

**Clifton, Deborah J**

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**From:** Lofthus, Lee J  
**Sent:** Monday, February 26, 2007 2:55 PM  
**To:** Silas, Adrien  
**Cc:** Clifton, Deborah J  
**Subject:** RE: ODAG Moschella draft testimony for a 03/06/07 hearing re the Importance of the Justice Department's United States Attorneys

Adrien, no comment from me.. Lee L. JMD

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

**From:** Clifton, Deborah J  
**Sent:** Friday, February 23, 2007 4:52 PM  
**To:** Moschella, William; Elston, Michael (ODAG); Frisch, Stuart; Atwell, Tonya M; Barksdale, Gwen; Hardin, Gail; Horkan, Nancy; Lauria-Sullens, Jolene; Lofthus, Lee J; Pagliarini, Raymond; Rodgers, Janice; Santangelo, Mari (JMD); Schultz, Walter H; DeFalaise, Lou (OARM); Davis, Valorie A; Jackson, Wykema C; Wilcox, Matrina (OLP); Engel, Steve; Marshall, C. Kevin; Mitchell, Dyone; Robinson, Lawan; Smith, George; Davis, Kerry; Lofton, Betty; Opl, Legislation; Samuels, Julie; Cummings, Holly (CIV); Benderson, Judith (USAEO); Nowacki, John (USAEO); Smith, David L. (USAEO); Voris, Natalie (USAEO); Caballero, Luis (ODAG)  
**Cc:** Scott-Finan, Nancy; Seidel, Rebecca; Silas, Adrien  
**Subject:** ODAG Moschella draft testimony for a 03/06/07 hearing re the Importance of the Justice Department's United States Attorneys

YOU WILL NOT RECEIVE A HARD COPY OF THIS REQUEST. PLEASE PROVIDE COMMENTS TO ADRIEN SILAS, OLA, NO LATER THAN 2 pm 02/26/07.

**Clifton, Deborah J**

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**From:** Frisch, Stuart  
**Sent:** Friday, February 23, 2007 5:38 PM  
**To:** Clifton, Deborah J; Scott-Finan, Nancy; Seidel, Rebecca; Silas, Adrien  
**Subject:** RE: ODAG Moschella draft testimony for a 03/06/07 hearing re the Importance of the Justice Department's United States Attorneys

No comment.

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**Sent:** Friday, February 23, 2007 4:52 PM  
**To:** Moschella, William; Elston, Michael (ODAG); Frisch, Stuart; Atwell, Tonya M; Barksdale, Gwen; Hardin, Gail; Horkan, Nancy; Lauria-Sullens, Jolene; Lofthus, Lee J; Pagliarini, Raymond; Rodgers, Janice; Santangelo, Mari (JMD); Schultz, Walter H; DeFalaise, Lou (OARM); Davis, Valorie A; Jackson, Wykema C; Wilcox, Matrina (OLP); Engel, Steve; Marshall, C. Kevin; Mitchell, Dyone; Robinson, Lawan; Smith, George; Davis, Kerry; Lofton, Betty; Opl, Legislation; Samuels, Julie; Cummings, Holly (CIV); Benderson, Judith (USAEO); Nowacki, John (USAEO); Smith, David L. (USAEO); Voris, Natalie (USAEO); Caballero, Luis (ODAG)  
**Cc:** Scott-Finan, Nancy; Seidel, Rebecca; Silas, Adrien  
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**Clifton, Deborah J**

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**From:** Silas, Adrien  
**Sent:** Friday, February 23, 2007 3:46 PM  
**To:** Clifton, Deborah J  
**Subject:** FW: Draft Testimony

**Attachments:** DRAFT Moschella Testimony.doc



DRAFT Moschella  
Testimony.doc ...

DEBBIE: Please circulate to:

ODAG  
JMD/PERSONNEL  
JMD/GC  
Attorney Recruitment & Mgt  
OLP  
OLC  
CRM  
CIV  
EOUSA

with commetns due to me by 2 p.m. on Monday. Thanks!

-----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



# Department of Justice

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**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**

**"[[TITLE]]"**

**PRESENTED ON**

**MARCH 6, 2007**

OLA000000831

**Testimony  
of**

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

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

**“[[Title]]”**

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.

As the chief federal law-enforcement officers in their districts, U.S. Attorneys represent the Attorney General before Americans who may not otherwise have contact with the Department of Justice. 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 six key priorities for the Department of Justice, and in each of their districts, U.S. Attorneys lead our efforts to protect America from terrorist attacks and fight violent crime, combat illegal drug trafficking, ensure the integrity of government and the marketplace, enforce our immigration laws, and prosecute crimes that endanger children and families—including child pornography, obscenity, and human trafficking.

United States Attorneys serve at the pleasure of the President. Like any other high-ranking officials in

the Executive Branch, they may be removed for any reason or no reason. The Department of Justice—including the office of United States Attorney—was created precisely so that the government’s legal business could be effectively managed and carried out through a coherent program under the supervision of the Attorney General. And unlike judges, who are supposed to act independently of those who nominate them, U.S. Attorneys are accountable to the Attorney General, and through him, to the President—the head of the Executive Branch. 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 the position’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 out his or her four-year term 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.

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—in consultation with home-state Senators—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 13 vacancies have occurred since that date. This amendment has not changed our commitment to nominating candidates for Senate confirmation. In fact, the Administration has nominated a total of 15 individuals for Senate consideration since the appointment authority was amended, with 12 of those nominees having been confirmed to date. Of the 13 vacancies that have occurred since the time that the law was amended, the Administration has nominated candidates to fill five of these positions, has interviewed candidates for nomination for seven more positions, and is waiting to receive names to set up interviews for the final position—all in consultation with home-state Senators.

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

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

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 the interim staff of an agency. Such a judicial appointee would have authority for litigating the entire federal criminal and civil docket before the very district court to whom he or she was beholden for the appointment. This arrangement, at a minimum, gives rise to an appearance of potential conflict that undermines the performance or perceived performance of both the Executive and Judicial Branches. A judge may be inclined to select a U.S. Attorney who shares the judge's ideological or prosecutorial philosophy. Or a judge may select a prosecutor apt to settle cases and enter plea bargains, so as to preserve judicial resources. *See Wiener, Inter-Branch Appointments After the Independent Counsel: Court Appointment of United States Attorneys*, 86 Minn. L. Rev. 363, 428 (2001) (concluding that court appointment of interim U.S. Attorneys is unconstitutional).

Prosecutorial authority should be exercised by the Executive Branch in a unified manner, consistent with the application of criminal enforcement policy under the Attorney General. 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.

**Clifton, Deborah J**

---

**From:** Young, Evan  
**Sent:** Wednesday, February 07, 2007 9:55 AM  
**To:** Clifton, Deborah J  
**Subject:** RE: Transcript of Paul McNulty's hearing on 02-06-07 re US Attorneys

Thanks--this is perfect.

---

**From:** Clifton, Deborah J  
**Sent:** Wednesday, February 07, 2007 9:39 AM  
**To:** Young, Evan  
**Subject:** Transcript of Paul McNulty's hearing on 02-06-07 re US Attorneys

Evan,

Here it is. Let me know if you need a copy of his prepared statement.

Debbie Clifton

<< File: 02-06-07 McNulty Transcript re US Attorneys.doc >>

**Clifton, Deborah J**

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**From:** Silas, Adrien  
**Sent:** Friday, February 02, 2007 10:58 AM  
**To:** Clifton, Deborah J  
**Cc:** Cabral, Catalina  
**Subject:** FW: 2/6 US Attorney Hearing

Am I handling this issue?

---

**From:** Cabral, Catalina  
**Sent:** Friday, February 02, 2007 10:54 AM  
**To:** Silas, Adrien  
**Subject:** 2/6 US Attorney Hearing

Are you the clearance attorney for the 2/6 "Is the DOJ Politicizing the Hiring and Firing of U.S. Attorneys?" hearing. I'm assuming so since Velma told me she had H.R. 740 and H.R. 297, but didn't mention US Attorneys. Just wanted to make sure though before I added you.

Catalina Cabral  
U.S. DEPARTMENT OF JUSTICE  
Office of Legislative Affairs  
Catalina.Cabral@USDOJ.gov  
(202) 514-4828

## Clifton, Deborah J

---

**From:** Blackwood, Kristine  
**Sent:** Wednesday, January 31, 2007 10:43 AM  
**To:** Elston, Michael (ODAG); Sampson, Kyle; Seidel, Rebecca  
**Cc:** Scott-Finan, Nancy; Clifton, Deborah J  
**Subject:** RE: SJC U.S. Attorneys hearing Draft testimony

Mike - I'm making your changes now. I'll send it back to you so you can see it.

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

**From:** Elston, Michael (ODAG)  
**Sent:** Wednesday, January 31, 2007 10:37 AM  
**To:** Blackwood, Kristine; Sampson, Kyle; Seidel, Rebecca  
**Cc:** Scott-Finan, Nancy; Clifton, Deborah J  
**Subject:** Re: SJC U.S. Attorneys hearing Draft testimony

Strike that. You have already set the deadline. Just be prepared for substantial ODAG revisions around 4:30.

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

**From:** Elston, Michael (ODAG)  
**To:** Blackwood, Kristine; Sampson, Kyle; Seidel, Rebecca  
**CC:** Scott-Finan, Nancy; Clifton, Deborah J  
**Sent:** Wed Jan 31 10:28:31 2007  
**Subject:** Re: SJC U.S. Attorneys hearing Draft testimony

Not sure that will work. This is not ODAG clearance, this is the DAG's testimony. I would like the pen by noon or shortly thereafter.

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

**From:** Blackwood, Kristine  
**To:** Elston, Michael (ODAG); Sampson, Kyle; Seidel, Rebecca  
**CC:** Scott-Finan, Nancy; Clifton, Deborah J  
**Sent:** Wed Jan 31 10:26:41 2007  
**Subject:** RE: SJC U.S. Attorneys hearing Draft testimony

Comments are due at 3pm. Then ODAG gets it with any comments, then we get it to OMB by 5pm.

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

**From:** Elston, Michael (ODAG)  
**Sent:** Wednesday, January 31, 2007 10:26 AM  
**To:** Blackwood, Kristine; Sampson, Kyle; Seidel, Rebecca  
**Cc:** Scott-Finan, Nancy; Clifton, Deborah J  
**Subject:** Re: SJC U.S. Attorneys hearing Draft testimony

This is due at 5, right?

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

**From:** Blackwood, Kristine  
**To:** Elston, Michael (ODAG); Sampson, Kyle; Seidel, Rebecca  
**CC:** Scott-Finan, Nancy; Clifton, Deborah J  
**Sent:** Wed Jan 31 10:23:58 2007  
**Subject:** RE: SJC U.S. Attorneys hearing Draft testimony

I was hoping to get all comments by 3pm, and to send you a redline that would be easy to read. I've got the OLP edits in now, but thought it would be easier for people if I send that version out on top of Debbie's email, and ask them to use that version as an updated one instead of the one Debbie just sent.

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

From: Elston, Michael (ODAG)  
Sent: Wednesday, January 31, 2007 10:22 AM  
To: Blackwood, Kristine; Sampson, Kyle; Seidel, Rebecca  
Cc: Scott-Finan, Nancy; Clifton, Deborah J  
Subject: Re: SJC U.S. Attorneys hearing Draft testimony

At what point will you be turning the pen over to ODAG?

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

From: Blackwood, Kristine  
To: Sampson, Kyle; Seidel, Rebecca  
CC: Scott-Finan, Nancy; Clifton, Deborah J; Elston, Michael (ODAG)  
Sent: Wed Jan 31 10:16:47 2007  
Subject: RE: SJC U.S. Attorneys hearing Draft testimony

I'm working on the OLP edits and planning to circulate an updated version that folks can redline. I'd rather not confuse them with too many versions, so would like to get whatever anyone has.

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From: Sampson, Kyle  
Sent: Wednesday, January 31, 2007 10:04 AM  
To: Blackwood, Kristine; Seidel, Rebecca  
Cc: Scott-Finan, Nancy; Clifton, Deborah J; Elston, Michael (ODAG)  
Subject: RE: SJC U.S. Attorneys hearing Draft testimony

I physically gave them to Elston -- he has possession now.

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

From: Blackwood, Kristine  
Sent: Wednesday, January 31, 2007 9:58 AM  
To: Sampson, Kyle; Seidel, Rebecca  
Cc: Scott-Finan, Nancy; Clifton, Deborah J; Elston, Michael (ODAG)  
Subject: RE: SJC U.S. Attorneys hearing Draft testimony

Could we have them please?

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From: Blackwood, Kristine  
To: Seidel, Rebecca; Sampson, Kyle  
CC: Scott-Finan, Nancy; Clifton, Deborah J  
Sent: Wed Jan 31 08:51:12 2007  
Subject: Re: SJC U.S. Attorneys hearing Draft testimony

Yes. Debbie - this should go to EOUSA, FBI, ATF, USMS, DEA, CIV, ASG, CRM, due back 3pm. .

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

From: Seidel, Rebecca  
To: Sampson, Kyle  
CC: Blackwood, Kristine; Scott-Finan, Nancy  
Sent: Tue Jan 30 19:35:46 2007  
Subject: RE: SJC U.S. Attorneys hearing Draft testimony

send comments back to Kristine. If we are going to get to OMB by COB tomorrow, I would think 3pm is the latest for comments to give Kristine time to assimilate and deconflict.

right Kristine?

---

From: Sampson, Kyle  
Sent: Tuesday, January 30, 2007 7:35 PM  
To: Seidel, Rebecca  
Subject: RE: SJC U.S. Attorneys hearing Draft testimony

comments to who? by when?

---

From: Seidel, Rebecca  
Sent: Tuesday, January 30, 2007 7:34 PM  
To: Sampson, Kyle; Moschella, William; Elston, Michael (ODAG); Brand, Rachel; Bounds, Ryan W (OLP); Goodling, Monica  
Cc: Scott-Finan, Nancy; Nowacki, John (USAE0); Clifton, Deborah J; Blackwood, Kristine; Hertling, Richard  
Subject: FW: SJC U.S. Attorneys hearing Draft testimony  
Importance: High

Thank you John. Debbie and Kristine are gone for the evening, but will circulate within DOJ first thing in the morning. OAG, ODAG and OLP - wanted to get to you directly so you don't have to wait till morning circulation. Debbie, we need OMB clearance by Friday COB, so that means we have to get to OMB Wed COB at latest.

note the hearing is now Tuesday the 6th instead of Wed the 7th.

---

From: Nowacki, John (USAE0) [mailto:John.Nowacki@usdoj.gov]  
Sent: Tuesday, January 30, 2007 7:30 PM  
To: Seidel, Rebecca; Scott-Finan, Nancy  
Subject: SJC U.S. Attorneys hearing

The draft testimony for the DAG is attached.

<<DRAFT Testimony -- US Attorneys Hearing.doc>>

## Clifton, Deborah J

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**Clifton, Deborah J**

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## Clifton, Deborah J

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To: Seidel, Rebecca; Scott-Finan, Nancy  
Subject: SJC U.S. Attorneys hearing

The draft testimony for the DAG is attached.

<<DRAFT Testimony -- US Attorneys Hearing.doc>>

**Clifton, Deborah J**

---

**From:** Blackwood, Kristine  
**Sent:** Wednesday, January 31, 2007 10:24 AM  
**To:** Elston, Michael (ODAG); Sampson, Kyle; Seidel, Rebecca  
**Cc:** Scott-Finan, Nancy; Clifton, Deborah J  
**Subject:** RE: SJC U.S. Attorneys hearing Draft testimony

I was hoping to get all comments by 3pm, and to send you a redline that would be easy to read. I've got the OLP edits in now, but thought it would be easier for people if I send that version out on top of Debbie's email, and ask them to use that version as an updated one instead of the one Debbie just sent.

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

**From:** Elston, Michael (ODAG)  
**Sent:** Wednesday, January 31, 2007 10:22 AM  
**To:** Blackwood, Kristine; Sampson, Kyle; Seidel, Rebecca  
**Cc:** Scott-Finan, Nancy; Clifton, Deborah J  
**Subject:** Re: SJC U.S. Attorneys hearing Draft testimony

At what point will you be turning the pen over to ODAG?

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

**From:** Blackwood, Kristine  
**To:** Sampson, Kyle; Seidel, Rebecca  
**CC:** Scott-Finan, Nancy; Clifton, Deborah J; Elston, Michael (ODAG)  
**Sent:** Wed Jan 31 10:16:47 2007  
**Subject:** RE: SJC U.S. Attorneys hearing Draft testimony

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**Sent:** Wednesday, January 31, 2007 10:04 AM  
**To:** Blackwood, Kristine; Seidel, Rebecca  
**Cc:** Scott-Finan, Nancy; Clifton, Deborah J; Elston, Michael (ODAG)  
**Subject:** RE: SJC U.S. Attorneys hearing Draft testimony

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**Cc:** Scott-Finan, Nancy; Clifton, Deborah J; Elston, Michael (ODAG)  
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**From:** Blackwood, Kristine

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To: Sampson, Kyle; Moschella, William; Elston, Michael (ODAG); Brand, Rachel; Bounds, Ryan W (OLP); Goodling, Monica  
Cc: Scott-Finan, Nancy; Nowacki, John (USAE0); Clifton, Deborah J; Blackwood, Kristine; Hertling, Richard  
Subject: FW: SJC U.S. Attorneys hearing Draft testimony  
Importance: High

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**Subject:** RE: SJC U.S. Attorneys hearing Draft testimony  
**Attachments:** S 214 testimony (OLP redline).doc

I am attaching a redline of the draft testimony with some proposed emendations; they are all stylistic.

Ryan Bounds  
OLP  
x54870

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**DRAFT TESTIMONY FOR**  
**DEPUTY ATTORNEY GENERAL PAUL MCNULTY**

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

Wednesday, February 7, 2007

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

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

0LA00000890

U.S. Attorneys are not only prosecutors; they are government officials charged with managing and implementing the policies and priorities of the Executive Branch. The Department of Justice—including the office of United States Attorney—was created precisely so that the government’s legal business could be effectively managed and carried out through a coherent program under the supervision of the Attorney General. And unlike judges, who are supposed to act independently of those who nominate them, U.S. Attorneys are accountable to the Attorney General, and through him, to the President—the head of the Executive Branch. For these reasons, the Department is committed to having the best person discharging the responsibilities of that office at all times and in every district.

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

Deleted: P

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

In every single case where a vacancy occurs, it is the goal of the Bush Administration to have a United States Attorney that is confirmed by the Senate. Every single time that a vacancy has arisen, the President has either made a nomination, or the Administration is working—in consultation with home-state Senators—to select candidates for nomination. Let me be perfectly clear—at no time has the Administration sought to avoid the Senate confirmation process by appointing an interim United States Attorney and then refused to move forward in consultation with home-state Senators on the selection, nomination, and confirmation of a new U.S. Attorney. Consultation and confirmation is the method preferred by the Senate, and that is the method preferred by the Administration.

Since January 20, 2001, 125 new U.S. Attorneys have been nominated by the President and confirmed by the Senate. On March 9, 2006, the Congress amended the Attorney General's authority to appoint interim U.S. Attorneys, and 13 vacancies have occurred since that date. This amendment has not changed our commitment to nominating candidates for Senate confirmation. In fact, the Administration has nominated a total of 15 individuals for Senate consideration since the appointment authority was amended, with 12 of those nominees having been confirmed to date. Of the 13 vacancies that have occurred since the time that the law was amended, the Administration has nominated candidates to fill five of these positions, has interviewed

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

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

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

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

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

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

## Clifton, Deborah J

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**From:** Blackwood, Kristine  
**Sent:** Wednesday, January 31, 2007 8:52 AM  
**To:** Clifton, Deborah J  
**Subject:** Fw: SJC U.S. Attorneys hearing Draft testimony

**Importance:** High

**Attachments:** DRAFT Testimony -- US Attorneys Hearing.doc

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

**From:** Seidel, Rebecca  
**To:** Sampson, Kyle; Moschella, William; Elston, Michael (ODAG); Brand, Rachel; Bounds, Ryan W (OLP); Goodling, Monica  
**CC:** Scott-Finan, Nancy; Nowacki, John (USAE0); Clifton, Deborah J; Blackwood, Kristine; Hertling, Richard  
**Sent:** Tue Jan 30 19:33:38 2007  
**Subject:** FW: SJC U.S. Attorneys hearing Draft testimony



DRAFT Testimony --  
US Attorney...

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note the hearing is now Tuesday the 6th instead of Wed the 7th.

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**Sent:** Tuesday, January 30, 2007 7:30 PM  
**To:** Seidel, Rebecca; Scott-Finan, Nancy  
**Subject:** SJC U.S. Attorneys hearing

The draft testimony for the DAG is attached.

<<DRAFT Testimony -- US Attorneys Hearing.doc>>

**DRAFT TESTIMONY FOR**  
**DEPUTY ATTORNEY GENERAL PAUL MCNULTY**

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

Wednesday, February 7, 2007

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

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

U.S. Attorneys are not only prosecutors; they are government officials charged with managing and implementing the policies and priorities of the Executive Branch. The Department of Justice—including the office of United States Attorney—was created precisely so that the government’s legal business could be effectively managed and carried out through a coherent program under the supervision of the Attorney General. And unlike judges, who are supposed to act independently of those who nominate them, U.S. Attorneys are accountable to the Attorney General, and through him, to the President—the head of the Executive Branch. For these reasons, the Department is committed to having the best person discharging the responsibilities of that office at all times and in every district.

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

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In every single case where a vacancy occurs, it is the goal of the Bush Administration to have a United States Attorney that is confirmed by the Senate. Every single time that a vacancy has arisen, the President has either made a nomination, or the Administration is working—in consultation with home-state Senators—to select candidates for nomination. Let me be perfectly clear—at no time has the Administration sought to avoid the Senate confirmation process by appointing an interim United States Attorney and then refused to move forward in consultation with home-state Senators on the selection, nomination, and confirmation of a new U.S. Attorney. Consultation and confirmation is the method preferred by the Senate, and that is the method preferred by the Administration.

Since January 20, 2001, 125 new U.S. Attorneys have been nominated by the President and confirmed by the Senate. On March 9, 2006, the Congress amended the Attorney General's authority to appoint interim U.S. Attorneys, and 13 vacancies have occurred since that date. This amendment has not changed our commitment to nominating candidates for Senate confirmation. In fact, the Administration has nominated a total of 15 individuals for Senate consideration since the appointment authority was amended, with 12 of those nominees having been confirmed to date. Of the 13 vacancies that have occurred since the time that the law was amended, the Administration has nominated candidates to fill five of these positions, has interviewed

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

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

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S. 214 seems aimed at solving a problem that does not exist. When a vacancy in the office of U.S. Attorney occurs, the Department often looks first to the First Assistant or another senior manager in the office to serve as an Acting or interim U.S. Attorney. Where neither the First Assistant nor another senior manager is able or willing to serve as an Acting or interim U.S. Attorney, or where their service would not be appropriate under the circumstances, the Administration may look to other Department employees to serve temporarily. No matter which way a U.S. Attorney is temporarily appointed, the Administration consistently seeks to consult with home-state Senators and fill the vacancy with a Presidentially-nominated and Senate-confirmed nominee.

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

**Clifton, Deborah J**

---

**From:** Blackwood, Kristine  
**Sent:** Wednesday, January 31, 2007 8:51 AM  
**To:** Seidel, Rebecca; Sampson, Kyle  
**Cc:** Scott-Finan, Nancy; Clifton, Deborah J  
**Subject:** Re: SJC U.S. Attorneys hearing Draft testimony

Yes. Debbie - this should go to EOUSA, FBI, ATF, USMS, DEA, CIV, ASG, CRM, due back 3pm. .

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

**From:** Seidel, Rebecca  
**To:** Sampson, Kyle  
**CC:** Blackwood, Kristine; Scott-Finan, Nancy  
**Sent:** Tue Jan 30 19:35:46 2007  
**Subject:** RE: SJC U.S. Attorneys hearing Draft testimony

send comments back to Kristine. If we are going to get to OMB by COB tomorrow, I would think 3pm is the latest for comments to give Kristine time to assimilate and deconflict. right Kristine?

---

**From:** Sampson, Kyle  
**Sent:** Tuesday, January 30, 2007 7:35 PM  
**To:** Seidel, Rebecca  
**Subject:** RE: SJC U.S. Attorneys hearing Draft testimony

comments to who? by when?

---

**From:** Seidel, Rebecca  
**Sent:** Tuesday, January 30, 2007 7:34 PM  
**To:** Sampson, Kyle; Moschella, William; Elston, Michael (ODAG); Brand, Rachel; Bounds, Ryan W (OLP); Goodling, Monica  
**Cc:** Scott-Finan, Nancy; Nowacki, John (USAE0); Clifton, Deborah J; Blackwood, Kristine; Hertling, Richard  
**Subject:** FW: SJC U.S. Attorneys hearing Draft testimony  
**Importance:** High

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**Attachments:** DRAFT Testimony -- US Attorneys Hearing.doc

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Committee on the Judiciary  
U.S. Senate

Wednesday, February 7, 2007

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

**Clifton, Deborah J**

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**From:** Clifton, Deborah J  
**Sent:** Friday, February 23, 2007 4:52 PM  
**To:** Moschella, William; Elston, Michael (ODAG); Frisch, Stuart; Atwell, Tonya M; Barksdale, Gwen; Hardin, Gail; Horkan, Nancy; Lauria-Sullens, Jolene; Lofthus, Lee J; Pagliarini, Raymond; Rodgers, Janice; Santangelo, Mari (JMD); Schultz, Walter H; DeFalaise, Lou (OARM); Davis, Valorie A; Jackson, Wykema C; Wilcox, Matrina (OLP); Engel, Steve; Marshall, C. Kevin; Mitchell, Dyone; Robinson, Lawan; Smith, George; Davis, Kerry; Lofton, Betty; Opl, Legislation; Samuels, Julie; Cummings, Holly (CIV); Benderson, Judith (USAEO); Nowacki, John (USAEO); Smith, David L. (USAEO); Voris, Natalie (USAEO); Caballero, Luis (ODAG)  
**Cc:** Scott-Finan, Nancy; Seidel, Rebecca; Silas, Adrien  
**Subject:** ODAG Moschella draft testimony for a 03/06/07 hearing re the Importance of the Justice Department's United States Attorneys

**Attachments:** DRAFT Moschella Testimony.doc; H15control.pdf



DRAFT Moschella H15control.pdf (12 KB)  
Testimony.doc ...

YOU WILL NOT RECEIVE A HARD COPY OF THIS REQUEST. PLEASE PROVIDE COMMENTS TO ADRIEN SILAS, OLA, NO LATER THAN 2 pm 02/26/07.

**Tracking:**

**Recipient**

- Moschella, William
- Elston, Michael (ODAG)
- Frisch, Stuart
- Atwell, Tonya M
- Barksdale, Gwen
- Hardin, Gail
- Horkan, Nancy
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**Recipient**

Cummings, Holly (CIV)  
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# Department of Justice

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**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**

**“[[TITLE]]”**

**PRESENTED ON**

**MARCH 6, 2007**

OLA000000917

**Testimony  
of**

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

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

**“[[Title]]”**

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.

As the chief federal law-enforcement officers in their districts, U.S. Attorneys represent the Attorney General before Americans who may not otherwise have contact with the Department of Justice. 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 six key priorities for the Department of Justice, and in each of their districts, U.S. Attorneys lead our efforts to protect America from terrorist attacks and fight violent crime, combat illegal drug trafficking, ensure the integrity of government and the marketplace, enforce our immigration laws, and prosecute crimes that endanger children and families—including child pornography, obscenity, and human trafficking.

United States Attorneys serve at the pleasure of the President. Like any other high-ranking officials in

the Executive Branch, they may be removed for any reason or no reason. The Department of Justice—including the office of United States Attorney—was created precisely so that the government’s legal business could be effectively managed and carried out through a coherent program under the supervision of the Attorney General. And unlike judges, who are supposed to act independently of those who nominate them, U.S. Attorneys are accountable to the Attorney General, and through him, to the President—the head of the Executive Branch. 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 the position’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 out his or her four-year term 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.

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—in consultation with home-state Senators—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 13 vacancies have occurred since that date. This amendment has not changed our commitment to nominating candidates for Senate confirmation. In fact, the Administration has nominated a total of 15 individuals for Senate consideration since the appointment authority was amended, with 12 of those nominees having been confirmed to date. Of the 13 vacancies that have occurred since the time that the law was amended, the Administration has nominated candidates to fill five of these positions, has interviewed candidates for nomination for seven more positions, and is waiting to receive names to set up interviews for the final position—all in consultation with home-state Senators.

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

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

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 the interim staff of an agency. Such a judicial appointee would have authority for litigating the entire federal criminal and civil docket before the very district court to whom he or she was beholden for the appointment. This arrangement, at a minimum, gives rise to an appearance of potential conflict that undermines the performance or perceived performance of both the Executive and Judicial Branches. A judge may be inclined to select a U.S. Attorney who shares the judge's ideological or prosecutorial philosophy. Or a judge may select a prosecutor apt to settle cases and enter plea bargains, so as to preserve judicial resources. *See Wiener, Inter-Branch Appointments After the Independent Counsel: Court Appointment of United States Attorneys*, 86 Minn. L. Rev. 363, 428 (2001) (concluding that court appointment of interim U.S. Attorneys is unconstitutional).

Prosecutorial authority should be exercised by the Executive Branch in a unified manner, consistent with the application of criminal enforcement policy under the Attorney General. 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.

Department Of Justice  
Office Legislative Affairs  
Control Sheet

Date Of Document: 02/23/07 Control No.: 070223-13441  
Date Received: 02/23/07 ID No.: 435525  
Due Date: 02/26/07 2 pm

From: OLA (HOUSE JUDICIARY COMTE) (H.15) ((110TH  
CONGRESS))

To: HOUSE JUDICIARY COMTE

Subject:

ATTACHED FOR YOUR REVIEW AND COMMENT IS A COPY OF THE DRAFT STATEMENT OF  
WILLIAM MOSCHELLA, PRINCIPAL ASSOCIATE DEPUTY ATTORNEY GENERAL,  
REGARDING THE IMPORTANCE OF THE JUSTICE DEPARTMENT'S UNITED STATES  
ATTORNEYS, BEFORE THE HOUSE JUDICIARY COMTE, TO BE GIVEN ON MARCH 6,  
2007

Action/Information:

Signature Level: OLA

Referred To:

Assigned: Action:

ODAG, JMD/PERSONNEL/GC,  
OARM, OLP, OLC, CRM, CIV,  
EOUSA

02/23/07 COMMENTS DUE TO OLA/SILAS BY 2 PM  
02/26/07. CC: OLA/SCOTT-FINAN/  
SEIDEL

Remarks:

Comments:

File Comments:

Primary Contact: ADRIEN SILAS, 514-7276

OLA000000925

**Clifton, Deborah J**

---

**From:** Clifton, Deborah J  
**Sent:** Wednesday, January 31, 2007 10:38 AM  
**To:** Seidel, Rebecca; Blackwood, Kristine  
**Cc:** Scott-Finan, Nancy  
**Subject:** RE: SJC U.S. Attorneys hearing Draft testimony

I agree.

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

**From:** Seidel, Rebecca  
**Sent:** Wednesday, January 31, 2007 10:37 AM  
**To:** Blackwood, Kristine  
**Cc:** Scott-Finan, Nancy; Clifton, Deborah J  
**Subject:** Re: SJC U.S. Attorneys hearing Draft testimony

Much appreciated. But from this point forward, just send them what you have and send them component comments as you get them. We ordinarily would send to Witness right?

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**CC:** Scott-Finan, Nancy  
**Sent:** Wed Jan 31 10:32:58 2007  
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<<DRAFT Testimony -- US Attorneys Hearing.doc>>

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Scott-Finan, Nancy

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Read: 1/31/2007 10:52 AM  
Deleted: 2/1/2007 6:58 PM  
Read: 1/31/2007 10:43 AM

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CC: Scott-Finan, Nancy; Clifton, Deborah J  
Sent: Wed Jan 31 10:23:58 2007  
Subject: RE: SJC U.S. Attorneys hearing Draft testimony

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Subject: Re: SJC U.S. Attorneys hearing Draft testimony

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CC: Scott-Finan, Nancy; Clifton, Deborah J; Elston, Michael (ODAG)  
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Sent: Wednesday, January 31, 2007 10:04 AM  
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Cc: Scott-Finan, Nancy; Clifton, Deborah J; Elston, Michael (ODAG)  
Subject: RE: SJC U.S. Attorneys hearing Draft testimony

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From: Blackwood, Kristine  
To: Seidel, Rebecca; Sampson, Kyle  
CC: Scott-Finan, Nancy; Clifton, Deborah J

Sent: Wed Jan 31 08:51:12 2007  
Subject: Re: SJC U.S. Attorneys hearing Draft testimony

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Sent: Tue Jan 30 19:35:46 2007  
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comments to who? by when?

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To: Sampson, Kyle; Moschella, William; Elston, Michael (ODAG); Brand, Rachel; Bounds, Ryan W (OLP); Goodling, Monica  
Cc: Scott-Finan, Nancy; Nowacki, John (USAEO); Clifton, Deborah J; Blackwood, Kristine; Hertling, Richard  
Subject: FW: SJC U.S. Attorneys hearing Draft testimony  
Importance: High

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Sent: Tuesday, January 30, 2007 7:30 PM  
To: Seidel, Rebecca; Scott-Finan, Nancy  
Subject: SJC U.S. Attorneys hearing

The draft testimony for the DAG is attached.

<<DRAFT Testimony -- US Attorneys Hearing.doc>>

Tracking:	Recipient	Read
	Blackwood, Kristine	Read: 1/31/2007 10:32 AM
	Scott-Finan, Nancy	Read: 1/31/2007 10:43 AM
	Seidel, Rebecca	Read: 1/31/2007 10:52 AM

## Clifton, Deborah J

---

**From:** Clifton, Deborah J  
**Sent:** Wednesday, January 31, 2007 10:30 AM  
**To:** Blackwood, Kristine; Seidel, Rebecca  
**Cc:** Scott-Finan, Nancy  
**Subject:** RE: SJC U.S. Attorneys hearing Draft testimony

Kristine,

ODAG should have the pen. You should be forwarding all comments to ODAG so that they can determine which ones they want to accept and which ones that don't want to accept. You should not be making the edits.

Debbie

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**From:** Elston, Michael (ODAG)  
**Sent:** Wednesday, January 31, 2007 10:29 AM  
**To:** Blackwood, Kristine; Sampson, Kyle; Seidel, Rebecca  
**Cc:** Scott-Finan, Nancy; Clifton, Deborah J  
**Subject:** Re: SJC U.S. Attorneys hearing Draft testimony

Not sure that will work. This is not ODAG clearance, this is the DAG's testimony. I would like the pen by noon or shortly thereafter.

-----Original Message-----  
**From:** Blackwood, Kristine  
**To:** Elston, Michael (ODAG); Sampson, Kyle; Seidel, Rebecca  
**CC:** Scott-Finan, Nancy; Clifton, Deborah J  
**Sent:** Wed Jan 31 10:26:41 2007  
**Subject:** RE: SJC U.S. Attorneys hearing Draft testimony

Comments are due at 3pm. Then ODAG gets it with any comments, then we get it to OMB by 5pm.

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**From:** Elston, Michael (ODAG)  
**Sent:** Wednesday, January 31, 2007 10:26 AM  
**To:** Blackwood, Kristine; Sampson, Kyle; Seidel, Rebecca  
**Cc:** Scott-Finan, Nancy; Clifton, Deborah J  
**Subject:** Re: SJC U.S. Attorneys hearing Draft testimony

This is due at 5, right?

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**From:** Clifton, Deborah J  
**Sent:** Wednesday, January 31, 2007 10:25 AM  
**To:** Taylor, Velma  
**Subject:** FW: SJC U.S. Attorneys hearing Draft testimony

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**From:** Blackwood, Kristine  
**Sent:** Wednesday, January 31, 2007 10:24 AM  
**To:** Elston, Michael (ODAG); Sampson, Kyle; Seidel, Rebecca  
**Cc:** Scott-Finan, Nancy; Clifton, Deborah J  
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To: Seidel, Rebecca; Scott-Finan, Nancy  
Subject: SJC U.S. Attorneys hearing

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**Tracking:**

**Recipient**  
Taylor, Velma

**Read**

Read: 1/31/2007 10:26 AM

**Clifton, Deborah J**

---

**From:** Clifton, Deborah J  
**Sent:** Wednesday, January 31, 2007 9:40 AM  
**To:** Blackwood, Kristine  
**Subject:** FW: SJC U.S. Attorneys hearing Draft testimony  
**Attachments:** S 214 testimony (OLP redline).doc

**Tracking:**      **Recipient**      **Read**  
Blackwood, Kristine Read: 1/31/2007 9:42 AM

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**From:** Bounds, Ryan W (OLP)  
**Sent:** Wednesday, January 31, 2007 9:40 AM  
**To:** Seidel, Rebecca  
**Cc:** Clifton, Deborah J; Davis, Valorie A  
**Subject:** RE: SJC U.S. Attorneys hearing Draft testimony

I am attaching a redline of the draft testimony with some proposed emendations; they are all stylistic.

Ryan Bounds  
OLP  
x54870

---

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**Sent:** Tuesday, January 30, 2007 7:34 PM  
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**DRAFT TESTIMONY FOR**  
**DEPUTY ATTORNEY GENERAL PAUL MCNULTY**

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

Wednesday, February 7, 2007

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

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

U.S. Attorneys are not only prosecutors; they are government officials charged with managing and implementing the policies and priorities of the Executive Branch. The Department of Justice—including the office of United States Attorney—was created precisely so that the government’s legal business could be effectively managed and carried out through a coherent program under the supervision of the Attorney General. And unlike judges, who are supposed to act independently of those who nominate them, U.S. Attorneys are accountable to the Attorney General, and through him, to the President—the head of the Executive Branch. For these reasons, the Department is committed to having the best person discharging the responsibilities of that office at all times and in every district.

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

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

In every single case where a vacancy occurs, it is the goal of the Bush Administration to have a United States Attorney that is confirmed by the Senate. Every single time that a vacancy has arisen, the President has either made a nomination, or the Administration is working—in consultation with home-state Senators—to select candidates for nomination. Let me be perfectly clear—at no time has the Administration sought to avoid the Senate confirmation process by appointing an interim United States Attorney and then refused to move forward in consultation with home-state Senators on the selection, nomination, and confirmation of a new U.S. Attorney. Consultation and confirmation is the method preferred by the Senate, and that is the method preferred by the Administration.

Since January 20, 2001, 125 new U.S. Attorneys have been nominated by the President and confirmed by the Senate. On March 9, 2006, the Congress amended the Attorney General's authority to appoint interim U.S. Attorneys, and 13 vacancies have occurred since that date. This amendment has not changed our commitment to nominating candidates for Senate confirmation. In fact, the Administration has nominated a total of 15 individuals for Senate consideration since the appointment authority was amended, with 12 of those nominees having been confirmed to date. Of the 13 vacancies that have occurred since the time that the law was amended, the Administration has nominated candidates to fill five of these positions, has interviewed

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

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

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

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

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

United States Attorneys serve at the pleasure of the President. Like any other high-ranking officials in the Executive Branch, they may be removed for any reason or no reason. The Attorney General and I are responsible for evaluating the performance of the United States Attorneys and ensuring that they are leading their offices effectively. It should come as no surprise to anyone that, in an organization as large as the Justice Department, U.S. Attorneys may be removed, or asked or encouraged to resign. However, U.S. Attorneys are never removed, or asked or encouraged to resign, in an effort to retaliate against them or interfere with or inappropriately influence a particular investigation, criminal prosecution, or civil case. Any suggestion to the contrary is unfounded, and it irresponsibly undermines the reputation for impartiality on which the Department has always prided itself.

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

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

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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 only 120 days; thereafter, the district court was authorized to appoint an interim U.S. Attorney. In cases where a Senate-confirmed U.S. Attorney could not be appointed within 120 days, the limitation on the Attorney General's appointment authority resulted in several recurring problems. Some district courts recognized the conflicts inherent in the appointment of an interim U.S. Attorney who would then have matters before the court—not to mention the oddity of one branch of government's appointing officers of another—and simply refused to exercise the appointment authority. In those cases, the Attorney General was consequently required to make multiple 120-day interim appointments. Other district courts ignored the inherent conflicts and the oddity of the situation and sought to appoint as interim U.S. Attorneys candidates who lacked the required clearances or appropriate qualifications. Last year's amendment of section 546, which brought that section largely into conformity with the Vacancies Reform Act, was necessary and entirely appropriate.~~

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S. 214, on the other hand, would not only fail to ensure that ~~the earlier problems~~ did not recur; it would exacerbate them by making appointment by the district court the only means of temporarily filling a vacancy—a step inconsistent with sound separation-of-powers principles. We are aware of no other agency where federal judges—members of a separate branch of government—~~appoint the interim staff of an agency~~. Such a judicial appointee would have authority for litigating the entire federal criminal and civil docket before the very district court to whom he or she was beholden for the appointment. This arrangement, at a minimum, gives rise to an appearance of potential

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conflict that undermines the performance of both the Executive and Judicial Branches. Furthermore, prosecutorial authority should be exercised by the Executive Branch in a unified manner, consistent with the application of criminal enforcement policy under the Attorney General. S. 214 would undermine the effort to achieve a unified and consistent approach to prosecutions and federal law enforcement.

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

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

**Clifton, Deborah J**

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

**YOU WILL NOT RECEIVE A HARD COPY OF THIS REQUEST.  
PLEASE PROVIDE COMMENTS TO KRISTINE BLACKWOOD,  
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S214control.pdf (12 KB)



DRAFT Testimony -- US Attorney...

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Seidel, Rebecca  
Blackwood, Kristine

Department Of Justice  
Office Legislative Affairs  
Control Sheet

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

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

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

To: SENATE JUDICIARY COMTE

Subject:

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

Action/Information:

Signature Level: OLA

Referred To:

Assigned: Action:

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

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

Remarks:

Comments:

File Comments:

Primary Contact: KRISTINE BLACKWOOD, 514-2113

OLA000000953

**DRAFT TESTIMONY FOR**  
**DEPUTY ATTORNEY GENERAL PAUL MCNULTY**

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

Wednesday, February 7, 2007

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

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

U.S. Attorneys are not only prosecutors; they are government officials charged with managing and implementing the policies and priorities of the Executive Branch. The Department of Justice—including the office of United States Attorney—was created precisely so that the government’s legal business could be effectively managed and carried out through a coherent program under the supervision of the Attorney General. And unlike judges, who are supposed to act independently of those who nominate them, U.S. Attorneys are accountable to the Attorney General, and through him, to the President—the head of the Executive Branch. For these reasons, the Department is committed to having the best person discharging the responsibilities of that office at all times and in every district.

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

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

In every single case where a vacancy occurs, it is the goal of the Bush Administration to have a United States Attorney that is confirmed by the Senate. Every single time that a vacancy has arisen, the President has either made a nomination, or the Administration is working—in consultation with home-state Senators—to select candidates for nomination. Let me be perfectly clear—at no time has the Administration sought to avoid the Senate confirmation process by appointing an interim United States Attorney and then refused to move forward in consultation with home-state Senators on the selection, nomination, and confirmation of a new U.S. Attorney. Consultation and confirmation is the method preferred by the Senate, and that is the method preferred by the Administration.

Since January 20, 2001, 125 new U.S. Attorneys have been nominated by the President and confirmed by the Senate. On March 9, 2006, the Congress amended the Attorney General's authority to appoint interim U.S. Attorneys, and 13 vacancies have occurred since that date. This amendment has not changed our commitment to nominating candidates for Senate confirmation. In fact, the Administration has nominated a total of 15 individuals for Senate consideration since the appointment authority was amended, with 12 of those nominees having been confirmed to date. Of the 13 vacancies that have occurred since the time that the law was amended, the Administration has nominated candidates to fill five of these positions, has interviewed

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

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

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

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

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

United States Attorneys serve at the pleasure of the President. Like any other high-ranking officials in the Executive Branch, they may be removed for any reason or no reason. The Attorney General and I are responsible for evaluating the performance of the United States Attorneys and ensuring that they are leading their offices effectively. It should come as no surprise to anyone that, in an organization as large as the Justice Department, U.S. Attorneys may be removed, or asked or encouraged to resign. However, U.S. Attorneys are never removed, or asked or encouraged to resign, in an effort to retaliate against them or interfere with or inappropriately influence a particular investigation, criminal prosecution, or civil case. Any suggestion to the contrary is simply irresponsible.

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

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

As you know, prior to last year's amendment of 28 U.S.C. § 546, the Attorney General could appoint an interim U.S. Attorney for only 120 days; thereafter, the district court was authorized to appoint an interim U.S. Attorney. In cases where a Senate-confirmed U.S. Attorney could not be appointed within 120 days, the limitation on the Attorney General's appointment authority resulted in several recurring problems. Some district courts recognized the conflicts inherent in the appointment of an interim U.S. Attorney who would then have matters before the court—not to mention the oddity of one branch of government appointing officers of another—and simply refused to exercise the appointment authority. In those cases, the Attorney General was then required to make multiple 120-day interim appointments. Other district courts ignored the inherent conflicts and the oddity, and sought to appoint as interim U.S. Attorneys unacceptable candidates without the required clearances or appropriate qualifications. Last year's amendment of section 546, which brought the section largely into conformity with the Vacancies Reform Act, was necessary and entirely appropriate.

S. 214, on the other hand, would not only fail to ensure that those problems did not recur; it would exacerbate them by making appointment by the district court the only means of temporarily filling a vacancy—a step inconsistent with sound separation-of-powers principles. We are aware of no other agency where federal judges—members of a separate branch of government and not the head of the agency—appoint interim staff on behalf of the agency. Such a judicial appointee would have authority for litigating the entire federal criminal and civil docket before the very district court to whom he or she was beholden for the appointment. This arrangement, at a minimum, gives rise to an

appearance of potential conflict that undermines the performance of both the Executive and Judicial Branches. Furthermore, prosecutorial authority should be exercised by the Executive Branch in a unified manner, consistent with the application of criminal enforcement policy under the Attorney General. S. 214 would undermine the effort to achieve a unified and consistent approach to prosecutions and federal law enforcement.

S. 214 seems aimed at solving a problem that does not exist. When a vacancy in the office of U.S. Attorney occurs, the Department often looks first to the First Assistant or another senior manager in the office to serve as an Acting or interim U.S. Attorney. Where neither the First Assistant nor another senior manager is able or willing to serve as an Acting or interim U.S. Attorney, or where their service would not be appropriate under the circumstances, the Administration may look to other Department employees to serve temporarily. No matter which way a U.S. Attorney is temporarily appointed, the Administration consistently seeks to consult with home-state Senators and fill the vacancy with a Presidentially-nominated and Senate-confirmed nominee.

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



# Department of Justice

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STATEMENT

OF

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

BEFORE THE

COMMITTEE ON THE JUDICIARY  
UNITED STATES SENATE

CONCERNING

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

PRESENTED ON

FEBRUARY 6, 2007

OLA000000961

**Testimony  
of**

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

**Committee on the Judiciary  
United States Senate**

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

February 6, 2007

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Kristine Blackwood

# URGENT

Department Of Justice  
Office Legislative Affairs  
Control Sheet

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

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

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

To: SENATE JUDICIARY COMTE

Subject:

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

Action/Information:

Signature Level: OLA

Referred To:

Assigned: Action:

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

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

Remarks:

Comments:

File Comments:

Primary Contact: KRISTINE BLACKWOOD, 514-2113

ATF (Rubenstein) w/c  
USMS (Noory) w/c  
CRM (Koenig) w/c  
DEA (Dudley) w/c  
sent to OAG/Summers 1/31  
parabules rec'd w/c see attached

OLA000000969

## Clifton, Deborah J

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**From:** Blackwood, Kristine  
**Sent:** Wednesday, January 31, 2007 8:51 AM  
**To:** Seidel, Rebecca; Sampson, Kyle  
**Cc:** Scott-Finan, Nancy; Clifton, Deborah J  
**Subject:** Re: SJC U.S. Attorneys hearing Draft testimony

Yes. Debbie - this should go to EOUSA, FBI, ATF, USMS, DEA, CIV, ASG, CRM, due back 3pm.

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

**From:** Seidel, Rebecca  
**To:** Sampson, Kyle  
**CC:** Blackwood, Kristine; Scott-Finan, Nancy  
**Sent:** Tue Jan 30 19:35:46 2007  
**Subject:** RE: SJC U.S. Attorneys hearing Draft testimony

send comments back to Kristine. If we are going to get to OMB by COB tomorrow, I would think 3pm is the latest for comments to give Kristine time to assimilate and deconflict. right Kristine?

---

**From:** Sampson, Kyle  
**Sent:** Tuesday, January 30, 2007 7:35 PM  
**To:** Seidel, Rebecca  
**Subject:** RE: SJC U.S. Attorneys hearing Draft testimony

comments to who? by when?

---

**From:** Seidel, Rebecca  
**Sent:** Tuesday, January 30, 2007 7:34 PM  
**To:** Sampson, Kyle; Moschella, William; Elston, Michael (ODAG); Brand, Rachel; Bounds, Ryan W (OLP); Goodling, Monica  
**Cc:** Scott-Finan, Nancy; Nowacki, John (USAE0); Clifton, Deborah J; Blackwood, Kristine; Hertling, Richard  
**Subject:** FW: SJC U.S. Attorneys hearing Draft testimony  
**Importance:** High

Thank you John. Debbie and Kristine are gone for the evening, but will circulate within DOJ first thing in the morning. OAG, ODAG and OLP - wanted to get to you directly so you don't have to wait till morning circulation. Debbie, we need OMB clearance by Friday COB, so that means we have to get to OMB Wed COB at latest.

note the hearing is now Tuesday the 6th instead of Wed the 7th.

---

**From:** Nowacki, John (USAE0) [mailto:John.Nowacki@usdoj.gov]  
**Sent:** Tuesday, January 30, 2007 7:30 PM  
**To:** Seidel, Rebecca; Scott-Finan, Nancy  
**Subject:** SJC U.S. Attorneys hearing

The draft testimony for the DAG is attached.

<<DRAFT Testimony -- US Attorneys Hearing.doc>>

**Clifton, Deborah J**

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**From:** Blackwood, Kristine  
**Sent:** Wednesday, January 31, 2007 8:52 AM  
**To:** Clifton, Deborah J  
**Subject:** Fw: SJC U.S. Attorneys hearing Draft testimony

**Importance:** High

**Attachments:** DRAFT Testimony -- US Attorneys Hearing.doc

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

**From:** Seidel, Rebecca  
**To:** Sampson, Kyle; Moschella, William; Elston, Michael (ODAG); Brand, Rachel; Bounds, Ryan W (OLP); Goodling, Monica  
**CC:** Scott-Finan, Nancy; Nowacki, John (USAE0); Clifton, Deborah J; Blackwood, Kristine; Hertling, Richard  
**Sent:** Tue Jan 30 19:33:38 2007  
**Subject:** FW: SJC U.S. Attorneys hearing Draft testimony



DRAFT Testimony --  
US Attorney...

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note the hearing is now Tuesday the 6th instead of Wed the 7th.

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**Sent:** Tuesday, January 30, 2007 7:30 PM  
**To:** Seidel, Rebecca; Scott-Finan, Nancy  
**Subject:** SJC U.S. Attorneys hearing

The draft testimony for the DAG is attached.

<<DRAFT Testimony -- US Attorneys Hearing.doc>>

**DRAFT TESTIMONY FOR**  
**DEPUTY ATTORNEY GENERAL PAUL MCNULTY**

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

Wednesday, February 7, 2007

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

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

U.S. Attorneys are not only prosecutors; they are government officials charged with managing and implementing the policies and priorities of the Executive Branch. The Department of Justice—including the office of United States Attorney—was created precisely so that the government’s legal business could be effectively managed and carried out through a coherent program under the supervision of the Attorney General. And unlike judges, who are supposed to act independently of those who nominate them, U.S. Attorneys are accountable to the Attorney General, and through him, to the President—the head of the Executive Branch. For these reasons, the Department is committed to having the best person discharging the responsibilities of that office at all times and in every district.

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

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

In every single case where a vacancy occurs, it is the goal of the Bush Administration to have a United States Attorney that is confirmed by the Senate. Every single time that a vacancy has arisen, the President has either made a nomination, or the Administration is working—in consultation with home-state Senators—to select candidates for nomination. Let me be perfectly clear—at no time has the Administration sought to avoid the Senate confirmation process by appointing an interim United States Attorney and then refused to move forward in consultation with home-state Senators on the selection, nomination, and confirmation of a new U.S. Attorney. Consultation and confirmation is the method preferred by the Senate, and that is the method preferred by the Administration.

Since January 20, 2001, 125 new U.S. Attorneys have been nominated by the President and confirmed by the Senate. On March 9, 2006, the Congress amended the Attorney General's authority to appoint interim U.S. Attorneys, and 13 vacancies have occurred since that date. This amendment has not changed our commitment to nominating candidates for Senate confirmation. In fact, the Administration has nominated a total of 15 individuals for Senate consideration since the appointment authority was amended, with 12 of those nominees having been confirmed to date. Of the 13 vacancies that have occurred since the time that the law was amended, the Administration has nominated candidates to fill five of these positions, has interviewed

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

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

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

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

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

United States Attorneys serve at the pleasure of the President. Like any other high-ranking officials in the Executive Branch, they may be removed for any reason or no reason. The Attorney General and I are responsible for evaluating the performance of the United States Attorneys and ensuring that they are leading their offices effectively. It should come as no surprise to anyone that, in an organization as large as the Justice Department, U.S. Attorneys may be removed, or asked or encouraged to resign. However, U.S. Attorneys are never removed, or asked or encouraged to resign, in an effort to retaliate against them or interfere with or inappropriately influence a particular investigation, criminal prosecution, or civil case. Any suggestion to the contrary is simply irresponsible.

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

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

As you know, prior to last year's amendment of 28 U.S.C. § 546, the Attorney General could appoint an interim U.S. Attorney for only 120 days; thereafter, the district court was authorized to appoint an interim U.S. Attorney. In cases where a Senate-confirmed U.S. Attorney could not be appointed within 120 days, the limitation on the Attorney General's appointment authority resulted in several recurring problems. Some district courts recognized the conflicts inherent in the appointment of an interim U.S. Attorney who would then have matters before the court—not to mention the oddity of one branch of government appointing officers of another—and simply refused to exercise the appointment authority. In those cases, the Attorney General was then required to make multiple 120-day interim appointments. Other district courts ignored the inherent conflicts and the oddity, and sought to appoint as interim U.S. Attorneys unacceptable candidates without the required clearances or appropriate qualifications. Last year's amendment of section 546, which brought the section largely into conformity with the Vacancies Reform Act, was necessary and entirely appropriate.

S. 214, on the other hand, would not only fail to ensure that those problems did not recur; it would exacerbate them by making appointment by the district court the only means of temporarily filling a vacancy—a step inconsistent with sound separation-of-powers principles. We are aware of no other agency where federal judges—members of a separate branch of government and not the head of the agency—appoint interim staff on behalf of the agency. Such a judicial appointee would have authority for litigating the entire federal criminal and civil docket before the very district court to whom he or she was beholden for the appointment. This arrangement, at a minimum, gives rise to an

appearance of potential conflict that undermines the performance of both the Executive and Judicial Branches. Furthermore, prosecutorial authority should be exercised by the Executive Branch in a unified manner, consistent with the application of criminal enforcement policy under the Attorney General. S. 214 would undermine the effort to achieve a unified and consistent approach to prosecutions and federal law enforcement.

S. 214 seems aimed at solving a problem that does not exist. When a vacancy in the office of U.S. Attorney occurs, the Department often looks first to the First Assistant or another senior manager in the office to serve as an Acting or interim U.S. Attorney. Where neither the First Assistant nor another senior manager is able or willing to serve as an Acting or interim U.S. Attorney, or where their service would not be appropriate under the circumstances, the Administration may look to other Department employees to serve temporarily. No matter which way a U.S. Attorney is temporarily appointed, the Administration consistently seeks to consult with home-state Senators and fill the vacancy with a Presidentially-nominated and Senate-confirmed nominee.

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

## Blackwood, Kristine

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**From:** Blackwood, Kristine  
**Sent:** Thursday, February 01, 2007 12:48 PM  
**To:** 'Angela\_M.\_Simms@omb.eop.gov'  
**Cc:** Scott-Finan, Nancy; Seidel, Rebecca; Elston, Michael (ODAG)  
**Subject:** RE: DAG McNulty Testimony - US Attorneys - Senate Judiciary 2-6-07

**Attachments:** ODAGMcNultyTestimonySJC2-6-07PoliticizationofUSAttorneys(DOJredline).doc



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monySJC2-6-07P...

Hi Angie,

We made a few stylistic edits after we sent this off last night. I have redlined the changes so you can see them. Please let me know if you have any question.

Thanks for expediting this.

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Tracking:	Recipient	Read
	'Angela_M._Simms@omb.eop.gov'	
	Scott-Finan, Nancy	Read: 2/1/2007 12:52 PM
	Seidel, Rebecca	Read: 2/1/2007 12:54 PM
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# Department of Justice

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STATEMENT

OF

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

BEFORE THE

COMMITTEE ON THE JUDICIARY  
UNITED STATES SENATE

CONCERNING

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

PRESENTED ON

FEBRUARY 6, 2007

OLA000000981

**Testimony  
of**

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

**Committee on the Judiciary  
United States Senate**

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

February 6, 2007

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

I have often said that being a United States Attorney is one of the greatest jobs you can ever have. It is a privilege and a challenge—one that carries a great responsibility. As former Attorney General Griffin Bell said, U.S. Attorneys are “the front-line troops charged with carrying out the Executive’s constitutional mandate to execute faithfully the laws in every federal judicial district.” As the chief federal law-enforcement officers in their districts, U.S.

Attorneys represent the Attorney General before Americans who may not otherwise have contact with the Department of Justice. They lead our efforts to protect America from terrorist attacks and fight violent crime, combat illegal drug trafficking, ensure the integrity of government and the marketplace, enforce our immigration laws, and prosecute crimes that endanger children and families—including child pornography, obscenity, and human trafficking.

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

The Attorney General and I are responsible for evaluating the performance of the United States Attorneys and ensuring that they are leading their offices effectively. It should come as no surprise to anyone that, in an organization as large as the Justice Department, U.S. Attorneys

are removed or asked or encouraged to resign from time to time. However, in this Administration U.S. Attorneys are never—repeat, never—removed, or asked or encouraged to resign, in an effort to retaliate against them, or interfere with, or inappropriately influence a particular investigation, criminal prosecution, or civil case. Any suggestion to the contrary is unfounded, and it irresponsibly undermines the reputation for impartiality the Department has earned over many years and on which it depends.

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

The leadership of an office is more than the direction of individual cases. It involves managing limited resources, maintaining high morale in the office, and building relationships

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

**Deleted:** The Administration takes seriously its obligation to have the best person possible leading the office at any given time.

**Deleted:** U.S. Attorney

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

In every single case where a vacancy occurs, the Bush Administration is committed to having a United States Attorney who is confirmed by the Senate. And the Administration's actions bear this out. Every time a vacancy has arisen, the President has either made a

nomination, or the Administration is working—in consultation with home-state Senators—to select candidates for nomination. Let me be perfectly clear—at no time has the Administration sought to avoid the Senate confirmation process by appointing an interim United States Attorney and then refusing to move forward, in consultation with home-State Senators, on the selection, nomination and confirmation of a new United States Attorney. Not once.

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

However, while that nomination process continues, the Department must have a leader in place to carry out the important work of these offices. To ensure an effective and smooth transition during U.S. Attorney vacancies, the office of the U.S. Attorney must be filled on an interim basis. To do so, the Department relies on the Vacancy Reform Act ("VRA"), 5 U.S.C. §

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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.

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Attorney who is not the First Assistant. It does not indicate an intention to avoid the confirmation process, as some have suggested.

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

As you know, before last year's amendment of 28 U.S.C. § 546, the Attorney General could appoint an interim U.S. Attorney for the first 120 days after a vacancy arose; thereafter, the district court was authorized to appoint an interim U.S. Attorney. In cases where a Senate-confirmed U.S. Attorney could not be appointed within 120 days, the limitation on the Attorney General's appointment authority resulted in recurring problems. Some district courts recognized

the conflicts inherent in the appointment of an interim U.S. Attorney who would then have matters before the court—not to mention the oddity of one branch of government’s appointing officers of another—and simply refused to exercise the appointment authority. In those cases, the Attorney General was consequently required to make multiple successive 120-day interim appointments. Other district courts ignored the inherent conflicts and sought to appoint as interim U.S. Attorneys wholly unacceptable candidates who lacked the required clearances or appropriate qualifications.

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

S. 214 would not merely reverse the 2006 amendment; it would exacerbate the problems experienced under the prior version of the statute by making judicial appointment the only means of temporarily filling a vacancy—a step inconsistent with sound separation-of-powers principles. We are aware of no other agency where federal judges—members of a separate branch of

government—appoint the interim staff of an agency. Such a judicial appointee would have authority for litigating the entire federal criminal and civil docket before the very district court to whom he or she was beholden for the appointment. This arrangement, at a minimum, gives rise to an appearance of potential conflict that undermines the performance or perceived performance of both the Executive and Judicial Branches. A judge may be inclined to select a U.S. Attorney who shares the judge’s ideological or prosecutorial philosophy. Or a judge may select a prosecutor apt to settle cases and enter plea bargains, so as to preserve judicial resources. *See Wiener, Inter-Branch Appointments After the Independent Counsel: Court Appointment of United States Attorneys*, 86 Minn. L. Rev. 363, 428 (2001) (concluding that court appointment of interim U.S. Attorneys is unconstitutional).

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

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

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



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Scott-Finan, Nancy	Read: 1/31/2007 8:58 PM
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# Department of Justice

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STATEMENT

OF

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

BEFORE THE

COMMITTEE ON THE JUDICIARY  
UNITED STATES SENATE

CONCERNING

**“PRESERVING PROSECUTORIAL INDEPENDENCE:  
IS THE DEPARTMENT OF JUSTICE  
POLITICIZING THE HIRING AND FIRING  
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PRESENTED ON

FEBRUARY 6, 2007

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**Testimony  
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**Committee on the Judiciary  
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February 6, 2007

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Attorneys represent the Attorney General before Americans who may not otherwise have contact with the Department of Justice. They lead our efforts to protect America from terrorist attacks and fight violent crime, combat illegal drug trafficking, ensure the integrity of government and the marketplace, enforce our immigration laws, and prosecute crimes that endanger children and families—including child pornography, obscenity, and human trafficking.

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

The Attorney General and I are responsible for evaluating the performance of the United States Attorneys and ensuring that they are leading their offices effectively. It should come as no surprise to anyone that, in an organization as large as the Justice Department, U.S. Attorneys

are removed or asked or encouraged to resign from time to time. However, in this Administration U.S. Attorneys are never—repeat, never—removed, or asked or encouraged to resign, in an effort to retaliate against them, or interfere with, or inappropriately influence a particular investigation, criminal prosecution, or civil case. Any suggestion to the contrary is unfounded, and it irresponsibly undermines the reputation for impartiality the Department has earned over many years and on which it depends.

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

The leadership of an office is more than the direction of individual cases. It involves managing limited resources, maintaining high morale in the office, and building relationships

with federal, state and local law enforcement partners. The Administration takes seriously its obligation to have the best person possible leading the office at any given time. 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 U.S. Attorney nor another senior manager in the office is able or willing to serve as interim U.S. Attorney, or when the appointment of either would not be appropriate in the circumstances, the Department has looked to other, qualified Department employees.

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

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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 U.S. Attorney 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 U.S. Attorney. It does not indicate an intention to avoid the confirmation process, as some have suggested.

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

As you know, before last year’s amendment of 28 U.S.C. § 546, the Attorney General could appoint an interim U.S. Attorney for the first 120 days after a vacancy arose; thereafter, the district court was authorized to appoint an interim U.S. Attorney. In cases where a Senate-confirmed U.S. Attorney could not be appointed within 120 days, the limitation on the Attorney

General's appointment authority resulted in recurring problems. Some district courts recognized the conflicts inherent in the appointment of an interim U.S. Attorney who would then have matters before the court—not to mention the oddity of one branch of government's appointing officers of another—and simply refused to exercise the appointment authority. In those cases, the Attorney General was consequently required to make multiple successive 120-day interim appointments. Other district courts ignored the inherent conflicts and sought to appoint as interim U.S. Attorneys wholly unacceptable candidates who lacked the required clearances or appropriate qualifications.

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

S. 214 would not merely reverse the 2006 amendment; it would exacerbate the problems experienced under the prior version of the statute by making judicial appointment the only means of temporarily filling a vacancy—a step inconsistent with sound separation-of-powers principles.

We are aware of no other agency where federal judges—members of a separate branch of government—appoint the interim staff of an agency. Such a judicial appointee would have authority for litigating the entire federal criminal and civil docket before the very district court to whom he or she was beholden for the appointment. This arrangement, at a minimum, gives rise to an appearance of potential conflict that undermines the performance or perceived performance of both the Executive and Judicial Branches. A judge may be inclined to select a U.S. Attorney who shares the judge’s ideological or prosecutorial philosophy. Or a judge may select a prosecutor apt to settle cases and enter plea bargains, so as to preserve judicial resources. *See Wiener, Inter-Branch Appointments After the Independent Counsel: Court Appointment of United States Attorneys*, 86 Minn. L. Rev. 363, 428 (2001) (concluding that court appointment of interim U.S. Attorneys is unconstitutional).

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

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

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

**Blackwood, Kristine**

**Subject:** FW: DAG McNulty draft testimony for a 02/06/07 hearing re Preserving Prosecutorial Independence

**Importance:** High

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

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**From:** Rubenstein, Steve R. [mailto:Stephen.R.Rubenstein@usdoj.gov]

**Sent:** Wednesday, January 31, 2007 5:39 PM

**To:** Blackwood, Kristine

**Subject:** FW: DAG McNulty draft testimony for a 02/06/07 hearing re Preserving Prosecutorial Independence

**Importance:** High

ATF has no comment.

**Blackwood, Kristine**

**Subject:** FW: DAG McNulty draft testimony for a 02/06/07 hearing re Preserving Prosecutorial Independence

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**From:** Noory, John (USMS) [mailto:John.Noory@usdoj.gov]

**Sent:** Wednesday, January 31, 2007 4:16 PM

**To:** Blackwood, Kristine

**Cc:** Conway, Janice (USMS); Mayer, Diana (USMS); Edgar, Eliza (USMS); Wade, Jill C

**Subject:** RE: DAG McNulty draft testimony for a 02/06/07 hearing re Preserving Prosecutorial Independence

Kristine,

The USMS has no comment on the draft testimony.

Thanks,

John

**Blackwood, Kristine**

**Subject:** FW: DAG McNulty draft testimony for a 02/06/07 hearing re Preserving Prosecutorial Independence

---

**From:** Kockritz, Janis [mailto:Janis.Kockritz@usdoj.gov]

**Sent:** Wednesday, January 31, 2007 11:51 AM

**To:** Blackwood, Kristine

**Cc:** Opl, Legislation

**Subject:** RE: DAG McNulty draft testimony for a 02/06/07 hearing re Preserving Prosecutorial Independence

200068185

Kristine,

Crn has no comments on the above captioned draft testimony.

Janis Kockritz

Office of Policy and Legislation

**Blackwood, Kristine**

---

**Subject:** FW: DAG McNulty draft testimony for a 02/06/07 hearing re Preserving Prosecutorial Independence

**Importance:** High

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

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**From:** Dudley, John A. [mailto:John.A.Dudley@usdoj.gov]

**Sent:** Wednesday, January 31, 2007 11:12 AM

**To:** Blackwood, Kristine

**Subject:** FW: DAG McNulty draft testimony for a 02/06/07 hearing re Preserving Prosecutorial Independence

**Importance:** High

DEA has no comment.

## Blackwood, Kristine

---

**From:** Elston, Michael (ODAG)  
**Sent:** Thursday, February 01, 2007 8:20 AM  
**To:** Sampson, Kyle; Scott-Finan, Nancy  
**Cc:** Seidel, Rebecca; Blackwood, Kristine; Goodling, Monica  
**Subject:** RE: DAG Testimony - US Attorneys

I agree with all of those changes, Kyle.

---

**From:** Sampson, Kyle  
**Sent:** Thursday, February 01, 2007 4:29 AM  
**To:** Elston, Michael (ODAG); Scott-Finan, Nancy  
**Cc:** Seidel, Rebecca; Blackwood, Kristine; Goodling, Monica  
**Subject:** RE: DAG Testimony - US Attorneys

This looks great. Just a couple of suggestions:

1. On p. 4, para. 1, the sentence -- "The Administration takes seriously its obligation to have the best person possible leading the office at any given time." -- is redundant. The testimony says the same thing on p. 3, end of the first full para.;
2. Same para. (and then throughout), after first saying "First Assistant U.S. Attorney", I then would use the more conversational "First Assistant"; and
3. On p. 10, carryover para., I would strike "rather than a court" -- I know what you mean, but it might sound weird to say that prosecutors should not be accountable to courts.

---

**From:** Elston, Michael (ODAG)  
**Sent:** Wednesday, January 31, 2007 8:35 PM  
**To:** Scott-Finan, Nancy  
**Cc:** Seidel, Rebecca; Blackwood, Kristine; Sampson, Kyle; Goodling, Monica  
**Subject:** RE: DAG Testimony - US Attorneys

Kristine, Nancy and Rebecca:

Attached is the ODAG-approved version of the DAG's testimony for submission to OMB. Thanks for your patience. I even got Dana Boente to proofread!

Mike

<< File: ODAGMcNultyTestimonySJC2-6-07PoliticizationofUSAttorneys.doc >>

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**From:** Scott-Finan, Nancy  
**Sent:** Wednesday, January 31, 2007 5:53 PM  
**To:** Elston, Michael (ODAG)  
**Cc:** Seidel, Rebecca; Blackwood, Kristine  
**Subject:** DAG Testimony - US Attorneys

Hey, Mike,

Just checking in. I know that Paul wanted to review the testimony personally before we send it to OMB. Will we have his comments tonight or early in the morning? Thanks much.

Nancy

## Blackwood, Kristine

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**From:** Blackwood, Kristine  
**Sent:** Wednesday, January 31, 2007 8:38 PM  
**To:** Elston, Michael (ODAG); Scott-Finan, Nancy  
**Cc:** Seidel, Rebecca; Sampson, Kyle; Goodling, Monica  
**Subject:** RE: DAG Testimony - US Attorneys

Thanks! We'll get this to OMB tonight.

---

**From:** Elston, Michael (ODAG)  
**Sent:** Wednesday, January 31, 2007 8:35 PM  
**To:** Scott-Finan, Nancy  
**Cc:** Seidel, Rebecca; Blackwood, Kristine; Sampson, Kyle; Goodling, Monica  
**Subject:** RE: DAG Testimony - US Attorneys

Kristine, Nancy and Rebecca:

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Mike

<< File: ODAGMcNultyTestimonySJC2-6-07PoliticizationofUSAAttorneys.doc >>

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**From:** Scott-Finan, Nancy  
**Sent:** Wednesday, January 31, 2007 5:53 PM  
**To:** Elston, Michael (ODAG)  
**Cc:** Seidel, Rebecca; Blackwood, Kristine  
**Subject:** DAG Testimony - US Attorneys

Hey, Mike,

Just checking in. I know that Paul wanted to review the testimony personally before we send it to OMB. Will we have his comments tonight or early in the morning? Thanks much.

Nancy

Tracking:	Recipient	Read
	Elston, Michael (ODAG)	Read: 1/31/2007 8:53 PM
	Scott-Finan, Nancy	Read: 1/31/2007 8:58 PM
	Seidel, Rebecca	Read: 1/31/2007 9:12 PM
	Sampson, Kyle	Read: 1/31/2007 8:54 PM
	Goodling, Monica	Read: 1/31/2007 8:50 PM

**Blackwood, Kristine**

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**From:** Elston, Michael (ODAG)  
**Sent:** Wednesday, January 31, 2007 8:35 PM  
**To:** Scott-Finan, Nancy  
**Cc:** Seidel, Rebecca; Blackwood, Kristine; Sampson, Kyle; Goodling, Monica  
**Subject:** RE: DAG Testimony - US Attorneys

**Attachments:** ODAGMcNultyTestimonySJC2-6-07PoliticizationofUSAttorneys.doc

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Mike



ODAGMcNultyTesti  
monySJC2-6-07P...

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**From:** Scott-Finan, Nancy  
**Sent:** Wednesday, January 31, 2007 5:53 PM  
**To:** Elston, Michael (ODAG)  
**Cc:** Seidel, Rebecca; Blackwood, Kristine  
**Subject:** DAG Testimony - US Attorneys

Hey, Mike,

Just checking in. I know that Paul wanted to review the testimony personally before we send it to OMB. Will we have his comments tonight or early in the morning? Thanks much.

Nancy



# Department of Justice

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**STATEMENT**

**OF**

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

**BEFORE THE**

**COMMITTEE ON THE JUDICIARY  
UNITED STATES SENATE**

**CONCERNING**

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

**PRESENTED ON**

**FEBRUARY 6, 2007**

OLA000001010

**Testimony  
OF**

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

**Committee on the Judiciary  
United States Senate**

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

February 6, 2007

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

I have often said that being a United States Attorney is one of the greatest jobs you can ever have. It is a privilege and a challenge—one that carries a great responsibility. As former Attorney General Griffin Bell said, U.S. Attorneys are “the front-line troops charged with carrying out the Executive’s constitutional mandate to execute faithfully the laws in every federal judicial district.” As the chief federal law-enforcement officers in their districts, U.S.

Attorneys represent the Attorney General before Americans who may not otherwise have contact with the Department of Justice. They lead our efforts to protect America from terrorist attacks and fight violent crime, combat illegal drug trafficking, ensure the integrity of government and the marketplace, enforce our immigration laws, and prosecute crimes that endanger children and families—including child pornography, obscenity, and human trafficking.

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

The Attorney General and I are responsible for evaluating the performance of the United States Attorneys and ensuring that they are leading their offices effectively. It should come as no surprise to anyone that, in an organization as large as the Justice Department, U.S. Attorneys

are removed or asked or encouraged to resign from time to time. However, in this Administration U.S. Attorneys are never—repeat, never—removed, or asked or encouraged to resign, in an effort to retaliate against them, or interfere with, or inappropriately influence a particular investigation, criminal prosecution, or civil case. Any suggestion to the contrary is unfounded, and it irresponsibly undermines the reputation for impartiality the Department has earned over many years and on which it depends.

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

The leadership of an office is more than the direction of individual cases. It involves managing limited resources, maintaining high morale in the office, and building relationships

with federal, state and local law enforcement partners. The Administration takes seriously its obligation to have the best person possible leading the office at any given time. 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 U.S. Attorney nor another senior manager in the office is able or willing to serve as interim U.S. Attorney, or when the appointment of either would not be appropriate in the circumstances, the Department has looked to other, qualified Department employees.

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

In every single case where a vacancy occurs, the Bush Administration is committed to having a United States Attorney who is confirmed by the Senate. And the Administration's

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

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

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

interim basis. To do so, the Department relies on the Vacancy Reform Act (“VRA”), 5 U.S.C. § 3345(a)(1), when the First Assistant U.S. Attorney 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 U.S. Attorney. It does not indicate an intention to avoid the confirmation process, as some have suggested.

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

As you know, before last year’s amendment of 28 U.S.C. § 546, the Attorney General could appoint an interim U.S. Attorney for the first 120 days after a vacancy arose; thereafter, the district court was authorized to appoint an interim U.S. Attorney. In cases where a Senate-confirmed U.S. Attorney could not be appointed within 120 days, the limitation on the Attorney

General's appointment authority resulted in recurring problems. Some district courts recognized the conflicts inherent in the appointment of an interim U.S. Attorney who would then have matters before the court—not to mention the oddity of one branch of government's appointing officers of another—and simply refused to exercise the appointment authority. In those cases, the Attorney General was consequently required to make multiple successive 120-day interim appointments. Other district courts ignored the inherent conflicts and sought to appoint as interim U.S. Attorneys wholly unacceptable candidates who lacked the required clearances or appropriate qualifications.

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

S. 214 would not merely reverse the 2006 amendment; it would exacerbate the problems experienced under the prior version of the statute by making judicial appointment the only means of temporarily filling a vacancy—a step inconsistent with sound separation-of-powers principles.

We are aware of no other agency where federal judges—members of a separate branch of government—appoint the interim staff of an agency. Such a judicial appointee would have authority for litigating the entire federal criminal and civil docket before the very district court to whom he or she was beholden for the appointment. This arrangement, at a minimum, gives rise to an appearance of potential conflict that undermines the performance or perceived performance of both the Executive and Judicial Branches. A judge may be inclined to select a U.S. Attorney who shares the judge’s ideological or prosecutorial philosophy. Or a judge may select a prosecutor apt to settle cases and enter plea bargains, so as to preserve judicial resources. *See Wiener, Inter-Branch Appointments After the Independent Counsel: Court Appointment of United States Attorneys*, 86 Minn. L. Rev. 363, 428 (2001) (concluding that court appointment of interim U.S. Attorneys is unconstitutional).

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

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

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



## Blackwood, Kristine

---

**From:** Blackwood, Kristine  
**Sent:** Thursday, February 01, 2007 12:48 PM  
**To:** 'Angela\_M.\_Simms@omb.eop.gov'  
**Cc:** Scott-Finan, Nancy; Seidel, Rebecca; Elston, Michael (ODAG)  
**Subject:** RE: DAG McNulty Testimony - US Attorneys - Senate Judiciary 2-6-07

**Attachments:** ODAGMcNultyTestimonySJC2-6-07PoliticizationofUSAttorneys(DOJredline).doc



ODAGMcNultyTesti  
monySJC2-6-07P...

Hi Angie,

We made a few stylistic edits after we sent this off last night. I have redlined the changes so you can see them. Please let me know if you have any question.

Thanks for expediting this.

---

**From:** Blackwood, Kristine  
**Sent:** Wednesday, January 31, 2007 8:47 PM  
**To:** 'Angela\_M.\_Simms@omb.eop.gov'; 'Richard\_E.\_Green@omb.eop.gov'  
**Cc:** Scott-Finan, Nancy; Seidel, Rebecca  
**Subject:** DAG McNulty Testimony - US Attorneys - Senate Judiciary 2-6-07

<< File: ODAGMcNultyTestimonySJC2-6-07PoliticizationofUSAttorneys.doc >> Angie, Richard,

Attached is the DOJ testimony for Tuesday's hearing. Please let us know if you have any question.

Thanks.

Tracking:	Recipient	Read
	'Angela_M._Simms@omb.eop.gov'	
	Scott-Finan, Nancy	Read: 2/1/2007 12:52 PM
	Seidel, Rebecca	Read: 2/1/2007 12:54 PM
	Elston, Michael (ODAG)	Read: 2/1/2007 1:42 PM

## Blackwood, Kristine

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**From:** Seidel, Rebecca  
**Sent:** Wednesday, January 31, 2007 9:10 PM  
**To:** Blackwood, Kristine  
**Subject:** RE: DAG McNulty Testimony - US Attorneys - Senate Judiciary 2-6-07

Where is the views letter on the bill? We need to let them know they can clear them together as they will be very similar.

---

**From:** Blackwood, Kristine  
**Sent:** Wednesday, January 31, 2007 8:47 PM  
**To:** 'Angela\_M.\_Simms@omb.eop.gov'; 'Richard\_E.\_Green@omb.eop.gov'  
**Cc:** Scott-Finan, Nancy; Seidel, Rebecca  
**Subject:** DAG McNulty Testimony - US Attorneys - Senate Judiciary 2-6-07

<< File: ODAGMcNultyTestimonyJJC2-6-07PoliticizationofUSAttorneys.doc >> Angie, Richard,

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Thanks.

-

**Blackwood, Kristine**

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**Attachments:** ODAGMcNultyTestimonySJC2-6-07PoliticizationofUSAttorneys(DOJredline).doc



ODAGMcNultyTesti  
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**Cc:** Scott-Finan, Nancy; Seidel, Rebecca  
**Subject:** DAG McNulty Testimony - US Attorneys - Senate Judiciary 2-6-07

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<b>Tracking:</b>	<b>Recipient</b>	<b>Read</b>
	'Angela_M._Simms@omb.eop.gov'	
	Scott-Finan, Nancy	Read: 2/1/2007 12:52 PM
	Seidel, Rebecca	Read: 2/1/2007 12:54 PM
	Elston, Michael (ODAG)	Read: 2/1/2007 1:42 PM

**Blackwood, Kristine**

**From:** Blackwood, Kristine  
**Sent:** Friday, February 02, 2007 11:31 AM  
**To:** Elston, Michael (ODAG)  
**Cc:** Moschella, William; Scott-Finan, Nancy; Seidel, Rebecca; Sampson, Kyle  
**Subject:** FW: (Partial) Passback: [AMS-110-15] JUSTICE Testimony on S.214 - the Preserving United States Attorney Independence Act of 2007  
**Attachments:** ODAGMcNultyTestimonySJC2-6-07PoliticizationofUSAttorneys with TFB comments.doc;  
 ODAGMcNultyTestimonySJC2-6-07PoliticizationofUSAttorneys(DOJredline).doc

**Tracking:**

Recipient	Read
Elston, Michael (ODAG)	
Moschella, William	
Scott-Finan, Nancy	Read: 2/2/2007 11:32 AM
Seidel, Rebecca	
Sampson, Kyle	Read: 2/2/2007 11:42 AM

Please see attached from OMB (the document with the notation "TFB comments"). Please note that Todd Braunstein's comments were on the first version we sent, not the one that we revised and sent OMB. So at least one of his edits has already been made (striking the "oddity" reference). Please advise. Thanks.

**From:** Simms, Angela M. [mailto:Angela\_M.\_Simms@omb.eop.gov]  
**Sent:** Friday, February 02, 2007 11:15 AM  
**To:** Blackwood, Kristine  
**Cc:** Green, Richard E.  
**Subject:** (Partial) Passback: [AMS-110-15] JUSTICE Testimony on S.214 - the Preserving United States Attorney Independence Act of 2007

Kristine,

Attached are comments from DPC staff regarding S.214. However, this is a partial passback. I am still waiting to hear from at least one more office before I can provide a complete passback. Please let me know Justice's response to the comments included in this e-mail.

Angie  
 202-395-3857



# Department of Justice

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STATEMENT

OF

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

BEFORE THE

COMMITTEE ON THE JUDICIARY  
UNITED STATES SENATE

CONCERNING

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

PRESENTED ON

FEBRUARY 6, 2007

OLA000001025

**Testimony  
OF**

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

**Committee on the Judiciary  
United States Senate**

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

February 6, 2007

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

**Comment [b1]:** Is it proper to refer to Sen. Schumer as the Chairman, since this is a full committee hearing?

I have often said that being a United States Attorney is one of the greatest jobs you can ever have. It is a privilege and a challenge—one that carries a great responsibility. As former Attorney General Griffin Bell said, U.S. Attorneys are “the front-line troops charged with carrying out the Executive’s constitutional mandate to execute faithfully the laws in every federal judicial district.” As the chief federal law-enforcement officers in their districts, U.S.

Attorneys represent the Attorney General before Americans who may not otherwise have contact with the Department of Justice. They lead our efforts to protect America from terrorist attacks and fight violent crime, combat illegal drug trafficking, ensure the integrity of government and the marketplace, enforce our immigration laws, and prosecute crimes that endanger children and families—including child pornography, obscenity, and human trafficking.

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

The Attorney General and I are responsible for evaluating the performance of the United States Attorneys and ensuring that they are leading their offices effectively. It should come as no surprise to anyone that, in an organization as large as the Justice Department, U.S. Attorneys

are removed or asked or encouraged to resign from time to time. However, in this Administration U.S. Attorneys are never—repeat, never—removed, or asked or encouraged to resign, in an effort to retaliate against them, or interfere with, or inappropriately influence a particular investigation, criminal prosecution, or civil case. Any suggestion to the contrary is unfounded, and it irresponsibly undermines the reputation for impartiality the Department has earned over many years and on which it depends.

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

The leadership of an office is more than the direction of individual cases. It involves managing limited resources, maintaining high morale in the office, and building relationships

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

**Comment [b2]:** Is DOJ really in position to speak for the Senate? Surely the observation is correct, but it may appear presumptuous to some Senators for the Administration to state it.

In every single case where a vacancy occurs, the Bush Administration is committed to having a United States Attorney who is confirmed by the Senate. And the Administration's

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

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

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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 U.S. Attorney 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 U.S. Attorney. It does not indicate an intention to avoid the confirmation process, as some have suggested.

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

As you know, before last year’s amendment of 28 U.S.C. § 546, the Attorney General could appoint an interim U.S. Attorney for the first 120 days after a vacancy arose; thereafter, the district court was authorized to appoint an interim U.S. Attorney. In cases where a Senate-confirmed U.S. Attorney could not be appointed within 120 days, the limitation on the Attorney

General's appointment authority resulted in recurring problems. Some district courts recognized the conflicts inherent in the appointment of an interim U.S. Attorney who would then have matters before the court—not to mention the oddity of one branch of government's 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.

**Comment [b3]:** Doesn't the executive branch appoint "officers" [i.e., judges] in the judicial branch? So is it fair to say that this is "odd"?

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

S. 214 would not merely reverse the 2006 amendment; it would exacerbate the problems experienced under the prior version of the statute by making judicial appointment the only means of temporarily filling a vacancy—a step inconsistent with sound separation-of-powers principles.

We are aware of no other agency where federal judges—members of a separate branch of government—appoint the interim staff of an agency. Such a judicial appointee would have authority for litigating the entire federal criminal and civil docket before the very district court to whom he or she was beholden for the appointment. This arrangement, at a minimum, gives rise to an appearance of potential conflict that undermines the performance or perceived performance of both the Executive and Judicial Branches. A judge may be inclined to select a U.S. Attorney who shares the judge’s ideological or prosecutorial philosophy. Or a judge may select a prosecutor apt to settle cases and enter plea bargains, so as to preserve judicial resources. *See Wiener, Inter-Branch Appointments After the Independent Counsel: Court Appointment of United States Attorneys*, 86 Minn. L. Rev. 363, 428 (2001) (concluding that court appointment of interim U.S. Attorneys is unconstitutional).

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

**Comment [b4]:** I worry about pushing this argument too far because the very same arguments can be turned around and used to critique the President’s power to appoint judges. (E.g., “judicial appointees would have authority for deciding cases where one of the parties is the very government to whom he or she was beholden for the appointment”). Won’t insist on removing or changing this, but would ask DOJ to reconsider devoting even this much room to it.

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

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



## Blackwood, Kristine

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**From:** Scott-Finan, Nancy  
**Sent:** Friday, February 02, 2007 12:11 PM  
**To:** Blackwood, Kristine; Seidel, Rebecca  
**Subject:** RE: (Partial) Passback: [AMS-110-15] JUSTICE Testimony on S.214 - the Preserving United States Attorney Independence Act of 2007

1. Schumer is chairing even though it is a full Committee hearing. That should answer the DPC question.
2. Both by the Senate--We should leave in because the Senators have raised the issue and are saying that we are using the interim appointments to avoid Senate confirmation.
3. We feel very strongly about that paragraph; it is key to our argument.

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

**From:** Blackwood, Kristine  
**Sent:** Friday, February 02, 2007 12:08 PM  
**To:** Seidel, Rebecca  
**Cc:** Scott-Finan, Nancy  
**Subject:** RE: (Partial) Passback: [AMS-110-15] JUSTICE Testimony on S.214 - the Preserving United States Attorney Independence Act of 2007

On everything? Just want to be sure.

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

**From:** Seidel, Rebecca  
**Sent:** Friday, February 02, 2007 11:57 AM  
**To:** Blackwood, Kristine  
**Cc:** Scott-Finan, Nancy  
**Subject:** Re: (Partial) Passback: [AMS-110-15] JUSTICE Testimony on S.214 - the Preserving United States Attorney Independence Act of 2007

I agree with Kyle.

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

**From:** Blackwood, Kristine  
**To:** Seidel, Rebecca  
**CC:** Scott-Finan, Nancy  
**Sent:** Fri Feb 02 11:55:05 2007  
**Subject:** RE: (Partial) Passback: [AMS-110-15] JUSTICE Testimony on S.214 - the Preserving United States Attorney Independence Act of 2007

Rebecca - there are some other minor comments. 1. Question whether we should address to "Chairman Schumer" because Schumer's not actually the chairman. 2. Question whether we should say "the appointment of USAs by and with the advice and consent of the Senate is unquestionably the apptmt method preferred by BOTH THE SENATE and the Administration -- is DOJ really in a position to speak for the Senate? Surely the observation is correct, but it may appear presumptuous to some Senators for the Administration to state it. 3. A couple of stylistic edits on page six. 4. A comment on something we already took out (the "oddity" phrase).

What do you advise re those???

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**From:** Sampson, Kyle  
**Sent:** Friday, February 02, 2007 11:49 AM  
**To:** Seidel, Rebecca; Blackwood, Kristine; Elston, Michael (ODAG)  
**Cc:** Moschella, William; Scott-Finan, Nancy  
**Subject:** RE: (Partial) Passback: [AMS-110-15] JUSTICE Testimony on S.214 - the Preserving United States Attorney Independence Act of 2007

I don't think you need to; he posed them as suggestions. In sum: they were "how can we

complain about judges appointing USAs when the President appoints judges".

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Sent: Friday, February 02, 2007 11:47 AM  
To: Sampson, Kyle; Blackwood, Kristine; Elston, Michael (ODAG)  
Cc: Moschella, William; Scott-Finan, Nancy  
Subject: Re: (Partial) Passback: [AMS-110-15] JUSTICE Testimony on S.214 - the Preserving United States Attorney Independence Act of 2007

He is in my immigration mtg with SJC Rs right now. I can discuss with him if someone can summarize his edits and our reasons for pushing back in text of email so I can read on bberry.

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From: Sampson, Kyle  
To: Blackwood, Kristine; Elston, Michael (ODAG)  
CC: Moschella, William; Scott-Finan, Nancy; Seidel, Rebecca  
Sent: Fri Feb 02 11:41:58 2007  
Subject: RE: (Partial) Passback: [AMS-110-15] JUSTICE Testimony on S.214 - the Preserving United States Attorney Independence Act of 2007

I disagree with, and would not accept, any of Braunstein's comments.

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From: Blackwood, Kristine  
Sent: Friday, February 02, 2007 11:31 AM  
To: Elston, Michael (ODAG)  
Cc: Moschella, William; Scott-Finan, Nancy; Seidel, Rebecca; Sampson, Kyle  
Subject: FW: (Partial) Passback: [AMS-110-15] JUSTICE Testimony on S.214 - the Preserving United States Attorney Independence Act of 2007

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From: Simms, Angela M. [mailto:Angela\_M\_Simms@omb.eop.gov]  
Sent: Friday, February 02, 2007 11:15 AM  
To: Blackwood, Kristine  
Cc: Green, Richard E.  
Subject: (Partial) Passback: [AMS-110-15] JUSTICE Testimony on S.214 - the Preserving United States Attorney Independence Act of 2007

Kristine,

Attached are comments from DPC staff regarding S.214. However, this is a partial passback. I am still waiting to hear from at least one more office before I can provide a complete passback. Please let me know Justice's response to the comments included in this e-mail.

Angie  
202-395-3857

**Blackwood, Kristine**

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**From:** Blackwood, Kristine  
**Sent:** Friday, February 02, 2007 11:44 AM  
**To:** Angela\_M.\_Simms@omb.eop.gov  
**Cc:** Scott-Finan, Nancy; Seidel, Rebecca  
**Subject:** FW: (Partial) Passback: [AMS-110-15] JUSTICE Testimony on S.214 - the Preserving United States Attorney Independence Act of 2007

<b>Tracking: Recipient</b>	<b>Read</b>
Angela_M._Simms@omb.eop.gov	
Scott-Finan, Nancy	Read: 2/2/2007 11:45 AM
Seidel, Rebecca	Read: 2/2/2007 12:07 PM

Hi Angie,

We are not able to accept any of the DPC comments.

---

**From:** Simms, Angela M. [mailto:Angela\_M.\_Simms@omb.eop.gov]  
**Sent:** Friday, February 02, 2007 11:15 AM  
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**Subject:** FW: (Partial) Passback: [AMS-110-15] JUSTICE Testimony on S.214 - the Preserving United States Attorney Independence Act of 2007  
**Attachments:** ODAGMcNultyTestimonySJC2-6-07PoliticizationofUSAttorneys with TFB comments.doc; ODAGMcNultyTestimonySJC2-6-07PoliticizationofUSAttorneys(DOJredline).doc

**Tracking:**

Recipient	Read
Elston, Michael (ODAG)	
Moschella, William	
Scott-Finan, Nancy	Read: 2/2/2007 11:32 AM
Seidel, Rebecca	
Sampson, Kyle	Read: 2/2/2007 11:42 AM

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# Department of Justice

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STATEMENT

OF

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

BEFORE THE

COMMITTEE ON THE JUDICIARY  
UNITED STATES SENATE

CONCERNING

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

PRESENTED ON

FEBRUARY 6, 2007

OLA000001042

**Testimony  
OF**

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

**Committee on the Judiciary  
United States Senate**

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

February 6, 2007

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

**Comment [b1]:** Is it proper to refer to Sen. Schumer as the Chairman, since this is a full committee hearing?

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Attorneys represent the Attorney General before Americans who may not otherwise have contact with the Department of Justice. They lead our efforts to protect America from terrorist attacks and fight violent crime, combat illegal drug trafficking, ensure the integrity of government and the marketplace, enforce our immigration laws, and prosecute crimes that endanger children and families—including child pornography, obscenity, and human trafficking.

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The Attorney General and I are responsible for evaluating the performance of the United States Attorneys and ensuring that they are leading their offices effectively. It should come as no surprise to anyone that, in an organization as large as the Justice Department, U.S. Attorneys

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

Deleted: one

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 U.S. Attorney 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 U.S. Attorney. It does not indicate an intention to avoid the confirmation process, as some have suggested.

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

As you know, before last year’s amendment of 28 U.S.C. § 546, the Attorney General could appoint an interim U.S. Attorney for the first 120 days after a vacancy arose; thereafter, the district court was authorized to appoint an interim U.S. Attorney. In cases where a Senate-confirmed U.S. Attorney could not be appointed within 120 days, the limitation on the Attorney

General's appointment authority resulted in recurring problems. Some district courts recognized the conflicts inherent in the appointment of an interim U.S. Attorney who would then have matters before the court—not to mention the oddity of one branch of government's 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.

**Comment [b3]:** Doesn't the executive branch appoint "officers" [i.e., judges] in the judicial branch? So is it fair to say that this is "odd"?

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

S. 214 would not merely reverse the 2006 amendment; it would exacerbate the problems experienced under the prior version of the statute by making judicial appointment the only means of temporarily filling a vacancy—a step inconsistent with sound separation-of-powers principles.

We are aware of no other agency where federal judges—members of a separate branch of government—appoint the interim staff of an agency. Such a judicial appointee would have authority for litigating the entire federal criminal and civil docket before the very district court to whom he or she was beholden for the appointment. This arrangement, at a minimum, gives rise to an appearance of potential conflict that undermines the performance or perceived performance of both the Executive and Judicial Branches. A judge may be inclined to select a U.S. Attorney who shares the judge’s ideological or prosecutorial philosophy. Or a judge may select a prosecutor apt to settle cases and enter plea bargains, so as to preserve judicial resources. *See Wiener, Inter-Branch Appointments After the Independent Counsel: Court Appointment of United States Attorneys*, 86 Minn. L. Rev. 363, 428 (2001) (concluding that court appointment of interim U.S. Attorneys is unconstitutional).

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

**Comment [b4]:** I worry about pushing this argument too far because the very same arguments can be turned around and used to critique the President’s power to appoint judges. (E.g., “judicial appointees would have authority for deciding cases where one of the parties is the very government to whom he or she was beholden for the appointment”). Won’t insist on removing or changing this, but would ask DOJ to reconsider devoting even this much room to it.

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

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

## Blackwood, Kristine

---

**From:** Blackwood, Kristine  
**Sent:** Friday, February 02, 2007 4:52 PM  
**To:** Scott-Finan, Nancy  
**Cc:** Seidel, Rebecca  
**Subject:** RE: (Clearance) AMS-110-15 (DAG Testimony on USA, S.214)

**Attachments:** ODAGMcNultyTestimonySJC2-6-07PoliticizationofUSAttorneysclearedfinal.doc;  
ODAGMcNultyTestimonySJC2-6-07PoliticizationofUSAttorneysclearedfinal.pdf



ODAGMcNultyTesti ODAGMcNultyTesti  
monySJC2-6-07P... monySJC2-6-07P...

Try this one

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

**From:** Blackwood, Kristine  
**Sent:** Friday, February 02, 2007 4:48 PM  
**To:** Scott-Finan, Nancy  
**Cc:** Seidel, Rebecca  
**Subject:** RE: (Clearance) AMS-110-15 (DAG Testimony on USA, S.214)

Here's the corrected and cleared version.

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

**From:** Seidel, Rebecca  
**Sent:** Friday, February 02, 2007 4:36 PM  
**To:** 'Simms, Angela M.'; Blackwood, Kristine  
**Cc:** Scott-Finan, Nancy  
**Subject:** RE: (Clearance) AMS-110-15 (DAG Testimony on USA, S.214)

Thank you for all your help Angie! We know you must be flooded today.

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

**From:** Simms, Angela M. [mailto:Angela.M.\_Simms@omb.eop.gov]  
**Sent:** Friday, February 02, 2007 4:36 PM  
**To:** Blackwood, Kristine  
**Cc:** Scott-Finan, Nancy; Seidel, Rebecca  
**Subject:** (Clearance) AMS-110-15 (DAG Testimony on USA, S.214)

Kristine,

This testimony on S.214 is cleared, as amended.

Angie  
202-395-3857

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

**From:** Seidel, Rebecca [mailto:Rebecca.Seidel@usdoj.gov]  
**Sent:** Friday, February 02, 2007 4:24 PM  
**To:** Green, Richard E.; Simms, Angela M.  
**Cc:** Scott-Finan, Nancy; Blackwood, Kristine  
**Subject:** FW: DAG testimony on USA firings issue  
**Importance:** High

see below, this is apparently the only comment from WH counsel's office. We accept. Does this mean it is cleared? I spoke with Todd Braunstein at a meeting we were at together and understood his comments were only suggestions. Has he responded to our response yet? Didn't get the impression he was going to push.

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

From: Oprison, Christopher G.  
[mailto:Christopher\_G.\_Oprison@who.eop.gov]  
Sent: Friday, February 02, 2007 4:02 PM  
To: Seidel, Rebecca; Scott-Finan, Nancy  
Cc: Gibbs, Landon M.; Brosnahan, Jennifer R.; McIntosh, Brent J.; Brady,  
Ryan D.  
Subject: RE: DAG testimony on USA firings issue

Here are the comments I sent earlier today to our front office:

I have no legal objections. One minor wordsmithing edit: on Page 7,  
paragraph starting "As you know, . . ." In the third sentence,  
substitute "government" for "government's"

My apologies, ladies, for the delay. Thanks for following up.

Christopher G. Oprison  
Associate Counsel to the President  
phone: (202) 456-5871  
fax: (202) 456-5104

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

From: Seidel, Rebecca [mailto:Rebecca.Seidel@usdoj.gov]  
Sent: Friday, February 02, 2007 3:55 PM  
To: Scott-Finan, Nancy; Oprison, Christopher G.; Brosnahan, Jennifer R.;  
McIntosh, Brent J.  
Cc: Gibbs, Landon M.  
Subject: Re: DAG testimony on USA firings issue

As of 20 min ago, Angela at omb had not received anything from WH  
counsel.

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

From: Scott-Finan, Nancy  
To: 'Oprison, Christopher G.' <Christopher\_G.\_Oprison@who.eop.gov>;  
Brosnahan, Jennifer R. <Jennifer\_R.\_Brosnahan@who.eop.gov>; McIntosh,  
Brent J. <Brent\_J.\_McIntosh@who.eop.gov>; Seidel, Rebecca  
CC: Gibbs, Landon M. <Landon\_M.\_Gibbs@who.eop.gov>  
Sent: Fri Feb 02 15:49:04 2007  
Subject: RE: DAG testimony on USA firings issue

We have not received comments from WH Counsel through the OMB passback  
process; only from DPC.

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

From: Oprison, Christopher G.  
[mailto:Christopher\_G.\_Oprison@who.eop.gov]  
Sent: Friday, February 02, 2007 3:46 PM  
To: Brosnahan, Jennifer R.; McIntosh, Brent J.; Seidel, Rebecca  
Cc: Scott-Finan, Nancy; Gibbs, Landon M.  
Subject: RE: DAG testimony on USA firings issue

Correct - Landon forwarded them, I believe

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

From: Brosnahan, Jennifer R.  
Sent: Friday, February 02, 2007 3:45 PM  
To: McIntosh, Brent J.; 'rebecca.seidel@usdoj.gov'  
Cc: 'nancy.scott-finan@usdoj.gov'; Oprison, Christopher G.  
Subject: RE: DAG testimony on USA firings issue

Chris reviewed and submitted comments, I believe...

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

From: McIntosh, Brent J.  
Sent: Friday, February 02, 2007 3:23 PM  
To: 'rebecca.seidel@usdoj.gov'  
Cc: 'nancy.scott-finan@usdoj.gov'; Brosnahan, Jennifer R.  
Subject: Re: DAG testimony on USA firings issue

Not me. I'm on paternity leave. Ccing Jenny, who may know status.

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

From: Seidel, Rebecca  
To: McIntosh, Brent J.  
CC: Scott-Finan, Nancy  
Sent: Fri Feb 02 15:08:16 2007  
Subject: DAG testimony on USA firings issue

OMB tells us they are only waiting to hear from WH counsel's office, otherwise it is cleared. Need to give to DAG to take home for weekend. Can u fin out who is reviewing for you guys and nudge? (Is it you ? :))

**Tracking:**

**Recipient**

**Read**

Seidel, Rebecca

Read: 2/2/2007 4:54 PM

Scott-Finan, Nancy

Read: 2/2/2007 4:52 PM

**FILE COPY**  
**LEGISLATIVE AFFAIRS**

Department Of Justice  
Office Legislative Affairs  
Control Sheet

Date Of Document: 02/02/07  
Date Received: 02/02/07  
Due Date: 02/06/07

Control No.: 070207-13288  
ID No.: 435321

From: SENATOR PATRICK LEAHY CHMN, SENATE JUDICIARY COMTE  
(S.214) ((110TH CONGRESS))

To: RICHARD HERTLING ACTING AAG, OLA

Subject:

LETTER FROM THE CHAIRMAN, SENATE JUDICIARY COMMITTEE, INVITING THE AG OR HIS DESIGNEE TO TESTIFY AT THE COMMITTEE HEARING ENTITLED "PRESERVING PROSECUTORIAL INDEPENDENCE: IS THE DEPARTMENT OF JUSTICE POLITICIZING THE HIRING AND FIRING OF U.S. ATTORNEYS?" THE HEARING IS SCHEDULED FOR FEBRUARY 6, 2007, AT 9:30 AM IN ROOM 226 - DIRKSEN SOB.

Action/Information:

Signature Level: OLA

Referred To:

Assigned: Action:

OLA;SCOTT-FINAN

02/02/07 FOR APPROPRIATE ACTION

Remarks:

Comments:

File Comments:

Primary Contact: NANCY SCOTT-FINAN, 514-3752

OLA000001055

**Clifton, Deborah J**

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**From:** Scott-Finan, Nancy  
**Sent:** Friday, February 02, 2007 1:44 PM  
**To:** Clifton, Deborah J  
**Cc:** Blackwood, Kristine  
**Subject:** FW: Invitation to 2/6/07 Prosecutorial Independence Hearing - Senate Judiciary Committee  
**Attachments:** 02-06-07 PJJ Hearing Invite to DoJ.pdf

For the system. Here is the official invite letter.

5.2/14

PATRICK J. LEAHY, VERMONT, CHAIRMAN

EDWARD M. KENNEDY, MASSACHUSETTS  
JOSEPH R. BIDEN, JR., DELAWARE  
HERB KOHL, WISCONSIN  
DIANNE FEINSTEIN, CALIFORNIA  
RUSSELL D. FEINGOLD, WISCONSIN  
CHARLES E. SCHUMER, NEW YORK  
RICHARD J. DURBIN, ILLINOIS  
BENJAMIN L. CARDIN, MARYLAND  
SHELDON WHITEHOUSE, RHODE ISLAND

ARLEN SPECTER, PENNSYLVANIA  
ORRIN G. HATCH, UTAH  
CHARLES E. GRASSLEY, IOWA  
JON KYL, ARIZONA  
JEFF SESSIONS, ALABAMA  
LINDSEY O. GRAHAM, SOUTH CAROLINA  
JOHN CORNYN, TEXAS  
SAM BROWNBACK, KANSAS  
TOM COBURN, OKLAHOMA

## United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510-6275

BRUCE A. COHEN, *Chief Counsel and Staff Director*  
MICHAEL O'NEILL, *Republican Chief Counsel and Staff Director*

February 2, 2007

Mr. Richard Hertling  
Acting Assistant Attorney General  
U.S. Department of Justice  
Office of Legislative Affairs  
950 Pennsylvania Avenue, NW  
Washington, DC 20530-0001

By Email

Dear Mr. Hertling:

I invite the Attorney General or his designee to appear and testify at the Senate Committee on the Judiciary hearing entitled "Preserving Prosecutorial Independence: Is the Department of Justice Politicizing the Hiring and Firing of U.S. Attorneys?" The hearing is scheduled for February 6, 2007, at 9:30 a.m. in room 226 of the Dirksen Senate Office Building.

Please let us know as soon as possible whether the Attorney General intends to appear or if he will send the Deputy Attorney General. Committee rules require that that the written testimony be provided by 9:30 a.m., Monday morning, February 5.

We request that you provide 75 hard copies of the written testimony and curriculum vitae for the witness at least 24 hours before the hearing is scheduled to begin. Please send the hard copies as soon as possible to the attention of Nikole Burroughs, Hearing Clerk, Senate Committee on the Judiciary, 224 Dirksen Senate Office Building, Washington, D.C. 20510. Please also send an electronic copy of the testimony and a short biography via email to [Nikole\\_Burroughs@judiciary-dem.senate.gov](mailto:Nikole_Burroughs@judiciary-dem.senate.gov) and [Arielle\\_Goren@judiciary-dem.senate.gov](mailto:Arielle_Goren@judiciary-dem.senate.gov).

Please contact Nikole Burroughs at (202) 224-7703 with any questions.

Sincerely,

  
PATRICK LEAHY  
Chairman

OLA000001057

**Clifton, Deborah J**

---

**From:** Seidel, Rebecca  
**Sent:** Friday, February 02, 2007 1:42 PM  
**To:** Clifton, Deborah J; Blackwood, Kristine  
**Cc:** Scott-Finan, Nancy; Wade, Jill C  
**Subject:** FW: Invitation to 2/6/07 Prosecutorial Independence Hearing - Senate Judiciary Committee  
**Attachments:** 02-06-07 PJJ Hearing Invite to DoJ.pdf

here is the official invite

---

**From:** Burroughs, Nikole (Judiciary-Dem) [mailto:Nikole\_Burroughs@Judiciary-dem.senate.gov]  
**Sent:** Friday, February 02, 2007 1:37 PM  
**To:** Hertling, Richard  
**Cc:** Goren, Arielle (Judiciary-Dem); Bharara, Preet (Judiciary-Dem); Wade, Jill C; Seidel, Rebecca  
**Subject:** Invitation to 2/6/07 Prosecutorial Independence Hearing - Senate Judiciary Committee

Dear Mr. Hertling:

Attached please find a letter from Senator Leahy inviting the Attorney General or his designee to appear and testify before the Senate Committee on the Judiciary on Tuesday, February 6, 2007, to discuss the topic of "Preserving Prosecutorial Independence: Is the Department of Justice Politicizing the Hiring and Firing of U.S. Attorneys?"

Should you have any questions please feel free to contact me at (202) 224-7703 or [nikole\\_burroughs@judiciary-dem.senate.gov](mailto:nikole_burroughs@judiciary-dem.senate.gov).

Thank you,

Nikole

Nikole Burroughs

Hearing Clerk

United States Senate

Committee on the Judiciary

(202) 224-7703

**Clifton, Deborah J**

---

**From:** Wade, Jill C  
**Sent:** Friday, February 02, 2007 1:43 PM  
**To:** Clifton, Deborah J; Scott-Finan, Nancy  
**Subject:** Fw: Invitation to 2/6/07 Prosecutorial Independence Hearing - Senate Judiciary Committee

**Attachments:** 02-06-07 PJJ Hearing Invite to DoJ.pdf

I like how they notice this three days in advance.

Jill C. Wade  
U.S. DEPARTMENT OF JUSTICE  
Office of Legislative Affairs  
(202) 514-3597

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

**From:** Burroughs, Nikole (Judiciary-Dem) <Nikole\_Burroughs@Judiciary-dem.senate.gov>  
**To:** Hertling, Richard  
**CC:** Goren, Arielle (Judiciary-Dem) <Arielle\_Goren@Judiciary-dem.senate.gov>; Bharara, Preet (Judiciary-Dem) <Preet\_Bharara@Judiciary-dem.senate.gov>; Wade, Jill C; Seidel, Rebecca  
**Sent:** Fri Feb 02 13:37:26 2007  
**Subject:** Invitation to 2/6/07 Prosecutorial Independence Hearing - Senate Judiciary Committee



02-06-07 PJJ  
Hearing Invite to...

Dear Mr. Hertling:

Attached please find a letter from Senator Leahy inviting the Attorney General or his designee to appear and testify before the Senate Committee on the Judiciary on Tuesday, February 6, 2007, to discuss the topic of "Preserving Prosecutorial Independence: Is the Department of Justice Politicizing the Hiring and Firing of U.S. Attorneys?"

Should you have any questions please feel free to contact me at (202) 224-7703 or [nikole\\_burroughs@judiciary-dem.senate.gov](mailto:nikole_burroughs@judiciary-dem.senate.gov).

Thank you,

Nikole

Nikole Burroughs  
Hearing Clerk  
United States Senate

Committee on the Judiciary

(202) 224-7703

PATRICK J. LEAHY, VERMONT, CHAIRMAN

EDWARD M. KENNEDY, MASSACHUSETTS  
JOSEPH R. BIDEN, Jr., DELAWARE  
HERB KOHL, WISCONSIN  
DIANNE FEINSTEIN, CALIFORNIA  
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CHARLES E. SCHUMER, NEW YORK  
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ORRIN G. HATCH, UTAH  
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JON KYL, ARIZONA  
JEFF SESSIONS, ALABAMA  
LINDSEY O. GRAHAM, SOUTH CAROLINA  
JOHN CORNYN, TEXAS  
SAM BROWNBACK, KANSAS  
TOM COBURN, OKLAHOMA

BRUCE A. COHEN, *Chief Counsel and Staff Director*  
MICHAEL O'NEILL, *Republican Chief Counsel and Staff Director*

## United States Senate

COMMITTEE ON THE JUDICIARY  
WASHINGTON, DC 20510-6275

February 2, 2007

Mr. Richard Hertling  
Acting Assistant Attorney General  
U.S. Department of Justice  
Office of Legislative Affairs  
950 Pennsylvania Avenue, NW  
Washington, DC 20530-0001

By Email

Dear Mr. Hertling:

I invite the Attorney General or his designee to appear and testify at the Senate Committee on the Judiciary hearing entitled "Preserving Prosecutorial Independence: Is the Department of Justice Politicizing the Hiring and Firing of U.S. Attorneys?" The hearing is scheduled for February 6, 2007, at 9:30 a.m. in room 226 of the Dirksen Senate Office Building.

Please let us know as soon as possible whether the Attorney General intends to appear or if he will send the Deputy Attorney General. Committee rules require that the written testimony be provided by 9:30 a.m., Monday morning, February 5.

We request that you provide 75 hard copies of the written testimony and curriculum vitae for the witness at least 24 hours before the hearing is scheduled to begin. Please send the hard copies as soon as possible to the attention of Nikole Burroughs, Hearing Clerk, Senate Committee on the Judiciary, 224 Dirksen Senate Office Building, Washington, D.C. 20510. Please also send an electronic copy of the testimony and a short biography via email to [Nikole\\_Burroughs@judiciary-dem.senate.gov](mailto:Nikole_Burroughs@judiciary-dem.senate.gov) and [Arielle\\_Goren@judiciary-dem.senate.gov](mailto:Arielle_Goren@judiciary-dem.senate.gov).

Please contact Nikole Burroughs at (202) 224-7703 with any questions.

Sincerely,

  
PATRICK LEAHY  
Chairman

OLA000001061

**FILE COPY**  
**LEGISLATIVE AFFAIRS**

Department Of Justice  
Office Legislative Affairs  
Control Sheet

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

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

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

To: SENATE JUDICIARY COMTE

Subject:

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

Action/Information:

Signature Level: OLA

Referred To:

Assigned: Action:

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

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

Remarks:

Comments:

File Comments:

Primary Contact: KRISTINE BLACKWOOD, 514-2113

OLA000001062

**Clifton, Deborah J**

---

**From:** Blackwood, Kristine  
**Sent:** Wednesday, January 31, 2007 8:51 AM  
**To:** Seidel, Rebecca; Sampson, Kyle  
**Cc:** Scott-Finan, Nancy; Clifton, Deborah J  
**Subject:** Re: SJC U.S. Attorneys hearing Draft testimony

Yes. Debbie - this should go to EOUSA, FBI, ATF, USMS, DEA, CIV, ASG, CRM, due back 3pm. .

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

**From:** Seidel, Rebecca  
**To:** Sampson, Kyle  
**CC:** Blackwood, Kristine; Scott-Finan, Nancy  
**Sent:** Tue Jan 30 19:35:46 2007  
**Subject:** RE: SJC U.S. Attorneys hearing Draft testimony

send comments back to Kristine. If we are going to get to OMB by COB tomorrow, I would think 3pm is the latest for comments to give Kristine time to assimilate and deconflict. right Kristine?

---

**From:** Sampson, Kyle  
**Sent:** Tuesday, January 30, 2007 7:35 PM  
**To:** Seidel, Rebecca  
**Subject:** RE: SJC U.S. Attorneys hearing Draft testimony

comments to who? by when?

---

**From:** Seidel, Rebecca  
**Sent:** Tuesday, January 30, 2007 7:34 PM  
**To:** Sampson, Kyle; Moschella, William; Elston, Michael (ODAG); Brand, Rachel; Bounds, Ryan W (OLP); Goodling, Monica  
**Cc:** Scott-Finan, Nancy; Nowacki, John (USAE0); Clifton, Deborah J; Blackwood, Kristine; Hertling, Richard  
**Subject:** FW: SJC U.S. Attorneys hearing Draft testimony  
**Importance:** High

Thank you John. Debbie and Kristine are gone for the evening, but will circulate within DOJ first thing in the morning. OAG, ODAG and OLP - wanted to get to you directly so you don't have to wait till morning circulation. Debbie, we need OMB clearance by Friday COB, so that means we have to get to OMB Wed COB at latest.

note the hearing is now Tuesday the 6th instead of Wed the 7th.

---

**From:** Nowacki, John (USAE0) [mailto:John.Nowacki@usdoj.gov]  
**Sent:** Tuesday, January 30, 2007 7:30 PM  
**To:** Seidel, Rebecca; Scott-Finan, Nancy  
**Subject:** SJC U.S. Attorneys hearing

The draft testimony for the DAG is attached.

<<DRAFT Testimony -- US Attorneys Hearing.doc>>

**Clifton, Deborah J**

---

**From:** Blackwood, Kristine  
**Sent:** Wednesday, January 31, 2007 8:52 AM  
**To:** Clifton, Deborah J  
**Subject:** Fw: SJC U.S. Attorneys hearing Draft testimony

**Importance:** High

**Attachments:** DRAFT Testimony -- US Attorneys Hearing.doc

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

**From:** Seidel, Rebecca  
**To:** Sampson, Kyle; Moschella, William; Elston, Michael (ODAG); Brand, Rachel; Bounds, Ryan W (OLP); Goodling, Monica  
**CC:** Scott-Finan, Nancy; Nowacki, John (USAEO); Clifton, Deborah J; Blackwood, Kristine; Hertling, Richard  
**Sent:** Tue Jan 30 19:33:38 2007  
**Subject:** FW: SJC U.S. Attorneys hearing Draft testimony



DRAFT Testimony --  
US Attorney...

Thank you John. Debbie and Kristine are gone for the evening, but will circulate within DOJ first thing in the morning. OAG, ODAG and OLP - wanted to get to you directly so you don't have to wait till morning circulation. Debbie, we need OMB clearance by Friday COB, so that means we have to get to OMB Wed COB at latest.

note the hearing is now Tuesday the 6th instead of Wed the 7th.

---

**From:** Nowacki, John (USAEO) [mailto:John.Nowacki@usdoj.gov]  
**Sent:** Tuesday, January 30, 2007 7:30 PM  
**To:** Seidel, Rebecca; Scott-Finan, Nancy  
**Subject:** SJC U.S. Attorneys hearing

The draft testimony for the DAG is attached.

<<DRAFT Testimony -- US Attorneys Hearing.doc>>

**DRAFT TESTIMONY FOR**  
**DEPUTY ATTORNEY GENERAL PAUL MCNULTY**

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

Wednesday, February 7, 2007

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

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

**Clifton, Deborah J**

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**From:** Seidel, Rebecca  
**Sent:** Tuesday, January 30, 2007 7:34 PM  
**To:** Sampson, Kyle; Moschella, William; Elston, Michael (ODAG); Brand, Rachel; Bounds, Ryan W (OLP); Goodling, Monica  
**Cc:** Scott-Finan, Nancy; Nowacki, John (USAEO); Clifton, Deborah J; Blackwood, Kristine; Hertling, Richard  
**Subject:** FW: SJC U.S. Attorneys hearing Draft testimony  
**Importance:** High  
**Attachments:** DRAFT Testimony -- US Attorneys Hearing.doc

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**Subject:** SJC U.S. Attorneys hearing

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**FILE COPY**  
**LEGISLATIVE AFFAIRS**

*File 5.214*

**Clifton, Deborah J**

**From:** Bounds, Ryan W (OLP)  
**Sent:** Wednesday, January 31, 2007 9:40 AM  
**To:** Seidel, Rebecca  
**Cc:** Clifton, Deborah J; Davis, Valorie A  
**Subject:** RE: SJC U.S. Attorneys hearing Draft testimony  
**Attachments:** S 214 testimony (OLP redline).doc

I am attaching a redline of the draft testimony with some proposed emendations; they are all stylistic.

Ryan Bounds  
OLP  
x54870

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**Sent:** Tuesday, January 30, 2007 7:34 PM  
**To:** Sampson, Kyle; Moschella, William; Elston, Michael (ODAG); Brand, Rachel; Bounds, Ryan W (OLP); Goodling, Monica  
**Cc:** Scott-Finan, Nancy; Nowacki, John (USAEO); Clifton, Deborah J; Blackwood, Kristine; Hertling, Richard  
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**Importance:** High

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# FILE COPY

File 5214

Clifton, Deborah J

## LEGISLATIVE AFFAIRS

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**Sent:** Wednesday, January 31, 2007 9:58 AM  
**To:** Blackwood, Kristine; Seidel, Rebecca  
**Cc:** Scott-Finan, Nancy; Clifton, Deborah J; Elston, Michael (ODAG)  
**Subject:** Re: SJC U.S. Attorneys hearing Draft testimony

I gave my comments to Elston this morning.

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

**From:** Blackwood, Kristine  
**To:** Seidel, Rebecca; Sampson, Kyle  
**CC:** Scott-Finan, Nancy; Clifton, Deborah J  
**Sent:** Wed Jan 31 08:51:12 2007  
**Subject:** Re: SJC U.S. Attorneys hearing Draft testimony

Yes. Debbie - this should go to EOUSA, FBI, ATF, USMS, DEA, CIV, ASG, CRM, due back 3pm. .

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

**From:** Seidel, Rebecca  
**To:** Sampson, Kyle  
**CC:** Blackwood, Kristine; Scott-Finan, Nancy  
**Sent:** Tue Jan 30 19:35:46 2007  
**Subject:** RE: SJC U.S. Attorneys hearing Draft testimony

send comments back to Kristine. If we are going to get to OMB by COB tomorrow, I would think 3pm is the latest for comments to give Kristine time to assimilate and deconflict. right Kristine?

---

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To: Seidel, Rebecca; Scott-Finan, Nancy  
Subject: SJC U.S. Attorneys hearing

The draft testimony for the DAG is attached.

<<DRAFT Testimony -- US Attorneys Hearing.doc>>

**Clifton, Deborah J**

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**Cc:** Scott-Finan, Nancy; Clifton, Deborah J; Elston, Michael (ODAG)  
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**Sent:** Wednesday, January 31, 2007 9:23 AM  
**To:** Beth Beers; Carol Keeley; Erin Sanford; Kristan Mack; Rene Morton Nevens; Theresa Spinola; Holly.Cummings@usdoj.gov; Currie.Gunn@usdoj.gov; Gregory.Katsas@usdoj.gov; Aloma.A.Shaw@usdoj.gov; Elizabeth.Edgar@usdoj.gov; Janice.Conway@usdoj.gov; Robert.Alexander@usdoj.gov; Stephen.R.Rubenstein@usdoj.gov; Teresa.G.Ficaretta@usdoj.gov; Natalie.Voris@usdoj.gov; David.L.Smith2@usdoj.gov; John.Nowacki@usdoj.gov; Judith.Benderson@usdoj.gov; dcoates@leo.gov; Legislation.OPL@usdoj.gov; Patricia.Massie@usdoj.gov; Betty.Lofton@usdoj.gov; Whelan, Colleen; Shoemaker, Sheldon R; Newman, Yvette; Kripp, Joseph W.; Jameson, Dana B; Flaherty, Connor; Dudley, John A.; Brown, Jason F.; John.Noory@usdoj.gov; John.McNulty@usdoj.gov; Diana.Mayer@usdoj.gov; Julie.Samuels@usdoj.gov  
**Cc:** Kyle.Sampson@usdoj.gov; William.Moschella@usdoj.gov; Michael.Elston@usdoj.gov; Ryan.W.Bounds@usdoj.gov; Monica.Goodling@usdoj.gov; Luis.Caballero2@usdoj.gov; Valorie.A.Davis@usdoj.gov; Wykema.C.Jackson@usdoj.gov; Matrina.Wilcox2@usdoj.gov; Nancy.Scott-Finan@usdoj.gov; Rebecca.Seidel@usdoj.gov; Kristine.Blackwood@usdoj.gov  
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**YOU WILL NOT RECEIVE A HARD COPY OF THIS REQUEST. PLEASE PROVIDE COMMENTS TO KRISTINE BLACKWOOD, OLA, NO LATER THAN 3 pm 01/31/07.**

<<S214control.pdf>>      <<DRAFT Testimony -- US Attorneys Hearing.doc>>

## Clifton, Deborah J

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Sent: Wednesday, January 31, 2007 9:58 AM  
To: Blackwood, Kristine; Seidel, Rebecca  
Cc: Scott-Finan, Nancy; Clifton, Deborah J; Elston, Michael (ODAG)  
Subject: Re: SJC U.S. Attorneys hearing Draft testimony

I gave my comments to Elston this morning.

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

From: Blackwood, Kristine  
To: Seidel, Rebecca; Sampson, Kyle  
CC: Scott-Finan, Nancy; Clifton, Deborah J  
Sent: Wed Jan 31 08:51:12 2007  
Subject: Re: SJC U.S. Attorneys hearing Draft testimony

Yes. Debbie - this should go to EOUSA, FBI, ATF, USMS, DEA, CIV, ASG, CRM, due back 3pm. .

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

From: Seidel, Rebecca  
To: Sampson, Kyle  
CC: Blackwood, Kristine; Scott-Finan, Nancy  
Sent: Tue Jan 30 19:35:46 2007  
Subject: RE: SJC U.S. Attorneys hearing Draft testimony

send comments back to Kristine. If we are going to get to OMB by COB tomorrow, I would think 3pm is the latest for comments to give Kristine time to assimilate and deconflict.

right Kristine?

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From: Sampson, Kyle  
Sent: Tuesday, January 30, 2007 7:35 PM  
To: Seidel, Rebecca  
Subject: RE: SJC U.S. Attorneys hearing Draft testimony

comments to who? by when?

---

From: Seidel, Rebecca  
Sent: Tuesday, January 30, 2007 7:34 PM  
To: Sampson, Kyle; Moschella, William; Elston, Michael (ODAG); Brand, Rachel; Bounds, Ryan W (OLP); Goodling, Monica  
Cc: Scott-Finan, Nancy; Nowacki, John (USAEO); Clifton, Deborah J; Blackwood, Kristine; Hertling, Richard  
Subject: FW: SJC U.S. Attorneys hearing Draft testimony  
Importance: High

Thank you John. Debbie and Kristine are gone for the evening, but will circulate within DOJ first thing in the morning. OAG, ODAG and OLP - wanted to get to you directly so you don't have to wait till morning circulation. Debbie, we need OMB clearance by Friday COB, so that means we have to get to OMB Wed COB at latest.

note the hearing is now Tuesday the 6th instead of Wed the 7th.

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From: Nowacki, John (USAEO) [mailto:John.Nowacki@usdoj.gov]  
Sent: Tuesday, January 30, 2007 7:30 PM  
To: Seidel, Rebecca; Scott-Finan, Nancy  
Subject: SJC U.S. Attorneys hearing

The draft testimony for the DAG is attached.

<<DRAFT Testimony -- US Attorneys Hearing.doc>>

**FILE COPY**  
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Department Of Justice  
Office Legislative Affairs  
Control Sheet

Date Of Document: 02/23/07  
Date Received: 02/23/07  
Due Date: 02/26/07 2 pm

Control No.: 070223-13441  
ID No.: 435525

From: OLA (HOUSE JUDICIARY COMTE) (H.15, H.R. 580)  
(110TH CONGRESS))

To: HOUSE JUDICIARY COMTE

Subject:

ATTACHED FOR YOUR REVIEW AND COMMENT IS A COPY OF THE DRAFT STATEMENT OF WILLIAM MOSCHELLA, PRINCIPAL ASSOCIATE DEPUTY ATTORNEY GENERAL, REGARDING THE IMPORTANCE OF THE JUSTICE DEPARTMENT'S UNITED STATES ATTORNEYS, BEFORE THE HOUSE JUDICIARY COMTE, TO BE GIVEN ON MARCH 6, 2007

Action/Information:

Signature Level: OLA

Referred To:

Assigned: Action:

ODAG, JMD/PERSONNEL/GC,  
OARM, OLP, OLC, CRM, CIV,  
EOUSA

02/23/07 COMMENTS DUE TO OLA/SILAS BY 2 PM  
02/26/07. CC: OLA/SCOTT-FINAN/  
SEIDEL

Remarks:

Comments:

03/06/07: ODAG/MOSCHELLA TESTIFIED. DJC

File Comments:

Primary Contact: ADRIEN SILAS, 514-7276

OLA000001134

# FILE COPY

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Department Of Justice  
Office Legislative Affairs  
Control Sheet

Date Of Document: 02/26/07  
Date Received: 02/26/07  
Due Date: 03/06/07

Control No.: 070302-13505  
ID No.: 435608

From: CONG. JOHN CONYERS, JR. CHMN, HOUSE JUDICIARY COMTE  
(H.R. 580, H.15) ((110TH CONGRESS))

To: RICHARD HERTLING ACTING AAG, OLA

Subject:

LETTER FROM THE CHAIRMAN, HOUSE JUDICIARY COMTE, INVITING A REPRESENTATIVE OF THE ADMINISTRATION TO TESTIFY AT A HEARING ON MARCH 6, 2007, ON H.R.580, RESTORING CHECKS AND BALANCES IN THE CONFIRMATION PROCESS OF U.S. ATTORNEYS. THE HEARING WILL TAKE PLACE A 2 PM IN ROOM 2141 - RAYBURN HOB. INVITES PAUL MCNULTY, DEPUTY ATTORNEY GENERAL, TO TESTIFY.

Action/Information:

Signature Level: OLA

Referred To:

Assigned: Action:

OLA;SCOTT-FINAN

02/26/07 FOR APPROPRIATE ACTION

Remarks:

Comments:

03/06/07: ODAG/MOSCHELLA TESTIFIED. CC: EXEC SEC # DJC

File Comments: EXEC SEC # 1145085

Primary Contact: NANCY SCOTT-FINAN, 514-3752

OLA000001135



# Department of Justice

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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**

OLA000001136

**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**

Chairwoman Sanchez, Congressman Cannon, and members of the Subcommittee, thank you for the invitation to discuss the importance of the Justice Department’s United States Attorneys.

Although – as previously noted by the Attorney General and the Deputy Attorney General in their testimony – the Department of Justice continues to believe the Attorney General’s current interim appointment authority is good policy, and has concerns about H.R. 580, the “Preserving United States Attorneys Independence Act of 2007,” the Department looks forward to working with the Committee in an effort to reach common ground on this important issue. It should be made clear, however, that despite the speculation, it was never the objective of the Department, when exercising this interim appointment authority, to circumvent the Senate confirmation process.

Some background. 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 and report to the Attorney General in the discharge of their offices. 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 while U.S. Attorneys are charged with making prosecutorial decisions, they are also duty bound to implement and further the Administration's and Department's priorities and policy decisions. 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. In no context is accountability more important to our society than on the front lines of law enforcement and the exercise of prosecutorial discretion. Thus, United States Attorneys are, and should be, accountable to the Attorney General.

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. 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.

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 is asked to resign so the new President can nominate a successor for confirmation by the Senate. Moreover, U.S. Attorneys do not necessarily stay in place even during an administration. For example, more than 40 percent 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 U.S. Attorneys, our system depends on the dedicated service of the career investigators and prosecutors. While a new Administration may articulate new priorities or emphasize different types of cases, the effect of a U.S. Attorney on an ongoing investigation or prosecution is, in fact, minimal, 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 U.S. 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.

As stated above, the Administration has not 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. In every case where a vacancy occurs, the Administration is committed to having a Senate-confirmed U.S. Attorney. And the Administration's actions bear this out. In each instance, the President either has 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, 124 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 18 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 16 individuals for Senate consideration since the appointment authority was amended, with 12 of those nominees having been confirmed to date. Of the 18 vacancies that have occurred since the time that the law was amended, the Administration has nominated candidates to fill six of these positions, has interviewed candidates for nomination for eight 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 and to ensure continuity of operations. 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, either under 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. Ensuring that the interim and permanent appointment process runs smoothly and effectively will be the focus of the Department's efforts to reach common ground with the Congress on this issue.

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

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Office Legislative Affairs  
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Date Of Document: 02/26/07  
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Control No.: 070302-13505  
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From: CONG. JOHN CONYERS, JR. CHMN, HOUSE JUDICIARY COMTE  
(H.R. 580, H.15) ((110TH CONGRESS))

To: RICHARD HERTLING ACTING AAG, OLA

Subject:

LETTER FROM THE CHAIRMAN, HOUSE JUDICIARY COMTE, INVITING A REPRESENTATIVE OF THE ADMINISTRATION TO TESTIFY AT A HEARING ON MARCH 6, 2007, ON H.R.580, RESTORING CHECKS AND BALANCES IN THE CONFIRMATION PROCESS OF U.S. ATTORNEYS. THE HEARING WILL TAKE PLACE A 2 PM IN ROOM 2141 - RAYBURN HOB. INVITES PAUL MCNUITY, DEPUTY ATTORNEY GENERAL, TO TESTIFY.

Action/Information:

Signature Level: OLA

Referred To:

Assigned: Action:

OLA;SCOTT-FINAN

02/26/07 FOR APPROPRIATE ACTION

Remarks:

Comments:

File Comments:

Primary Contact: NANCY SCOTT-FINAN, 514-3752

OLA000001143