Opening Statement of
Congressman Bill Pascrell, Jr.
Eighth Congressional District of New Jersey

House Committee on the Judiciary
Subcommittee on Commercial and Administrative Law

HEARING

Deferred Prosecution: Should Corporate Settlement Agreements Be Without Guidelines?

March 11, 2008

Introductory Remarks

I want to thank Full Committee Chairman Conyers and Subcommittee Chairwoman Sanchez for allowing me to testify before the Subcommittee on Commercial and Administrative Law on the issue of deferred prosecution agreements. On November 26th of last year I wrote to Chairman Conyers and Chairwoman Sanchez calling for hearings on the ability of the U.S. Attorney's Office to enter into deferred prosecution agreements. I appreciate the fact that they have both realized the critical nature of this issue and have pursued it vigorously since that day. I have believed since the beginning that the Judiciary Committee is the most appropriate forum to investigate this issue.

My attention was first brought to this issue of deferred prosecution agreements in large part because of published reports regarding the actions taken by the U.S. Attorney's Office in New Jersey. It had been reported that U.S Attorney for the District of New Jersey, Christopher Christie had reached a $311 million settlement to end an investigation into kickbacks being made by leading manufacturers of knee and hip replacements. This settlement reportedly ended a two-year federal probe into allegations that these manufacturers paid surgeons millions of dollars to use and promote their knee and hip replacements, which would constitute a violation of Medicare fraud statutes. Within this agreement these manufacturers agreed to hire a federal monitor, selected by the U.S. Attorney, which would ensure they comply with the law and a strict set of reforms. However, I was initially concerned that there was little transparency within this provision of the agreement as it could allow the federal monitor to act with impunity while the manufacturers remain under the threat of prosecution.

Furthermore, this agreement raised questions about the discretion of the U.S. Attorney's Office to select federal monitors. In this case, Mr. Christie selected Ashcroft Group Consulting Services, which according to reports stands to collect as much as $52 million in 18 months for its monitoring of Zimmer Holdings of Indiana. Apparently, these compensation agreements for federal monitors are almost never known publicly and were only released in this instance because they were disclosed in the SEC filings for Zimmer Holdings of Indiana. I was concerned that under the continued threat of prosecution, any party being investigated seemingly has little choice but to agree to the selection of these federal monitors and their exorbitant fees. Therein the selection of these federal monitors by Mr. Christie could give the impression of impropriety and political favoritism.

Actions of U.S. Attorney Christopher Christie

I am disappointed that Mr. Christie is not appearing at this Subcommittee today. Mr. Christie is at the center of this investigation and has thus far failed to enlighten Members of Congress or the general public about the process by which he concluded this deferred prosecution agreement. Prior to his appointment as U.S. Attorney for New Jersey, he served as an attorney in private practice defending large corporate clients and therefore has intimate knowledge of both sides of corporate prosecutions. Furthermore, Mr. Christie has failed to shed any light on his selection of federal monitors in this case.

I want to make clear that throughout this process I have not made any accusation of corruption on the part of Mr. Christie. However, there are a number of indisputable facts in this case that raise very troubling questions, which remain unanswered. First and foremost is the fact is that Mr. Christie selected former Attorney General John Ashcroft, his own former superior, for a highly lucrative federal monitoring contract. In addition, there were four other medical device manufacturers given deferred prosecution agreements under this case. In every instance Mr. Christie selected former Justice Department associates to serve as federal monitors under highly lucrative monitoring contracts. This was seemingly done without any negotiation of fees or any consideration of selecting monitors with whom he was not closely associated with. These actions are all the more troubling in the light of testimony by representatives of Zimmer Holdings to the Senate Special Committee on Aging that

Mr. Christie never presented the evidence he held against them and that he never forewarned them to the fact that he would be selecting Ashcroft Group as their monitor. This representative also made clear that Zimmer Holdings felt compelled to consent to this deferred prosecution agreement because they feared being taken off the Medicare providers list, which would have crippled their business. Therefore, Mr. Christie held all the leverage in this agreement and dictated the terms completely as he saw fit.

In my mind, these monitoring agreements amount to no-bid federal contracts that are ripe for political considerations. Current Attorney General Michael Mukasey tried to defend this practice last month before the full Judiciary Committee by stating that these monitoring contracts are paid out by private corporations and not through federal funds. However, the Attorney General fails to mention that these are publicly traded companies and these exorbitant monitoring fees will surely impact American consumers. In the end, Mr. Christie may defend himself by saying that he needed to select these monitors since he knew he could trust them. But, I must be clear when I say that the selection of close associates by a federal officer to take on highly lucrative contracts, which are not negotiated and in which outside contractors are not even considered, is the essence of political favoritism.

Testimony from Former Attorney General Ashcroft

I am pleased that former U.S. Attorney General John Ashcroft has agreed to testify before this Subcommittee. Mr. Ashcroft's testimony is critical to understanding the process by which he was selected as the monitor for Zimmer Holdings. In addition, as Attorney General Mr. Ashcroft created the current system of deferred prosecution agreements. To this date, Mr. Ashcroft has also remained quiet in explaining his role in this process. As in the case of Mr. Christie, I have never made any accusation of wrongdoing on the part of Mr. Ashcroft. However, the troubling fact is that Mr. Ashcroft created a process for corporate prosecutions within the Department of Justice, from which he now benefits handsomely from. I hope that Mr. Ashcroft will choose, through his testimony to this Subcommittee, to answer these questions regarding his relationship with U.S. Attorney Christie and this exorbitant monitoring contract.

History of Deferred Prosecution Agreements

As I delved deeper into this issue involving U.S. Attorney Christie and former Attorney General Ashcroft I came to the realization that this case of deferred prosecution agreements encompassed an even larger issue of corporate prosecutions in the post-Enron era. In researching the history, I discovered that the practice of deferred prosecution agreements was made legal through the Speedy Trial Act of 1974 (Public Law 93-619, codified at 18 U.S.C. 3161(h)(2)), which first gave the attorney for the Government the right to have a period of delay during which prosecution is deferred pursuant to a written agreement with the defendant. In the beginning this remedy was rarely used by government prosecutors, except in small-scale drug cases involving diversion programs usually for marijuana-related offenses. However, the indictment and ensuing collapse of accounting giant Arthur Andersen in March 2002 made clear to both prosecutors and defense attorneys the susceptibility large corporations have to federal prosecutions and the consequences that result. In response to the large number of federal prosecutions against corporations, the Department of Justice issued a memorandum, known as the "Thompson Memo" after Deputy Attorney General Larry Thompson, which, instructed federal prosecutors to explicitly consider "granting a corporation immunity or amnesty or pretrial diversion…in exchange for cooperation when a corporation's timely cooperation appears to be necessary to the public interest and other means of obtaining the desired cooperation are unavailable or would not be effective."

However, it has become clear in the years since the 'Thompson Memo' that federal prosecutors hold even greater power and discretion through deferred prosecution agreements since oversight of such agreements seemingly has not existed through the federal government or the judiciary. In fact, a study conducted by Lawrence D. Finder and Ryan D. McConnell found that the number of deferred prosecution agreements

between the Department of Justice and corporations grew to thirty-five last year from just five in 2003, highlighting the explosive use of this hidden policy. It is my contention that the intent of the Speedy Trial Act of 1974 was never to the scope and breadth of deferred corporate prosecutions now being brought by federal prosecutors. It seems clear that the Department of Justice in recent years has consistently worked to shield this practice from oversight by Congress and the courts.

'Statement of Principles on Deferred Prosecution Agreements'

I myself have not yet introduced legislation on this critical issue because I believe that this issue must first be investigated by the Judiciary Committee through proceedings like this hearing. Additionally, I believe any legislation cannot merely address the issue of contracting with federal monitors, but must have a comprehensive approach to the larger issue of corporate prosecutions. In December of last year in lieu of legislation, I sent to this Committee and to the Department of Justice, my *Statement of Principles on Deferred Prosecution Agreements*. These four principles lay out a comprehensive approach to reforming deferred prosecution agreements and I look forward to continuing my work with this Committee to turn these principles into legislation that will finally provide oversight to this practice.

1. Require Guidelines on Deferred Prosecution Agreements: Corporate attorneys including the Association of Corporate Counsel have long complained that the Department of Justice has never issued any formal guidelines on the practice of deferred prosecution agreements. These attorneys believe that they can not properly represent their client's best interests when they have no guidelines to rely upon as to when corporations may be offered a deferred prosecution agreement and without clear knowledge of the parameters of such an agreement. This has left many to believe that the Department of Justice refuses to offer written guidelines so that its federal prosecutors can continue to have unmitigated discretion as to when to offer a deferred prosecution agreement and the manner in which they are carried out. Clearly, without any written rules on such agreements it becomes impossible to hold federal prosecutors to account. The requirement to issue formal written guidelines on deferred prosecution agreements would be the first place to start in order to provide any accountability to such agreements.

2. Restore Judicial Oversight of Deferred Prosecution Agreements: Under the current system deferred prosecution agreements allow federal prosecutors and corporate offenders to avoid the scrutiny of the judicial system entirely. These agreements are conducted between the two parties outside of a courtroom and once such an agreement is reached the courts are no longer involved in the case. Conversely, in other criminal cases that come before the court, the prosecution and defense are free to reach a plea bargain agreement, but the presiding judge is not bound by any such agreement and has the discretion to deny it based upon legal precedent. In order to restore this balance it is necessary to give the presiding judge the authority to sign-off on the terms of a deferred prosecution agreement as well as the selection of a federal monitor. In addition, the federal monitor and the corporation should be required to submit quarterly reports to the Chief Judge of the District Court. These reports would allow the judiciary to monitor the progression of these agreements through the federal monitor as well as allow corporations to have confidential communication with the judiciary to voice any concerns that they may fear to bring up with the federal prosecutor.

3. Take the Selection of Federal Monitors Out of the Hands of U.S. Attorneys: The U.S. Attorney's Office wields immense clout and in fact has the authority to bring the full weight of the federal government upon those individuals and parties whom they consider under suspicion of federal law. However, as the actions of U.S. Attorney Christie have made clear, deferred prosecution agreements allow federal prosecutors to brandish even greater influence especially as it relates to the selection of federal monitors. While these monitors work for the prosecution and are hired by the U.S. Attorney, they are in fact paid at the expense of the corporations. In additions, the fees are set by firms who have already been selected to serve as federal monitors and corporations feel they are in no position to negotiate. These factors have led to massive legal fees thus making it very lucrative to be selected as a federal monitor and have led some to believe there to be the appearance of

impropriety and political favoritism on the part of the U.S. Attorney's office. This issue could be remedied by taking the decision on whom to hire as a federal monitor out of the hands of U.S. Attorneys. Instead, the Executive Office for United States Attorneys could contract with firms and create a set fee structure for services rendered as a federal monitor. This would allow the Department of Justice to create a national database of firms who would have the experience and specialized skills necessary to serve as federal monitors. The Executive Office for United States Attorneys would then make a final decision on which firm to hire based upon the particular requirements of each case.

4. Require Full Disclosure of Deferred Prosecution Agreements: Since the introduction of the 'Thompson Memo' in January 2003 the public has had little understanding about the nature of deferred prosecution agreements specifically because few details have ever been released. This is particularly the case as it relates to the fees charged by federal monitors, which have always been held secret. In fact, in the case involving U.S. Attorney Christie the fees charged by Mr. Ashcroft's firm were only released because the corporation, Zimmer Inc., found the fees to be so large and burdensome that they felt compelled to report them to their shareholders through their SEC filings. In order to create any transparency through this process there must be a requirement for full disclosure of the terms of a deferred prosecution agreement as well as any contracts reached with firms serving as federal monitors.

Department of Justice Action on the Selection of Federal Monitors

Last week the Acting Deputy Attorney General at the Department of Justice Craig Morford introduced a memorandum discussing the 'Selection and Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations.' This memorandum was apparently introduced in response to the actions taken by U.S. Attorney Christopher Christie in hiring his former superior John Ashcroft as a federal monitor. However, this memorandum comes far too late and does far too little to truly reform the practice of deferred prosecution agreements, as is necessary. First and foremost, is the fact that this memorandum only addresses the selection of federal monitors and entirely ignores the need to provide guidance on deferred prosecution agreements to corporate attorneys as well as fully disclose all such agreements to the public. In addition, the memorandum does not acknowledge the lack of judicial or Congressional oversight of this practice and the imbalanced system of justice that this creates. Finally, this memorandum merely ascribes many principles that already exist within statues governing the ethics of this issue. For example, the memorandum states pre-existing guidelines set forth in 18 U.S.C § 208 and 5 C.F.R. Part 2635 to avoid the appearance of a conflict-of-interest in the selection of monitors. From reading these statutes it seems quite reasonable to understand that Mr. Christie has already violated the letter and the spirit of these pre-exiting ethics guidelines with his selection of former colleagues and associates to serve as federal monitors. I would hope then that the Department of Justice would hold Mr. Christie to account for his actions that run counter to ethics guidelines he should have been following from the start.

Concluding Remarks

I can not stress more strongly the need for comprehensive legislation regarding deferred prosecution agreements. This practice has clearly been created by the Department of Justice to generate unmitigated power for federal prosecutors in pursuing corporations, as is highlighted by the actions of U.S. Attorney Christie in this case. Corporate prosecutions are of critical importance to our nation because of the money, resources and jobs that can be at stake. However, an even more essential concern has emerged through these deferred prosecution agreements and that is the lack of any checks and balances within the system. We are all well versed on the checks and balances between the executive, legislative and judiciary branches of government. However, within each of these branches also exists its own set of checks and balances necessary to avoid the concentration of power. As Members of this Committee know, within the judiciary branch these checks and balances involve the powers and responsibilities of the defense, the prosecution and the courts. However, within the deferred

prosecution system power is almost entirely concentrated in the hands of federal prosecutors. For example, if an individual is charged with a crime and strikes a plea bargain with the prosecution then that plea must go before a judge who has the power to deny and in some cases to alter that agreement based on judicial discretion. However, when it comes to these deferred prosecution agreements that are struck between federal prosecutors and corporations it means that neither party ever sees the inside of a courtroom let alone has to put these agreements before a judge.

In essence federal prosecutors hold all the cards over these corporations, which have everything to fear in a prolonged prosecution and little to gain in challenging powerful federal prosecutors. No one here, including myself, is in a position of defending corrupt corporations or arguing against their full prosecution by the law. But the presumed innocence of defendants before trial and the balance between the prosecution and defense are hallmarks of our justice system. In this instance however, we are left with a deferred prosecution system that gives federal prosecutors unmitigated power to be judge, jury and sentencer. Truly, it was never the intent of our justice system to concentrate such power in the hands of any one individual or office. We must not allow deferred prosecution to become a form of deferred justice.

Again, I want to thank Chairman Conyers and Chairwoman Sanchez for allowing me to testify before this Subcommittee. I look forward to continued investigation of this critical issue and further efforts to develop comprehensive corporate prosecution legislation.

Thank You.

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2. Restore Judicial Oversight of Deferred Prosecution Agreements: Under the current system deferred prosecution agreements allow federal prosecutors and corporate offenders to avoid the scrutiny of the judicial system entirely. These agreements are conducted between the two parties outside of a courtroom and once such an agreement is reached the courts are no longer involved in the case. Conversely, in other criminal cases that come before the court, the prosecution and defense are free to reach a plea bargain agreement, but the presiding judge is not bound by any such agreement and has the discretion to deny it based upon legal precedent. In order to restore this balance it is necessary to give the presiding judge the authority to sign-off on the terms of a deferred prosecution agreement as well as the selection of a federal monitor. In addition, the federal monitor and the corporation should be required to submit quarterly reports to the Chief Judge of the District Court. These reports would allow the judiciary to monitor the progression of these agreements through the federal monitor as well as allow corporations to have confidential communication with the judiciary to voice any concerns that they may fear to bring up with the federal prosecutor.

3. Take the Selection of Federal Monitors Out of the Hands of U.S. Attorneys: The U.S. Attorney's Office wields immense clout and in fact has the authority to bring the full weight of the federal government upon those individuals and parties whom they consider under suspicion of federal law. However, as the actions of U.S. Attorney Christie have made clear, deferred prosecution agreements allow federal prosecutors to brandish even greater influence especially as it relates to the selection of federal monitors. While these monitors work for the prosecution and are hired by the U.S. Attorney, they are in fact paid at the expense of the corporations. In additions, the fees are set by firms who have already been selected to serve as federal monitors and corporations feel they are in no position to negotiate. These factors have led to massive legal fees thus making it very lucrative to be selected as a federal monitor and have led some to believe there to be the appearance of

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4. Require Full Disclosure of Deferred Prosecution Agreements: Since the introduction of the 'Thompson Memo' in January 2003 the public has had little understanding about the nature of deferred prosecution agreements specifically because few details have ever been released. This is particularly the case as it relates to the fees charged by federal monitors, which have always been held secret. In fact, in the case involving U.S. Attorney Christie the fees charged by Mr. Ashcroft's firm were only released because the corporation, Zimmer Inc., found the fees to be so large and burdensome that they felt compelled to report them to their shareholders through their SEC filings. In order to create any transparency through this process there must be a requirement for full disclosure of the terms of a deferred prosecution agreement as well as any contracts reached with firms serving as federal monitors.

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I want to make clear that throughout this process I have not made any accusation of corruption on the part of Mr. Christie. However, there are a number of indisputable facts in this case that raise very troubling questions, which remain unanswered. First and foremost is the fact is that Mr. Christie selected former Attorney General John Ashcroft, his own former superior, for a highly lucrative federal monitoring contract. In addition, there were four other medical device manufacturers given deferred prosecution agreements under this case. In every instance Mr. Christie selected former Justice Department associates to serve as federal monitors under highly lucrative monitoring contracts. This was seemingly done without any negotiation of fees or any consideration of selecting monitors with whom he was not closely associated with. These actions are all the more troubling in the light of testimony by representatives of Zimmer Holdings to the Senate Special Committee on Aging that

Mr. Christie never presented the evidence he held against them and that he never forewarned them to the fact that he would be selecting Ashcroft Group as their monitor. This representative also made clear that Zimmer Holdings felt compelled to consent to this deferred prosecution agreement because they feared being taken off the Medicare providers list, which would have crippled their business. Therefore, Mr. Christie held all the leverage in this agreement and dictated the terms completely as he saw fit.

In my mind, these monitoring agreements amount to no-bid federal contracts that are ripe for political considerations. Current Attorney General Michael Mukasey tried to defend this practice last month before the full Judiciary Committee by stating that these monitoring contracts are paid out by private corporations and not through federal funds. However, the Attorney General fails to mention that these are publicly traded companies and these exorbitant monitoring fees will surely impact American consumers. In the end, Mr. Christie may defend himself by saying that he needed to select these monitors since he knew he could trust them. But, I must be clear when I say that the selection of close associates by a federal officer to take on highly lucrative contracts, which are not negotiated and in which outside contractors are not even considered, is the essence of political favoritism.

Testimony from Former Attorney General Ashcroft

I am pleased that former U.S. Attorney General John Ashcroft has agreed to testify before this Subcommittee. Mr. Ashcroft's testimony is critical to understanding the process by which he was selected as the monitor for Zimmer Holdings. In addition, as Attorney General Mr. Ashcroft created the current system of deferred prosecution agreements. To this date, Mr. Ashcroft has also remained quiet in explaining his role in this process. As in the case of Mr. Christie, I have never made any accusation of wrongdoing on the part of Mr. Ashcroft. However, the troubling fact is that Mr. Ashcroft created a process for corporate prosecutions within the Department of Justice, from which he now benefits handsomely from. I hope that Mr. Ashcroft will choose, through his testimony to this Subcommittee, to answer these questions regarding his relationship with U.S. Attorney Christie and this exorbitant monitoring contract.

History of Deferred Prosecution Agreements

As I delved deeper into this issue involving U.S. Attorney Christie and former Attorney General Ashcroft I came to the realization that this case of deferred prosecution agreements encompassed an even larger issue of corporate prosecutions in the post-Enron era. In researching the history, I discovered that the practice of deferred prosecution agreements was made legal through the Speedy Trial Act of 1974 (Public Law 93-619, codified at 18 U.S.C. 3161(h)(2)), which first gave the attorney for the Government the right to have a period of delay during which prosecution is deferred pursuant to a written agreement with the defendant. In the beginning this remedy was rarely used by government prosecutors, except in small-scale drug cases involving diversion programs usually for marijuana-related offenses. However, the indictment and ensuing collapse of accounting giant Arthur Andersen in March 2002 made clear to both prosecutors and defense attorneys the susceptibility large corporations have to federal prosecutions and the consequences that result. In response to the large number of federal prosecutions against corporations, the Department of Justice issued a memorandum, known as the "Thompson Memo" after Deputy Attorney General Larry Thompson, which, instructed federal prosecutors to explicitly consider "granting a corporation immunity or amnesty or pretrial diversion…in exchange for cooperation when a corporation's timely cooperation appears to be necessary to the public interest and other means of obtaining the desired cooperation are unavailable or would not be effective."

However, it has become clear in the years since the 'Thompson Memo' that federal prosecutors hold even greater power and discretion through deferred prosecution agreements since oversight of such agreements seemingly has not existed through the federal government or the judiciary. In fact, a study conducted by Lawrence D. Finder and Ryan D. McConnell found that the number of deferred prosecution agreements

between the Department of Justice and corporations grew to thirty-five last year from just five in 2003, highlighting the explosive use of this hidden policy. It is my contention that the intent of the Speedy Trial Act of 1974 was never to the scope and breadth of deferred corporate prosecutions now being brought by federal prosecutors. It seems clear that the Department of Justice in recent years has consistently worked to shield this practice from oversight by Congress and the courts.

'Statement of Principles on Deferred Prosecution Agreements'

I myself have not yet introduced legislation on this critical issue because I believe that this issue must first be investigated by the Judiciary Committee through proceedings like this hearing. Additionally, I believe any legislation cannot merely address the issue of contracting with federal monitors, but must have a comprehensive approach to the larger issue of corporate prosecutions. In December of last year in lieu of legislation, I sent to this Committee and to the Department of Justice, my *Statement of Principles on Deferred Prosecution Agreements*. These four principles lay out a comprehensive approach to reforming deferred prosecution agreements and I look forward to continuing my work with this Committee to turn these principles into legislation that will finally provide oversight to this practice.

1. Require Guidelines on Deferred Prosecution Agreements: Corporate attorneys including the Association of Corporate Counsel have long complained that the Department of Justice has never issued any formal guidelines on the practice of deferred prosecution agreements. These attorneys believe that they can not properly represent their client's best interests when they have no guidelines to rely upon as to when corporations may be offered a deferred prosecution agreement and without clear knowledge of the parameters of such an agreement. This has left many to believe that the Department of Justice refuses to offer written guidelines so that its federal prosecutors can continue to have unmitigated discretion as to when to offer a deferred prosecution agreement and the manner in which they are carried out. Clearly, without any written rules on such agreements it becomes impossible to hold federal prosecutors to account. The requirement to issue formal written guidelines on deferred prosecution agreements would be the first place to start in order to provide any accountability to such agreements.

2. Restore Judicial Oversight of Deferred Prosecution Agreements: Under the current system deferred prosecution agreements allow federal prosecutors and corporate offenders to avoid the scrutiny of the judicial system entirely. These agreements are conducted between the two parties outside of a courtroom and once such an agreement is reached the courts are no longer involved in the case. Conversely, in other criminal cases that come before the court, the prosecution and defense are free to reach a plea bargain agreement, but the presiding judge is not bound by any such agreement and has the discretion to deny it based upon legal precedent. In order to restore this balance it is necessary to give the presiding judge the authority to sign-off on the terms of a deferred prosecution agreement as well as the selection of a federal monitor. In addition, the federal monitor and the corporation should be required to submit quarterly reports to the Chief Judge of the District Court. These reports would allow the judiciary to monitor the progression of these agreements through the federal monitor as well as allow corporations to have confidential communication with the judiciary to voice any concerns that they may fear to bring up with the federal prosecutor.

3. Take the Selection of Federal Monitors Out of the Hands of U.S. Attorneys: The U.S. Attorney's Office wields immense clout and in fact has the authority to bring the full weight of the federal government upon those individuals and parties whom they consider under suspicion of federal law. However, as the actions of U.S. Attorney Christie have made clear, deferred prosecution agreements allow federal prosecutors to brandish even greater influence especially as it relates to the selection of federal monitors. While these monitors work for the prosecution and are hired by the U.S. Attorney, they are in fact paid at the expense of the corporations. In additions, the fees are set by firms who have already been selected to serve as federal monitors and corporations feel they are in no position to negotiate. These factors have led to massive legal fees thus making it very lucrative to be selected as a federal monitor and have led some to believe there to be the appearance of

impropriety and political favoritism on the part of the U.S. Attorney's office. This issue could be remedied by taking the decision on whom to hire as a federal monitor out of the hands of U.S. Attorneys. Instead, the Executive Office for United States Attorneys could contract with firms and create a set fee structure for services rendered as a federal monitor. This would allow the Department of Justice to create a national database of firms who would have the experience and specialized skills necessary to serve as federal monitors. The Executive Office for United States Attorneys would then make a final decision on which firm to hire based upon the particular requirements of each case.

4. Require Full Disclosure of Deferred Prosecution Agreements: Since the introduction of the 'Thompson Memo' in January 2003 the public has had little understanding about the nature of deferred prosecution agreements specifically because few details have ever been released. This is particularly the case as it relates to the fees charged by federal monitors, which have always been held secret. In fact, in the case involving U.S. Attorney Christie the fees charged by Mr. Ashcroft's firm were only released because the corporation, Zimmer Inc., found the fees to be so large and burdensome that they felt compelled to report them to their shareholders through their SEC filings. In order to create any transparency through this process there must be a requirement for full disclosure of the terms of a deferred prosecution agreement as well as any contracts reached with firms serving as federal monitors.

Department of Justice Action on the Selection of Federal Monitors

Last week the Acting Deputy Attorney General at the Department of Justice Craig Morford introduced a memorandum discussing the 'Selection and Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations.' This memorandum was apparently introduced in response to the actions taken by U.S. Attorney Christopher Christie in hiring his former superior John Ashcroft as a federal monitor. However, this memorandum comes far too late and does far too little to truly reform the practice of deferred prosecution agreements, as is necessary. First and foremost, is the fact that this memorandum only addresses the selection of federal monitors and entirely ignores the need to provide guidance on deferred prosecution agreements to corporate attorneys as well as fully disclose all such agreements to the public. In addition, the memorandum does not acknowledge the lack of judicial or Congressional oversight of this practice and the imbalanced system of justice that this creates. Finally, this memorandum merely ascribes many principles that already exist within statues governing the ethics of this issue. For example, the memorandum states pre-existing guidelines set forth in 18 U.S.C § 208 and 5 C.F.R. Part 2635 to avoid the appearance of a conflict-of-interest in the selection of monitors. From reading these statutes it seems quite reasonable to understand that Mr. Christie has already violated the letter and the spirit of these pre-exiting ethics guidelines with his selection of former colleagues and associates to serve as federal monitors. I would hope then that the Department of Justice would hold Mr. Christie to account for his actions that run counter to ethics guidelines he should have been following from the start.

Concluding Remarks

I can not stress more strongly the need for comprehensive legislation regarding deferred prosecution agreements. This practice has clearly been created by the Department of Justice to generate unmitigated power for federal prosecutors in pursuing corporations, as is highlighted by the actions of U.S. Attorney Christie in this case. Corporate prosecutions are of critical importance to our nation because of the money, resources and jobs that can be at stake. However, an even more essential concern has emerged through these deferred prosecution agreements and that is the lack of any checks and balances within the system. We are all well versed on the checks and balances between the executive, legislative and judiciary branches of government. However, within each of these branches also exists its own set of checks and balances necessary to avoid the concentration of power. As Members of this Committee know, within the judiciary branch these checks and balances involve the powers and responsibilities of the defense, the prosecution and the courts. However, within the deferred

prosecution system power is almost entirely concentrated in the hands of federal prosecutors. For example, if an individual is charged with a crime and strikes a plea bargain with the prosecution then that plea must go before a judge who has the power to deny and in some cases to alter that agreement based on judicial discretion. However, when it comes to these deferred prosecution agreements that are struck between federal prosecutors and corporations it means that neither party ever sees the inside of a courtroom let alone has to put these agreements before a judge.

In essence federal prosecutors hold all the cards over these corporations, which have everything to fear in a prolonged prosecution and little to gain in challenging powerful federal prosecutors. No one here, including myself, is in a position of defending corrupt corporations or arguing against their full prosecution by the law. But the presumed innocence of defendants before trial and the balance between the prosecution and defense are hallmarks of our justice system. In this instance however, we are left with a deferred prosecution system that gives federal prosecutors unmitigated power to be judge, jury and sentencer. Truly, it was never the intent of our justice system to concentrate such power in the hands of any one individual or office. We must not allow deferred prosecution to become a form of deferred justice.

Again, I want to thank Chairman Conyers and Chairwoman Sanchez for allowing me to testify before this Subcommittee. I look forward to continued investigation of this critical issue and further efforts to develop comprehensive corporate prosecution legislation.

Thank You.

Opening Statement of
Congressman Bill Pascrell, Jr.
Eighth Congressional District of New Jersey

House Committee on the Judiciary
Subcommittee on Commercial and Administrative Law

HEARING

Deferred Prosecution: Should Corporate Settlement Agreements Be Without Guidelines?

March 11, 2008

Introductory Remarks

I want to thank Full Committee Chairman Conyers and Subcommittee Chairwoman Sanchez for allowing me to testify before the Subcommittee on Commercial and Administrative Law on the issue of deferred prosecution agreements. On November 26th of last year I wrote to Chairman Conyers and Chairwoman Sanchez calling for hearings on the ability of the U.S. Attorney's Office to enter into deferred prosecution agreements. I appreciate the fact that they have both realized the critical nature of this issue and have pursued it vigorously since that day. I have believed since the beginning that the Judiciary Committee is the most appropriate forum to investigate this issue.

My attention was first brought to this issue of deferred prosecution agreements in large part because of published reports regarding the actions taken by the U.S. Attorney's Office in New Jersey. It had been reported that U.S Attorney for the District of New Jersey, Christopher Christie had reached a $311 million settlement to end an investigation into kickbacks being made by leading manufacturers of knee and hip replacements. This settlement reportedly ended a two-year federal probe into allegations that these manufacturers paid surgeons millions of dollars to use and promote their knee and hip replacements, which would constitute a violation of Medicare fraud statutes. Within this agreement these manufacturers agreed to hire a federal monitor, selected by the U.S. Attorney, which would ensure they comply with the law and a strict set of reforms. However, I was initially concerned that there was little transparency within this provision of the agreement as it could allow the federal monitor to act with impunity while the manufacturers remain under the threat of prosecution.

Furthermore, this agreement raised questions about the discretion of the U.S. Attorney's Office to select federal monitors. In this case, Mr. Christie selected Ashcroft Group Consulting Services, which according to reports stands to collect as much as $52 million in 18 months for its monitoring of Zimmer Holdings of Indiana. Apparently, these compensation agreements for federal monitors are almost never known publicly and were only released in this instance because they were disclosed in the SEC filings for Zimmer Holdings of Indiana. I was concerned that under the continued threat of prosecution, any party being investigated seemingly has little choice but to agree to the selection of these federal monitors and their exorbitant fees. Therein the selection of these federal monitors by Mr. Christie could give the impression of impropriety and political favoritism.

Actions of U.S. Attorney Christopher Christie

I am disappointed that Mr. Christie is not appearing at this Subcommittee today. Mr. Christie is at the center of this investigation and has thus far failed to enlighten Members of Congress or the general public about the process by which he concluded this deferred prosecution agreement. Prior to his appointment as U.S. Attorney for New Jersey, he served as an attorney in private practice defending large corporate clients and therefore has intimate knowledge of both sides of corporate prosecutions. Furthermore, Mr. Christie has failed to shed any light on his selection of federal monitors in this case.

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As I delved deeper into this issue involving U.S. Attorney Christie and former Attorney General Ashcroft I came to the realization that this case of deferred prosecution agreements encompassed an even larger issue of corporate prosecutions in the post-Enron era. In researching the history, I discovered that the practice of deferred prosecution agreements was made legal through the Speedy Trial Act of 1974 (Public Law 93-619, codified at 18 U.S.C. 3161(h)(2)), which first gave the attorney for the Government the right to have a period of delay during which prosecution is deferred pursuant to a written agreement with the defendant. In the beginning this remedy was rarely used by government prosecutors, except in small-scale drug cases involving diversion programs usually for marijuana-related offenses. However, the indictment and ensuing collapse of accounting giant Arthur Andersen in March 2002 made clear to both prosecutors and defense attorneys the susceptibility large corporations have to federal prosecutions and the consequences that result. In response to the large number of federal prosecutions against corporations, the Department of Justice issued a memorandum, known as the "Thompson Memo" after Deputy Attorney General Larry Thompson, which, instructed federal prosecutors to explicitly consider "granting a corporation immunity or amnesty or pretrial diversion…in exchange for cooperation when a corporation's timely cooperation appears to be necessary to the public interest and other means of obtaining the desired cooperation are unavailable or would not be effective."

However, it has become clear in the years since the 'Thompson Memo' that federal prosecutors hold even greater power and discretion through deferred prosecution agreements since oversight of such agreements seemingly has not existed through the federal government or the judiciary. In fact, a study conducted by Lawrence D. Finder and Ryan D. McConnell found that the number of deferred prosecution agreements

between the Department of Justice and corporations grew to thirty-five last year from just five in 2003, highlighting the explosive use of this hidden policy. It is my contention that the intent of the Speedy Trial Act of 1974 was never to the scope and breadth of deferred corporate prosecutions now being brought by federal prosecutors. It seems clear that the Department of Justice in recent years has consistently worked to shield this practice from oversight by Congress and the courts.

'Statement of Principles on Deferred Prosecution Agreements'

I myself have not yet introduced legislation on this critical issue because I believe that this issue must first be investigated by the Judiciary Committee through proceedings like this hearing. Additionally, I believe any legislation cannot merely address the issue of contracting with federal monitors, but must have a comprehensive approach to the larger issue of corporate prosecutions. In December of last year in lieu of legislation, I sent to this Committee and to the Department of Justice, my *Statement of Principles on Deferred Prosecution Agreements*. These four principles lay out a comprehensive approach to reforming deferred prosecution agreements and I look forward to continuing my work with this Committee to turn these principles into legislation that will finally provide oversight to this practice.

1. Require Guidelines on Deferred Prosecution Agreements: Corporate attorneys including the Association of Corporate Counsel have long complained that the Department of Justice has never issued any formal guidelines on the practice of deferred prosecution agreements. These attorneys believe that they can not properly represent their client's best interests when they have no guidelines to rely upon as to when corporations may be offered a deferred prosecution agreement and without clear knowledge of the parameters of such an agreement. This has left many to believe that the Department of Justice refuses to offer written guidelines so that its federal prosecutors can continue to have unmitigated discretion as to when to offer a deferred prosecution agreement and the manner in which they are carried out. Clearly, without any written rules on such agreements it becomes impossible to hold federal prosecutors to account. The requirement to issue formal written guidelines on deferred prosecution agreements would be the first place to start in order to provide any accountability to such agreements.

2. Restore Judicial Oversight of Deferred Prosecution Agreements: Under the current system deferred prosecution agreements allow federal prosecutors and corporate offenders to avoid the scrutiny of the judicial system entirely. These agreements are conducted between the two parties outside of a courtroom and once such an agreement is reached the courts are no longer involved in the case. Conversely, in other criminal cases that come before the court, the prosecution and defense are free to reach a plea bargain agreement, but the presiding judge is not bound by any such agreement and has the discretion to deny it based upon legal precedent. In order to restore this balance it is necessary to give the presiding judge the authority to sign-off on the terms of a deferred prosecution agreement as well as the selection of a federal monitor. In addition, the federal monitor and the corporation should be required to submit quarterly reports to the Chief Judge of the District Court. These reports would allow the judiciary to monitor the progression of these agreements through the federal monitor as well as allow corporations to have confidential communication with the judiciary to voice any concerns that they may fear to bring up with the federal prosecutor.

3. Take the Selection of Federal Monitors Out of the Hands of U.S. Attorneys: The U.S. Attorney's Office wields immense clout and in fact has the authority to bring the full weight of the federal government upon those individuals and parties whom they consider under suspicion of federal law. However, as the actions of U.S. Attorney Christie have made clear, deferred prosecution agreements allow federal prosecutors to brandish even greater influence especially as it relates to the selection of federal monitors. While these monitors work for the prosecution and are hired by the U.S. Attorney, they are in fact paid at the expense of the corporations. In additions, the fees are set by firms who have already been selected to serve as federal monitors and corporations feel they are in no position to negotiate. These factors have led to massive legal fees thus making it very lucrative to be selected as a federal monitor and have led some to believe there to be the appearance of

impropriety and political favoritism on the part of the U.S. Attorney's office. This issue could be remedied by taking the decision on whom to hire as a federal monitor out of the hands of U.S. Attorneys. Instead, the Executive Office for United States Attorneys could contract with firms and create a set fee structure for services rendered as a federal monitor. This would allow the Department of Justice to create a national database of firms who would have the experience and specialized skills necessary to serve as federal monitors. The Executive Office for United States Attorneys would then make a final decision on which firm to hire based upon the particular requirements of each case.

4. Require Full Disclosure of Deferred Prosecution Agreements: Since the introduction of the 'Thompson Memo' in January 2003 the public has had little understanding about the nature of deferred prosecution agreements specifically because few details have ever been released. This is particularly the case as it relates to the fees charged by federal monitors, which have always been held secret. In fact, in the case involving U.S. Attorney Christie the fees charged by Mr. Ashcroft's firm were only released because the corporation, Zimmer Inc., found the fees to be so large and burdensome that they felt compelled to report them to their shareholders through their SEC filings. In order to create any transparency through this process there must be a requirement for full disclosure of the terms of a deferred prosecution agreement as well as any contracts reached with firms serving as federal monitors.

Department of Justice Action on the Selection of Federal Monitors

Last week the Acting Deputy Attorney General at the Department of Justice Craig Morford introduced a memorandum discussing the 'Selection and Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations.' This memorandum was apparently introduced in response to the actions taken by U.S. Attorney Christopher Christie in hiring his former superior John Ashcroft as a federal monitor. However, this memorandum comes far too late and does far too little to truly reform the practice of deferred prosecution agreements, as is necessary. First and foremost, is the fact that this memorandum only addresses the selection of federal monitors and entirely ignores the need to provide guidance on deferred prosecution agreements to corporate attorneys as well as fully disclose all such agreements to the public. In addition, the memorandum does not acknowledge the lack of judicial or Congressional oversight of this practice and the imbalanced system of justice that this creates. Finally, this memorandum merely ascribes many principles that already exist within statues governing the ethics of this issue. For example, the memorandum states pre-existing guidelines set forth in 18 U.S.C § 208 and 5 C.F.R. Part 2635 to avoid the appearance of a conflict-of-interest in the selection of monitors. From reading these statutes it seems quite reasonable to understand that Mr. Christie has already violated the letter and the spirit of these pre-exiting ethics guidelines with his selection of former colleagues and associates to serve as federal monitors. I would hope then that the Department of Justice would hold Mr. Christie to account for his actions that run counter to ethics guidelines he should have been following from the start.

Concluding Remarks

I can not stress more strongly the need for comprehensive legislation regarding deferred prosecution agreements. This practice has clearly been created by the Department of Justice to generate unmitigated power for federal prosecutors in pursuing corporations, as is highlighted by the actions of U.S. Attorney Christie in this case. Corporate prosecutions are of critical importance to our nation because of the money, resources and jobs that can be at stake. However, an even more essential concern has emerged through these deferred prosecution agreements and that is the lack of any checks and balances within the system. We are all well versed on the checks and balances between the executive, legislative and judiciary branches of government. However, within each of these branches also exists its own set of checks and balances necessary to avoid the concentration of power. As Members of this Committee know, within the judiciary branch these checks and balances involve the powers and responsibilities of the defense, the prosecution and the courts. However, within the deferred

prosecution system power is almost entirely concentrated in the hands of federal prosecutors. For example, if an individual is charged with a crime and strikes a plea bargain with the prosecution then that plea must go before a judge who has the power to deny and in some cases to alter that agreement based on judicial discretion. However, when it comes to these deferred prosecution agreements that are struck between federal prosecutors and corporations it means that neither party ever sees the inside of a courtroom let alone has to put these agreements before a judge.

In essence federal prosecutors hold all the cards over these corporations, which have everything to fear in a prolonged prosecution and little to gain in challenging powerful federal prosecutors. No one here, including myself, is in a position of defending corrupt corporations or arguing against their full prosecution by the law. But the presumed innocence of defendants before trial and the balance between the prosecution and defense are hallmarks of our justice system. In this instance however, we are left with a deferred prosecution system that gives federal prosecutors unmitigated power to be judge, jury and sentencer. Truly, it was never the intent of our justice system to concentrate such power in the hands of any one individual or office. We must not allow deferred prosecution to become a form of deferred justice.

Again, I want to thank Chairman Conyers and Chairwoman Sanchez for allowing me to testify before this Subcommittee. I look forward to continued investigation of this critical issue and further efforts to develop comprehensive corporate prosecution legislation.

Thank You.

Opening Statement of
Congressman Bill Pascrell, Jr.
Eighth Congressional District of New Jersey

House Committee on the Judiciary
Subcommittee on Commercial and Administrative Law

HEARING

Deferred Prosecution: Should Corporate Settlement Agreements Be Without Guidelines?

March 11, 2008

Introductory Remarks

I want to thank Full Committee Chairman Conyers and Subcommittee Chairwoman Sanchez for allowing me to testify before the Subcommittee on Commercial and Administrative Law on the issue of deferred prosecution agreements. On November 26th of last year I wrote to Chairman Conyers and Chairwoman Sanchez calling for hearings on the ability of the U.S. Attorney's Office to enter into deferred prosecution agreements. I appreciate the fact that they have both realized the critical nature of this issue and have pursued it vigorously since that day. I have believed since the beginning that the Judiciary Committee is the most appropriate forum to investigate this issue.

My attention was first brought to this issue of deferred prosecution agreements in large part because of published reports regarding the actions taken by the U.S. Attorney's Office in New Jersey. It had been reported that U.S Attorney for the District of New Jersey, Christopher Christie had reached a $311 million settlement to end an investigation into kickbacks being made by leading manufacturers of knee and hip replacements. This settlement reportedly ended a two-year federal probe into allegations that these manufacturers paid surgeons millions of dollars to use and promote their knee and hip replacements, which would constitute a violation of Medicare fraud statutes. Within this agreement these manufacturers agreed to hire a federal monitor, selected by the U.S. Attorney, which would ensure they comply with the law and a strict set of reforms. However, I was initially concerned that there was little transparency within this provision of the agreement as it could allow the federal monitor to act with impunity while the manufacturers remain under the threat of prosecution.

Furthermore, this agreement raised questions about the discretion of the U.S. Attorney's Office to select federal monitors. In this case, Mr. Christie selected Ashcroft Group Consulting Services, which according to reports stands to collect as much as $52 million in 18 months for its monitoring of Zimmer Holdings of Indiana. Apparently, these compensation agreements for federal monitors are almost never known publicly and were only released in this instance because they were disclosed in the SEC filings for Zimmer Holdings of Indiana. I was concerned that under the continued threat of prosecution, any party being investigated seemingly has little choice but to agree to the selection of these federal monitors and their exorbitant fees. Therein the selection of these federal monitors by Mr. Christie could give the impression of impropriety and political favoritism.

Actions of U.S. Attorney Christopher Christie

I am disappointed that Mr. Christie is not appearing at this Subcommittee today. Mr. Christie is at the center of this investigation and has thus far failed to enlighten Members of Congress or the general public about the process by which he concluded this deferred prosecution agreement. Prior to his appointment as U.S. Attorney for New Jersey, he served as an attorney in private practice defending large corporate clients and therefore has intimate knowledge of both sides of corporate prosecutions. Furthermore, Mr. Christie has failed to shed any light on his selection of federal monitors in this case.

I want to make clear that throughout this process I have not made any accusation of corruption on the part of Mr. Christie. However, there are a number of indisputable facts in this case that raise very troubling questions, which remain unanswered. First and foremost is the fact is that Mr. Christie selected former Attorney General John Ashcroft, his own former superior, for a highly lucrative federal monitoring contract. In addition, there were four other medical device manufacturers given deferred prosecution agreements under this case. In every instance Mr. Christie selected former Justice Department associates to serve as federal monitors under highly lucrative monitoring contracts. This was seemingly done without any negotiation of fees or any consideration of selecting monitors with whom he was not closely associated with. These actions are all the more troubling in the light of testimony by representatives of Zimmer Holdings to the Senate Special Committee on Aging that

Mr. Christie never presented the evidence he held against them and that he never forewarned them to the fact that he would be selecting Ashcroft Group as their monitor. This representative also made clear that Zimmer Holdings felt compelled to consent to this deferred prosecution agreement because they feared being taken off the Medicare providers list, which would have crippled their business. Therefore, Mr. Christie held all the leverage in this agreement and dictated the terms completely as he saw fit.

In my mind, these monitoring agreements amount to no-bid federal contracts that are ripe for political considerations. Current Attorney General Michael Mukasey tried to defend this practice last month before the full Judiciary Committee by stating that these monitoring contracts are paid out by private corporations and not through federal funds. However, the Attorney General fails to mention that these are publicly traded companies and these exorbitant monitoring fees will surely impact American consumers. In the end, Mr. Christie may defend himself by saying that he needed to select these monitors since he knew he could trust them. But, I must be clear when I say that the selection of close associates by a federal officer to take on highly lucrative contracts, which are not negotiated and in which outside contractors are not even considered, is the essence of political favoritism.

Testimony from Former Attorney General Ashcroft

I am pleased that former U.S. Attorney General John Ashcroft has agreed to testify before this Subcommittee. Mr. Ashcroft's testimony is critical to understanding the process by which he was selected as the monitor for Zimmer Holdings. In addition, as Attorney General Mr. Ashcroft created the current system of deferred prosecution agreements. To this date, Mr. Ashcroft has also remained quiet in explaining his role in this process. As in the case of Mr. Christie, I have never made any accusation of wrongdoing on the part of Mr. Ashcroft. However, the troubling fact is that Mr. Ashcroft created a process for corporate prosecutions within the Department of Justice, from which he now benefits handsomely from. I hope that Mr. Ashcroft will choose, through his testimony to this Subcommittee, to answer these questions regarding his relationship with U.S. Attorney Christie and this exorbitant monitoring contract.

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Deferred Prosecution: Should Corporate Settlement Agreements Be Without Guidelines?

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'Statement of Principles on Deferred Prosecution Agreements'

I myself have not yet introduced legislation on this critical issue because I believe that this issue must first be investigated by the Judiciary Committee through proceedings like this hearing. Additionally, I believe any legislation cannot merely address the issue of contracting with federal monitors, but must have a comprehensive approach to the larger issue of corporate prosecutions. In December of last year in lieu of legislation, I sent to this Committee and to the Department of Justice, my *Statement of Principles on Deferred Prosecution Agreements*. These four principles lay out a comprehensive approach to reforming deferred prosecution agreements and I look forward to continuing my work with this Committee to turn these principles into legislation that will finally provide oversight to this practice.

1. Require Guidelines on Deferred Prosecution Agreements: Corporate attorneys including the Association of Corporate Counsel have long complained that the Department of Justice has never issued any formal guidelines on the practice of deferred prosecution agreements. These attorneys believe that they can not properly represent their client's best interests when they have no guidelines to rely upon as to when corporations may be offered a deferred prosecution agreement and without clear knowledge of the parameters of such an agreement. This has left many to believe that the Department of Justice refuses to offer written guidelines so that its federal prosecutors can continue to have unmitigated discretion as to when to offer a deferred prosecution agreement and the manner in which they are carried out. Clearly, without any written rules on such agreements it becomes impossible to hold federal prosecutors to account. The requirement to issue formal written guidelines on deferred prosecution agreements would be the first place to start in order to provide any accountability to such agreements.

2. Restore Judicial Oversight of Deferred Prosecution Agreements: Under the current system deferred prosecution agreements allow federal prosecutors and corporate offenders to avoid the scrutiny of the judicial system entirely. These agreements are conducted between the two parties outside of a courtroom and once such an agreement is reached the courts are no longer involved in the case. Conversely, in other criminal cases that come before the court, the prosecution and defense are free to reach a plea bargain agreement, but the presiding judge is not bound by any such agreement and has the discretion to deny it based upon legal precedent. In order to restore this balance it is necessary to give the presiding judge the authority to sign-off on the terms of a deferred prosecution agreement as well as the selection of a federal monitor. In addition, the federal monitor and the corporation should be required to submit quarterly reports to the Chief Judge of the District Court. These reports would allow the judiciary to monitor the progression of these agreements through the federal monitor as well as allow corporations to have confidential communication with the judiciary to voice any concerns that they may fear to bring up with the federal prosecutor.

3. Take the Selection of Federal Monitors Out of the Hands of U.S. Attorneys: The U.S. Attorney's Office wields immense clout and in fact has the authority to bring the full weight of the federal government upon those individuals and parties whom they consider under suspicion of federal law. However, as the actions of U.S. Attorney Christie have made clear, deferred prosecution agreements allow federal prosecutors to brandish even greater influence especially as it relates to the selection of federal monitors. While these monitors work for the prosecution and are hired by the U.S. Attorney, they are in fact paid at the expense of the corporations. In additions, the fees are set by firms who have already been selected to serve as federal monitors and corporations feel they are in no position to negotiate. These factors have led to massive legal fees thus making it very lucrative to be selected as a federal monitor and have led some to believe there to be the appearance of

impropriety and political favoritism on the part of the U.S. Attorney's office. This issue could be remedied by taking the decision on whom to hire as a federal monitor out of the hands of U.S. Attorneys. Instead, the Executive Office for United States Attorneys could contract with firms and create a set fee structure for services rendered as a federal monitor. This would allow the Department of Justice to create a national database of firms who would have the experience and specialized skills necessary to serve as federal monitors. The Executive Office for United States Attorneys would then make a final decision on which firm to hire based upon the particular requirements of each case.

4. Require Full Disclosure of Deferred Prosecution Agreements: Since the introduction of the 'Thompson Memo' in January 2003 the public has had little understanding about the nature of deferred prosecution agreements specifically because few details have ever been released. This is particularly the case as it relates to the fees charged by federal monitors, which have always been held secret. In fact, in the case involving U.S. Attorney Christie the fees charged by Mr. Ashcroft's firm were only released because the corporation, Zimmer Inc., found the fees to be so large and burdensome that they felt compelled to report them to their shareholders through their SEC filings. In order to create any transparency through this process there must be a requirement for full disclosure of the terms of a deferred prosecution agreement as well as any contracts reached with firms serving as federal monitors.

Department of Justice Action on the Selection of Federal Monitors

Last week the Acting Deputy Attorney General at the Department of Justice Craig Morford introduced a memorandum discussing the 'Selection and Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations.' This memorandum was apparently introduced in response to the actions taken by U.S. Attorney Christopher Christie in hiring his former superior John Ashcroft as a federal monitor. However, this memorandum comes far too late and does far too little to truly reform the practice of deferred prosecution agreements, as is necessary. First and foremost, is the fact that this memorandum only addresses the selection of federal monitors and entirely ignores the need to provide guidance on deferred prosecution agreements to corporate attorneys as well as fully disclose all such agreements to the public. In addition, the memorandum does not acknowledge the lack of judicial or Congressional oversight of this practice and the imbalanced system of justice that this creates. Finally, this memorandum merely ascribes many principles that already exist within statues governing the ethics of this issue. For example, the memorandum states pre-existing guidelines set forth in 18 U.S.C § 208 and 5 C.F.R. Part 2635 to avoid the appearance of a conflict-of-interest in the selection of monitors. From reading these statutes it seems quite reasonable to understand that Mr. Christie has already violated the letter and the spirit of these pre-exiting ethics guidelines with his selection of former colleagues and associates to serve as federal monitors. I would hope then that the Department of Justice would hold Mr. Christie to account for his actions that run counter to ethics guidelines he should have been following from the start.

Concluding Remarks

I can not stress more strongly the need for comprehensive legislation regarding deferred prosecution agreements. This practice has clearly been created by the Department of Justice to generate unmitigated power for federal prosecutors in pursuing corporations, as is highlighted by the actions of U.S. Attorney Christie in this case. Corporate prosecutions are of critical importance to our nation because of the money, resources and jobs that can be at stake. However, an even more essential concern has emerged through these deferred prosecution agreements and that is the lack of any checks and balances within the system. We are all well versed on the checks and balances between the executive, legislative and judiciary branches of government. However, within each of these branches also exists its own set of checks and balances necessary to avoid the concentration of power. As Members of this Committee know, within the judiciary branch these checks and balances involve the powers and responsibilities of the defense, the prosecution and the courts. However, within the deferred

prosecution system power is almost entirely concentrated in the hands of federal prosecutors. For example, if an individual is charged with a crime and strikes a plea bargain with the prosecution then that plea must go before a judge who has the power to deny and in some cases to alter that agreement based on judicial discretion. However, when it comes to these deferred prosecution agreements that are struck between federal prosecutors and corporations it means that neither party ever sees the inside of a courtroom let alone has to put these agreements before a judge.

In essence federal prosecutors hold all the cards over these corporations, which have everything to fear in a prolonged prosecution and little to gain in challenging powerful federal prosecutors. No one here, including myself, is in a position of defending corrupt corporations or arguing against their full prosecution by the law. But the presumed innocence of defendants before trial and the balance between the prosecution and defense are hallmarks of our justice system. In this instance however, we are left with a deferred prosecution system that gives federal prosecutors unmitigated power to be judge, jury and sentencer. Truly, it was never the intent of our justice system to concentrate such power in the hands of any one individual or office. We must not allow deferred prosecution to become a form of deferred justice.

Again, I want to thank Chairman Conyers and Chairwoman Sanchez for allowing me to testify before this Subcommittee. I look forward to continued investigation of this critical issue and further efforts to develop comprehensive corporate prosecution legislation.

Thank You.

Opening Statement of
Congressman Bill Pascrell, Jr.
Eighth Congressional District of New Jersey

House Committee on the Judiciary
Subcommittee on Commercial and Administrative Law

HEARING

Deferred Prosecution: Should Corporate Settlement Agreements Be Without Guidelines?

March 11, 2008

Introductory Remarks

I want to thank Full Committee Chairman Conyers and Subcommittee Chairwoman Sanchez for allowing me to testify before the Subcommittee on Commercial and Administrative Law on the issue of deferred prosecution agreements. On November 26th of last year I wrote to Chairman Conyers and Chairwoman Sanchez calling for hearings on the ability of the U.S. Attorney's Office to enter into deferred prosecution agreements. I appreciate the fact that they have both realized the critical nature of this issue and have pursued it vigorously since that day. I have believed since the beginning that the Judiciary Committee is the most appropriate forum to investigate this issue.

My attention was first brought to this issue of deferred prosecution agreements in large part because of published reports regarding the actions taken by the U.S. Attorney's Office in New Jersey. It had been reported that U.S Attorney for the District of New Jersey, Christopher Christie had reached a $311 million settlement to end an investigation into kickbacks being made by leading manufacturers of knee and hip replacements. This settlement reportedly ended a two-year federal probe into allegations that these manufacturers paid surgeons millions of dollars to use and promote their knee and hip replacements, which would constitute a violation of Medicare fraud statutes. Within this agreement these manufacturers agreed to hire a federal monitor, selected by the U.S. Attorney, which would ensure they comply with the law and a strict set of reforms. However, I was initially concerned that there was little transparency within this provision of the agreement as it could allow the federal monitor to act with impunity while the manufacturers remain under the threat of prosecution.

Furthermore, this agreement raised questions about the discretion of the U.S. Attorney's Office to select federal monitors. In this case, Mr. Christie selected Ashcroft Group Consulting Services, which according to reports stands to collect as much as $52 million in 18 months for its monitoring of Zimmer Holdings of Indiana. Apparently, these compensation agreements for federal monitors are almost never known publicly and were only released in this instance because they were disclosed in the SEC filings for Zimmer Holdings of Indiana. I was concerned that under the continued threat of prosecution, any party being investigated seemingly has little choice but to agree to the selection of these federal monitors and their exorbitant fees. Therein the selection of these federal monitors by Mr. Christie could give the impression of impropriety and political favoritism.

Actions of U.S. Attorney Christopher Christie

I am disappointed that Mr. Christie is not appearing at this Subcommittee today. Mr. Christie is at the center of this investigation and has thus far failed to enlighten Members of Congress or the general public about the process by which he concluded this deferred prosecution agreement. Prior to his appointment as U.S. Attorney for New Jersey, he served as an attorney in private practice defending large corporate clients and therefore has intimate knowledge of both sides of corporate prosecutions. Furthermore, Mr. Christie has failed to shed any light on his selection of federal monitors in this case.

I want to make clear that throughout this process I have not made any accusation of corruption on the part of Mr. Christie. However, there are a number of indisputable facts in this case that raise very troubling questions, which remain unanswered. First and foremost is the fact is that Mr. Christie selected former Attorney General John Ashcroft, his own former superior, for a highly lucrative federal monitoring contract. In addition, there were four other medical device manufacturers given deferred prosecution agreements under this case. In every instance Mr. Christie selected former Justice Department associates to serve as federal monitors under highly lucrative monitoring contracts. This was seemingly done without any negotiation of fees or any consideration of selecting monitors with whom he was not closely associated with. These actions are all the more troubling in the light of testimony by representatives of Zimmer Holdings to the Senate Special Committee on Aging that

Mr. Christie never presented the evidence he held against them and that he never forewarned them to the fact that he would be selecting Ashcroft Group as their monitor. This representative also made clear that Zimmer Holdings felt compelled to consent to this deferred prosecution agreement because they feared being taken off the Medicare providers list, which would have crippled their business. Therefore, Mr. Christie held all the leverage in this agreement and dictated the terms completely as he saw fit.

In my mind, these monitoring agreements amount to no-bid federal contracts that are ripe for political considerations. Current Attorney General Michael Mukasey tried to defend this practice last month before the full Judiciary Committee by stating that these monitoring contracts are paid out by private corporations and not through federal funds. However, the Attorney General fails to mention that these are publicly traded companies and these exorbitant monitoring fees will surely impact American consumers. In the end, Mr. Christie may defend himself by saying that he needed to select these monitors since he knew he could trust them. But, I must be clear when I say that the selection of close associates by a federal officer to take on highly lucrative contracts, which are not negotiated and in which outside contractors are not even considered, is the essence of political favoritism.

Testimony from Former Attorney General Ashcroft

I am pleased that former U.S. Attorney General John Ashcroft has agreed to testify before this Subcommittee. Mr. Ashcroft's testimony is critical to understanding the process by which he was selected as the monitor for Zimmer Holdings. In addition, as Attorney General Mr. Ashcroft created the current system of deferred prosecution agreements. To this date, Mr. Ashcroft has also remained quiet in explaining his role in this process. As in the case of Mr. Christie, I have never made any accusation of wrongdoing on the part of Mr. Ashcroft. However, the troubling fact is that Mr. Ashcroft created a process for corporate prosecutions within the Department of Justice, from which he now benefits handsomely from. I hope that Mr. Ashcroft will choose, through his testimony to this Subcommittee, to answer these questions regarding his relationship with U.S. Attorney Christie and this exorbitant monitoring contract.

History of Deferred Prosecution Agreements

As I delved deeper into this issue involving U.S. Attorney Christie and former Attorney General Ashcroft I came to the realization that this case of deferred prosecution agreements encompassed an even larger issue of corporate prosecutions in the post-Enron era. In researching the history, I discovered that the practice of deferred prosecution agreements was made legal through the Speedy Trial Act of 1974 (Public Law 93-619, codified at 18 U.S.C. 3161(h)(2)), which first gave the attorney for the Government the right to have a period of delay during which prosecution is deferred pursuant to a written agreement with the defendant. In the beginning this remedy was rarely used by government prosecutors, except in small-scale drug cases involving diversion programs usually for marijuana-related offenses. However, the indictment and ensuing collapse of accounting giant Arthur Andersen in March 2002 made clear to both prosecutors and defense attorneys the susceptibility large corporations have to federal prosecutions and the consequences that result. In response to the large number of federal prosecutions against corporations, the Department of Justice issued a memorandum, known as the "Thompson Memo" after Deputy Attorney General Larry Thompson, which, instructed federal prosecutors to explicitly consider "granting a corporation immunity or amnesty or pretrial diversion…in exchange for cooperation when a corporation's timely cooperation appears to be necessary to the public interest and other means of obtaining the desired cooperation are unavailable or would not be effective."

However, it has become clear in the years since the 'Thompson Memo' that federal prosecutors hold even greater power and discretion through deferred prosecution agreements since oversight of such agreements seemingly has not existed through the federal government or the judiciary. In fact, a study conducted by Lawrence D. Finder and Ryan D. McConnell found that the number of deferred prosecution agreements

between the Department of Justice and corporations grew to thirty-five last year from just five in 2003, highlighting the explosive use of this hidden policy. It is my contention that the intent of the Speedy Trial Act of 1974 was never to the scope and breadth of deferred corporate prosecutions now being brought by federal prosecutors. It seems clear that the Department of Justice in recent years has consistently worked to shield this practice from oversight by Congress and the courts.

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Deferred Prosecution: Should Corporate Settlement Agreements Be Without Guidelines?

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3. Take the Selection of Federal Monitors Out of the Hands of U.S. Attorneys: The U.S. Attorney's Office wields immense clout and in fact has the authority to bring the full weight of the federal government upon those individuals and parties whom they consider under suspicion of federal law. However, as the actions of U.S. Attorney Christie have made clear, deferred prosecution agreements allow federal prosecutors to brandish even greater influence especially as it relates to the selection of federal monitors. While these monitors work for the prosecution and are hired by the U.S. Attorney, they are in fact paid at the expense of the corporations. In additions, the fees are set by firms who have already been selected to serve as federal monitors and corporations feel they are in no position to negotiate. These factors have led to massive legal fees thus making it very lucrative to be selected as a federal monitor and have led some to believe there to be the appearance of

impropriety and political favoritism on the part of the U.S. Attorney's office. This issue could be remedied by taking the decision on whom to hire as a federal monitor out of the hands of U.S. Attorneys. Instead, the Executive Office for United States Attorneys could contract with firms and create a set fee structure for services rendered as a federal monitor. This would allow the Department of Justice to create a national database of firms who would have the experience and specialized skills necessary to serve as federal monitors. The Executive Office for United States Attorneys would then make a final decision on which firm to hire based upon the particular requirements of each case.

4. Require Full Disclosure of Deferred Prosecution Agreements: Since the introduction of the 'Thompson Memo' in January 2003 the public has had little understanding about the nature of deferred prosecution agreements specifically because few details have ever been released. This is particularly the case as it relates to the fees charged by federal monitors, which have always been held secret. In fact, in the case involving U.S. Attorney Christie the fees charged by Mr. Ashcroft's firm were only released because the corporation, Zimmer Inc., found the fees to be so large and burdensome that they felt compelled to report them to their shareholders through their SEC filings. In order to create any transparency through this process there must be a requirement for full disclosure of the terms of a deferred prosecution agreement as well as any contracts reached with firms serving as federal monitors.

Department of Justice Action on the Selection of Federal Monitors

Last week the Acting Deputy Attorney General at the Department of Justice Craig Morford introduced a memorandum discussing the 'Selection and Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations.' This memorandum was apparently introduced in response to the actions taken by U.S. Attorney Christopher Christie in hiring his former superior John Ashcroft as a federal monitor. However, this memorandum comes far too late and does far too little to truly reform the practice of deferred prosecution agreements, as is necessary. First and foremost, is the fact that this memorandum only addresses the selection of federal monitors and entirely ignores the need to provide guidance on deferred prosecution agreements to corporate attorneys as well as fully disclose all such agreements to the public. In addition, the memorandum does not acknowledge the lack of judicial or Congressional oversight of this practice and the imbalanced system of justice that this creates. Finally, this memorandum merely ascribes many principles that already exist within statues governing the ethics of this issue. For example, the memorandum states pre-existing guidelines set forth in 18 U.S.C § 208 and 5 C.F.R. Part 2635 to avoid the appearance of a conflict-of-interest in the selection of monitors. From reading these statutes it seems quite reasonable to understand that Mr. Christie has already violated the letter and the spirit of these pre-exiting ethics guidelines with his selection of former colleagues and associates to serve as federal monitors. I would hope then that the Department of Justice would hold Mr. Christie to account for his actions that run counter to ethics guidelines he should have been following from the start.

Concluding Remarks

I can not stress more strongly the need for comprehensive legislation regarding deferred prosecution agreements. This practice has clearly been created by the Department of Justice to generate unmitigated power for federal prosecutors in pursuing corporations, as is highlighted by the actions of U.S. Attorney Christie in this case. Corporate prosecutions are of critical importance to our nation because of the money, resources and jobs that can be at stake. However, an even more essential concern has emerged through these deferred prosecution agreements and that is the lack of any checks and balances within the system. We are all well versed on the checks and balances between the executive, legislative and judiciary branches of government. However, within each of these branches also exists its own set of checks and balances necessary to avoid the concentration of power. As Members of this Committee know, within the judiciary branch these checks and balances involve the powers and responsibilities of the defense, the prosecution and the courts. However, within the deferred

prosecution system power is almost entirely concentrated in the hands of federal prosecutors. For example, if an individual is charged with a crime and strikes a plea bargain with the prosecution then that plea must go before a judge who has the power to deny and in some cases to alter that agreement based on judicial discretion. However, when it comes to these deferred prosecution agreements that are struck between federal prosecutors and corporations it means that neither party ever sees the inside of a courtroom let alone has to put these agreements before a judge.

In essence federal prosecutors hold all the cards over these corporations, which have everything to fear in a prolonged prosecution and little to gain in challenging powerful federal prosecutors. No one here, including myself, is in a position of defending corrupt corporations or arguing against their full prosecution by the law. But the presumed innocence of defendants before trial and the balance between the prosecution and defense are hallmarks of our justice system. In this instance however, we are left with a deferred prosecution system that gives federal prosecutors unmitigated power to be judge, jury and sentencer. Truly, it was never the intent of our justice system to concentrate such power in the hands of any one individual or office. We must not allow deferred prosecution to become a form of deferred justice.

Again, I want to thank Chairman Conyers and Chairwoman Sanchez for allowing me to testify before this Subcommittee. I look forward to continued investigation of this critical issue and further efforts to develop comprehensive corporate prosecution legislation.

Thank You.

Opening Statement of
Congressman Bill Pascrell, Jr.
Eighth Congressional District of New Jersey

House Committee on the Judiciary
Subcommittee on Commercial and Administrative Law

HEARING

Deferred Prosecution: Should Corporate Settlement Agreements Be Without Guidelines?

March 11, 2008

Introductory Remarks

I want to thank Full Committee Chairman Conyers and Subcommittee Chairwoman Sanchez for allowing me to testify before the Subcommittee on Commercial and Administrative Law on the issue of deferred prosecution agreements. On November 26th of last year I wrote to Chairman Conyers and Chairwoman Sanchez calling for hearings on the ability of the U.S. Attorney's Office to enter into deferred prosecution agreements. I appreciate the fact that they have both realized the critical nature of this issue and have pursued it vigorously since that day. I have believed since the beginning that the Judiciary Committee is the most appropriate forum to investigate this issue.

My attention was first brought to this issue of deferred prosecution agreements in large part because of published reports regarding the actions taken by the U.S. Attorney's Office in New Jersey. It had been reported that U.S Attorney for the District of New Jersey, Christopher Christie had reached a $311 million settlement to end an investigation into kickbacks being made by leading manufacturers of knee and hip replacements. This settlement reportedly ended a two-year federal probe into allegations that these manufacturers paid surgeons millions of dollars to use and promote their knee and hip replacements, which would constitute a violation of Medicare fraud statutes. Within this agreement these manufacturers agreed to hire a federal monitor, selected by the U.S. Attorney, which would ensure they comply with the law and a strict set of reforms. However, I was initially concerned that there was little transparency within this provision of the agreement as it could allow the federal monitor to act with impunity while the manufacturers remain under the threat of prosecution.

Furthermore, this agreement raised questions about the discretion of the U.S. Attorney's Office to select federal monitors. In this case, Mr. Christie selected Ashcroft Group Consulting Services, which according to reports stands to collect as much as $52 million in 18 months for its monitoring of Zimmer Holdings of Indiana. Apparently, these compensation agreements for federal monitors are almost never known publicly and were only released in this instance because they were disclosed in the SEC filings for Zimmer Holdings of Indiana. I was concerned that under the continued threat of prosecution, any party being investigated seemingly has little choice but to agree to the selection of these federal monitors and their exorbitant fees. Therein the selection of these federal monitors by Mr. Christie could give the impression of impropriety and political favoritism.

Actions of U.S. Attorney Christopher Christie

I am disappointed that Mr. Christie is not appearing at this Subcommittee today. Mr. Christie is at the center of this investigation and has thus far failed to enlighten Members of Congress or the general public about the process by which he concluded this deferred prosecution agreement. Prior to his appointment as U.S. Attorney for New Jersey, he served as an attorney in private practice defending large corporate clients and therefore has intimate knowledge of both sides of corporate prosecutions. Furthermore, Mr. Christie has failed to shed any light on his selection of federal monitors in this case.

I want to make clear that throughout this process I have not made any accusation of corruption on the part of Mr. Christie. However, there are a number of indisputable facts in this case that raise very troubling questions, which remain unanswered. First and foremost is the fact is that Mr. Christie selected former Attorney General John Ashcroft, his own former superior, for a highly lucrative federal monitoring contract. In addition, there were four other medical device manufacturers given deferred prosecution agreements under this case. In every instance Mr. Christie selected former Justice Department associates to serve as federal monitors under highly lucrative monitoring contracts. This was seemingly done without any negotiation of fees or any consideration of selecting monitors with whom he was not closely associated with. These actions are all the more troubling in the light of testimony by representatives of Zimmer Holdings to the Senate Special Committee on Aging that

Mr. Christie never presented the evidence he held against them and that he never forewarned them to the fact that he would be selecting Ashcroft Group as their monitor. This representative also made clear that Zimmer Holdings felt compelled to consent to this deferred prosecution agreement because they feared being taken off the Medicare providers list, which would have crippled their business. Therefore, Mr. Christie held all the leverage in this agreement and dictated the terms completely as he saw fit.

In my mind, these monitoring agreements amount to no-bid federal contracts that are ripe for political considerations. Current Attorney General Michael Mukasey tried to defend this practice last month before the full Judiciary Committee by stating that these monitoring contracts are paid out by private corporations and not through federal funds. However, the Attorney General fails to mention that these are publicly traded companies and these exorbitant monitoring fees will surely impact American consumers. In the end, Mr. Christie may defend himself by saying that he needed to select these monitors since he knew he could trust them. But, I must be clear when I say that the selection of close associates by a federal officer to take on highly lucrative contracts, which are not negotiated and in which outside contractors are not even considered, is the essence of political favoritism.

Testimony from Former Attorney General Ashcroft

I am pleased that former U.S. Attorney General John Ashcroft has agreed to testify before this Subcommittee. Mr. Ashcroft's testimony is critical to understanding the process by which he was selected as the monitor for Zimmer Holdings. In addition, as Attorney General Mr. Ashcroft created the current system of deferred prosecution agreements. To this date, Mr. Ashcroft has also remained quiet in explaining his role in this process. As in the case of Mr. Christie, I have never made any accusation of wrongdoing on the part of Mr. Ashcroft. However, the troubling fact is that Mr. Ashcroft created a process for corporate prosecutions within the Department of Justice, from which he now benefits handsomely from. I hope that Mr. Ashcroft will choose, through his testimony to this Subcommittee, to answer these questions regarding his relationship with U.S. Attorney Christie and this exorbitant monitoring contract.

History of Deferred Prosecution Agreements

As I delved deeper into this issue involving U.S. Attorney Christie and former Attorney General Ashcroft I came to the realization that this case of deferred prosecution agreements encompassed an even larger issue of corporate prosecutions in the post-Enron era. In researching the history, I discovered that the practice of deferred prosecution agreements was made legal through the Speedy Trial Act of 1974 (Public Law 93-619, codified at 18 U.S.C. 3161(h)(2)), which first gave the attorney for the Government the right to have a period of delay during which prosecution is deferred pursuant to a written agreement with the defendant. In the beginning this remedy was rarely used by government prosecutors, except in small-scale drug cases involving diversion programs usually for marijuana-related offenses. However, the indictment and ensuing collapse of accounting giant Arthur Andersen in March 2002 made clear to both prosecutors and defense attorneys the susceptibility large corporations have to federal prosecutions and the consequences that result. In response to the large number of federal prosecutions against corporations, the Department of Justice issued a memorandum, known as the "Thompson Memo" after Deputy Attorney General Larry Thompson, which, instructed federal prosecutors to explicitly consider "granting a corporation immunity or amnesty or pretrial diversion…in exchange for cooperation when a corporation's timely cooperation appears to be necessary to the public interest and other means of obtaining the desired cooperation are unavailable or would not be effective."

However, it has become clear in the years since the 'Thompson Memo' that federal prosecutors hold even greater power and discretion through deferred prosecution agreements since oversight of such agreements seemingly has not existed through the federal government or the judiciary. In fact, a study conducted by Lawrence D. Finder and Ryan D. McConnell found that the number of deferred prosecution agreements

between the Department of Justice and corporations grew to thirty-five last year from just five in 2003, highlighting the explosive use of this hidden policy. It is my contention that the intent of the Speedy Trial Act of 1974 was never to the scope and breadth of deferred corporate prosecutions now being brought by federal prosecutors. It seems clear that the Department of Justice in recent years has consistently worked to shield this practice from oversight by Congress and the courts.

'Statement of Principles on Deferred Prosecution Agreements'

I myself have not yet introduced legislation on this critical issue because I believe that this issue must first be investigated by the Judiciary Committee through proceedings like this hearing. Additionally, I believe any legislation cannot merely address the issue of contracting with federal monitors, but must have a comprehensive approach to the larger issue of corporate prosecutions. In December of last year in lieu of legislation, I sent to this Committee and to the Department of Justice, my *Statement of Principles on Deferred Prosecution Agreements*. These four principles lay out a comprehensive approach to reforming deferred prosecution agreements and I look forward to continuing my work with this Committee to turn these principles into legislation that will finally provide oversight to this practice.

1. Require Guidelines on Deferred Prosecution Agreements: Corporate attorneys including the Association of Corporate Counsel have long complained that the Department of Justice has never issued any formal guidelines on the practice of deferred prosecution agreements. These attorneys believe that they can not properly represent their client's best interests when they have no guidelines to rely upon as to when corporations may be offered a deferred prosecution agreement and without clear knowledge of the parameters of such an agreement. This has left many to believe that the Department of Justice refuses to offer written guidelines so that its federal prosecutors can continue to have unmitigated discretion as to when to offer a deferred prosecution agreement and the manner in which they are carried out. Clearly, without any written rules on such agreements it becomes impossible to hold federal prosecutors to account. The requirement to issue formal written guidelines on deferred prosecution agreements would be the first place to start in order to provide any accountability to such agreements.

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Concluding Remarks

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Thank You.

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Deferred Prosecution: Should Corporate Settlement Agreements Be Without Guidelines?

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3. Take the Selection of Federal Monitors Out of the Hands of U.S. Attorneys: The U.S. Attorney's Office wields immense clout and in fact has the authority to bring the full weight of the federal government upon those individuals and parties whom they consider under suspicion of federal law. However, as the actions of U.S. Attorney Christie have made clear, deferred prosecution agreements allow federal prosecutors to brandish even greater influence especially as it relates to the selection of federal monitors. While these monitors work for the prosecution and are hired by the U.S. Attorney, they are in fact paid at the expense of the corporations. In additions, the fees are set by firms who have already been selected to serve as federal monitors and corporations feel they are in no position to negotiate. These factors have led to massive legal fees thus making it very lucrative to be selected as a federal monitor and have led some to believe there to be the appearance of

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4. Require Full Disclosure of Deferred Prosecution Agreements: Since the introduction of the 'Thompson Memo' in January 2003 the public has had little understanding about the nature of deferred prosecution agreements specifically because few details have ever been released. This is particularly the case as it relates to the fees charged by federal monitors, which have always been held secret. In fact, in the case involving U.S. Attorney Christie the fees charged by Mr. Ashcroft's firm were only released because the corporation, Zimmer Inc., found the fees to be so large and burdensome that they felt compelled to report them to their shareholders through their SEC filings. In order to create any transparency through this process there must be a requirement for full disclosure of the terms of a deferred prosecution agreement as well as any contracts reached with firms serving as federal monitors.

Department of Justice Action on the Selection of Federal Monitors

Last week the Acting Deputy Attorney General at the Department of Justice Craig Morford introduced a memorandum discussing the 'Selection and Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations.' This memorandum was apparently introduced in response to the actions taken by U.S. Attorney Christopher Christie in hiring his former superior John Ashcroft as a federal monitor. However, this memorandum comes far too late and does far too little to truly reform the practice of deferred prosecution agreements, as is necessary. First and foremost, is the fact that this memorandum only addresses the selection of federal monitors and entirely ignores the need to provide guidance on deferred prosecution agreements to corporate attorneys as well as fully disclose all such agreements to the public. In addition, the memorandum does not acknowledge the lack of judicial or Congressional oversight of this practice and the imbalanced system of justice that this creates. Finally, this memorandum merely ascribes many principles that already exist within statues governing the ethics of this issue. For example, the memorandum states pre-existing guidelines set forth in 18 U.S.C § 208 and 5 C.F.R. Part 2635 to avoid the appearance of a conflict-of-interest in the selection of monitors. From reading these statutes it seems quite reasonable to understand that Mr. Christie has already violated the letter and the spirit of these pre-exiting ethics guidelines with his selection of former colleagues and associates to serve as federal monitors. I would hope then that the Department of Justice would hold Mr. Christie to account for his actions that run counter to ethics guidelines he should have been following from the start.

Concluding Remarks

I can not stress more strongly the need for comprehensive legislation regarding deferred prosecution agreements. This practice has clearly been created by the Department of Justice to generate unmitigated power for federal prosecutors in pursuing corporations, as is highlighted by the actions of U.S. Attorney Christie in this case. Corporate prosecutions are of critical importance to our nation because of the money, resources and jobs that can be at stake. However, an even more essential concern has emerged through these deferred prosecution agreements and that is the lack of any checks and balances within the system. We are all well versed on the checks and balances between the executive, legislative and judiciary branches of government. However, within each of these branches also exists its own set of checks and balances necessary to avoid the concentration of power. As Members of this Committee know, within the judiciary branch these checks and balances involve the powers and responsibilities of the defense, the prosecution and the courts. However, within the deferred

prosecution system power is almost entirely concentrated in the hands of federal prosecutors. For example, if an individual is charged with a crime and strikes a plea bargain with the prosecution then that plea must go before a judge who has the power to deny and in some cases to alter that agreement based on judicial discretion. However, when it comes to these deferred prosecution agreements that are struck between federal prosecutors and corporations it means that neither party ever sees the inside of a courtroom let alone has to put these agreements before a judge.

In essence federal prosecutors hold all the cards over these corporations, which have everything to fear in a prolonged prosecution and little to gain in challenging powerful federal prosecutors. No one here, including myself, is in a position of defending corrupt corporations or arguing against their full prosecution by the law. But the presumed innocence of defendants before trial and the balance between the prosecution and defense are hallmarks of our justice system. In this instance however, we are left with a deferred prosecution system that gives federal prosecutors unmitigated power to be judge, jury and sentencer. Truly, it was never the intent of our justice system to concentrate such power in the hands of any one individual or office. We must not allow deferred prosecution to become a form of deferred justice.

Again, I want to thank Chairman Conyers and Chairwoman Sanchez for allowing me to testify before this Subcommittee. I look forward to continued investigation of this critical issue and further efforts to develop comprehensive corporate prosecution legislation.

Thank You.

Opening Statement of
Congressman Bill Pascrell, Jr.
Eighth Congressional District of New Jersey

House Committee on the Judiciary
Subcommittee on Commercial and Administrative Law

HEARING

Deferred Prosecution: Should Corporate Settlement Agreements Be Without Guidelines?

March 11, 2008

Introductory Remarks

I want to thank Full Committee Chairman Conyers and Subcommittee Chairwoman Sanchez for allowing me to testify before the Subcommittee on Commercial and Administrative Law on the issue of deferred prosecution agreements. On November 26th of last year I wrote to Chairman Conyers and Chairwoman Sanchez calling for hearings on the ability of the U.S. Attorney's Office to enter into deferred prosecution agreements. I appreciate the fact that they have both realized the critical nature of this issue and have pursued it vigorously since that day. I have believed since the beginning that the Judiciary Committee is the most appropriate forum to investigate this issue.

My attention was first brought to this issue of deferred prosecution agreements in large part because of published reports regarding the actions taken by the U.S. Attorney's Office in New Jersey. It had been reported that U.S Attorney for the District of New Jersey, Christopher Christie had reached a $311 million settlement to end an investigation into kickbacks being made by leading manufacturers of knee and hip replacements. This settlement reportedly ended a two-year federal probe into allegations that these manufacturers paid surgeons millions of dollars to use and promote their knee and hip replacements, which would constitute a violation of Medicare fraud statutes. Within this agreement these manufacturers agreed to hire a federal monitor, selected by the U.S. Attorney, which would ensure they comply with the law and a strict set of reforms. However, I was initially concerned that there was little transparency within this provision of the agreement as it could allow the federal monitor to act with impunity while the manufacturers remain under the threat of prosecution.

Furthermore, this agreement raised questions about the discretion of the U.S. Attorney's Office to select federal monitors. In this case, Mr. Christie selected Ashcroft Group Consulting Services, which according to reports stands to collect as much as $52 million in 18 months for its monitoring of Zimmer Holdings of Indiana. Apparently, these compensation agreements for federal monitors are almost never known publicly and were only released in this instance because they were disclosed in the SEC filings for Zimmer Holdings of Indiana. I was concerned that under the continued threat of prosecution, any party being investigated seemingly has little choice but to agree to the selection of these federal monitors and their exorbitant fees. Therein the selection of these federal monitors by Mr. Christie could give the impression of impropriety and political favoritism.

Actions of U.S. Attorney Christopher Christie

I am disappointed that Mr. Christie is not appearing at this Subcommittee today. Mr. Christie is at the center of this investigation and has thus far failed to enlighten Members of Congress or the general public about the process by which he concluded this deferred prosecution agreement. Prior to his appointment as U.S. Attorney for New Jersey, he served as an attorney in private practice defending large corporate clients and therefore has intimate knowledge of both sides of corporate prosecutions. Furthermore, Mr. Christie has failed to shed any light on his selection of federal monitors in this case.

I want to make clear that throughout this process I have not made any accusation of corruption on the part of Mr. Christie. However, there are a number of indisputable facts in this case that raise very troubling questions, which remain unanswered. First and foremost is the fact is that Mr. Christie selected former Attorney General John Ashcroft, his own former superior, for a highly lucrative federal monitoring contract. In addition, there were four other medical device manufacturers given deferred prosecution agreements under this case. In every instance Mr. Christie selected former Justice Department associates to serve as federal monitors under highly lucrative monitoring contracts. This was seemingly done without any negotiation of fees or any consideration of selecting monitors with whom he was not closely associated with. These actions are all the more troubling in the light of testimony by representatives of Zimmer Holdings to the Senate Special Committee on Aging that

Mr. Christie never presented the evidence he held against them and that he never forewarned them to the fact that he would be selecting Ashcroft Group as their monitor. This representative also made clear that Zimmer Holdings felt compelled to consent to this deferred prosecution agreement because they feared being taken off the Medicare providers list, which would have crippled their business. Therefore, Mr. Christie held all the leverage in this agreement and dictated the terms completely as he saw fit.

In my mind, these monitoring agreements amount to no-bid federal contracts that are ripe for political considerations. Current Attorney General Michael Mukasey tried to defend this practice last month before the full Judiciary Committee by stating that these monitoring contracts are paid out by private corporations and not through federal funds. However, the Attorney General fails to mention that these are publicly traded companies and these exorbitant monitoring fees will surely impact American consumers. In the end, Mr. Christie may defend himself by saying that he needed to select these monitors since he knew he could trust them. But, I must be clear when I say that the selection of close associates by a federal officer to take on highly lucrative contracts, which are not negotiated and in which outside contractors are not even considered, is the essence of political favoritism.

Testimony from Former Attorney General Ashcroft

I am pleased that former U.S. Attorney General John Ashcroft has agreed to testify before this Subcommittee. Mr. Ashcroft's testimony is critical to understanding the process by which he was selected as the monitor for Zimmer Holdings. In addition, as Attorney General Mr. Ashcroft created the current system of deferred prosecution agreements. To this date, Mr. Ashcroft has also remained quiet in explaining his role in this process. As in the case of Mr. Christie, I have never made any accusation of wrongdoing on the part of Mr. Ashcroft. However, the troubling fact is that Mr. Ashcroft created a process for corporate prosecutions within the Department of Justice, from which he now benefits handsomely from. I hope that Mr. Ashcroft will choose, through his testimony to this Subcommittee, to answer these questions regarding his relationship with U.S. Attorney Christie and this exorbitant monitoring contract.

History of Deferred Prosecution Agreements

As I delved deeper into this issue involving U.S. Attorney Christie and former Attorney General Ashcroft I came to the realization that this case of deferred prosecution agreements encompassed an even larger issue of corporate prosecutions in the post-Enron era. In researching the history, I discovered that the practice of deferred prosecution agreements was made legal through the Speedy Trial Act of 1974 (Public Law 93-619, codified at 18 U.S.C. 3161(h)(2)), which first gave the attorney for the Government the right to have a period of delay during which prosecution is deferred pursuant to a written agreement with the defendant. In the beginning this remedy was rarely used by government prosecutors, except in small-scale drug cases involving diversion programs usually for marijuana-related offenses. However, the indictment and ensuing collapse of accounting giant Arthur Andersen in March 2002 made clear to both prosecutors and defense attorneys the susceptibility large corporations have to federal prosecutions and the consequences that result. In response to the large number of federal prosecutions against corporations, the Department of Justice issued a memorandum, known as the "Thompson Memo" after Deputy Attorney General Larry Thompson, which, instructed federal prosecutors to explicitly consider "granting a corporation immunity or amnesty or pretrial diversion…in exchange for cooperation when a corporation's timely cooperation appears to be necessary to the public interest and other means of obtaining the desired cooperation are unavailable or would not be effective."

However, it has become clear in the years since the 'Thompson Memo' that federal prosecutors hold even greater power and discretion through deferred prosecution agreements since oversight of such agreements seemingly has not existed through the federal government or the judiciary. In fact, a study conducted by Lawrence D. Finder and Ryan D. McConnell found that the number of deferred prosecution agreements

between the Department of Justice and corporations grew to thirty-five last year from just five in 2003, highlighting the explosive use of this hidden policy. It is my contention that the intent of the Speedy Trial Act of 1974 was never to the scope and breadth of deferred corporate prosecutions now being brought by federal prosecutors. It seems clear that the Department of Justice in recent years has consistently worked to shield this practice from oversight by Congress and the courts.

'Statement of Principles on Deferred Prosecution Agreements'

I myself have not yet introduced legislation on this critical issue because I believe that this issue must first be investigated by the Judiciary Committee through proceedings like this hearing. Additionally, I believe any legislation cannot merely address the issue of contracting with federal monitors, but must have a comprehensive approach to the larger issue of corporate prosecutions. In December of last year in lieu of legislation, I sent to this Committee and to the Department of Justice, my *Statement of Principles on Deferred Prosecution Agreements*. These four principles lay out a comprehensive approach to reforming deferred prosecution agreements and I look forward to continuing my work with this Committee to turn these principles into legislation that will finally provide oversight to this practice.

1. Require Guidelines on Deferred Prosecution Agreements: Corporate attorneys including the Association of Corporate Counsel have long complained that the Department of Justice has never issued any formal guidelines on the practice of deferred prosecution agreements. These attorneys believe that they can not properly represent their client's best interests when they have no guidelines to rely upon as to when corporations may be offered a deferred prosecution agreement and without clear knowledge of the parameters of such an agreement. This has left many to believe that the Department of Justice refuses to offer written guidelines so that its federal prosecutors can continue to have unmitigated discretion as to when to offer a deferred prosecution agreement and the manner in which they are carried out. Clearly, without any written rules on such agreements it becomes impossible to hold federal prosecutors to account. The requirement to issue formal written guidelines on deferred prosecution agreements would be the first place to start in order to provide any accountability to such agreements.

2. Restore Judicial Oversight of Deferred Prosecution Agreements: Under the current system deferred prosecution agreements allow federal prosecutors and corporate offenders to avoid the scrutiny of the judicial system entirely. These agreements are conducted between the two parties outside of a courtroom and once such an agreement is reached the courts are no longer involved in the case. Conversely, in other criminal cases that come before the court, the prosecution and defense are free to reach a plea bargain agreement, but the presiding judge is not bound by any such agreement and has the discretion to deny it based upon legal precedent. In order to restore this balance it is necessary to give the presiding judge the authority to sign-off on the terms of a deferred prosecution agreement as well as the selection of a federal monitor. In addition, the federal monitor and the corporation should be required to submit quarterly reports to the Chief Judge of the District Court. These reports would allow the judiciary to monitor the progression of these agreements through the federal monitor as well as allow corporations to have confidential communication with the judiciary to voice any concerns that they may fear to bring up with the federal prosecutor.

3. Take the Selection of Federal Monitors Out of the Hands of U.S. Attorneys: The U.S. Attorney's Office wields immense clout and in fact has the authority to bring the full weight of the federal government upon those individuals and parties whom they consider under suspicion of federal law. However, as the actions of U.S. Attorney Christie have made clear, deferred prosecution agreements allow federal prosecutors to brandish even greater influence especially as it relates to the selection of federal monitors. While these monitors work for the prosecution and are hired by the U.S. Attorney, they are in fact paid at the expense of the corporations. In additions, the fees are set by firms who have already been selected to serve as federal monitors and corporations feel they are in no position to negotiate. These factors have led to massive legal fees thus making it very lucrative to be selected as a federal monitor and have led some to believe there to be the appearance of

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4. Require Full Disclosure of Deferred Prosecution Agreements: Since the introduction of the 'Thompson Memo' in January 2003 the public has had little understanding about the nature of deferred prosecution agreements specifically because few details have ever been released. This is particularly the case as it relates to the fees charged by federal monitors, which have always been held secret. In fact, in the case involving U.S. Attorney Christie the fees charged by Mr. Ashcroft's firm were only released because the corporation, Zimmer Inc., found the fees to be so large and burdensome that they felt compelled to report them to their shareholders through their SEC filings. In order to create any transparency through this process there must be a requirement for full disclosure of the terms of a deferred prosecution agreement as well as any contracts reached with firms serving as federal monitors.

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Concluding Remarks

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Thank You.

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Deferred Prosecution: Should Corporate Settlement Agreements Be Without Guidelines?

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Department of Justice Action on the Selection of Federal Monitors

Last week the Acting Deputy Attorney General at the Department of Justice Craig Morford introduced a memorandum discussing the 'Selection and Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations.' This memorandum was apparently introduced in response to the actions taken by U.S. Attorney Christopher Christie in hiring his former superior John Ashcroft as a federal monitor. However, this memorandum comes far too late and does far too little to truly reform the practice of deferred prosecution agreements, as is necessary. First and foremost, is the fact that this memorandum only addresses the selection of federal monitors and entirely ignores the need to provide guidance on deferred prosecution agreements to corporate attorneys as well as fully disclose all such agreements to the public. In addition, the memorandum does not acknowledge the lack of judicial or Congressional oversight of this practice and the imbalanced system of justice that this creates. Finally, this memorandum merely ascribes many principles that already exist within statues governing the ethics of this issue. For example, the memorandum states pre-existing guidelines set forth in 18 U.S.C § 208 and 5 C.F.R. Part 2635 to avoid the appearance of a conflict-of-interest in the selection of monitors. From reading these statutes it seems quite reasonable to understand that Mr. Christie has already violated the letter and the spirit of these pre-exiting ethics guidelines with his selection of former colleagues and associates to serve as federal monitors. I would hope then that the Department of Justice would hold Mr. Christie to account for his actions that run counter to ethics guidelines he should have been following from the start.

Concluding Remarks

I can not stress more strongly the need for comprehensive legislation regarding deferred prosecution agreements. This practice has clearly been created by the Department of Justice to generate unmitigated power for federal prosecutors in pursuing corporations, as is highlighted by the actions of U.S. Attorney Christie in this case. Corporate prosecutions are of critical importance to our nation because of the money, resources and jobs that can be at stake. However, an even more essential concern has emerged through these deferred prosecution agreements and that is the lack of any checks and balances within the system. We are all well versed on the checks and balances between the executive, legislative and judiciary branches of government. However, within each of these branches also exists its own set of checks and balances necessary to avoid the concentration of power. As Members of this Committee know, within the judiciary branch these checks and balances involve the powers and responsibilities of the defense, the prosecution and the courts. However, within the deferred

prosecution system power is almost entirely concentrated in the hands of federal prosecutors. For example, if an individual is charged with a crime and strikes a plea bargain with the prosecution then that plea must go before a judge who has the power to deny and in some cases to alter that agreement based on judicial discretion. However, when it comes to these deferred prosecution agreements that are struck between federal prosecutors and corporations it means that neither party ever sees the inside of a courtroom let alone has to put these agreements before a judge.

In essence federal prosecutors hold all the cards over these corporations, which have everything to fear in a prolonged prosecution and little to gain in challenging powerful federal prosecutors. No one here, including myself, is in a position of defending corrupt corporations or arguing against their full prosecution by the law. But the presumed innocence of defendants before trial and the balance between the prosecution and defense are hallmarks of our justice system. In this instance however, we are left with a deferred prosecution system that gives federal prosecutors unmitigated power to be judge, jury and sentencer. Truly, it was never the intent of our justice system to concentrate such power in the hands of any one individual or office. We must not allow deferred prosecution to become a form of deferred justice.

Again, I want to thank Chairman Conyers and Chairwoman Sanchez for allowing me to testify before this Subcommittee. I look forward to continued investigation of this critical issue and further efforts to develop comprehensive corporate prosecution legislation.

Thank You.

Opening Statement of
Congressman Bill Pascrell, Jr.
Eighth Congressional District of New Jersey

House Committee on the Judiciary
Subcommittee on Commercial and Administrative Law

HEARING

Deferred Prosecution: Should Corporate Settlement Agreements Be Without Guidelines?

March 11, 2008

Introductory Remarks

I want to thank Full Committee Chairman Conyers and Subcommittee Chairwoman Sanchez for allowing me to testify before the Subcommittee on Commercial and Administrative Law on the issue of deferred prosecution agreements. On November 26th of last year I wrote to Chairman Conyers and Chairwoman Sanchez calling for hearings on the ability of the U.S. Attorney's Office to enter into deferred prosecution agreements. I appreciate the fact that they have both realized the critical nature of this issue and have pursued it vigorously since that day. I have believed since the beginning that the Judiciary Committee is the most appropriate forum to investigate this issue.

My attention was first brought to this issue of deferred prosecution agreements in large part because of published reports regarding the actions taken by the U.S. Attorney's Office in New Jersey. It had been reported that U.S Attorney for the District of New Jersey, Christopher Christie had reached a $311 million settlement to end an investigation into kickbacks being made by leading manufacturers of knee and hip replacements. This settlement reportedly ended a two-year federal probe into allegations that these manufacturers paid surgeons millions of dollars to use and promote their knee and hip replacements, which would constitute a violation of Medicare fraud statutes. Within this agreement these manufacturers agreed to hire a federal monitor, selected by the U.S. Attorney, which would ensure they comply with the law and a strict set of reforms. However, I was initially concerned that there was little transparency within this provision of the agreement as it could allow the federal monitor to act with impunity while the manufacturers remain under the threat of prosecution.

Furthermore, this agreement raised questions about the discretion of the U.S. Attorney's Office to select federal monitors. In this case, Mr. Christie selected Ashcroft Group Consulting Services, which according to reports stands to collect as much as $52 million in 18 months for its monitoring of Zimmer Holdings of Indiana. Apparently, these compensation agreements for federal monitors are almost never known publicly and were only released in this instance because they were disclosed in the SEC filings for Zimmer Holdings of Indiana. I was concerned that under the continued threat of prosecution, any party being investigated seemingly has little choice but to agree to the selection of these federal monitors and their exorbitant fees. Therein the selection of these federal monitors by Mr. Christie could give the impression of impropriety and political favoritism.

Actions of U.S. Attorney Christopher Christie

I am disappointed that Mr. Christie is not appearing at this Subcommittee today. Mr. Christie is at the center of this investigation and has thus far failed to enlighten Members of Congress or the general public about the process by which he concluded this deferred prosecution agreement. Prior to his appointment as U.S. Attorney for New Jersey, he served as an attorney in private practice defending large corporate clients and therefore has intimate knowledge of both sides of corporate prosecutions. Furthermore, Mr. Christie has failed to shed any light on his selection of federal monitors in this case.

I want to make clear that throughout this process I have not made any accusation of corruption on the part of Mr. Christie. However, there are a number of indisputable facts in this case that raise very troubling questions, which remain unanswered. First and foremost is the fact is that Mr. Christie selected former Attorney General John Ashcroft, his own former superior, for a highly lucrative federal monitoring contract. In addition, there were four other medical device manufacturers given deferred prosecution agreements under this case. In every instance Mr. Christie selected former Justice Department associates to serve as federal monitors under highly lucrative monitoring contracts. This was seemingly done without any negotiation of fees or any consideration of selecting monitors with whom he was not closely associated with. These actions are all the more troubling in the light of testimony by representatives of Zimmer Holdings to the Senate Special Committee on Aging that

Mr. Christie never presented the evidence he held against them and that he never forewarned them to the fact that he would be selecting Ashcroft Group as their monitor. This representative also made clear that Zimmer Holdings felt compelled to consent to this deferred prosecution agreement because they feared being taken off the Medicare providers list, which would have crippled their business. Therefore, Mr. Christie held all the leverage in this agreement and dictated the terms completely as he saw fit.

In my mind, these monitoring agreements amount to no-bid federal contracts that are ripe for political considerations. Current Attorney General Michael Mukasey tried to defend this practice last month before the full Judiciary Committee by stating that these monitoring contracts are paid out by private corporations and not through federal funds. However, the Attorney General fails to mention that these are publicly traded companies and these exorbitant monitoring fees will surely impact American consumers. In the end, Mr. Christie may defend himself by saying that he needed to select these monitors since he knew he could trust them. But, I must be clear when I say that the selection of close associates by a federal officer to take on highly lucrative contracts, which are not negotiated and in which outside contractors are not even considered, is the essence of political favoritism.

Testimony from Former Attorney General Ashcroft

I am pleased that former U.S. Attorney General John Ashcroft has agreed to testify before this Subcommittee. Mr. Ashcroft's testimony is critical to understanding the process by which he was selected as the monitor for Zimmer Holdings. In addition, as Attorney General Mr. Ashcroft created the current system of deferred prosecution agreements. To this date, Mr. Ashcroft has also remained quiet in explaining his role in this process. As in the case of Mr. Christie, I have never made any accusation of wrongdoing on the part of Mr. Ashcroft. However, the troubling fact is that Mr. Ashcroft created a process for corporate prosecutions within the Department of Justice, from which he now benefits handsomely from. I hope that Mr. Ashcroft will choose, through his testimony to this Subcommittee, to answer these questions regarding his relationship with U.S. Attorney Christie and this exorbitant monitoring contract.

History of Deferred Prosecution Agreements

As I delved deeper into this issue involving U.S. Attorney Christie and former Attorney General Ashcroft I came to the realization that this case of deferred prosecution agreements encompassed an even larger issue of corporate prosecutions in the post-Enron era. In researching the history, I discovered that the practice of deferred prosecution agreements was made legal through the Speedy Trial Act of 1974 (Public Law 93-619, codified at 18 U.S.C. 3161(h)(2)), which first gave the attorney for the Government the right to have a period of delay during which prosecution is deferred pursuant to a written agreement with the defendant. In the beginning this remedy was rarely used by government prosecutors, except in small-scale drug cases involving diversion programs usually for marijuana-related offenses. However, the indictment and ensuing collapse of accounting giant Arthur Andersen in March 2002 made clear to both prosecutors and defense attorneys the susceptibility large corporations have to federal prosecutions and the consequences that result. In response to the large number of federal prosecutions against corporations, the Department of Justice issued a memorandum, known as the "Thompson Memo" after Deputy Attorney General Larry Thompson, which, instructed federal prosecutors to explicitly consider "granting a corporation immunity or amnesty or pretrial diversion…in exchange for cooperation when a corporation's timely cooperation appears to be necessary to the public interest and other means of obtaining the desired cooperation are unavailable or would not be effective."

However, it has become clear in the years since the 'Thompson Memo' that federal prosecutors hold even greater power and discretion through deferred prosecution agreements since oversight of such agreements seemingly has not existed through the federal government or the judiciary. In fact, a study conducted by Lawrence D. Finder and Ryan D. McConnell found that the number of deferred prosecution agreements

between the Department of Justice and corporations grew to thirty-five last year from just five in 2003, highlighting the explosive use of this hidden policy. It is my contention that the intent of the Speedy Trial Act of 1974 was never to the scope and breadth of deferred corporate prosecutions now being brought by federal prosecutors. It seems clear that the Department of Justice in recent years has consistently worked to shield this practice from oversight by Congress and the courts.

'Statement of Principles on Deferred Prosecution Agreements'

I myself have not yet introduced legislation on this critical issue because I believe that this issue must first be investigated by the Judiciary Committee through proceedings like this hearing. Additionally, I believe any legislation cannot merely address the issue of contracting with federal monitors, but must have a comprehensive approach to the larger issue of corporate prosecutions. In December of last year in lieu of legislation, I sent to this Committee and to the Department of Justice, my *Statement of Principles on Deferred Prosecution Agreements*. These four principles lay out a comprehensive approach to reforming deferred prosecution agreements and I look forward to continuing my work with this Committee to turn these principles into legislation that will finally provide oversight to this practice.

1. Require Guidelines on Deferred Prosecution Agreements: Corporate attorneys including the Association of Corporate Counsel have long complained that the Department of Justice has never issued any formal guidelines on the practice of deferred prosecution agreements. These attorneys believe that they can not properly represent their client's best interests when they have no guidelines to rely upon as to when corporations may be offered a deferred prosecution agreement and without clear knowledge of the parameters of such an agreement. This has left many to believe that the Department of Justice refuses to offer written guidelines so that its federal prosecutors can continue to have unmitigated discretion as to when to offer a deferred prosecution agreement and the manner in which they are carried out. Clearly, without any written rules on such agreements it becomes impossible to hold federal prosecutors to account. The requirement to issue formal written guidelines on deferred prosecution agreements would be the first place to start in order to provide any accountability to such agreements.

2. Restore Judicial Oversight of Deferred Prosecution Agreements: Under the current system deferred prosecution agreements allow federal prosecutors and corporate offenders to avoid the scrutiny of the judicial system entirely. These agreements are conducted between the two parties outside of a courtroom and once such an agreement is reached the courts are no longer involved in the case. Conversely, in other criminal cases that come before the court, the prosecution and defense are free to reach a plea bargain agreement, but the presiding judge is not bound by any such agreement and has the discretion to deny it based upon legal precedent. In order to restore this balance it is necessary to give the presiding judge the authority to sign-off on the terms of a deferred prosecution agreement as well as the selection of a federal monitor. In addition, the federal monitor and the corporation should be required to submit quarterly reports to the Chief Judge of the District Court. These reports would allow the judiciary to monitor the progression of these agreements through the federal monitor as well as allow corporations to have confidential communication with the judiciary to voice any concerns that they may fear to bring up with the federal prosecutor.

3. Take the Selection of Federal Monitors Out of the Hands of U.S. Attorneys: The U.S. Attorney's Office wields immense clout and in fact has the authority to bring the full weight of the federal government upon those individuals and parties whom they consider under suspicion of federal law. However, as the actions of U.S. Attorney Christie have made clear, deferred prosecution agreements allow federal prosecutors to brandish even greater influence especially as it relates to the selection of federal monitors. While these monitors work for the prosecution and are hired by the U.S. Attorney, they are in fact paid at the expense of the corporations. In additions, the fees are set by firms who have already been selected to serve as federal monitors and corporations feel they are in no position to negotiate. These factors have led to massive legal fees thus making it very lucrative to be selected as a federal monitor and have led some to believe there to be the appearance of

impropriety and political favoritism on the part of the U.S. Attorney's office. This issue could be remedied by taking the decision on whom to hire as a federal monitor out of the hands of U.S. Attorneys. Instead, the Executive Office for United States Attorneys could contract with firms and create a set fee structure for services rendered as a federal monitor. This would allow the Department of Justice to create a national database of firms who would have the experience and specialized skills necessary to serve as federal monitors. The Executive Office for United States Attorneys would then make a final decision on which firm to hire based upon the particular requirements of each case.

4. Require Full Disclosure of Deferred Prosecution Agreements: Since the introduction of the 'Thompson Memo' in January 2003 the public has had little understanding about the nature of deferred prosecution agreements specifically because few details have ever been released. This is particularly the case as it relates to the fees charged by federal monitors, which have always been held secret. In fact, in the case involving U.S. Attorney Christie the fees charged by Mr. Ashcroft's firm were only released because the corporation, Zimmer Inc., found the fees to be so large and burdensome that they felt compelled to report them to their shareholders through their SEC filings. In order to create any transparency through this process there must be a requirement for full disclosure of the terms of a deferred prosecution agreement as well as any contracts reached with firms serving as federal monitors.

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Concluding Remarks

I can not stress more strongly the need for comprehensive legislation regarding deferred prosecution agreements. This practice has clearly been created by the Department of Justice to generate unmitigated power for federal prosecutors in pursuing corporations, as is highlighted by the actions of U.S. Attorney Christie in this case. Corporate prosecutions are of critical importance to our nation because of the money, resources and jobs that can be at stake. However, an even more essential concern has emerged through these deferred prosecution agreements and that is the lack of any checks and balances within the system. We are all well versed on the checks and balances between the executive, legislative and judiciary branches of government. However, within each of these branches also exists its own set of checks and balances necessary to avoid the concentration of power. As Members of this Committee know, within the judiciary branch these checks and balances involve the powers and responsibilities of the defense, the prosecution and the courts. However, within the deferred

prosecution system power is almost entirely concentrated in the hands of federal prosecutors. For example, if an individual is charged with a crime and strikes a plea bargain with the prosecution then that plea must go before a judge who has the power to deny and in some cases to alter that agreement based on judicial discretion. However, when it comes to these deferred prosecution agreements that are struck between federal prosecutors and corporations it means that neither party ever sees the inside of a courtroom let alone has to put these agreements before a judge.

In essence federal prosecutors hold all the cards over these corporations, which have everything to fear in a prolonged prosecution and little to gain in challenging powerful federal prosecutors. No one here, including myself, is in a position of defending corrupt corporations or arguing against their full prosecution by the law. But the presumed innocence of defendants before trial and the balance between the prosecution and defense are hallmarks of our justice system. In this instance however, we are left with a deferred prosecution system that gives federal prosecutors unmitigated power to be judge, jury and sentencer. Truly, it was never the intent of our justice system to concentrate such power in the hands of any one individual or office. We must not allow deferred prosecution to become a form of deferred justice.

Again, I want to thank Chairman Conyers and Chairwoman Sanchez for allowing me to testify before this Subcommittee. I look forward to continued investigation of this critical issue and further efforts to develop comprehensive corporate prosecution legislation.

Thank You.