TESTIMONY OF
REPRESENTATIVE FRANK PALLONE, JR.

DEFERRED PROSECUTION:
SHOULD CORPORATE SETTLEMENT AGREEMENTS BE WITHOUT GUIDELINES?

MARCH 11, 2008

I would like to thank the subcommittee for holding this very important hearing on the process for appointing federal monitors in deferred prosecution agreements. I would also like to thank Chairwoman Linda Sanchez for inviting me to testify today.

Recently, it has come to light that certain federal prosecutors are using their powerful positions to steer no-bid contracts to former employers and other influential people with which they have close ties.

I find it troubling that federal prosecutors have such tremendous discretion in appointing these corporate monitors. Allowing an unelected official unfettered leverage against companies and corporations who have potentially engaged in criminal behavior invites the type of abuse our judicial system is designed to prevent.

Specifically, in my home state of New Jersey, a consulting firm led by former Attorney General John Ashcroft received a contract from U.S. Attorney Chris Christie, his former employee. The fact that there was no competitive bidding and no public input in this process is problematic.

It seems that every U.S. Attorney handles the process of appointing corporate monitors differently. Some, like Christie, literally dictated the choice. Others provide a short list to the company accused of criminal activity or simply reserve their right to veto a company's selection.

With little say over which firm is appointed as a corporate monitor, companies are strong-armed into complying with the will of the U.S. Attorney. This essentially amounts to corporate blackmail on the part of the U.S. Attorneys.

Yesterday the Justice Department released an internal memo outlining a set of guidelines for the use of federal monitors in connection with deferred prosecution agreements. While it's encouraging that the Justice Department considered some of the reforms included in legislation I have introduced, the new guidelines are far too weak. I believe that the only way to ensure that politics and favoritism are completely removed from this process is to have someone independent of the Justice Department, like a U.S. district court judge, involved in the process.

That is why I have introduced H.R. 5086, which would establish safeguards and eliminate the culture of favoritism and political interference that permeates these corporate monitor arrangements.

My legislation would direct Attorney General Michael Mukasey to issue guidelines delineating when U.S. Attorneys should utilize corporate monitors. While the Justice Department touches upon this in its memo, the guidelines the department outlines still give far too much latitude to U.S. Attorneys. My legislation requires that a corporate monitor be selected and approved by a third-party district court judge or other magistrate from a pool of pre-qualified firms. These monitors would then be paid according to a predetermined fee schedule set by the district court.

The legislation also sets out criteria for consideration in the determination of whether to enter into a deferred prosecution agreement. The Justice Department guidelines do not provide sufficient guidance as to when these agreements are appropriate. My legislation recommends that the Justice Department consider the impact an agreement will have on employees and shareholders. Additionally, the department should consider remedial action taken by the corporation in response to wrongdoing and possible alternative punishments available. Having a uniform set of criteria available for when to enter into these agreements will be essential in eliminating abuse.

Another important aspect of my legislation mandates that all corporate monitors submit reports to the appropriate U.S. Attorney and U.S. district court. The department guidelines vaguely state that "it may be appropriate for the monitor to make periodic written reports to the Government and the corporation." This needs to be a requirement. It is essential for these monitors to keep the department and all involved parties apprised of the progress being made on the agreement. This will also ensure that the corporate monitor is properly performing all of the duties mandated in the agreement.

The use of deferred prosecution agreements and corporate monitors has increased exponentially, from 5 in 2003 to 35 such agreements last year. I believe that the reforms offered in my legislation are essential in rooting out any possible corruption or wrong-doing in the process of distributing these monitor arrangements. We cannot allow U.S. Attorneys or the Justice Department to have unyielding and absolute power in this process.

Once again, I would like to thank Chairwoman Sanchez and the subcommittee for inviting me here to testify at this important hearing. It is my hope that we can work together to have further hearings on the issue so that constructive reform to the process of deferred prosecution agreements can be brought about.