CHAIRMAN

RANKING MINORITY MEMBER

U.S. House of Representatives
Committee on the Judiciary

Washington, DC 20515–6216
One Hundred Tenth Congress

March 8, 2007

The Honorable Alberto R. Gonzales
Attorney General of the United States
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

Dear Mr. Attorney General:

We write to follow up on the hearings held in the House and Senate Judiciary Committees this week concerning the forced resignations of six U.S. Attorneys. At these hearings, a number of important disclosures were made, several of which raise very troubling legal questions about the conduct of officials at the Justice Department. Because of these concerns, and in order to further our investigation, we ask that you make available to us certain officials at the Department for follow-up questioning next week and that you provide us with certain critical documents and information.

At our hearings we learned of a number of troubling matters. Among other things:

- Two of the fired U.S. Attorneys, Mr. Bogden and Mr. Charlton, testified that they were told by Mr. William Mercer, the Acting Associate Attorney General, that they were fired for political reasons in order to put others in those positions so they could build their resumes, contrary to the claim by Justice Department officials that they were fired for "performance related" reasons. Many of the rationales for the terminations offered by Mr. Moschella at our hearing do not appear to hold up to scrutiny. For example, Mr. McKay was allegedly terminated because of his promotion of an information sharing program, even though he was praised for this work and his program was selected to be a pilot program by the Department. Mr. Cummins was allegedly terminated in part because he was rumored to want to leave before his term was finished, even though he testified he had never told that to anyone at the Department prior to his resignation. Mr. Charlton was allegedly terminated because he wanted the FBI to tape the confessions of alleged child molesters to facilitate their convictions, even though the Deputy Attorney General's office had asked him not to resign over this issue and asked him to initiate a pilot program on this matter.

- Mr. Iglesias and Mr. McKay testified that there were several efforts made to influence their prosecutorial decisions. For example, Mr. Iglesias testified that he felt "leaned on" and "sickened" by *ex parte* congressional contacts, and Mr. McKay testified that he

received a call from a congressional representative apparently intended to pressure him to pursue a criminal vote fraud investigation, and subsequently stated that he was asked during an interview with White House Counsel Harriet Miers to explain why he had "mishandled" that issue. This testimony raises serious issues concerning possible undue influence and obstruction of justice.

- Mr. Cummins testified that he received a call from Michael Elston, Mr. McNulty's Chief of Staff, who informed him that voluntary testimony to Congress by Mr. Cummins or any of his colleagues would be seen as "a major escalation of the conflict meriting some kind of unspecified form of retaliation." On its face, this testimony raises the possibility that the Department may have sought to obstruct Congress' efforts to ascertain the truth concerning these firings.

In order to further our investigation and resolve the many contradictions between statements by the Department and the terminated U.S. Attorneys, we need to interview several employees at the Department, and accordingly ask that you make them available to us to interview within the next week. These individuals include:

- Paul McNulty, Deputy Attorney General;
- D. Kyle Sampson, Chief of Staff to the Attorney General;
- Michael Elston, Chief of Staff to the Deputy Attorney General;
- Michael Battle, Director, Executive Office for U.S. Attorneys;
- Monica Goodling, Senior Counsel to the Attorney General and Liaison to the White House; and
- William Mercer, United States Attorney for Montana and Acting Associate Attorney General.

We will also require that you provide to us information and documents next week as well.[1] Specifically, we request that you supply the following documents and information in accordance with the definitions enclosed with this letter:

- copies of all documents (including but not limited to e-mails), either within the Department of Justice or relating to communications between anyone at the Department and the White House or any other person or entity, concerning the termination of the six U.S. Attorneys who testified at our hearing and the selection of their replacements. This includes, but is not limited to, any materials relating to the meetings held within the Justice Department on the subject, communications from or to the White House on the subject, any lists of U.S. Attorneys to be replaced, any lists of replacement candidates for their positions, the Justice Department and Administration responses to the controversy over the firings, and post-termination communications with the fired U.S. Attorneys;

- copies of all documents relating to communications between the Justice Department and Members of Congress concerning any of the terminated U.S. Attorneys in advance of their terminations;

- copies of all documents relating to communications that the Justice Department had with the terminated U.S. Attorneys during their tenure in office concerning any failure in their performance, including any failure to comply with the Justice Department's priorities or directives;

- the names of any Members of Congress who were given advance notification of the terminated U.S. Attorneys by anyone in the Justice Department, together with the dates of any such notification; and

- the names of all individuals in the White House and Justice Department who were in any respect involved in the decision to seek the resignation of the terminated U.S. Attorneys, in addition to those identified by Mr. Moschella in his testimony.

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[1]Pursuant to a letter delivered to Mr. Moschella on Monday, March 5, 2007, we had hoped to receive certain requested documents and information in advance of the hearing. For purposes of this letter, any reference to the Justice Department encompasses all components thereof, e.g., the Executive Office for United States Attorneys.

We request that you provide the requested documentary materials and other information to us by 6:00 p.m. on Thursday, March 15, 2007, and we will be in touch with your office concerning the above individuals. Responses and questions should be directed to the Judiciary Committee office, 2138 Rayburn House Office Building, Washington, DC 20515 (tel: 202-225- ; fax: 202-225-). Thank you for your cooperation in this matter.

Sincerely,

John Conyers, Jr.
Chairman

Linda T. Sánchez
Chairwoman, Subcommittee on Commercial and Administrative Law

Enclosure

cc: Hon. Richard A. Hertling
Hon. Lamar S. Smith
Hon. Christopher B. Cannon

Definitions

1. The term "document" means any written, recorded or graphic matter of any nature whatsoever, regardless of how recorded, and whether original or copy, including, but not limited to, the following: memoranda, reports, manuals, instructions, working papers, records, notes, letters, notices, confirmations, telegrams, receipts, appraisals, pamphlets, magazine or newspaper articles, interoffice and intra-office communications, electronic mail (e-mail), contracts, cables, notations of any type of conversation, telephone calls, meetings or other communications, bulletins, printed matter, computer printouts, teletypes, transcripts, diaries, analyses, summaries, minutes, comparisons, messages, correspondence, press releases, circulars, reviews, opinions, studies and investigations, questionnaires and surveys, and work sheets (and all drafts, preliminary versions, alterations, modifications, revisions, changes, and amendments of any of the foregoing, as well as any attachments or appendices thereto), and graphic or oral records of any kind (including without limitation, photographs, charts, graphs, voice mails, microfiche, microfilm, videotape, recordings and motion pictures), and electronic and mechanical records or representations of any kind (including without limitation, tapes, cassettes, disks, computer files, computer hard drive files, CDs, DVDs, memory sticks, and recordings) and other written, printed, typed or other graphic or recorded matter of any kind of nature, however produced or reproduced, and whether preserved in writing, film, tape, disk, videotape or otherwise. A document bearing any notation not a part of the original text is to be considered a separate document. A draft or non-identical copy is a separate document within the meaning of this term.

2. The term "communication" means each manner or means of disclosure or exchange of information, regardless of means utilized, whether oral, electronic, by document or otherwise, and whether face-to-face, in a meeting, by telephone, mail, e-mail, telexes, discussions, releases, personal delivery, or otherwise.

REDACTED

3/5/07

[redacted]

CO [redacted]

US Attys letter from [illegible]

[redacted]

- HM
- CO
- MS

3/4/07 Call w/ H. Mais:

CO - McNulty briefing in closed session to Hill; Cummings situation discussed

HM - Pockyle (through BK) -- would DOJ have something to accommodate Griffin in ARK. w/ any position; not specific as to USA

- may not even recall any discussion post-JSC

- always thought highly of Tim Griffin; one time he stopped by to say hello; not a universal ID: that doesn

- WHC not at all the moving force in Cummings situation

- & specific recollection of POTUS conversations; HM not in a specific meeting w/ POTUS w/ these decisions

- decisions made by DOJ

- Sen. Pryor called AG + HM to discuss Griffin and his status as interim appt.

Q - What was background on Cummings leaving? Timing of his statements to press.

Knew Griffin is in USA + knew e some post stuff with supported it

From: Sampson, Kyle [Kyle.Sampson@usdoj.gov]
Sent: Friday, December 08, 2006 7:04 PM
To: Kelley, William K.
Cc: Miers, Harriet; Fiddelke, Debbie S.
Subject: Re: Nevada US Atty

Thx for the heads up.

Sent from my BlackBerry Wireless Handheld

-----Original Message-----
From: Kelley, William K. <William_K._Kelley@who.eop.gov>
To: Sampson, Kyle
CC: Miers, Harriet <Harriet_Miers@who.eop.gov>; Fiddelke, Debbie S. <Debbie_S._Fiddelke@who.eop.gov>
Sent: Fri Dec 08 18:33:17 2006
Subject: Nevada US Atty

Heads up about disgruntlement in Nevada. Sen. Ensign's COS informs me that the Senator is very unhappy about the decision to let Bogden go, very unhappy about its timing, and doesn't understand the urgency. They say that they have confirmed about 6 judges, 5 marshals, and 1 US Attorney, and it hasn't taken less than 9 months for a single one of those confirmations to be accomplished in a Republican-controlled Congress. Why, they ask, leave the office in the hands of an interim person during that period when it could have been Bogden?

I explained to him our thinking at some length. But they are unsatisfied, and the COS said that Ensign would be calling the AG to make sure that Bodgen, who they say has done a great job for Nevada, gets a fair shake.

From: Sampson, Kyle [Kyle.Sampson@usdoj.gov]
Sent: Wednesday, December 13, 2006 1:46 PM
To: Kelley, William K.
Subject: Just returned your call

I need to chat with you re:

1.
2.
3. Griffin

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

From: Sampson, Kyle [Kyle.Sampson@usdoj.gov]
Sent: Tuesday, December 12, 2006 10:34 PM
To: Lee, Kenneth K.
Subject: RE: Lam

My apologies for its rambling nature.

-----Original Message-----
From: Lee, Kenneth K. [mailto:Kenneth_K._Lee@who.eop.gov]
Sent: Tuesday, December 12, 2006 10:33 PM
To: Sampson, Kyle
Subject: Re: Lam

Got the voicemail. Thanks.

-----Original Message-----
From: Sampson, Kyle
To: Lee, Kenneth K.
Sent: Tue Dec 12 22:15:46 2006
Subject: RE: Lam

t you a v-mail earlier. Please call if you want to discuss further.

From: Lee, Kenneth K. [mailto:Kenneth_K._Lee@who.eop.gov]
Sent: Tuesday, December 12, 2006 6:06 PM
To: Sampson, Kyle
Subject: Lam

Kyle --

I just left you a voicemail, but can you give me a brief update on Carol Lam (USA/S.D. Cal.)? I believe that she was one of the USAs under the replacement plan. Do you know what the basis was for the replacement? And do you know if there were any issues/problems when she was (presumably) notified of this plan last week? Harriet may be asked about it tomorrow, and I wanted to give her the background information just in case.

Thanks,

Ken
456-

From: Oprison, Christopher G.
Sent: Friday, December 15, 2006 1:19 PM
To: Monica.Goodling@usdoj.gov
Subject: Tim Griffin

Monica - when you get a chance, I need some information about Tim Griffin. Can you give me a call at your convenience? Thanks

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

From: Sampson, Kyle [Kyle.Sampson@usdoj.gov]
Sent: Friday, December 15, 2006 2:32 PM
To: Oprison, Christopher G.
Cc: Goodling, Monica
Subject: U.S. Attorney -- E.D. Ark.

Chris, we haven't met yet, but I'm sure we will.

Wanted to give you a heads up. Bud Cummins, the U.S. Attorney in Little Rock, announced to his troops today that he is resigning effective Wednesday, December 20. The AG spoke to Sen. Pryor (who had called him about this earlier in the week) and informed him that we were going to put Tim Griffin in as U.S. Attorney under an AG appointment. We're in the process now of giving Sen. Lincoln notice and then will put out a press release today, announcing Griffin's appointment. There is a lot of back story here that you may or may not know. Call if you want to discuss. Thanks.

Kyle Sampson
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(202) 514-2001 wk.
(202) 305- cell
kyle.sampson@usdoj.gov

From: Sampson, Kyle [mailto:Kyle.Sampson@usdoj.gov]
Sent: Friday, December 15, 2006 2:37 PM
To: Oprison, Christopher G.
Cc: Goodling, Monica
Subject: RE: U.S. Attorney -- E.D. Ark.

Alas, no. But I have a window between 3:15pm-3:30pm. Let me know.

From: Oprison, Christopher G. [mailto:Christopher_G._Oprison@who.eop.gov]
Sent: Friday, December 15, 2006 2:35 PM
To: Sampson, Kyle
Cc: Goodling, Monica
Subject: RE: U.S. Attorney -- E.D. Ark.

Kyle - this is one issue that is front/center on my radar screen. I have had several conversations with Scott Jennings and with the Counsel about the controversy but, as you might suspect, I am lacking some crucial background knowledge. Will you be available to discuss today at 3:30?

From: Sampson, Kyle [mailto:Kyle.Sampson@usdoj.gov]
Sent: Friday, December 15, 2006 2:32 PM
To: Oprison, Christopher G.
Cc: Goodling, Monica
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Chris, we haven't met yet, but I'm sure we will.

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kyle.sampson@usdoj.gov

From: Miers, Harriet
Sent: Sunday, September 17, 2006 3:13 PM
To: Brosnahan, Jennifer R.; Kelley, William K.
Subject: FW: United States Attorneys

We should talk about this tomorrow morning.

-----Original Message-----
From: Kyle.Sampson@usdoj.gov [mailto:Kyle.Sampson@usdoj.gov]
Sent: Wednesday, September 13, 2006 4:23 PM
To: Miers, Harriet
Subject: RE: United States Attorneys

Harriet, the U.S. Attorney ranks currently break down as follows:

I. Vacancies w/o Candidates

D. Alaska
E.D. Tenn.
S.D.W.V.

II. USAs Who Have Been (Or Will Be) Nominated for Other Things (I am strongly of the view that we should be working now to get their replacements selected and in the pipeline)

S.D. Ga. (Lisa Wood)
N.D. Ind. (Joe Van Bokkelen)
E.D. Mich. (Steve Murphy)
D. Mont. (Bill Mercer)
E.D.N.Y. (Roz Mauskopf)
D.D.C. (Ken Wainstein)

III. USAs Who, Rumor Has It, Will Be Leaving in Coming Months

C.D. Cal. (Deb Yang)
N.D. Iowa (Chuck Larsen, Sr.)
M.D. Tenn. (Jim Vines)

IV. USA in the Process of Being Pushed Out

E.D. Ark. (Bud Cummins)

V. USAs We Now Should Consider Pushing Out

D. Ariz. (Paul Charlton)
S.D. Cal. (Carol Lam)
N.D. Fla. (Greg Miller)
D. Me. (Paula Silsby)
W.D. Mich. (Margaret Chiara)
D. Nev. (Dan Bogden)
M.D. Pa. (Tom Marino)
W.D. Wash. (John McKay)

VI. Summary

I am only in favor of executing on a plan to push some USAs out if we really are ready and willing to put in the time necessary to select candidates and get them appointed -- it will be counterproductive to DOJ operations if we push USAs out and then don't have replacements ready to roll immediately. In addition, I strongly recommend that, as a matter of Administration policy, we utilize the new statutory provisions that authorize the AG to make USA appointments. We can continue to do selection in JSC, but then should have DOJ take over entirely the vet and appointment. By not going the PAS route, we can give far less deference to home-State Senators and thereby get (1) our preferred person

appointed and (2) do it far faster and more efficiently, at less political cost to the White House.

Let me know when you have read this; I have one follow up item I would want to do over the phone. What say you?

Kyle

-----Original Message-----
From: Harriet_Miers@who.eop.gov [mailto:Harriet_Miers@who.eop.gov]
Sent: Wednesday, September 13, 2006 2:39 PM
To: Sampson, Kyle
Subject: United States Attorneys

Kyle, any current thinking on holdover U. S. Attorneys? Any recent word on Debra Yang's intentions?

From: Kyle.Sampson@usdoj.gov
Sent: Sunday, September 17, 2006 3:41 PM
To: Miers, Harriet
Subject: Re: United States Attorneys

No worries. At your convenience.

-----Original Message-----
From: Harriet_Miers@who.eop.gov <Harriet_Miers@who.eop.gov>
To: Sampson, Kyle
Sent: Sun Sep 17 15:14:30 2006
Subject: RE: United States Attorneys

Kyle, thanks for this. I have not forgotten I need to follow up on the info, but things have been crazy. Will be back in touch!

-----Original Message-----
From: Kyle.Sampson@usdoj.gov [mailto:Kyle.Sampson@usdoj.gov]
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To: Miers, Harriet
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From: Sampson, Kyle [Kyle.Sampson@usdoj.gov]
Sent: Friday, December 15, 2006 4:45 PM
To: Oprison, Christopher G.
Cc: Goodling, Monica
Subject: U.S. Attorney -- E.D. Ark.
Importance: High

The Senators' Chiefs of Staff now have been notified of our intention (1) to put Griffin in as USA under an AG appointment and (2) to issue a press release out of DOJ today stating the same.

Chris, I think the White House (you) needs to continue the dialogue with the Senators re our desire to have the President nominate, and the Senate confirm, Griffin. They think they smell a rat, i.e., that we are doing an end around of their advice and consent authority by exercising the new, unlimited AG appointment authority.

Monica, please be sure that the Griffin meeting with Sen. Pryor gets scheduled.

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

From: Goodling, Monica [Monica.Goodling@usdoj.gov]
Sent: Friday, December 15, 2006 5:21 PM
To: Sampson, Kyle; Oprison, Christopher G.
Subject: RE: U.S. Attorney -- E.D. Ark.

FYI - To close the loop, the Chief Judge was notified and the district was given the press release for distribution around 4:50 p.m. It will be out the door shortly, if it is not already. The PIO was instructed to use OPA's phone number for any follow up questions, which is our normal practice given that we are announcing an AG action.

I will ensure that the meeting is set up and staffed appropriately, at the Senator's earliest convenience.

From: Sampson, Kyle
Sent: Friday, December 15, 2006 4:45 PM
To: 'Oprison, Christopher G.'
Cc: Goodling, Monica
Subject: U.S. Attorney -- E.D. Ark.
Importance: High

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(202) 305 ;ell
kyle.sampson@usdoj.gov

From: Goodling, Monica [Monica.Goodling@usdoj.gov]
Sent: Thursday, January 11, 2007 11:36 AM
To: Sampson, Kyle; Fahrenkopf, Leslie
Subject: FW: Interview

FYI - Rogers has pulled out of candidacy for the NM position.

-----Original Message-----
From: Nowacki, John (USAEO)
Sent: Thursday, January 11, 2007 11:08 AM
To: Goodling, Monica
Subject: Fw: Interview

FYI

-----Original Message-----
From: Patrick J. Rogers
To: USAEO-Candidates
CC: Nowacki, John (USAEO)
Sent: Thu Jan 11 11:01:20 2007
Subject: RE: Interview

Dear Debbie:

Before you go to any additional trouble or expense, I have told Sen. Domenici that I would be very honored by the suggestion I should be considered, but that I believed others were more qualified for the position. I am not sure, in good conscience I can proceed at this point.
I believe all three persons publicly identified would be very fine USAs.
Chuck Peifer is the most outstanding of the fine lot. In the unlikely event the three candidates are found wanting for reasons that are certainly unknown to me, I would be hardpressed to ignore the administration or Sen. Domenici, but I sincerely believe you have 3 capable, qualified persons who would do a fine job for New Mexico and for the cause of justice.

I would request that you proceed asap with the process.

Thank you for your time and consideration.

Best regards, Pat Rogers

Patrick J. Rogers
Modrall, Sperling, Roehl, Harris & Sisk, P.A.
P.O. Box 2168
Albuquerque, NM 87103-2168
Tel: 505-848
Fax: 505-848-

<file:///C:/Documents%20and%20Settings/pjr/Desktop/Modrall%20Logo%20Smal
ll.jpg>

REDACTED

REDACTED

From: Sampson, Kyle [Kyle.Sampson@usdoj.gov]
Sent: Monday, December 18, 2006 1:05 PM
To: Oprison, Christopher G.
Cc: Goodling, Monica
Subject: FW: U.S. Attorney appointment

FYI – when I talked to Russell on Friday he asked for the citations to the AG's appointment authority.

From: Sampson, Kyle
Sent: Monday, December 18, 2006 1:04 PM
To: 'bob_russell
Subject: U.S. Attorney appointment

Bob, it turns out there are many ways that a person may become U.S. Attorney:

1. 28 U.S.C. § 541(a) ("The President shall appoint, by and with the advice and consent of the Senate, a United States attorney for each judicial district.");

2. 5 U.S.C. § 3345(a)(1) (providing in the event of a vacancy that "the first assistant to the office of such officer shall perform the functions and duties of the office temporarily in an acting capacity");

3. 5 U.S.C. § 3345(a)(2) (providing in the event of a vacancy that "the President (and only the President) may select a person who serves in an office for which appointment is required to be made by the President, by and with the advice and consent of the Senate, to perform the functions and duties of the vacant office temporarily in an acting capacity");

4. 5 U.S.C. § 3345(a)(3) (providing in the event of a vacancy that "the President (and only the President) may direct an officer or employee of such Executive agency to perform the functions and duties of the vacant office temporarily in an acting capacity," so long as such person has "served in a position in such agency for not less than 90 days" at a rate "equal to or greater than the minimum rate of pay payable for a position at GS-15 of the General Schedule");

5. 28 U.S.C. § 546(a) (providing that "the Attorney General may appoint a United States attorney for the district in which the office of United States attorney is vacant"); and

6. U.S. Const., art. II, § 2 (providing that the "President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session").

Of course, as the AG mentioned to the Senator, it remains our hope that the President will nominate Tim Griffin and the Senate will confirm him. Please let me know if there is any additional information we can provide you. Thanks!

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

Fw: U.S. Attorney appointment

kyle.sampson@usdoj.gov

-----Original Message-----
From: Goodling, Monica [mailto:Monica.Goodling@usdoj.gov]
Sent: Tuesday, December 19, 2006 12:22 PM
To: Oprison, Christopher G.; Sampson, Kyle
Subject: Another Griffin article

FYI

-----Original Message-----
From: griffin
Sent: Tuesday, December 19, 2006 10:49 AM
To: Goodling, Monica
Subject: Another one

Lincoln calls appointment of Rove assistant 'unfortunate'

By ANDREW DeMILLO Associated Press Writer

LITTLE ROCK (AP)_ Arkansas Sen. Blanche Lincoln called President Bush's decision to appoint political adviser Karl Rove's former assistant as interim U.S. attorney for eastern Arkansas ''unfortunate'' because she believes it bypasses the normal approval process.

I think it's very unfortunate that the president would choose not to go down the normal process,'' Lincoln, D-Ark., told The Associated Press in an interview on Monday.

The Justice Department announced Friday that Tim Griffin would replace Bud Cummins, who plans to resign Dec. 20. There is no maximum amount of time someone can serve as an interim U.S. attorney.

''This is a person who's going to be implementing the law of the land, and I have concerns from what I read in terms of his political nature,'' Lincoln said. ''People need to know that and the way you know that is by going through the processes. The reason we have processes and committees and hearings is so there will be a transparency in the people that are going to serve, and that won't exist in this case.''

Arkansas' lone Republican in Congress, Rep. John Boozman, last week said Griffin was highly qualified for the position. But Griffin, who worked on President Bush's re-election campaign in 2004, likely wouldn't have faced a fair hearing in the soon-to-be Democratically controlled Senate, Boozman said.

A native of Magnolia, Griffin now serves as special assistant U.S. attorney for the eastern district of Arkansas. Griffin has previously served as special assistant to President Bush and deputy director of political affairs at the White House, as well as deputy communications director for the RepublicanNationalCommittee.

He recently finished a year of active duty in Iraq and is an Army Reserve major, serving in the Judge Advocate General's Corps.

A spokesman for Sen. Mark Pryor, D-Ark., on Friday criticized the appointment for avoiding the normal appointment process.

The senator is concerned that, by announcing an interim (appointment) and not making a nomination, they're determining who the nominee is,'' Pryor spokesman Michael Teague said Friday. ''They're basically circumventing the constitutional process.''

A Justice Department spokesman has said officials will work with the Arkansas congressional delegation ''in the near future'' to make a nomination, and that Griffin was nominated on an interim basis because of the timing of Cummins' resignation.

Lincoln said the White House had contacted her earlier in the year and said they were interested in appointing him to Bud Cummins' position. She said her office had expressed concern about his appointment.

''I don't know that much more about him than you could find if you Googled him,'' Lincoln said. ''That's what we did.''

-----Original Message-----
From: Sampson, Kyle [mailto:Kyle.Sampson@usdoj.gov]
Sent: Tuesday, December 19, 2006 6:27 PM
To: Oprison, Christopher G.
Subject: RE: Another Griffin article

My thoughts:

1. I think we should gum this to death: ask the Senators to give Tim a chance, meet with him, give him some time in office to see how he performs, etc. If they ultimately say, "no never" (and the longer we can forestall that, the better), then we can tell them we'll look for other candidates, ask them for recommendations, evaluate the recommendations, interview their candidates, and otherwise run out the clock. All of this should be done in "good faith," of course.
2. Officially, Tim is the U.S. Attorney, and will identify himself as such on pleadings and other official documents. I think it's fine for us to refer to him as an "interim U.S. Attorney" in talking points, with the understanding that by "interim U.S Attorney" we mean AG-appointed (as opposed to Presidentially-appointed and Senate confirmed) U.S. ttorney.
Overall, I think we should take the temperature way down -- our guy is in there so the :us quo is good for us. Ask for them to consider him; note that he is qualified and doing a good job whenever asked; pledge to desire a Senate-confirmed U.S. Attorney; and otherwise hunker down.
4. The only thing really at risk here is a repeal of the AG's appointment authority. We intend to have DOJ leg affairs people on notice to work hard to preserve this (House members won't care about this; all we really need is for one Senator to object to language being added to legislative vehicles that are moving through). There is some risk that we'll lose the authority, but if we don't ever exercise it then what's the point of having it? (I'm not 100 percent sure that Tim was the guy on which to test drive this authority, but know that getting him appointed was important to Harriet, Karl, etc.)

-----Original Message-----
From: Oprison, Christopher G. [mailto:Christopher_G._Oprison@who.eop.gov]
Sent: Tuesday, December 19, 2006 6:16 PM
To: Sampson, Kyle
Subject: RE: Another Griffin article

Thanks. I raised that issue with Harriet earlier. Seems to me that (1) Pryor and Lincoln are taking steps to back DOJ/WH into a corner on Tim Griffin and commit to not commit on him as a nominee; and (2) "interim" may be a source of confusion or, worse, a term that Pryor's and Lincoln's office can springboard from to press for their own nominee rather than rallying behind Tim. What are your thoughts? If this is a Section 546 AG appointment for unlimited duration, Tim can call himself "US Attorney" rather than "interim" or "acting" and our talkers should avoid referring to him as "interim." What are your thoughts?

-----Original Message-----
n: Sampson, Kyle [mailto:Kyle.Sampson@usdoj.gov]
: Tuesday, December 19, 2006 5:36 PM
Oprison, Christopher G.
Subject: FW: Another Griffin article

fyi

-----Original Message-----
'om: Scolinos, Tasia
.ent: Tuesday, December 19, 2006 5:34 PM
Sampson, Kyle; Goodling, Monica
Roehrkasse, Brian
..bject: RE: Another Griffin article

I agree - those are stronger talkers.

BR- who in our office took this call? Let's make sure they have these new points if we get another call. Thanks.

-----Original Message-----
From: Sampson, Kyle
Sent: Tuesday, December 19, 2006 5:30 PM
To: Goodling, Monica; Scolinos, Tasia
Subject: RE: Another Griffin article

Monica/Tasia, I'm a little concerned about this:

"A Justice Department spokesman has said officials will work with the Arkansas congressional delegation ''in the near future'' to make a nomination, and that Griffin was nominated on an interim basis because of the timing of Cummins' resignation."

I think would prefer:

* When a U.S. Attorney vacancy arises, someone needs to be appointed -- even if on an interim basis -- to fill the vacancy and do the work of the U.S. Attorney.
* Griffin was appointed on an interim basis because of the timing of Cummins' resignation.
* It is our hope that, in every federal district, we'll be able to have a U.S. Attorney 'ho was nominated by the President and confirmed by the Senate.

--Original Message-----
m: Goodling, Monica
Sent: Tuesday, December 19, 2006 12:22 PM
To: 'Oprison, Christopher G.'; Sampson, Kyle
Subject: Another Griffin article

FYI

-----Original Message-----
From: griffin
Sent: Tuesday, December 19, 2006 10:49 AM
To: Goodling, Monica
Subject: Another one

Lincoln calls appointment of Rove assistant 'unfortunate'

By ANDREW DeMILLO Associated Press Writer

LITTLE ROCK (AP) Arkansas Sen. Blanche Lincoln called President Bush's decision to appoint political adviser Karl Rove's former assistant as interim U.S. attorney for eastern Arkansas ''unfortunate'' because she believes it bypasses the normal approval process.

''I think it's very unfortunate that the president would choose not to go down the normal route,'' Lincoln, D-Ark., told The Associated Press in an interview on Monday.

The Justice Department announced Friday that Tim Griffin would replace Bud Cummins, who 'lans to resign Dec. 20. There is no maximum amount of time someone can serve as an rim U.S. attorney.

.nis is a person who's going to be implementing the law of the land, and I have concerns from what I read in terms of his political nature,'' Lincoln said. ''People need to know

that and the way you know that is by going through the processes. The reason we have processes and committees and hearings is so there will be a transparency in the people that are going to serve, and that won't exist in this case.''

·kansas' lone Republican in Congress, Rep. John Boozman, last week said Griffin was ıghly qualified for the position. But Griffin, who worked on President Bush's re-election ·baign in 2004, likely wouldn't have faced a fair hearing in the soon-to-be ɔcratically controlled Senate, Boozman said.

A native of Magnolia, Griffin now serves as special assistant U.S. attorney for the eastern district of Arkansas. Griffin has previously served as special assistant to President Bush and deputy director of political affairs at the White House, as well as deputy communications director for the RepublicanNationalCommittee.

He recently finished a year of active duty in Iraq and is an Army Reserve major, serving in the Judge Advocate General's Corps.

A spokesman for Sen. Mark Pryor, D-Ark., on Friday criticized the appointment for avoiding the normal appointment process.

''The senator is concerned that, by announcing an interim (appointment) and not making a nomination, they're determining who the nominee is,'' Pryor spokesman Michael Teague said Friday. ''They're basically circumventing the constitutional process.''

A Justice Department spokesman has said officials will work with the Arkansas congressional delegation ''in the near future'' to make a nomination, and that Griffin was nominated on an interim basis because of the timing of Cummins' resignation.

Lincoln said the White House had contacted her earlier in the year and said they were interested in appointing him to Bud Cummins' position. She said her office had expressed concern about his appointment.

''I don't know that much more about him than you could find if you Googled him,'' Lincoln aid. ''That's what we did.''

Scott Jennings

From: Scott Jennings
Sent: 12/20/2006 5:15:00 PM
To: Sampson, Kyle;
Cc:
Bcc:
Subject: Washington USATTY

Can you give me a couple of talking points on why McKay was in our group to move on?

His brother has a letter in to Karl, and I know I will be asked for a response.

Thanks man -

From: Goodling, Monica [mailto:Monica.Goodling@usdoj.gov]
Sent: Thursday, December 28, 2006 6:24 PM
To: Sampson, Kyle; Oprison, Christopher G.
Subject: EDAR article

FYI

(Chris -- We already spoke with Tim about not handling his own press, and he understands that he needs to work through our Public Affairs office in the future.)

New U.S. Attorney Says Job Matters, Not How He Got It (ARKDG)
By Linda Satter
Arkansas Democrat-Gazette, December 27, 2006

Newly appointed as interim U. S. attorney for the Eastern District of Arkansas through a maneuver that has drawn criticism

from the state's two reigning Democrats, Tim Griffin says he hopes to turn the spotlight off the way he got the job and onto his

plan to aggressively fight crime through cooperative efforts.
"I am honored by the attorney general's decision to name me U. S. attorney," Griffin said Wednesday, his first day on the

job. "I look forward to working with Sen. [Mark] Pryor and Sen. [Blanche] Lincoln to make Arkansas safer," he said after a long

day that began with being sworn in by Chief U. S. District Judge Leon Holmes and ended with many of his books and papers yet

to be moved into a corner office from a smaller space down the hall that he has occupied since September.
Just five days earlier, the U. S. Department of Justice announced that Attorney General Alberto Gonzales planned to
appoint the 38-year-old lawyer from Magnolia to the post that Bud Cummins earlier announced he was vacating after five years.

Sens. Pryor and Lincoln immediately expressed dismay that the interim appointment came during a congressional recess,
under a provision of the Patriot Act that allows the fill- ing of a vacancy without going through the usual process of being

nominated by the White House, screened by the Senate Judiciary Committee and voted on by the Senate.
The surprise announcement "denied the Senate the opportunity to carefully consider and evaluate Mr. Griffin's qualifications and denied the American people the transparency the standard nomination process provides,"

Lincoln said through

a spokesman.
Pryor's press secretary, Michael Teague, complained that unless the appointment is followed up by a formal nomination, it

could end up being a sneaky way for the Bush administration to reward an insider with a plum job without having to prove his

qualifications and ability to be nonpartisan. Teague cited Griffin's strong ties to the Republican Party and his reputation as an

aggressive former GOP campaign researcher, at one point under Karl Rove, Bush's main political adviser and deputy chief of

staff.
"We hope we're wrong that they're trying to circumvent the process by never nominating him," Teague reiterated on Friday,

but he added that the administration might think that Griffin will "just evolve into the U. S. attorney" from the interim post he now

holds. Later Friday, Justice Department spokesman Brian Roehrkasse addressed those concerns directly, indicating that Griffin's

appointment is indeed meant to be temporary, at least until it can go through the formal nomination process. "We have asked

that Sen. Pryor meet with the acting U. S. attorney," Roehrkasse said. "We are hopeful that by working with the two U. S.

senators from Arkansas, we will make a nomination that the senators support and the Congress approves."
Roehrkasse explained, "When a U. S. attorney resigns, there is a need for someone to fill that position." He noted that
often, the first assistant U. S. attorney in the affected district will serve as the acting U. S. attorney until the formal nomination

process begins for a replacement. But in this case, "the first assistant is on maternity leave," he said, referring to Jane Duke, who

gave birth to twins earlier than expected the same week of the announcement. "Tim was chosen because of his significant
experience working as a federal prosecutor in both Arkansas and in the Justice Department in Washington, D. C.," Roehrkasse

said.
Asked how soon the formal nomination process might begin, he said, "We've put the meeting request out there. That's
what we're working on right now." Under the Patriot Act, the intent of appointments by the attorney general is to aid national

security by ensuring that key law enforcement posts aren't left unoccupied. Ryan James, spokesman for Arkansas' only
Republican U. S. congressman, John Boozman, also defended Griffin's appointment on Friday, noting that it is not the same as a

"true recess appointment," in which the president nominates someone to the position, often for the duration of the

current

Congress. "It's not unprecedented to make acting appointments, for whatever reason," James said, noting that President Clinton

did the same thing.
He said Boozman believes that a full Senate confirmation process could be unfair to Griffin because of the combination of

a new Democratic-majority Congress being seated in January and Griffin's prior association with Rove, a Republican stalwart.

The process could quickly become very political, and, "He may not get a fair shake as far as his qualifications," James said

of Griffin. James added that Boozman believes that Griffin is qualified.
Griffin acknowledged Wednesday, after being sworn in as the district's 43 rd chief federal prosecutor, "The way one is
appointed to be U. S. attorney is a political process. It is a political appointment. But the moment you become U. S. attorney,

politics stop.... There is no room for politics in the U. S. attorney's office. Politics stop at the door."
He added, "My job is to make sure all Arkansans are treated equally under the law."
Indeed, U. S. attorneys across the country are generally of the same political party as the president who nominates them.

While they are required to be lawyers, many have little actual courtroom experience and heavily rely on the "career" prosecutors

in the office to handle the day-today legal machinations.
Many also have used the office as a steppingstone to an elected office. Griffin declined to discuss his future beyond his

new job.
Griffin's legal experience includes 10 years as a JAG (Judge Advocate General) officer in the U. S. Army Reserve, and the

prosecution of 40 criminal cases as an Army prosecutor at Fort Campbell, Ky., including a case in which a solider pleaded guilty

to the attempted murder of his platoon sergeant. Griffin also served as senior counsel to the House Government Reform
Committee and was an associate with a New Orleans law firm.
He graduated with honors, both from Hendrix College in Conway and Tulane Law School in New Orleans.
Cummins, a Bush appointee who said he is leaving to pursue other interests, said he told the Justice Department more
than a year ago that he would be leaving, to give the department time to find a replacement.
He also defended Griffin on Friday, calling him a friend who is "very competent" and "very capable."
"I'm not being critical of Sen. Pryor," Cummins said Friday. "I can certainly understand their position. But I think it will

eventually all work out."
He explained, "It would not surprise me at all if they ultimately put Tim through the normal nomination process."
Cummins, whom Pryor press secretary Teague praised as "a fantastic U. S. attorney" who "is respected on both sides of
the aisle," said he is "100 percent confident that Tim understands that we don't do politics at the U. S. attorney's office." He said

the department makes that clear to its incoming prosecutors. Griffin, who now supervises about 25 attorneys and 35 support staff

members, has worked as an assistant under Cummins since September, and also worked in the Arkansas office in 2001 and
2002 as a special assistant, to gain experience.
During that time, he organized and coordinated the department's Project Safe Neighborhoods initiative, a Bush administration effort to reduce firearm-related violence through close cooperation between state and federal law officers that he

says is still a pet project of his.
Griffin said that since 2001, the office has seen a 390 percent increase in the number of firearm-related cases it has taken

on — often taking over local cases, with local prosecutors' consent, to ensure that violators face the stricter penalties available in

federal court. That includes an absence of parole. Griffin noted that he has talked with his counterpart in the state's Western

District, U. S. Attorney Bob Balfe, about "working as closely as possible, forging a seamless relationship, particularly where our

districts meet, so we can be aggressive in fighting crime in the Eastern District, the Western District or both." He said he also

plans to work closely with U. S. attorneys in neighboring states "because criminals aren't concerned with artificial borders." He

recently completed a year of active duty in the U. S. Army, including a stint in Iraq. He and his wife of two years, Elizabeth, have

no children.
"I've had a lot of jobs in my life, and what I've tried to do in each and every one of them is perform with excellence," Griffin

said. "Bud has set a great example as U. S. attorney. He set the standard, and I am going to work hard to meet that standard to

the best of my ability."
To those who doubt him, he said, "I am going to ask them to judge me on my performance."

From: Miers, Harriet

Sent: Sunday, January 07, 2007 4:54 PM

To: Sampson, Kyle

Subject: USA in Massachusetts

REDACTED

Also, I received another call from Gerry Parsky who had received a call from Senator Feinstein. Her assertion was that we were circumventing the Commission process re the USAs in San Diego and San Francisco by using the AG appt authority. I told him that I did not believe that that was correct. I told him that while the AG can and should put someone in on an interim basis that the intent was to use the process in each instance. He said she was concerned that the interim process was intended not to be interim so that it was being used as a subterfuge. Am I correct in what I told Gerry?

From: Sampson, Kyle [Kyle.Sampson@usdoj.gov]
Sent: Sunday, January 07, 2007 8:59 PM
To: Miers, Harriet
Subject: RE: USA in Massachusetts

Harriet, thanks for your e-mail.

1. With regard to the U.S. Attorney for the District of Massachusetts, currently there is no vacancy. Mike Sullivan is the presidentially-appointed U.S. Attorney there; he also serves by presidential designation as the Acting Director of the Bureau of Alcohol, Tobacco & Firearms (ATF) under the Vacancies Reform Act. I personally think that he should be considered for nomination to be the permanent Director of ATF, but we still are working on that with PPO. In sum, we are many months away from having a vacancy in the U.S. Attorney position in Boston, if we get one at all.
2. With regard to the upcoming U.S. Attorney vacancies in California, you are absolutely correct. When a vacancy arises, an "acting" or "interim" (i.e., non-PAS) U.S. Attorney must be identified -- someone needs to be in charge. When there is a gap between PAS U.S. Attorneys, there are many ways that an "acting" or "interim" U.S. Attorney can be put in place:

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In dealing with Senators, we should be very clear that when there is a U.S. Attorney vacancy our policy remains to consult with the Senators and come up with a candidate for presidential nomination and Senate confirmation. With regard to "acting" or "interim" U.S. Attorneys, DOJ's policy is to (1) consider whether the First Assistant U.S. Attorney (FAUSA) is suitable to serve automatically, by operation of law (see the first * above), or (2) if not, whether someone else in the USAO (usually the criminal chief) or in DOJ generally is suitable to serve pursuant to one of the other "acting" or "interim" authorities.

With regard to the upcoming California vacancies, REDACTED, so we'll need to identify someone in the office or in DOJ to go in under an AG appointment during the time it takes to get someone through the Parsky Commission, nominated, and confirmed. I'm not sure what our assessment is of the FAUSA in San Diego; that evaluation is being conducted now.

From: Miers, Harriet [mailto:Harriet_Miers@who.eop.gov]
Sent: Sunday, January 07, 2007 4:54 PM
To: Sampson, Kyle
Subject: USA in Massachusetts

REDACTED

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From: Miers, Harriet
Sent: Sunday, January 07, 2007 9:07 PM
To: Kyle.Sampson@usdoj.gov
Subject: Re: USA in Massachusetts

Kyle, thanks. Should I gleen from this that there will be a usual process and that my indication to Gerry will be correct: we will pursue putting someone in place who is reviewed by the Commission and nominated? That is without regard to someone serving as interim.

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From: Sampson, Kyle
To: Miers, Harriet
Sent: Sun Jan 07 20:58:38 2007
Subject: RE: USA in Massachusetts

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From: Sampson, Kyle [Kyle.Sampson@usdoj.gov]
Sent: Sunday, January 07, 2007 9:47 PM
To: Miers, Harriet
Subject: RE: USA in Massachusetts

I know, I know -- I never liked the commissions! Berenson and I went round and round on this.

REDACTED C'est la vie.

-----Original Message-----
From: Miers, Harriet [mailto:Harriet_Miers@who.eop.gov]
Sent: Sunday, January 07, 2007 9:44 PM
To: Sampson, Kyle
Subject: Re: USA in Massachusetts

As you know the Commission has been in place going back well before the change in counsel so I don't know what debates resulted in its institution. REDACTED I am just trying to make sure that what I told Gerry is right.

-----Original Message-----
From: Sampson, Kyle
To: Miers, Harriet
Sent: Sun Jan 07 21:30:55 2007
Subject: RE: USA in Massachusetts

As you know, I'd prefer dealing directly with the the Senators to ascertain candidates that both the President and the Senators can support for nomination and confirmation, as opposed to dealing with the unelected, unaccountable, slow Parsky Commissions (whose interests, I'm convinced, are not aligned with the President's). That said, I understand that the decision to continue to deal with the Parsky Commissions has been made. In no case (including E.D. Ark.) am I in favor of using the AG's appointment authority unilaterally to jam Senators -- that will only result in the Congress taking that authority away from us. So, for example, in Arkansas, I think we need to work to get the Senators comfortable with Tim Griffin, to the point where the President would nominate Tim and expect the Senators to give him a fair shot at confirmation. If they never get there, then we should try to work with them in good faith to find another suitable candidate.

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* U.S. Const., art. II, § 2 (providing that the "President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session").

In dealing with Senators, we should be very clear that when there is a U.S. Attorney vacancy our policy remains to consult with the Senators and come up with a candidate for presidential nomination and Senate confirmation. With regard to "acting" or "interim" U.S. Attorneys, DOJ's policy is to (1) consider whether the First Assistant U.S. Attorney (FAUSA) is suitable to serve automatically, by operation of law (see the first * above), or (2) if not, whether someone else in the USAO (usually the criminal chief) or in DOJ generally is suitable to serve pursuant to one of the other "acting" or "interim" authorities.

With regard to the upcoming California vacancies, REDACTED, so we'll need to identify someone in the office or in DOJ to go in under an AG appointment during the time it takes to get someone through the Parsky Commission, nominated, and confirmed. I'm not sure what our assessment is of the FAUSA in San Diego; that evaluation is being conducted now.

From: Miers, Harriet [mailto:Harriet_Miers@who.eop.gov]
Sent: Sunday, January 07, 2007 4:54 PM
To: Sampson, Kyle
Subject: USA in Massachusetts

REDACTED

Also, I received another call from Gerry Parsky who had received a call from Senator Feinstein. Her assertion was that we were circumventing the Commission process re the USAs in San Diego and San Francisco by using the AG appt authority. I told him that I did not believe that that was correct. I told him that while the AG can and should put someone in on an interim basis that the intent was to use the process in each instance. He said she was concerned that the interim process was intended not to be interim so that it was being used as a subterfuge. Am I correct in what I told Gerry?

From: Sampson, Kyle [Kyle.Sampson@usdoj.gov]

Sent: Friday, January 12, 2007 9:52 AM

To: Hardos, Debbie (USAEO); Best, David T; Scott-Finan, Nancy; Bullock, Katja; Trono, Robert (USMS); Dickinson, Lisa (USMS)

Cc: Goodling, Monica; Battle, Michael (USAEO); Brand, Rachel; Hertling, Richard; Moschella, William; Kelley, William K.; Oprison, Christopher G.; Fahrenkopf, Leslie; Stanton, Cheryl M.

Subject: Clearance for Nomination (4)

Importance: High

Per the Deputy Counsel to the President, the following have been cleared for nomination:

John Wood, to be U.S. Attorney for the Western District of Missouri;

REDACTED

Per our regular process, EOUSA will (1) get Wood and REDACTED scheduled for their final AG/DAG interviews and (2) prepare and transmit to the WH the noms paperwork.

Prior to nomination, EOUSA and USMS will notify the current incumbents in the office.

Also prior to nomination, DOJ OLA will provide notifications to the home-state Senators and to Sens. Leahy and Specter. Thanks!

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

From: Oprison, Christopher G.
Sent: Friday, January 12, 2007 1:34 PM
To: Goodling, Monica; Sampson, Kyle
Subject: Tim Griffin

Just called and asked about his meeting with the AG/DAG on Tuesday. He had quite a few questions that I could not answer and sounded concerned about the reason for the meeeting. Monica, Tim said he left you a voicemail. Anything I should know about or is this internal-DOJ. I don't plan on reporting back to Tim with any information and will leave that to DOJ, but just wanted to make sure you were aware.

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

From: Sampson, Kyle [Kyle.Sampson@usdoj.gov]
Sent: Friday, January 12, 2007 1:35 PM
To: Oprison, Christopher G.; Goodling, Monica
Subject: RE: Tim Griffin

internal DOJ
we'll take it from here

From: Oprison, Christopher G. [mailto:Christopher_G._Oprison@who.eop.gov]
Sent: Friday, January 12, 2007 1:34 PM
To: Goodling, Monica; Sampson, Kyle
Subject: Tim Griffin

Just called and asked about his meeting with the AG/DAG on Tuesday. He had quite a few questions that I could not answer and sounded concerned about the reason for the meeeting. Monica, Tim said he left you a voicemail. Anything I should know about or is this internal-DOJ. I don't plan on reporting back to Tim with any information and will leave that to DOJ, but just wanted to make sure you were aware.

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

From: Fahrenkopf, Leslie
Sent: Friday, January 12, 2007 2:07 PM
To: 'Hardos, Debbie (USAEO)'
Subject: RE: USA Interviews - New Mexico

Debbie:

Chris Oprison will attend all three interviews on Wednesday the 17th. I will forward the resumes to him.

Thanks -
Leslie

-----Original Message-----
From: Hardos, Debbie (USAEO)
Sent: Friday, January 12, 2007 1:54 PM
To: Fahrenkopf, Leslie
Subject: Re: USA Interviews - New Mexico

Leslie: I've already contacted the prospective candidates and panel members. Can you send another Associate?
Thank you,
Debbie

-----Original Message-----
From: Fahrenkopf, Leslie <Leslie_Fahrenkopf@who.eop.gov>
To: Hardos, Debbie (USAEO) Margolis, David
; Goodling, Monica <Monica.Goodling@usdoj.gov>
Sent: Fri Jan 12 11:36:17 2007
Subject: RE: USA Interviews - New Mexico

I apologize. A meeting that I must attend has been added to my schedule on Wednesday and it conflicts with the Ellington and Peifer interviews. If rescheduling poses too much difficulty, I will find a colleague to attend in my place.

Thanks -
Leslie

From: Hardos, Debbie (USAEO)
Sent: Thursday, January 11, 2007 2:51 PM
To: Goodling, Monica; Margolis, David; Fahrenkopf, Leslie; Reyes, Luis A.; Delatorre, Lindsey M.
Cc: Walker, Shelia M; Washington, Tracy T; Im, Saovaluck
Subject: RE: USA Interviews - New Mexico

At this time, there are 3 prospective candidates for the USA position in New Mexico (Bibb, Ellington and Peifer). Patrick Rogers withdrew from consideration and a 5th name has not been received..

From: Hardos, Debbie (USAEO)
Sent: Wednesday, January 10, 2007 9:45 AM
To: Goodling, Monica; Margolis, David; 'leslie_fahrenkopf@who.eop.gov'; 'Reyes, Luis A.'; 'Delatorre, Lindsey M.'
Cc: Walker, Shelia M; Washington, Tracy T; Im, Saovaluck
Subject: USA Interviews - New Mexico

Please let me know if you are available on Wednesday, January 17, 9am-3pm (12n-1pm break) to interview 5 prospective USA candidates.

From: Perino, Dana M.
Sent: Tuesday, January 16, 2007 8:58 AM
To: 'Roehrkasse, Brian'; Lawrimore, Emily A.; Mamo, Jeanie S.
Cc: Smith, Kimberly A
Subject: RE: Heads Up on WSJ USA Story

Brian – Tony Snow's asking for more background on this. Can you provide?

From: Roehrkasse, Brian
Sent: Monday, January 15, 2007 4:07 PM
To: Perino, Dana M.; Lawrimore, Emily A.; Mamo, Jeanie S.
Cc: Smith, Kimberly A
Subject: FW: Heads Up on WSJ USA Story

FYI - Please send any follow up calls on this to me tomorrow.

From: Roehrkasse, Brian
Sent: Monday, January 15, 2007 4:06 PM
To: Goodling, Monica; Elston, Michael (ODAG); Moschella, William; Sampson, Kyle
Cc: Scolinos, Tasia
Subject: Heads Up on WSJ USA Story

Our new *Wall Street Journal* beat reporter will publish a story tomorrow about the recent resignations of U.S. Attorneys. Through his reporting, he believes at least six U.S. Attys were forced to resign including USAs Ryan, Cummins, Lam, Bogden, Igelsias and Charlton. I didn't confirm, deny or otherwise comment beyond cautioning him that he better be careful his sources are accurate. He did speak with at least Cummins and Igelsias, and possibly others.

When he first contacted me about this story he raised questions about political motivations and the correlation to the recent legislative changes on the AG's appointment authority. However, with all of the background information we provided on the appointment authority and pointing him towards our recent nominations, I don't think it will be as politically focused. More likely, he will write that the Department is pushing out USAs because they are underperforming or not embracing the Department's priorities.

The story will be very critical of how the Bud Cummins situation was handled. He thinks despite the political pedigree, that Griffin is very qualified, but just the way in which it was handled with Cummins and Pryor will make it nearly impossible for him to be nominated or confirmed. The good news on this front is he finds Feinstein and Pryor's criticism that we don't intend to nominate USAs suspect and unwarranted.

Talking Points:

- In every case, it is a goal of this Administration to have a U.S. Attorney that is confirmed by the Senate. It is inconceivable for a member of Congress to believe that use of an appointment authority to fill a vacancy is in any way an attempt to circumvent the confirmation process. When a United States Attorney submits his or her resignation, the Administration has an obligation to ensure that someone is able to carry out the important function of leading a U.S. Attorney's office. Following such a situation, we consult with the home-state Senators prior to nomination regarding candidates for Senate consideration.

- Our record since this authority was amended demonstrates we are committed to working with the Senate to nominate candidates for U.S. Attorney positions. Specifically, since March 9, 2006, the Administration has nominated 13 individuals to serve as U.S. Attorney (12 have been confirmed). Additionally, since the appointment authority was amended, there have been 11 vacancies created by outgoing U.S. Attorneys -- of those 11 vacancies, the Administration nominated candidates to fill four of these positions to date and has already interviewed candidates for the other seven positions.

Brian Roehrkasse
Deputy Director of Public Affairs
U.S. Department of Justice
(202) 514-

From: Sampson, Kyle [Kyle.Sampson@usdoj.gov]
Sent: Tuesday, January 16, 2007 10:31 AM
To: Kelley, William K.
Subject: Leahy-Feinstein Letter re USA appointments
Importance: High
Attachments: Leahy Letter re USA Appts 1.16.2007.doc; Leahy Letter re USA Appts 1.16.2007 fact sheet.doc

Bill, attached are the "final" drafts of the letter and fact sheet. We REALLY want to get these sent up to the Hill ASAP, but I feel like I need your clearance, as it implicates the President's appointment authority. For your ease of reference, the operative language for your purposes is:

"The Administration is committed to having a Senate-confirmed United States Attorney in all 94 federal districts."

If WHCO is fine with this statement, then you all should be fine with the rest of the letter. Thanks for your attention to this. Standing by.

<<Leahy Letter re USA Appts 1.16.2007.doc>> <<Leahy Letter re USA Appts 1.16.2007 fact sheet.doc>>

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

January 16, 2007

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

The Honorable Dianne Feinstein
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Chairman Leahy and Senator Feinstein:

This is in response to your letter, dated January 9, 2007, regarding the Administration's appointment of United States Attorneys.

United States Attorneys are at the forefront of the Department of Justice's efforts. They are leading the charge to protect America from acts of terrorism; reduce violent crime, including gun crime and gang crime; enforce immigration laws; fight illegal drugs, especially methamphetamine; combat crimes that endanger children and families like child pornography, obscenity, and human trafficking; and ensure the integrity of the marketplace and of government by prosecuting corporate fraud and public corruption. The Attorney General and the Deputy Attorney General are responsible for evaluating the performance the United States Attorneys and ensuring that United States Attorneys are leading their offices effectively.

United States Attorneys serve at the pleasure of the President. Thus, like other high-ranking Executive Branch officials, they may be removed for, *inter alia*, substandard performance or failure to implement effectively the Department's priorities. That on occasion in an organization as large as the Justice Department some United States Attorneys are removed, or are asked or encouraged to resign, because of substandard performance or failure to implement effectively the Department's priorities should come as no surprise. Please be assured, however, that United States Attorneys never are removed, or asked or encouraged to resign, in an effort to interfere with or inappropriately influence a particular investigation, criminal prosecution or civil case. United States Attorneys are law enforcement officials and officers of the court who must carry out their responsibilities with strict impartiality.

The Administration is committed to having a Senate-confirmed United States Attorney in all 94 federal districts. When a vacancy in the office of United States Attorney occurs (because of removal, resignation or for any other reason), the Administration first must determine who will serve temporarily as United States Attorney until a new Senate-confirmed United States Attorney is appointed. Because of the importance of continuity in the office, the Administration often looks to the First Assistant United States Attorney or another senior manager in the office to serve as acting or interim United States Attorney. Where neither the First Assistant United States Attorney nor another senior manager in the office is able or willing to serve as acting or interim United States Attorney, or where their service would not be appropriate in the circumstances, the Administration may look to other Department employees to serve as interim United States Attorney. At no time, however, has the Administration sought to avoid the Senate confirmation process by (1) appointing an interim United States Attorney and then (2) refusing to move forward, in consultation with home-State Senators, on the selection, nomination and (hopefully) confirmation of a new United States Attorney. The appointment of United States Attorneys by and with the advice and consent of the Senate unquestionably is the appointment method preferred by the Senate and the one that the Administration follows.

Last year's amendment to the Attorney General's appointment authority was necessary and appropriate. Prior to the amendment, the Attorney General could appoint an interim United States Attorney for only 120 days; thereafter, the district court was authorized to appoint an interim United States Attorney. In cases where a Senate-confirmed United States Attorney could not be appointed within 120 days, the limitation on the Attorney General's appointment authority resulted in numerous, recurring problems. For example, some district courts – recognizing the oddity of members of one branch of government appointing officers of another and the conflicts inherent in the appointment of an interim United States Attorney who would then have many matters before the court – refused to exercise the court appointment authority, thereby requiring the Attorney General to make successive, 120-day appointments. In contrast, other district courts – ignoring the oddity and the inherent conflicts – sought to appoint as interim United States Attorney wholly unacceptable candidates who did not have the appropriate experience or the necessary clearances. Because the Administration is committed to having a Senate-confirmed United States Attorney in all 94 federal districts, changing the law to restore the limitations on the Attorney General's appointment authority is unnecessary.

Enclosed per your request is information regarding the exercise of the Attorney General's authority to appoint interim United States Attorneys. As you will see, the enclosed information establishes conclusively that the Administration is committed to having a Senate-confirmed United States Attorney in all 94 federal districts. Indeed, every single time that a United States Attorney vacancy has arisen, the President either has made a nomination or the Administration is working, in consultation with home-State

Senators, to select candidates for nomination. Such nominations are, of course, subject to Senate confirmation.

Sincerely,

Richard A. Hertling
Acting Assistant Attorney General

FACT SHEET: UNITED STATES ATTORNEY APPOINTMENTS

NOMINATIONS AFTER AMENDMENT TO ATTORNEY GENERAL'S APPOINTMENT AUTHORITY

Since March 9, 2006, when the Congress amended the Attorney General's authority to appoint interim United States Attorneys, the President has nominated 13 individuals to serve as United States Attorney (two additional nominations are expected this week). The 13 nominations are:

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

All but Phillip Green have been confirmed by the Senate.

VACANCIES AFTER AMENDMENT TO ATTORNEY GENERAL'S APPOINTMENT AUTHORITY

Since March 9, 2006, there have been 11 new U.S. Attorney vacancies that have arisen. For five of the 11 vacancies, the First Assistant United States Attorney (FAUSA) in the district was selected to lead the office in an acting capacity under the Vacancies Reform Act, *see* 5 U.S.C. § 3345(a)(1) (first assistant may serve in acting capacity for 210 days unless a nomination is made). Those districts are:

- **Central District of California** – FAUSA George Cardona is acting United States Attorney (Cardona is not a candidate for presidential nomination; a nomination is not yet ready);
- **Southern District of Illinois** – FAUSA Randy Massey is acting United States Attorney (Massey is not a candidate for presidential nomination; a nomination was made last Congress, but confirmation did not occur);
- **Northern District of Iowa** – FAUSA Judi Whetstine is acting United States Attorney (Whetstine is not a candidate for nomination and is retiring this month, necessitating an Attorney General appointment; nomination is not yet ready);

- **Eastern District of North Carolina** – FAUSA George Holding served as acting United States Attorney (Holding was nominated and confirmed);
- **Northern District of West Virginia** – FAUSA Rita Valdrini served as acting United States Attorney (Valdrini was not a candidate for presidential nomination; another individual was nominated and confirmed).

For six of the 11 vacancies, the Department selected another Department employee to serve as interim United States Attorney until a nomination could be submitted to the Senate, *see* 28 U.S.C. § 546(a) ("Attorney General may appoint a United States attorney for the district in which the office of United States attorney is vacant"). Those districts are:

- **Eastern District of Virginia** – Pending nominee Chuck Rosenberg was appointed interim United States Attorney when incumbent United States Attorney resigned to be appointed Deputy Attorney General (Rosenberg was confirmed shortly thereafter);
- **Eastern District of Arkansas** – Tim Griffin was appointed interim United States Attorney when incumbent United States Attorney resigned (Griffin has expressed interest in presidential nomination; nomination is not yet ready);
- **District of Columbia** – Jeff Taylor was appointed interim United States Attorney when incumbent United States Attorney resigned to be appointed Assistant Attorney General for the National Security Division (Taylor has expressed interest in presidential nomination; nomination is not yet ready);
- **District of Nebraska** – Joe Stecher was appointed interim United States Attorney when incumbent United States Attorney resigned to be appointed Chief Justice of Nebraska Supreme Court (Stecher has expressed interest in presidential nomination; nomination is not yet ready);
- **Middle District of Tennessee** – Craig Morford was appointed interim United States Attorney when incumbent United States Attorney resigned (Morford has expressed interest in presidential nomination; nomination is not yet ready); and
- **Western District of Missouri** – Brad Schlozman was appointed interim United States Attorney when incumbent United States Attorney and FAUSA resigned (Schlozman has expressed interest in presidential appointment; nomination is not yet ready).

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

The Attorney General has exercised the authority to appoint interim United States Attorneys a total of nine times since the authority was amended in March 2006. In two of the nine cases, the FAUSA had been serving as acting United States Attorney under the Vacancies Reform Act (VRA), but the VRA's 210-day period expired before a nomination could be made. Thereafter, the Attorney General appointed that same FAUSA to serve as interim United States Attorney. These districts include:

- **District of Puerto Rico** – Rosa Rodriguez-Velez (Rodriguez-Velez has expressed interest in presidential nomination; nomination is not yet ready); and
- **Eastern District of Tennessee** – Russ Dedrick (Dedrick has expressed interest in presidential nomination; nomination is not yet ready).

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

- **District of Alaska** – Nelson Cohen (Cohen is not a candidate for presidential nomination; nomination is not yet ready).

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

- **Eastern District of Virginia** – Pending nominee Chuck Rosenberg was appointed interim United States Attorney when incumbent United States Attorney resigned to be appointed Deputy Attorney General (Rosenberg was confirmed shortly thereafter);
- **Eastern District of Arkansas** – Tim Griffin was appointed interim United States Attorney when incumbent United States Attorney resigned (Griffin has expressed interest in presidential nomination; nomination is not yet ready);
- **District of Columbia** – Jeff Taylor was appointed interim United States Attorney when incumbent United States Attorney resigned to be appointed Assistant Attorney General for the National Security Division (Taylor has expressed interest in presidential nomination; nomination is not yet ready);
- **District of Nebraska** – Joe Stecher was appointed interim United States Attorney when incumbent United States Attorney resigned to be appointed Chief Justice of Nebraska Supreme Court (Stecher has expressed interest in presidential nomination; nomination is not yet ready);
- **Middle District of Tennessee** – Craig Morford was appointed interim United States Attorney when incumbent United States Attorney resigned (Morford has expressed interest in presidential nomination; nomination is not yet ready); and
- **Western District of Missouri** – Brad Schlozman was appointed interim United States Attorney when incumbent United States Attorney and FAUSA resigned (Schlozman has expressed interest in presidential appointment; nomination is not yet ready).

From: Sampson, Kyle [Kyle.Sampson@usdoj.gov]
Sent: Friday, January 12, 2007 2:18 PM
To: Kelley, William K.
Subject: Re: BI completed -- J. Timothy Griffin -- U.S. Attorney for the E.D. Ark.

No. Somebody jumped the gun, assuming he'd be cleared and then ready for his AG/DAG pre-nomination mtgs.

Sent from my BlackBerry Wireless Handheld

-----Original Message-----
From: Kelley, William K. <William_K._Kelley@who.eop.gov>
To: Sampson, Kyle
Sent: Fri Jan 12 14:02:31 2007
Subject: RE: BI completed -- J. Timothy Griffin -- U.S. Attorney for the E.D. Ark.

I do want to. Thanks. Also, we've heard Tim's been summoned for a meeting next week with the AG and DAG -- anything going on we should know about?

From: Sampson, Kyle [mailto:Kyle.Sampson@usdoj.gov]
Sent: Friday, January 12, 2007 2:00 PM
To: Kelley, William K.
Subject: FW: BI completed -- J. Timothy Griffin -- U.S. Attorney for the E.D. Ark.
Importance: High

Given the Senators' interest, you may want to review the full BI. Let me know.

From: Sampson, Kyle
Sent: Friday, January 12, 2007 2:00 PM
To: Kelley, William K.
Cc: Goodling, Monica; Lindsey_N._Paola@who.eop.gov
Subject: BI completed -- J. Timothy Griffin -- U.S. Attorney for the E.D. Ark.
Importance: High

Bill, the BI for the following has been completed:

J. Timothy Griffin of Arkansas, to be U.S. Attorney for the Eastern District of Arkansas.

The BI summary is being faxed to you forthwith. Please let me know if you are able to clear this candidate for nomination based on the BI summary, or if you would like the BI delivered to you. Thanks.

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

From: Roehrkasse, Brian
Sent: Friday, January 12, 2007 6:45 PM
To: Mamo, Jeanie S.; Lawrimore, Emily A.
Subject: US Attorney Resignations

Here is what we are saying on-the-record about the appointment authority.

In every case, it is a goal of this Administration to have a U.S. Attorney that is confirmed by the Senate. It is inconceivable for a member of Congress to believe that use of an appointment authority to fill a vacancy is in any way an attempt to circumvent the confirmation process. When a United States Attorney submits his or her resignation, the Administration has an obligation to ensure that someone is able to carry out the important function of leading a U.S. Attorney's office. Following such a situation, we consult with the home-state Senators prior to nomination regarding candidates for Senate consideration.

Our record since this authority was amended demonstrates we are committed to working with the Senate to nominate candidates for U.S. Attorney positions. Specifically, since March 9, 2006, the Administration has nominated 13 individuals to serve as U.S. Attorney (12 have been confirmed). Additionally, since the appointment authority was amended, there have been 11 vacancies created by outgoing U.S. Attorneys -- of those 11 vacancies, the Administration nominated candidates to fill four of these positions to date and has already interviewed candidates for the other seven positions.

Here is what we are providing for background about vacancies.....

- United States Attorneys serve at the pleasure of the President, and whenever a vacancy occurs, we act to fill it in compliance with our obligations under the Constitution, the laws of the United States, and in consultation with the home-state Senators in the region. The Senators have raised concerns based on a misunderstanding of the facts surrounding the resignations of a handful of U.S. Attorneys, each of whom have been in office for their full four year term or more.
- When a United States Attorney submits his or her resignation, the Administration has -- in every case -- consulted with home-state Senators regarding candidates for the Presidential nomination and Senate confirmation. The Administration continues to be committed to working to nominate a candidate for Senate consideration in every case that a vacancy is created, as evidenced by the fact that there have been 125 confirmations of new U.S. Attorneys since January 20, 2001.
- With 93 U.S. Attorney positions across the country, the Department often averages between 8-15 vacancies at any given time. Because of the important work conducted by these offices, and the need to ensure that the office is being managed effectively and appropriately, the Department uses a range of options to ensure continuity of operations.
- In some cases, the First Assistant U.S. Attorney is an appropriate choice. However, in other cases, the First Assistant may not be an appropriate option for reasons including that he or she: resigns or retires at the same time at the outgoing U.S. Attorney; indicates that he/she does not want to serve as Acting; has ongoing or completed OPR or IG matters in their file, which may make his/her elevation to the Acting role inappropriate; or is subject of an unfavorable recommendation by the outgoing U.S. Attorney or otherwise does not enjoy the

confidence of those responsible for ensuring ongoing operations and an appropriate transition until such time as a new U.S. Attorney is nominated and confirmed by the Senate. In those cases, the Attorney General has appointed another individual to lead the office during the transition.

Vacancies Since the Appointment Authority Has Changed:

- Since March 9, 2006, when the appointment authority was amended, the Administration has nominated 13 individuals for Senate consideration (12 have been confirmed to date).
- Since March 9, 2006, when the appointment authority was amended, 11 vacancies have been created. Of the 11 vacancies, the Administration nominated candidates to fill four of these positions (three were confirmed to date) and has interviewed candidates for the other 7 positions.
- The 11 vacancies were filled as follows:

· In 5 cases, the First Assistant was selected to lead the office and took over under the Vacancy Reform Act's provision at: 5 U.S.C. § 3345(a)(1). That authority is limited to 210 days, unless a nomination is made during that period.

· In 5 cases, the Department selected another Department employee to serve as interim until such time as a nomination is submitted to the Senate.

· In 1 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.

Amending the Statute:

- We are aware of no other federal agency where federal judges, members of a separate branch of government and not the head of the agency, appoint interim staff on behalf of the agency.
- In early 2006, the statute that authorizes the appointment of interim United States Attorneys (28 U.S.C. § 546) was amended by section 502 of Public Law 109-177 to eliminate the provision of a 120-day appointment and to allow the Attorney General to appoint interim United States Attorneys to serve until the nomination and confirmation of a United States Attorney under 28 U.S.C. § 541.
- The statute was amended for several reasons: 1) the previous provision was constitutionally-suspect and the Senate respects the Constitution; 2) some federal judges, recognizing the inherent problems, have refused to do appointments, creating a situation where the Attorney General had to do multiple 120-day appointments; 3) a small number of federal judges, disregarding the Constitutional issues, attempted to appoint individuals other than those proposed by the Department – in one case, someone who had never been a federal government official and hence had never been subject of the required national security clearance process, an unacceptable risk given the responsibilities and operations overseen by our U.S. Attorneys.

Listing of Nominations Since the Change in the Appointment Authority (13 to date):

- Erik C. Peterson – Western District of Wisconsin (from outside the Department)
- Charles P. Rosenberg – Eastern District of Virginia (from inside the Department; was interim)

- Thomas Anderson - District of Vermont (from inside the Department; was not interim)
- Martin J. Jackley - District of South Dakota (from outside the Department)
- R. Alexander Acosta – Southern District of Florida (from inside the Department; was interim)
- Troy A. Eid - District of Colorado (from outside the Department)
- Phillip J. Green – Southern District of Illinois (from outside the Department)
- George Holding – Eastern District of North Carolina (from inside the Department; was First Assistant and was Acting)
- Sharon Potter – Northern District of West Virginia (from inside the Department; was not interim)
- Brett Tolman - District of Utah (from inside the Department; was not interim)
- Rodger Heaton – Central District of Illinois (from inside the Department; was interim)
- Deborah Rhodes – Southern District of Alabama (from inside the Department; was interim)
- Rachel Paulose - District of Minnesota (from inside the Department; was interim)

All but Phillip Green were confirmed in the last Congress.

Listing of Vacancies Occurring After the Change in the Appointment Authority (11 to date):

· In 5 cases, the First Assistant was selected to lead the office and took over under as Acting under the Vacancy Reform Act's provision at: 5 U.S.C. § 3345(a)(1). That authority is limited to 210 days, unless a nomination is made during that period. Those districts include:

· Central District of California – FAUSA George Cardona is Acting
1 Southern District of Illinois – FAUSA Randy Massey is Acting
2 Northern District of Iowa – FAUSA Judi Whetstine is Acting
3 Eastern District of North Carolina – FAUSA George Holding became Acting
4 Northern District of West Virginia – FAUSA Rita Valdrini became Acting

· In 5 cases, the Department selected another Department employee to serve as interim until a nomination was submitted to the Senate. Those districts include:

· Eastern District of Virginia – Chuck Rosenberg, was given an interim appointment when Paul McNulty vacated the position to take the oath as Deputy Attorney General (Rosenberg was confirmed shortly thereafter)

1 Eastern District of Arkansas – Tim Griffin was appointed interim
2 District of Columbia – Jeff Taylor was appointed interim
3 Nebraska – Joe Stecher was appointed interim
4 Middle District of Tennessee – Craig Morford was appointed interim

· In 1 case, the First Assistant resigned at the same time as the U.S. Attorney, creating a need for an interim from the Department until such time as a nomination is submitted to the Senate.

· Western District of Missouri – Brad Schlozman was appointed interim

Brian Roehrkasse
Deputy Director of Public Affairs

U.S. Department of Justice
(202) 514-

From: Sampson, Kyle [Kyle.Sampson@usdoj.gov]
Sent: Tuesday, January 16, 2007 3:29 PM
To: Kelley, William K.
Subject: RE: feinstein on the floor (USA issue)

Hertling and I briefed Bruce Cohen and Jennifer Duck (Feinstein's staffer) on Friday for over an hour; we were pretty forthcoming with them regarding Lam (SD) and Ryan (SF) -- doesn't seem to have deterred the Senator's demagoguing.

From: Kelley, William K. [mailto:William_K._Kelley@who.eop.gov]
Sent: Tuesday, January 16, 2007 2:50 PM
To: Sampson, Kyle
Subject: FW: feinstein on the floor (USA issue)

FYI -- maybe we can consider briefing the interested Senators in private without going negative in public?

From: Miers, Harriet
Sent: Tuesday, January 16, 2007 2:48 PM
To: Kelley, William K.
Subject: RE: feinstein on the floor (USA issue)

I would really like to hear one precedent where we have been willing to discuss negatives about a person that is comparable to this situation. The individuals aren't saying anything public. Senators are. Then we are going to go out and say negative things about the people?

From: Kelley, William K.
Sent: Tuesday, January 16, 2007 2:38 PM
To: Miers, Harriet
Subject: RE: feinstein on the floor (USA issue)

Do you want me to raise this with Joel?

From: Miers, Harriet
Sent: Tuesday, January 16, 2007 2:31 PM
To: Kelley, William K.
Subject: RE: feinstein on the floor (USA issue)

I am quite surprised that we would engage on whether a personnel action on a Presidential appointment is justified for the reasons I have earlier stated. We can see what the Chief thinks.

From: Kelley, William K.
Sent: Tuesday, January 16, 2007 1:58 PM
To: Miers, Harriet
Subject: FW: feinstein on the floor (USA issue)
Importance: High

See below. DOJ is pushing back a bit.

From: Sampson, Kyle [mailto:Kyle.Sampson@usdoj.gov]
Sent: Tuesday, January 16, 2007 1:57 PM
To: Kelley, William K.
Subject: FW: feinstein on the floor (USA issue)
Importance: High

Bill, the media and Senate Dems are alleging that we are forcing USAs out for inappropriate political reasons (Feinstein said words to that effect on the Senate floor this morning!) -- not for their incompetence. I really think that our letter should include the (oblique) language about some USAs sometimes being "removed, or asked or encouraged to resign" because of "substandard performance" and/or "failure to implement effectively the Department's priorities." This is the high road: we don't finger anyone specifically (and never will).

FYI -- our USA in SD is refusing to resign (though we've given her until 5pm eastern); recommendation that she be removed immediately should be over to you by the end of the day.

From: Seidel, Rebecca
Sent: Tuesday, January 16, 2007 1:06 PM
To: Sampson, Kyle; Goodling, Monica
Cc: Moschella, William; Hertling, Richard; Tracci, Robert N
Subject: FW: feinstein on the floor (USA issue)
Importance: High

see below.

From: Hayden, Cindy (Judiciary-Rep)
Sent: Tuesday, January 16, 2007 1:04 PM
To: Seidel, Rebecca
Subject: feinstein on the floor

feinstein on the floor talking about the forcing out of 7 US attorneys

do you guys have rebuttal explanation for the situation

From: Sampson, Kyle
Sent: Tuesday, January 16, 2007 9:14 AM
To: Kelley, William K.
Subject: FW: Griffin talkers and USA fact sheet

Importance: High

Attachments: Griffin Talkers.doc; Leahy Letter re USA Appts 1.16.2007 fact sheet.doc; Leahy Letter re USA Appts 1.16.2007.doc

For the gaggle.

From: Goodling, Monica
Sent: Tuesday, January 16, 2007 9:13 AM
To: Sampson, Kyle
Subject: Griffin talkers and USA fact sheet

Griffin Talkers.doc (32 KB) | Leahy Letter re USA Appts 1.16... | Leahy Letter re USA Appts 1.16...

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

- Timothy Griffin was appointed to serve as the interim U.S. Attorney for the Eastern District of Arkansas following the resignation of Bud Cummins, who resigned on December 20, 2006.

- The Attorney General has told Senator Pryor that the Administration would like to nominate Mr. Griffin and that we are not circumventing the process by making an interim appointment. The Department must have someone that they have confidence in lead the office until such time as the Senate confirms a new U.S. Attorney.

- Mr. Griffin has significant experience as a federal prosecutor at both the Department of Justice and as a military prosecutor. At the time of his appointment, he was serving as a federal prosecutor in the Eastern District of Arkansas. Also, from 2001 to 2002, Mr. Griffin served at the Department of Justice as Special Assistant to the Assistant Attorney General for the Criminal Division and as a Special Assistant U.S. Attorney in the Eastern District of Arkansas in Little Rock. In this capacity, Mr. Griffin prosecuted a variety of federal cases with an emphasis on firearm and drug cases. He also organized the Eastern District's Project Safe Neighborhoods (PSN) initiative, the Bush Administration's effort to reduce firearm-related violence by promoting close cooperation between State and federal law enforcement, and served as the PSN coordinator.

- Prior to rejoining the Department in the fall of 2006, Mr. Griffin completed a year of active duty in the U.S. Army, and is in his tenth year as an officer in the U.S. Army Reserve, Judge Advocate General's Corps (JAG), holding the rank of Major. In September 2005, Mr. Griffin was mobilized to active duty to serve as an Army prosecutor at Fort Campbell, Ky. At Fort Campbell, he prosecuted 40 criminal cases, including *U.S. v. Mikel*, which drew national interest after Pvt. Mikel attempted to murder his platoon sergeant and fired upon his unit's early morning formation. Pvt. Mikel pleaded guilty to attempted murder and was sentenced to 25 years in prison.

- In May 2006, Tim was assigned to the 501st Special Troops Battalion, 101st Airborne Division and sent to serve in Iraq. From May through August 2006, he served as an Army JAG with the 101st Airborne Division in Mosul, Iraq, as a member of the 172d Stryker Brigade Combat Team Brigade Operational Law Team, for which he was awarded the Combat Action Badge and the Army Commendation Medal.

- Prior to being called to active duty, Mr. Griffin served as Special Assistant to the President and Deputy Director of the Office of Political Affairs at the White House, following a stint at the Republican National Committee. Mr. Griffin has also served as Senior Counsel to the House Government Reform Committee, as an Associate Independent Counsel for *In Re: Housing and Urban Development Secretary Henry Cisneros*, and as an associate attorney with a New Orleans law firm.

- Mr. Griffin graduated *cum laude* from Hendrix College in Conway, Ark., and received his law degree, *cum laude*, from Tulane Law School. He also attended graduate school at Pembroke College at Oxford University. Mr. Griffin was raised in Magnolia, Ark., and resides in Little Rock with his wife, Elizabeth.

FACT SHEET: UNITED STATES ATTORNEY APPOINTMENTS

NOMINATIONS AFTER AMENDMENT TO ATTORNEY GENERAL'S APPOINTMENT AUTHORITY

Since March 9, 2006, when the Congress amended the Attorney General's authority to appoint interim United States Attorneys, the President has nominated 13 individuals to serve as United States Attorney (two additional nominations are expected this week). The 13 nominations are:

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

All but Phillip Green have been confirmed by the Senate.

VACANCIES AFTER AMENDMENT TO ATTORNEY GENERAL'S APPOINTMENT AUTHORITY

Since March 9, 2006, there have been 11 new U.S. Attorney vacancies that have arisen. For five of the 11 vacancies, the First Assistant United States Attorney (FAUSA) in the district was selected to lead the office in an acting capacity under the Vacancies Reform Act, *see* 5 U.S.C. § 3345(a)(1) (first assistant may serve in acting capacity for 210 days unless a nomination is made). Those districts are:

- **Central District of California** – FAUSA George Cardona is acting United States Attorney (Cardona is not a candidate for presidential nomination; a nomination is not yet ready);
- **Southern District of Illinois** – FAUSA Randy Massey is acting United States Attorney (Massey is not a candidate for presidential nomination; a nomination was made last Congress, but confirmation did not occur);
- **Northern District of Iowa** – FAUSA Judi Whetstine is acting United States Attorney (Whetstine is not a candidate for nomination and is retiring this month, necessitating an Attorney General appointment; nomination is not yet ready);

- **Eastern District of North Carolina** – FAUSA George Holding served as acting United States Attorney (Holding was nominated and confirmed);
- **Northern District of West Virginia** – FAUSA Rita Valdrini served as acting United States Attorney (Valdrini was not a candidate for presidential nomination; another individual was nominated and confirmed).

For six of the 11 vacancies, the Department selected another Department employee to serve as interim United States Attorney until a nomination could be submitted to the Senate. Those districts are:

- **Eastern District of Virginia** – Pending nominee Chuck Rosenberg was appointed interim United States Attorney when incumbent United States Attorney resigned to be appointed Deputy Attorney General (Rosenberg was confirmed shortly thereafter);
- **Eastern District of Arkansas** – Tim Griffin was appointed interim United States Attorney when incumbent United States Attorney resigned (Griffin has expressed interest in presidential nomination; nomination is not yet ready);
- **District of Columbia** – Jeff Taylor was appointed interim United States Attorney when incumbent United States Attorney resigned to be appointed Assistant Attorney General for the National Security Division (Taylor has expressed interest in presidential nomination; nomination is not yet ready);
- **District of Nebraska** – Joe Stecher was appointed interim United States Attorney when incumbent United States Attorney resigned to be appointed Chief Justice of Nebraska Supreme Court (Stecher has expressed interest in presidential nomination; nomination is not yet ready);
- **Middle District of Tennessee** – Craig Morford was appointed interim United States Attorney when incumbent United States Attorney resigned (Morford is not a candidate for presidential nomination; nomination is not yet ready); and
- **Western District of Missouri** – Brad Schlozman was appointed interim United States Attorney when incumbent United States Attorney and FAUSA resigned (Schlozman is not a candidate for presidential appointment; nomination is not yet ready).

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

The Attorney General has exercised the authority to appoint interim United States Attorneys a total of nine times since the authority was amended in March 2006. In two of the nine cases, the FAUSA had been serving as acting United States Attorney under the Vacancies Reform Act (VRA), but the VRA's 210-day period expired before a nomination could be made. Thereafter, the Attorney General appointed that same FAUSA to serve as interim United States Attorney. These districts include:

- **District of Puerto Rico** – Rosa Rodriguez-Velez (Rodriguez-Velez has expressed interest in presidential nomination; nomination is not yet ready); and
- **Eastern District of Tennessee** – Russ Dedrick (Dedrick has expressed interest in

presidential nomination; nomination is not yet ready).

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

- **District of Alaska** – Nelson Cohen (Cohen is not a candidate for presidential nomination; nomination is not yet ready).

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

- **Eastern District of Virginia** – Pending nominee Chuck Rosenberg was appointed interim United States Attorney when incumbent United States Attorney resigned to be appointed Deputy Attorney General (Rosenberg was confirmed shortly thereafter);
- **Eastern District of Arkansas** – Tim Griffin was appointed interim United States Attorney when incumbent United States Attorney resigned (Griffin has expressed interest in presidential nomination; nomination is not yet ready);
- **District of Columbia** – Jeff Taylor was appointed interim United States Attorney when incumbent United States Attorney resigned to be appointed Assistant Attorney General for the National Security Division (Taylor has expressed interest in presidential nomination; nomination is not yet ready);
- **District of Nebraska** – Joe Stecher was appointed interim United States Attorney when incumbent United States Attorney resigned to be appointed Chief Justice of Nebraska Supreme Court (Stecher has expressed interest in presidential nomination; nomination is not yet ready);
- **Middle District of Tennessee** – Craig Morford was appointed interim United States Attorney when incumbent United States Attorney resigned (Morford is not a candidate for presidential nomination; nomination is not yet ready); and
- **Western District of Missouri** – Brad Schlozman was appointed interim United States Attorney when incumbent United States Attorney and FAUSA resigned (Schlozman is not a candidate for presidential appointment; nomination is not yet ready).

January 16, 2007

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

The Honorable Dianne Feinstein
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Chairman Leahy and Senator Feinstein:

This is in response to your letter, dated January 9, 2007, regarding the Administration's appointment of United States Attorneys.

United States Attorneys are at the forefront of the Department of Justice's efforts. They are leading the charge to protect America from acts of terrorism; reduce violent crime, including gun crime and gang crime; enforce immigration laws; fight illegal drugs, especially methamphetamine; combat crimes that endanger children and families, like child pornography, obscenity, and human trafficking; and ensure the integrity of the marketplace and of government by prosecuting corporate fraud and public corruption. The Attorney General and the Deputy Attorney General are responsible for evaluating the performance the United States Attorneys and ensuring that United States Attorneys are leading their offices effectively.

United States Attorneys serve at the pleasure of the President. Thus, like other high-ranking Executive Branch officials, they may be removed for, *inter alia*, substandard performance or failure to embrace the Administration's policies. That on occasion some United States Attorneys are removed, or are asked or encouraged to resign, because of substandard performance or failure to embrace the Administration's policies should come as no surprise. Please be assured, however, that United States Attorneys never are removed, or asked or encouraged to resign, in an effort to interfere with or inappropriately influence a particular investigation, criminal prosecution or civil case. United States Attorneys are law enforcement officials and officers of the court who must carry out their responsibilities with strict impartiality.

The Administration is committed to having a Senate-confirmed United States Attorney in all 94 federal districts. When a vacancy in the office of United States Attorney occurs (because of removal, resignation or for any other reason), the Administration first must determine who will serve temporarily as United States Attorney until a new Senate-confirmed United States Attorney is appointed. Because of the importance of continuity in the office, the Administration often looks to the First Assistant United States Attorney or another senior manager in the office to serve as acting or interim United States Attorney. Where neither the First Assistant United States Attorney nor another senior manager in the office is able or willing to serve as acting or interim United States Attorney, or where their service would not be appropriate in the circumstances, the Administration may look to other Department employees to serve as interim United States Attorney. At no time, however, has the Administration sought to avoid the Senate confirmation process by (1) appointing an interim United States Attorney and then (2) refusing to move forward, in consultation with home-State Senators, on the selection, nomination and (hopefully) confirmation of a new United States Attorney. The appointment of United States Attorneys by and with the advice and consent of the Senate unquestionably is the appointment method preferred by the Senate and the one that the Administration follows.

Last year's amendment to the Attorney General's appointment authority was necessary and appropriate. Prior to the amendment, the Attorney General could appoint an interim United States Attorney for only 120 days; thereafter, the district court was authorized to appoint an interim United States Attorney. In cases where a Senate-confirmed United States Attorney could not be appointed within 120 days, the limitation on the Attorney General's appointment authority resulted in numerous, recurring problems. For example, some district courts – recognizing the oddity of members of one branch of government appointing officers of another and the conflicts inherent in the appointment of an interim United States Attorney who would then have many matters before the court – refused to exercise the court appointment authority, thereby requiring the Attorney General to make successive, 120-day appointments. In contrast, other district courts – ignoring the oddity and the inherent conflicts – sought to appoint as interim United States Attorney wholly unacceptable candidates who did not have the appropriate experience or the necessary clearances. Because the Administration is committed to having a Senate-confirmed United States Attorney in all 94 federal districts, changing the law to restore the limitations on the Attorney General's appointment authority is unnecessary.

Enclosed per your request is information regarding the exercise of the Attorney General's authority to appoint interim United States Attorneys. As you will see, the enclosed information establishes conclusively that the Administration is committed to having a Senate-confirmed United States Attorney in all 94 federal districts. Indeed, every single time that a United States Attorney vacancy has arisen, the President either has made a nomination or the Administration is working, in consultation with home-State

Senators, to select candidates for nomination. Such nominations are, of course, subject to Senate confirmation.

Sincerely,

Richard A. Hertling
Acting Assistant Attorney General

From: Scott-Finan, Nancy

Sent: Tuesday, January 16, 2007 4:39 PM

To: Perkins, Paul R.; Miers, Harriet; Kelley, William K.; Goeglein, Tim; Taylor, Sara M.; Jennings, Jeffery S.; Carroll, Carlton F.; Looney, Andrea B.; Brosnahan, Jennifer R.; Oprison, Christopher G.; Sinatra, Nicholas A.; Mamo, Jeanie S.; Lawrimore, Emily A.; McCathran, William W.; Saunders, G. Timothy; Sampson, Kyle; Macklin, Kristi R; Scolinos, Tasia; Goodling, Monica; jan.williams@usdoj.gov; Moschella, William; Battle, Michael (USAEO); nancy.scottfinan Best, David T; Nowacki, John (USAEO); Fahrenkopf, Leslie

Cc: Roebke, Heather M.; Gibbs, Landon M.; Brady, Ryan D.; Isakson, Curtis M.; Webster, Jocelyn S.; Dunne, Dianna L.; Conant, Alex

Subject: RE: U.S. Attorney Nominations

Messages have been left with all home state offices offices and the Delegate for Puerto Rico and Senate Judiciary Chair and Ranking Minority Member for both the US Marshal nominees and the US Attorney nominees.

From: Perkins, Paul R.
Sent: Tuesday, January 16, 2007 4:05 PM
To: Miers, Harriet; Kelley, William K.; Goeglein, Tim; Taylor, Sara M.; Jennings, Jeffery S.; Carroll, Carlton F.; Looney, Andrea B.; Brosnahan, Jennifer R.; Oprison, Christopher G.; Sinatra, Nicholas A.; Mamo, Jeanie S.; Lawrimore, Emily A.; McCathran, William W.; Saunders, G. Timothy; Sampson, Kyle; Macklin, Kristi R; Scolinos, Tasia; Goodling, Monica; jan.williams@usdoj.gov; Moschella, William; Battle, Michael (USAEO); nancy.scottfinar ; Best, David T; Nowacki, John (USAEO); Fahrenkopf, Leslie
Cc: Roebke, Heather M.; Gibbs, Landon M.; Brady, Ryan D.; Isakson, Curtis M.; Webster, Jocelyn S.; Dunne, Dianna L.; Conant, Alex
Subject: U.S. Attorney Nominations

Note: This is a preliminary internal notification, and it is not to be made public.

The following nominations is expected to be delivered to the U.S. Senate this afternoon:

John Wood, of Missouri, to be United States Attorney for the Western District of Missouri, vice Todd Peterson Graves.

REDACTED

Per our agreed upon process, prior to the nomination, EOUSA will inform: 1) the acting U.S. Attorney in the district, and 2) the candidate.

Also, per our agreed upon process, prior to the nomination, DOJ Legislative Affairs will inform: 1) the home-state Senators, and 2) Senators Specter and Leahy.

Please reply to this e-mail to confirm that these steps have been completed.

Thank you,
Paul Perkins
White House Counsel's Office
(202) 456

-

From: Nowacki, John (USAEO)

Sent: Tuesday, January 16, 2007 4:39 PM

To: Perkins, Paul R.; Miers, Harriet; Kelley, William K.; Goeglein, Tim; Taylor, Sara M.; Jennings, Jeffery S.; Carroll, Carlton F.; Looney, Andrea B.; Brosnahan, Jennifer R.; Oprison, Christopher G.; Sinatra, Nicholas A.; Mamo, Jeanie S.; Lawrimore, Emily A.; McCathran, William W.; Saunders, G. Timothy; Sampson, Kyle; Macklin, Kristi R; Scolinos, Tasia; Goodling, Monica; jan.williams@usdoj.gov; Moschella, William; Battle, Michael (USAEO); nancy.scottfinan Best, David T; Fahrenkopf, Leslie

Cc: Roebke, Heather M.; Gibbs, Landon M.; Brady, Ryan D.; Isakson, Curtis M.; Webster, Jocelyn S.; Dunne, Dianna L.; Conant, Alex

Subject: RE: U.S. Attorney Nominations

EOUSA has completed notifications.

From: Perkins, Paul R.
Sent: Tuesday, January 16, 2007 4:05 PM
To: Miers, Harriet; Kelley, William K.; Goeglein, Tim; Taylor, Sara M.; Jennings, Jeffery S.; Carroll, Carlton F.; Looney, Andrea B.; Brosnahan, Jennifer R.; Oprison, Christopher G.; Sinatra, Nicholas A.; Mamo, Jeanie S.; Lawrimore, Emily A.; McCathran, William W.; Saunders, G. Timothy; Sampson, Kyle; Macklin, Kristi R; Scolinos, Tasia; Goodling, Monica; jan.williams@usdoj.gov; Moschella, William; Battle, Michael (USAEO); nancy.scottfinan Best, David T; Nowacki, John (USAEO); Fahrenkopf, Leslie
Cc: Roebke, Heather M.; Gibbs, Landon M.; Brady, Ryan D.; Isakson, Curtis M.; Webster, Jocelyn S.; Dunne, Dianna L.; Conant, Alex
Subject: U.S. Attorney Nominations

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Please reply to this e-mail to confirm that these steps have been completed.

Thank you,
Paul Perkins
White House Counsel's Office
(202) 456

From: Perkins, Paul R.

Sent: Tuesday, January 16, 2007 5:27 PM

To: Miers, Harriet; Kelley, William K.; Goeglein, Tim; Taylor, Sara M.; Jennings, Jeffery S.; Looney, Andrea B.; Brosnahan, Jennifer R.; Smith, John M.; Lee, Kenneth K.; McIntosh, Brent J.; Oprison, Christopher G.; Eckert, Paul R.; Fahrenkopf, Leslie; Stanton, Cheryl M.; Scudder, Michael Y.; Sinatra, Nicholas A.; Mamo, Jeanie S.; Lawrimore, Emily A.; McCathran, William W.; Saunders, G. Timothy; Lipscomb, Kimberlyn C.; Lawrimore, Emily A.; kyle.sampson@usdoj.gov; kristi.r.macklin@usdoj.gov; tasia.scolinos Monica.Goodling@usdoj.gov; jan.williams@usdoj.gov; william.moschella@usdoj.gov; michael.battle@usdoj.gov; nancy.scottfinan David.T.Best John.Nowacki lisa.dickinson2 robert.trono

Cc: Roebke, Heather M.; Gibbs, Landon M.; Paola, Lindsey N.; Isakson, Curtis M.; Brady, Ryan D.; Webster, Jocelyn S.; Dunne, Dianna L.; Conant, Alex; David.T.Best

Subject: Withdrawal and Nominations

The Smith (CA 9) withdrawal and nomination has been delivered to the U.S. Senate.

Also, the nominations for Wood (USA, WD MO), REDACTED
have been delivered to the U.S. Senate.

Thank you,
Paul Perkins

From: Sampson, Kyle [Kyle.Sampson@usdoj.gov]
Sent: Tuesday, January 16, 2007 5:30 PM
To: Kelley, William K.
Subject: FW: feinstein
Importance: High

i'm updating the letter now to reflect the two usa appts today
lam has resigned
can we send our response? the stronger version? please advise.

From: Roehrkasse, Brian
Sent: Tuesday, January 16, 2007 5:28 PM
To: Elston, Michael (ODAG); Sampson, Kyle; Scolinos, Tasia; Goodling, Monica
Subject: FW: feinstein

This is generating a lot of calls.

From: Johnson, Kevin
Sent: Tuesday, January 16, 2007 5:12 PM
To: Roehrkasse, Brian
Subject: feinstein

FOR IMMEDIATE RELEASE:
Tuesday, January 16, 2007

Contact: Scott Gerber, 202/224-
http://feinstein.senate.gov

Senator Feinstein Concerned over Resignations of at Least Seven U.S. Attorneys Across the Country

- Senator Feinstein to question Attorney General Gonzalez at Judiciary Committee Hearing later this week -

Washington, DC – *In a speech on the Senate Floor, U.S. Senator Dianne Feinstein (D-Calif.) today expressed concern about the fact that a number of U.S. Attorneys have been asked by the Department of Justice to resign their positions prior to the end of their terms and without cause.*

In a little noticed provision included in the Patriot Act reauthorization last year, the Administration's authority to appoint interim U.S. Attorneys was greatly expanded. The law was changed so that if a vacancy arises the Attorney General may appoint a replacement for an indefinite period of time – thus completely avoiding the Senate confirmation process

Senators Feinstein, Patrick Leahy (D-Vt.), and Mark Pryor (D-Ark.) last week

introduced the Preserving United States Attorney Independence Act, which would prevent further circumvention of the Senate's constitutional prerogative to confirm U.S. Attorneys and restore appointment authority to the appropriate District Courts.

The full text of Senator Feinstein's floor statement follows.

Recent newspaper articles have detailed the circumstances surrounding the departure of several U.S. Attorneys across the country:

- **Politicizing Prosecutors:** "United States attorneys are so powerful that their impartiality must be beyond question. One way to ensure that is to require them to submit to questions from the Senate, and face a confirmation vote." *New York Times* – 1/15/07. www.nytimes.com/2007/01/15/opinion/15mon2.html?_r=1&oref=slogin

- **U.S. Attorney Vacancies Spark Concerns:** "As the Bush administration enters its last two years, a number of U.S. attorneys are departing, causing concern that some high-profile prosecutions may suffer. As many as seven U.S. attorneys. . . are leaving or being pushed out." *Wall Street Journal* – 1/16/07. http://online.wsj.com/google_login.html?url=http%3A%2F%2Fonline.wsj.com%2Farticle%2FSB116891552371177295.html%3Fmod%3Dgooglenews_wsj

- **Lam is Asked to Step Down:** "The Bush administration has quietly asked San Diego U.S. Attorney Carol Lam, best known for her high-profile prosecutions of politicians and corporate executives, to resign her post, a law enforcement official said." *San Diego Union Tribune* – 1/12/07. http://weblog.signonsandiego.com/uniontrib/20070112/news_1n12lam.html

- **Nevada U.S. Attorney Given Walking Papers:** "The Bush administration has forced Daniel Bogden out of his position as U.S. attorney for the District of Nevada, Nevada's two senators said Sunday." *Las Vegas Review Journal* – 1/16/07. www.reviewjournal.com/lvrj_home/2007/Jan-15-Mon-2007/news/11980257.html

The following is a transcript of Senator Feinstein's floor speech:

"Mr. President, I have introduced an amendment on this bill which has to do with the appointment of U.S. Attorneys. This is also the subject of the Judiciary Committee's jurisdiction, and since the Attorney General himself will be before that committee on Thursday, and I will be asking him some questions, I speak today in morning business on what I know so much about this situation.

Recently, it came to my attention that the Department of Justice has asked several U.S. Attorneys from around the country to resign their positions -- some by the end of this month -- prior to the end of their terms not based on any allegation of misconduct. In other words, they are forced resignations.

I have also heard that the Attorney General plans to appoint interim replacements and potentially avoid Senate confirmation by leaving an interim U.S. Attorney in place for the remainder of the Bush administration.

How does this happen? The Department sought and essentially was given new authority under a little known provision in the PATRIOT Act Reauthorization to appoint interim appointments who are not subject to Senate confirmation and who could remain in place for the remainder of the Bush administration.

To date, I know of at least seven U.S. Attorneys forced to resign without cause, without any allegations of misconduct. These include two from my home State, San Diego and San Francisco, as well as U.S. Attorneys from New Mexico, Nevada, Arkansas, Texas, Washington and Arizona.

In California, press reports indicate that Carol Lam, U.S. Attorney for San Diego, has been asked to leave her position, as has Kevin Ryan of San Francisco. The public response has been shock. Peter Nunez, who served as the San Diego U.S. Attorney from 1982 to 1988, has said, 'This is like nothing I've ever seen in my 35-plus years.'

He went on to say that while the President has the authority to fire a U.S. Attorney for any reason, it is 'extremely rare' unless there is an allegation of misconduct.

To my knowledge, there are no allegations of misconduct having to do with Carol Lam. She is a distinguished former judge. Rather, the only explanation I have seen are concerns that were expressed about prioritizing public corruption cases over smuggling and gun cases.

The most well-known case involves a U.S. Attorney in Arkansas. Senators Pryor and Lincoln have raised significant concerns about how "Bud" Cummins was asked to resign and in his place the administration appointed their top lawyer in charge of political opposition research, Tim Griffin. I have been told Mr. Griffin is quite young, 37, and Senators Pryor and Lincoln have expressed concerns about press reports that have indicated Mr. Griffin has been a political operative for the RNC.

While the administration has confirmed that 5 to 10 U.S. Attorneys have been asked to leave, I have not been given specific details about why these individuals were asked to leave. Around the country, though, U.S. Attorneys are bringing many of the most important and complex cases being prosecuted. They are responsible for taking the

lead on public corruption cases and many of the antiterrorist efforts in the country. As a matter of fact, we just had the head of the FBI, Bob Mueller, come before the Judiciary Committee at our oversight hearing and tell us how they have dropped the priority of violent crime prosecution and, instead, are taking up public corruption cases; ergo, it only follows that the U.S. Attorneys would be prosecuting public corruption cases.

As a matter of fact, the rumor has it -- and this is only rumor -- that U.S. Attorney Lam, who carried out the prosecution of the Duke Cunningham case, has other cases pending whereby, rumor has it, Members of Congress have been subpoenaed. I have also been told that this interrupts the flow of the prosecution of these cases, to have the present U.S. attorney be forced to resign by the end of this month.

Now, U.S. Attorneys play a vital role in combating traditional crimes such as narcotics trafficking, bank robbery, guns, violence, environmental crimes, civil rights, and fraud, as well as taking the lead on prosecuting computer hacking, Internet fraud, and intellectual property theft, accounting and securities fraud, and computer chip theft.

How did all of this happen? This is an interesting story. Apparently, when Congress reauthorized the PATRIOT Act last year, a provision was included that modified the statute that determines how long interim appointments are made. The PATRIOT Act Reauthorization changed the law to allow interim appointments to serve indefinitely rather than for a limited 120 days. Prior to the PATRIOT Act Reauthorization and the 1986 law, when a vacancy arose, the court nominated an interim U.S. Attorney until the Senate confirmed a Presidential nominee. The PATRIOT Act Reauthorization in 2006 removed the 120-day limit on that appointment, so now the Attorney General can nominate someone who goes in without any confirmation hearing by this Senate and serve as U.S. Attorney for the remainder of the President's term in office. This is a way, simply stated, of avoiding a Senate confirmation of a U.S. Attorney.

The rationale to give the authority to the court has been that since district court judges are also subject to Senate confirmation and are not political positions, there is greater likelihood that their choice of who should serve as an interim U.S. Attorney would be chosen based on merit and not manipulated for political reasons. To me, this makes good sense.

Finally, by having the district court make the appointments, and not the Attorney General, the process provides an incentive for the administration to move quickly to appoint a replacement and to work in cooperation with the Senate to get the best qualified candidate confirmed.

I strongly believe we should return this power to district courts to appoint interim U.S. Attorneys. That is why last week, Senator Leahy, the incoming Chairman of the

Judiciary Committee, the Senator from Arkansas, Senator Pryor, and I filed a bill that would do just that. Our bill simply restores the statute to what it once was and gives the authority to appoint interim U.S. Attorneys back to the district court where the vacancy arises.

I could press this issue on this bill. However, I do not want to do so because I have been saying I want to keep this bill as clean as possible, that it is restricted to the items that are the purpose of the bill, not elections or any other such things. I ought to stick to my own statement.

Clearly, the President has the authority to choose who he wants working in his administration and to choose who should replace an individual when there is a vacancy. But the U.S. Attorneys' job is too important for there to be unnecessary disruptions, or, worse, any appearance of undue influence. At a time when we are talking about toughening the consequences for public corruption, we should change the law to ensure that our top prosecutors who are taking on these cases are free from interference or the appearance of impropriety. This is an important change to the law. Again, I will question the Attorney General Thursday about it when he is before the Judiciary Committee for an oversight hearing.

I am particularly concerned because of the inference in all of this that is drawn to manipulation in the lineup of cases to be prosecuted by a U.S. Attorney. In the San Diego case, at the very least, we have people from the FBI indicating that Carol Lam has not only been a straight shooter but a very good prosecutor. Therefore, it is surprising to me to see that she would be, in effect, forced out, without cause. This would go for any other U.S. Attorney among the seven who are on that list.

We have something we need to look into, that we need to exercise our oversight or

From: Kelley, William K.
Sent: Tuesday, January 16, 2007 7:39 PM
To: Sampson, Kyle
Subject: RE:

Gulp.

From: Sampson, Kyle [mailto:Kyle.Sampson@usdoj.gov]
Sent: Tuesday, January 16, 2007 7:35 PM
To: Kelley, William K.
Subject: RE:

basically

From: Kelley, William K. [mailto:William_K._Kelley@who.eop.gov]
Sent: Tuesday, January 16, 2007 6:57 PM
To: Sampson, Kyle
Subject: RE:

And she's not backing off? What does she say? "I don't believe you, Mr. Attorney General?"

From: Sampson, Kyle [mailto:Kyle.Sampson@usdoj.gov]
Sent: Tuesday, January 16, 2007 6:57 PM
To: Kelley, William K.
Subject: RE:

Already done. And AG did sincerely and credibly deliver. And all I can say is that she is dumb as a post.

From: Kelley, William K. [mailto:William_K._Kelley@who.eop.gov]
Sent: Tuesday, January 16, 2007 6:53 PM
To: Sampson, Kyle
Subject: RE:

I think the AG should talk to Senator Feinstein privately and clear the air. I can't believe that she wouldn't accept his explanation, which not only would be sincerely and credibly delivered, but would also have the virtue of being nothing but the truth.

From: Sampson, Kyle [mailto:Kyle.Sampson@usdoj.gov]
Sent: Tuesday, January 16, 2007 6:42 PM
To: Kelley, William K.
Subject: RE:

thx

From: Kelley, William K. [mailto:William_K._Kelley@who.eop.gov]
Sent: Tuesday, January 16, 2007 6:41 PM
To: Sampson, Kyle
Subject:

The view here is that it is risky, and maybe unprecedented, for us to comment on a personnel matter in a negative way. It is true, and frustrating, that Sen. Feinstein is attacking us unfairly, but the US Attorneys themselves haven't fired any shots. Until they do, Harriet feels very strongly that we shouldn't respond on the merits, even though we are convinced that they have disloyally stirred up the Senators.

We are all fine with saying what you want to say about filling all 94 slots.

Thanks.

Sara Taylor

From: Sara Taylor
Sent: 1/17/2007 7:35:58 PM
To: 'Sampson, Kyle' Kyle.Sampson@usdoj.gov;
Cc:
Bcc:
Subject: RE: USA appts -- Pryor issue

Thx.

From: Sampson, Kyle [mailto:Kyle.Sampson@usdoj.gov]
Sent: Wednesday, January 17, 2007 5:47 PM
To: Sara Taylor
Subject: USA appts -- Pryor issue
Importance: High

<<LeahyFeinsteinResponsetoJan.9.07 letterReApptsofUSAs.pdf>>

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

Sampson, Kyle

From: Sampson, Kyle
nt: 1/17/2007 5:47:17 PM
: Sara Taylor /O=REPUBLICAN NATIONAL COMMITTEE/OU=RNC/CN=RECIPIENTS/CN=SMTAYLOR;
:
Bcc:
Subject: USA appts -- Pryor issue
Attachments: LeahyFeinsteinResponsetoJan.9.07 letterReApptsofUSAs.pdf;

<<LeahyFeinsteinResponsetoJan.9.07 letterReApptsofUSAs.pdf>>

Kyle Sampson
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kyle.sampson@usdoj.gov

U.S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

January 16, 2007

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

The Honorable Dianne Feinstein
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Chairman Leahy and Senator Feinstein:

This is in response to your letter, dated January 9, 2007, regarding the Administration's appointment of United States Attorneys.

United States Attorneys are at the forefront of the Department of Justice's efforts. They are leading the charge to protect America from acts of terrorism; reduce violent crime, including gun crime and gang crime; enforce immigration laws; fight illegal drugs, especially methamphetamine; combat crimes that endanger children and families like child pornography, obscenity, and human trafficking; and ensure the integrity of the marketplace and of government by prosecuting corporate fraud and public corruption. The Attorney General and the Deputy Attorney General are responsible for evaluating the performance the United States Attorneys and ensuring that United States Attorneys are leading their offices effectively.

United States Attorneys serve at the pleasure of the President. Thus, like other high-ranking Executive Branch officials, they may be removed for any reason or no reason. That on occasion in an organization as large as the Justice Department some United States Attorneys are removed, or are asked or encouraged to resign, should come as no surprise. Discussions with United States Attorneys regarding their continued service generally are non-public, out of respect for those United States Attorneys; indeed, a public debate about the United States Attorneys that may have been asked or encouraged to resign only disserves their interests. In any event, please be assured that United States Attorneys never are removed, or asked or encouraged to resign, in an effort to retaliate against them or interfere with or inappropriately influence a particular investigation, criminal prosecution or civil case. United States Attorneys are law

enforcement officials and officers of the court who must carry out their responsibilities with strict impartiality.

The Administration is committed to having a Senate-confirmed United States Attorney in all 94 federal districts. When a vacancy in the office of United States Attorney occurs (because of removal, resignation or for any other reason), the Administration first must determine who will serve temporarily as United States Attorney until a new Senate-confirmed United States Attorney is appointed. Because of the importance of continuity in the office, the Administration often looks to the First Assistant United States Attorney or another senior manager in the office to serve as acting or interim United States Attorney. Where neither the First Assistant United States Attorney nor another senior manager in the office is able or willing to serve as acting or interim United States Attorney, or where their service would not be appropriate in the circumstances, the Administration may look to other Department employees to serve as interim United States Attorney. At no time, however, has the Administration sought to avoid the Senate confirmation process by (1) appointing an interim United States Attorney and then (2) refusing to move forward, in consultation with home-State Senators, on the selection, nomination and (hopefully) confirmation of a new United States Attorney. The appointment of United States Attorneys by and with the advice and consent of the Senate unquestionably is the appointment method preferred by the Senate and the one that the Administration follows.

Last year's amendment to the Attorney General's appointment authority was necessary and appropriate. Prior to the amendment, the Attorney General could appoint an interim United States Attorney for only 120 days; thereafter, the district court was authorized to appoint an interim United States Attorney. In cases where a Senate-confirmed United States Attorney could not be appointed within 120 days, the limitation on the Attorney General's appointment authority resulted in numerous, recurring problems. For example, some district courts – recognizing the oddity of members of one branch of government appointing officers of another and the conflicts inherent in the appointment of an interim United States Attorney who would then have many matters before the court – refused to exercise the court appointment authority, thereby requiring the Attorney General to make successive, 120-day appointments. In contrast, other district courts – ignoring the oddity and the inherent conflicts – sought to appoint as interim United States Attorney wholly unacceptable candidates who did not have the appropriate experience or the necessary clearances. Because the Administration is committed to having a Senate-confirmed United States Attorney in all 94 federal districts, changing the law to restore the limitations on the Attorney General's appointment authority is unnecessary.

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

every single time that a United States Attorney vacancy has arisen, the President either has made a nomination or the Administration is working, in consultation with home-State Senators, to select candidates for nomination. Such nominations are, of course, subject to Senate confirmation.

Sincerely,

Richard A. Hertling
Acting Assistant Attorney General

Enclosure

FACT SHEET: UNITED STATES ATTORNEY APPOINTMENTS

NOMINATIONS AFTER AMENDMENT TO ATTORNEY GENERAL'S APPOINTMENT AUTHORITY

Since March 9, 2006, when the Congress amended the Attorney General's authority to appoint interim United States Attorneys, the President has nominated 15 individuals to serve as United States Attorney. The 15 nominations are:

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

All but Phillip Green, John Wood, and Rosa Rodriguez-Velez have been confirmed by the Senate.

VACANCIES AFTER AMENDMENT TO ATTORNEY GENERAL'S APPOINTMENT AUTHORITY

Since March 9, 2006, there have been 11 new U.S. Attorney vacancies that have arisen. For five of the 11 vacancies, the First Assistant United States Attorney (FAUSA) in the district was selected to lead the office in an acting capacity under the Vacancies Reform Act. *see* 5 U.S.C. § 3345(a)(1) (first assistant may serve in acting capacity for 210 days unless a nomination is made). Those districts are:

- **Central District of California** – FAUSA George Cardona is acting United States Attorney (Cardona is not a candidate for presidential nomination; a nomination is not yet ready);
- **Southern District of Illinois** – FAUSA Randy Massey is acting United States Attorney (Massey is not a candidate for presidential nomination; a nomination was made last Congress, but confirmation did not occur);

- **Northern District of Iowa** – FAUSA Judi Whetstine is acting United States Attorney (Whetstine is not a candidate for nomination and is retiring this month, necessitating an Attorney General appointment; nomination is not yet ready);
- **Eastern District of North Carolina** – FAUSA George Holding served as acting United States Attorney (Holding was nominated and confirmed);
- **Northern District of West Virginia** – FAUSA Rita Valdrini served as acting United States Attorney (Valdrini was not a candidate for presidential nomination; another individual was nominated and confirmed).

For six of the 11 vacancies, the Department selected another Department employee to serve as interim United States Attorney until a nomination could be submitted to the Senate, *see* 28 U.S.C. § 546(a) ("Attorney General may appoint a United States attorney for the district in which the office of United States attorney is vacant"). Those districts are:

- **Eastern District of Virginia** – Pending nominee Chuck Rosenberg was appointed interim United States Attorney when incumbent United States Attorney resigned to be appointed Deputy Attorney General (Rosenberg was confirmed shortly thereafter);
- **Eastern District of Arkansas** – Tim Griffin was appointed interim United States Attorney when incumbent United States Attorney resigned (Griffin has expressed interest in presidential nomination; nomination is not yet ready);
- **District of Columbia** – Jeff Taylor was appointed interim United States Attorney when incumbent United States Attorney resigned to be appointed Assistant Attorney General for the National Security Division (Taylor has expressed interest in presidential nomination; nomination is not yet ready);
- **District of Nebraska** – Joe Stecher was appointed interim United States Attorney when incumbent United States Attorney resigned to be appointed Chief Justice of Nebraska Supreme Court (Stecher has expressed interest in presidential nomination; nomination is not yet ready);
- **Middle District of Tennessee** – Craig Morford was appointed interim United States Attorney when incumbent United States Attorney resigned (Morford has expressed interest in presidential nomination; nomination is not yet ready); and
- **Western District of Missouri** – Brad Schlozman was appointed interim United States Attorney when incumbent United States Attorney and FAUSA resigned (Schlozman expressed interest in presidential appointment; someone else was nominated).

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

The Attorney General has exercised the authority to appoint interim United States Attorneys a total of nine times since the authority was amended in March 2006. In two of the nine cases, the FAUSA had been serving as acting United States Attorney under the Vacancies Reform Act (VRA), but the VRA's 210-day period expired before a nomination could be made. Thereafter, the Attorney General appointed that same

FAUSA to serve as interim United States Attorney. These districts include:

- **District of Puerto Rico** – Rosa Rodriguez-Velez (Rodriguez-Velez has been nominated); and
- **Eastern District of Tennessee** – Russ Dedrick (Dedrick has expressed interest in presidential nomination; nomination is not yet ready).

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

- **District of Alaska** – Nelson Cohen (Cohen is not a candidate for presidential nomination; nomination is not yet ready).

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

- **Eastern District of Virginia** – Pending nominee Chuck Rosenberg was appointed interim United States Attorney when incumbent United States Attorney resigned to be appointed Deputy Attorney General (Rosenberg was confirmed shortly thereafter);
- **Eastern District of Arkansas** – Tim Griffin was appointed interim United States Attorney when incumbent United States Attorney resigned (Griffin has expressed interest in presidential nomination; nomination is not yet ready);
- **District of Columbia** – Jeff Taylor was appointed interim United States Attorney when incumbent United States Attorney resigned to be appointed Assistant Attorney General for the National Security Division (Taylor has expressed interest in presidential nomination; nomination is not yet ready);
- **District of Nebraska** – Joe Stecher was appointed interim United States Attorney when incumbent United States Attorney resigned to be appointed Chief Justice of Nebraska Supreme Court (Stecher has expressed interest in presidential nomination; nomination is not yet ready);
- **Middle District of Tennessee** – Craig Morford was appointed interim United States Attorney when incumbent United States Attorney resigned (Morford has expressed interest in presidential nomination; nomination is not yet ready); and
- **Western District of Missouri** – Brad Schlozman was appointed interim United States Attorney when incumbent United States Attorney and FAUSA resigned (Schlozman expressed interest in presidential appointment; someone else was nominated).

From: Goodling, Monica [Monica.Goodling@usdoj.gov]
Sent: Thursday, January 18, 2007 11:16 AM
To: Oprison, Christopher G.
Subject: RE: Tim

No, but Pryor called the AG again yesterday.

From: Oprison, Christopher G. [mailto:Christopher_G._Oprison@who.eop.gov]
Sent: Thursday, January 18, 2007 11:16 AM
To: Goodling, Monica
Subject: Tim

Monica - did Bob Russell or anyone else from Pryor's office contact you to discuss Bud's departure?

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

From: Sampson, Kyle [Kyle.Sampson@usdoj.gov]
Sent: Thursday, January 25, 2007 9:54 AM
To: Miers, Harriet
Subject: RE: FYI

Hertling and I are briefing Schumer staff tomorrow. GOPers on the Committee are standing firm for the Administration -- Sessions is Ranking on the Subcommittee and is all briefed up. Our wobblies (i.e., Specter) are with us.

-----Original Message-----
From: Miers, Harriet [mailto:Harriet_Miers@who.eop.gov]
Sent: Thursday, January 25, 2007 9:52 AM
To: Sampson, Kyle
Subject: FW: FYI

Re conversation I just had with the AG.

-----Original Message-----
From: Oprison, Christopher G.
Sent: Thursday, January 25, 2007 9:43 AM
To: Miers, Harriet; Kelley, William K.
Cc: Brosnahan, Jennifer R.
Subject: FW: FYI

fyi

-----Original Message-----
From: Tim Griffin
Sent: Thursday, January 25, 2007 9:42 AM
To: Oprison, Christopher G.
Subject: FYI

January 25, 2007

NOTICE OF FULL COMMITTEE HEARING

The Senate Committee on the Judiciary has scheduled a hearing on "Preserving Prosecutorial

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

for Wednesday, February 7, 2007 at 9:30 a.m. in Room 226 of the Dirksen Senate Office Building.

Senator Schumer will chair the hearing.

By order of the Chairman

From: Sampson, Kyle [mailto:Kyle.Sampson@usdoj.gov]
Sent: Thursday, January 25, 2007 10:51 AM
To: Kelley, William K.; staylor@gwb43.com; Taylor, Sara M.
Subject: FOR YOUR REVIEW -- DOJ response to Pryor letter re Griffin
Importance: High

Bill/Sara, the attached .pdf is an outrageous letter the AG rec'd from Sen. Pryor re Griffin; the attached Word doc is our proposed response. Wanted the two of you to have the benefit of reviewing before we send our response later today. Let me know if you have any concerns/comments. Thx!

<<Senator Mark Pryor Ltr. re Tim Griffin.pdf>> <<Pryor Letter re Griffin.doc>>

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

MARK PRYOR
ARKANSAS

COMMITTEES:
COMMERCE, SCIENCE AND TRANSPORTATION

HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS

SELECT COMMITTEE ON ETHICS

SMALL BUSINESS AND ENTREPRENEURSHIP

United States Senate

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257 DIRKSEN SENATE OFFICE BUILDING
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500 PRESIDENT CLINTON AVENUE
SUITE 401
LITTLE ROCK, AR 72201
(501) 324-6336
TOLL FREE: (877) 259-9602
http://pryor.senate.gov

January 11, 2007

The Honorable Alberto Gonzales
U.S. Department of Justice
950 Pennsylvania Ave, NW
Washington, DC 20530

Dear Attorney General Gonzales:

I am writing this letter to express my displeasure regarding your appointment of Tim Griffin as Interim U.S. Attorney for the Eastern District of Arkansas. As you will recall, we discussed this matter in two telephone calls (Wednesday December 13, 2006, and December 15, 2006) in which I informed you of my reservations.

First, it is clear (from events that occurred in July and August 2006), that there was an attempt to force then U.S. Attorney Cummins to resign. At that time, my office expressed my concern to the White House Counsel regarding this matter, and Mr. Cummins was able to remain in his position until the end of December. While I am pleased that his service was extended, I am left with the conclusion that the purpose for the dismissal of Mr. Cummins was to appoint Mr. Griffin.

Second, I am astonished that the reason given by your office for the interim appointment is that the First Assistant U.S. Attorney is on maternity leave and therefore would not be able to perform the responsibilities of the appointment. This reason was given to my Chief of Staff, to the news media, and to me by your liaison in a meeting this week. This concerns me on several levels, but most importantly it uses pregnancy and motherhood as conditions that deny an appointment. While this may not be actionable in a public employment setting, it clearly would be in a private employment setting. The U.S. Department of Justice should never discriminate against women in this manner.

Finally, and most importantly, the appointment undermines the Senate confirmation process. The authority granted to the Attorney General to make an interim appointment for an indefinite time was given pursuant to the Patriot Act. I believe that in using this provision, the Attorney General should articulate a national security or law enforcement need that necessitates such an appointment. You have failed to do so in this case. In fact, as cited above, the reason articulated is at worst grossly deficient, and at best, a poor pretense.

For me personally this last point is most troublesome. When the Patriot Act was up for reauthorization, you called me and discussed the importance of its passage. I told you that while there were items in the Act that concerned me, I trusted that the spirit of the law would be upheld. It has also come to my attention that there may have been other similar appointments made under this provision of the Patriot Act. Therefore, I believe that the spirit of the law regarding this interim appointment (and perhaps others) has been violated. As such, I am pushing for a legislative change. I have signed on to a Bill that would strike the previous amended language and restore appointment authority to the original 120 days.

I am quite sure that you may not agree with some or all of my conclusions, therefore, I await your response and I appreciate your cooperation in this matter.

Sincerely,

Mark Pryor

Mark Pryor

Sent via facsimile

January 24, 2007

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

Dear Senator Pryor:

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

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

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

The Eastern District of Arkansas is not different. As the Attorney General stated to you again last week, in a telephone conversation on January 17, 2007, the Administration is committed to having a Senate-confirmed United States Attorney in that

district too. That is why the Administration has consulted with you and Senator Lincoln for several months now regarding possible candidates for nomination, including Mr. Griffin. That is why the Attorney General has sought your views as to whether, if nominated, you would support Mr. Griffin's confirmation. The Administration awaits your decision.

If you decide that you would support Mr. Griffin's confirmation, then the President's senior advisors (after taking into account Senator Lincoln's views) likely would recommend that the President nominate him. With your support, Mr. Griffin almost certainly would be confirmed and appointed. We are convinced that, given his strong record as a federal prosecutor and as a military prosecutor, Mr. Griffin would serve ably as a Senate-confirmed United States Attorney. If, in contrast, you decide that for whatever reason you will not support Mr. Griffin's confirmation, then the President's senior advisors (after taking into account Senator Lincoln's views) will give your views substantial weight in determining what recommendation to make to the President, as we recognize it would be unusual for any nominee for United States Attorney to be confirmed over the objection of a home-State Senator.

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

Enclosed is information regarding the exercise of the Attorney General's authority to appoint interim United States Attorneys. As you will see, the enclosed information establishes conclusively that the Administration is committed to having a Senate-confirmed United States Attorney in all 94 federal districts. Indeed, every single time that a United States Attorney vacancy has arisen, the President either has made a nomination or – as with the Eastern District of Arkansas – the Administration is working,

in consultation with home-State Senators, to select a candidate for nomination. Such nominations are, of course, subject to Senate confirmation.

Sincerely,

Richard A. Hertling
Acting Assistant Attorney General

cc: The Honorable Blanche L. Lincoln

From: Sara Taylor [st@gwb43.com]
Sent: Thursday, January 25, 2007 10:59 AM
To: Kyle.sampson@usdoj.gov; Kelley, William K.; Taylor, Sara M.
Subject: Re: FOR YOUR REVIEW -- DOJ response to Pryor letter re Griffin

I'm concerned we imply that we'll pull down Griffin's nomination should Pryor object.

-----Original Message-----
From: Sampson, Kyle <Kyle.Sampson@usdoj.gov>
To: William_K._Kelley@who.eop.gov <William_K._Kelley@who.eop.gov>; Sara Taylor; Sara_M._Taylor@who.eop.gov <Sara_M._Taylor@who.eop.gov>
Sent: Thu Jan 25 10:50:31 2007
Subject: FOR YOUR REVIEW -- DOJ response to Pryor letter re Griffin

Bill/Sara, the attached .pdf is an outrageous letter the AG rec'd from Sen. Pryor re Griffin; the attached Word doc is our proposed response. Wanted the two of you to have the benefit of reviewing before we send our response later today. Let me know if you have any concerns/comments. Thx!

<<Senator Mark Pryor Ltr. re Tim Griffin.pdf>> <<Pryor Letter re Griffin.doc>>

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

From: Kelley, William K.
Sent: 1/25/2007 10:57:56 AM
To: Sampson, Kyle Kyle.Sampson@usdoj.gov; Sara Taylor /O=REPUBLICAN NATIONAL COMMITTEE/OU=RNC/CN=RECIPIENTS/CN=SMTAYLOR; Taylor, Sara M. Sara_M._Taylor@who.eop.gov;
Cc:
Bcc:
Subject: RE: FOR YOUR REVIEW -- DOJ response to Pryor letter re Griffin

I think that more of a response on the merits is warranted regarding the allegations of pregnancy discrimination. The draft letter says that that Griffin has been chosen because of his qualifications, but it doesn't take issue (or address) Senator Pryor's claim that he was told the 1st Asst was unavailable due to maternity leave and that that constitutes pregnancy/sex discrmination.

From: Sampson, Kyle [mailto:Kyle.Sampson@usdoj.gov]
Sent: Thursday, January 25, 2007 10:51 AM
To: Kelley, William K.; staylor@gwb43.com; Taylor, Sara M.
Subject: FOR YOUR REVIEW -- DOJ response to Pryor letter re Griffin
Importance: High

Bill/Sara, the attached .pdf is an outrageous letter the AG rec'd from Sen. Pryor re Griffin; the attached Word doc is our proposed response. Wanted the two of you to have the benefit of reviewing before we send our response later today. Let me know if you have any concerns/comments. Thx!

<<Senator Mark Pryor Ltr. re Tim Griffin.pdf>> <<Pryor Letter re Griffin.doc>>

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

From: Goodling, Monica [Monica.Goodling@usdoj.gov]
Sent: Friday, January 26, 2007 12:04 PM
To: Oprison, Christopher G.
Subject: RE: D NM US Attorney

Yes

From: Oprison, Christopher G. [mailto:Christopher_G._Oprison@who.eop.gov]
Sent: Friday, January 26, 2007 12:01 PM
To: Goodling, Monica
Subject: D NM US Attorney

Monica - if we have not already done so, can we go ahead and send to Jim Bibb the SF 86 for him to start filling out? That way, assuming we move forward, we will have that form completed and ready to send him into BI.

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

From: Goodling, Monica [Monica.Goodling@usdoj.gov]
Sent: Friday, January 26, 2007 12:11 PM
To: Oprison, Christopher G.
Subject: Bibb Resume

Importance: High

Attachments: bibb resume.pdf

bibb
ume.pdf (12 k

I think you should send it on. We are not going to need to speak with them until we have an interim/acting announcement in mid-February.
Attached for your reference. Thanks.

From: Sampson, Kyle [Kyle.Sampson@usdoj.gov]
Sent: Monday, January 29, 2007 9:42 AM
To: Morgenstern, David (Alexander); Kelley, William K.
Subject: RE: Thursday meeting

David, calling you now.

From: Morgenstern, David (Alexander)
Sent: Monday, January 29, 2007 9:40 AM
To: Sampson, Kyle; William_K._Kelley@who.eop.gov
Subject: Thursday meeting

On Thursday, Attorney General Gonzales and Harriet Miers are scheduled to meet with Senators Alexander and Corker re: U.S. Attorneys. Sen. Alexander asked if I could get some more information about what Attorney General Gonzales and Ms. Miers want to discuss. (If you prefer to discuss over the phone instead of via email, please feel free to call my direct line at 224- .) Thanks.

David Morgenstern
Legislative Director
Office of U.S. Senator Lamar Alexander
(202) 224-4944
(202) 224 iirect

From: Elston, Michael (ODAG) [Michael.Elston@usdoj.gov]
Sent: Wednesday, January 31, 2007 9:40 AM
To: Oprison, Christopher G.
Subject: Re: Feinstein

No worries -- Senate Judiciary Committee, but chaired by Sen. Schumer.

-----Original Message-----
From: Oprison, Christopher G. <Christopher_G._Oprison@who.eop.gov>
To: Elston, Michael (ODAG)
Sent: Wed Jan 31 09:32:00 2007
Subject: RE: Feinstein

Sorry for the rookie questions - which committee/subcommittee?

-----Original Message-----
From: Elston, Michael (ODAG) [mailto:Michael.Elston@usdoj.gov]
Sent: Wednesday, January 31, 2007 9:30 AM
To: Oprison, Christopher G.
Subject: Re: Feinstein

February 6 at 9:30 am.

-----Original Message-----
From: Oprison, Christopher G. <Christopher_G._Oprison@who.eop.gov>
To: Elston, Michael (ODAG)
Sent: Wed Jan 31 09:22:00 2007
Subject: Feinstein

Mike - you mentioned there may be hearings held regarding Feinstein's measure to eliminate the AG-Appointment authority. Do you know when those are slated to be held?

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

From: Sampson, Kyle [Kyle.Sampson@usdoj.gov]
Sent: Friday, February 02, 2007 2:35 PM
To: Oprison, Christopher G.; Scott Jennings
Subject: E.D. Ark. -- Griffin
Attachments: PryorResponseReAppointmentofInterimUSAGriffin.pdf

Here's the letter the AG sent to Sen. Pryor this week. Bill and Sara both signed off on it; I should have sent to you two as well. I think it lays out the way forward pretty clearly.

<<PryorResponseReAppointmentofInterimUSAGriffin.pdf>>

Kyle Sampson
Chief of Staff
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530
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kyle.sampson@usdoj.gov

U.S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

January 31, 2007

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

Dear Senator Pryor:

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

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

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

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

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

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

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

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

Sincerely,

Richard A. Hertling

Richard A. Hertling
Acting Assistant Attorney General

cc: The Honorable Blanche L. Lincoln

Enclosure

FACT SHEET: UNITED STATES ATTORNEY APPOINTMENTS

NOMINATIONS AFTER AMENDMENT TO ATTORNEY GENERAL'S APPOINTMENT AUTHORITY

Since March 9, 2006, when the Congress amended the Attorney General's authority to appoint interim United States Attorneys, the President has nominated 15 individuals to serve as United States Attorney. The 15 nominations are:

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

All but Phillip Green, John Wood, and Rosa Rodriguez-Velez have been confirmed by the Senate.

VACANCIES AFTER AMENDMENT TO ATTORNEY GENERAL'S APPOINTMENT AUTHORITY

Since March 9, 2006, there have been 13 new U.S. Attorney vacancies that have arisen. They have been filled as noted below.

For 4 of the 13 vacancies, the First Assistant United States Attorney (FAUSA) in the district was selected to lead the office in an acting capacity under the Vacancies Reform Act, *see* 5 U.S.C. § 3345(a)(1) (first assistant may serve in acting capacity for 210 days unless a nomination is made) until a nomination could be or can be submitted to the Senate. Those districts are:

- **Central District of California** – FAUSA George Cardona is acting United States Attorney
- **Southern District of Illinois** – FAUSA Randy Massey is acting United States Attorney (a nomination was made last Congress for Phillip Green, but confirmation did not occur);

- **Eastern District of North Carolina** – FAUSA George Holding served as acting United States Attorney (Holding was nominated and confirmed);
- **Northern District of West Virginia** – FAUSA Rita Valdrini served as acting United States Attorney (Sharon Potter was nominated and confirmed).

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

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

For 8 of the 13 vacancies, the Department selected another Department employee to serve as interim United States Attorney until a nomination could be submitted to the Senate, *see* 28 U.S.C. § 546(a) ("Attorney General may appoint a United States attorney for the district in which the office of United States attorney is vacant"). Those districts are:

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

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

The Attorney General has exercised the authority to appoint interim United States Attorneys a total of 12 times since the authority was amended in March 2006.

In 2 of the 12 cases, the FAUSA had been serving as acting United States Attorney under the Vacancies Reform Act (VRA), but the VRA's 210-day period expired before a nomination could be made. Thereafter, the Attorney General appointed that same FAUSA to serve as interim United States Attorney. These districts include:

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

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

- **District of Alaska** – Nelson Cohen

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

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

In the 8 remaining cases, the Department selected another Department employee to serve as interim United States Attorney until a nomination could be submitted to the Senate. Those districts are:

- **Eastern District of Virginia** – Pending nominee Chuck Rosenberg was appointed interim United States Attorney when incumbent United States Attorney resigned to be appointed Deputy Attorney General (Rosenberg was confirmed shortly thereafter);
- **Eastern District of Arkansas** – Tim Griffin was appointed interim United States Attorney when incumbent United States Attorney resigned;
- **District of Columbia** – Jeff Taylor was appointed interim United States Attorney when incumbent United States Attorney resigned to be appointed Assistant Attorney General for the National Security Division;
- **District of Nebraska** – Joe Stecher was appointed interim United States Attorney when incumbent United States Attorney resigned to be appointed Chief Justice of Nebraska Supreme Court;

- **Middle District of Tennessee** – Craig Morford was appointed interim United States Attorney when incumbent United States Attorney resigned;
- **Western District of Missouri** – Brad Schlozman was appointed interim United States Attorney when incumbent United States Attorney and FAUSA resigned at the same time (John Wood was nominated);
- **Western District of Washington** – Jeff Sullivan was appointed interim United States Attorney when incumbent United States Attorney resigned; and
- **District of Arizona** – Dan Knauss was appointed interim United States Attorney when incumbent United States Attorney resigned.

From: Goodling, Monica [Monica.Goodling@usdoj.gov]
Sent: Friday, February 02, 2007 3:29 PM
To: Oprison, Christopher G.
Subject: RE: E.D. Ark. -- Griffin

no worries

From: Oprison, Christopher G. [mailto:Christopher_G._Oprison@who.eop.gov]
Sent: Friday, February 02, 2007 3:00 PM
To: Sampson, Kyle; Goodling, Monica
Subject: RE: E.D. Ark. -- Griffin

great

and by the way, I did not mean to imply at any level that I had a problem with Tim contacting me directly. I felt ineffective because I had no information to offer him.

From: Sampson, Kyle [mailto:Kyle.Sampson@usdoj.gov]
Sent: Friday, February 02, 2007 2:59 PM
To: Goodling, Monica; Oprison, Christopher G.
Subject: RE: E.D. Ark. -- Griffin

ok w/ me
you may want to share w/ him Pryor's outrageous letter (which prompted the AG's response) too
it's attached hereto

From: Goodling, Monica
Sent: Friday, February 02, 2007 2:57 PM
To: Sampson, Kyle; 'Oprison, Christopher G.'
Subject: RE: E.D. Ark. -- Griffin

Yes, Tim and I speak daily. It's likely to be discussed on Tuesday at the hearing, so he should know. I pondered this yesterday, but when we spoke he was spun up and I didn't think it was the best time. Yesterday's issue has now been resolved, so barring any concerns from you guys, I'll let him know today that the AG and the Senator have continued their discussions and that the AG sent the letter up as part of that dialogue. (And share it with him.)

From: Sampson, Kyle
Sent: Friday, February 02, 2007 2:45 PM
To: 'Oprison, Christopher G.'
Cc: Goodling, Monica
Subject: RE: E.D. Ark. -- Griffin

Tim needs to be carefully managed
monica (cc'd hereto) is the one here who tim calls regularly
as tim is frequently calling you also, perhaps the two of you should compare notes
monica, what say you?

From: Oprison, Christopher G. [mailto:Christopher_G._Oprison@who.eop.gov]
Sent: Friday, February 02, 2007 2:42 PM
To: Sampson, Kyle
Subject: RE: E.D. Ark. -- Griffin

thanks Kyle

Was Tim provided a copy of this letter or informed of it in sum and substance. If not, should he, as a courtesy? I defer to you on that.

From: Sampson, Kyle [mailto:Kyle.Sampson@usdoj.gov]
Sent: Friday, February 02, 2007 2:35 PM
To: Oprison, Christopher G.; Scott Jennings
Subject: E.D. Ark. -- Griffin

Here's the letter the AG sent to Sen. Pryor this week. Bill and Sara both signed off on it; I should have sent to you two as well. I think it lays out the way forward pretty clearly.

<<PryorResponseReAppointmentofInterimUSAGriffin.pdf>>

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

From: Scott-Finan, Nancy
Sent: Friday, February 02, 2007 3:50 PM
To: Green, Richard E.; Seidel, Rebecca; Oprison, Christopher G.
Cc: Blackwood, Kristine; Simms, Angela M.
Subject: RE: DAG McNulty's testimony on USA issue and Views letter

Angela and Richard,
We understand from Chris Oprison that WH Counsel has submitted comments. We have not yet received them. Thanks.

From: Green, Richard E.
Sent: Friday, February 02, 2007 12:23 PM
To: Seidel, Rebecca
Cc: Scott-Finan, Nancy; Blackwood, Kristine; Simms, Angela M.
Subject: RE: DAG McNulty's testimony on USA issue and Views letter

Angie and Kristine are talking to each other. I believe we are close on the views letter; we just need to get Justice response on a handful of what I would say are relatively minor comments. On the testimony, we have one key office to hear from. (We set a 1:00 today deadline when your guys asked us to try to clear by COB Friday. We're seeing if we can get comments sooner from a couple of key offices.) What you need to know is that we got the letter on Tuesday at 6:45 p.m. (which means effectively Wednesday morning) and the testimony on Wednesday at 8:45 p.m. (which means effectively Thursday morning). We didn't wait for the testimony to circulate the letter or that would not have happened until Thursday (yesterday)! If we had actually gotten these materials on Monday and Tuesday, we might actually be farther along or done at this point.

From: Seidel, Rebecca
Sent: Friday, February 02, 2007 9:44 AM
To: Green, Richard E.; Simms, Angela M.
Cc: Scott-Finan, Nancy; Blackwood, Kristine
Subject: DAG McNulty's testimony on USA issue and Views letter
Importance: High

Where are we on clearance? The DAG needs to take his testimony home for the weekend and we need to give him his briefing book at 2pm. Views letter on the bill and testimony are substantially similar so we asked earlier this week that they be circulated together as it would be the same reviewers and substantially the same material.

I believe the views letter was sent to OMB on Monday and the Testimony Tues. Please tell me asap if there is any hold up and where it is so we can affirmatively reach out to resolve asap? Thanks.

From: Scott Jennings [SJennings@gwb43.com]
Sent: Thursday, February 08, 2007 2:03 PM
To: Sampson, Kyle; Lee, Kenneth K.
Subject: FW: John McKay

Thought you should see this:

From: Jon Seaton
Sent: Thursday, February 08, 2007 1:55 PM
To: Scott Jennings
Subject: FW: John McKay

FYI...

From: Partoyan, Connie
Sent: Thursday, February 08, 2007 1:52 PM
To: Mike Britt; Jon Seaton
Subject: John McKay

Guys,

Cathy went to the WA Delegation breakfast (first of the year) this morning. Everyone was there. She said Patty Murray mentioned the concern over the departure of John McKay as WWA US Attorney - and is starting to look into whether he was asked to leave, and seems to think that John would be willing to come before the Senate and testify that he was asked to leave.

Just wanted to give you guys a heads up on it....

Connie Partoyan

Chief of Staff

Congresswoman Cathy McMorris Rodgers

202/225

www.mcmorrisrodgers.house.gov

From: Sara Taylor
Sent: Wednesday, February 07, 2007 2:30 PM
To: 'Sampson, Kyle'
Subject: RE: USAT - Prosecutor fired so ex-Rove aide could get his job

Yes – that'd be GREAT. He's really running his mouth though and talking to everyone, which is problematic.

From: Sampson, Kyle [mailto:Kyle.Sampson@usdoj.gov]
Sent: Wednesday, February 07, 2007 10:26 AM
To: Sara Taylor
Subject: RE: USAT - Prosecutor fired so ex-Rove aide could get his job

I was thinking of a different approach, to wit: we are working to get Cummins to submit a letter (or op-ed) that says (1) everyone knew that I'd been looking since 2004 to leave the office for the private sector, (2) when I was contacted about moving on I agreed that it made sense, and (3) Tim Griffin is an outstanding U.S. Attorney who did tremendous work in the office as an AUSA (see the Cummins letter to Griffin dated August 13, 2002, see attached), who has more prosecution experience that I have now, and who should be supported for confirmation by Sen. Pryor and Sen. Lincoln.

From: Sara Taylor [mailto:st@gwb43.com]
Sent: Wednesday, February 07, 2007 10:09 AM
To: Sampson, Kyle
Subject: FW: USAT - Prosecutor fired so ex-Rove aide could get his job

I normally don't like attacking our friends, but since Bud Cummins is talking to everyone - why don't we tell the deal on him?

From: White House News Update
Sent: Wednesday, February 07, 2007 6:38 AM
To: Soper, Steven W.
Subject: USAT - Prosecutor fired so ex-Rove aide could get his job

Prosecutor fired so ex-Rove aide could get his job

By Kevin Johnson, USA TODAY

WASHINGTON — The Justice Department acknowledged Tuesday that it fired the U.S. government's chief prosecutor in Little Rock for no reason except to replace him with a lawyer who had been an aide to Karl Rove, the Bush administration's chief political strategist.

However, in an appearance before the Senate Judiciary Committee, Deputy Attorney General Paul McNulty rejected criticism that the forced resignations of Bud Cummins and six other U.S. attorneys last year were politically inspired, or amounted to retaliation for the attorneys' involvement in controversial investigations and prosecutions.

McNulty's testimony before the panel, which is investigating the firings of the prosecutors, was part of an exchange with Sen. Charles Schumer, D-N.Y. Schumer said the White House's appointment process

for prosecutors was "corrupted with political, rather than prudent, considerations."

"What happened here doesn't sound like business as usual; it appears more reminiscent of a different sort of Saturday night massacre," Schumer said, referring to Watergate-era firings at Justice that were ordered by President Nixon.

"When I hear you talk about a politicization of the (Justice) Department, it is like a knife in my back," McNulty responded.

Schumer and other committee members have questioned the department's action, suggesting the administration was taking advantage of a section of the USA Patriot Act that allows the appointment of interim U.S. attorneys for indefinite periods. The process, Schumer and other critics in Congress have said, could allow federal prosecutors to be appointed without having to face confirmation by the Senate.

McNulty said the administration has no plan to circumvent the confirmation process and will send the Senate nominations for permanent replacements for the prosecutors. He said the six prosecutors dismissed besides Cummins — including San Diego U.S. Attorney Carol Lam, who oversaw the corruption prosecution of former congressman Randy "Duke" Cunningham, R-Calif. — were let go for performance-related reasons.

Much of Tuesday's hearing focused on Cummins and Lam.

McNulty acknowledged that Cummins had had a successful tenure in Arkansas and that he was asked to step aside last year to allow former White House aide Tim Griffin to take the job.

McNulty said that aside from his political work, Griffin had more prosecutorial experience than Cummins did when he first took the Little Rock job five years ago. The deputy attorney general said Griffin's experience included a stint in Iraq as a military prosecutor.

Before his call to active duty in 2005, Griffin was an aide to Rove at the White House. Griffin's résumé says he "organized and coordinated support for the president's agenda, including the nomination of Judge John Roberts" to be U.S. chief justice.

In Lam's case, McNulty said, the Justice Department considered the political impact of removing her in light of her involvement in the prosecution of Cunningham, who was sentenced to eight years in federal prison last year after pleading guilty to accepting $2.4 million in bribes.

McNulty declined to publicly detail the reasons for her dismissal. But Sen. Jeff Sessions, R-Ala., cited letters to the Justice Department and Lam from members of Congress who complained about Lam's alleged inattention to prosecuting smugglers of illegal immigrants.

From: Sampson, Kyle [Kyle.Sampson@usdoj.gov]
Sent: Thursday, February 08, 2007 2:27 PM
To: Lee, Kenneth K.
Subject: RE: John McKay

Seen 'em. Thx.

From: Lee, Kenneth K.
Sent: Thursday, February 08, 2007 2:10 PM
To: Sampson, Kyle
Subject: RE: John McKay

Kyle -- In case you haven't seen them, there have been local articles where McKay admits that he was asked to leave (and someone leaked allegedly glowing DOJ reviews of McKay's performance). I can forward them to you if you haven't seen them yet.

From: Sampson, Kyle [mailto:Kyle.Sampson@usdoj.gov]
Sent: Thursday, February 08, 2007 2:07 PM
To: Scott Jennings; Lee, Kenneth K.
Subject: RE: John McKay

Thx.

From: Scott Jennings [mailto:SJennings@gwb43.com]
Sent: Thursday, February 08, 2007 2:03 PM
To: Sampson, Kyle; Kenneth_K._Lee@who.eop.gov
Subject: FW: John McKay

Thought you should see this:

From: Jon Seaton
Sent: Thursday, February 08, 2007 1:55 PM
To: Scott Jennings
Subject: FW: John McKay

FYI...

From: Partoyan, Connie
Sent: Thursday, February 08, 2007 1:52 PM
To: Mike Britt; Jon Seaton
Subject: John McKay

Guys,

John McKay

Cathy went to the WA Delegation breakfast (first of the year) this morning. Everyone was there. She said Patty Murray mentioned the concern over the departure of John McKay as WWA US Attorney - and is starting to look into whether he was asked to leave, and seems to think that John would be willing to come before the Senate and testify that he was asked to leave.

Just wanted to give you guys a heads up on it....

Connie Partoyan

Chief of Staff

Congresswoman Cathy McMorris Rodgers

202/225

www.mcmorrisrodgers.house.gov

From: Sampson, Kyle [mailto:Kyle.Sampson@usdoj.gov]
Sent: Tuesday, February 13, 2007 5:25 PM
To: Kelley, William K.
Subject: RE:

Bill, here you go -- pasted in the text as well as attached doc.

Summary of U.S. Attorney appointment legislation

Before the March 9, 2006, enactment of the USA PATRIOT Improvement and Reauthorization Act of 2005, the Attorney General had the authority to appoint U.S. Attorneys to vacant positions for periods not exceeding 120 days. If the President did not appoint a U.S. Attorney to such a vacancy within 120 days of the appointment made by the Attorney General, the appointment expired, and the local district court was authorized to appoint a U.S. Attorney to serve until the President made the appointment.

Section 502 of the USA PATRIOT Improvement and Reauthorization Act of 2005 enlarged the scope of the Attorney General's interim appointment authority. Specifically, the Act struck the provision that both limited the validity of the Attorney General's appointments to 120 days and authorized district courts to make subsequent appointments. The Act provided instead that "[a] person appointed as United States attorney [by the Attorney General] may serve until . . . a United States attorney for such district [is] appointed by the President." District courts retained no authority to appoint U.S. Attorneys. This change was explained in the Conference Report for the Act as "address [ing] an inconsistency in the appointment process of United States Attorneys."

On January 9, 2007, Senator Feinstein introduced S. 214, entitled the "Preserving United States Attorney Independence Act of 2007." As introduced, S. 214 would have stripped the Attorney General of all authority to appoint U.S. Attorneys on an interim basis and would have authorized only the local district court to fill a U.S. Attorney vacancy pending an appointment by the President in the normal course.

The Deputy Attorney General testified in opposition to S. 214 before the Senate Judiciary Committee on February 6, 2007. Senator Feinstein later introduced a substitute amendment to the bill that would restore the Attorney General's interim appointment authority as it existed before enactment of the USA PATRIOT Improvement and Reauthorization Act of 2005. As amended, S. 214 would also limit the validity of appointments that have already been made by the Attorney General to a period not exceeding 120 days from the date of the bill's enactment and would authorize the local district courts to fill all resulting vacancies pursuant to their newly restored appointment power.

The amended bill was reported out of the Senate Judiciary Committee on February 8, 2007, by a vote of 13-6, with Senators Specter, Hatch, and Grassley voting with all of the Democrats in favor of the amendment. Senator Specter has signed on as a cosponsor of the bill as reported.

Senator Kyl is considering introducing an amendment to S. 214 on the Senate floor that would, among other things, impose a precatory obligation on the President to nominate a U.S. Attorney within 180 days of a vacancy's arising and, failing that, to authorize the local district court to fill the vacancy with an interim appointment. The amendment would limit the court's authority by (1) requiring it to appoint a current employee of the Department of Justice or a federal law enforcement officer, (2) requiring it to give the Attorney General seven days' notice of the identity of an appointee, and (3) prohibiting the appointment of any person under investigation by the inspector general of a federal department or agency. Senator Kyl has solicited the technical assistance of the Department of Justice in drafting such an amendment.

From: Kelley, William K. [mailto:William_K._Kelley@who.eop.gov]
Sent: Tuesday, February 13, 2007 10:44 AM
To: Sampson, Kyle
Subject:

Kyle--Josh has asked for a one-pager on the US Attorney legislation, some time today. We don't have an Associate Counsel on this, so it's me (and I am jammed) or someone over there. Can you get someone to summarize the background and the legislation? The big shots here particularly need absolute clarity that the proposed fix just restores the pre-Patriot status quo. Let me know -- and thanks.

Summary of U.S. Attorney appointment legislation

Before the March 9, 2006, enactment of the USA PATRIOT Improvement and Reauthorization Act of 2005, the Attorney General had the authority to appoint U.S. Attorneys to vacant positions for periods not exceeding 120 days. If the President did not appoint a U.S. Attorney to such a vacancy within 120 days of the appointment made by the Attorney General, the appointment expired, and the local district court was authorized to appoint a U.S. Attorney to serve until the President made the appointment.

Section 502 of the USA PATRIOT Improvement and Reauthorization Act of 2005 enlarged the scope of the Attorney General's interim appointment authority. Specifically, the Act struck the provision that both limited the validity of the Attorney General's appointments to 120 days and authorized district courts to make subsequent appointments. The Act provided instead that "[a] person appointed as United States attorney [by the Attorney General] may serve until . . . a United States attorney for such district [is] appointed by the President." District courts retained no authority to appoint U.S. Attorneys. This change was explained in the Conference Report for the Act as "address[ing] an inconsistency in the appointment process of United States Attorneys."

On January 9, 2007, Senator Feinstein introduced S. 214, entitled the "Preserving United States Attorney Independence Act of 2007." As introduced, S. 214 would have stripped the Attorney General of all authority to appoint U.S. Attorneys on an interim basis and would have authorized only the local district court to fill a U.S. Attorney vacancy pending an appointment by the President in the normal course.

The Deputy Attorney General testified in opposition to S. 214 before the Senate Judiciary Committee on February 6, 2007. Senator Feinstein later introduced a substitute amendment to the bill that would restore the Attorney General's interim appointment authority as it existed before enactment of the USA PATRIOT Improvement and Reauthorization Act of 2005. As amended, S. 214 would also limit the validity of appointments that have already been made by the Attorney General to a period not exceeding 120 days from the date of the bill's enactment and would authorize the local district courts to fill all resulting vacancies pursuant to their newly restored appointment power.

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Goodling, Monica

From: Goodling, Monica
Sent: 2/14/2007 5:55:36 PM
To: Scott Jennings /O=REPUBLICAN NATIONAL COMMITTEE/OU=RNC/CN=RECIPIENTS/CN=SJENNINGS;
Cc:
Bcc:
Subject: Transcript of Paul McNulty's hearing on 02-06-07 re US Attorneys
Attachments: 02-06-07 McNulty Transcript re US Attorneys.doc;

Scott – This is the version of the transcript we have so far. The formal transcript from the Hill will not arrive for some time. Please let me know if you need anything else.

Best, Monica

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

Monica M. Goodling
White House Liaison & Senior Counsel to the Attorney General
Department of Justice
950 Pennsylvania Ave N.W.
Washington, D.C. 20530
202.353 (phone)
202.305 (fax)

"[W]e rededicate ourselves to the ideals that inspired our founders. During that hot summer in Philadelphia more than 200 years ago, from our desperate fight for independence to the darkest days of a civil war, to the hard-fought battles of the 20th century, there were many chances to lose our heart, our nerve, or our way. But Americans have always held firm, because we have always believed in certain truths: We know that the freedom we defend is meant for all men and women, and for all times. And we know that when the work is hard, the proper response is not retreat; it is courage." - President George W. Bush, July 4, 2005

From: Goodling, Monica [Monica.Goodling@usdoj.gov]
Sent: Thursday, February 15, 2007 2:25 PM
To: Oprison, Christopher G.
Subject: RE: question

It is info we have given to friendlies on the Hill. It can all go.

From: Oprison, Christopher G. [mailto:Christopher_G._Oprison@who.eop.gov]
Sent: Thursday, February 15, 2007 2:04 PM
To: Goodling, Monica
Subject: RE: question

Monica, other than the McNulty testimony, is any of this material public and can it be disseminated to Mark McKinnon?

From: Goodling, Monica [mailto:Monica.Goodling@usdoj.gov]
Sent: Wednesday, February 14, 2007 7:09 PM
To: Oprison, Christopher G.; Sampson, Kyle
Subject: RE: question

Chris -- The relevant talkers and statistics are contained in the attached documents. Please let me know if you need anything else. (We do not have a canned editorial response).

From: Oprison, Christopher G. [mailto:Christopher_G._Oprison@who.eop.gov]
Sent: Wednesday, February 14, 2007 6:02 PM
To: Sampson, Kyle; Goodling, Monica
Subject: FW: question

Kyle, Monica

See below from Pete Wehner in Stategic Initiatives. Has DOJ drafted talking points? If not, and if you think it advisable to respond, I would suggest sending along the DAG's Senate Judiciary testimony from last week. Or, alternatively, we could provide no response. Your thoughts?

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I'd be grateful if you could -- and I'd understand if you can't.

Many thanks.

Pete

From: Mark McKinnon
Sent: Monday, February 12, 2007 8:48 PM
To: Wehner, Peter H.
Subject: Conason

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Thanks,
mck

Alberto Gonzalez's coup d'etat
The Constitution be damned, the attorney general has seized control of U.S. attorney appointments for partisan purposes.
By Joe Conason

Feb. 09, 2007 | Under any circumstances, the Bush <http://dir.salon.com/topics/george_w_bush/> administration's sudden, explicitly political dismissal and replacement of United States attorneys in judicial districts across the country would be very troubling -- both as a violation of American law enforcement traditions and as a triumph of patronage over competence.

But as the story behind these strange decisions unfolds, a familiar theme is emerging. Again, the White House and the Justice Department have been exposed in a secretive attempt to expand executive power for partisan purposes. And again, their scheming is tainted with a nasty whiff of authoritarianism.

There is much more at stake here than a handful of federal jobs.

Leading senators of both parties are disturbed by these incidents because U.S. attorneys -- the powerful officials appointed by the president to prosecute federal crimes and defend federal interests in each of the nation's judicial districts -- are supposed to be as nonpartisan as possible. Democrats mostly appoint Democrats and Republicans mostly appoint Republicans, but the U.S. attorneys are usually chosen with the advice and consent of the senators from their home states, and then confirmed by the full Senate, with a decent respect for skill and experience as well as political connections.

The reason for this appointment process was simple: These prosecutors must police the politicians. They are expected to guard the nation's judicial system against the varieties of political abuse that are typical of authoritarian systems. They are granted a substantial degree of independence from the government in Washington, including the attorney general who functions as their boss.

To ensure that no U.S. attorney could be fired on a whim and replaced with a malleable hack, the relevant statute required that whenever a vacancy occurred in midterm, the replacement would be

appointed by federal circuit judges rather than by the president. Getting rid of irksomely honest and nonpartisan prosecutors was difficult if not impossible.

But that wholesome safeguard was breached in December 2005, when the Senate renewed the Patriot Act. At the behest of the Justice Department, an aide to Sen. Arlen Specter slipped a provision into the bill <http://www.tpmmuckraker.com/archives/002354.php> that permitted the White House to place its own appointees in vacant U.S. attorney positions permanently and without Senate confirmation. So silently was this sleight of hand performed that Specter himself now claims, many months later, to have been completely unaware of the amendment's passage. (Of course, it would be nice if the senators actually read the legislation before they voted, particularly when they claim to be the authors.)

The staffer who reportedly performed this bit of dirty work <http://www.tpmmuckraker.com/archives/002489.php> is Michael O'Neill, a law professor at George Mason University and former clerk for Supreme Court Justice Clarence Thomas. As the Washington Times explained <http://www.washingtontimes.com/national/20050905-114119-3586r.htm> when O'Neill was appointed as the Senate Judiciary Committee's chief counsel, many observers believed that Specter had hired him to reassure conservatives of his loyalty to the Bush White House. Right-wing distrust had almost ousted the Pennsylvania moderate from the Judiciary chairmanship, and appointing O'Neill was apparently the price for keeping that post.

Evidently O'Neill rewarded Specter by sneaking through legislation to deprive him and his fellow senators of one of their most important powers, at the behest of an attorney general intent on aggrandizing executive power. The results of this backstage betrayal -- now playing out in a wave of politicized dismissals and hirings -- were perfectly predictable and utterly poisonous.

Carol Lam, the U.S. attorney in San Diego who successfully prosecuted the sensationally crooked Republican Rep. Randy "Duke" Cunningham, <http://www.signonsandiego.com/news/politics/20070121-9999-1n21lam.html> was fired for no known reason while she is still pursuing important leads in that historic case. Cunningham is supposed to be cooperating, but if Bush replaces her with a partisan stooge, he may be able to keep his secrets. Bud Cummings, the respected U.S. attorney in Little Rock, Ark., was canned to make room for a Republican opposition research operative <http://www.warandpiece.com/blogdirs/005470.html> and Karl Rove acolyte named Timothy Griffin. Could that conceivably have anything to do with Sen. Hillary Rodham Clinton <http://dir.salon.com/topics/hillary_rodham_clinton/>'s presidential candidacy? Paul Charlton, the U.S. attorney in Arizona, was thrown out <http://www.aei.org/publications/filter.all,pubID.25497/pub_detail.asp> while investigating allegations of corruption against Republican Rep. Rick Renzi.

And John McKay, the U.S. attorney in Seattle whose diligence has been praised by judges and lawyers of both parties, was simply ordered to quit <http://www.theolympian.com/377/story/64410.html> last December, for no obvious reason. Although McKay's last evaluation by the Justice Department was excellent, the attorney general insists that all of these curious firings were due to "performance" issues.

Any such self-serving statements emanating from Alberto Gonzales <http://dir.salon.com/topics/alberto_gonzales/> should always be greeted with appropriate skepticism. So should the claim that he sought to seize control of interim U.S. attorney appointments because of his concern over the "separation of powers" issues supposedly inherent in judges' appointing prosecutors. As the McClatchy Newspapers reported on Jan. 26, Gonzales has named at least nine "conservative loyalists from the Bush administration's inner circle" <http://www.realcities.com/mld/krwashington/16555903.htm> to positions vacated by professional prosecutors.

On Thursday, the Senate Judiciary Committee voted to restore the old nonpartisan system <http://www.washingtonpost.com/wp-dyn/content/article/2007/02/08/AR2007020800907.html> for replacing U.S. attorneys and to require Senate confirmation of all new appointees. The full Senate <http://dir.salon.com/topics/senate/> and the House of Representatives <http://dir.salon.com/topics/house_of_representatives/> should do likewise, despite Republican opposition, but that is not enough. The Senate Democrats should continue to probe the attorney general's little coup d'état and all of the resulting appointments. That is the best way to discourage future usurpations -- and to frustrate whatever skulduggery was afoot this time.

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-- By Joe Conason

FACT SHEET: UNITED STATES ATTORNEY APPOINTMENTS

NOMINATIONS AFTER AMENDMENT TO ATTORNEY GENERAL'S APPOINTMENT AUTHORITY

Since March 9, 2006, when the Congress amended the Attorney General's authority to appoint interim United States Attorneys, the President has nominated 15 individuals to serve as United States Attorney. The 15 nominations are:

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

All but Phillip Green, John Wood, and Rosa Rodriguez-Velez have been confirmed by the Senate.

VACANCIES AFTER AMENDMENT TO ATTORNEY GENERAL'S APPOINTMENT AUTHORITY

Since March 9, 2006, there have been 14 new U.S. Attorney vacancies that have arisen. They have been filled as noted below.

For 5 of the 13 vacancies, the First Assistant United States Attorney (FAUSA) in the district was selected to lead the office in an acting capacity under the Vacancies Reform Act, *see* 5 U.S.C. § 3345(a)(1) (first assistant may serve in acting capacity for 210 days unless a nomination is made) until a nomination could be or can be submitted to the Senate. Those districts are:

- **Central District of California** – FAUSA George Cardona is acting United States Attorney
- **Southern District of Illinois** – FAUSA Randy Massey is acting United States Attorney (a nomination was made last Congress for Phillip Green, but confirmation did not occur);

- **Eastern District of North Carolina** – FAUSA George Holding served as acting United States Attorney (Holding was nominated and confirmed);
- **Northern District of West Virginia** – FAUSA Rita Valdrini served as acting United States Attorney (Sharon Potter was nominated and confirmed); and
- **Southern District of Georgia** – FAUSA Edmund A. Booth, Jr. is acting USA.

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

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

For 8 of the 14 vacancies, the Department selected another Department employee to serve as interim United States Attorney until a nomination could be submitted to the Senate, *see* 28 U.S.C. § 546(a) ("Attorney General may appoint a United States attorney for the district in which the office of United States attorney is vacant"). Those districts are:

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

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

The Attorney General has exercised the authority to appoint interim United States Attorneys a total of 12 times since the authority was amended in March 2006.

In 2 of the 12 cases, the FAUSA had been serving as acting United States Attorney under the Vacancies Reform Act (VRA), but the VRA's 210-day period expired before a nomination could be made. Thereafter, the Attorney General appointed that same FAUSA to serve as interim United States Attorney. These districts include:

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

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

- **District of Alaska** – Nelson Cohen

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

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

In the 8 remaining cases, the Department selected another Department employee to serve as interim United States Attorney until a nomination could be submitted to the Senate. Those districts are:

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

Overview:

- In every single case, it is a goal of the Bush Administration to have a U.S. Attorney that is confirmed by the Senate. Use of the AG's appointment authority is in no way an attempt to circumvent the confirmation process. To the contrary, when a United States Attorney submits his or her resignation, the Administration has an obligation to ensure that someone is able to carry out the important function of leading a U.S. Attorney's office during the period when there is not a presidentially-nominated, senate-confirmed (PAS) U.S. Attorney. Whenever a U.S. Attorney vacancy arises, we consult with the home-state Senators about candidates for nomination.

- Our record since the AG-appointment authority was amended demonstrates we are committed to working with the Senate to nominate candidates for U.S. Attorney positions. Every single time that a United States Attorney vacancy has arisen, the President either has made a nomination or the Administration is working, in consultation with home-State Senators, to select candidates for nomination.
    - ✓ Specifically, since March 9, 2006 (when the AG's appointment authority was amended), the Administration has nominated 15 individuals to serve as U.S. Attorney (12 have been confirmed to date).

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

- United States Attorneys are at the forefront of the Department of Justice's efforts. They are leading the charge to protect America from acts of terrorism; reduce violent crime, including gun crime and gang crime; enforce immigration laws; fight illegal drugs, especially methamphetamine; combat crimes that endanger children and families like child pornography, obscenity, and human trafficking; and ensure the integrity of the marketplace and of government by prosecuting corporate fraud and public corruption.

- The Attorney General and the Deputy Attorney General are responsible for evaluating the performance the United States Attorneys and ensuring that United States Attorneys are leading their offices effectively.

- United States Attorneys serve at the pleasure of the President. Thus, like other high-ranking Executive Branch officials, they may be removed for any reason or no reason. That on occasion in an organization as large as the Justice Department some United States Attorneys are removed, or are asked or encouraged to resign, should come as no surprise. United States Attorneys never are removed, or asked or encouraged to resign, in an effort to retaliate against them or interfere with or

inappropriately influence a particular investigation, criminal prosecution or civil case.

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

- The Attorney General and the Deputy Attorney General are responsible for evaluating the performance the U.S. Attorneys and ensuring that they are leading their offices effectively. However, U.S. Attorneys are never removed, or asked or encouraged to resign, in an effort to retaliate against them or interfere with or inappropriately influence a particular investigation, criminal prosecution or civil case.

The Administration Must Ensure an Effective Transition When Vacancies Occur:

- When a United States Attorney has submitted his or her resignation, the Administration has -- in every single case -- consulted with home-state Senators regarding candidates for the Presidential nomination and Senate confirmation. The Administration is committed to nominating a candidate for Senate consideration everywhere a vacancy arises, as evidenced by the fact that there have been 124 confirmations of new U.S. Attorneys since January 20, 2001.

- With 93 U.S. Attorney positions across the country, the Department often averages between 8-15 vacancies at any given time. Because of the important work conducted by these offices, and the need to ensure that the office is being managed effectively and appropriately, the Department uses a range of options to ensure continuity of operations.

- In some cases, the First Assistant U.S. Attorney is an appropriate choice. However, in other cases, the First Assistant may not be an appropriate option for reasons including that he or she: resigns or retires at the same time as the outgoing U.S. Attorney; indicates that he/she does not want to serve as Acting U.S. Attorney; has ongoing or completed OPR or IG matters in their file, which may make his/her elevation to the Acting role inappropriate; or is subject of an unfavorable recommendation by the outgoing U.S. Attorney or otherwise does not enjoy the confidence of those responsible for ensuring ongoing operations and an appropriate transition until such time as a new U.S. Attorney is nominated and confirmed by the Senate. In those cases, the Attorney General has appointed another individual to lead the office during the transition, often another senior manager from that office or an experienced attorney from within the Department.

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

- Since March 9, 2006, when the appointment authority was amended, the Administration has nominated 15 individuals for Senate consideration (12 have been confirmed to date).

- Since March 9, 2006, when the appointment authority was amended, 14 vacancies have been created. Of those 14 vacancies, the Administration nominated candidates to fill 5 of these positions (3 were confirmed to date), has interviewed candidates for 7 positions, and is waiting to receive names to set up interviews for 2 positions – all in consultation with home-state Senators.

The 14 Vacancies Were Filled on an Interim Basis Using a Range of Authorities, in Order To Ensure an Effective and Smooth Transition:

- In 5 cases, the First Assistant was selected to lead the office and took over under the Vacancy Reform Act's provision at: 5 U.S.C. § 3345(a)(1). That authority is limited to 210 days, unless a nomination is made during that period.

- In 1 case, the First Assistant was selected to lead the office and took over under the Vacancy Reform Act's provision at: 5 U.S.C. § 3345(a)(1). However, the First Assistant took federal retirement a month later and the Department had to select another Department employee to serve as interim under AG appointment until such time as a nomination is submitted to the Senate.

- In 7 cases, the Department selected another Department employee to serve as interim under AG appointment until such time as a nomination is submitted to the Senate.

- In 1 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.

Amending the Statute Was Necessary:

- Last year's amendment to the Attorney General's appointment authority was necessary and appropriate.

- We are aware of no other federal agency where federal judges, members of a separate branch of government and not the head of the agency, appoint interim staff on behalf of the agency.

- Prior to the amendment, the Attorney General could appoint an interim United States Attorney for only 120 days; thereafter, the district court was authorized to appoint an interim United States Attorney. In cases where a Senate-confirmed United States Attorney could not be appointed within 120 days, the limitation on

the Attorney General's appointment authority resulted in numerous, recurring problems.

- The statute was amended for several reasons:

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

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

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

UNITED STATES ATTORNEYS' PROSECUTION STATISTICS

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

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

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

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

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

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

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

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

Examples of Difficult Transition Situations

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

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

2. **Eastern District of Oklahoma:** In 2000-2001, a vacancy occurred in the EDOK. The court refused to exercise the court's authority to make appointments. As a result, the Attorney General appointed Shelly Sperling to three 120-day appointments before Sperling was nominated and confirmed by the Senate (he was appointed by the Attorney General to a fourth 120-day term while the nomination was pending).

3. **In the Western District of Virginia:** In 2001, a vacancy occurred in the WDVA. The court declined to exercise its authority to make an appointment. As a result, the Attorney General made two successive 120-day appointments (two different individuals).

This problem is not new ...

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

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

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

2. **South Dakota:**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

I yield to my colleague from Pennsylvania.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Senator Feingold.

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

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

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

SEN. SCHUMER: Without objection.

Senator Hatch.

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

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

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

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

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

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

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

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

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

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

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

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

Thank you, Mr. Chairman.

SEN. SCHUMER: Thank you, Senator Hatch.

And Senator Cardin had to leave.

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

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

Senator Pryor.

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

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

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

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

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

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

process to work in the best traditions of the Senate and in the best traditions of our democracy. In fact, I've been accused on more than one occasion of being overly fair to the president's nominations.

It is with this background that I state my belief that recent events relating to U.S. attorney dismissals and replacements are unacceptable and should be unacceptable to all of us.

Now, I would like to speak specifically about the facts that occurred regarding the U.S. attorney replacement for the Eastern District of Arkansas. In the summer of 2006, my office was told by reliable sources in the Arkansas legal and political community that then-U.S. Attorney Bud Cummins was resigning and the White House would nominate Mr. Tim Griffin as his replacement. I asked the reasons for Mr. Cummins' leaving and was informed that he was doing so to pursue other opportunities.

My office was later told by the administration that he was leaving on his own initiative and that Mr. Tim Griffin would be nominated. I did not know Mr. Griffin, but I spoke to him by telephone in August 2006 about his potential nomination. I told him that I know many lawyers in the state but I knew very little about his legal background. In other words, I did not know if he was qualified or if he had the right temperament or if he could be fair and impartial. I informed him that I would have trouble supporting him until the Judiciary Committee had reviewed these issues. I told him if he were to be nominated that I would evaluate my concerns in light of the committee process.

It should be noted that around this time, it we becoming clear that Mr. Cummins was being forced out, contrary to what my office had been told by the administration.

Sometime after the interview with Mr. Griffin, I learned that there were newspaper accounts regarding his work on behalf of the Republican National Committee about efforts that had been categorized as "caging African-American votes." This arises from allegations that Mr. Griffin and others in the RNC were targeting African-Americans in Florida for voter challenges during the 2004 presidential campaign.

I specifically addressed this issue to Mr. Griffin in a subsequent meeting. When I questioned him about this, he provided an account that was very different from the allegation. However, I informed him that due to the seriousness of the issue, this is precisely the reason why the nomination and confirmation process is in place. I told him I would not be comfortable until this committee had thoroughly examined his background. Given my concerns over this potential nominee, I as well as others protested, and Mr. Cummins was allowed to stay until the end of the year.

Rumors began to circulate in October of 2006 that the White House was going to make a recess appointment which, of course, I found troubling. This rumor was persistent in the Arkansas legal and political community. I called the White House on December 13, 2006 to express my concerns about a recess appointment and spoke to then-White House Counsel Harriet Myers. She told me that she would get back to me on this matter. I also called Attorney General Gonzales expressing my reservations. And he informed me that he would get back to me as well.

Despite expressing my concerns about a recess appointment to the White House and to the attorney general, two days later, on December 15, 2006, Ms.

Myers informed me that Mr. Griffin was their choice. Also on that same day, General Gonzales confirmed that he was going to appoint Mr. Griffin as an interim U.S. attorney. Subsequently, my office inquired about the legal authority for the appointment and was informed it was pursuant to the amended statute in the Patriot Act.

Before I say any more, I need to tell the committee that I respect and like General Gonzales. I supported his confirmation to be attorney general. I have always found him to be a straight shooter. And even though I disagree with him on this decision, it has not changed my view of him. I suspect he is only doing what he has been told to do. On December 20, 2006, Mr. Cummins' tenure as U.S. attorney was over. On that same day, Mr. Griffin was appointed interim U.S. attorney for the eastern district of Arkansas. The timing was controlled by the administration. On January 11, 2007, I wrote a letter to General Gonzales outlining my objections with regard to this appointment. First, I made clear my concern as to how Mr. Cummins was summarily dismissed. Second, I outlined my amazement as to the excuse given as the reason for the interim appointment which was due to the first assistant being on maternity leave. Third, I objected to the circumventing of the Senate confirmation process.

The attorney general's office responded on January 31, 2007 denying any discrimination or wrongdoing. I will address these issues now.

As more light was shed on the situation in Arkansas, it became clear that Bud Cummins was asked to resign without cause so that the White House could reward the Arkansas post to Mr. Griffin. Mr. Cummins confirmed this on January 13, 2007 in an article in the Arkansas Democrat-Gazette newspaper wherein he said he had been asked to step down so the White House could appoint another person. By all accounts, Mr. Cummins' performance has been fair, balanced, professional and just. Lawyers on both sides of the political spectrum have nothing but positive things to say about Mr. Cummins' performance. During his tenure, he established a highly successful anti-terrorism advisory council that brought together law enforcement at all levels for terrorism training. In the area of drug prosecutions, he continued at historic levels of quality, complex and significant Organized Crime Drug Enforcement Task Force drug prosecutions. He also increased federal firearm prosecutions, pursued public corruption and cyber crime investigations and led to lengthy prison sentences for those convicted.

In addition, I understand that his performance evaluations were always exceptional. On this last point, I would ask the committee to try to gather the service evaluations of Mr. Cummins and the other dismissed U.S. attorneys to determine how they were perceived by the Justice Department as having performed their jobs.

The reason I'm reciting Mr. Cummins' performance record is that it stands in stark contrast to General Gonzales' testimony before this committee when he stated, quote, "Some people should view it as a sign of good management. What we do is make an evaluation about the performance of individuals, and I have a responsibility to the people in your districts that we have the best possible people in these positions.

And that's the reason why changes sometimes have to be made. Although there are a number of reasons why changes get made and why people leave on their own, I think I would never, ever make a change in the United States attorney position for political reasons, or if it would in any way jeopardize an ongoing serious investigation. I just would not do it." End quote.

The attorney general then refused to say why Mr. Cummins was told to leave. However, it is my understanding that in other cases around the country, Justice Department officials have disclosed their reasoning for firing other U.S. attorneys. The failure to acknowledge that Bud Cummins was told to leave for a purely political reason is a great disservice to someone who has been loyal to the administration and who performed his work admirably. I have discussed in detail the events surrounding Mr. Cummins' dismissal. Now I would like to discuss the very troubling pretense for Mr. Griffin's appointment to interim U.S. attorney over the first assistant U.S. attorney in the Little Rock office.

The Justice Department advised me that normally, the first assistant U.S. attorney is selected for the acting appointment while the White House sends their nominee through the Senate confirmation process. This is based on 5 U.S.C., Section 3345A1. However, in this case the Justice Department confirmed that the first assistant was passed over because she was on maternity leave. This was the reason given to my chief of staff, as well as comments by the Justice Department spokesman Brian Rorchast (sp) -- and I'm not sure if I pronounced that name correctly -- wherein he was quoted in newspapers as saying, "When the U.S. attorney resigns, there is a need for someone to fill that position." He noted that often the first assistant U.S. attorney in the affected district will serve as the acting U.S. attorney until the formal nomination process begins for the replacement. "But in this case, the first assistant is on maternity leave." That's what he said.

In addition, this reason was given to me specifically by a Justice Department liaison at a meeting in my office. In my letter to the attorney general, I stated that while this may or may not be actionable in a public employment setting, it clearly would be in a private employment setting. Of all the agencies in the federal government, the Justice Department should not hold this view of pregnancy and motherhood in the workplace. I call this a pretense because it has become clear that Mr. Griffin was always the choice to replace Mr. Cummins. Before I close, let me address the circumvention of the Senate's confirmation process. General Gonzales has said that it is his intention to nominate all U.S. attorneys, and -- but that does not water in Arkansas. For seven months now, the administration has known of the departure of Mr. Cummins. Remember, they created his departure. It has now been 49 days since Bud Cummins was ousted without cause. If they were serious about the confirmation process, I cannot believe that it would have taken so long to nominate someone.

Now to be fair, in my most recent telephone call with General Gonzales, he asked me whether I would support Tim Griffin as my nominee for this position. I thought long and hard about this, and the answer is I cannot. If nominated, I would do everything I could to make sure he has an opportunity to tell his side of the story regarding all allegations and concerns to the committee, and I would ask the committee to give Mr. Griffin a vote as quickly as possible. It is impossible for me to say that I would never support his nomination because I do not know all the facts. That is why we have a process in the Senate. I know I would never consider him as my nominee because I just know too many other lawyers who are more qualified, more experienced and more respected by the Arkansas bar. I will advise General Gonzales about this decision shortly.

Regardless of the situation in Arkansas, I am convinced that this should not happen again. I'm also convinced that the administration and maybe future administrations will try to bypass the Senate unless we change this law. I do not say this lightly. Already a challenge has been made to the appointment

of Mr. Griffin in Arkansas as violating the U.S. Constitution because it bypassed Senate confirmation. While I have not reviewed the pleadings filed in this case -- I believe it's a capital murder case, I don't know all the situation there -- but I have not reviewed the pleadings there, I have read a recent article in the Arkansas Democratic Gazette that concerns me.

It is reported that, quote, "because United States attorneys are inferior officers, the appointment clause of the Constitution expressly permits Congress to vest their appointments in the Attorney General and does not require the advice and consent of the Senate before they're appointed," end quote. Please do not miss this point. The Justice Department has now pleaded in court that U.S. attorneys, as a matter of constitutional law, are not subject to the advice and consent of the United States Senate.

After a thorough review by this committee, I hope that you will reach the same conclusion I have, which is this. No administration should be able to appoint U.S. attorneys without proper checks and balances. This is larger than party affiliation or any single appointment. This touches our solemn responsibility as senators. I hope this committee will address it by voting for S.214, which I join in offering along with Senators Feinstein and Leahy. Thank you, Mr. Chairman.

SEN. SCHUMER: Thank you very much, Senator Pryor, for your really outstanding testimony. And we will pursue many of the things you bring up. I know that you have a busy schedule, and I would ask the indulgence of the committee that if we have questions of Senator Pryor, we submit them in writing. Would that be okay?

SEN. LEAHY: Well, Mr. Chairman, may I just ask one or two questions?

SEN. SCHUMER: Sure.

SEN. LEAHY: Thank you. (Cross talk.)

Senator Pryor, do you think that Mr. Griffin is not qualified for the job?

SEN. PRYOR: It's hard for me to say whether he is or isn't because I just know so little about his background. When I met with him, we talked about this, and I told him that it was my sincere hope that they nominate him so he could go through the process here. But it's impossible for me to say whether he is or isn't because I know so little about him. And just by the way of background on him, and this is probably more detail than the committee wants, is that he went to college in Arkansas, and then he went off to Tulane Law School in Louisiana. And then, more or less, he didn't come back to the state, I think he did maybe a year of practice in the U.S. attorney's office at some point, but basically he's -- his professional life has been mostly outside the state. So he's come back in, and the legal community just doesn't know him.

SEN. LEAHY: Well, fair enough. Do you think it ought to be a matter for the committee? I think that's the traditional way.

SEN. PRYOR: Certainly.

SEN. LEAHY: Do you think that his having worked for the Republican National Committee -- RNC -- or that he may be a protege' of Karl Rove is relevant in any way as to his qualifications?

SEN. PRYOR: To me, it I not relevant. I think we all come to these various positions with different backgrounds, and certainly if someone works for a political committee or a politician or an administration -- that doesn't concern me. Some of the activities that he may have been involved in do raise concerns. However, when I talked to him about that, he offered an explanation, like I said, that was very different than the press accounts of what he did. And here again, that takes me back to the process. That's why we have a process. Let him go through the committee, let you all and your staffs look at it, let him -- let everybody evaluate that and see what the true facts are.
SEN. LEAHY: Well, fair enough. The activities may bear. His conduct bears on his qualifications, but just the fact of working for the Republican National Committee and for Karl Rove is not a disqualifier.

SEN. PRYOR: No, not in my mind it's not.

SEN. LEAHY: Thank you very much for coming in, Senator Pryor. We know how busy you are, and you've made a very comprehensive analysis, and it's very helpful to have a senator appear substantively --

SEN. PRYOR: Thank you.

SEN. LEAHY: -- so thank you.

SEN. PRYOR: Thank you.

SEN. SCHUMER: Thank you, Senator Pryor. Any further questions?

Thank you so much.

Okay, our next witness is the honorable Paul J. McNulty. He's the deputy attorney general of the United States. He has spent almost his entire career as a public servant, with more than two decades of experience in government at both the state and federal levels. Just personally, Paul and I have known each other. When he served in the House, I knew him well. We worked together on the House Judiciary Committee. He's a man of great integrity. I have a great deal of faith in him and his personality, and who he is and what he does. From 2001 to 2006, of course, he served as U.S. attorney for the Eastern District of Virginia.

(The witness is sworn in.)

MR. MCNULTY: Thank you, Mr. Chairman, and thank you for your kindness.

I appreciate the opportunity to be here this morning and attempt to clear up the misunderstandings and misperceptions about the recent resignations of some U.S. attorneys, and to testify in strong opposition to S. 214, a bill which would strip the Attorney General of the authority to make interim appointments to fill vacant U.S. attorney positions.

As you know and as you've said, Mr. Chairman, I had the privilege of serving as United States Attorney for four and a half years. It was the best job I ever had. That's something you hear a lot from former United States attorneys -- "best job I ever had." In my case, Mr. Chairman, it was even better than serving as counsel under your leadership with the Subcommittee on Crime. Now why is it -- being U.S. Attorney -- the best job? Why is it such a great job? There are a variety of reasons, but I think it boils down to this.

The United States attorneys are the president's chief legal representatives in the 94 federal judicial districts. In my former district of Eastern Virginia, Supreme Court Chief Justice John Marshall was the first United States attorney. Being the president's chief legal representative means you are the face of the Department of Justice in your district. Every police chief you support, every victim you comfort, every citizen you inspire or encourage, and yes, every criminal who is prosecuted in your name communicates to all of these people something significant about the priorities and values of both the president and the Attorney General.

At his inauguration, the president raises his right hand and solemnly swears to faithfully execute the office of the president of the United States. He fulfills this promise in no small measure through the men and women he appoints as United States attorneys. If the president and the attorney general want to crack down on gun crimes -- if they want to go after child pornographers and pedophiles as this president and attorney general have ordered federal prosecutors to do, it's the United States attorneys who have the privilege of making such priorities a reality. That's why it's the best job a lawyer can ever have. It's an incredible honor.

And this is why, Mr. Chairman, judges should not appoint United States attorneys as S. 214 proposes. What could be clearer executive branch responsibilities than the attorney general's authority to temporarily appoint, and the president's opportunity to nominate for Senate confirmation, those who will execute the president's duties of office? S. 214 doesn't even allow the attorney general to make any interim appointments, contrary to the law prior to the most recent amendment.

The indisputable fact is that United States attorneys serve at the pleasure of the president. They come and they go for lots of reasons. Of the United States attorneys in my class at the beginning of this administration, more than half are now gone. Turnover is not unusual, and it rarely causes a problem because even though the job of United States attorney is extremely important, the greatest assets of any successful United States attorney are the career men and women who serve as assistant United States attorneys. Victim witness coordinators, paralegals, legal assistants, and administrative personnel -- their experience and professionalism ensures smooth continuity as the job of U.S. attorney transitions from one person to another.

Mr. Chairman, I conclude with these three promises to this committee and the American people on behalf of the attorney general and myself. First, we have -- we never have and never will seek to remove a United States attorney to interfere with an ongoing investigation or prosecution or in retaliation for prosecution. Such as act is contrary to the most basic values of our system of justice, the proud legacy of the Department of Justice and our integrity as public servants.

Second, in every single case where a United States attorney position is vacant, the administration is committed to fulfilling -- to filling that position with a United States attorney who is confirmed by the Senate. The attorney general's appointment authority has not and will not be used to circumvent the confirmation process. All accusations in this regard are contrary to the clear factual record. The statistics are laid out in my written statement. And third, through temporary appointments and nominations for Senate confirmation, the administration will continue to fill U.S. attorney vacancies with men and women who are well qualified to assume the important duties of this office. Mr. Chairman, if I thought the concerns you outlined in

your opening statement were true, I would be disturbed too. But these concerns are not based on facts. And the selection process we will discuss today I think will shed a great deal of light on that.

Finally, I have a lot of respect for you, Mr. Chairman, as you know. And when I hear you talk about the politicizing of the Department of Justice, it's like a knife in my heart. The AG and I love the department, and it's an honor to serve, and we love its mission. And your perspective is completely contrary to my daily experience, and I would love the opportunity -- not just today but in the weeks and months ahead -- to dispel you of the opinion that you hold.

I appreciate your friendship and courtesy, and I am happy to respond to the committee's questions.

SEN. SCHUMER: Well, thank you, Deputy Attorney General, and very much appreciate your heartfelt comments.

I can just tell you -- and it's certainly not just me but speaking for myself -- what I have seen happen in the Justice Department is a knife to my heart as somebody who's followed and overseen the Justice Department for many, many years. And perhaps there are other explanations, but on issue after issue after issue after issue -- I think Senator Specter alluded to it to some extent -- the view that executive authority is paramount. To the extent that many of us feel congressional prerogatives written in law are either ignored or ways are found around them, I have never seen anything like it. And there are many fine public servants in the Justice Department. I had great respect for your predecessor, Mr. Comey. I have great respect for you. But you have to judge the performance of the Justice Department by what it does, not the quality or how much you like the people in it. And so my comment is not directed at you in particular, but it is directed at a Justice Department that seems to me to be far more politically harnessed than previous Justice Departments, whether they be under Democrat or -- Democratic or Republican administrations.

There are a lot of questions, but I know some of my colleagues -- I know my colleague from Rhode Island wants to ask questions and has other places to go so I'm going to limit the first round to five minutes for each of us, and then we'll -- in the second round we'll go to more unlimited time if it's just reasonable, if that's okay with you, Mr. Chairman, okay?

First, I just -- you say in your testimony that a United States attorney may be removed for any reason or no reason, that's your quote. So my first question is do you believe that U.S. attorneys can be fired on simply a whim? Somehow the president (sneeze) or the attorney general -- bless you -- wakes up one morning and says, "I don't like him -- let's fire him." What's the reason? "I just don't like him." Would that be okay?

MR. MCNULTY: Well, Mr. --

SEN. SCHUMER: Well, let me say, is that legally allowed?

MR. MCNULTY: Well, if we're using just a very narrow question of can in a legal sense, I think the law is clear that "serve at the pleasure" would mean that there needs to be no specific basis.

SEN. SCHUMER: Right. But I think you would agree that that would not be a good idea.

MR. MCNULTY: I would agree.

SEN. SCHUMER: Okay. Now let me ask you this. You do agree that a United States attorney can't be removed for a discriminatory reason -- because that person is a woman or black or -- do you agree with that?

MR. MCNULTY: Sure. I --

SEN. SCHUMER: So there are some limits here?

MR. MCNULTY: Well, of course, and there would certainly be moral limits and -- I don't know the law in the area of removal and relates to those special categories, but I certainly know that as a -- an appropriate thing to do -- would be completely inappropriate.

SEN. SCHUMER: Okay. And you do believe, of course, that a U.S. attorney could be removed for a corrupt reason --

MR. MCNULTY: Right.

SEN. SCHUMER: -- in return for a bribe or a favor? Okay. Now let me ask you this. Do you think it is good for public confidence and respect of the Justice Department for the president to exercise his power to remove a U.S. attorney simply to give somebody else a chance at the job? Let's just assume for the sake of argument that that's the reason. Mr. X, you're doing a very, very fine job but we'd prefer -- and you're in the middle of your term -- no one objects to what you've done -- but we prefer that Mr. Y take over. Would that be a good idea? Would that practice be wise?

MR. MCNULTY: I think that if it was done on a large scale, it could raise substantial issues and concerns. But I don't have the same perhaps alarm that you might have about whether or not that is a bad practice. If at the end of the first four-year term -- and of course all of our confirmation certificates say that we serve for a four-year term -- at the end of that four-year term, if there was an effort to identify and nominate new individuals to step in -- to take on a second term, for example, I'm not so sure that would be contrary to the best interest of the Department of Justice. It's not something that's been done -- it's not something that's being contemplated to do. But the turnover has already been essentially like that. We've already switched out more than half of the U.S. attorneys that served in the first term, so change is not something that slows down or debilitates the work of the Department of Justice.

SEN. SCHUMER: Right. But -- and all of these, these seven that we are talking about, they had completed their four-year terms, every one of them, but then had been in some length of holdover period.

MR. MCNULTY: Right.

SEN. SCHUMER: They weren't all told immediately at the end, or right before the end of their four-year term, to leave. Is that right?

MR. MCNULTY: That's correct.

SEN. SCHUMER: Okay. I still have a few minutes left, but I now have a whole new round of questioning and I don't want to break it in the middle, so I'm going to call on Senator Specter for his five minutes.

SEN. SPECTER: (Audio break) -- Chairman.

Mr. McNulty, were you ever an assistant U.S. attorney?

MR. MCNULTY: No, I wasn't.

SEN. SPECTER: Well, I was interested in your comment that the best job you had was U.S. attorney, and that's probably because you were never an assistant U.S. attorney -- (laughter) -- because I was an assistant district attorney, and that's a much better job than district attorney.

MR. MCNULTY: I've heard that from a lot of assistants. That's true.

SEN. SPECTER: The assistants just get to go into court and try cases and cross-examine witnesses and talk to juries and have a much higher level of sport than administrators who are U.S. attorneys or district attorneys.

Mr. McNulty, what about Carol Lam? I think we ought to get specific with the accusations that are made. Why was she terminated?

MR. MCNULTY: Senator, I came here today to be as forthcoming as I possibly can, and I will continue to work with the committee to provide information. But one thing that I do not want to do is, in a public setting, as the attorney general declined to do, to discuss specific issues regarding people. I think that it's -- it is unfair to individuals to have a discussion like that in this setting, in a public way, and I just have to respectfully decline going into specific reasons about any individual.

SEN. SPECTER: Well, Mr. McNulty, I can understand your reluctance to do so, but when we have confirmation hearings, which is the converse of inquiries into termination, we go into very difficult matters. Now, maybe somebody who's up for confirmation has more of an expectation of having critical comments made than someone who is terminated, and I'm not going to press you as to a public matter. But I think the committee needs to know why she was terminated, and if we can both find that out and have sufficient public assurance that the termination was justified, I'm delighted -- I'm willing to do it that way.

I'm not sure that these attorneys who were terminated wouldn't prefer to have it in a public setting, but we have the same thing as to Mr. Cummins and we have the same thing as to going into the qualifications of the people you've appointed. But to find out whether or not what Senator Schumer has had to say is right or wrong, we need to be specific.

MR. MCNULTY: Can I make two comments on -- first on the question of confirmation process. If you want to talk about me, and I'm here to have an opportunity to respond to everything I've ever done, that's one thing. I just am reluctant to talk about somebody who's not here and has the right to respond. And I don't -- I just don't want to unfairly prejudice any --

SEN. SPECTER: But Mr. McNulty, we are talking about you when we ask the question about why did you fire X or why did you fire Y. We're talking about what you did.

MR. MCNULTY: And I will have to be -- try to work with the committee to give them as much information as possible, but I also want to say something else.

Essentially, we're here to stipulate to the fact that if the committee is seeking information, our position basically is that -- that there is going to be a range of reasons and we don't believe that we have an obligation to set forth a certain standard or reason or a cause when it comes to removal.

SEN. SPECTER: Are you saying that aside from not wanting to have comments about these individuals in a public setting which, again, I say I'm not pressing, that the Department of Justice is taking the position that you will not tell the committee in our oversight capacity why you terminated these people?

MR. MCNULTY: No. No, I'm not saying that. I'm saying something a little more complicated than that. What I'm saying is that in searching through any document you might seek from the Department, such as an -- every three years we do an evaluation of an office. Those are called "EARs" reports. You may or may not see an EAR report what would be of concern to the leadership of a department, because that's just one way of measuring someone's performance. And much of this is subjective, and won't be apparent in the form of some report that was done two or three years ago by a group of individuals that looked at an office.

SEN. SPECTER: Well, my time is up, but we're going to go beyond reports. We're going to go to what the reasons were.

MR. MCNULTY: Sure.

SEN. SPECTER: -- subjective reasons are understandable.

MR. MCNULTY: I understand -- (cross talk) --

SEN. SPECTER: I like -- I like to observe that red signal, but you don't have to. You're the witness. Go ahead.

MR. MCNULTY: No, I just -- the senator opened, the chairman opened with a reference to documentation, and I just wanted to make it clear that there really may or may not be documentation as you think of it, because there aren't objective standards necessary in these matters when it comes to managing the department and thinking through what is best for the future of the department in terms of leadership of offices. In some places we may have some information that you can read; in others, we'll have to just explain our thinking.

SEN. SPECTER: Well, we can understand oral testimony and subjective evaluations.

MR. MCNULTY: Thank you, Senator.

SEN. SPECTER: We don't function solely on documents.

SEN. SCHUMER: Especially those of us who've been assistant district attorneys.

SEN. SPECTER: That's the standard, Mr. McNulty. So your qualifications are being challenged here. You haven't been an assistant U.S. attorney. (Laughter.)

SEN. SCHUMER: The senator from Rhode Island.

SEN. SHELDON WHITEHOUSE (D-RI): Thank you, Mr. Chairman.

Mr. McNulty, welcome. You're clearly a very wonderful and impressive man. But it strikes me that your suggestion that there is a clear factual record about what happened and that this was just turnover are both just plain wrong.

I start on the clear factual record part with the suggestion that has been made to The Washington Post, that the attorney general also made to us, and I'm quoting from the Post article on Sunday: "Each of the recently dismissed prosecutors had performance problems," which does not jibe with the statement of Mr. Cummins from Arkansas that he was told there was nothing wrong with his performance, but that officials in Washington wanted to give the job to another GOP loyalist. So right from the very get-go we start with something that is clearly not a clear factual record of what took place; in fact, there's -- on the very basic question of what the motivation was for these, we're getting two very distinct and irreconcilable stories.

MR. MCNULTY: Senator --

SEN. WHITEHOUSE: And I don't think that, if it's true, that as The Washington Post reported, six of the prosecutors received calls notifying them of their firings on a single day. The suggestion that this is just ordinary turnover doesn't seem to pass the last test, really. Could you respond to those two observations?

MR. MCNULTY: Yes, sir. Thank you.

Senator, first of all, with regard to Arkansas and what happened there and any other efforts to seek the resignation of U.S. attorneys, these have been lumped together, but they really ought not to be. And we'll talk about the Arkansas situation, as Senator Pryor has laid it out.

And the fact is that there was a change made there that was not connected to, as was said, the performance of the incumbent, but more related to the opportunity to provide a fresh start with a new person in that position.

With regard to the other positions, however --

SEN. WHITEHOUSE: But why would you need a fresh start if the first person was doing a perfectly good job?

MR. MCNULTY: Well, again, in the discretion of the department, individuals in the position of U.S. attorneys serve at the pleasure of the president. And because turnover -- and that's the only way of going to your second question I was referring to turnover -- because turnover is a common thing is U.S. attorneys offices --

SEN. WHITEHOUSE: I know. I turned over myself as a U.S. attorney.

MR. MCNULTY: -- bringing in someone does not create a disruption that is going to be hazardous to the office. And it does, again, provide some benefits.

In the case of Arkansas, which this is really what we're talking about, the individual who was brought in had a significant prosecution experience -- he actually had more experience than Mr. Cummins did when he started the job -- and so there was every reason to believe that he could be a good interim until his nomination or someone else's nomination for that position went forward and there was a confirmed person in the job.

SEN. WHITEHOUSE: Mr. McNulty, what value does it bring to the U.S. attorneys office in Arkansas to have the incoming U.S. attorney have served as an aide to Karl Rove and to have served on the Republican National Committee?

MR. MCNULTY: With all --

SEN. WHITEHOUSE: Do you find anything useful there to be an U.S. attorney?

MR. MCNULTY: Well, I don't know. All I know is that a lot of U.S. attorneys have political backgrounds. Mr. Cummins ran for Congress as a Republican candidate. Mr. Cummins served in the Bush- Cheney campaign. I don't know if those experiences were useful for him to be a successful U.S. attorney, because he was.

I think a lot of U.S. attorneys bring political experience to the job. It might help them in some intangible way. But in the case of Mr. Griffin, he actually was in that district for a period of time serving as an assistant United States attorney, started their gun enforcement program, did many cases as a JAG prosecutor, went to Iraq, served his country there and came back. So there are a lot of things about him that make him a credible and well-qualified person to be a U.S. attorney.

SEN. WHITEHOUSE: Having run public corruption cases, and having firsthand experience of how difficult it is to get people to be willing to testify and come forward, it is not an easy thing to do. You put your career,

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

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

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

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

SEN. WHITEHOUSE: We hope.

MR. MCNULTY: -- yes.

SEN. SCHUMER: Senator --

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

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

SEN. SCHUMER: Senator Hatch.

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

MR. MCNULTY: Thank you, Senator.

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

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

MR. MCNULTY: No.

SEN. HATCH: Were the people removed?

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

Certainly the effort was made to encourage and --

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

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

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

MR. MCNULTY: Absolutely.

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

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

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

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

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

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

MR. MCNULTY: Right.

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

MR. MCNULTY: Right.

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. MCNULTY: Thank you, Senator.

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

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

SEN. HATCH: Thank you, Mr. Chairman.

SEN. SCHUMER: Senator Feinstein.

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

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

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

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

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

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

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

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

MR. MCNULTY: Yes.

SEN. FEINSTEIN: Thank you very much.

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

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

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

Let me just ask just one --

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

SEN. FEINSTEIN: Sure, sure.

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

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

SEN. FEINSTEIN: I appreciate that.

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

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

SEN. FEINSTEIN: No.

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

MR. : (Off mike.)

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

SEN. SCHUMER: Thank you.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. MCNULTY: Correct.

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

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

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

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

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

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

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

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

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

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

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

SEN. SCHUMER: Yup.

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

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

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

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

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

SEN. SCHUMER: Mm-hm.

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

SEN. SCHUMER: Right.

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

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

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

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

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

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

MR. MCNULTY: (No audible response.)

SEN. SCHUMER: Okay. Do you dispute that?

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

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

MR. MCNULTY: I'm sorry?

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

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

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

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

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

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

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

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

MR. MCNULTY: Okay.

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

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

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

MR. MCNULTY: Yes.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

SEN. SCHUMER: You did.

MR. MCNULTY: I said "well qualified."

SEN. SCHUMER: Okay.

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

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

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

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

SEN. SCHUMER: Yeah, okay.

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

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

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

MR. MCNULTY: Okay.

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

MR. MCNULTY: I don't.

SEN. SCHUMER: Okay.

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

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

SEN. SCHUMER: You are assuming that.

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

SEN. SCHUMER: All right.

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

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

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

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

MR. MCNULTY: We'll take it back.

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

MR. MCNULTY: These are presidential appointments --

SEN. SCHUMER: Exactly.

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

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

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

MR. MCNULTY: I don't know.

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

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

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

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

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

SEN. SCHUMER: Right.

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

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

SEN. SCHUMER: Okay.

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

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

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

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

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

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

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

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

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

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

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

MR. MCNULTY: No.

SEN. SCHUMER: Good.

Next, are there any --

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

SEN. SCHUMER: As of today?

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

SEN. SCHUMER: I understand.

MR. MCNULTY: Okay.

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

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

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

MR. MCNULTY: That seems rather broad.

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

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

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

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

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

MR. MCNULTY: (Cross talk.)

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

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

MR. MCNULTY: No.

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

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

SEN. SESSIONS: (Off mike.)

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

SEN. SESSION: I would be glad to.

SEN. SCHUMER: Great. Without objection.

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

MR. MCNULTY: Certainly.

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

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

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

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

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

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

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

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

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

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

MR. MCNULTY: Right.

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

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

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

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

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

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

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

SEN. SCHUMER: Those are public letters.

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

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

MR. MCNULTY: Yes.

SEN. SCHUMER: Thank you.

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

SEN. SCHUMER: Okay.

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

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

MR. MCNULTY: (Cross talk.)

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

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

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

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

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

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

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

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

SEN. SCHUMER: Yeah. Okay.

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

I was --

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

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

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

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

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

SEN. SCHUMER: Yeah, I'm asking you, would you have objection? Because as I understand it, the sponsors simply want to restore what existed before the Patriot Act changed. Would the administration be opposed to that? MR. MCNULTY: Our position, I think, would be opposition. But we recognize that that's better than what the original legislation is. And the reason is because we supported what was done in the Patriot Act because we think it cleaned up a problem that though it only came up occasionally, and in the great majority of cases the system did work out okay, when it does come up, it can create some very serious problems.

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

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

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

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

Senator Specter.

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

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

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

MR. MCNULTY: Correct.

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

MR. MCNULTY: Don't know.

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

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

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

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

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

SEN. SPECTER: I know that. Would you?

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

SEN. SPECTER: Will consider.

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

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

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

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

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

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

Senator Whitehouse.

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

SEN. SCHUMER: (Off mike.)

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

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

SEN. WHITEHOUSE: What is not a factor?

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

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

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

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

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

MR. MCNULTY: Yes.

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

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

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

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

SEN. WHITEHOUSE: Of course.

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

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

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

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

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

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

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

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

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

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

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

SEN. WHITEHOUSE: We'll follow up.

Thank you, Mr. Chairman.

SEN. SCHUMER: Senator Sessions?

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

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

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

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

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

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

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

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

MR. MCNULTY: Right.

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

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

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

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

MR. MCNULTY: Oh, I see your question.

SEN. SESSIONS: -- would appoint those appointments?

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

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

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

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

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

MR. MCNULTY: Yeah.

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

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

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

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

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

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

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

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

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

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

Thank you, Mr. Chairman.

SEN. SCHUMER: Well, thank you.

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

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

Thank you.

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

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

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

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

(The witnesses are sworn.)

Ms. White, you may proceed.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

SEN. SCHUMER: Thank you, Ms. White.

Professor Levenson.

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

SEN. SCHUMER: Yes.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

SEN. SCHUMER: Thank you, Professor Levenson.

Mr. Gerson.

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

And let me talk to a couple of contrarian issues.

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

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

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

MR. GERSON: Thank you.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Thank you.

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

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

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

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

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

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

SEN. SCHUMER: You bet.

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

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

SEN. SCHUMER: Want to give us the example?

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

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

MR. GERSON: Four-year.

SEN. SCHUMER: Four-year.

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

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

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

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

SEN. SPECTER: (Off mike.)

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

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

SEN. SCHUMER: Thank you.

Senator Specter.

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

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

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

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

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

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

SEN. SCHUMER: I heard about that.

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

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

MR. GERSON: I'd darn well better.

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

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

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

MS. LEVINSON: Well, I do --

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

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

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

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

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

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

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

SEN. SPECTER: What was wrong with Cox?

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

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

Thank you all very much.

MS. LEVINSON: Thank you.

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

Thank you.

END.