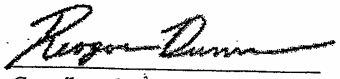
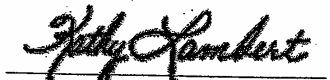
Thank you for your thoughtful consideration of this request.

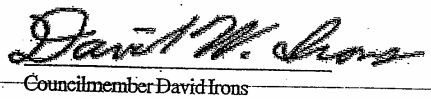
Respectfully,



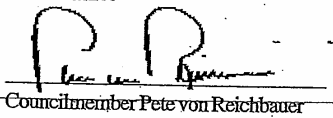
Councilmember Reagan Dunn
District Six



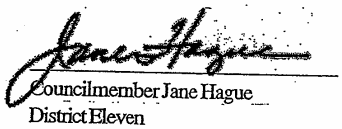
Councilmember Kathy Lambert
District Three



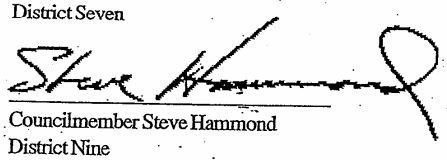
Councilmember David Irons
District Twelve



Councilmember Pete von Reichbauer
District Seven



Councilmember Jane Hague
District Eleven



Councilmember Steve Hammond
District Nine

cc: The Honorable John McKay, United States Attorney for the Western District of Washington

Department of Justice
EXECUTIVE SECRETARIAT
CONTROL SHEET

DATE OF DOCUMENT:	04/07/2005	**WORKFLOW ID:**	778071
DATE RECEIVED:	04/08/2005	**DUE DATE:**	

FROM: Mr. Bob Williams
President
Evergreen Freedom Foundation
PO Box 552
Olympia, WA 98507

TO: AG (cc indicated for CRT Acosta, CIV Keisler, CRM Wray)

MAIL TYPE: General

SUBJECT: Advising that members of the King County Council recently submitted a request to DOJ for a federal investigation of the Washington State 2004 general election. In support of that request, the Evergreen Freedom Foundation (EEF) submits evidence of possible fraud and civil rights violations compiled as part of EEF's Voter Integrity Project. EEF believes that a DOJ investigation is necessary and urgent. (Note: No record in ES of corres from the King County Council but see WF 759557.)

DATE ASSIGNED	**ACTION COMPONENT & ACTION REQUESTED**
04/15/2005	Criminal Division For component response.

INFO COMPONENT: OAG, ODAG, OASG, OIPL, EOUSA, CRM, CIV

COMMENTS: 5/20/2005: CRM replied by ltr dtd 5/10/05.
04/15/2005: Per CRT reassign to CRM.
FedEx 8473-3217-3425

FILE CODE: AG FILE: CIVIL RIGHTS Voting

EXECSEC POC: Debbie Alexander: 202-616-0075

Evergreen Freedom Foundation
A Nonprofit Public Policy Research Organization

April 7, 2005

The Honorable Alberto Gonzales
United States Department of Justice
950 Pennsylvania Ave NW
Washington, DC 20530-0001

COPY

Dear Attorney General Gonzales:

Members of the King County Council recently submitted a request to your office for a federal investigation of the Washington State 2004 general election. In support of that request, the Evergreen Freedom Foundation (EFF) submits evidence of possible fraud and civil rights violations that we have compiled as part of our Voter Integrity Project.

So many irregularities were uncovered following the 2004 general election that the integrity of our entire system was brought into question. In response, EFF established the Voter Integrity Project with the goal of restoring the free and fair elections that are indispensable to our political freedoms. The necessary first step in developing an effective corrective action plan was to determine what went wrong. Faced with apparent indifference by election officials to registration and voting fraud and outright cover-up of their own errors, it has been necessary to rely on private organizations and citizens to investigate, analyze, and gather evidence. Information supporting the following allegations was compiled and is summarized in the enclosure:

1. Over 1000 felons cast illegal votes.
2. At least 45 votes were cast in the name of deceased persons, at least 15 people voted twice, and at least 2 non-citizens voted.
3. More than 660 unverified provisional ballots were inserted into tabulating machines at the polls.
4. Some signatures collected by party workers to validate provisional ballots were apparently forged.
5. Almost 900 more absentee ballots were counted in King County than the number of registered voters who sent in absentee ballots.
6. King County reconciliation records from the year 2000 general election are missing.
7. Election officials illegally modified (enhanced) ballots.
8. Selected absentee ballots were set aside and not counted. Voters who were disenfranchised were not notified.
9. There was an apparent organized effort to register voters who had been judged mentally incompetent.
10. King County election officials have been unable to reconcile polling place results and are withholding election records to cover up error and possible fraud.

P.O. Box 552, Olympia, Washington 98507 | (360) 956-3482 fax:(360) 352-1874 | effwa@effwa.org www.effwa.org

11. King County illegally registered individuals who gave the County Courthouse as their residence and mailing address.
12. King County illegally registered individuals who gave invalid residence addresses.

We believe strong indications exist of illegal activities including election fraud, noncompliance with regulations, and civil rights violations. However, state officials have only limited authority to pursue such allegations and county authorities have failed to carry out their responsibilities. Therefore we believe that a Department of Justice investigation is necessary and urgent.

Thank you for your consideration.

Respectfully submitted,

Bob Williams

Bob Williams
President

Enclosure

cc: R. Alexander Acosta, Assistant Attorney General, Civil Rights Division
Peter D, Keisler, Assistant Attorney General, Civil Division
Christopher A. Wray, Assistant Attorney General, Criminal Division
John McKay, United States Attorney for the Western District of Washington

Evident Illegal Activity in the 2004 Washington State General Election

1. **Over 1000 felons cast illegal votes.**

On February 22nd, the Rossi campaign reported that they found 1108 persons voted who had felony convictions but did not have voting rights restores. (Exhibit 1.1) This list is currently being investigated by county prosecutors and has not been released. King County reported that about 200 have subsequently had their registrations cancelled by the county prosecutor but there is no indication that any will be prosecuted.

The BIAW independently compiled a list of 506 felons who voted. There may be some overlap with the list compiled by the Rossi campaign. (Exhibit 1.2)

2. **At least 45 votes were cast in the name of deceased persons, at least 15 people voted twice, and at least 2 non-citizens voted.**

On March 3rd, the Dino Rossi campaign released a list of 45 persons who were credited with having voted in the November 2004 election but were deceased prior to that election. (Exhibit 2.1)

On February 22nd, the Rossi campaign reported that they had found 10 people in Washington State who had voted more than once and 5 people who had voted in Washington and another state. (Exhibit 1.1)

Two non-citizens identified themselves to King County Elections as having voted and were removed from the rolls. (Exhibit 2.2) It is suspected that there are far more non-citizens voting in Washington State elections but there have been no citizenship checks by elections officials.

3. **More than 660 unverified provisional ballots were inserted into tabulating machines at the polls.**

In King County, provisional ballots are identical to poll ballots. Provisional voters are required to put marked ballots into envelopes for later validation. Early in January, 2005, King County election officials revealed that 348 provisional ballots were inserted into tabulating machines at the polls without validation. (Exhibit 3.1)

In a meeting with the King County Council on March 14, 2005, Director of Elections Dean Logan reported that the number was not limited to 348; that there were more instances in which insertion of un-validated ballots was likely to have occurred. He reported that an analysis shows 660 additional un-validated ballots although some of those might overlap with the 348 already reported.

4. **Some signatures collected by party workers to validate provisional ballots were apparently forged.**

On November 12, 2005, Superior Court Judge Dean Lum ruled that the names of 929 voters whose ballots have been rejected because of mismatched or missing signatures be disclosed. This resulted from an action brought by the Washington State Democratic Party. Party workers immediately began contacting these voters to selectively obtain signature affidavits from those who supported the democratic candidate for governor. County election officials subsequently accepted approximately 415 ot these affidavits and the votes were tallied.

The Building Industry Association of Washington (BIAW) conducted an effort to determine the validity of the signatures from public records, a home ownership survey, and endorsements on checks sent with the survey forms. Approximately 150 signatures were obtained for comparison and turned over to a documents expert for examination. Several possible forgeries have been detected. To date, examination of signatures continues. This information is on file at BIAW offices in Olympia. (Examples are included in Exhibit 4.1.)

5. **Almost 900 more absentee ballots were counted in King County than the number of registered voters who sent in absentee ballots.**

An analysis of election returns by Stefan Sharkansky showed that 565,014 absentee ballots were counted but only 564,234 people can be identified as having cast valid absentee ballots. The latter number, the number of absentee voters, is the sum of the number of people credited with voting, the number of Federal write-in ballots, and the number of address confidentiality ballots less the number of credited voters whose ballots were rejected and not counted. (Exhibit 5.1- summary lines only)

The source data for Mr. Sharkansky's analysis were derived from various King County documents, including the manual recount precinct canvass, the Mail Ballot Report and the voter file released shortly after the manual recount.

Subsequent to Mr. Sharkanshy's analysis, King County Elections confirmed that 93 absentee ballots had not been removed from their mailing envelopes. (Exhibit 5.2) These envelopes were reported to have been opened indicating that the voters had been credited although the ballots had not been tabulated. This increased the number excess absentee ballots from 780 to 873.

6. **King County reconciliation records from the year 2000 general election are missing.**

King County reconciliation records for the 2000 election were sought by Councilmember David Irons to verify that there was close reconciliation of the number of votes cast with the number of voters in the previous presidential election. In response, an email from Director of Elections and Records Dean Logan reveals that reconciliation records are available for 1999, 2001, and 2002 but not for 2000. He states in passing that records retention for Federal

elections is 22 months. This is a "red herring". Other election records for 2000 were retained; the reconciliation records for 2000 have disappeared. (Exhibit 6.1)

7. Election officials illegally modified (enhanced) ballots.

The Washington Administrative Code provides

> If a ballot contains marks or punches that differ from those specified in the voting instructions, those marks or punches shall not be counted as valid votes unless there is a discernable and consistent pattern, to the extent that the voter's intent can clearly be determined. If there is such a pattern, the ballot shall be enhanced or duplicated to reflect the voter's intent. [Emphasis added.]

The general requirement is that improperly marked ballots shall not be counted. A limited exception applies; ballots are enhanced only when the voter's intent can clearly be determined.

On March 14, 2004, the King County Council held a hearing in which Director of Elections Dean Logan was questioned. During questioning on the issue of enhancement of optically scanned ballots, Mr. Logan pointed out that the Canvassing Board delegates ballot enhancement to his staff, and that ballots may be enhanced only if the intent of the voter is clear. According to Mr. Logan, approximately 1600 ballots were forwarded to the Canvassing Board because voter intent was not clear. Therefore, these ballots should have been rejected. Instead, most of them were accepted and enhanced in disregard of the law. Mr. Logan also pointed out that approximately twenty-five were enhanced based on a two to one vote, which is even more convincing evidence that alteration of ballots occurred when voter intent was not clear.

8. Selected absentee ballots were set aside and not counted. Voters who were disenfranchised were not notified.

King County discovered that 93 absentee ballots had not been counted and were still in their mailing envelopes. (Exhibit 5.3) The mailing envelopes were opened but inner security envelopes were not removed. Eight-six percent of the uncounted ballots were from the 8th Congressional District although that district accounted for only thirty-two percent of total absentee ballots in King County. (Exhibit 8.1) This is evidence that the ballots were deliberately left in their mailing envelopes. King County election officials refuse to identify the names of the disenfranchised voters or notify them that their votes were not counted.

A National Guard officer who recently returned from duty in Iraq discovered through an on-line database that his absentee ballot had not been counted. He also determined that his ballot was not one of the 93. This raises the likely possibility that many more absentee ballots may have been set aside or rejected without notifying the voter.

9. There was an apparent organized effort to register voters who had been judged incompetent.

Western State Hospital (WSH)
is operated by the State of Washington for approximately 800 individuals suffering form mental health disease. The Center for Geriatric Services houses about 200 geriatric patients with acute mental illness. Many of these have been judged incompetent and are under guardianship. The Center for Forensic Services houses about 250 patients who were committed by the criminal justice system. Evaluation and treatment services are provided for adults prior to their trial, after they are convicted, or after they are acquitted by reason of insanity.

A large number of patients in WSH were registered or had a change in registration in late 2004 and voted in the general election. An employee in the hospital reported that there appeared to be an organized effort to register patients including some that she knew to have been declared incompetent. Exhibit 9.1 is a list of patients recently registered at WSH and Exhibit 9.2 is a list of patients housed in the legal offender unit who voted.

10. King County election officials have been unable to reconcile polling place results and are withholding election records to cover up error and possible fraud.

King County will not release copies of some records that would allow an independent audit of election results and reconciliation of poll votes and voters. Whenever records are released they are inconsistent with previous releases. For example, the King County Absentee Ballot Return Statistics report shows 566,294 absentee ballots had been returned by November 15 but the Mail Ballot Report to the Canvassing Board shows 568,333. (Exhibits 10.1 and 10.2) There are numerous other irregularities for which there is no apparent explanation.

King County election officials discovered in late March that some absentee ballots had not ever been counted. There was a concerted effort to withhold this information from County Council members for more that a week. (Exhibit 10.3) The problem was not revealed until a reporter questioned the Director of Records and Elections. This discovery showed that the numbers in absentee reconciliation had been fabricated.

11. King County illegally registered individuals who gave the County Courthouse as their residence and mailing address.

Individuals with non-traditional residences are allowed to give a government building as their residence but must also give an address where they receive mail. The auditor is required by statute to send the applicant an acknowledgement notice with instructions to the postal service not to forward and to return to the auditor if undeliverable. If the registration notice is returned the auditor is required to place the registrant on the inactive list. As of March 28, 2005, eighty-two individuals were on the active voter list and remained registered with the King County Administration Building as their mailing address. Eighteen were registered as permanent absentee voters. It is not known who received the ballots that were mailed to them nor is it known why eighty-two individuals remain on the active list even though mail cannot be delivered to them. (Exhibit 11.1)

The failure of King County election officials to comply with the requirements to place registrants on the inactive list may not be limited to those residing at the Administration Building. This very well may be a systemic failure. Incorrect addresses in the election database can easily lead to fraudulent use of absentee ballots sent through the mail.

12. King County illegally registered individuals who gave invalid residence addresses.

The Revised Code of Washington provides

> On receipt of an application for voter registration under this chapter, the county auditor shall review the application to determine whether the information supplied is complete. An application that contains the applicant's name, complete valid residence address, date of birth, and signature attesting to the truth of the information provided on the application is complete. [Emphasis added.]

Residence addresses were checked for Seattle precinct #1823, a downtown precinct. Fifteen registrants were found to have invalid residence addresses this single precinct and one of these was entered in the database twice. Four of the registrants were in office buildings, five in a warehouse, and six in a non-existent location. (The non-existent location was probably an address error, which caused the voters to be registered in the wrong precinct.) Since this was only one sample precinct there are probably hundreds of voters registered at false residence addresses. (Exhibit 12.1) King County illegally accepted these as valid residence addresses. Registration in the wrong precinct can result in votes being illegally cast for candidates and issues outside of the proper political district.

MG

Department of Justice
EXECUTIVE SECRETARIAT
CONTROL SHEET

DATE OF DOCUMENT: 02/03/2006
DATE RECEIVED: 02/14/2006
WORKFLOW ID: 953247
DUE DATE: 03/07/2006

FROM:
Mr. Bob Williams
President
Evergreen Freedom Foundation
PO Box 552
Olympia, WA 98507

TO: AG

MAIL TYPE: General

SUBJECT: Regarding serious charges of malfeasance concerning USA John McKay, W.D. of WA. Requesting that the AG ask Mr. McKay to recuse himself and allow public integrity attorneys to investigate election fraud in Washington state. Feels Mr. McKay's refusal to act will soon seriously hinder any chance for a thorough investigation. Encls. See WFs 780668, 778071 & 759557.

DATE ASSIGNED
02/21/2006

ACTION COMPONENT & ACTION REQUESTED
Criminal Division
For component response.

INFO COMPONENT: OAG, ODAG, OASG, OIPL, EOUSA, CRT, CIV, FBI

COMMENTS:

FILE CODE:

EXECSEC POC: Debbie Alexander: 202-616-0075

EVERGREEN FREEDOM FOUNDATION
...because freedom matters!

953247

2006 FEB 14 PM 4:05

February 3, 2006

The Honorable Alberto Gonzales
United States Department of Justice
950 Pennsylvania Ave NW
Washington, DC 20530-0001

Dear Attorney General Gonzales,

I would like to bring to your attention the serious charges of malfeasance regarding John McKay, U.S. Attorney for Western Washington. He has systematically ignored and refused to act on evidence of substantial election fraud given to his office, and I ask for your action to right this wrong.

In an August 2005 press release you rightly said, "The power to vote is one of the greatest opportunities we share as Americans....The very fiber of our Nation rests on the zealous protection of certain inalienable rights for every citizen, and we cannot grow complacent in the safeguarding of those rights. The Department of Justice will continue to aggressively protect each person's right to vote—and just as important—preserve the value of that vote from those who would corrupt the election process."

Mr. McKay has not protected the voting rights of the citizens of Washington state. Decisive action is needed to prevent him from further damaging the value of our votes.

On April 1, 2005, six members of the King County Council (Seattle-area) sent a request to you requesting a Department of Justice investigation of the 2004 General Election. This request was followed on April 7, 2005, by a letter from the Evergreen Freedom Foundation (EFF) of Olympia, Washington.

The letter from EFF included twelve specific allegations of election fraud under this definition, and it was copied to Mr. McKay in his role as U.S. Attorney. The letter is enclosed for your review. Please note that, subsequently, much additional evidence has been found and sent to Mr. McKay.

After several attempts to contact Mr. McKay to request a grand jury investigation of these allegations, his office finally directed us to the Seattle FBI office. When called, the FBI stated that they could not begin an investigation without a request from Mr. McKay.

P.O. Box 552, Olympia, Washington 98507 | (360) 956-3482 fax:(360)352-1874 | www.effwa.org e-mail: effwa@effwa.org

Further attempts to contact Mr. McKay regarding the investigation were rebuffed with the explanation that he had no authority to conduct a grand jury investigation of election fraud. This despite the fact that Mr. McKay issued three press releases since May 2002 urging the public to contact his office with suspicions of election fraud.

Upon further research, Mr. McKay's explanation was found to be wrong:

1. Authority is found in the U.S. Attorney's Grand Jury Manual Section 9-11-241 and in 28 U.S.C. 547.
2. A September 2004 report to Congress by the GAO stated that U.S. Attorneys and PIN attorneys initiated a total of 61 election fraud investigations related to election years 2000-2003.
3. Arlen Storm, the DEO for Mr. McKay, attended a Symposium on Ballot Access and Voting Integrity Initiative hosted by your department in September 2004. During this session, he received clear information on his duties and authority to investigate election fraud.
4. Currently there are at least four ongoing grand jury investigations of election fraud by U.S. Attorneys, all with less evidence than was presented to Mr. McKay.
5. Top officials in the Public Integrity Section of your department have confirmed that Mr. McKay has the authority to convene a grand jury for investigation of the election.

I have asked Mr. McKay to consider recusing himself from the investigation, allowing Public Integrity Section attorneys to step in. He has ignored this suggestion.

The election system in Washington state is severely damaged, partially as a result of apparent election fraud. So many irregularities have been uncovered that the integrity of the entire system is in question, and the people of our state have lost faith in the ability of government to conduct clean and fair elections. The integrity of the system and confidence of the public cannot be restored without vigorous enforcement of election laws.

Mr. McKay is an essential part in this enforcement effort. Sadly, those who wish to commit federal election fraud in Washington state are free to continue their illegal activities, thanks in part to Mr. McKay.

I detailed my concerns to the Executive Office of U.S. Attorneys and to the Public Integrity Section, but have seen no change in the situation or even a response to my concerns.

Therefore, I respectfully request that you ask Mr. McKay to recuse himself and allow PIN attorneys to investigate election fraud in Washington state. If he is unwilling to do this, please ask President Bush to replace Mr. McKay with a U.S. Attorney who will do his job.

Time is of the essence, as part of any investigation into the 2004 General Election will necessarily involve election records held by county auditors. Some of these records can

be destroyed after a short period of time, and thus Mr. McKay's refusal to act will soon seriously hinder any chance for a thorough investigation.

Thank you for looking into this matter.

Cordially,

Bob Williams

Bob Williams
President

Cc:

William O. Jenkins, Jr.
Director, Homeland Security and Justice Issues, Government Accountability Office
Senator Susan Collins
Chairman, Senate Committee on Homeland Security and Governmental Affairs
Senator Arlen Specter
Chairman, Senate Judiciary Committee
Representative Tom Davis
Chairman, House Committee on Government Reform
Representative F. James Sensenbrenner, Jr.
Chairman, House Judiciary Committee

Enclosures:

- Letter from King County Councilmembers to Attorney General Gonzales
- Letter from EFF to Attorney General Gonzales
- Letter from EFF to Executive Office of U.S. Attorneys
- Letter from Stefan Sharkansky to the Seattle office of the FBI

Evergreen Freedom Foundation
A Nonprofit Public Policy Research Organization

May 20, 2005

Thomas F. McLaughlin
Assistant Inspector General
U.S. Department of Justice
Investigations Division
950 Pennsylvania Avenue, NW
Room 4706
Washington, D.C. 20530

Dear Mr. McLaughlin,

I am writing to request an investigation by your office into misconduct by John McKay, U.S. Attorney for Western Washington. I believe that he has committed malfeasance by systematically refusing to act on evidence of election fraud delivered to his office. He has attempted to hide behind a façade of excuses and responsibility-shifting, while sensitive documents pertinent to the investigation are in danger of being destroyed. His lack of action, whether intentional or negligent, has effectively hamstrung the possibility of finding and eliminating election fraud in Washington state.

On April 1, 2005, six members of the King County Council (Seattle-area) sent a request to U.S. Attorney General Gonzales for a Department of Justice investigation of the 2004 General Election. This request was followed up on April 7, 2005, by a letter from the Evergreen Freedom Foundation (EFF) of Olympia, Washington.

I believed that the Department of Justice would initiate an investigation; a belief based on a September 2004 report to Congress from the Government Accountability Office (GAO), which stated, "The Public Integrity Section (PIN), in conjunction with the 93 U.S. Attorneys and the FBI, is responsible for enforcing federal criminal laws applicable to federal election fraud offenses, among other things. Election fraud is conduct that corrupts the electoral process for (1) obtaining, marking, or tabulating ballots; (2) canvassing and certifying election results; or (3) registering voters."

The letter from EFF included twelve specific allegations of election fraud under this definition, and it was therefore copied to Mr. McKay in his role as U.S. Attorney. The letter is enclosed for your review. Please note that, subsequently, additional evidence has been found and sent to Mr. McKay.

After several attempts to contact Mr. McKay to request a grand jury investigation of these allegations, his office finally directed us to the Seattle FBI office. When called, the FBI stated that they could not begin an investigation without a request from Mr. McKay.

I contacted Mr. McKay again to relay this information, and was directed to Assistant U.S. Attorney Arlen Storm, the appointed District Elections Officer (DEO) for Western

Washington. His duties as DEO, as outlined by the GAO report to Congress, include screening and conducting "preliminary investigations of complaints, in conjunction with the FBI and PIN [Public Integrity Section], to determine whether they constitute potential election crimes and should become matters for investigation"; overseeing "the investigation and prosecution of election fraud and other election crimes in their districts"; and coordinating "their district's (investigative and prosecutorial) efforts with DOJ headquarters prosecutors."

Mr. Storm clearly has the duty to review and conduct preliminary investigations of allegations of election fraud; yet he too directed me to contact the FBI, who continued to indicate that they would not conduct an investigation without a request from Mr. McKay. Mr. McKay also attempted to evade the investigation by shifting responsibility to state authorities. In an email response to a question on this issue he wrote "Given the [election] contest now pending in state courts, state venues continue to exist for the matters you identify..." This communication ignored the fact that the 2004 General Election was for federal as well as state offices.

Further attempts to contact Mr. McKay regarding the investigation were rebuffed with the explanation that he had no authority to conduct a grand jury investigation of election fraud. This is despite the fact that Mr. McKay issued three press releases since May 2002 urging the public to contact his office with suspicions of election fraud.

Upon further research this excuse was found to be wrong, for several reasons:

1. Authority is found in the U.S. Attorney's Grand Jury Manual Section 9-11-241 and in 28 U.S.C. 547;
2. A September 2004 report to Congress by the GAO stated that U.S. Attorneys and PIN attorneys initiated a total of 61 election fraud investigations related to election years 2000-2003. These investigations took place in 32 states, none were in Washington.
3. Mr. Storm, the DEO for Mr. McKay, attended a Symposium on Ballot Access and Voting Integrity Initiative hosted by the DoJ in September 2004. During this session he received clear information on his duties and authority to investigate election fraud.
4. Currently there are at least four ongoing grand jury investigations of election fraud by U.S. Attorneys, all with less evidence than was presented to Mr. McKay.
5. Top officials in the PIN of the DoJ have confirmed that Mr. McKay has the authority to convene a grand jury for investigation of the election.

These points were related to Mr. McKay in a letter from the Evergreen Freedom Foundation on April 20, 2005. Despite this explanation, Mr. McKay has continued to refuse to begin an investigation, and has offered no valid reason for his reluctance. On May 9, 2005, Mr. McKay appeared on a local radio talk show, and stated that his jurisdiction is limited to "crimes like bribery, forgery of ballots, conspiracies to intimidate individuals to affect the outcome of an election." He intimated that he was waiting on state and county authorities to investigate, as well as attorneys from an

ongoing election challenge civil case. The transcript of this interview, which aired on the John Carlson show on KVI radio in Seattle, is available if needed.
Part of any investigation into the 2004 General Election will necessarily involve election records held by county auditors. Some of these records can be destroyed after a short period of time, and thus Mr. McKay's omission to act will soon seriously hinder any chance for a thorough investigation.

I have even asked Mr. McKay to merely recuse himself from the investigation, thus allowing DoJ PIN attorneys to step in. He has completely ignored this suggestion.

The election system in Washington state is severely damaged, partially as a result of apparent election fraud. So many irregularities have been uncovered that the integrity of the entire system is in question, and the people of our state have lost faith in the ability of government to conduct clean and fair elections. The integrity of the system and confidence of the public cannot be restored without vigorous enforcement of the election laws.

Mr. McKay is an essential part of this necessary enforcement, but despite repeated contacts from EFF and scores of concerned citizens, he has refused to fulfill his duties as a U.S. Attorney.

I respectfully request that you investigate this matter promptly. Please contact me if you need further information.

Cordially,

Bob Williams

Bob Williams
President

Enclosures:

- Press release of November 1, 2004 from John McKay
- Email of January 27, 2005, from John McKay stating the limits of his authority
- News Article of April 14, 2005, regarding call for grand jury.
- Letter of April 20, 2005 from EFF to John McKay
- Three Emails of April 29, 2005 from Bob Williams to John McKay
- Email of May 4, 2005, to John McKay from Bob Williams, includes series of exchanges
- Email of May 4, 2005 from DEO Arlen Storm to concerned citizen
- Email of May 5, 2005 from Bob Williams to John McKay
- Letter of May 12, 2005 from Arlen Storm to Bob Williams
- Letter of May 19, 2005 from Bob Williams to John McKay

December 02, 2005

Federal Bureau of Investigation
1110 Third Avenue
Seattle, WA 98101-2904

Dear Sir or Madam:

Enclosed is evidence that officials in King County, Washington committed election fraud during the 2004 General Election. Stefan Sharkansky uncovered this evidence through examination of public records to understand why the number of votes counted exceeded the number of persons who voted. Official foot dragging and cover-up continues to delay completion of his investigation, forcing him to file a lawsuit for disclosure of records. However, he has been able to find a significant amount of fraudulently processed ballots. The information is detailed in the accompanying CD with photographs of the ballot envelopes.

Evidence of fraud is in three categories:

1. Provisional ballots cast by voters who returned incomplete registrations and were not entitled to vote in the November 2004 election. Some envelopes were marked "Fatal Pend" indicating that the ballot was rejected; yet the rejection was overridden by election officials and the ballots were counted. Figures 1a and 1b are examples. To date, 89 such ballots have been found. It is estimated that there is a total of 100 to 150.
2. Provisional ballots cast by unregistered voters. Most of these voters were inexplicitly assigned to Precinct 1823, home of the King County Administration Building, even though their residential addresses are in different jurisdictions. Figure 2 is an example. To date, 30 such ballots have been found. It is estimated that there is a total of 100.
3. Provisional ballots cast by voters who also cast absentee ballots. Markings on many of the envelopes prove that it was known that absentee ballots had been received; yet both ballots were counted. Figures 3a and 3b show an example. To date, 146 such ballots have been found. It is estimated that there is a total of 200.

Additional evidence shows that many of the unqualified ballots were processed in the last 24 hours before initial certification when the closeness of the governor election was known. Also, there is evidence that computer records were modified to cover up irregularities.

The enclosed CD contains images of the evidence, details concerning the evidence in a spreadsheet file named "IneligibleVotesPost.xls", and an explanatory file named "IneligibleVoteCatalog.pdf".

Please note that under federal and state records retention laws, election records may be destroyed after 22 months. Therefore, only 9 months remain until original evidence of election fraud may be destroyed.

The following is contact information for Mr. Sharkansky:

Stefan Sharkansky
5726 Keystone Pl N
Seattle, WA 98103
(206) 526-9970
e-mail: theshark@usefulwork.com

I supported Mr. Sharkansky in the review of archived ballot envelopes for the violations discussed in item 3 above. Contact information for me is:

Robert M. Edelman
29871 232nd Ave SE
Black Diamond, WA 98010
(360) 886-7166
e-mail: bobedelman@comcast.net

Respectfully submitted,

Robert M. Edelman

AAG

MG

Department of Justice
EXECUTIVE SECRETARIAT
CONTROL SHEET

DATE OF DOCUMENT: 12/14/2006
DATE RECEIVED: 12/29/2006
WORKFLOW ID: 1114470
DUE DATE: 01/17/2007

FROM: The Honorable John McKay
U. S. Attorney, W.D. of Washington
601 Union Street, Suite 5100
Seattle, WA 98101-3903

TO: AG

MAIL TYPE: Priority VIP Correspondence-Policy/Issue

SUBJECT: Submitting his resignation as USA for the Western District of Washington, effective 1/26/2007. Commending the AG for his leadership and extending best wishes.

DATE ASSIGNED
12/29/2006

ACTION COMPONENT & ACTION REQUESTED
Executive Office of United States Attorneys
Prepare response for AG signature.

INFO COMPONENT: OAG, ODAG, OLP

COMMENTS:

FILE CODE:

EXECSEC POC: Debbie Alexander: 202-616-0075

1/19/10
DA

U.S. Department of Justice

United States Attorney
Western District of Washington

700 Stewart Street, Suite 5220
Seattle, Washington 98101-1271
Tel: (206) 553-7970
Fax: (206) 553-2054

December 14, 2006

Hon. Alberto Gonzalez
Attorney General of the United States
950 Pennsylvania Ave. N.W., Room 5111
Washington, D.C. 20530

Dear Judge Gonzalez:

I have today submitted to the President my resignation as United States Attorney for the Western District of Washington, effective midnight January 26, 2007.

It has been a privilege to serve with you and the many talented men and women of the U.S. Department of Justice. I am particularly proud of the accomplishments of the prosecutors, trial attorneys and support staff whom I have been honored to lead in this District. Together, we have helped to secure our nation from terrorism, international drug crime, violent criminals and corporate fraud.

We have reestablished the unifying role of the United States Attorney as the chief federal law enforcement official with the responsibility to advance the priorities of the President and the Attorney General. In doing so, this District has experienced dramatic increases in investigations and prosecutions within these priorities, including the extensive use of Title III wiretaps and unprecedented law enforcement information sharing through the innovative Law Enforcement Information Exchange (LInX). The expansion of this program under the leadership of U.S. Attorneys and the Attorney General's Advisory Committee ranks among my most satisfying and rewarding endeavors, and I hope and trust the Department will continue to lead this critical effort to combat terrorism and organized crime that transcends jurisdictional boundaries.

I have been privileged to know you longer than most of our colleagues. I deeply admire your service as Texas Supreme Court Justice and White House Counsel, and am grateful for your support and friendship during my prior service at Legal Services Corporation and as United States Attorney. You have my best wishes for every continued success, and to you and all of your family I send my prayers for a joyous Christmas and all of the blessings of the New Year.

Sincerely,

John McKay
United States Attorney

MG

Department of Justice
EXECUTIVE SECRETARIAT
CONTROL SHEET

DATE OF DOCUMENT: 12/19/2006
DATE RECEIVED: 12/20/2006
WORKFLOW ID: 1110451
DUE DATE: 01/09/2007

FROM: The Honorable Bud Cummins
U.S. Attorney, E.D. of Arkansas
U.S. Department of Justice
425 West Capitol Avenue, Suite 500
Little Rock, AR 72201

TO: AG

MAIL TYPE: Priority VIP Correspondence-Policy/Issue

SUBJECT: Submitting his resignation as USA for the Eastern District of Arkansas effective 10 a.m. 12/20/2006. Commending the AG for his support and extending best wishes.

DATE ASSIGNED
12/22/2006

ACTION COMPONENT & ACTION REQUESTED
Executive Office of United States Attorneys
Prepare response for AG signature.

INFO COMPONENT: OAG, ODAG, OLP

COMMENTS: 12/22/2006: FedEx 8596-9092-9940

FILE CODE:

EXECSEC POC: Debbie Alexander: 202-616-0075

111643/ DA

U.S. Department of Justice RECEIVED

United States Attorney
Eastern District of Arkansas

425 W. Capitol Avenue, Suite 500
Little Rock, Arkansas 72201

December 19, 2006

Attorney General Alberto R. Gonzales
United States Department of Justice
Main Justice Building, Room 5111
950 Pennsylvania Avenue, NW
Washington, DC 20530

Dear Judge Gonzales:

I am hereby submitting my resignation as United States Attorney for the Eastern District of Arkansas, effective ten o'clock in the morning (10:00 a.m.) December 20, 2006. It has been a great honor and privilege to have served these past five years as a United States Attorney by Presidential appointment.

Serving the United States as a United States Attorney has been the highest honor and most fulfilling duty of my career. Thank you for your support and the support of the Department of Justice during my tenure. Your visit to my district in July 2005 inspired our entire staff. On a personal level, I enjoyed that opportunity to get to know you a little better. Your leadership has been marvelous.

I deeply appreciate the opportunity to have served as the United States Attorney for the Eastern District of the United States. I wish you the best of luck and success.

Sincerely,

Bud Cummins
United States Attorney
Eastern District of Arkansas

BC/clb

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Company US Department of Justice

Recipient's Address Main Justice Room 5111

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AG
MG

Department of Justice
EXECUTIVE SECRETARIAT
CONTROL SHEET

DATE OF DOCUMENT: 12/18/2006
DATE RECEIVED: 12/27/2006
WORKFLOW ID: 1112394
DUE DATE: 01/12/2007

FROM: The Honorable Paul K. Charlton
U.S. Attorney, District of Arizona
40 North Central Avenue, Suite 1200
Phoenix, AZ 85004

TO: AG

MAIL TYPE: Priority VIP Correspondence-Policy/Issue

SUBJECT: Submitting his resignation as U.S. Attorney for the District of Arizona, effective midnight 1/31/2007. Expressing his appreciation for the opportunity to have served as U.S. Attorney and advising that it has been the highest honor and most fulfilling duty of his public career.

DATE ASSIGNED	ACTION COMPONENT & ACTION REQUESTED
12/28/2006	Executive Office of United States Attorneys Prepare response for AG signature.

INFO COMPONENT: OAG, ODAG, OLP

COMMENTS:

FILE CODE:

EXECSEC POC: Barbara Wells: 202-616-0025

1112394
BW

U. S. Department of Justice

United States Attorney
District of Arizona

2 Renaissance Square
40 North Central Avenue, Suite 1200
Phoenix, Arizona 85004-4408

(602) 514-7500
FAX (602) 514-7670

December 18, 2006

The Attorney General
United States Department of Justice
Main Justice Building, Room 5111
950 Pennsylvania Avenue, NW
Washington, DC 20530

Dear Mr. Attorney General:

I am hereby submitting my resignation as United States Attorney for the District of Arizona of the United States, effective midnight January 31, 2007. It has been a great honor and privilege to have served as a United States Attorney.

Serving the United States as a United States Attorney has been the highest honor and most fulfilling duty of my public career.

I wish you the best of luck and success.

Sincerely yours,

PAUL K. CHARLTON
United States Attorney
District of Arizona

KS
MG

Department of Justice
EXECUTIVE SECRETARIAT
CONTROL SHEET

DATE OF DOCUMENT:	01/17/2007	**WORKFLOW ID:**	1125135
DATE RECEIVED:	01/18/2007	**DUE DATE:**	02/08/2007

FROM: The Honorable Daniel G. Bogden
U.S. Attorney, District of Nevada
333 Las Vegas Boulevard S, Suite 5000
Las Vegas, NV 89101

TO: AG

MAIL TYPE: Priority VIP Correspondence-Policy/Issue

SUBJECT: Submitting his resignation as United States Attorney for the District of Nevada effective midnight 2/28/2007. States that it has been an honor and privilege to serve as U.S. Attorney, initially by the appointment of former Attorney General John Ashcroft and thereafter by Presidential appointment.

DATE ASSIGNED	**ACTION COMPONENT & ACTION REQUESTED**
01/25/2007	Executive Office of United States Attorneys Prepare response for AG signature.

INFO COMPONENT: OAG, ODAG, OLP

COMMENTS:

FILE CODE:

EXECSEC POC: Debbie Alexander: 202-616-0075

112513S
OA

U.S. Department of Justice

United States Attorney
District of Nevada

Daniel G. Bogden
United States Attorney

333 Las Vegas Boulevard South
Suite 5000
Las Vegas, Nevada 89101

Telephone (702) 388-6336
FAX: (702) 388-6296

January 17, 2007

The Attorney General
United States Department of Justice
Main Justice Building, Room 5111
950 Pennsylvania Avenue, NW
Washington, DC 20530

Dear Mr. Attorney General:

I am hereby submitting my resignation as United States Attorney for the District of Nevada, effective midnight February 28, 2007. It has been a great honor and privilege to have served the past five and one-half years as a United States Attorney, initially by appointment of Attorney General John Ashcroft and thereafter by Presidential appointment.

Serving the United States as a United States Attorney has been the highest honor and most fulfilling duty of my public career. Thank you for your support and the support of the Department of Justice during my tenure.

I deeply appreciate the opportunity to have served as the United States Attorney for the District of Nevada. I wish you the best of luck and success.

Sincerely,

Daniel G. Bogden

DANIEL G. BOGDEN
United States Attorney
District of Nevada

AG
KS
nG

Department of Justice
EXECUTIVE SECRETARIAT
CONTROL SHEET

DATE OF DOCUMENT: 01/03/2007
DATE RECEIVED: 01/05/2007

WORKFLOW ID: 1117121
DUE DATE: 01/23/2007

FROM: The Honorable Kevin V. Ryan
U.S. Attorney, N.D. of California
450 Golden Gate Avenue
P.O. Box 36055
San Francisco, CA 94102

TO: AG

MAIL TYPE: Priority VIP Correspondence-Policy/Issue

SUBJECT: Submitting his resignation as the United States Attorney for the N.D. of California with the proposed effective date of 4/27/2007. States that it has been an honor and privilege to serve the American people as a member of President Bush's Administration.

DATE ASSIGNED	ACTION COMPONENT & ACTION REQUESTED
01/08/2007	Executive Office of United States Attorneys Prepare response for AG signature.

INFO COMPONENT: OAG, ODAG, OLP

COMMENTS:

FILE CODE:

EXECSEC POC: Paula Stephens: 202-616-0074

U.S. Department of Justice

Kevin V. Ryan
United States Attorney
Northern District of California

11th Floor, Federal Building
450 Golden Gate Avenue, Box 36055
San Francisco, California 94102

(415) 436-6968
FAX:(415) 436-7234

111721
PS

Attorney General Alberto R. Gonzales
Attorney General of the United States
United States Department of Justice

January 3, 2007

Dear General Gonzales,

I hereby tender my resignation as the United States Attorney for the Northern District of California with the proposed effective date of April 27, 2007. It has been an honor and privilege to serve the American people as a member of President Bush's Administration.

Sincerely,

Kevin V. Ryan

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 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.

MARY JO WHITE

PARTNER

When Mary Jo White left her post as US Attorney for the Southern District of New York in January, 2002, she was acclaimed for her nearly nine years as the leader of what is widely recognized as the premier US Attorney's office in the nation. She had supervised over 200 Assistant US Attorneys in successfully prosecuting some of the most important national and international matters, including complex white collar and international terrorism cases. She is a Fellow in the American College of Trial Lawyers and the International College of Trial Lawyers. Ms. White is the recipient of numerous awards and is regularly ranked as a leading lawyer by directories that evaluate law firms. In addition, Ms. White served as a Director of The Nasdaq Stock Exchange, and on its Executive, Audit and Policy Committees (2002 to February 2006). She is also a member of the Council on Foreign Relations.

Ms. White rejoined Debevoise in 2002, and was made Chair of the firm's over 225-lawyer Litigation Department. Ms. White's practice concentrates on internal investigations and defense of companies and individuals accused by the government of involvement in white collar corporate crime or Securities and Exchange Commission (SEC) and civil securities law violations, and on other major business litigation disputes and crises. For her criminal work, she leads a Debevoise team that includes ten former Assistant US Attorneys with extensive experience in major commercial investigations and prosecutions.

Ms. White served as the United States Attorney for the Southern District of New York from 1993 to 2002. She is the only woman to hold the top position in the more than 200-year history of that office, which has the responsibility of enforcing the federal criminal and civil laws of the nation. Ms. White also served as the first Chairperson of Attorney General Janet Reno's Advisory Committee of United States Attorneys from all over the country. Prior to becoming the United States Attorney in the Southern District of New York, Ms. White served as the First Assistant United States Attorney and Acting United States Attorney in the Eastern District of New York from 1990 to 1993.

Under Ms. White's leadership, the United States Attorney's Office for the Southern District of New York successfully investigated and prosecuted numerous cases of national and international significance. These include cases involving large scale white collar and complex securities and financial institution frauds as well as cases involving corporate criminal liability, international

terrorism, international money laundering, police and other public official corruption, organized crime, civil rights, environmental law violations, narcotics trafficking and major racketeering cases that dismantled the largest, most violent gangs in New York City. Prominent among those cases were the prosecution of those responsible for the bombing of the WTC in 1993; the terrorists who planned to blow up the United Nations, the FBI Building in Manhattan, and the Lincoln and Holland Tunnels; the terrorists who plotted to simultaneously blow up a dozen jumbo jets over the Pacific Ocean; those responsible for the bombings of the US Embassies in Nairobi, Kenya and Tanzania in 1998, including Osama Bin Laden; and the investigation of the terrorist attacks of September 11, 2001 on the WTC and the Pentagon.

Ms. White has received numerous awards and honorary degrees for her professional accomplishments, including the George W. Bush Award for Excellence in Counterterrorism and the Agency Seal Medallion given by the CIA; the Director of the FBI's Jefferson Cup Award for Contributions to the Rule of Law in the Fight Against Terrorism and Crime; the Sandra Day O'Connor Award for Distinction in Public Service; the John P. O'Neill Pillar of Justice Award given by the Respect for Law Alliance; the Edward Weinfeld Award for Distinguished Contributions to the Administration of Justice given by the New York County Lawyers' Association; the "Prosecutor of the Year" Award given by the Respect for Law Alliance; the "Community Leadership Award" given by the Federal Law Enforcement Foundation; the "Law Enforcement Person of the Year" Award given by the Society of Professional Investigators; the "Magnificent 7" Award given by the Business and Professional Women USA; the "Human Relations Award" given by the Anti-Defamation League Lawyer's Division; the "Women of Power and Influence Award" given by the National Organization of Women; the "American Prosecutor's Award" given by St. John's University Criminal Justice Program; the "Medal for Excellence" given by the Columbia University School of Law Association; the "Outstanding Women of the Bar Award" given by the New York County Lawyers' Association; the Milton S. Gould Award for Outstanding Oral Advocacy; the "Law & Society Award" given by the New York Lawyers for the Public Interest; and the "Most Influential Women in the Law Award" given by the Benjamin N. Cardozo School of Law.

From 1983 to 1990, Ms. White was a litigation partner at Debevoise, where she focused on white collar defense work, SEC enforcement matters, and commercial and professional civil litigation. From 1978 to 1981, Ms. White served as an Assistant United States Attorney in the Southern District of New York, where she became Chief Appellate Attorney of the Criminal Division. Prior to that, she worked as an associate at Debevoise from 1976 to 1978. Ms. White served as a law clerk to the Honorable Marvin E. Frankel, US District Court for the Southern District of New York and was admitted to the bar in New York in 1975.

Ms. White graduated from William & Mary, Phi Beta Kappa with a B.A. in Psychology in 1970, The New School for Social Research with an M.A. in Psychology in 1971 and Columbia Law School with a J.D. in 1974, where she was an officer of the Law Review.

LAURIE L. LEVENSON

Professor of Law and William M. Rains Fellow
Director, Center for Ethical Advocacy

Laurie L. Levenson is Professor of Law and William M. Rains Fellow at Loyola Law School where she teaches criminal law, criminal procedure, ethics, anti-terrorism, and evidence. She served as Loyola's Associate Dean for Academic Affairs from 1996-1999. In addition to her teaching responsibilities, Professor Levenson is also the Director of the Loyola Center for Ethical Advocacy. Professor Levenson was the 2003 recipient of Professor of the Year from both Loyola Law School and the Federal Judicial Center.

Prior to joining the Loyola Law School faculty in 1989, Professor Levenson served for eight years as an Assistant United States Attorney in Los Angeles. While a federal prosecutor, Professor Levenson tried a wide variety of federal criminal cases, including violent crimes, narcotics offenses, white collar crimes, immigration and public corruption cases. She served as Chief of the Training Section and Chief of the Criminal Appellate Section of the U.S. Attorney's Office. In 1988, she received the Attorney General's Director's Award for Superior Performance. Additionally, she received commendations from the FBI, IRS, U.S. Postal Service, and DEA.

Professor Levenson attended law school at UCLA School of Law and received her undergraduate degree from Stanford University. In law school, she was the Chief Article Editor of the Law Review. After graduation, she clerked for the Honorable Judge James Hunter, III, of the U.S. Court of Appeals for the Third Circuit.

Professor Levenson is the author of numerous books and articles, including: *California Criminal Procedure* (2003); California Criminal Law (2003), *Handbook on the Federal Rules of Criminal Procedure* (2003); *Roadmap of Criminal Law* (1997); *Police Corruption and New Models for Reform,* 35 Suffolk L. Rev. 1 (2001); *Working Outside the Rules: The Undefined Responsibilities of Federal Prosecutors (*1999); *Ethics of Being a Legal Commentator,* 69 So. Cal. L. Rev. 1303 (1996); *Good Faith Defenses: Reshaping Strict Liability Crimes,* 78 Cornell L. Rev. 401 (1993); *Change of Venue and the Role of the Criminal Jury,* 66 So. Cal. L. Rev. 1533 (1993); *The Future of Civil Rights Prosecutions: The Lessons of the Rodney King Trial,* 41 U.C.L.A. L. Rev. 509 (1994); and *Media Madness or Civics 101: The Lessons of "The Trial of the Century,"* 26 U.W.L.A. 57 (1995).

Professor Levenson has served as a volunteer counsel for the "Webster Commission" and as a Special Master for the Los Angeles Superior Court and United States District Court. She has served as a member of the Los Angeles County Bar Association Judicial Appointments Committee and Judiciary Committee.

Professor Levenson lectures regularly throughout the country and internationally for the Federal Judicial Center, National Judicial College, international bar associations, bar review courses, community groups and legal societies.

Statement of Mary Jo White

Senate Committee on the Judiciary
Hearing: "Preserving Prosecutorial Independence:
Is the Department of Justice Politicizing the Hiring and Firing of U.S. Attorneys?"
February 6, 2007

My name is Mary Jo White. I am providing this written statement and testifying at this hearing at the invitation of Senator Patrick Leahy, the Chairman of the United States Senate Committee on the Judiciary.

By way of background, I spent over fifteen years in the Department of Justice (the "Department"), both as an Assistant United States Attorney and as United States Attorney. I served during the tenures of seven Attorneys General: Griffin B. Bell, Benjamin R. Civiletti, William French Smith, Richard L. Thornburgh, William P. Barr, Janet Reno and John Ashcroft. I was twice appointed as an Interim United States Attorney, first in the Eastern District of New York in 1992 by Attorney General Barr and then in 1993 by Attorney General Reno in the Southern District of New York. Most recently, I served for nearly nine years as the Presidentially-appointed United States Attorney in the Southern District of New York from September 1993 until January 2002. I was the Chair of the Attorney General's Advisory Committee from 1993-1994. Since April 2002, I have served as the Chair of the Litigation Group of Debevoise & Plimpton LLP, the law firm at which I started my legal career.

Maintaining the prosecutorial independence of the United States Attorneys, which is the subject of this hearing, is vital to ensuring the fair and impartial administration of

justice in our federal system. Concerns have recently been raised as to whether that independence is being compromised by the reported installation by the Department of Justice of Interim United States Attorneys in replacement of a number of sitting Presidentially-appointed United States Attorneys who have allegedly been asked to resign in the absence of misconduct or other compelling cause. It has been variously suggested that at least some of these resignations have been sought from qualified United States Attorneys in favor of appointees who may be more politically and behaviorally aligned with the Department's priorities; to replace a United States Attorney because of public corruption or other kinds of sensitive cases and investigations brought or in process; as a result of a Congressman's criticism; or just to give another person the opportunity to serve and have the high-profile platform of serving as a United States Attorney. These allegations, in my view, raise legitimate concerns for this Committee about the fair and impartial administration of justice, both in fact and in appearance. If the allegations were true, the actions being taken by the Department would appear to pose a threat to the independence of the United States Attorneys and to diminish the importance of the jobs they are entrusted to do. There would be, at a minimum, a significant appearance issue.

A related concern has been raised about a recent change in the statutory framework for the appointment of Interim United States Attorneys embodied in the re-authorized USA Patriot Act.[1] Under the new provision, the Attorney General is accorded unilateral power to make appointments of Interim United States Attorneys for an indefinite period of time, without the necessity of obtaining the advice and consent of the

United States Senate, which is required for every Presidentially-nominated United States Attorney. Previously, the law empowered the Attorney General to appoint Interim United States Attorneys for a period up to 120 days; thereafter, if no successor was nominated by the President and confirmed by the Senate, the chief judge of the relevant district court was accorded the power of appointment until a Presidentially-appointed successor was confirmed by the Senate.

For whatever assistance it may be to the Committee, I will provide my personal perspective on these issues. Before doing so, let me make very clear up front that I have the greatest respect for the Department of Justice as an institution and have no personal knowledge of the facts and circumstances regarding any of the reported requests for resignations of sitting United States Attorneys. And, with one exception, I do not know any of the United States Attorneys in question or their reported replacements. The one exception is the United States Attorney for the Southern District of California, a career prosecutor, whom I know and first came to know of when she was an Assistant United States Attorney doing very impressive work in the area of healthcare fraud. Because I do not know the precipitating facts and circumstances, I am not in a position to support or criticize the reported actions of the Department and do not do so by testifying at this hearing. I can and will speak only about my views about the importance of the United States Attorneys to our federal system of criminal and civil justice, the importance of preserving the independence of the United States Attorneys, and how I believe that casual

or unwisely motivated requests for their resignations could undermine our system of justice and diminish public confidence.

My views on the issues I understand to be before the Committee are as follows:

- United States Attorneys are political appointees who serve at the pleasure of the President. It is thus customary and expected that the United States Attorneys generally will be replaced when a new President of a different party is elected. There is also no question that Presidents have the power to replace any United States Attorney they have appointed for whatever reason they choose.

- In my experience and to my knowledge, however, it would be unprecedented for the Department of Justice or the President to ask for the resignations of United States Attorneys during an Administration, except in rare instances of misconduct or for other significant cause. This is, in my view, how it should be.

- United States Attorneys are, by statute and historical custom, the chief law enforcement officers in their districts, subject to the general supervision of the Attorney General.[2] Although political appointees, the United States Attorneys, once appointed, play a critical and non-political, impartial role in the administration of justice in our federal system. Their selection is of vital national and local interest.

- In his well-known address to the United States Attorneys in 1940, then Attorney General Robert H. Jackson, although acknowledging the need for some measure of centralized control and coordination by the Department, eloquently emphasized the importance of the role of the United States Attorneys and their independence:

> It would probably be within the range of that exaggeration permitted in Washington to say that assembled in this room is one of the most powerful peace-time forces known to our country. The prosecutor has more control over life, liberty, and reputation than any other person in America. His discretion is tremendous.
>
> . . . .
>
> These powers have been granted to our law-enforcement agencies because it seems necessary

> that such a power to prosecute be lodged somewhere. This authority has been granted by people who really wanted the right thing done—wanted crime eliminated—but also wanted the best in our American traditions preserved.
>
> . . . .
>
> Because of this immense power to strike at citizens, not with mere individual strength, but with all the force of government itself, the post of [United States Attorney] from the very beginning has been safeguarded by presidential appointment, requiring confirmation of the Senate of the United States. You are thus required to win an expression of confidence in your character by both the legislative and the executive branches of the government before assuming the responsibilities of a federal prosecutor.
>
> . . . .
>
> Your responsibility in your several districts for law enforcement and for its methods cannot be wholly surrendered to Washington, and ought not to be assumed by a centralized Department of Justice.
>
> . . . .
>
> Your positions are of such independence and importance that while you are being diligent, strict, and vigorous in law enforcement you can also afford to be just.
>
> . . . .
>
> The federal prosecutor has now been prohibited from engaging in political activities. I am convinced that a good-faith acceptance of the spirit and letter of that doctrine will relieve many [United States Attorneys] from the embarrassment of what have heretofore been regarded as legitimate expectations of political service. . . . I think the Hatch Act should be utilized by federal prosecutors as a protection against demands on their time and prestige. . . .[3]

- Justice Jackson's remarks capture well the importance of both the role of United States Attorneys and the independence that is necessary to successfully fulfill their role. The Department of Justice should guard

carefully against acting in ways that may be perceived to diminish the importance of the office of United States Attorney or of its independence.

- Changing a United States Attorney invariably causes disruption and loss of traction in cases and investigations in a United States Attorney's Office. This is especially so in sensitive or controversial cases and investigations where the leadership and independence of the United States Attorney are often crucial to the successful pursuit of such matters, especially in the face of criticism or political backlash. Replacing a United States Attorney can, of course, be necessary or part of the normal and expected process that accompanies a change of the political guard. But I do not believe that such changes should, as a matter of sound policy, be undertaken lightly or without significant cause. In this and most previous Administrations, the United States Attorneys appointed by the prior Administration were replaced in an orderly and respectful fashion over several months after the election to allow for a smooth transition. If wholesale change in the United States Attorneys is to occur, it should be done in this way. In my view, wholesale replacement of the United States Attorneys should not be done immediately following an election, as occurred at the outset of the Clinton Administration—such abrupt change is not necessary and can undermine the important work of the United States Attorneys' Offices. In some instances, the President of a different party has allowed some of his predecessor's appointees to remain, as happened in New York, with the support of Senator Daniel Patrick Moynihan, when Jimmy Carter was elected President.

- If United States Attorneys are replaced during an Administration without apparent good cause, the wrong message can be sent to other United States Attorneys. We want our United States Attorneys to be strong and independent in carrying out their jobs and the priorities of the Department. We want them to speak up on matters of policy, to be appropriately aggressive in investigating and prosecuting crimes of all kinds and wisely use their limited resources to address the priorities of their particular district. The United States Attorneys are generally closest to the problems and needs of their districts and thus use their discretion and judgment as to how best to apply national initiatives and priorities. One size seldom fits all. There isn't one right answer or rigid plan that can be applied to achieve optimal justice in each district. The federal system has historically counted on the independence and good judgment of the United States Attorneys to carry out the Department's mission, tailored to the specific circumstances of their districts.

- In my opinion, the United States Attorneys have historically served this country with great distinction. Once in office, they become impartial public servants doing their best to achieve justice without fear or favor. As Justice Sutherland said in *Berger v. United States*: "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice be done. As such, he is in a peculiar and very definite sense the servant of the law. . . ."[4] I am certain that the Department of Justice would not want to act in such a way or have its actions perceived in such a way to derogate from this model of the non-political pursuit of justice by those selected in an open and transparent manner.

- Finally, as to the issue of the optimal appointment mechanism for Interim United States Attorneys, I defer to Congress and the constitutional scholars to find the right answer. For what it is worth, as a practical matter, I believe that the Department of Justice, in the first instance, is ordinarily in the best position to select an appropriate Interim United States Attorney who will ensure the least disruption of the business of the United States Attorney's Office until a permanent successor can be selected and confirmed. I can, however, also appreciate the concern with permitting such appointments to be made for an indefinite period of time without the necessity of Senate confirmation. I personally thought the structure of allowing the Attorney General to appoint Interim United States Attorneys for a period of 120 days and then giving that power to the chief judge of the district generally worked well and achieved an appropriate balance.

Thank you for giving me the opportunity to share my perspective with the Committee. I would be happy to answer any questions.

[1] USA Patriot Improvement and Reauthorization Act of 2005, Pub. L. 109-177, §502, 120 Stat. 192, 246-47 (2006); 28 U.S.C. § 546 (2006).

[2] 28 U.S.C. §§ 519 & 521-50 (2006); *Nadler v. Mann*, 951 F.2d 301, 305 (11th Cir. 1992); United States Attorneys Mission Statement ("Each United States Attorney exercises wide discretion in the use of his/her resources to further the priorities of the local jurisdiction and needs of their communities. United States Attorneys have been delegated full authority and control in the areas of personnel management, financial

management, and procurement."), http://www.usdoj.gov/usao/index.html (last visited Feb. 4, 2007); U.S. Attys' Manual § 3-2.100 ("the United States Attorney serves as the chief law enforcement officer in each judicial district. . . ."); U.S. Attys' Manual § 3-2.140 ("They are the principal federal law enforcement officers in their judicial districts."), http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title3/2musa.htm#3-2.100 (last visited Feb 4, 2007).

[3] Robert H. Jackson, *The Federal Prosecutor*, Address at the Second Annual Conference of United States Attorneys (Apr. 1, 1940), reprinted in 24 *J. Am. Judicature Soc'y* 18, 19 (1940); *also available at* http://www.roberthjackson.org/Man/theman2-7-6-1/ (last visited Feb. 4, 2007).

[4] 295 U.S. 78, 88 (1935).

Testimony of Professor Laurie L. Levenson
Senate Judiciary Committee Hearing
"Preserving Prosecutorial Independence: Is the Department of Justice Politicizing the Hiring and Firing of U.S. Attorneys?"

Feb. 6, 2007

Thank you for the opportunity to testify before your committee. I am currently Professor of Law, William M. Rains Fellow, and Director of the Center for Ethical Advocacy at Loyola Law School. I am the author of several books and dozens of articles, many of which address law enforcement and the criminal justice system. For eight years, from 1981 to 1989, I proudly served as an Assistant United States Attorney for the Central District of California in Los Angeles. As an Assistant U.S. Attorney, I worked as a trial attorney in the Major Crimes and Major Frauds Section, Chief of the Appellate Section and Chief of Training for the Criminal Division. I received the Attorney General's Director's Award for Superior Performance and commendations from the Federal Bureau of Investigation, United States Postal Inspectors, and other federal investigative agencies.

I was hired as an Assistant U.S. Attorney by Andrea S. Ordin, a Democrat appointed by President Jimmy Carter. When she left, I served for three Republican U.S. Attorneys during my tenure in the office. First, I worked for the Honorable Stephen S. Trott, who was appointed by President Ronald Reagan. Next, I worked for interim U.S. Attorney Alexander H. Williams, III , another Republican, who was appointed by the chief judge of our district. Finally, I worked for U.S. Attorney Robert C. Bonner, who was appointed by President George H.W. Bush. The transition from one U.S. Attorney to the next was seamless, and did not carry with it the controversy that has now developed about changes in U.S. Attorneys. I remain in regular contact with current and former federal prosecutors throughout the country. I hear their concerns and try to address them in my articles and books on the role and responsibilities of federal prosecutors.

As a former Assistant United States Attorney who served under both Democratic and Republican administrations, I am deeply concerned about the recent firings of qualified and demonstrably capable United States Attorneys and their replacement with individuals who lack the traditional qualifications for the position. The perception by many, including those who currently serve and have served in U.S. Attorneys Offices, is that there is a growing politicization of the work of federal prosecutors. Asking qualified U.S. Attorneys to leave and replacing them with political insiders is demoralizing; it denigrates the work of hardworking and dedicated Assistant U.S. Attorneys and undermines public confidence in the work of their offices.

Recently, seven United States Attorneys were fired by the Attorney General during the middle of a presidential term. Several of them have excellent reputations for being dedicated, experienced and successful U.S. Attorneys. Nonetheless, they were given no reason for their dismissals and, in at least one case, have been replaced by

someone who does not have the professional qualifications for the position, but comes from a deeply political, partisan background. Perhaps not so coincidentally, all of this is occurring on the heels of the Attorney General securing new statutory power to make indefinite interim appointments of U.S. Attorneys without review by the Senate or any other branch of government.

In my opinion, the new appointment procedures for interim U.S. Attorneys have added to the increasing politicization of federal law enforcement. Under the prior system, the Attorney General could appoint an interim U.S. Attorney for 120 days, giving the President a full four months to nominate and seek confirmation of a permanent replacement. If this was not done, the Chief Justice of the District would appoint an interim U.S. Attorney until a successor U.S. Attorney was nominated and confirmed. This system gave an incentive to the President to nominate a successor in a timely fashion and gave the Senate an opportunity to fulfill its constitutional responsibility of evaluating and deciding whether to confirm that candidate.

Under the present system, the Executive Branch can – and appears determined to – bypass the confirmation role of the Senate by making indefinite interim appointments. The result is a system where political favorites may be appointed without any opportunity for the Senate to evaluate those candidates' backgrounds and qualifications to serve as the chief federal law enforcement officer of their districts. Even if the Attorney General can explain the recent round of firings and replacements, the current statutory system opens the door to future abuses. The public should not have to rely on the good faith of individuals over sound statutory authority to ensure the accountability of key federal law enforcement officials.

In my testimony, I would like to address three key issues: First, the dangers of the politicization of the U.S. Attorneys Offices; second, why the recent actions of this administration are different from those of prior administrations, and third, why it is both constitutional and preferable to have the Chief Judges of the district, not the Attorney General, appoint interim U.S. Attorneys.

The recent perceived purging of qualified U.S. Attorneys is having a devastating impact on the morale of Assistant United States Attorneys. These individuals work hard to protect all of us by prosecuting a wide range of federal crimes. In recent years, AUSAs have struggled with many challenges, including a lack of resources. In Los Angeles (where I served as a federal prosecutor), there have been times recently when there was insufficient paper for the AUSAs to copy documents they were constitutionally required to turn over in discovery. Nonetheless, these professionals persevered at their jobs because of their commitment to pursuing justice on behalf of the people they serve. It is deeply demoralizing for them to now see capable leaders with proven track records of successful prosecutions summarily dismissed and replaced by those who lack the qualifications and professional backgrounds traditionally expected of United States Attorneys.

Moreover, the dismissal of competent U.S. Attorneys and their replacement with interim U.S. Attorneys unfamiliar with local law enforcement priorities and the operation of the offices poses risks to ongoing law enforcement initiatives. Many U.S. Attorneys Offices are engaged in joint task forces with state and local law enforcement agencies. Appointing an interim U.S. Attorney unfamiliar with the district gives the appearance that the ship has lost its rudder, undermines public confidence in federal law enforcement, creates cynicism about the role of politics in all prosecutorial decisions, and makes it more difficult to maintain such joint law enforcement operations.

Although this is not the first time in history that U.S. Attorneys have been asked to submit their resignations, the Attorney General's actions at this time are unlike anything that has occurred before. In my experience, one could expect a changeover in U.S. Attorneys when there was a change in Administrations. United States Attorneys serve at the pleasure of the President and a new President certainly has the right to make appointments to that position. However, we have never seen the type of turnover now in progress, where the Attorney General, not the President, is asking mid-term that demonstrably capable U.S. Attorneys submit their resignations so that Washington insiders may be appointed in their place.

Moreover, we have never seen an Administration accomplish this task by bypassing the traditional appointment process. Under the prior system, the rules for interim appointments limited the Attorney General's power to install a U.S. Attorney for lengthy periods of time without the advice and consent of the Senate. Under the current system, the Attorney General is free to make indefinite interim appointments of individuals whose background, qualifications and prosecutorial priorities are not subjected to Congressional scrutiny.

The issue is one of transparency and accountability. If interim U.S. Attorneys may serve indefinitely without undergoing the confirmation process, the Senate simply cannot fulfill its constitutional "checks and balances" role in the appointment of these officers. The confirmation process serves an important purpose in the selection of U.S. Attorneys. It gives the Senate an opportunity to closely examine the background and qualifications of the person poised to become the most powerful federal officer in each district and to evaluate the priorities that nominee is setting for law enforcement in his or her jurisdiction.

The prior system -- in which the Chief Judge appointed interim U.S. Attorneys if the Administration did not nominate and obtain confirmation for one within four months of the vacancy opening -- had advantages that the current system does not. First, in my experience, the Chief Judges of a district often have a much better sense of the operation of the U.S. Attorney's office and federal agencies in their jurisdiction than those who are thousands of miles away in Washington, D.C. Indeed, in my district and many others, several district judges are themselves former U.S. Attorneys, intimately familiar with the requirements of the office. Their goal is to find a U.S. Attorney who will serve the needs of the local office and the constituents it serves. Chief Judges are generally familiar with the federal bar in the district and with those individuals who could best fulfill the interim

role. The Chief Judges are in an excellent position to find an appointee, often someone from the office itself, who will serve as a steward until a permanent successor is found.

Second, interim appointments by Chief Judges are less likely to be viewed as political favors, because it is understood that the judge's selection can be superseded at any time once the Administration nominates and obtains Senate confirmation of an appointee of its choice. Chief Judges generally have the respect and confidence of those in their district. There is a greater belief that the Chief Judge will have the best operations of the justice system in mind when he or she makes an interim appointment.

In my opinion, the role of judges under the prior system in making interim appointments of United States Attorneys is constitutional and consistent with separation-of-powers principles. In *Morrison v. Olson*, 487 U.S. 654 (1988), the United States Supreme Court held that the role of the courts in appointing independent counsel pursuant to the Ethics in Government Act of 1978 did not violate Article III of the Constitution or separation-of-powers principles. Chief Justice William Rehnquist recognized that the Constitution permits judges to become involved in the appointment of special prosecutors. *See* U.S. Const., Art. II, §2, cl. 2 ("excepting clause" to "Appointments clause"). He then noted that that lower courts had similarly upheld interim judicial appointments of United States Attorneys. *See United States v. Solomon*, 216 F.Supp. 835 (S.D.N.Y. 1963).

Like the role of judges in making appointments of special prosecutors, the role of Chief Judges in making interim appointments of U.S. Attorneys is authorized by the Constitution itself. U.S. Attorneys can be properly considered "inferior officers" for purposes of the Appointments Clause. They have less jurisdiction and overall authority than the Attorney General and rely on the Attorney General for resources and Justice Department policies. The "Excepting Clause" allows judges to be involved in the appointment process of inferior officers. The court's role in appointment of interim U.S. Attorneys does not unnecessarily entangle the judicial branch with the day-to-day operations of the Executive Branch. Moreover, if the Executive Branch disagrees with the court's appointment, it has a ready remedy by nominating and obtaining confirmation of its own candidate.

Nor does the role of judges in appointing a prosecutor violate separation-of-powers principles. The Chief Judge's power to appoint an interim U.S. Attorney does not come with the right to "supervise" that individual in his or her investigative or prosecutorial authority. *Morrison* at 681. The interim U.S. Attorney does not report to the judge and there is no reason to believe that he or she will change prosecutorial policies at the whim of the court. For the reasons the Supreme Court authorized judges to appoint independent counsel in *Morrison*, I believe it is constitutional for Congress to adopt a rule giving judges a role in appointing interim U.S. Attorneys.

The public has great confidence in appointments made by the bench, whether they be of the Federal Public Defender, Magistrate Judges or interim prosecutors. Indeed, the Supreme Court itself has noted the benefits of having judges involved in the appointment

of prosecutors. In *Morrison*, Chief Justice Rehnquist wrote, "[I]n light of judicial experience with prosecutors in criminal cases, it could be said that *courts are especially well qualified* to appoint prosecutors." *Id.* at 676 n.13 (emphasis added).

Last week, in a letter dated February 2, 2007, to Senator Patrick J. Leahy, Chairman of the Senate Judiciary Committee, Acting Assistant Attorney General Richard A. Hertling, claimed that it would be "inappropriate and inconsistent with sound separation of powers principles ... to vest federal courts with the authority to appoint a crucial Executive Branch office such as a United States Attorney." He cited no authority in support of this principle; indeed, the case law, as represented by *Morrison*, goes against him on this point. The Supreme Court has made it quite clear that judges may properly have a role in appointing prosecutors and that such a procedure does not violate constitutional proscriptions or principles of separation of powers.

I was further surprised when Mr. Hertling's letter claimed that an interim U.S. Attorney appointed by the court could not be sufficiently independent because he or she would be "beholden" to the court for making his or her appointment. I am unaware of any situation in which an interim U.S. Attorney failed to do his or her duties because of some supposed indebtedness to the court, nor does Mr. Hertling cite any such example. Moreover, if there ever were to be such a situation, the President could fire that individual and nominate a successor U.S. Attorney who would be subject to the confirmation process.

The recent actions of the Attorney General give the appearance that there is an ongoing effort by the Attorney General to consolidate power over U.S. Attorneys Offices and insulate their actions from the scrutiny of Congress. It is very hard to otherwise explain why a U.S. Attorney like Bud Cummins III would be terminated after receiving sterling evaluations and replaced by a political adviser who doesn't have nearly the same qualifications. Such actions are likely to work against the interest of federal law enforcement and of the American public.

Ultimately, the debate today is about what we want our U.S. Attorneys Offices to be. If they are to be professional law enforcement offices responding to the needs of the citizens of their districts, they must be led by independent professionals with the support of the Justice Department. If and when they become mere rewards or resume builders for those in the good graces of the Attorney General, they will quickly lose their credibility and thus their ability to perform their jobs effectively. U.S. Attorneys Offices which become – or are perceived to have become – politicized will cease to attract the best and the brightest of lawyers committed to serving the public as dedicated, politically independent professionals. The new Act authorizing appointment of interim U.S. Attorneys for an indefinite period of time creates a serious risk this will occur, because it undermines the Senate's role in evaluating and confirming candidates. As such it poses a much greater risk to constitutional principles, including the separation of powers, than does the role of judges in making interim appointments.

Content of message:

The Administration is grateful for your service, but wants to give someone else the chance to serve in your district.

January 31st is a firm date for departures - - an "extension" will hinder the process of getting a new U.S. Attorney in place and giving whoever is eventually selected the opportunity to serve for a full two years.

Context of message:

- Mercer took calls from Bogden and Charlton

  all 3 had started together as U.S. Attorneys, were long-time AUSAs before becoming U.S. Attorneys, and our fellow Westerners;

  given his role as Acting Associate AG, it made sense for them to reach out to him to discuss

- Because he did not supervise them, he had no basis to discuss more with them than his understanding that they were being asked to step aside so that someone else could have the opportunity to serve as U.S. Attorney

  As such, these calls were not designed to be an opportunity for a full discussion of the basis for the dismissal.

  In general, as noted earlier with our overall effort, perhaps these discussions should have been a time for a full airing of the reasons for the dismissal. However, at the time, this seemed to be imprudent as it would inspire rounds of back and forth on performance even though a final decision had been made.

  In retrospect, perhaps this approach was focused too much on being empathetic and supportive and should have been more specific. However, it was our intention to say nothing negative about their performance publicly or otherwise.

  Saying that a U.S. Attorney is being asked to leave to allow another person to serve in the role is not inconsistent with the fact that the Department had concerns regarding performance and/or policy compliance.

  It also cannot be interpreted as an admission that others had been identified to take over as U.S. Attorney.

AG
KS
MG

Department of Justice
EXECUTIVE SECRETARIAT
CONTROL SHEET

DATE OF DOCUMENT: 01/03/2007
DATE RECEIVED: 01/05/2007
WORKFLOW ID: 1117121
DUE DATE: 01/23/2007

FROM: The Honorable Kevin V. Ryan
U.S. Attorney, N.D. of California
450 Golden Gate Avenue
P.O. Box 36055
San Francisco, CA 94102

TO: AG

MAIL TYPE: Priority VIP Correspondence-Policy/Issue

SUBJECT: Submitting his resignation as the United States Attorney for the N.D. of California with the proposed effective date of 4/27/2007. States that it has been an honor and privilege to serve the American people as a member of President Bush's Administration.

DATE ASSIGNED	ACTION COMPONENT & ACTION REQUESTED
01/08/2007	Executive Office of United States Attorneys Prepare response for AG signature.

INFO COMPONENT: OAG, ODAG, OLP

COMMENTS:

FILE CODE:

EXECSEC POC: Paula Stephens: 202-616-0074

U.S. Department of Justice

Kevin V. Ryan
United States Attorney
Northern District of California

11th Floor, Federal Building
450 Golden Gate Avenue, Box 36055
San Francisco, California 94102

(415) 436-6968
FAX:(415) 436-7234

111712
P

Attorney General Alberto R. Gonzales
Attorney General of the United States
United States Department of Justice

January 3, 2007

Dear General Gonzales,

I hereby tender my resignation as the United States Attorney for the Northern District of California with the proposed effective date of April 27, 2007. It has been an honor and privilege to serve the American people as a member of President Bush's Administration.

Sincerely,

Kevin V. Ryan