Sent: Monday, January 29, 2007 11:34 AM
To: Scott-Finan, Nancy
Cc: Seidel, Rebecca
Subject: Re: Independence of US Attorneys

I don't recall anything about any testimony, and OLP probably should not draft it anyway. (RAH was of the view that this was a good project for EOUSA.) We'll be circulating a draft views letter today.
RWB

-----Original Message-----
From: Scott-Finan, Nancy
To: Bounds, Ryan W (OLP)
CC: Seidel, Rebecca
Sent: Mon Jan 29 11:29:56 2007
Subject: Independence of US Attorneys

Ryan,
How are we doing on the views letter and the testimony. It is my understanding that OLP is drafting both and that the DAG will be testifying. Under the Committee rules, since the hearing was noticed two weeks out, our testimony is due on the Hill a week from today.
Thanks much.
Nancy

Draft Testimony for
Deputy Attorney General
Paul McNulty

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

Wednesday, February 7, 2007

OUTLINE

I. The role of the U.S. Attorney
- Chief federal law enforcement officer in the district
- Law enforcement/Prosecutor
- Manager/executor of Administration's priorities

II. U.S. Attorney appointments
- History of U.S. Attorney appointments
  - Generally
  - In Bush Administration
- Administration is committed to having Senate-confirmed U.S. Attorney in every district
  - Evidence of this
  - Examples
- U.S. Attorneys serve at pleasure of the President
  - May be removed for any reason or no reasons
  - Appropriate reasons to remove (or ask or encourage to resign): malfeasance, management issues, etc.
  - Inappropriate reasons to remove (or ask or encourage to resign): to influence investigation or prosecution

III. The Feinstein bill/interim U.S. Attorney appointments
- Amendment to § 546 was necessary and appropriate
  - Constitutional concerns
  - Practical/policy concerns
- Administration's standard practice in making interim U.S. Attorney appointments
  - DOJ employee
  - Preferably someone form within the office (though exceptions where warranted)

Murphy, Sean (USAEO)

From: Murphy, Sean (USAEO)
Sent: Monday, January 29, 2007 8:29 PM
To: Nowacki, John (USAEO)

Attachments: draft DAG testimony .doc

draft DAG
stimony .doc (58 K.

Sampson's outline is in Black,
Proposed Testimony language is in Blue
Comments are in Red.

Sean P. Murphy
Policy Coordinator and Special Assistant to the Director
Executive Office for United States Attorneys
U.S. Department of Justice
950 Pennsylvania Ave. NW Suite 2248
Washington, DC 20530
(202) 353-3137

Draft Testimony for
Deputy Attorney General
Paul McNulty

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

Wednesday, February 7, 2007

OUTLINE

I. The role of the U.S. Attorney

- Chief federal law enforcement officer in the district
- Law enforcement/Prosecutor
- Manager/executor of Administration's priorities

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

In pursuit of Department objectives, USAs manage large offices of federal prosecutors and report directly to the Deputy Attorney General and the Attorney general. USAs also represent the administration, the Attorney General, and federal law-enforcement resources in their respective communities. United States Attorneys are law enforcement officials and officers of the court who must carry out their responsibilities with strict impartiality. For these reasons, the Department is committed to having the best person discharging the responsibilities for the USA at all times in every district.

II. U.S. Attorney appointments

- History of U.S. Attorney appointments
  - Generally
  - In Bush Administration

Before last year's amendment, the Attorney General could appoint an interim United States Attorney for only 120 days; thereafter, the district courts was authorized to

appoint an interim USA. In cases where a Senate-confirmed USA could not be appointed within 120 days, the limitation on the Attorney General's appointment authority resulted in several recurring problems. For example, some district courts–recognizing the oddity of members of one branch of government appointing officers of another and the conflicts inherent in the appointment of an interim USA who would then have many matters before the court–refused to exercise the court's appointment authority. Such refusals required the AG to make multiple 120-day appointments. In contrast, other district courts–ignoring the oddity and inherent conflicts–sought to appoint as interim USAs wholly unacceptable candidates who did not have the appropriate qualifications or the necessary clearances.

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

- Administration is committed to having Senate-confirmed U.S. Attorney in every district
    - Evidence of this
    - Examples

Our record since the Attorney General-appointment authority was amended last year demonstrates we are committed to working with the Senate to nominate candidates for U.S. Attorney positions. Every single time that a United States Attorney vacancy has arisen, the President either has made a nomination or the Administration is working, in consultation with home-State Senators, to select candidates for nomination. Specifically, since March 9, 2006, when the AG's appointment authority was amended, the Administration has nominated 15 individuals to serve as U.S. Attorney. 12 have been confirmed to date (Jan 29, 2007).

Specifically since March 9, 2006, when the appointment authority was amended, 11 vacancies have been created. Of those 11 vacancies, the Administration nominated candidates to fill five of these positions (three were confirmed to date) and has interviewed candidates for the other six positions – all in consultation with home-state Senators.

The 11 Vacancies Were Filled on an Interim Basis Using a Range of Authorities, in Order To Ensure an Effective and Smooth Transition:

- In 5 cases, the First Assistant was selected to lead the office and took over under

the Vacancy Reform Act's provision at: 5 U.S.C. § 3345(a)(1). That authority is limited to 210 days, unless a nomination is made during that period.

• In 5 cases, the Department selected another Department employee to serve as interim under the Attorney General appointment authority until such time as a nomination is submitted to the Senate. (we should consider stating how many of these AG Appoints went on to be Presidentially-appointed, such as Acosta was)

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

- U.S. Attorneys serve at pleasure of the President
  - May be removed for any reason or no reasons
  - Appropriate reasons to remove (or ask or encourage to resign): malfeasance, management issues, etc.
  - Inappropriate reasons to remove (or ask or encourage to resign): to influence investigation or prosecution

United States Attorneys serve at the pleasure of the President, and whenever a vacancy occurs, we act to fill it in compliance with our obligations under the Constitution, the laws of the United States, and in consultation with the home-state Senators. The Attorney General and the Deputy Attorney General are responsible for evaluating the performance the U.S. Attorneys and ensuring that they are leading their offices effectively.

Like other high-ranking Executive Branch officials, United States Attorneys may be removed for any reason or no reason. On occasion, in an organization as large as the Justice Department, some United States Attorneys are removed, or are asked or encouraged to resign. This should come as no surprise.

Some Senators have raised concerns based on a misunderstanding of the facts surrounding the resignations of a handful of U.S. Attorneys, each of whom have been in office for their full four year term or more. Such discussions with United States Attorneys regarding their continued service generally are non-public, out of respect for those United States Attorneys; indeed, a public debate about the United States Attorneys that may have been asked or encouraged to resign only disserves their interests.

In any event, please be assured that United States Attorneys never are removed, or asked or encouraged to resign, in an effort to retaliate against them or interfere with or inappropriately influence a particular investigation, criminal prosecution or civil case.

III. The Feinstein bill/interim U.S. Attorney appointments

- Amendment to § 546 was necessary and appropriate

- Constitutional concerns
- Practical/policy concerns

Last year's amendment to the Attorney General's appointment authority was necessary and appropriate. As you know, prior to last year's amendment, the Attorney General could appoint an interim United States Attorney for only 120 days; thereafter, the district court was authorized to appoint an interim United States Attorney. In cases where a Senate confirmed United States Attorney could not be appointed within 120 days, the limitation on the Attorney General's appointment authority resulted in numerous, recurring problems. Because the Administration is committed to having a Senate-confirmed United States Attorney in all 94 federal districts, changing the law to restore the limitations on the Attorney General's appointment authority is unnecessary.

S. 214 appears to be aimed at solving a problem that has not arisen. The Administration has repeatedly demonstrated its commitment to having Senate-Confirmed USAs in every federal district. The Department's concern principle concern with this legislation is that it would be inappropriate. The Department of Justice is aware of no other federal agency for which federal judges rather than Executive Branch officials make staffing decisions. Moreover, the bill would diminish the Attorney General's ability to ensure that the nation's laws are duly enforced by requiring him to work closely with and through supervisory officials over whose selection he has no immediate influence.

S. 214 would institute a new appointee regime without allowing the Attorney General's authority under current law to be tested in practice. The bill would reverse last year's amendment to 28 U.S.C. Sec. 546 whereby the Attorney General is authorized to appoint an interim United States Attorney to serve until the position is filled by a candidate who has been confirmed by the Senate and appointed by the President in the normal course. Last year's amendment was meant to ensure that the Attorney General would be able to maintain the Department's uninterrupted law-enforcement efforts event in the event of a United States Attorney Vacancy that lasts longer than expected.

Appointments by Courts (even interim appointments) creates conflicting loyalties and conflicts of interests, and is unconstitutional. Former Carter Administration Attorney General Griffin Bell recommended to Congress that appointments of U.S. Attorneys be vested solely in the Attorney General to assure high quality in appointees, to minimize the stigma of political patronage, and to foster effective departmental management.

Court appointment of U.S. Attorneys threatens to undermine judicial impartiality and the appearance of impartiality and thrusts courts into partisan political battles. By selecting U.S. Attorneys, judges lose their institutional distance and impartiality as to whether charges are filed, dropped, or settled. A judge may be inclined to select a U.S. Attorney who shares the judge's ideological or prosecutorial philosophy. Or a judge may select a prosecutor apt to settle cases and enter plea bargains, so as to preserve judicial resources. *See* Wiener, *Inter-Branch Appointments After the Independent Counsel: Court Appointment of United States Attorneys*, 86 Minn. L. Rev. 363, 428 (2001) (concluding that court appointment of interim U.S. Attorneys is unconstitutional).

More fundamentally, court appointment of U.S. Attorneys violates the separation of powers because it puts courts in the position of appointing subordinates charged with carrying out the President's duty to execute the laws—thus defeating the accountability of core executive branch officials intended under the Constitution.

- Administration's standard practice in making interim U.S. Attorney appointments
  - DOJ employee
  - Preferably someone form within the office (though exceptions where warranted)

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

Our record since the AG-appointment authority was amended demonstrates that we are committed to working with the Senate to nominate candidates for United States Attorney positions. Every single time that a United States Attorney vacancy has arisen, the President either has made a nomination or the Administration is working, in consultation with home-State Senators, to select candidates for nomination.

END

Nowacki, John (USAEO)

From: Sampson, Kyle
Sent: Monday, January 29, 2007 6:29 PM
To: Battle, Michael (USAEO); Nowacki, John (USAEO)
Cc: Hertling, Richard; Scott-Finan, Nancy; Goodling, Monica; Elston, Michael (ODAG)
Subject: RE: Independence of US Attorneys - testimony

Importance: High

Attachments: draft DAG testimony -- USAs hearing.doc

draft DAG
stimony -- USAs he.

Mike/John, here's my draft outline for DAG testimony at next week's hearing. Thanks for working on this. Look forward to seeing your draft. Thx.

-----Original Message-----
From: Hertling, Richard
Sent: Monday, January 29, 2007 6:21 PM
To: Sampson, Kyle; Scott-Finan, Nancy; Goodling, Monica
Subject: RE: Independence of US Attorneys - testimony

Oral statement will be 5 minutes, though the DAG could go longer. The written can be a longer still if necessary to cover the subject.

-----Original Message-----
From: Sampson, Kyle
Sent: Monday, January 29, 2007 6:18 PM
To: Scott-Finan, Nancy; Goodling, Monica
Cc: Hertling, Richard
Subject: RE: Independence of US Attorneys - testimony

Working on it.
You tell me: how long would the subcommittee want his statement to be?
10 minutes? 5?

-----Original Message-----
From: Scott-Finan, Nancy
Sent: Monday, January 29, 2007 6:12 PM
To: Sampson, Kyle; Goodling, Monica
Cc: Hertling, Richard
Subject: FW: Independence of US Attorneys - testimony

Kyle,
Do you have an outline already available? And, how long would you like the statement to be? Thanks.
Nancy

-----Original Message-----
From: Hertling, Richard
Sent: Monday, January 29, 2007 5:51 PM
To: Scott-Finan, Nancy; Seidel, Rebecca; Bounds, Ryan W (OLP)
Cc: Nowacki, John (USAEO)
Subject: RE: Independence of US Attorneys - testimony

EOUSA will take the initial stab at testimony following receipt of an outline from Kyle Sampson.

-----Original Message-----
From: Scott-Finan, Nancy
Sent: Monday, January 29, 2007 5:51 PM
To: Hertling, Richard; Seidel, Rebecca; Bounds, Ryan W (OLP)
Cc: Nowacki, John (USAEO)
Subject: RE: Independence of US Attorneys - testimony

Ryan, have you had a chance to check with Rachel?
Thanks.
Nancy

-----Original Message-----
From: Hertling, Richard
Sent: Monday, January 29, 2007 12:01 PM
To: Seidel, Rebecca; Bounds, Ryan W (OLP); Scott-Finan, Nancy
Cc: Nowacki, John (USAEO)
Subject: RE: Independence of US Attorneys - testimony

Whoever drafts it, the testimony needs to include a sentence stating that DOJ is currently reviewing the issue of whether the appointment of an interim US Attorney by the judicial branch is constitutional.

-----Original Message-----
From: Seidel, Rebecca
Sent: Monday, January 29, 2007 11:58 AM
To: Bounds, Ryan W (OLP); Scott-Finan, Nancy
Cc: Hertling, Richard; Nowacki, John (USAEO)
Subject: RE: Independence of US Attorneys - testimony
Importance: High

We have to figure out asap because the testimony needs to go into DOJ clearance TOMORROW (because we have to get to committee 48 hours in advance, so needs to get to Committee Monday, so OMB needs it Wed).

-----Original Message-----
From: Bounds, Ryan W (OLP)
Sent: Monday, January 29, 2007 11:56 AM
To: Seidel, Rebecca; Scott-Finan, Nancy
Cc: Hertling, Richard
Subject: RE: Independence of US Attorneys

I'll raise it with Rachel. She wanted to ensure that the person who is working on the views letter went back to the crime initiative ASAP, and there's no reason for OLP rather than EOUSA to work on drafting testimony if we're reassigning it to someone new anyway.

-----Original Message-----
From: Seidel, Rebecca
Sent: Monday, January 29, 2007 11:38 AM
To: Bounds, Ryan W (OLP); Scott-Finan, Nancy
Cc: Hertling, Richard
Subject: RE: Independence of US Attorneys

Richard thought OLP was doing both the views letter and the testimony, makes sense one can morph into the other.

-----Original Message-----
From: Bounds, Ryan W (OLP)
Sent: Monday, January 29, 2007 11:34 AM
To: Scott-Finan, Nancy
Cc: Seidel, Rebecca
Subject: Re: Independence of US Attorneys

I don't recall anything about any testimony, and OLP probably should not draft it anyway. (RAH was of the view that this was a good project for

EOUSA.) We'll be circulating a draft views letter today.
RWB

-----Original Message-----
From: Scott-Finan, Nancy
To: Bounds, Ryan W (OLP)
CC: Seidel, Rebecca
Sent: Mon Jan 29 11:29:56 2007
Subject: Independence of US Attorneys

Ryan,
How are we doing on the views letter and the testimony. It is my understanding that OLP is drafting both and that the DAG will be testifying. Under the Committee rules, since the hearing was noticed two weeks out, our testimony is due on the Hill a week from today.
Thanks much.
Nancy

Draft Testimony for
Deputy Attorney General
Paul McNulty

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

Wednesday, February 7, 2007

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  - Generally
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III. The Feinstein bill/interim U.S. Attorney appointments
- ~~Amendment to § 546 was necessary and appropriate~~
  - Constitutional concerns
  - Practical/policy concerns
- Administration's standard practice in making interim U.S. Attorney appointments
  - DOJ employee
  - Preferably someone form within the office (though exceptions where warranted)

Nowacki, John (USAEO)

From: Nowacki, John (USAEO)
Sent: Monday, January 29, 2007 6:52 PM
To: Sampson, Kyle
Subject: RE: US Attorney appointments

Great, thanks.

From: Sampson, Kyle
Sent: Monday, January 29, 2007 6:50 PM
To: Nowacki, John (USAEO)
Subject: FW: US Attorney appointments

John, wanted you to have this -- for the draft DAG testimony.

From: Mercer, William W
Sent: Monday, January 29, 2007 1:17 PM
To: Moschella, William
Cc: McNulty, Paul J; Sampson, Kyle; Elston, Michael (ODAG)
Subject: FW: US Attorney appointments

I promised some talkers based upon the Bell/Meador and Wiener articles. Here they are.

From: O'Quinn, John C
Sent: Friday, January 26, 2007 2:52 PM
To: Mercer, William W
Cc: McDonald, Esther Slater
Subject: US Attorney appointments

Bill,

Attached are 2 pages of talking points on why the AG and not courts should be appointing interim US Attorneys. Also attached is a 1 page proposal that would make the appointment of interim US Attorneys by the AG more or less consistent with the appointment of persons as "acting" under the Vacancies Reform Act. It would give the AG a lot of breathing space on appointing interim US Attorneys, but make it so that appointments were not indefinite; it would also give the Senate incentive to act on nominations. Note a different approach to consider -- if section 546 were simply repealed altogether, that the provisions of the Vacancies Reform Act would apply (5 USC 3345), and the President could simply name acting US Attorneys just as he does with other nominated/confirmed executive branch positions.

<<US Attorney Talking Points.doc>> <<US Attorney language.doc>>

John C. O'Quinn
Deputy Associate Attorney General
950 Penn Ave, NW, Room 5722

Washington, DC 20530
202 514-9500
John.C.O'Quinn@usdoj.gov

Nowacki, John (USAEO)

From: Nowacki, John (USAEO)
Sent: Tuesday, January 30, 2007 6:23 PM
To: Goodling, Monica
Subject: DRAFT Testimony

Attachments: DRAFT Testimony -- US Attorneys Hearing.doc

The draft testimony is attached; I promised it to OLA by seven o'clock. Thanks for taking a look.

On AZ, the office senior mgmt is at a funeral and we have not been able to reach anyone. Mike couldn't reach the judge, either. We have left messages for the judge, Charlton, and Knauss.

DRAFT Testimony -- US Attorney...

Nowacki, John (USAEO)

From: Scott-Finan, Nancy
Sent: Thursday, February 01, 2007 6:21 PM
To: Nowacki, John (USAEO)
Subject: FW: DAG McNulty Testimony - US Attorneys - Senate Judiciary 2-6-07
Attachments: ODAGMcNultyTestimonySJC2-6-07PoliticizationofUSAttorneys(DOJredline).doc

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

<<ODAGMcNultyTestimonySJC2-6-07PoliticizationofUSAttorneys(DOJredline).doc>> Hi Angie,

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

Thanks for expediting this.

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

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

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

Thanks.

-

Department of Justice

STATEMENT

OF

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

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

CONCERNING

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

PRESENTED ON

FEBRUARY 6, 2007

Testimony
of

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

Committee on the Judiciary
United States Senate

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

February 6, 2007

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

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

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

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

The Attorney General and I are responsible for evaluating the performance of the United States Attorneys and ensuring that they are leading their offices effectively. It should come as no

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

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

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

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

Deleted: U.S. Attorney

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

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

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

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

Deleted: U.S. Attorney

Deleted: U.S. Attorney

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

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

In most cases, of course, the district court simply appointed the Attorney General's choice as interim U.S. Attorney, revealing the fact that most judges recognized the importance of appointing an interim U.S. Attorney who enjoys the confidence of the Attorney General. In other words, the most important factor in the selection of past court-appointed interim U.S. Attorneys was the Attorney General's recommendation. By foreclosing the possibility of judicial appointment of interim U.S. Attorneys unacceptable to the Administration, last year's amendment to Section 546 appropriately eliminated a procedure that created unnecessary

problems without any apparent benefit.

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

Prosecutorial authority should be exercised by the Executive Branch in a unified manner, consistent with the application of criminal enforcement policy under the Attorney General. S. 214 would undermine the effort to achieve a unified and consistent approach to prosecutions and

federal law enforcement. Court-appointed U.S. Attorneys would be at least as accountable to the chief judge of the district court as to the Attorney General, which could, in some circumstances become untenable. In no context is accountability more important to our society than on the front lines of law enforcement and the exercise of prosecutorial discretion, and the Department contends that the chief prosecutor should be accountable to the Attorney General, the President, and ultimately the people.

Deleted: rather than a court

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

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

Nowacki, John (USAEO)

From: Scott-Finan, Nancy
Sent: Monday, February 05, 2007 10:57 AM
To: Goodling, Monica; Sampson, Kyle; Hertling, Richard; Seidel, Rebecca; Elston, Michael (ODAG); Moschella, William; Kirsch, Thomas; Nowacki, John (USAEO); Battle, Michael (USAEO)
Cc: Long, Linda E
Subject: FW: 2/6 Hearing Witness Testimony
Attachments: Levenson Testimony 2-6-07.pdf; Levenson Bio.pdf; White Testimony 2-6-07.pdf; White Bio.pdf

Attached is the testimony for the two other witnesses for tomorrow's hearing

cc: Linda for Paul

Nowacki, John (USAEO)

From: USDOJ- Office of Public Affairs
Sent: Tuesday, February 06, 2007 11:25 AM
To: USDOJ- Office of Public Affairs
Subject: PREPARED STATEMENT OF DEPUTY ATTORNEY GENERAL PAUL J. MCNULTY AT THE SENATE JUDICIARY COMMITTEE HEARING ON APPOINTMENTS AND RESIGNATIONS OF U.S. ATTORNEYS

Department of Justice

FOR IMMEDIATE RELEASE DAG

TUESDAY, FEBRUARY 6, 2007 (202) 514-2007

WWW.USDOJ.GOV TDD (202) 514-1888

PREPARED STATEMENT OF DEPUTY ATTORNEY GENERAL PAUL J. MCNULTY AT THE SENATE

JUDICIARY COMMITTEE HEARING ON APPOINTMENTS AND RESIGNATIONS OF U.S. ATTORNEYS

WASHINGTON, D.C.

Thank you, Mr. Chairman. I appreciate the opportunity to be here this morning and attempt to clear up the misunderstandings and mispersceptions about the recent resignations of some United States Attorneys (USA), and to testify in strong opposition to S.214, a bill which would strip the Attorney General of the authority to make interim appointments to fill vacant USA positions.

As you know, I had the privilege of serving as a USA for 4 ½ years. It was the best job I ever had. That's something you hear a lot from former USAs – "Best job I ever had." In my case, Mr. Chairman, it was even better than serving as counsel on the House Crime Sub. under your leadership.

Why is being a USA such a great job? There are a variety of reasons, but I think it boils down to this. The USAs are the President's chief legal representatives in the 94 federal judicial districts. In my former district of Eastern Virginia, Supreme Court Chief Justice John Marshal was the first USA.

Being the President's chief legal representative means you are the face of the Justice Department in your district. Every police chief you support, every victim you comfort, every citizen you inspire or encourage, and, yes, every criminal who is prosecuted in your name, communicates to all of these people something significant about the priorities and values of both the President and the AG. At his innauguration, the President raises his right hand and solemnly swears to faithfully execute the office of the President of the United States. He fulfills this promise in no small measure through the men and

women he appoints as USAs. If the President and the Attorney General want to crack down on gun criminals or go after child pornographers and pedophiles, as this President and AG have ordered federal prosecutors to do, it's the USAs who have the privilege of making such priorities a reality. That's why it's the best job a lawyer can ever have. It's an incredible honor.

And this is why, Mr. Chairman, judges should not appoint USAs, as S.214 proposes. What could be clearer Executive Branch responsibilities than the AG's authority to temporarily appoint and for the President to nominate for Senate confirmation those who will execute the President's duties of office? S.214 doesn't even allow the AG to make ANY interim appointments, contrary to the law prior to the most recent amendment.

The indisputable fact is that USAs serve at the pleasure of the President. They come and they go for lots of reasons. Of the USAs appointed in my class at the beginning of this Administration, more than half are now gone. Turnover is not unusual and it rarely causes a problem because even though the job of USA is extremely important, the greatest assets of any successful USA are the career men and women who serve as AUSAs, victim-witness coordinators, paralegals, legal assistants, and administrative personnel. Their experience and professionalism ensures smooth continuity as the USA job transitions from one person to another.

Mr. Chairman, I conclude with these three promises to this Committee and the American people on behalf of the AG and myself:

1) We never have and never will seek to remove a USA to interfere with an ongoing investigation or prosecution. Such an act is contrary to the most basic values of our system of justice, the proud legacy of the Department of Justice, and our integrity as public servants.

2) In every single case, where a USA position is vacant, the Administration is committed to filling that position with a USA who is confirmed by the Senate. The AG's appointment authority has not, and will not, be used to circumvent the confirmation process. All accusations in this regard are contrary to the clear factual record. The statistics are all laid out in my written statement.

3) Through temporary appointments and nominations for Senate confirmation, the Administration will continue to fill USA vacancies with men and women who are well qualified to assume the important duties of this office.

Mr. Chairman, I appreciate your friendship and courtesy, and I am happy to respond to the Committee's questions.

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Nowacki, John (USAEO)

From: USDOJ- Office of Public Affairs
Sent: Tuesday, February 06, 2007 3:00 PM
To: USDOJ- Office of Public Affairs
Subject: WRITTEN STATEMENT OF DEPUTY ATTORNEY GENERAL PAUL J. MCNULTY TO THE SENATE JUDICIARY COMMITTEE FOR HEARING ON APPOINTMENTS AND RESIGNATIONS OF U.S. ATTORNEYS

Department of Justice

FOR IMMEDIATE RELEASE DAG

TUESDAY, FEBRUARY 6, 2007 (202) 514-2007

WWW.USDOJ.GOV TDD (202) 514-1888

WRITTEN STATEMENT OF DEPUTY ATTORNEY GENERAL PAUL J. MCNULTY TO THE SENATE

JUDICIARY COMMITTEE FOR HEARING ON APPOINTMENTS AND RESIGNATIONS OF U.S. ATTORNEYS

WASHINGTON, D.C.

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

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

U.S. Attorneys are not only prosecutors; they are government officials charged with managing and implementing the policies and priorities of the Executive Branch. United States Attorneys serve at the pleasure of the President. Like any other high-ranking officials in the Executive Branch, they may be removed for any reason or no reason. The Department of Justice—including the office of United States Attorney—was created precisely so that the government's legal business could be effectively managed

and carried out through a coherent program under the supervision of the Attorney General. And unlike judges, who are supposed to act independently of those who nominate them, U.S. Attorneys are accountable to the Attorney General, and through him, to the President—the head of the Executive Branch. For these reasons, the Department is committed to having the best person possible discharging the responsibilities of that office at all times and in every district.

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

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

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

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

In every single case where a vacancy occurs, the Bush Administration is committed to having a United States Attorney who is confirmed by the Senate. And the Administration's actions bear this out. Every time a vacancy has arisen, the President has either made a nomination, or the Administration is working—in consultation with home-state Senators—to select candidates for nomination. Let me be perfectly clear—at no time has the Administration sought to avoid the Senate confirmation process by appointing an interim United States Attorney and then refusing to move forward, in consultation with home-State Senators, on the selection, nomination and confirmation of a new United States Attorney.

Not once.

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

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

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

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

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

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

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

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

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

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Nowacki, John (USAEO)

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

Attachments: DRAFT Moschella Testimony.doc

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

-- John

DRAFT Moschella Testimony.doc ...

Nowacki, John (USAEO)

From: Nowacki, John (USAEO)
Sent: Wednesday, February 28, 2007 5:46 PM
To: Scott-Finan, Nancy
Subject: RE: Draft HJC testimony

Thanks.

From: Scott-Finan, Nancy
Sent: Wednesday, February 28, 2007 5:45 PM
To: Nowacki, John (USAEO)
Subject: RE: Draft HJC testimony

No.
Will told me he would not have comments to me until tomorrow morning.

From: Nowacki, John (USAEO) [mailto:John.Nowacki@usdoj.gov]
Sent: Wednesday, February 28, 2007 5:39 PM
To: Scott-Finan, Nancy
Subject: RE: Draft HJC testimony

Has it gone to OMB yet?

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

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

Nancy

Department of Justice

STATEMENT

OF

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

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES HOUSE OF REPRESENTATIVES

CONCERNING

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

PRESENTED ON

MARCH 6, 2007

Testimony
of

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

Committee on the Judiciary
United States House of Representatives

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

March 6, 2007

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

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

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

priorities of the Executive Branch. The Attorney General has set forth key priorities for the Department of Justice, and in each of their districts, U.S. Attorneys lead the Department's efforts to protect America from terrorist attacks and fight violent crime, combat illegal drug trafficking, ensure the integrity of government and the marketplace, enforce our immigration laws, and prosecute crimes that endanger children and families—including child pornography, obscenity, and human trafficking.

United States Attorneys serve at the pleasure of the President. Like any other high-ranking officials in the Executive Branch, they may be removed for any reason or no reason. The Department of Justice—including the office of United States Attorney—was created precisely so that the government's legal business could be effectively managed and carried out through a coherent program under the supervision of the Attorney General. Unlike judges, who are supposed to act independently of those who nominate them, U.S. Attorneys are accountable to the Attorney General, and through him, to the President—the head of the Executive Branch. This accountability ensures compliance with Department policy, and is often recognized by the Members of Congress who write to the Department to encourage various U.S. Attorneys' Offices to focus on a particular area of law enforcement.

The Attorney General and the Deputy Attorney General are responsible for evaluating the performance of the United States Attorneys and ensuring that they are leading their offices effectively. It should come as no surprise to anyone that, in an organization as large as the Justice Department, U.S. Attorneys are removed or asked or encouraged to resign from time to time. However, in this Administration U.S. Attorneys are never—repeat, never—removed, or asked or encouraged to resign, in an effort to retaliate against them, or interfere with, or inappropriately influence a particular investigation, criminal prosecution, or civil case. Any suggestion

to the contrary is unfounded, and it irresponsibly undermines the reputation for impartiality the Department has earned over many years and on which it depends.

Turnover in the position of U.S. Attorney is not uncommon and should be expected, particularly after a U.S. Attorney's four-year term has expired. When a presidential election results in a change of administration, every U.S. Attorney leaves and the new President nominates a successor for confirmation by the Senate. Moreover, U.S. Attorneys do not necessarily stay in place even during an administration. For example, approximately half of the U.S. Attorneys appointed at the beginning of the Bush Administration had left office by the end of 2006. Of the U.S. Attorneys whose resignations have been the subject of recent discussion, each one had served longer than four years prior to being asked to resign.

Given the reality of turnover among the United States Attorneys, it is actually the career investigators and prosecutors who exercise direct responsibility for nearly all investigations and cases handled by a U.S. Attorney's Office. While a new U.S. Attorney may articulate new priorities or emphasize different types of cases, the effect of a U.S. Attorney's departure on an existing investigation is, in fact, minimal, and that is as it should be. The career civil servants who prosecute federal criminal cases are dedicated professionals and an effective U.S. Attorney relies on the professional judgment of those prosecutors.

The leadership of an office is more than the direction of individual cases. It involves managing limited resources, maintaining high morale in the office, and building relationships with federal, state, and local law enforcement partners. When a U.S. Attorney submits his or her resignation, the Department must first determine who will serve temporarily as interim U.S. Attorney. The Department has an obligation to ensure that

someone is able to carry out the important function of leading a U.S. Attorney's Office during the period when there is not a presidentially-appointed, Senate-confirmed United States Attorney. Often, the Department looks to the First Assistant U.S. Attorney or another senior manager in the office to serve as U.S. Attorney on an interim basis. When neither the First Assistant nor another senior manager in the office is able or willing to serve as interim U.S. Attorney, or when the appointment of either would not be appropriate in the circumstances, the Department has looked to other, qualified Department employees. For example, in the District of Minnesota and the Northern District of Iowa, the First Assistant took federal retirement at or near the same time that the U.S. Attorney resigned, which required the Department to select another official to lead the office.

At no time, however, has the Administration sought to avoid the confirmation process in the Senate by appointing an interim U.S. Attorney and then refusing to move forward—in consultation with home-State Senators—on the selection, nomination, confirmation and appointment of a new U.S. Attorney. Not once. In every single case where a vacancy occurs, the Bush Administration is committed to having a United States Attorney who is confirmed by the Senate. And the Administration's actions bear this out. Every time a vacancy has arisen, the President has either made a nomination, or the Administration is working to select candidates for nomination. The appointment of U.S. Attorneys by and with the advice and consent of the Senate is unquestionably the appointment method preferred by the Senate, and it is unquestionably the appointment method preferred by the Administration.

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

U.S. Attorneys, and 16 vacancies have occurred since that date. This amendment has not changed our commitment to nominating candidates for Senate confirmation. In fact, the Administration has nominated a total of 15 individuals for Senate consideration since the appointment authority was amended, with 12 of those nominees having been confirmed to date. Of the 16 vacancies that have occurred since the time that the law was amended, the Administration has nominated candidates to fill five of these positions, has interviewed candidates for nomination for seven more positions, and is waiting to receive names to set up interviews for the remaining positions—all in consultation with home-state Senators.

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

H.R. 580 would supersede last year's amendment to 28 U.S.C. § 546 that authorized the Attorney General to appoint an interim U.S. Attorney to serve until a person fills the position by being confirmed by the

Senate and appointed by the President. Last year's amendment was intended to ensure continuity of operations in the event of a U.S. Attorney vacancy that lasts longer than expected. H.R. 580 would institute a new appointment regime without allowing the Attorney General's authority under current law to be tested in practice.

Prior to last year's amendment, the Attorney General could appoint an interim U.S. Attorney for the first 120 days after a vacancy arose; thereafter, the district court was authorized to appoint an interim U.S. Attorney. In cases where a Senate-confirmed U.S. Attorney could not be appointed within 120 days, the limitation on the Attorney General's appointment authority resulted in recurring problems. Some district courts recognized the conflicts inherent in the appointment of an interim U.S. Attorney who would then have matters before the court—not to mention the oddity of one branch of government appointing officers of another—and simply refused to exercise the appointment authority. In those cases, the Attorney General was consequently required to make multiple successive 120-day interim appointments. Other district courts ignored the inherent conflicts and sought to appoint as interim U.S. Attorneys wholly unacceptable candidates who lacked the required clearances or appropriate qualifications.

In most cases, of course, the district court simply appointed the Attorney General's choice as interim U.S. Attorney, revealing the fact that most judges recognized the importance of appointing an interim U.S. Attorney who enjoys the confidence of the Attorney General. In other words, the most important factor in the selection of past court-appointed interim U.S. Attorneys was the Attorney General's recommendation. By foreclosing the possibility of judicial appointment of interim U.S. Attorneys unacceptable to the Administration, last year's amendment to Section 546 appropriately eliminated a procedure that created unnecessary problems

without any apparent benefit.

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H.R. 580 appears to be aimed at addressing a problem that has not arisen. The Administration has repeatedly demonstrated its commitment to having a Senate-confirmed U.S. Attorney in every federal district. As noted, when a vacancy in the office of U.S. Attorney occurs, the Department typically looks first to the First Assistant or another senior manager in the office to serve as an acting or interim U.S. Attorney. Where neither the First Assistant nor another senior manager is able or willing to serve as an acting or interim U.S. Attorney, or where their service would not be appropriate under the circumstances, the Administration has looked to other Department employees to serve temporarily. No matter which way a U.S. Attorney is temporarily appointed, the Administration has consistently sought, and will continue to seek, to fill the vacancy—in consultation with home-State Senators—with a presidentially-nominated and Senate-confirmed nominee.

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

Nowacki, John (USAEO)

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

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

Department of Justice

STATEMENT

OF

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

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES HOUSE OF REPRESENTATIVES

CONCERNING

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

PRESENTED ON

MARCH 6, 2007

Testimony
of

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

Committee on the Judiciary
United States House of Representatives

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

March 6, 2007

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

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

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

priorities of the Executive Branch. The Attorney General has set forth key priorities for the Department of Justice, and in each of their districts, U.S. Attorneys lead the Department's efforts to protect America from terrorist attacks and fight violent crime, combat illegal drug trafficking, ensure the integrity of government and the marketplace, enforce our immigration laws, and prosecute crimes that endanger children and families—including child pornography, obscenity, and human trafficking.

United States Attorneys serve at the pleasure of the President. Like any other high-ranking officials in the Executive Branch, they may be removed for any reason or no reason. The Department of Justice—including the office of United States Attorney—was created precisely so that the government's legal business could be effectively managed and carried out through a coherent program under the supervision of the Attorney General. Unlike judges, who are supposed to act independently of those who nominate them, U.S. Attorneys are accountable to the Attorney General, and through him, to the President—the head of the Executive Branch. This accountability ensures compliance with Department policy, and is often recognized by the Members of Congress who write to the Department to encourage various U.S. Attorneys' Offices to focus on a particular area of law enforcement.

The Attorney General and the Deputy Attorney General are responsible for evaluating the performance of the United States Attorneys and ensuring that they are leading their offices effectively. It should come as no surprise to anyone that, in an organization as large as the Justice Department, U.S. Attorneys are removed or asked or encouraged to resign from time to time. However, in this Administration U.S. Attorneys are never—repeat, never—removed, or asked or encouraged to resign, in an effort to retaliate against them, or interfere with, or inappropriately influence a particular investigation, criminal prosecution, or civil case. Any suggestion

to the contrary is unfounded, and it irresponsibly undermines the reputation for impartiality the Department has earned over many years and on which it depends.

Turnover in the position of U.S. Attorney is not uncommon and should be expected, particularly after a U.S. Attorney's four-year term has expired. When a presidential election results in a change of administration, every U.S. Attorney leaves and the new President nominates a successor for confirmation by the Senate. Moreover, U.S. Attorneys do not necessarily stay in place even during an administration. For example, approximately half of the U.S. Attorneys appointed at the beginning of the Bush Administration had left office by the end of 2006. Of the U.S. Attorneys whose resignations have been the subject of recent discussion, each one had served longer than four years prior to being asked to resign.

Given the reality of turnover among the United States Attorneys, it is actually the career investigators and prosecutors who exercise direct responsibility for nearly all investigations and cases handled by a U.S. Attorney's Office. While a new U.S. Attorney may articulate new priorities or emphasize different types of cases, the effect of a U.S. Attorney's departure on an existing investigation is, in fact, minimal, and that is as it should be. The career civil servants who prosecute federal criminal cases are dedicated professionals and an effective U.S. Attorney relies on the professional judgment of those prosecutors.

The leadership of an office is more than the direction of individual cases. It involves managing limited resources, maintaining high morale in the office, and building relationships with federal, state, and local law enforcement partners. When a U.S. Attorney submits his or her resignation, the Department must first determine who will serve temporarily as interim U.S. Attorney. The Department has an obligation to ensure that

someone is able to carry out the important function of leading a U.S. Attorney's Office during the period when there is not a presidentially-appointed, Senate-confirmed United States Attorney. Often, the Department looks to the First Assistant U.S. Attorney or another senior manager in the office to serve as U.S. Attorney on an interim basis. When neither the First Assistant nor another senior manager in the office is able or willing to serve as interim U.S. Attorney, or when the appointment of either would not be appropriate in the circumstances, the Department has looked to other, qualified Department employees. For example, in the District of Minnesota and the Northern District of Iowa, the First Assistant took federal retirement at or near the same time that the U.S. Attorney resigned, which required the Department to select another official to lead the office.

At no time, however, has the Administration sought to avoid the confirmation process in the Senate by appointing an interim U.S. Attorney and then refusing to move forward—in consultation with home-State Senators—on the selection, nomination, confirmation and appointment of a new U.S. Attorney. Not once. In every single case where a vacancy occurs, the Bush Administration is committed to having a United States Attorney who is confirmed by the Senate. And the Administration's actions bear this out. Every time a vacancy has arisen, the President has either made a nomination, or the Administration is working to select candidates for nomination. The appointment of U.S. Attorneys by and with the advice and consent of the Senate is unquestionably the appointment method preferred by the Senate, and it is unquestionably the appointment method preferred by the Administration.

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

U.S. Attorneys, and 16 vacancies have occurred since that date. This amendment has not changed our commitment to nominating candidates for Senate confirmation. In fact, the Administration has nominated a total of 15 individuals for Senate consideration since the appointment authority was amended, with 12 of those nominees having been confirmed to date. Of the 16 vacancies that have occurred since the time that the law was amended, the Administration has nominated candidates to fill five of these positions, has interviewed candidates for nomination for seven more positions, and is waiting to receive names to set up interviews for the remaining positions—all in consultation with home-state Senators.

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

H.R. 580 would supersede last year's amendment to 28 U.S.C. § 546 that authorized the Attorney General to appoint an interim U.S. Attorney to serve until a person fills the position by being confirmed by the

Senate and appointed by the President. Last year's amendment was intended to ensure continuity of operations in the event of a U.S. Attorney vacancy that lasts longer than expected. H.R. 580 would institute a new appointment regime without allowing the Attorney General's authority under current law to be tested in practice.

Prior to last year's amendment, the Attorney General could appoint an interim U.S. Attorney for the first 120 days after a vacancy arose; thereafter, the district court was authorized to appoint an interim U.S. Attorney. In cases where a Senate-confirmed U.S. Attorney could not be appointed within 120 days, the limitation on the Attorney General's appointment authority resulted in recurring problems. Some district courts recognized the conflicts inherent in the appointment of an interim U.S. Attorney who would then have matters before the court—not to mention the oddity of one branch of government appointing officers of another—and simply refused to exercise the appointment authority. In those cases, the Attorney General was consequently required to make multiple successive 120-day interim appointments. Other district courts ignored the inherent conflicts and sought to appoint as interim U.S. Attorneys wholly unacceptable candidates who lacked the required clearances or appropriate qualifications.

In most cases, of course, the district court simply appointed the Attorney General's choice as interim U.S. Attorney, revealing the fact that most judges recognized the importance of appointing an interim U.S. Attorney who enjoys the confidence of the Attorney General. In other words, the most important factor in the selection of past court-appointed interim U.S. Attorneys was the Attorney General's recommendation. By foreclosing the possibility of judicial appointment of interim U.S. Attorneys unacceptable to the Administration, last year's amendment to Section 546 appropriately eliminated a procedure that created unnecessary problems

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