

Silas, Adrien

From: Nowacki, John (USAEO) [John.Nowacki@usdoj.gov]
Sent: Tuesday, February 27, 2007 12:01 PM
To: Scott-Finan, Nancy; Moschella, William; Sampson, Kyle
Cc: Elston, Michael (ODAG); Goodling, Monica; Hertling, Richard; Silas, Adrien; Burton, Faith
Subject: RE: Draft Testimony

We are pulling together the additional reports and will have them shortly.

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

From: Scott-Finan, Nancy
Sent: Tuesday, February 27, 2007 11:59 AM
To: Moschella, William; Sampson, Kyle
Cc: Elston, Michael (ODAG); Goodling, Monica; Hertling, Richard; Silas, Adrien; Burton, Faith; Nowacki, John (USAEO)
Subject: RE: Draft Testimony

The staffer just sent an email asking whether we will be bringing the EARS reports to the briefing tomorrow.

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

From: Moschella, William
Sent: Tuesday, February 27, 2007 11:20 AM
To: Scott-Finan, Nancy; Sampson, Kyle
Cc: Elston, Michael (ODAG); Goodling, Monica; Hertling, Richard; Silas, Adrien; Nowacki, John (USAEO)
Subject: Re: Draft Testimony

I don't care whether we address the bill directly or incorporate our views by reference to a views letter, but we have to address it.

Sent from my BlackBerry Wireless Handheld

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

From: Scott-Finan, Nancy
To: Moschella, William; Sampson, Kyle
CC: Elston, Michael (ODAG); Goodling, Monica; Hertling, Richard; Silas, Adrien; Nowacki, John (USAEO)
Sent: Tue Feb 27 09:45:40 2007
Subject: RE: Draft Testimony

Since we have not written a views letter on H.R. 580, the House companion bill, do you want the views letter incorporated in the testimony as well?

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

From: Moschella, William
Sent: Monday, February 26, 2007 7:46 PM
To: Sampson, Kyle; Scott-Finan, Nancy; Clifton, Deborah J
Cc: Elston, Michael (ODAG); Goodling, Monica; Hertling, Richard; Silas, Adrien
Subject: RE: Draft Testimony

Nancy, after the comments are incorporated, I would like to see it one more time before it goes to OMB.

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

From: Sampson, Kyle
Sent: Monday, February 26, 2007 6:30 PM
To: Scott-Finan, Nancy; Clifton, Deborah J
Cc: Elston, Michael (ODAG); Moschella, William; Goodling, Monica; Hertling, Richard; Silas, Adrien

Subject: RE: Draft Testimony

My comments are being faxed to Nancy and Deborah now. Thx!

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

From: Scott-Finan, Nancy

Sent: Friday, February 23, 2007 9:35 AM

To: Clifton, Deborah J

Cc: Elston, Michael (ODAG); Moschella, William; Sampson, Kyle; Goodling, Monica; Hertling, Richard; Silas, Adrien

Subject: FW: Draft Testimony

Attached is the testimony for the HJC hearing on March 6. We need internal clearance by COB Monday so we can get to OMB on Tuesday.

Monica, Kyle, Mike and Will,
I am giving it to you in advance for your edits.

Thanks much.

Nancy

Silas, Adrien

From: Silas, Adrien
Sent: Tuesday, February 27, 2007 2:00 PM
To: Nowacki, John (USAEO); Scott-Finan, Nancy
Cc: Smith, David L. (USAEO); Voris, Natalie (USAEO)
Subject: H15, US Atty - ODAG Tstmny (Control -13441)

The Office of Attorney Recruitment and Management (Lou DeFalaise) has given me the following oral comments to consider emphasizing in the statement:

- 1) Ultimately, the President -- rather than the United States Attorneys -- is responsible for enforcing the laws.
- 2) Local prosecutors can be voted out of office for their performance. However, the President (and the Senate) are the only political/democratic connection to the performance of the United States Attorneys.

Silas, Adrien

From: Scott-Finan, Nancy
Sent: Tuesday, February 27, 2007 2:03 PM
To: Nowacki, John (USAEO); Silas, Adrien; Seidel, Rebecca; Hertling, Richard
Subject: FW: Revised Draft Testimony -- HCJ USA Hearing
Attachments: DRAFT Moschella Testimony.doc

John, I have added the opposition to HR 580 as the first paragraph. Do you want to weave in language from the third, fourth and sixth paragraphs of the views letter on the Senate bill ASAP and get this back to Adrien for additional circulation.

From: Nowacki, John (USAEO) [mailto:John.Nowacki@usdoj.gov]
Sent: Tuesday, February 27, 2007 1:39 PM
To: Scott-Finan, Nancy; Seidel, Rebecca
Subject: Revised Draft Testimony -- HCJ USA Hearing

Will's revised draft testimony -- with Kyle's edits -- is attached. Obviously, this does not include our views on HR 580, which will need to be added.

<<DRAFT Moschella Testimony.doc>>



Department of Justice

STATEMENT

OF

WILLIAM E. MOSCHELLA
PRINCIPAL ASSOCIATE DEPUTY ATTORNEY GENERAL
UNITED STATES DEPARTMENT OF JUSTICE

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES HOUSE OF REPRESENTATIVES

CONCERNING

“H.R. 580, RESTORING CHECKS AND BALANCES IN THE NOMINATION
PROCESS OF U.S. ATTORNEYS”

PRESENTED ON

MARCH 6, 2007

**Testimony
of**

**William E. Moschella
Principal Associate Deputy Attorney General
U.S. Department of Justice**

**Committee on the Judiciary
United States House of Representatives**

“H.R. 580, Restoring Checks and Balances in the Nomination Process of U.S. Attorneys”

March 6, 2007

Chairman Conyers, Congressman Smith, and members of the Committee, thank you for the invitation to discuss the importance of the Justice Department’s United States Attorneys.

The Department of Justice strongly opposes H.R. 580, the “Preserving United States Attorneys Independence Act of 2007.” H.R. 580 would significantly alter the manner in which U.S. Attorney vacancies are filled by completely removing the Attorney General’s authority to appoint interim U.S. Attorneys and allocating that authority to an entirely different branch of government. Under H.R. 580, the Attorney General would have no authority whatsoever to fill a U.S. Attorney vacancy on an interim basis – even one of short duration. Instead, only the district court would have this authority.

As the chief federal law-enforcement officers in their districts, U.S. Attorneys represent the Attorney General and the Department of Justice before Americans in their district. U.S. Attorneys are not only prosecutors, however; they are government officials charged with managing and implementing the policies and priorities of the Executive Branch. The Attorney General has set forth key priorities for the Department of

Justice, and in each of their districts, U.S. Attorneys lead the Department's 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.

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. 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. This accountability ensures compliance with Department policy, and is often recognized by the Members of Congress who write to the Department to encourage various U.S. Attorneys' Offices to focus on a particular area of law enforcement.

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. 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 and should be expected, particularly after a U.S. Attorney's four-year term has expired. 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. Of the U.S. Attorneys whose resignations have been the subject of recent discussion, each one had served longer than four years prior to being asked to resign.

Given the reality of turnover among the United States Attorneys, it is actually the career investigators and prosecutors who 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. For example, in the District of Minnesota and the Northern District of Iowa, the First Assistant took federal retirement at or near the same time that the U.S. Attorney resigned, which required the Department to select another official to lead the office.

At no time, however, has the Administration sought to avoid the confirmation process in the Senate 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. Not once. 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 to select candidates for nomination. The appointment of U.S. Attorneys by and with the advice and consent of the Senate is unquestionably the appointment method preferred by the Senate, and it is unquestionably the appointment method preferred by the Administration.

Since January 20, 2001, 125 new U.S. Attorneys have been nominated by the President and confirmed by the Senate. On March 9, 2006, the Congress amended the Attorney General's authority to appoint interim U.S. Attorneys, and 16 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 16 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 remaining positions—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.

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.

We are aware of no other agency where federal judges—members of a separate branch of government—appoint on an interim basis senior, policymaking 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. 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.

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.

Silas, Adrien

From: Nowacki, John (USAEO) [John.Nowacki@usdoj.gov]
Sent: Tuesday, February 27, 2007 7:50 PM
To: Silas, Adrien; Scott-Finan, Nancy
Subject: FW: Draft HJC testimony
Attachments: DRAFT Moschella Testimony.doc

Adrien -- Sorry; meant to send this to you as well.

From: Nowacki, John (USAEO)
Sent: Tuesday, February 27, 2007 7:49 PM
To: Scott-Finan, Nancy
Subject: Draft HJC testimony

Nancy -- Will's draft testimony (integrating Kyle's edits and your suggested additions re H.R. 580) is attached.

-- John

<<DRAFT Moschella Testimony.doc>>



Department of Justice

STATEMENT

OF

**WILLIAM E. MOSCHELLA
PRINCIPAL ASSOCIATE DEPUTY ATTORNEY GENERAL
UNITED STATES DEPARTMENT OF JUSTICE**

BEFORE THE

**COMMITTEE ON THE JUDICIARY
UNITED STATES HOUSE OF REPRESENTATIVES**

CONCERNING

**“H.R. 580, RESTORING CHECKS AND BALANCES IN THE NOMINATION
PROCESS OF U.S. ATTORNEYS”**

PRESENTED ON

MARCH 6, 2007

OLA000001239

**Testimony
of**

**William E. Moschella
Principal Associate Deputy Attorney General
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**Committee on the Judiciary
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Justice, and in each of their districts, U.S. Attorneys lead the Department's 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.

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. 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. This accountability ensures compliance with Department policy, and is often recognized by the Members of Congress who write to the Department to encourage various U.S. Attorneys' Offices to focus on a particular area of law enforcement.

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. 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.

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Given the reality of turnover among the United States Attorneys, it is actually the career investigators and prosecutors who 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

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At no time, however, has the Administration sought to avoid the confirmation process in the Senate 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. Not once. 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 to select candidates for nomination. The appointment of U.S. Attorneys by and with the advice and consent of the Senate is unquestionably the appointment method preferred by the Senate, and it is unquestionably the appointment method preferred by the Administration.

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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 remaining positions—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.

H.R. 580 would supersede last year’s amendment to 28 U.S.C. § 546 that authorized the Attorney General to appoint an interim U.S. Attorney to serve until a person fills the position by being confirmed by the Senate and appointed by the President. Last year’s amendment was intended to ensure continuity of operations in the event of a U.S. Attorney vacancy that lasts longer than expected. H.R. 580 would institute a new appointment regime without allowing the Attorney General’s authority under current law to be tested in practice.

Prior to last year's amendment, 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.

The Department's principal objection to H.R. 580 is that it would be inappropriate, and inconsistent with sound separation of powers principles, to vest federal courts with the authority to appoint a critical Executive Branch officer such as a United States Attorney under the circumstances described in the bill. We are aware of no other agency where federal judges—members of a separate branch of government—appoint on an interim

basis senior, policymaking 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. 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.

H.R. 580 appears to be aimed at addressing a problem that has not arisen. The Administration has repeatedly demonstrated its commitment to having a Senate-confirmed U.S. Attorney in every federal district. 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.

Silas, Adrien

From: Scott-Finan, Nancy
Sent: Tuesday, February 27, 2007 11:05 PM
To: Moschella, William; Elston, Michael (ODAG); Sampson, Kyle; Goodling, Monica
Cc: Hertling, Richard; Nowacki, John (USAEO); Silas, Adrien
Subject: FW: Draft HJC testimony
Attachments: DRAFT Moschella Testimony.doc

I am sending the revised testimony for your review and final comments before we send it to OMB.

Nancy

Silas, Adrien

From: Nowacki, John (USAEO) [John.Nowacki@usdoj.gov]
Sent: Wednesday, February 28, 2007 5:34 PM
To: Silas, Adrien
Subject: RE: H15, US Atty - ODAG Tstmny (Control -13441)

Adrien -- EOUSA put together the draft.

From: Silas, Adrien
Sent: Monday, February 26, 2007 5:17 PM
To: Scott-Finan, Nancy
Cc: DeFalaise, Lou (OARM); Hardin, Gail; Horkan, Nancy; Pagliarini, Raymond; Cummings, Holly (CIV); Voris, Natalie (USAEO); Smith, David L. (USAEO); Nowacki, John (USAEO); Lofton, Betty; Davis, Kerry; Samuels, Julie; Opl, Legislation
Subject: H15, US Atty - ODAG Tstmny (Control -13441)

Who has the lead on Will Moschella' congressional hearing statement? I have yet to hear from JMD/HR, OARM, CRM, CIV, and EOUSA. FYI, I have attached what I have received otherwise.

<<FW: ODAG Moschella draft testimony for a 03/06/07 hearing re the Importance of the Justice Department's United States Attorneys>> <<FW: ODAG Moschella draft testimony for a 03/06/07 hearing re the Importance of the Justice Department's United States Attorneys>>

Silas, Adrien

From: Scott-Finan, Nancy
Sent: Thursday, March 01, 2007 11:34 AM
To: Moschella, William; Elston, Michael (ODAG); Sampson, Kyle; Goodling, Monica; Hertling, Richard
Cc: Nowacki, John (USAEO); Silas, Adrien
Subject: FW: Draft HJC testimony
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I am recirculating for comments/additions the revised testimony that was sent around on Tuesday evening.



Department of Justice

STATEMENT

OF

WILLIAM E. MOSCHELLA
PRINCIPAL ASSOCIATE DEPUTY ATTORNEY GENERAL
UNITED STATES DEPARTMENT OF JUSTICE

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES HOUSE OF REPRESENTATIVES

CONCERNING

“H.R. 580, RESTORING CHECKS AND BALANCES IN THE NOMINATION
PROCESS OF U.S. ATTORNEYS”

PRESENTED ON

MARCH 6, 2007

**Testimony
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**Committee on the Judiciary
United States House of Representatives**

“H.R. 580, Restoring Checks and Balances in the Nomination Process of U.S. Attorneys”

March 6, 2007

Chairman Conyers, Congressman Smith, and members of the Committee, thank you for the invitation to discuss the importance of the Justice Department’s United States Attorneys.

The Department of Justice strongly opposes H.R. 580, the “Preserving United States Attorneys Independence Act of 2007.” H.R. 580 would significantly alter the manner in which U.S. Attorney vacancies are filled by completely removing the Attorney General’s authority to appoint interim U.S. Attorneys and allocating that authority to an entirely different branch of government. Under H.R. 580, the Attorney General would have no authority whatsoever to fill a U.S. Attorney vacancy on an interim basis—even one of short duration. Instead, only the district court would have this authority.

As the chief federal law-enforcement officers in their districts, U.S. Attorneys represent the Attorney General and the Department of Justice before Americans in their district. U.S. Attorneys are not only prosecutors, however; they are government officials charged with managing and implementing the policies and priorities of the Executive Branch. The Attorney General has set forth key priorities for the Department of

Justice, and in each of their districts, U.S. Attorneys lead the Department's 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.

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. 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. This accountability ensures compliance with Department policy, and is often recognized by the Members of Congress who write to the Department to encourage various U.S. Attorneys' Offices to focus on a particular area of law enforcement.

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. 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 and should be expected, particularly after a U.S. Attorney's four-year term has expired. 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. Of the U.S. Attorneys whose resignations have been the subject of recent discussion, each one had served longer than four years prior to being asked to resign.

Given the reality of turnover among the United States Attorneys, it is actually the career investigators and prosecutors who 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. For example, in the District of Minnesota and the Northern District of Iowa, the First Assistant took federal retirement at or near the same time that the U.S. Attorney resigned, which required the Department to select another official to lead the office.

At no time, however, has the Administration sought to avoid the confirmation process in the Senate 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. Not once. 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 to select candidates for nomination. The appointment of U.S. Attorneys by and with the advice and consent of the Senate is unquestionably the appointment method preferred by the Senate, and it is unquestionably the appointment method preferred by the Administration.

Since January 20, 2001, 125 new U.S. Attorneys have been nominated by the President and confirmed by the Senate. On March 9, 2006, the Congress amended the Attorney General's authority to appoint interim U.S. Attorneys, and 16 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 16 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 remaining positions—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.

H.R. 580 would supersede last year’s amendment to 28 U.S.C. § 546 that authorized the Attorney General to appoint an interim U.S. Attorney to serve until a person fills the position by being confirmed by the Senate and appointed by the President. Last year’s amendment was intended to ensure continuity of operations in the event of a U.S. Attorney vacancy that lasts longer than expected. H.R. 580 would institute a new appointment regime without allowing the Attorney General’s authority under current law to be tested in practice.

Prior to last year's amendment, 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.

The Department's principal objection to H.R. 580 is that it would be inappropriate, and inconsistent with sound separation of powers principles, to vest federal courts with the authority to appoint a critical Executive Branch officer such as a United States Attorney under the circumstances described in the bill. We are aware of no other agency where federal judges—members of a separate branch of government—appoint on an interim

basis senior, policymaking 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. 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.

H.R. 580 appears to be aimed at addressing a problem that has not arisen. The Administration has repeatedly demonstrated its commitment to having a Senate-confirmed U.S. Attorney in every federal district. 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.

Silas, Adrien

From: Hertling, Richard
Sent: Thursday, March 01, 2007 2:04 PM
To: Scott-Finan, Nancy; Moschella, William; Elston, Michael (ODAG); Sampson, Kyle; Goodling, Monica
Cc: Nowacki, John (USAEO); Silas, Adrien
Subject: RE: Draft HJC testimony
Attachments: DRAFT Moschella Testimony.doc

I have made some revisions to the testimony. See page 6 and then at the end to see my addition of text on the West Virginia and South Dakota situations and on proposed revisions to HR 580.

From: Scott-Finan, Nancy
Sent: Thursday, March 01, 2007 11:34 AM
To: Moschella, William; Elston, Michael (ODAG); Sampson, Kyle; Goodling, Monica; Hertling, Richard
Cc: Nowacki, John (USAEO); Silas, Adrien
Subject: FW: Draft HJC testimony

I am recirculating for comments/additions the revised testimony that was sent around on Tuesday evening.



Department of Justice

STATEMENT

OF

**WILLIAM E. MOSCHELLA
PRINCIPAL ASSOCIATE DEPUTY ATTORNEY GENERAL
UNITED STATES DEPARTMENT OF JUSTICE**

BEFORE THE

**COMMITTEE ON THE JUDICIARY
UNITED STATES HOUSE OF REPRESENTATIVES**

CONCERNING

**“H.R. 580, RESTORING CHECKS AND BALANCES IN THE NOMINATION
PROCESS OF U.S. ATTORNEYS”**

PRESENTED ON

MARCH 6, 2007

**Testimony
of**

**William E. Moschella
Principal Associate Deputy Attorney General
U.S. Department of Justice**

**Committee on the Judiciary
United States House of Representatives**

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Justice, and in each of their districts, U.S. Attorneys lead the Department's 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.

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Given the reality of turnover among the United States Attorneys, it is actually the career investigators and prosecutors who 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. For example, in the District of Minnesota and the Northern District of Iowa, the First Assistant took federal retirement at or near the same time that the U.S. Attorney resigned, which required the Department to select another official to lead the office.

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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 remaining positions—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.

H.R. 580 would supersede last year’s amendment to 28 U.S.C. § 546 that authorized the Attorney General to appoint an interim U.S. Attorney to serve until a person fills the position by being confirmed by the Senate and appointed by the President. Last year’s amendment was intended to ensure continuity of operations in the event of a U.S. Attorney vacancy that lasts longer than expected. H.R. 580 would institute a new appointment regime without allowing the Attorney General’s authority under current law to be tested in practice.

Prior to last year's amendment, 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 in which a Senate-confirmed U.S. Attorney could not be appointed within 120 days, the limitation on the Attorney General's appointment authority resulted in 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.

Two examples demonstrate the shortcomings of the previous system. During President Reagan's Administration, the district court appointed in the Southern District of West Virginia an interim U.S. Attorney who was neither a Justice Department employee nor a cleared individual. The new U.S. Attorney sought access to law-enforcement sensitive investigative materials related to the office's most sensitive public corruption investigation. The problem was that the interim U.S. Attorney had no clearances or had then undergone a background investigation so that the Attorney General and the Federal Bureau of Investigation could have complete confidence in the individual. The appointment forced the Department to remove the case files from the U.S. Attorney's office and bring them to Washington. In the end, the Department expedited the nomination of the permanent U.S. Attorney and appointed him to replace the court-appointed individual pending his confirmation.

In a second case, occurring in 2005, the district court appointed as interim U.S. Attorney in South Dakota an individual who similarly was not a Department of Justice or federal employee and had never

undergone the appropriate background check. As a result, the interim U.S. Attorney could have no access to classified information. The U.S. Attorney could not receive information from his district's anti-terrorism coordinator or from its Joint Terrorism Task Force. In a post 9/11 world, this situation was unacceptable.

Despite these two notorious instances, in most cases, the district courts have simply appointed the Attorney General's choice as interim U.S. Attorney, revealing the fact that most judges have 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.

The Department's principal objection to H.R. 580 is that it would be inappropriate, and inconsistent with sound separation of powers principles, to vest federal courts with the authority to appoint a critical Executive Branch officer such as a United States Attorney under the circumstances described in the bill. We are aware of no other agency where federal judges—members of a separate branch of government—appoint on an interim basis senior, policymaking 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. 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.

H.R. 580 appears to be aimed at addressing a problem that has not arisen. The Administration has repeatedly demonstrated its commitment to having a Senate-confirmed U.S. Attorney in every federal district. 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.

If, despite the fact that the Department does not believe a case has been made to repeal the current authority for appointing interim U.S. Attorneys, this Committee believes an amendment to section 546 is

warranted, the Department would urge the Committee to reject H.R. 580. Instead, we urge the Committee to restore the former system, allowing the district court to appoint the interim U.S. Attorney after a period of time, with some modifications. First, the 120-day period 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 in the former statute. 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 above, 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.

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

Silas, Adrien

From: Silas, Adrien
Sent: Thursday, March 01, 2007 7:02 PM
To: Nowacki, John (USAEO); Scott-Finan, Nancy
Cc: Smith, David L. (USAEO); Voris, Natalie (USAEO); Moschella, William
Subject: H15, US Atty - ODAG Tstmny (Control -13441)

How are we doing on this one? We urgently need to get it to OMB if the hearing is on Tuesday. Is EOUSA updating a draft for Will Moschella to review one last time?

Tracking:

Recipient

Read

Nowacki, John (USAEO)

Scott-Finan, Nancy

Read: 3/1/2007 7:04 PM

Smith, David L. (USAEO)

Voris, Natalie (USAEO)

Moschella, William

Silas, Adrien

From: Scott-Finan, Nancy
Sent: Thursday, March 01, 2007 7:07 PM
To: Silas, Adrien
Cc: Smith, David L. (USAEO); Voris, Natalie (USAEO); Moschella, William; Hertling, Richard; Nowacki, John (USAEO)
Subject: RE: H15, US Atty - ODAG Tstmny (Control -13441)

I just sent Will the version with Richard's edits. Will is reviewing this evening. Could you please let OMB know that they will receive it in the morning and that it will be substantially the previously cleared testimony for the Senate hearing including language from the views letter on S. 214. The only new parts of the testimony are two examples of court appointments hindering law enforcement and our recommendations for improvement of the legislation.

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Silas, Adrien

From: Nowacki, John (USAEO) [John.Nowacki@usdoj.gov]
Sent: Thursday, March 01, 2007 7:08 PM
To: Silas, Adrien; Scott-Finan, Nancy
Cc: Moschella, William; Voris, Natalie (USAEO); Smith, David L. (USAEO)
Subject: RE: H15, US Atty - ODAG Tstmny (Control -13441)
Attachments: DRAFT Moschella Testimony.doc

The only comments I've seen this last round are Richard Hertling's (attached with his changes integrated). Have we received anything else?

From: Silas, Adrien
Sent: Thursday, March 01, 2007 7:02 PM
To: Scott-Finan, Nancy; Nowacki, John (USAEO)
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Department of Justice

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PRINCIPAL ASSOCIATE DEPUTY ATTORNEY GENERAL
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Justice, and in each of their districts, U.S. Attorneys lead the Department's 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.

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. 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. This accountability ensures compliance with Department policy, and is often recognized by the Members of Congress who write to the Department to encourage various U.S. Attorneys' Offices to focus on a particular area of law enforcement.

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. 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 and should be expected, particularly after a U.S. Attorney's four-year term has expired. 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. Of the U.S. Attorneys whose resignations have been the subject of recent discussion, each one had served longer than four years prior to being asked to resign.

Given the reality of turnover among the United States Attorneys, it is actually the career investigators and prosecutors who 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. For example, in the District of Minnesota and the Northern District of Iowa, the First Assistant took federal retirement at or near the same time that the U.S. Attorney resigned, which required the Department to select another official to lead the office.

At no time, however, has the Administration sought to avoid the confirmation process in the Senate 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. Not once. 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 to select candidates for nomination. The appointment of U.S. Attorneys by and with the advice and consent of the Senate is unquestionably the appointment method preferred by the Senate, and it is unquestionably the appointment method preferred by the Administration.

Since January 20, 2001, 125 new U.S. Attorneys have been nominated by the President and confirmed by the Senate. On March 9, 2006, the Congress amended the Attorney General's authority to appoint interim U.S. Attorneys, and 16 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 16 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 remaining positions—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.

H.R. 580 would supersede last year’s amendment to 28 U.S.C. § 546 that authorized the Attorney General to appoint an interim U.S. Attorney to serve until a person fills the position by being confirmed by the Senate and appointed by the President. Last year’s amendment was intended to ensure continuity of operations in the event of a U.S. Attorney vacancy that lasts longer than expected. H.R. 580 would institute a new appointment regime without allowing the Attorney General’s authority under current law to be tested in practice.

Prior to last year's amendment, 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 in which a Senate-confirmed U.S. Attorney could not be appointed within 120 days, the limitation on the Attorney General's appointment authority resulted in 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.

Two examples demonstrate the shortcomings of the previous system. During President Reagan's Administration, the district court appointed in the Southern District of West Virginia an interim U.S. Attorney who was neither a Justice Department employee nor a cleared individual. The new U.S. Attorney sought access to law-enforcement sensitive investigative materials related to the office's most sensitive public corruption investigation. The problem was that the interim U.S. Attorney had no clearances or had then undergone a background investigation so that the Attorney General and the Federal Bureau of Investigation could have complete confidence in the individual. The appointment forced the Department to remove the case files from the U.S. Attorney's office and bring them to Washington. In the end, the Department expedited the nomination of the permanent U.S. Attorney and appointed him to replace the court-appointed individual pending his confirmation.

In a second case, occurring in 2005, the district court appointed as interim U.S. Attorney in South Dakota an individual who similarly was not a Department of Justice or federal employee and had never

undergone the appropriate background check. As a result, the interim U.S. Attorney could have no access to classified information. The U.S. Attorney could not receive information from his district's anti-terrorism coordinator or from its Joint Terrorism Task Force. In a post 9/11 world, this situation was unacceptable.

Despite these two notorious instances, in most cases, the district courts have simply appointed the Attorney General's choice as interim U.S. Attorney, revealing the fact that most judges have 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.

The Department's principal objection to H.R. 580 is that it would be inappropriate, and inconsistent with sound separation of powers principles, to vest federal courts with the authority to appoint a critical Executive Branch officer such as a United States Attorney under the circumstances described in the bill. We are aware of no other agency where federal judges—members of a separate branch of government—appoint on an interim basis senior, policymaking 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. 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.

H.R. 580 appears to be aimed at addressing a problem that has not arisen. The Administration has repeatedly demonstrated its commitment to having a Senate-confirmed U.S. Attorney in every federal district. 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.

If, despite the fact that the Department does not believe a case has been made to repeal the current authority for appointing interim U.S. Attorneys, this Committee believes an amendment to section 546 is

warranted, the Department would urge the Committee to reject H.R. 580. Instead, we urge the Committee to restore the former system, allowing the district court to appoint the interim U.S. Attorney after a period of time, with some modifications. First, the 120-day period 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 in the former statute. 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 above, 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.

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

Silas, Adrien

From: Silas, Adrien
Sent: Thursday, March 01, 2007 7:46 PM
To: Nowacki, John (USAEO)
Cc: Scott-Finan, Nancy; Moschella, William; Voris, Natalie (USAEO); Smith, David L. (USAEO)
Subject: FW: H15, US Atty - ODAG Tstmny (Control -13441)
Attachments: DRAFT Moschella Testimony.doc

I have received no other comments.

From: Nowacki, John (USAEO) [mailto:John.Nowacki@usdoj.gov]
Sent: Thursday, March 01, 2007 7:08 PM
To: Silas, Adrien; Scott-Finan, Nancy
Cc: Moschella, William; Voris, Natalie (USAEO); Smith, David L. (USAEO)
Subject: RE: H15, US Atty - ODAG Tstmny (Control -13441)

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Tracking:	Recipient	Read
	Nowacki, John (USAEO)	
	Scott-Finan, Nancy	Read: 3/1/2007 7:49 PM
	Moschella, William	
	Voris, Natalie (USAEO)	
	Smith, David L. (USAEO)	

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Sent: Thursday, March 01, 2007 8:22 PM
To: Silas, Adrien; Nowacki, John (USAEO); Scott-Finan, Nancy
Cc: Smith, David L. (USAEO); Voris, Natalie (USAEO)
Subject: RE: H15, US Atty - ODAG Tstmny (Control -13441)

We will have it first thing in the am

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Cc: Smith, David L. (USAEO); Voris, Natalie (USAEO); Moschella, William
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Silas, Adrien

From: Scott-Finan, Nancy
Sent: Friday, March 02, 2007 9:49 AM
To: Moschella, William; Goodling, Monica; Hertling, Richard
Cc: Silas, Adrien
Subject: Moschella testimony

Attachments: DRAFT Moschella Testimony.doc; DRAFT Moschella Testimony2.doc

I have made Will's edits and am sending two versions: version #1 tones down restoring the former system and version #2 we just urge that the Committee reject HR 580. Monica, please check the paragraph about the vacancies that have



DRAFT Moschella Testimony.doc ... DRAFT Moschella Testimony2.doc...

occurred and the number of nominations.

Pls advise which version you want us to send to OMB to start the interagency clearance process.

Thanks.

Nancy



Department of Justice

STATEMENT

OF

WILLIAM E. MOSCHELLA
PRINCIPAL ASSOCIATE DEPUTY ATTORNEY GENERAL
UNITED STATES DEPARTMENT OF JUSTICE

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES HOUSE OF REPRESENTATIVES

CONCERNING

“H.R. 580, RESTORING CHECKS AND BALANCES IN THE NOMINATION
PROCESS OF U.S. ATTORNEYS”

PRESENTED ON

MARCH 6, 2007

OLA000001288

**Testimony
of**

**William E. Moschella
Principal Associate Deputy Attorney General
U.S. Department of Justice**

**Committee on the Judiciary
United States House of Representatives**

“H.R. 580, Restoring Checks and Balances in the Nomination Process of U.S. Attorneys”

March 6, 2007

Chairman Conyers, Congressman Smith, and members of the Committee, thank you for the invitation to discuss the importance of the Justice Department’s United States Attorneys.

The Department of Justice strongly opposes H.R. 580, the “Preserving United States Attorneys Independence Act of 2007.” H.R. 580 would significantly alter the manner in which U.S. Attorney vacancies are filled by completely removing the Attorney General’s authority to appoint interim U.S. Attorneys and allocating that authority to an entirely different branch of government. Under H.R. 580, the Attorney General would have no authority whatsoever to fill a U.S. Attorney vacancy on an interim basis—even one of short duration. Instead, only the district court would have this authority.

As the chief federal law-enforcement officers in their districts, our 93 U.S. Attorneys represent the Attorney General and the Department of Justice throughout the United States. U.S. Attorneys are not just prosecutors; they are government officials charged with managing and implementing the policies and priorities of the President and the Attorney General. The Attorney General has set forth key priorities for the Department

of Justice, and in each of their districts, U.S. Attorneys lead the Department's 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.

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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. 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 and should be expected, particularly after a U.S. Attorney's four-year term has expired. 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. Of the U.S. Attorneys whose resignations have been the subject of recent discussion, each one had served longer than four years prior to being asked to resign.

Given the reality of turnover among the United States Attorneys, our system depends heavily on the dedicated service of the career investigators and prosecutors. 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. For example, in the District of Minnesota and the Northern District of Iowa, the First Assistant took federal retirement at or near the same time that the U.S. Attorney resigned, which required the Department to select another official to lead the office.

At no time, however, has the Administration sought to avoid the confirmation process in the Senate 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. Not once. 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 to select candidates for nomination. The appointment of U.S. Attorneys by and with the advice and consent of the Senate is unquestionably the appointment method preferred by the Senate, and it is unquestionably the appointment method preferred by the Administration.

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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 remaining positions—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.

H.R. 580 would supersede last year’s amendment to 28 U.S.C. § 546 that authorized the Attorney General to appoint an interim U.S. Attorney to serve until a person fills the position by being confirmed by the Senate and appointed by the President. Last year’s amendment was intended to ensure continuity of operations in the event of a U.S. Attorney vacancy that lasts longer than expected. H.R. 580 would institute a new appointment regime without allowing the Attorney General’s authority under current law to be tested in practice.

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Two examples demonstrate the shortcomings of the previous system. During President Reagan's Administration, the district court appointed in the Southern District of West Virginia an interim U.S. Attorney who was neither a Justice Department employee nor a cleared individual. The new U.S. Attorney sought access to law-enforcement sensitive investigative materials related to the office's most sensitive public corruption investigation. The problem was that the interim U.S. Attorney had no clearances or had then undergone a background investigation so that the Attorney General and the Federal Bureau of Investigation could have complete confidence in the individual. The appointment forced the Department to remove the case files from the U.S. Attorney's office and bring them to Washington. In the end, the Department expedited the nomination of the permanent U.S. Attorney and appointed him to replace the court-appointed individual pending his confirmation.

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The Department's principal objection to H.R. 580 is that it would be inappropriate, and inconsistent with sound separation of powers principles, to vest federal courts with the authority to appoint a critical Executive Branch officer such as a United States Attorney under the circumstances described in the bill. We are aware of no other agency where federal judges—members of a separate branch of government—appoint on an interim basis senior, policymaking 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*

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H.R. 580 appears to be aimed at addressing a problem that has not arisen. The Administration has repeatedly demonstrated its commitment to having a Senate-confirmed U.S. Attorney in every federal district. 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.

If, despite the fact that the Department does not believe a case has been made to repeal the current

authority for appointing interim U.S. Attorneys, this Committee believes an amendment to section 546 is warranted, the Department would urge the Committee to reject H.R. 580. Instead, we would urge the Committee to restore the former system and 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 in the former statute. 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 above, 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.

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



Department of Justice

STATEMENT

OF

**WILLIAM E. MOSCHELLA
PRINCIPAL ASSOCIATE DEPUTY ATTORNEY GENERAL
UNITED STATES DEPARTMENT OF JUSTICE**

BEFORE THE

**COMMITTEE ON THE JUDICIARY
UNITED STATES HOUSE OF REPRESENTATIVES**

CONCERNING

**“H.R. 580, RESTORING CHECKS AND BALANCES IN THE NOMINATION
PROCESS OF U.S. ATTORNEYS”**

PRESENTED ON

MARCH 6, 2007

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**Testimony
of**

**William E. Moschella
Principal Associate Deputy Attorney General
U.S. Department of Justice**

**Committee on the Judiciary
United States House of Representatives**

“H.R. 580, Restoring Checks and Balances in the Nomination Process of U.S. Attorneys”

March 6, 2007

Chairman Conyers, Congressman Smith, and members of the Committee, thank you for the invitation to discuss the importance of the Justice Department’s United States Attorneys.

The Department of Justice strongly opposes H.R. 580, the “Preserving United States Attorneys Independence Act of 2007.” H.R. 580 would significantly alter the manner in which U.S. Attorney vacancies are filled by completely removing the Attorney General’s authority to appoint interim U.S. Attorneys and allocating that authority to an entirely different branch of government. Under H.R. 580, the Attorney General would have no authority whatsoever to fill a U.S. Attorney vacancy on an interim basis—even one of short duration. Instead, only the district court would have this authority.

As the chief federal law-enforcement officers in their districts, our 93 U.S. Attorneys represent the Attorney General and the Department of Justice throughout the United States. U.S. Attorneys are not just prosecutors; they are government officials charged with managing and implementing the policies and priorities of the President and the Attorney General. The Attorney General has set forth key priorities for the Department

of Justice, and in each of their districts, U.S. Attorneys lead the Department's 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.

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. 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. This accountability ensures compliance with Department policy, and is often recognized by the Members of Congress who write to the Department to encourage various U.S. Attorneys' Offices to focus on a particular area of law enforcement.

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. 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 and should be expected, particularly after a U.S. Attorney's four-year term has expired. 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. Of the U.S. Attorneys whose resignations have been the subject of recent discussion, each one had served longer than four years prior to being asked to resign.

Given the reality of turnover among the United States Attorneys, our system depends heavily on the dedicated service of the career investigators and prosecutors. 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