

Changes to H.R. 580

- We would urge the Committee consider the following suggestions:
- First, the 120-day period in the prior statute proved to be far too short. Congress has itself determined in the Vacancies Reform Act that **210 days is a more appropriate length of time** to permit an official already with an agency to serve in an acting capacity in an office subject to Senate confirmation.
- We urge that, if the Committee wishes to restore some authority to the district courts to appoint interim U.S. Attorneys, it confer this authority on the district court only after 210 days have elapsed on the Attorney General's appointment, and not the 120 days as contemplated in H.R. 580.
- The reality is that between the selection of U.S. Attorneys and the confirmation process in the Senate, it now takes an average of more than 300 days to fill an open U.S. Attorney position with a confirmed individual.
- Second, to avoid problematic cases such as the two noted in my testimony, we request that the law **permit the district to appoint as interim U.S. Attorney only an individual who is a current Justice Department employee or has been cleared for or eligible to obtain a clearance for access to classified information.**
- Finally, we request that the law **contain a requirement that the district court consult with the Attorney General prior to making the appointment.** This last requirement will permit the Attorney General to advise the district court on whether the individual has been cleared or is qualified to receive a security clearance and whether the individual, if he or she is a current Justice Department employee, is the subject of an investigation by the Office of Professional Responsibility or the Inspector General.
- If H.R. 580 were amended to include these provisions, the Department would not interpose an objection to the legislation.

110th CONGRESS

1st Session

H. R. 580

To amend chapter 35 of title 28, United States Code, to provide for a 120-day limit to the term of a United States attorney appointed on an interim basis by the Attorney General, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

January 19, 2007

Mr. BERMAN (for himself, Mr. CONYERS, and Mr. SCOTT of Virginia) introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To amend chapter 35 of title 28, United States Code, to provide for a 120-day limit to the term of a United States attorney appointed on an interim basis by the Attorney General, and for other purposes.

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

SECTION 1. INTERIM APPOINTMENT OF UNITED STATES

ATTORNEYS .

Section 546 of title 28, United States Code, is amended by striking subsection (c) and inserting the following new subsections:

(c) A person appointed as United States attorney under this section may serve until the earlier of--

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

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

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

DAG000001203

TALKING POINTS
AND FACT SHEET

TALKING POINTS: U.S. ATTORNEY NOMINATIONS AND INTERIM APPOINTMENTS BY THE ATTORNEY GENERAL

Overview:

- In every single case, it is a goal of the Bush Administration to have a U.S. Attorney that is confirmed by the Senate. Use of the AG's appointment authority is in no way an attempt to circumvent the confirmation process. To the contrary, when a United States 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 (PAS) U.S. Attorney. Whenever a U.S. Attorney vacancy arises, we consult with the home-state Senators about candidates for nomination.
- Our record since the AG-appointment authority was amended demonstrates we are committed to working with the Senate to nominate candidates for U.S. Attorney positions. Every single time that a United States Attorney vacancy has arisen, the President either has made a nomination or the Administration is working, in consultation with home-State Senators, to select candidates for nomination.
 - ✓ Specifically, since March 9, 2006 (when the AG's appointment authority was amended), the Administration has nominated 16 individuals to serve as U.S. Attorney (12 have been confirmed to date).

U.S. Attorneys Serve at the Pleasure of the President:

- United States Attorneys are at the forefront of the Department of Justice's efforts. They are leading the charge to protect America from acts of terrorism; reduce violent crime, including gun crime and gang crime; enforce immigration laws; fight illegal drugs, especially methamphetamine; combat crimes that endanger children and families like child pornography, obscenity, and human trafficking; and ensure the integrity of the marketplace and of government by prosecuting corporate fraud and public corruption.
- The Attorney General and the Deputy Attorney General are responsible for evaluating the performance the United States Attorneys and ensuring that United States Attorneys are leading their offices effectively.
- United States Attorneys serve at the pleasure of the President. Thus, like other high-ranking Executive Branch officials, they may be removed for any reason or no reason. That on occasion in an organization as large as the Justice Department some United States Attorneys are removed, or are asked or encouraged to resign, should come as no surprise. United States Attorneys never are 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.

- Whenever a vacancy occurs, we act to fill it in compliance with our obligations under the Constitution, the laws of the United States, and in consultation with the home-state Senators. The Senators have raised concerns based on a misunderstanding of the facts surrounding the resignations of a handful of U.S. Attorneys, each of whom have been in office for their full four year term or more.
- The Attorney General and the Deputy Attorney General are responsible for evaluating the performance the U.S. Attorneys and ensuring that they are leading their offices effectively. 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.

The Administration Must Ensure an Effective Transition When Vacancies Occur:

- When a United States Attorney has submitted his or her resignation, the Administration has -- in every single case -- consulted with home-state Senators regarding candidates for the Presidential nomination and Senate confirmation. The Administration is committed to nominating a candidate for Senate consideration everywhere a vacancy arises, as evidenced by the fact that there have been 124 confirmations of new U.S. Attorneys since January 20, 2001.
- With 93 U.S. Attorney positions across the country, the Department often averages between 8-15 vacancies at any given time. Because of the important work conducted by these offices, and the need to ensure that the office is being managed effectively and appropriately, the Department uses a range of options to ensure continuity of operations.
- In some cases, the First Assistant U.S. Attorney is an appropriate choice. However, in other cases, the First Assistant may not be an appropriate option for reasons including that he or she: resigns or retires at the same time as the outgoing U.S. Attorney; indicates that he/she does not want to serve as Acting U.S. Attorney; has ongoing or completed OPR or IG matters in their file, which may make his/her elevation to the Acting role inappropriate; or is subject of an unfavorable recommendation by the outgoing U.S. Attorney or otherwise does not enjoy the confidence of those responsible for ensuring ongoing operations and an appropriate transition until such time as a new U.S. Attorney is nominated and confirmed by the Senate. In those cases, the Attorney General has appointed another individual to lead the office during the transition, often another senior manager from that office or an experienced attorney from within the Department.

The Administration Is Nominating Candidates for U.S. Attorney Positions:

- Since March 9, 2006, when the appointment authority was amended, the Administration has nominated 16 individuals for Senate consideration (12 have been confirmed to date).
- Since March 9, 2006, when the appointment authority was amended, 18 vacancies have been created. Of those 18 vacancies, the Administration nominated candidates to fill 6 of these positions (3 were confirmed to date), has interviewed candidates for 8 positions, and is waiting to receive names to set up interviews for the remaining positions – all in consultation with home-state Senators.

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

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

Amending the Statute Was Necessary:

- Last year's amendment to the Attorney General's appointment authority was necessary and appropriate.
- We are aware of no other federal 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.
- Prior to the amendment, the Attorney General could appoint an interim United States Attorney for only 120 days; thereafter, the district court was authorized to appoint an interim United States Attorney. In cases where a Senate-confirmed United States Attorney could not be appointed within 120 days, the limitation on the Attorney General's appointment authority resulted in numerous, recurring problems.

- The statute was amended for several reasons:
 - 1) The previous provision was constitutionally-suspect in that it is inappropriate and inconsistent with sound separation of powers principles to vest federal courts with the authority to appoint a critical Executive Branch officer such as a United States Attorney;
 - 2) Some district courts – recognizing the oddity of members of one branch of government appointing officers of another and the conflicts inherent in the appointment of an interim United States Attorney who would then have many matters before the court – refused to exercise the court appointment authority, thereby requiring the Attorney General to make successive, 120-day appointments;
 - 3) Other district courts – ignoring the oddity and the inherent conflicts – sought to appoint as interim United States Attorney wholly unacceptable candidates who did not have the appropriate experience or the necessary clearances.

- Court appointments raise significant conflict questions. After being appointed by the court, the judicial appointee would have authority for litigating the entire federal criminal and civil docket for this period before the very district court to whom he was beholden for his appointment. Such an arrangement at a minimum gives rise to an appearance of potential conflict that undermines the performance of not just the Executive Branch, but also the Judicial one. Furthermore, prosecutorial authority should be exercised by the Executive Branch in a unified manner, with consistent application of criminal enforcement policy under the supervision of the Attorney General.

- Because the Administration is committed to having a Senate-confirmed United States Attorney in all districts, changing the law to restore the limitations on the Attorney General's appointment authority is unnecessary.

FACT SHEET: UNITED STATES ATTORNEY APPOINTMENTS

NOMINATIONS AFTER AMENDMENT TO ATTORNEY GENERAL'S APPOINTMENT AUTHORITY

Since March 9, 2006, when the Congress amended the Attorney General's authority to appoint interim United States Attorneys, the President has nominated 16 individuals to serve as United States Attorney. The 16 nominations are:

- Erik Peterson – Western District of Wisconsin;
- Charles Rosenberg – Eastern District of Virginia;
- Thomas Anderson – District of Vermont;
- Martin Jackley – District of South Dakota;
- Alexander Acosta – Southern District of Florida;
- Troy Eid – District of Colorado;
- Phillip Green – Southern District of Illinois;
- George Holding – Eastern District of North Carolina;
- Sharon Potter – Northern District of West Virginia;
- Brett Tolman – District of Utah;
- Rodger Heaton – Central District of Illinois;
- Deborah Rhodes – Southern District of Alabama;
- Rachel Paulose – District of Minnesota;
- John Wood – Western District of Missouri;
- Rosa Rodriguez-Velez – District of Puerto Rico; and
- Jeffrey Taylor – District of Columbia.

All but Phillip Green, John Wood, Rosa Rodriguez-Velez, and Jeffrey Taylor have been confirmed by the Senate – 12 of 16 nominations.

VACANCIES AFTER AMENDMENT TO ATTORNEY GENERAL'S APPOINTMENT AUTHORITY

Since March 9, 2006, there have been 18 new U.S. Attorney vacancies that have arisen. They have been filled as noted below.

For 7 of the 18 vacancies, the First Assistant United States Attorney (FAUSA) in the district was selected to lead the office in an acting capacity under the Vacancies Reform Act, *see* 5 U.S.C. § 3345(a)(1) (first assistant may serve in acting capacity for 210 days unless a nomination is made) until a nomination could be or can be submitted to the Senate. Those districts are:

- Central District of California – FAUSA George Cardona is acting United States Attorney

- **Southern District of Illinois** – FAUSA Randy Massey is acting United States Attorney (a nomination was made last Congress for Phillip Green, but confirmation did not occur);
- **Eastern District of North Carolina** – FAUSA George Holding served as acting United States Attorney (Holding was nominated and confirmed);
- **Northern District of West Virginia** – FAUSA Rita Valdrini served as acting United States Attorney (Sharon Potter was nominated and confirmed);
- **Southern District of Georgia** – FAUSA Edmund A. Booth, Jr. is acting USA;
- **District of New Mexico** – FAUSA Larry Gomez is acting USA; and
- **District of Nevada** – FAUSA Steven Myhre is acting USA.

For 1 vacancy, the Department first selected the First Assistant United States Attorney to lead the office in an acting capacity under the Vacancies Reform Act, but the First Assistant retired a month later. At that point, the Department selected another employee to serve as interim United States Attorney until a nomination could be submitted to the Senate, *see* 28 U.S.C. § 546(a) (“Attorney General may appoint a United States attorney for the district in which the office of United States attorney is vacant”). This district is:

- **Northern District of Iowa** – FAUSA Judi Whetstine was acting United States Attorney until she retired and Matt Dummermuth was appointed interim United States Attorney.

For 10 of the 18 vacancies, the Department selected another Department employee to serve as interim United States Attorney until a nomination could be submitted to the Senate, *see* 28 U.S.C. § 546(a) (“Attorney General may appoint a United States attorney for the district in which the office of United States attorney is vacant”). Those districts are:

- **Eastern District of Virginia** – Pending nominee Chuck Rosenberg was appointed interim United States Attorney when incumbent United States Attorney resigned to be appointed Deputy Attorney General (Rosenberg was confirmed shortly thereafter);
- **Eastern District of Arkansas** – Tim Griffin was appointed interim United States Attorney when incumbent United States Attorney resigned;
- **District of Columbia** – Jeff Taylor was appointed interim United States Attorney when incumbent United States Attorney resigned to be appointed Assistant Attorney General for the National Security Division (Taylor has been nominated to fill the position permanently);
- **District of Nebraska** – Joe Stecher was appointed interim United States Attorney when incumbent United States Attorney resigned to be appointed Chief Justice of Nebraska Supreme Court;
- **Middle District of Tennessee** – Craig Morford was appointed interim United States Attorney when incumbent United States Attorney resigned;
- **Western District of Missouri** – Brad Schlozman was appointed interim United States Attorney when incumbent United States Attorney and FAUSA resigned at the same time (John Wood was nominated);

- **Western District of Washington** – Jeff Sullivan was appointed interim United States Attorney when incumbent United States Attorney resigned;
- **District of Arizona** – Dan Knauss was appointed interim United States Attorney when incumbent United States Attorney resigned;
- **Northern District of California** – Scott Schools was appointed interim United States Attorney when incumbent United States Attorney resigned; and
- **Southern District of California** – Karen Hewitt was appointed interim United States Attorney when incumbent United States Attorney resigned.

ATTORNEY GENERAL APPOINTMENTS AFTER AMENDMENT TO - ATTORNEY GENERAL'S APPOINTMENT AUTHORITY

The Attorney General has exercised the authority to appoint interim United States Attorneys a total of 14 times since the authority was amended in March 2006.

In 2 of the 14 cases, the FAUSA had been serving as acting United States Attorney under the Vacancies Reform Act (VRA), but the VRA's 210-day period expired before a nomination could be made. Thereafter, the Attorney General appointed that same FAUSA to serve as interim United States Attorney. These districts include:

- **District of Puerto Rico** – Rosa Rodriguez-Velez (Rodriguez-Velez has been nominated); and
- **Eastern District of Tennessee** – Russ Dedrick

In 1 case, the FAUSA had been serving as acting United States Attorney under the VRA, but the VRA's 210-day period expired before a nomination could be made. Thereafter, the Attorney General appointed another Department employee to serve as interim United States Attorney until a nomination could be submitted to the Senate. That district is:

- **District of Alaska** – Nelson Cohen

In 1 case, the Department originally selected the First Assistant to serve as acting United States Attorney; however, she retired from federal service a month later. At that point, the Department selected another Department employee to serve as interim United States Attorney until a nomination could be submitted to the Senate. That district is:

- **Northern District of Iowa** – Matt Dummermuth

In the 10 remaining cases, the Department selected another Department employee to serve as interim United States Attorney until a nomination could be submitted to the Senate. Those districts are:

- **Eastern District of Virginia** – Pending nominee Chuck Rosenberg was appointed interim United States Attorney when incumbent United States Attorney

resigned to be appointed Deputy Attorney General (Rosenberg was confirmed shortly thereafter);

- **Eastern District of Arkansas** – Tim Griffin was appointed interim United States Attorney when incumbent United States Attorney resigned;
- **District of Columbia** – Jeff Taylor was appointed interim United States Attorney when incumbent United States Attorney resigned to be appointed Assistant Attorney General for the National Security Division;
- **District of Nebraska** – Joe Stecher was appointed interim United States Attorney when incumbent United States Attorney resigned to be appointed Chief Justice of Nebraska Supreme Court;
- **Middle District of Tennessee** – Craig Morford was appointed interim United States Attorney when incumbent United States Attorney resigned;
- **Western District of Missouri** – Brad Schlozman was appointed interim United States Attorney when incumbent United States Attorney and FAUSA resigned at the same time (John Wood was nominated);
- **Western District of Washington** – Jeff Sullivan was appointed interim United States Attorney when incumbent United States Attorney resigned;
- **District of Arizona** – Dan Knauss was appointed interim United States Attorney when incumbent United States Attorney resigned;
- **Northern District of California** – Scott Schools was appointed interim United States Attorney when incumbent United States Attorney resigned; and
- **Southern District of California** – Karen Hewitt was appointed interim United States Attorney when incumbent United States Attorney resigned.

120 DAYS
NOT REALISTIC

DAG000001213

WHY 120 DAYS IS NOT REALISTIC

- One hundred twenty days is not a realistic period of time to permit any Administration to solicit and wait for home-state political leaders to identify a list of potential candidates, provide the time needed to interview and select a candidate for background investigation, provide the FBI with adequate time to do the full-field background investigation, prepare and submit the nomination, and to be followed by the Senate's review and confirmation of a new U.S. Attorney.
- The average number of days between the resignation of one Senate-confirmed U.S. Attorney and the President's nomination of a candidate for Senate consideration is 273 days (including 250 USAs during the Clinton Administration and George W. Bush Administration to date). Once nominated, the Senate has taken an additional period of time to review the nominations of the Administration's law enforcement officials.
- The average number of days between the nomination of a new U.S. Attorney candidate and Senate confirmation has been 58 days for President George W. Bush's USA nominees (note - the majority were submitted to a Senate that was controlled by the same party as the President) and 81 days for President Bill Clinton's USA nominees (note - 70% of nominees were submitted in the first two years to a Senate controlled by the same party as the President, others were submitted in the later six years to a party that was not).
- Simply adding the two averages of 273 and 58 days would mean a combined average of 331 days from resignation of one USA to confirmation of the next.
- The substantial time period between resignation and nomination is often due to factors outside the Administration's control, such as: 1) the Administration is waiting for home-state political leaders to develop and transmit their list of names for the Administration to begin interviewing candidates; 2) the Administration is awaiting feedback from home-state Senators on the individual selected after the interviews to move forward into background; and 3) the Administration is waiting for the FBI to complete its full-field background review. (The FBI often uses 2-4 months to do the background investigation -- and sometimes needs additional time if they identify an issue that requires significant investigation.)

DIFFICULT
TRANSITIONS

DAG000001215

Examples of Difficult Transition Situations

Examples of Districts Where Judges Did Not Exercise Their Court Appointment (Making the Attorney General's Appointment Authority Essential To Keep the Position Filled until a Nominee Is Confirmed)

1. **Southern District of Florida:** In 2005, a vacancy occurred in the SDFL. The Attorney General appointed Assistant Attorney General of the Civil Rights Division, Alex Acosta, for 120 days. At the end of the term, the Court indicated that they had (years earlier) appointed an individual who later became controversial. As a result, the Court indicated that they would not make an appointment unless the Department turned over its internal employee files and FBI background reports, so that the court could review potential candidates' backgrounds. Because those materials are protected under federal law, the Department declined the request. The court then indicated it would not use its authority at all, and that the Attorney General should make multiple, successive appointments. While the selection, nomination, and confirmation of a new U.S. Attorney was underway, the Attorney General made three 120-day appointments of Mr. Acosta. Ultimately, he was selected, nominated, and confirmed to the position.
2. **Eastern District of Oklahoma:** In 2000-2001, a vacancy occurred in the EDOK. The court refused to exercise the court's authority to make appointments. As a result, the Attorney General appointed Shelly Sperling to three 120-day appointments before Sperling was nominated and confirmed by the Senate (he was appointed by the Attorney General to a fourth 120-day term while the nomination was pending).
3. **In the Western District of Virginia:** In 2001, a vacancy occurred in the WDVA. The court declined to exercise its authority to make an appointment. As a result, the Attorney General made two successive 120-day appointments (two different individuals).

This problem is not new ...

4. **The District of Massachusetts.** In 1987, the Attorney General had appointed an interim U.S. Attorney while a nomination was pending before the Senate. The 120-day period expired before the nomination had been reviewed and the court declined to exercise its authority. The Attorney General then made another 120-day appointment. The legitimacy of the second appointment was questioned and was reviewed the U.S. District Court for the District of Massachusetts. The Judge upheld the validity of the second 120-day appointment where the court had declined to make an appointment. See 671 F. Supp. 5 (D. Ma. 1987).

Examples Where Judges Discussed Appointing or Attempted to Appoint Unacceptable Candidates:

1. **Southern District of West Virginia:** When a U.S. Attorney in the Southern District of West Virginia, David Faber, was confirmed to be a federal judge in 1987, the district went through a series of temporary appointments. Following the Attorney General's 120-day appointment of an individual named Michael Carey, the court appointed another individual as the U.S. Attorney. The court's appointee was not a DOJ-employee at the time and had not been subject of any background investigation. The court's appointee came into the office and started making inquiries into ongoing public integrity investigations, including investigations into Charleston Mayor Michael Roark and the Governor Arch Moore, both of whom were later tried and convicted of various federal charges. The First Assistant United States Attorney, knowing that the Department did not have the benefit of having a background examination on the appointee, believed that her inquiries into these sensitive cases were inappropriate and reported them to the Executive Office for United States Attorneys in Washington, D.C. The Department directed that the office remove the investigative files involving the Governor from the office for safeguarding. The Department further directed that the court's appointee be recused from certain criminal matters until a background examination was completed. During that time, the Reagan Administration sped up Michael Carey's nomination. Carey was confirmed and the court's appointee was replaced within two-three weeks of her original appointment.

2. **South Dakota:**

In 2005, a vacancy arose in South Dakota. The First Assistant United States Attorney (FAUSA) was elevated to serve as acting United States Attorney under the Vacancies Reform Act (VRA) for 210 days. As that appointment neared an end without a nomination having yet been made, the Attorney General made an interim appointment of the FAUSA for a 120-day term. The Administration continued to work to identify a nominee; however, it eventually became clear that there would not be a nomination and confirmation prior to the expiration of the 120-day appointment.

Near the expiration of the 120-day term, the Department contacted the court and requested that the FAUSA be allowed to serve under a court appointment. However, the court was not willing to re-appoint her. The Department proposed a solution to protect the court from appointing someone about whom they had reservations, which was for the court to refrain from making any appointment (as other district courts have sometimes done), which would allow the Attorney General to give the FAUSA a second successive, 120-day appointment.

The Chief Judge instead indicated that he was thinking about appointing a non-DOJ employee, someone without federal prosecution experience, who had not been the subject of a thorough background investigation and did not have the

necessary security clearances. The Department strongly indicated that it did not believe this was an appropriate individual to lead the office.

The Department then notified the court that the Attorney General intended to ask the FAUSA to resign her 120-day appointment early (without the expiration of the 120-day appointment, the Department did not believe the court's appointment authority was operational). The Department notified the court that since the Attorney General's authority was still in force, he would make a new appointment of another experienced career prosecutor. The Department believed that the Chief Judge indicated his support of this course of action and implemented this plan.

The FAUSA resigned her position as interim U.S. Attorney and the Attorney General appointed the new interim U.S. Attorney (Steve Mullins). A federal judge executed the oath and copies of the Attorney General's order and the press release were sent to the court for their information. There was no response for over 10 days, when a fax arrived stating that the court had also attempted to appoint the non-DOJ individual as the U.S. Attorney.

This created a situation where two individuals had seemingly been appointed by two different authorities. Defense attorneys indicated their intention to challenge ongoing investigations and cases. The Department attempted to negotiate a resolution to this very difficult situation, but was unsuccessful. Litigating the situation would have taken months, during which many of the criminal cases and investigations that were underway would have been thrown into confusion and litigation themselves.

Needing to resolve the matter for the sake of the ongoing criminal prosecutions and litigation, after it was clear that negotiations would resolve the matter, the White House Counsel notified the court's purported appointee that even if his court order was valid and effective, then the President was removing him from that office pursuant to Article II of the Constitution and 28 U.S.C. § 541(c). Shortly thereafter, Mr. Mullins resigned his Attorney General appointment and was recess appointed by President Bush to serve as the U.S. Attorney for the District of South Dakota. The Department continued to work with the home-state Senators and identified and nominated a new U.S. Attorney candidate, who was confirmed by the Senate in the summer of 2006.

3. **Northern District of California:** In 1998, a vacancy resulted in NDCA, a district suffering from numerous challenges. The district court shared the Department's concerns about the state of the office and discussed the possibility of appointing of a non-DOJ employee to take over. The Department found the potential appointment of a non-DOJ employee unacceptable. A confrontation was avoided by the Attorney General's appointment of an experienced prosecutor from Washington, D.C. (Robert Mueller), which occurred with the court's concurrence. Mueller served under an AG appointment for 120 days, after which the district court gave him a court appointment. Eight months later, President Clinton nominated Mueller to fill the position for the rest of his term.

U.S. ATTORNEY
STATISTICS

DAG000001219

UNITED STATES ATTORNEYS' PROSECUTION STATISTICS

This Administration Has Demonstrated that It Values Prosecution Experience. Of the 124 Individuals President George W. Bush Has Nominated Who Have Been Confirmed by the Senate:

- 98 had prior experience as prosecutors (79 %)
 - 71 had prior experience as federal prosecutors (57 %)
 - 54 had prior experience as state or local prosecutors (44%)
- 104 had prior experience as prosecutors or government litigators on the civil side (84 %)

In Comparison, of President Clinton's 122 Nominees Who Were Confirmed by the Senate:

- 84 had prior experience as prosecutors (69 %)
 - 56 had prior experience as federal prosecutors (46 %)
 - 40 had prior experience as state or local prosecutors (33 %)
- 87 had prior experience as prosecutors or government litigators on the civil side (71 %)

Since the Attorney General's Appointment Authority Was Amended on March 9, 2006, the Backgrounds of Our Nominees Has Not Changed. Of the 15 Nominees Since that Time:

- 13 of the 15 had prior experience as prosecutors (87%) – *a higher percentage than before.*
 - 11 of the 15 had prior experience as federal prosecutors (73%) – *a higher percentage than before the change*; 10 were career AUSAs or former career AUSAs and 1 had federal prosecution experience as an Assistant Attorney General of the Civil Rights Division
 - 4 of the 15 nominees had experience as state or local prosecutors (27%).

Those Chosen To Be Acting/Interim U.S. Attorneys since the Attorney General's Appointment Authority Was Amended on March 9, 2006, Have Continued To Be Highly Qualified. Of the 16 districts in which new vacancies have occurred, 17 acting and/or interim appointments have been made:

- 16 of the 17 had prior experience as federal prosecutors (94%)

UNITED STATES ATTORNEYS STATISTICS

Average Ages of U.S. Attorneys:

- Average age of President George W. Bush U.S. Attorneys: 44.82 years
- Average age of President Bill Clinton U.S. Attorneys: 44.67 years

Status of Our U.S. Attorneys' Four-Year Terms:

- 43 districts are currently being led by a U.S. Attorney nominated by President George W. Bush and confirmed by the Senate in 2001 or 2002. All of these U.S. Attorneys have completed their four year terms and continue to serve at the pleasure of the President (5 of the 43 have announced their resignations).
- Only 6 districts are currently being led by the first U.S. Attorney nominated by President Bush and confirmed by the Senate -- but who are still serving their four year terms.
- 44 districts are either being led by their second Presidentially-nominated and Senate-confirmed U.S. Attorney, or are currently awaiting a nomination. These U.S. Attorneys have not completed their four year terms.

This Administration Has Demonstrated that It Values Prosecution Experience. Of the 124 Individuals President George W. Bush Has Nominated Who Have Been Confirmed by the Senate:

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 - 71 had prior experience as federal prosecutors (57 %)
 - 54 had prior experience as state or local prosecutors (44%)
- 104 had prior experience as prosecutors or government litigators on the civil side (84 %)
- 10 had judicial experience (8%); 13 had Hill experience (10%)
- Of the 10 who had worked at Main Justice in the George W. Bush Administration before being nominated for a U.S. Attorney position, please note that 8 were either career AUSAs or former career AUSAs.

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Those Chosen To Be Acting/Interim U.S. Attorneys since the Attorney General's Appointment Authority Was Amended on March 9, 2006, Have Continued To Be Highly Qualified. Of the 14 districts in which vacancies have occurred, 15 acting and/or interim appointments have been made:

- 14 of the 15 had prior experience as federal prosecutors (93%)

ARKANSAS/
GRIPPIN

DAG000001223

TIMOTHY GRIFFIN AS INTERIM UNITED STATES ATTORNEY
FOR THE EASTERN DISTRICT OF ARKANSAS

- The Attorney General appointed Tim Griffin as the interim U.S. Attorney following the resignation of Bud Cummins, who resigned on Dec. 20, 2006. Since early in 2006, Mr. Cummins had been talking about leaving the Department to go into private practice for family reasons.
 - Timothy Griffin is highly qualified to serve as the U.S. Attorney for the Eastern District of Arkansas.
 - Mr. Griffin has significant experience as a federal prosecutor at both the Department of Justice and as a military prosecutor. At the time of his appointment, he was serving as a federal prosecutor in the Eastern District of Arkansas. Also, from 2001 to 2002, Mr. Griffin served at the Department of Justice as Special Assistant to the Assistant Attorney General for the Criminal Division and as a Special Assistant U.S. Attorney in the Eastern District of Arkansas in Little Rock. In this capacity, Mr. Griffin prosecuted a variety of federal cases with an emphasis on firearm and drug cases and organized the Eastern District's Project Safe Neighborhoods (PSN) initiative, the Bush Administration's effort to reduce firearm-related violence by promoting close cooperation between State and federal law enforcement, and served as the PSN coordinator.
 - Prior to rejoining the Department in the fall of 2006, Mr. Griffin completed a year of active duty in the U.S. Army, and is in his tenth year as an officer in the U.S. Army Reserve, Judge Advocate General's Corps (JAG), holding the rank of Major. In September 2005, Mr. Griffin was mobilized to active duty to serve as an Army prosecutor at Fort Campbell, Ky. At Fort Campbell, he prosecuted 40 criminal cases, including *U.S. v. Mikel*, which drew national interest after Pvt. Mikel attempted to murder his platoon sergeant and fired upon his unit's early morning formation. Pvt. Mikel pleaded guilty to attempted murder and was sentenced to 25 years in prison.
 - In May 2006, Tim was assigned to the 501st Special Troops Battalion, 101st Airborne Division and sent to serve in Iraq. From May through August 2006, he served as an Army JAG with the 101st Airborne Division in Mosul, Iraq, as a member of the 172d Stryker Brigade Combat Team Brigade Operational Law Team, for which he was awarded the Combat Action Badge and the Army Commendation Medal.
 - Like many political appointees, Mr. Griffin has political experience as well. Prior to being called to active duty, Mr. Griffin served as Special Assistant to the President and Deputy Director of the Office of Political Affairs at the White House, following a stint at the Republican National Committee. Mr. Griffin has also served as Senior Counsel to the House Government Reform Committee, as an Associate Independent Counsel for *In Re: Housing and Urban Development Secretary Henry Cisneros*, and as an associate attorney with a New Orleans law firm.
 - Mr. Griffin has very strong academic credentials. He graduated *cum laude* from Hendrix College in Conway, Ark., and received his law degree, *cum laude*, from Tulane Law School. He also attended graduate school at Pembroke College at Oxford University. Mr. Griffin was raised in Magnolia, Ark., and resides in Little Rock with his wife, Elizabeth.
-
- The Attorney General assured Senator Pryor that we are not circumventing the process by making an interim appointment and that the Administration intended to nominate Mr. Griffin. However, Senator Pryor refused to support Mr. Griffin if he was nominated. As a result of the lack of support shown by his home-state Senators, Mr. Griffin has withdrawn his name from consideration.

- While the Administration consults with the home-state Senators on a potential nomination, however, the Department must have someone lead the office – and we believe Mr. Griffin is well-qualified to serve in this interim role until such time as a new U.S. Attorney is nominated and confirmed.

BIOGRAPHIES OF U.S. ATTORNEYS FROM ARKANSAS

EASTERN DISTRICT

Attorney General Appointment of Tim Griffin (37 years old at appointment)

Appointed 12/20/2006

Educational Background:

- B.A. from Hendrix College in Arkansas in 1990
- Graduate school at Pembroke College, Oxford University in 1991
- J.D. from Tulane Law School in 1994

Prosecution & Military Background:

- Officer— currently a major— in the U.S. Army Judge Advocate General's (JAG) Corps (over ten years), including service as a Brigade Judge Advocate, U.S. Army JAG Corps., Operation Iraqi Freedom, 101st Airborne Division (Air Assault) May-Aug 2006 (approx. 3 months)
- Special Assistant U.S. Attorney, Eastern District of Arkansas, Sept 2001-June 2002 (9 months)
- Special Assistant to the Assistant Attorney General for the Criminal Division, U.S. Department of Justice (approx. 15 months)
- Senior Investigative Counsel, Committee on Government Reform, U.S. House of Representatives, 1997-1999 (approx. 2 ½ years total)
- Associate Independent Counsel, U.S. Office of Independent Counsel David Barrett (16 months)
- Associate Attorney, Jones, Walker, Waechter, Poitevent, Carrere & Denegre, L.L.P. (approx. one year)
- Military Honors: Army Commendation Medal with Five Oak Leaf Clusters; Army Achievement Medal with Four Oak Leaf Clusters; Army Reserve Components Achievement Medal with Two Oak Leaf Clusters; National Defense Service Medal; Iraq Campaign Medal; Global War on Terrorism Service Medal; Armed Forces Reserve Medal with Bronze Hourglass and "M" Devices; Army Service Ribbon; and Army Reserve Overseas Training Ribbon with "3" Device; and Combat Action Badge.

Political experience:

- Special Assistant to the President & Deputy Director, Office of Political Affairs, The White House (approximately 5 months; then on military leave)
- RNC Research Dir. & Dep. Communications Dir., 2004 Presidential Campaign (approx. 2 ½ years)
- RNC Dep. Research Director, 2000 Presidential Campaign (approx. 1 ½ years)

George W. Bush USA: H.E. "Bud" Cummins (42 years old at nomination)

Nominated 11/30/2001; confirmed 12/20/2001

Talkers:

- Unlike Mr. Griffin, he did not attend top-rated universities.
- *However, like Mr. Griffin, he had political experience.* In 2000, he served as Arkansas Legal Counsel to the Bush/Cheney campaign, was part of the GOP Florida Ballot Recount Team in Broward County, and was an Arkansas Elector. He was also the Republican nominee for the U.S. Congress 2nd Congressional District in 1996.

Background:

- B.S./B.A. from University of Arkansas in 1981
- J.D. from University of Arkansas Little Rock School of Law in 1989
- Private Law Practice and State Director, NFIB/Arkansas (approximately 3 years)
- Chief Legal Counsel for the Arkansas Governor (approximately one year)
- Private Law Practice 1993-1996 (approximately 3 years)
- Clerk to Chief Judge, United States District Court, Eastern District of Arkansas (approximately one year)
- Clerk to United States Magistrate Judge, United States District Court, Eastern District of Arkansas (approximately 2 years)
- Five separate gubernatorial appointments as Special Justice to Supreme Court of Arkansas

Clinton USA: Paula Jean Casey (42 years old at nomination)

Nominated 8/6/93; confirmed 9/21/93

Talkers:

- Unlike Mr. Griffin, she did not attend top-rated universities.
- Unlike Mr. Griffin, she did not have military or federal prosecution experience.
- *However, like Mr. Griffin, she had political experience.* She volunteered on the political campaigns of the President who nominated her and was a former student of his. In addition to owing the President her job, then-Governor Clinton had also appointed her husband to a state agency position. She was also a law student of then-Professor Bill Clinton. (See *Associated Press*, 11/10/93)

Background:

- B.A. from East Central Oklahoma University in 1973
 - J.D. from University of Arkansas Law School in 1976
-
- Staff attorney for the Central Arkansas Legal Services (approximately 3 years)
 - Deputy Public Defender (less than one year)
 - Supervisor of Legal Clinic at University of Arkansas Law School (approximately 2 years)

- Professor at the University of Arkansas Law School (approximately 8 years)
- Chief Counsel & Legislative Director to Senator Dale Bumpers (approximately 3 years)
- Lobbyist for the Arkansas Bar Association (approximately 1 year)

WESTERN DISTRICT

George W. Bush USA: Robert Cramer Balfe, III for WDAR (37 years old at nomination)

Nominated 6/1/2004; confirmed 11/20/2004

Talkers:

- While he had local experience as a prosecutor, he did not have federal prosecution experience. Also, he did not attend top-rated universities.

Background:

- B.S. from Arkansas State University in 1990
- J.D. from University of Arkansas School of Law in 1994
- Prosecuting Attorney for the 19th Judicial District West (approximately 3 years)
- Deputy Prosecuting Attorney for the 19th Judicial District West (approximately 5 years)
- Secretary/Treasurer of the Arkansas Prosecuting Attorney's Association

George W. Bush USA for WDAR: Thomas C. Gean (39 years old at nomination)

Nominated 8/2/2001; confirmed 10/23/2001

Talkers:

- While he did have local prosecution experience, he did not have any federal prosecution experience.

Background:

- Bachelor degree from University of Arkansas
- J.D. from Vanderbilt University Law School

-
- Prosecuting Attorney for the Sebastian County District Attorney's Office (approximately 4 years)
 - Attorney with Gean, Gean, and Gean in Fort Smith, Arkansas (approximately 4 years)
 - Attorney with Alston and Bird in Atlanta, Georgia (approximately 4 years)

Clinton USA for WDAR: Paul Kinloch Holmes, III (42 years old at nomination)
Nominated 8/6/1993; confirmed 9/21/93

Talkers:

- *Unlike Mr. Griffin, he did not have any military or federal prosecution experience. He also did not have any state or local prosecution experience. He also did not attend top-rated universities.*
- *Like Mr. Griffin, he had political experience. He served as chairman of the Sebastian County Democratic Party and Sebastian County Election Commission from 1979-1983. (See Arkansas Democrat-Gazette, 10/19/00)*

Background:

- B.A. from Westminster College in 1973
- J.D. from University of Arkansas in 1978
- Attorney for Warner and Smith, Fort Smith, Arkansas (approximately 15 years)

J. TIMOTHY GRIFFIN

EDUCATION

Louisiana State University Law School. New Orleans, Louisiana. Juris Doctor, *cum laude*, May 1994. Cumulative G.P.A.: 3.25/4.00; Rank: 80/319, Top 25%. Common law and civil law curricula. Legal Research and Writing grade: A.

- Senior Fellow, Legal Research and Writing Program. Taught first year law students legal research and writing.
- Volunteer, The New Orleans Free Tutoring Program, Inc.

Oxford University, Pembroke College. Oxford, England. Graduate School, British and European History, 1990-1991.

- Under-secretary and Treasurer, Oxford University Clay Pigeon Shooting Club.

Hendrix College. Conway, Arkansas. Bachelor of Arts in Economics and Business, *cum laude*, June 1990. Cumulative G.P.A.: Major 3.79/4.00, Overall 3.78/4.00; Rank: 22/210, Top 10%.

- Oxford Overseas Study Course, September 1988-May 1989, Oxford, England.

LEGAL EXPERIENCE

U.S. Attorney (Interim). Eastern District of Arkansas, U.S. Department of Justice. Little Rock, Arkansas. December 2006-present.

- Served as a Special Assistant U.S. Attorney, Eastern District of Arkansas, September-December 2006.

Trial Counsel, U.S. Army JAG Corps. Criminal Law Branch, Office of the Staff Judge Advocate. Fort Campbell, Kentucky, September 2005-May 2006; August-September 2006.

- Successfully prosecuted U.S. v. Mikel, involving a soldier's attempted murder of his platoon sergeant.
- Provided legal advice to E Co., 1st and 3rd Brigade Combat Teams, 101st Airborne Division (Air Assault)(R)(P).
- Prosecuted 40 Army criminal cases at courts-martial and federal criminal cases as a Special Assistant U.S. Attorney, Western District of Kentucky and Middle District of Tennessee, and handled 90 administrative separations.

Brigade Judge Advocate, U.S. Army Judge Advocate General's (JAG) Corps. Operation Iraqi Freedom. Task Force Band of Brothers. 501st STB, 101st Airborne Division (Air Assault). Mosul, Iraq, May-August 2006.

- Served on the Brigade Operational Law Team (BOLT), 172d Stryker Brigade Combat Team, FOB Marez, Iraq.
- Provided legal advice on various topics, including financial investigations, rules of engagement, and rule of law.

Special Assistant to the Assistant Attorney General. Criminal Division, U.S. Department of Justice. Washington, D.C. and Little Rock, Arkansas. March 2001-June 2002.

- Tracked issues for Assistant Attorney General Michael Chertoff and worked with the Office of International Affairs (OIA) on matters involving extradition, provisional arrest and mutual legal assistance treaties (MLATs).
- Prosecuted federal firearm and drug cases and served as the coordinator for Project Safe Neighborhoods, a strategy to reduce firearm-related violence through cooperation between state and federal law enforcement, as a Special Assistant U.S. Attorney, Eastern District of Arkansas, in Little Rock, September 2001-June 2002.

Senior Investigative Counsel. Committee on Government Reform, U.S. House of Representatives. Washington, D.C. January 1997-February 1998; June 1998-September 1999.

- Developed hearing series entitled "National Problems, Local Solutions: Federalism at Work" to highlight innovative and successful reforms at the state and local levels, including: "Fighting Crime in the Trenches," featuring New York City Mayor Rudolph Giuliani, and "Tax Reform in the States."
- Pursuant to the Committee's campaign finance investigation, interviewed Johnny Chung and played key role in hearing detailing his illegal political contributions; organized, supervised and conducted the financial investigation of individuals and entities; interviewed witnesses; drafted subpoenas; and briefed Speaker of the House Newt Gingrich.

Associate Independent Counsel. U.S. Office of Independent Counsel David M. Barrett. *In re: Henry G. Cisneros, Secretary of Housing and Urban Development (HUD)*. Washington, D.C. September 1995-January 1997.

- Interviewed numerous witnesses with the F.B.I. and supervised the execution of a search warrant.
- Drafted subpoenas and pleadings and questioned witnesses before a federal grand jury.

DAG000001230

Associate Attorney. General Litigation Section. Jones, Walker, Waechter, Poitevent, Carrere & Denegre, L.L.P. New Orleans, Louisiana. September 1994-September 1995.

- Drafted legal memoranda and pleadings and conducted depositions.

ADDITIONAL WORK EXPERIENCE

Special Assistant to the President and Deputy Director. Office of Political Affairs, The White House. Washington, D.C. April-September 2005. On military leave after mobilization to active duty, September 2005-September 2006.

- Advised President George W. Bush and Vice-President Richard B. Cheney.
- Organized and coordinated support for the President's agenda.

Research Director and Deputy Communications Director. 2004 Presidential Campaign, Republican National Committee (RNC). Washington, D.C. June 2002-December 2004.

- Briefed Vice-President Richard B. Cheney and other Bush-Cheney 2004 (BC04) and RNC senior staff.
- Managed RNC Research, the primary research resource for BC04, with over 25 staff.
- Worked daily with BC04 senior staff on campaign and press strategy, ad development and debate preparation.

Deputy Research Director. 2000 Presidential Campaign, Republican National Committee (RNC). Washington, D.C. September 1999-February 2001.

- Managed RNC Research, the primary research resource for Bush-Cheney 2000 (BC00), with over 30 staff.
- Served as legal advisor in Volusia and Brevard Counties for BC00 Florida Recount Team.

Campaign Manager. Betty Dickey for Attorney General. Pine Bluff, Arkansas. February 1998-May 1998.

SUMMARY OF MILITARY SERVICE

Major. JAG Corps, U.S. Army Reserve. Commissioned First Lieutenant, June 1996.

- Served on active duty in Mosul, Iraq with the 101st Airborne Division (Air Assault), and at Fort Campbell, Kentucky, September 2005-September 2006.
- Authorized to wear 101st Airborne Division (Air Assault) "Screaming Eagle" combat patch.
- Medals, Ribbons and Badges: Army Commendation Medal with Five Oak Leaf Clusters; Army Achievement Medal with Four Oak Leaf Clusters; Army Reserve Components Achievement Medal with Two Oak Leaf Clusters; National Defense Service Medal; Iraq Campaign Medal; Global War on Terrorism Service Medal; Armed Forces Reserve Medal with Bronze Hourglass and "M" Devices; Army Service Ribbon; and Army Reserve Overseas Training Ribbon with "3" Device; and Combat Action Badge.

ACTIVITIES AND ASSOCIATIONS

Arkansas Bar Association. Little Rock, Arkansas. Member, 1995-present. Annual Meeting Subcommittee on Technology, 2002. Admitted to Arkansas Bar, April 26, 1995.

Friends of Central Arkansas Libraries (FOCAL). Little Rock, Arkansas. Life Member.

Florence Crittenton Services, Inc. Little Rock, Arkansas. Member, Board of Directors, 2001-2002.

Louisiana State Bar Association. New Orleans, Louisiana. Member. Admitted October 7, 1994. Currently inactive.

The Oxford Union Society. Oxford, England. Member, 1990-present.

Pulaski County Bar Association. Little Rock, Arkansas. Member, 2001-2002. Co-chair, Law School Liaison Committee, 2001-2002.

Reserve Officers Association. Washington, D.C. Life Member.



U. S. Department of Justice

United States Attorney
Eastern District of Arkansas

Post Office Box 1229
Little Rock, Arkansas 72203

Tele. (501) 324-5342
Fax Nos. Civil (501) 324-7199
Criminal (501) 324-5221

August 13, 2002

Tim Griffin
Research Director and
Deputy Communications Director
Republican National Committee
310 First Street, S.E.
Washington, D.C. 20003

Dear Tim:

I want to formally thank you for your service to me and to the U.S. Attorney's Office, Eastern District of Arkansas for the year you served here as a Special Assistant United States Attorney. You performed at the highest level of excellence during your time here.

Overall, you served the office extremely well. I believe you indicted more people during your time here than any other AUSA. You were a real workhorse, and the quality of your work was excellent.

But I am particularly grateful for the work you did in developing and launching our Project Safe Neighborhoods (PSN) program. With minimal supervision, you took the initiative to plan, organize and implement an awesome PSN program. I am not aware of a better PSN program in the country. You should be pleased to know that our PSN program was highly recognized and commended in a recent department evaluation.

You are missed by your friends and colleagues here in the USAO, ED AR. Thanks for everything, and good luck.

Sincerely,

H.E. (Bud) Cummins
United States Attorney

DAG000001233

<http://www.arktimes.com/Articles/ArticleViewer.aspx?ArticleID=1d6008ff-5b23-4871-b95d-4825be0256d6>

The Insider Dec. 30
Arkansas Times Staff
Updated: 12/30/2004
Holiday schedules

Among the Arkansas congressional delegation, constituent service during the holiday season is something that senators can't be bothered with. Then again, they only have to run for re-election every six years, so who cares?

Calls to the Little Rock and Washington, D.C., offices of U.S. Sens. Blanche Lincoln and Mark Pryor yielded recorded messages informing us that no one would be available from Dec. 23-Jan. 3.

The House members had varying policies. U.S. Reps. Vic Snyder and John Boozman kept their Arkansas offices open through the holidays except for Christmas Eve and New Year's Eve. U.S. Rep. Marion Berry operated his Jonesboro office from 10 a.m.-2 p.m. most days, but closed it on Dec. 23-24 and 30-31.

Perhaps the loftier ambitions of U.S. Rep. Mike Ross are evident in his senatorial decision to shutter his offices from Dec. 23-Jan. 3

Clark, the TV series

A New York Post gossip column recently reported that retired Gen. Wesley Clark, the former presidential candidate from Arkansas, is "working on a sitcom."

Clark's office told us that the Post exaggerated his role in the project, especially by saying that Clark was "writing" the TV show and would "pitch" it to networks next year. In reality, Clark's associates insist that he is merely serving as a consultant in the development of the idea.

"General Clark is contributing to a show concept of an officer returning to his hometown after a career in the military," Clark's office said. "Gen. Clark is primarily focused on his business but continues to be involved in numerous other projects." That would include plotting a future political career, of course.

Legal action

It's a low-priority public issue, but tens of millions of dollars are at stake in plans to establish tax increment finance districts in, among others, Fayetteville, Rogers, Bentonville, Lowell, Johnson, North Little Rock, Sherwood and Jonesboro. They will divert local property taxes to subsidize private developments in already prosperous areas. Schools, but not other local tax units, will be made whole by the Arkansas legislature, meaning Arkansas taxpayers.

Columnist Max Brantley has been griping about this at some length recently. We hear he may soon have a valuable ally. There's solid indication a lawsuit could be filed shortly against the whole TIF scheme in Arkansas. TIF projects already underway have no guarantee they'd be grandfathered.

more years?

We were talking to U.S. Attorney Bud Cummins a while back on another subject and happened to ask about his plans, now that George W. Bush is set to serve another four years as president. Cummins (we forgot to mention earlier) said he went into the election with no

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

**COMMITMENT TO
FILLING VACANCIES**

DAG000001237

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

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

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

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

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

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

- **In 2 cases, the FAUSA had been serving as acting United States Attorney under the Vacancies Reform Act (VRA), but the VRA's 210-day period expired before a nomination could be made. Thereafter, the Attorney General appointed that same FAUSA to serve as interim United States Attorney until such time as a nomination is submitted to the Senate.**
- **In 1 case, the FAUSA had been serving as acting United States Attorney under the VRA, but the VRA's 210-day period expired and the Attorney General appointed another Department employee to serve as interim United States Attorney until a nomination can be submitted.**
- **In 1 case, the First Assistant was initially selected to lead the office and took over under the Vacancy Reform Act's provision, but then retired, at which time the Attorney General selected another Department employee to serve as interim under AG appointment until such time as a nomination is submitted to the Senate.**
- **In 10 cases, the Department originally selected another Department employee to serve as interim under AG appointment until such time as a nomination is submitted to the Senate. In 1 of those 10 cases, the First Assistant had resigned at the same time as the U.S. Attorney, creating a need for an interim until such time as a nomination is submitted to the Senate.**

EARS REPORTS

EARS REPORTS ARE NOT EVALUATIONS OF U.S. ATTORNEYS

- The Attorney General and the Deputy Attorney General are responsible for evaluating the performance of the United States Attorneys and ensuring that they are leading their offices effectively.
- Because United States Attorneys are appointed by the President and confirmed by the Senate, they do not have formal evaluations or annual performance reviews by their supervisors like other Department employees.
- An "EARS" report is not an evaluation of the performance of a United States Attorney by his or her supervisor. It is a peer review of the legal and administrative procedures and internal controls of the overall United States Attorney's Office that occurs once every three to five years.
- The Evaluation and Review Staff (EARS) of the Executive Office for United States Attorneys (EOUSA) conducts periodic peer reviews of each United States Attorney's Office (USAO) in order to evaluate the overall performance of the entire USAO, make reports, and allow the USAO to take corrective action where needed.
- The EARS program serves as a mechanism by which the USAO and the evaluators can share ideas and innovations, in addition to serving as a means of enhancing communication between EOUSA and the USAO. Evaluation teams are generally comprised of Assistant United States Attorneys and administrative staff from other USAOs who volunteer to evaluate their peers -- they are not professional auditors nor inspectors. The teams do not include other United States Attorneys.

Additional Background:

- Evaluators make recommendations for improving the operation of the USAO, analyzing the legal and administrative operations of the office and providing feedback and recommendations to the United States Attorney. The evaluation team relies on experienced AUSAs and USAO staff from all over the country, and is led by an AUSA. The evaluators are in an office for a maximum of one week, during which they interview all civil and criminal AUSA's at the USAO, as well as the administrative staff and some members of the support staff. In addition, the evaluation team interviews the district judges, some circuit judges, magistrate judges, bankruptcy judges, the Clerk of Court, the Probation Officer, other court personnel, the United States Marshal, representatives of the district's major civil and law enforcement agencies, the OCDETF Regional Coordinator, and any other federal officials or persons that appear appropriate to the USAO point-of-contact and the team leader. Employees at non-federal agencies, such as local prosecutors and police chiefs, may also be interviewed.
- The evaluation team produces a draft report, which is sent to the United States Attorney of the reviewed district for a response. Approximately three to four months after the response has been received, a follow-up evaluator or team visits the USAO review corrective measures, provide assistance to the district, assess the performance of the evaluation team, and produce a follow-up report. Once that report has been received, the EARS staff prepares a final evaluation report, which is approximately 6-12 pages in length. The final report is a narrative summary of the assessments and evaluations from the draft report that have been verified during the response and follow-up process, and of the corrective actions taken by the USAO regarding those recommendations. Completion of a final report takes between 235-265 days after the completion of the evaluation team's visit.

PUBLIC CORRUPTION

DAG000001242

PUBLIC CORRUPTION

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

Talking Points:

I. OVERALL COMMITMENT TO COMBATING PUBLIC CORRUPTION

- Ensuring the integrity of government is very important to me, and the Department endeavors to do that both here and abroad. At the outset, I would like to thank Congress for ratifying the U.N. Convention Against Corruption, which is an important new tool in the fight against global corruption.
- The Department's anti-corruption efforts include supporting the President's Kleptocracy initiative. And of course, the Department is pursuing officials who violate the laws Congress has put in place to combat public corruption, wherever it is found.
- Our citizens are entitled to honest services from all of their public officials, regardless of their political affiliation. Our citizens are also entitled to know that their public servants are making their official decisions based upon the best interests of the citizens who elect them and pay their salaries, and not based upon the public official's own financial interests.
- Whether public officials are responsible for protecting our national security, running our schools, or hiring the best contractor, citizens are entitled to know that the government is not for sale.
- Prosecutors in the United States Attorneys' Offices and the Criminal Division's Public Integrity Section work with the FBI and the Offices of Inspector General to combat public corruption on a daily basis.
- In order to protect the integrity of our government institutions and processes, I will continue the Department's commitment to aggressively investigate and prosecute public corruption wherever it is found.
- I consider it one of my paramount responsibilities to ensure that the Department continues to handle such investigations and prosecutions in a consistent, non-partisan, and appropriate manner throughout the nation.

II. RECENT DEVELOPMENTS AND ONGOING EFFORTS

- Within the past year, the Department has convicted the former governor of Illinois, the former governor of Alabama, the former Chief Executive Officer of HealthSouth, and the former mayor of Atlanta on a wide range of fraud and public corruption charges.
- The Department of Justice is also pursuing congressional corruption on several fronts. Within the past year, one Member of Congress and one former Member of Congress have been convicted of substantial public corruption charges.
- Additionally, the Department's continuing investigation into the activities of Washington lobbyist Jack Abramoff has netted a total of seven convictions to date, including the jury conviction of former General Services Administration official David Safavian.
- The Department continues to seek out corrupt law enforcement officers through its "Operation Lively Green" in Arizona. This once covert investigation has obtained a total of fifty-five (55) convictions of law enforcement officers that are current and former members of the United States Army, the United States Air Force and the Arizona Army National Guard.
- Finally, the Criminal Division of the Department of Justice is pursuing fraud and corruption among contractors and government officials in the rebuilding of Iraq. Several defendants have been charged to date. Three have pleaded guilty to substantial bribery and money laundering charges involving millions of dollars in contracts, and four have recently pled guilty to wire fraud for obtaining unauthorized pay by embezzling monies intended for troops deployed to Iraq.
- [IF ASKED REGARDING CONGRESSMAN JEFFERSON]: As you know, I cannot comment regarding that matter because the investigation is pending, and because litigation related to the investigation is pending before the courts.

Background

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

- Former Governor of Alabama Don Siegelman and former HealthSouth CEO Richard Scrushy, were convicted by a jury in June, 2006, of conspiracy, bribery, and mail fraud. (Public Integrity Section, Criminal Division, and United States Attorney for the Middle District of Alabama).
- Former Mayor of Atlanta Bill Campbell, was convicted by a jury in March, 2006, on tax evasion charges. (United States Attorney for the Northern District of Georgia).
- Congressional Cases:
 - Former Congressman Randall Cunningham pleaded guilty to bribery and was sentenced in March, 2006, to more than 8 years in prison. (United States Attorney for the Southern District of California).
 - Congressman William Jefferson is currently under investigation (DOJ has confirmed investigation). In connection with that investigation, Jefferson's former Legislative Assistant pleaded guilty to conspiracy and bribery and was sentenced in May, 2006, to 8 years in prison. Also, the president of a telecommunications firm that sought business in West Africa, pleaded guilty in May, 2006, to bribing congressman Jefferson. He was sentenced in September 2006 to 87 months in prison. (Criminal Division and the United States Attorney for the Eastern District of Virginia).
 - The D.C. Circuit has set an expedited briefing schedule on Jefferson's appeal from the district court's order denying his motion to return everything seized during the warrant search of his congressional office. Jefferson's brief is due on February 28, 2007; the government's answering brief is due on March 30, 2007. Jefferson argues that the search violated the Speech or Debate Clause. The Circuit initially stayed the prosecution team's review

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

- The ongoing Abramoff Investigation is headed by the Public Integrity Section of the Criminal Division, and has netted the following convictions to date:
 - Ohio Congressman Robert Ney pleaded guilty in September 2006 to conspiracy to commit multiple offenses – including honest services fraud, making false statements, and violations of his former chief of staff’s one-year lobbying ban – and to making false statements to the U.S. House of Representatives.
 - Former lobbyist Michael Scanlon pleaded guilty in November, 2005, to conspiracy to commit bribery and honest services fraud.
 - Former lobbyist Jack Abramoff pleaded guilty in January, 2006, to conspiracy, honest services fraud, and tax evasion.
 - Former lobbyist Neil Volz pleaded guilty in May, 2006, to honest services fraud and violating the one-year lobbying ban.
 - Former lobbyist Tony C. Rudy pleaded guilty in March, 2006, to conspiring with Jack Abramoff, Michael Scanlon and others to commit honest services fraud, mail and wire fraud, and a violation of conflict of interest post-employment restrictions
 - Department of the Interior employee Roger G. Stillwell pleaded guilty in June, 2006, to falsely certifying his Executive Branch Confidential Financial Disclosure Report.
 - David Safavian, former Chief of Staff to the Administrator of the GSA was convicted by a jury in June, 2006 of submitting false

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

- Operation Lively Green

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

- Iraqi Reconstruction:

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

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

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

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

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

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

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JMD Owner: Nik Apostolides

Phone: 616-3761

ELSTON/CUMMINS

DAG000001249



U.S. Department of Justice
Office of the Deputy Attorney General

Washington, D.C. 20530

March 6, 2007

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

Dear Mr. Chairman:

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

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

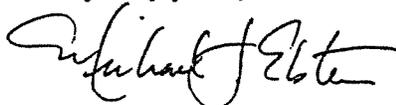
It is important and fair to note that Mr. Cummins stated today that he did not view any of my comments as an attempt to discourage him from testifying. In fact, on two prior occasions, Mr. Cummins had called me and asked me whether he should testify voluntarily in response to invitations he had received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

DAG000001250

The Honorable Charles E. Schumer
Page 2

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

Very truly yours,



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

cc: The Honorable Jeff Sessions

DAG000001251

From: H.E. Cummins [mailto:bc_pers@yahoo.com]

Sent: Tue 2/20/2007 5:06 PM

To: Dan Bogden; Paul K. Charlton; David Iglesias; Carol Lam; McKay, John (Law Adjunct)

Subject: on another note

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

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

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

Bud

McNULTY STATEMENT
SENATE HEARING

DAG000001253



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

DAG000001254

**Testimony
of**

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

**Committee on the Judiciary
United States Senate**

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

February 6, 2007

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

OTHER WITNESS
STATEMENTS
SENATE HEARINGS

DAG000001262

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

UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY

February 6, 2007

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

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

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

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

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

2. The selection and retention process for United States Attorneys is, and always has been, a "political" matter both because these activities are properly partisan and because their conduct is best confined to the elected, political branches of government.
3. S. 214, while understandably motivated and representative of a situation that might otherwise effectively be addressed, at least through congressional oversight, is misguided because the vacancy problems that it seeks to solve are neither unprecedented nor pervasive, and because the remedy offered, *i.e.*, an exclusive judicial role in dealing with vacant United States Attorneys' positions, contradicts an appropriate executive function, is anomalous and unwelcome to the judiciary and, most importantly, will have the unintended effect of hampering the Senate's proper oversight role of executive functions.

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

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

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

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

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

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

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

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

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

- (1) the qualification of a United States attorney for such district appointed by the President under section 541 of this title; or
- (2) the expiration of 120 days after appointment by the Attorney.

General under this section.

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

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

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

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

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

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

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

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

The Appointment of United States Attorneys is Properly a Political Function

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

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

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

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

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

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

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

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

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

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

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

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

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

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

S. 214 Could Have Unintended and Unacceptable Consequences

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

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

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

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

Conclusion

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

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

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

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

Statement of Mary Jo White

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

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

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

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

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

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

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

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

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

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

- United States Attorneys are political appointees who serve at the pleasure of the President. It is thus customary and expected that the United States Attorneys generally will be replaced when a new President of a different party is elected. There is also no question that Presidents have the power to replace any United States Attorney they have appointed for whatever reason they choose.
- In my experience and to my knowledge, however, it would be unprecedented for the Department of Justice or the President to ask for the resignations of United States Attorneys during an Administration, except in rare instances of misconduct or for other significant cause. This is, in my view, how it should be.
- United States Attorneys are, by statute and historical custom, the chief law enforcement officers in their districts, subject to the general supervision of the Attorney General.² Although political appointees, the United States Attorneys, once appointed, play a critical and non-political, impartial role in the administration of justice in our federal system. Their selection is of vital national and local interest.
- In his well-known address to the United States Attorneys in 1940, then Attorney General Robert H. Jackson, although acknowledging the need for some measure of centralized control and coordination by the Department, eloquently emphasized the importance of the role of the United States Attorneys and their independence:

It would probably be within the range of that exaggeration permitted in Washington to say that assembled in this room is one of the most powerful peace-time forces known to our country. The prosecutor has more control over life, liberty, and reputation than any other person in America. His discretion is tremendous.

.....

These powers have been granted to our law-enforcement agencies because it seems necessary

that such a power to prosecute be lodged somewhere. This authority has been granted by people who really wanted the right thing done—wanted crime eliminated—but also wanted the best in our American traditions preserved.

....
Because of this immense power to strike at citizens, not with mere individual strength, but with all the force of government itself, the post of [United States Attorney] from the very beginning has been safeguarded by presidential appointment, requiring confirmation of the Senate of the United States. You are thus required to win an expression of confidence in your character by both the legislative and the executive branches of the government before assuming the responsibilities of a federal prosecutor.

....
Your responsibility in your several districts for law enforcement and for its methods cannot be wholly surrendered to Washington, and ought not to be assumed by a centralized Department of Justice.

....
Your positions are of such independence and importance that while you are being diligent, strict, and vigorous in law enforcement you can also afford to be just.

....
The federal prosecutor has now been prohibited from engaging in political activities. I am convinced that a good-faith acceptance of the spirit and letter of that doctrine will relieve many [United States Attorneys] from the embarrassment of what have heretofore been regarded as legitimate expectations of political service. . . . I think the Hatch Act should be utilized by federal prosecutors as a protection against demands on their time and prestige. . . .³

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

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

- Changing a United States Attorney invariably causes disruption and loss of traction in cases and investigations in a United States Attorney's Office. This is especially so in sensitive or controversial cases and investigations where the leadership and independence of the United States Attorney are often crucial to the successful pursuit of such matters, especially in the face of criticism or political backlash. Replacing a United States Attorney can, of course, be necessary or part of the normal and expected process that accompanies a change of the political guard. But I do not believe that such changes should, as a matter of sound policy, be undertaken lightly or without significant cause. In this and most previous Administrations, the United States Attorneys appointed by the prior Administration were replaced in an orderly and respectful fashion over several months after the election to allow for a smooth transition. If wholesale change in the United States Attorneys is to occur, it should be done in this way. In my view, wholesale replacement of the United States Attorneys should not be done immediately following an election, as occurred at the outset of the Clinton Administration—such abrupt change is not necessary and can undermine the important work of the United States Attorneys' Offices. In some instances, the President of a different party has allowed some of his predecessor's appointees to remain, as happened in New York, with the support of Senator Daniel Patrick Moynihan, when Jimmy Carter was elected President.
- If United States Attorneys are replaced during an Administration without apparent good cause, the wrong message can be sent to other United States Attorneys. We want our United States Attorneys to be strong and independent in carrying out their jobs and the priorities of the Department. We want them to speak up on matters of policy, to be appropriately aggressive in investigating and prosecuting crimes of all kinds and wisely use their limited resources to address the priorities of their particular district. The United States Attorneys are generally closest to the problems and needs of their districts and thus use their discretion and judgment as to how best to apply national initiatives and priorities. One size seldom fits all. There isn't one right answer or rigid plan that can be applied to achieve optimal justice in each district. The federal system has historically counted on the independence and good judgment of the United States Attorneys to carry out the Department's mission, tailored to the specific circumstances of their districts.

- In my opinion, the United States Attorneys have historically served this country with great distinction. Once in office, they become impartial public servants doing their best to achieve justice without fear or favor. As Justice Sutherland said in *Berger v. United States*: “The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice be done. As such, he is in a peculiar and very definite sense the servant of the law. . . .”¹ I am certain that the Department of Justice would not want to act in such a way or have its actions perceived in such a way to derogate from this model of the non-political pursuit of justice by those selected in an open and transparent manner.
- Finally, as to the issue of the optimal appointment mechanism for Interim United States Attorneys, I defer to Congress and the constitutional scholars to find the right answer. For what it is worth, as a practical matter, I believe that the Department of Justice, in the first instance, is ordinarily in the best position to select an appropriate Interim United States Attorney who will ensure the least disruption of the business of the United States Attorney’s Office until a permanent successor can be selected and confirmed. I can, however, also appreciate the concern with permitting such appointments to be made for an indefinite period of time without the necessity of Senate confirmation. I personally thought the structure of allowing the Attorney General to appoint Interim United States Attorneys for a period of 120 days and then giving that power to the chief judge of the district generally worked well and achieved an appropriate balance.

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

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

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

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

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

⁴ 295 U.S. 78, 88 (1935).

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

Feb. 6, 2007

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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SENATE HEARING
TRANSCRIPT

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

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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But this is not abnormal for presidents to remove U.S. attorneys and replace them with interims. And there are all kinds of problems, even with that system as it has worked, because sometimes we in the Judiciary Committee don't move the confirmations like we should as well, either. So, there are lots of things that you could find faults with, but let's be very, very careful before we start dumping this in the hands of federal judges, most of whom I really admire, regardless of their prior political beliefs.

Thank you, Mr. Chairman.

SEN. SCHUMER: Thank you, Senator Hatch.

And Senator Cardin had to leave.

Senator Whitehouse, do you want to make an opening statement? No? Okay, thank you for coming,

And our first witness -- and I know he has a tight schedule, I appreciate him being here at this time -- is our hardworking friend from Arkansas, Senator Mark Pryor.

Senator Pryor.

SEN. MARK PRYOR (D-AR): Mr. Chairman, thank you.

And I also want to thank all the members of the committee.

I've come here today to talk about events that occurred regarding the appointment of the interim U.S. attorney for the eastern district of Arkansas which I believe -- SEN. SCHUMER: Senator, if you could just pull the mike a little closer.

SEN. PRYOR: -- raised serious concerns over the administration's encroachment on the Senate's constitutional responsibilities. I'm not only concerned about this matter as a member of the Senate but as a former practicing lawyer in Arkansas and former attorney general in my state. I know the Arkansas bar well, and all appointments that impact the legal and judicial arena in Arkansas are especially important to me.

Moreover, due to the events of the past Congress, I've given much thought as to what my role as a senator should be regarding executive and judicial nominations. I believe the confirmation process is as serious as anything that we do in government. You know my record. I've supported almost all of the president's nominations. On occasion, I have felt they were unfairly criticized for political purposes, for when I consider a nominee, I use a three-part test. First, is the nominee qualified?; second, does the nominee possess the proper temperament?; third, will the nominee be fair and impartial -- in other words, can they check their political views at the door?

Executive branch nominees are different from judicial nominees in many ways, but U.S. attorneys should be held to a high standard of independence. In other words, they're not inferior officers as defined by the U.S. Supreme Court. All U.S. attorneys must pursue justice. Wherever a case takes them, they should protect our republic by seeing that justice is done. Politics has no place in the pursuit of justice. This was my motivation in helping form the Gang of 14. I've tried very hard to be objective in my dealings with the president's nominations, including his nominations to the U.S. Supreme Court. I want the