecutors exercise direct responsibility for nearly all investigations and cases handled by a U.S. Attorney's Office. The effect of a U.S. Attorney's departure on an ongoing investigation would be minimal.

Given these facts, the Department of Justice strongly opposes S. 214, which would radically change the way in which U.S. Attorney vacancies are temporarily filled, taking the authority to appoint members of his own staff from the Attorney General and delegating it instead to another branch of government.

As you know, prior to last year's amendment of 28 U.S.C. § 546, 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 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 several 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 then required to make multiple 120-day interim appointments. Other district courts ignored the inherent conflicts and the oddity, and sought to appoint as interim U.S. Attorneys unacceptable candidates without the required clearances or appropriate qualifications. Last year's amendment of section 546, which brought the section largely into conformity with the Vacancies Reform Act, was necessary and entirely appropriate.

S. 214, on the other hand, would not only fail to ensure that those problems did not recur; it would exacerbate them by making appointment by the district court 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 and not the head of the agency—appoint interim staff on behalf of the 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 of both the Executive and Judicial Branches. Furthermore, 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.

S. 214 seems aimed at solving a problem that does not exist. When a vacancy in the office of U.S. Attorney occurs, the Department often 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 may look to other Department employees to serve temporarily. No matter which way a U.S. Attorney is temporarily appointed, the Administration consistently seeks to consult with home-state Senators and fill the vacancy with a Presidentially-nominated and Senate-confirmed nominee.

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

Moschella, William

From: Moschella, William
Sent: Wednesday, January 31, 2007 4:28 PM
To: Henderson, Charles V
Subject: Fw: DAG McNulty draft testimony for a 02/06/07 hearing re Preserving Prosecutorial Independence

Importance: High

Attachments: S214control.pdf; DRAFT Testimony -- US Attorneys Hearing.doc

Please print

Sent from my BlackBerry Wireless Handheld

-----Original Message-----

From: Clifton, Deborah J
To: Benderson, Judith (USAEO); Nowacki, John (USAEO); Smith, David L. (USAEO); Voris, Natalie (USAEO); Beth Beers <Elizabeth.Beers@ic.fbi.gov>; Carol Keeley <Carol.Keeley@ic.fbi.gov>; Denyse Coates <dcoates@leo.gov>; Erin Sanford <Erin.Sanford@ic.fbi.gov>; Kristan Mack <Kristan.Mack@ic.fbi.gov>; Rene Morton Nevens <Rene.Nevens@ic.fbi.gov>; Theresa Spinola <Theresa.Spinola@ic.fbi.gov>; Ficaretta, Teresa; Rubenstein, Steve R.; Alexander, Robert (USMS); Conway, Janice (USMS); Edgar, Eliza (USMS); Mayer, Diana (USMS); McNulty, John (USMS); Noory, John (USMS); Brown, Jason F.; Dudley, John A.; Flaherty, Connor; Jameson, Dana B; Kripp, Joseph W.; Newman, Yvette; Shoemaker, Sheldon R; Whelan, Colleen; Cummings, Holly (CIV); Gunn, Currie (SMO); Katsas, Gregory; Shaw, Aloma A; Lofton, Betty; Massie, Patricia; Opl, Legislation; Samuels, Julie
CC: Sampson, Kyle; Moschella, William; Elston, Michael (ODAG); Bounds, Ryan W (OLP); Goodling, Monica; Caballero, Luis (ODAG); Davis, Valorie A; Jackson, Wykema C; Wilcox, Matrina (OLP); Scott-Finan, Nancy; Seidel, Rebecca; Blackwood, Kristine
Sent: Wed Jan 31 09:22:54 2007
Subject: DAG McNulty draft testimony for a 02/06/07 hearing re Preserving Prosecutorial Independence

YOU WILL NOT RECEIVE A HARD COPY OF THIS REQUEST. PLEASE PROVIDE COMMENTS TO KRISTINE BLACKWOOD, OLA, NO LATER THAN 3 pm 01/31/07.



S214control.pdf (12 KB)



DRAFT Testimony -- US Attorney...

<<S214contr Hearing.doc>>

1.pd

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<<DRAFT Testimony -- US Attorneys

Moschella, William

From: Elston, Michael (ODAG)
Sent: Thursday, February 01, 2007 3:52 PM
To: Hertling, Richard
Cc: Sampson, Kyle; Goodling, Monica; Moschella, William; McNulty, Paul J; Seidel, Rebecca
Subject: Bud Cummins

just called to let me know that Pryor's and Schumer's staff have called and asked him to testify on Tuesday. He declined, but wanted to know if we wanted him to testify -- would tell the truth about his circumstances and would also strongly support our view of S 214.

Thoughts?

Moschella, William

From: Moschella, William
Sent: Thursday, February 01, 2007 6:36 PM
To: Seidel, Rebecca
Cc: Scott-Finan, Nancy; Hertling, Richard; Tracci, Robert N; Elston, Michael (ODAG)
Subject: RE: SJC hearing on USA issue - Intel

Thanks. Elston's your man for that one.

I emailed Richard the other day and wanted to make sure we were getting two notebooks with:

1) all correspondence on this issue; 2) the major editorials on the subject; 3) all legislation introduced on this matter; and 4) any other info OLA deems pertinent.

From: Seidel, Rebecca
Sent: Thursday, February 01, 2007 6:12 PM
To: Elston, Michael (ODAG); Moschella, William; Sampson, Kyle; Goodling, Monica; Nowacki, John (USAEO)
Cc: Scott-Finan, Nancy; Hertling, Richard; Tracci, Robert N
Subject: SJC hearing on USA issue - Intel

Just spoke with Schumer's Chief counsel.

Other witnesses will be:

For the Dems:

Mary Jo White (you will recall she was NY USA under Clinton)

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Stuart Gerson

The DAG will have his own panel

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P.s. Rob just received intel about an HJC hearing on the same subject -

Dems are planning a hearing on this subject before the Subcomm on Comm and Admin Law (which has oversight of U.S. Attnys) on Feb. 15.

No word about witnesses yet but certainly a senior DoJ person is likely to be requested.

Tracking:	Recipient	Read
	Seidel, Rebecca	Read: 2/1/2007 6:45 PM
	Scott-Finan, Nancy	Read: 2/1/2007 6:43 PM
	Hertling, Richard	Read: 2/1/2007 6:41 PM
	Tracci, Robert N	Read: 2/1/2007 6:42 PM
	Elston, Michael (ODAG)	Read: 2/5/2007 10:34 PM

Moschella, William

From: Seidel, Rebecca
Sent: Thursday, February 01, 2007 6:47 PM
To: Moschella, William
Cc: Scott-Finan, Nancy; Hertling, Richard; Tracci, Robert N; Elston, Michael (ODAG)
Subject: RE: SJC hearing on USA issue - Intel

Elston was in my office earlier this afternoon and Nancy showed him the notebook she already has ready (has most of the info in it already) and it will be ready with 2 copies by 2pm tomorrow afternoon is our goal. We are pressing OMB to clear both the testimony and the views letter by then as well so they can be inserted in the binder too.

From: Moschella, William
Sent: Thursday, February 01, 2007 6:36 PM
To: Seidel, Rebecca
Cc: Scott-Finan, Nancy; Hertling, Richard; Tracci, Robert N; Elston, Michael (ODAG)
Subject: RE: SJC hearing on USA issue - Intel

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From: Scott-Finan, Nancy
Sent: Thursday, February 01, 2007 6:46 PM
To: Moschella, William; Seidel, Rebecca
Cc: Hertling, Richard; Tracci, Robert N; Elston, Michael (ODAG)
Subject: RE: SJC hearing on USA issue - Intel

We have 8 books in process with
A placeholder for the testimony
A placeholder for the views letter on S. 214
S. 214
The correspondence with Feinstein/Leahy, Conyers and Pryor
The relevant parts of the DOJ oversight transcript from 1/18/07
The Feinstein statement floor statement on the issue
Editorials
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To: Scott-Finan, Nancy; Seidel, Rebecca
Cc: Hertling, Richard; Tracci, Robert N; Elston, Michael (ODAG)
Subject: RE: SJC hearing on USA issue - Intel

Excellent. The sooner the DAG can get one the better.

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Sent: Thursday, February 01, 2007 6:46 PM
To: Moschella, William; Seidel, Rebecca
Cc: Hertling, Richard; Tracci, Robert N; Elston, Michael (ODAG)
Subject: RE: SJC hearing on USA issue - Intel

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Scott-Finan, Nancy	Read: 2/1/2007 8:05 PM
Seidel, Rebecca	Read: 2/1/2007 7:04 PM
Hertling, Richard	Read: 2/1/2007 6:53 PM
Tracci, Robert N	Read: 2/1/2007 6:54 PM
Eiston, Michael (ODAG)	Read: 2/5/2007 10:35 PM

Paul J. McNulty

**Deputy Attorney General
U.S. Department of Justice**

Paul J. McNulty was sworn in as Deputy Attorney General of the United States on March 17, 2006. Prior to his confirmation by the Senate, Mr. McNulty had served as Acting Deputy Attorney General since November 1, 2005.

Mr. McNulty has spent nearly his entire career in public service, with more than two decades of experience in federal and state government. From September 14, 2001, to March 17, 2006, Mr. McNulty served as the United States Attorney for the Eastern District of Virginia. Under Mr. McNulty's leadership, the U.S. Attorney's Office in Eastern Virginia grew more than 20 percent, and he made the prosecution of terrorism, gun violence, drug trafficking, and corporate fraud his top priorities and successfully prosecuted many of our nation's highest profile cases in the War on Terror. He also launched initiatives against gangs, cybercrime and procurement fraud.

Before becoming U.S. Attorney, Mr. McNulty directed President Bush's transition team for the Department of Justice and then served as Principal Associate Deputy Attorney General. In the prior Bush Administration, Mr. McNulty was the Justice Department's director of policy and its chief spokesman.

Mr. McNulty has over 12 years of experience in the United States Congress. He was Chief Counsel and Director of Legislative Operations for the Majority Leader of the U.S. House of Representatives. He was also Chief Counsel to the House Subcommittee on Crime where he served for eight years. During those years he was a principal draftsman of many anti-terrorism, drug control, firearms and anti-fraud statutes.

Mr. McNulty has played a significant role in shaping criminal justice policy in the Commonwealth of Virginia. He served then Governor George Allen as a primary architect of the "Parole Abolition and Sentencing Reform" initiative in 1994, and he served on the board of the Department of Criminal Justice Services and the Advisory Committee of the Office of Juvenile Justice and Delinquency Prevention.

Mr. McNulty grew up in Pittsburgh, Pennsylvania. He married his college sweetheart 26 years ago, and they have four children.

###

January 2007

DAG000000980



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

DAG000000981

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 Schumer, Senator Sessions, 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.

Moschella, William

From: USDOJ- Office of Public Affairs
Sent: Tuesday, February 06, 2007 3:00 PM
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Subject: WRITTEN STATEMENT OF DEPUTY ATTORNEY GENERAL PAUL J. MCNULTY TO THE SENATE JUDICIARY COMMITTEE FOR HEARING ON APPOINTMENTS AND RESIGNATIONS OF U.S. ATTORNEYS

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Department of Justice

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SENATE
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WASHINGTON, D.C.

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Moschella, William

From: Scott-Finan, Nancy
Sent: Wednesday, February 07, 2007 10:32 AM
To: Sampson, Kyle; Goodling, Monica; Elston, Michael (ODAG); Moschella, William; Hertling, Richard; Seidel, Rebecca; Battle, Michael (USAEO); Nowacki, John (USAEO); Bounds, Ryan W (OLP); Kirsch, Thomas; Scolinos, Tasia; Mercer, William W; Margolis, David; Burton, Faith
Subject: FW: Transcript of Paul McNulty's hearing on 02-06-07 re US Attorneys
Attachments: 02-06-07 McNulty Transcript re US Attorneys.doc



02-06-07 McNulty
Transcript re...

HEARING OF THE SENATE JUDICIARY COMMITTEE SUBJECT: PRESERVING PROSECUTORIAL INDEPENDENCE: IS THE DEPARTMENT OF JUSTICE POLITICIZING THE HIRING AND FIRING OF U.S. ATTORNEYS? CHAIRED BY: SENATOR CHARLES SCHUMER (D-NY) WITNESSES: SENATOR MARK PRYOR (D-AR); DEPUTY ATTORNEY GENERAL PAUL J. MCNULTY; MARY JO WHITE, ATTORNEY; LAURIE L. LEVENSON, PROFESSOR OF LAW, LOYOLA LAW SCHOOL, LOS ANGELES, CA; STUART M. GERSON, ATTORNEY LOCATION: ROOM 226 DIRKSEN SENATE OFFICE BUILDING, WASHINGTON, D.C. TIME: 9:30 A.M. EST DATE: TUESDAY, FEBRUARY 6, 2007

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SEN. SCHUMER: (Sounds gavel.) Good morning and welcome to the first hearing of our Administrative Law and Court Subcommittee. And we --

STAFF: (Off mike.) SEN. SCHUMER: -- oh. And this is a full-committee hearing, I am just informed -- power has already gone to his head. (Laughter.) Reminds you of that old Woody Allen movie, remember? Anyway, we'll save that for another time.

Anyway, I will give an opening statement, then Senator Specter will, and any others who wish to give opening statements are welcome to do so.

Well, we are holding this hearing because many members of this committee, including Chairman Leahy -- who had hoped to be here, but is speaking on the floor at this time -- have become increasingly concerned about the administration of justice and the rule of law in this country. I have observed with increasing alarm how politicized the Department of Justice has become. I have watched with growing worry as the department has increasingly based hiring on political affiliation, ignored the recommendations of career attorneys, focused on the promotion of political agendas and failed to retain legions of talented career attorneys.

I have sat on this committee for eight years, and before that on the House Judiciary Committee for 16. During those combined 24 years of oversight over the Department of Justice, through seven presidential terms -- including three Republican presidents -- I have never seen the department more politicized and pushed further away from its mission as an apolitical enforcer of the rule of law. And now it appears even the hiring and firing of our top federal prosecutors has become infused and corrupted with political rather than prudent considerations -- or at least there is a very strong appearance that this is so.

For six years there has been little or no oversight of the Department of Justice on matters like these. Those days are now over. There are many questions surrounding the firing of a slew of U.S. attorneys. I am committed to getting to the bottom of those questions. If we do not get the documentary information that we seek, I will consider moving to subpoena that material, including performance evaluations and other documents. If we do not get

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forthright answers to our questions, I will consider moving to subpoena one or more of the fired U.S. attorneys so that the record is clear.

So with that in mind, let me turn to the issue at the center of today's hearing. Once appointed, U.S. attorneys, perhaps more than any other public servant, must be above politics and beyond reproach. They must be seen to enforce the rule of law without fear or favor. They have enormous discretionary power. And any doubt as to their impartiality and their duty to enforce the rule of law puts seeds of poison in our democracy.

When politics unduly infects the appointment and removal of U.S. attorneys, what happens? Cases suffer. Confidence plummets. And corruption has a chance to take root. And what has happened here over the last seven weeks is nothing short of breathtaking. Less than two months ago, seven or more U.S. attorneys reportedly received an unwelcome Christmas present. As The Washington Post reports, those top federal prosecutors were called and terminated on the same day. The Attorney General and others have sought to deflect criticism by suggesting that these officials all had it coming because of poor performance; that U.S. attorneys are routinely removed from office; and that this was only business as usual.

But what happened here doesn't sound like an orderly and natural replacement of underperforming prosecutors; it sounds more like a purge. What happened here doesn't sound like business as usual; it appears more reminiscent of a different sort of Saturday night massacre.

Here's what the record shows: Several U.S. attorneys were apparently fired with no real explanation; several were seemingly removed merely to make way for political up-and-comers; one was fired in the midst of a successful and continuing investigation of lawmakers; another was replaced with a pure partisan of limited prosecutorial experience, without Senate confirmation; and all of this, coincidentally, followed a legal change -- slipped into the Patriot Act in the dead of night -- which for first time in our history gave the Attorney General the power to make indefinite interim appointments and to bypass the Senate altogether.

We have heard from prominent attorneys -- including many Republicans -- who confirm that these actions are unprecedented, unnerving, and unnecessary. Let me quote a few. The former San Diego U.S. Attorney, Peter Nunez, who served under Reagan said, quote, "This is like nothing I've ever seen before in 35-plus years," unquote. He went on to say that while the president has the authority to fire a U.S. attorney for any reason, it is, quote, "extremely rare unless there is an allegation of misconduct."

Another former U.S. attorney and head of the National Association of Former United States Attorneys said members of his group were in "shock" over the purge, which, quote, "goes against all tradition."

The Attorney General, for his part, has flatly denied that politics has played any part in the firings. At a Judiciary Committee hearing last month, he testified that, quote, "I would never, ever make a change in a U.S. attorney position for political reasons." Unquote.

And yet, the recent purge of top federal prosecutors reeks of politics. An honest look at the record reveals that something is rotten in Denmark: In Nevada, where U.S. Attorney Daniel Bogden was reportedly fired, a Republican source told the press that, quote, "the decision to remove U.S. attorneys was

part of a plan to give somebody else that experience" -- this is a quote -- "to build up the back bench of Republicans by giving them high-profile jobs," unquote. That was in The Las Vegas Review-Journal on January 18th. In New Mexico, where U.S. Attorney David Iglesias was reportedly fired, he has publicly stated that when he asked why he was asked to resign, he, quote, "wasn't given any answers," unquote.

In San Diego, where U.S. Attorney Carol Lam was reportedly fired, the top-ranking FBI official in San Diego said, quote, "I guarantee politics is involved," unquote. And the former U.S. attorney under President Reagan said, quote, "It really is outrageous," unquote. Ms. Lam, of course, was in the midst of a sweeping public corruption investigation of "Duke" Cunningham and his co-conspirators, and her office has outstanding subpoenas to three House Committees. Was her firing a political retaliation? There's no way to know, but the Department of Justice should go out of its way to avoid even the appearance of impropriety. That is not too much to ask, and as I've said, the appearance here -- given all the circumstances -- is plain awful.

Finally, in Arkansas, where U.S. Attorney Bud Cummins was forced out, there is not a scintilla of evidence that he had any blemish on his record. In fact, he was well-respected on both sides of the aisle, and was in the middle of a number of important investigations. His sin -- occupying a high-profile position that was being eyed by an ambitious acolyte of Karl Rove, who had minimal federal prosecution experience, but was highly skilled at opposition research and partisan attacks for the Republican National Committee.

Among other things, I look forward to hearing the Deputy Attorney General explain to us this morning how and why a well-performing prosecutor in Arkansas was axed in favor of such a partisan warrior. What strings were pulled? What influence was brought to bear?

In June of 2006, when Karl Rove was himself still being investigated by a U.S. attorney, was he brazenly leading the charge to oust a sitting U.S. attorney and install his own former aide? We don't know, but maybe we can find out.

Now, I ask, is this really how we should be replacing U.S. Attorneys in the middle of a presidential term? No one doubts the president has the legal authority to do it, but can this build confidence in the Justice Department? Can this build confidence in the administration of justice?

I yield to my colleague from Pennsylvania.

SEN. ARLEN SPECTER (R-PA): I concur with Senator Schumer that the prosecuting attorney is obligated to function in a nonpolitical way. The prosecuting attorney is a quasi-judicial official. He's part judge and part advocate. And have the power of investigation and indictment and prosecution in the criminal courts is a tremendous power. And I know it very well, because I was the district attorney of a big tough city for eight years and an assistant district attorney for four years before that. And the phrase in Philadelphia, perhaps generally, was that the district attorney had the keys to the jail in his pocket.

Well, if he had the keys to the jail, that's a lot of power.

But let us focus on the facts as opposed to generalizations. And I and my colleagues on the Republican side of the aisle will cooperate in finding the

facts if the facts are present, but let's be cautious about the generalizations, which we heard a great many of in the chairman's opening remarks.

If the U.S. attorney was fired in retaliation for what was done on the prosecution of former Congressman Cunningham, that's wrong. And that's wrong even though the president has the power to terminate U.S. attorneys. But the U.S. attorneys can't function if they're going to be afraid of the consequences of a vigorous prosecution.

When Senator Schumer says that the provision was inserted into the Patriot Act in the dead of night, he's wrong. That provision was in the conference report, which was available for examination for some three months.

The first I found out about the change in the Patriot Act occurred a few weeks ago when Senator Feinstein approached me on the floor and made a comment about two U.S. attorneys who were replaced under the authority of the change in law in the Patriot Act which altered the way U.S. attorneys are replaced.

Prior to the Patriot Act, U.S. attorneys were replaced by the attorney general for 120 days, and then appointments by the court or the first assistant succeeded to the position of U.S. attorney. And the Patriot Act gave broader powers to the attorney general to appoint replacement U.S. attorneys.

I then contacted my very able chief counsel, Michael O'Neill, to find out exactly what had happened. And Mr. O'Neill advised me that the requested change had come from the Department of Justice, that it had been handled by Brett Tolman, who is now the U.S. attorney for Utah, and that the change had been requested by the Department of Justice because there had been difficulty with the replacement of a U.S. attorney in South Dakota, where the court made a replacement which was not in accordance with the statute; hadn't been a prior federal employee and did not qualify.

And there was also concern because, in a number of districts, the courts had questioned the propriety of their appointing power because of separation of powers. And as Mr. Tolman explained it to Mr. O'Neill, those were the reasons, and the provision was added to the Patriot Act, and as I say, was open for public inspection for more than three months while the conference report was not acted on.

If you'll recall, Senator Schumer came to the floor on December 16th and said he had been disposed to vote for the Patriot Act, but had changed his mind when The New York Times disclosed the secret wiretap program, electronic surveillance. May the record show that Senator Schumer is nodding in the affirmative. There's something we can agree on. In fact, we agree sometimes in addition.

Well, the conference report wasn't acted on for months, and at that time, this provision was subject to review. Now, I read in the newspaper that the chairman of the Judiciary Committee, Arlen Specter, "slipped it in." And I take umbrage and offense to that. I did not slip it in and I do not slip things in. That is not my practice. If there is some item which I have any idea is controversial, I tell everybody about it. That's what I do. So I found it offensive to have the report of my slipping it in. That's how it got into the bill.

Now, I've talked about the matter with Senator Feinstein, and I do agree that we ought to change it back to where it was before. She and I, I think, will be able to agree on the executive session on Thursday.

And let's be candid about it. The atmosphere in Washington, D.C. is one of high-level suspicion. There's a lot of suspicion about the executive branch because of what's happened with signing statements, because of what's happened with the surveillance program.

And there is no doubt, because it has been explicitly articulated -- maybe "articulate" is a bad word these days -- expressly stated by ranking Department of Justice officials that they want to increase -- executive branch officials -- they want to increase executive power.

So we live in an atmosphere of high-level suspicion. And I want to see this inquiry pursued on the items that Senator Schumer has mentioned. I don't want to see a hearing and then go on to other business. I want to see it pursued in each one of these cases and see what actually went on, because there are very serious accusations that are made. And if they're true, there ought to be very, very substantial action taken in our oversight function. But if they're false, then the accused ought to be exonerated.

But the purpose of the hearing, which can be accomplished, I think, in short order, is to change the Patriot Act so that this item is not possible for abuse. And in that, I concur with Senator Feinstein and Senator Leahy and Senator Schumer. And a pursuit of political use of the department is something that I also will cooperate in eliminating if, in fact, it is true.

Thank you, Mr. Chairman. SEN. SCHUMER: Thank you, Senator Specter.

Senator Feingold.

SEN. RUSSELL FEINGOLD (D-WI): Thank you, Mr. Chairman, for holding the hearing.

I have to chair a subcommittee, the Africa Subcommittee of the Foreign Relations Committee, at 10:00. And I was hoping to give an opening statement. But I'm very pleased not only with your statement but, frankly, with Senator Specter's statement, because it sounds to me like there's going to be a bipartisan effort to fix this.

I also have strong feelings about what was done here, but it sounds like there's a genuine desire to resolve this in that spirit. And in light of the fact I have to go anyway, Mr. Chairman, I'm just going to ask that my statement be put in the record.

SEN. SCHUMER: Without objection.

Senator Hatch.

SEN. ORRIN HATCH (R-UT): Thank you, Mr. Chairman. I appreciate it.

I've appreciated both of your statements, too. I don't agree fully with either statement. First of all, the U.S. attorneys serve at the pleasure of the president, whoever the president may be, whether it's a Democrat or a Republican. You know, the Department of Justice has repeatedly and adamantly

stated that U.S. attorneys are never removed or encouraged to resign in an effort to retaliate against them or interfere with investigations.

Now, this comes from a department whose mission is to enforce the law and defend the interests of the United States. Now, are we supposed to believe and trust their efforts when it comes to outstanding criminal cases and investigations which have made our country a safer place but then claim that they are lying when they tell us about their commitment to appoint proper U.S. attorneys? I personally believe that type of insinuation is completely reckless.

Now, if, in fact, there has been untoward political effort here, then I'd want to find it out just like Senators Schumer and Specter have indicated here. As has been said many times, U.S. attorneys serve at the pleasure of the president. I remember when President Clinton became president, he dismissed 93 U.S. attorneys, if I recall it correctly, in one day. That was very upsetting to some of my colleagues on our side. But he had a right to do it.

And frankly, I don't think anybody should have said he did it purely for political reasons, although I don't think you can ever remove all politics from actions that the president takes. The president can remove them for any reason or no reason whatsoever. That's the law, and it's very clear.

U.S. Code says that, quote, "Each United States attorney is subject to removal by the president," unquote. It doesn't say that the president has to give explanations, it doesn't say that the president has to get permission from Congress and it doesn't say that the president needs to grant media interviews giving full analysis of his personal decisions. Perhaps critics should seek to amend the federal court and require these types of restrictions on the president's authority, but I would be against that.

Finally, I want to point out that the legislation that we are talking about applies to whatever political party is in office. The law does not say that George Bush is the only president who can remove U.S. attorneys. And the law does not say that attorneys general appointed by a Republican president have interim appointment authority. The statutes apply to whoever is in office, no matter what political party.

Now, I remember, with regard to interim U.S. attorneys, that an interim appointed during the Clinton administration served for eight years in Puerto Rico and was not removed. Now, you know, I, for one, do not want judges appointing U.S. attorneys before whom they have to appear. That's why we have the executive branch of government.

Now, I would be interested if there is any evidence that impropriety has occurred or that politics has caused the removal of otherwise decent, honorable people. And I'm talking about pure politics, because let's face it, whoever's president certainly is going to be -- at least so far -- either a Democrat or Republican in these later years of our republic. So, these are important issues that are being raised here. But as I understand, we're talking about seven to nine U.S. attorneys, some of whom -- we'll just have to see what people have to say about it, but I'm going to be very interested in the comments of everybody here today. It should be a very, very interesting hearing.

But I would caution people to reserve your judgment. If there is an untoward impropriety here, my gosh, we should come down very hard against it.

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