Examples of Difficult Transition Situations

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

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

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

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

This problem is not new ...

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

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

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

2. **South Dakota:**

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

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

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

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

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

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

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

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

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

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

- The Attorney General appointed Tim Griffin as the interim U.S. Attorney following the resignation of Bud Cummins, who resigned on Dec. 20, 2006. Since early in 2006, Mr. Cummins had been talking about leaving the Department to go into private practice for family reasons.

- Timothy Griffin is highly qualified to serve as the U.S. Attorney for the Eastern District of Arkansas.

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

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

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

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

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

- The Attorney General has assured Senator Pryor that we are not circumventing the process by making an interim appointment and that the Administration would like to nominate Mr. Griffin. However, because the input of home-state Senators is important to the Administration, the Attorney General has asked Senator Pryor whether he would support Mr. Griffin if he was nominated. While the Administration consults with the home-state Senators on a potential nomination, however, the Department must have someone lead the office – and we believe Mr. Griffin is well-qualified to serve in this interim role until such time as a new U.S. Attorney is nominated and confirmed.

UNITED STATES ATTORNEYS' PROSECUTION STATISTICS

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

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

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

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

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

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

Those Chosen To Be Acting/Interim U.S. Attorneys since the Attorney General's Appointment Authority Was Amended on March 9, 2006, Have Continued To Be Highly Qualified. Of the 16 districts in which new vacancies have occurred, 17 acting and/or interim appointments have been made:

- 16 of the 17 had prior experience as federal prosecutors (94%)

Elston, Michael (ODAG)

From: Scott-Finan, Nancy
Sent: Monday, February 26, 2007 6:26 PM
To: Hertling, Richard; Burton, Faith; Elston, Michael (ODAG); Moschella, William; Margolis, David; Sampson, Kyle; Goodling, Monica; Battle, Michael (USAEO); Nowacki, John (USAEO); Macklin, Jay (USAEO); Scolinos, Tasia; Roehrkasse, Brian
Cc: Seidel, Rebecca; Tracci, Robert N
Subject: FW: HJC USA Briefing and Hearing Invitation

Attachments: HJC Hearing Invitation USA.pdf; HJC Briefing Request re USAs.pdf

Attached is the hearing invitation letter for the March 6 HJC hearing on "Restoring Checks and Balances in the Confirmation Process of U.S. Attorneys." Please note that they specifically request Paul and do not indicate that this is a Subcommittee hearing. The second letter is the briefing request and request for the EARS reports---please note that they ask for the EARS reports for all US Attorneys who have resigned since March 9, 2006--we have had 16 vacancies since March 9th.

From: Cabral, Catalina
Sent: Monday, February 26, 2007 6:16 PM
To: Scott-Finan, Nancy; Clifton, Deborah J
Subject: HJC USA Briefing and Hearing Invitation

Debbie,
The first document is a hearing invitation.

HJC Hearing Invitation USA.pdf...

HJC Briefing Request re USAs.p...

Catalina Cabral
U.S. DEPARTMENT OF JUSTICE
Office of Legislative Affairs
Catalina.Cabral@USDOJ.gov
(202) 514-4828

Elston, Michael (ODAG)

From: Moschella, William
Sent: Monday, February 26, 2007 7:47 PM
To: Scott-Finan, Nancy; Hertling, Richard; Burton, Faith; Elston, Michael (ODAG); Margolis, David; Sampson, Kyle; Goodling, Monica; Battle, Michael (USAEO); Nowacki, John (USAEO); Macklin, Jay (USAEO); Scolinos, Tasia; Roehrkasse, Brian
Cc: Seidel, Rebecca; Tracci, Robert N
Subject: RE: HJC USA Briefing and Hearing Invitation

The testimony needs to be updated to address hr 580.

From: Scott-Finan, Nancy
Sent: Monday, February 26, 2007 6:26 PM
To: Hertling, Richard; Burton, Faith; Elston, Michael (ODAG); Moschella, William; Margolis, David; Sampson, Kyle; Goodling, Monica; Battle, Michael (USAEO); Nowacki, John (USAEO); Macklin, Jay (USAEO); Scolinos, Tasia; Roehrkasse, Brian
Cc: Seidel, Rebecca; Tracci, Robert N
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Catalina Cabral
U.S. DEPARTMENT OF JUSTICE
Office of Legislative Affairs
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(202) 514-4828

Elston, Michael (ODAG)

From: Goodling, Monica
Sent: Tuesday, February 27, 2007 8:23 PM
To: Elston, Michael (ODAG); Moschella, William; Sampson, Kyle
Subject: FW: Farewell, Adios, Good bye, Auf Weidersehen

FYI - mass email today.

From: Iglesias, David C. (USANM) [mailto:David.C.Iglesias@usdoj.gov]
Sent: Tuesday, February 27, 2007 8:01 PM
To: USAEO-USAttorneys
Subject: Farewell, Adios, Good bye, Auf Weidersehen

Dear friends and colleagues:

As King Soloman wrote more than 2,500 years ago, "there is a time for everything." It's time to say goodbye from this wonderful job. Tomorrow will be my last day as U.S. Attorney. It's been the most responsible job I've ever had and the second most exciting job I've ever had (nothing beats being launched off and landing on a Navy aircraft carrier). The years have been an unprecedented mixture of experiences, memories and accomplishments. Beyond the record number of criminal cases my AUSAs brought, I'm proud of my hard-working office and its 95% conviction rate. I'm proud to have successfully prosecuted the biggest political corruption case in New Mexico history. I'm proud of having nationally recognized Weed and Seed and PSN programs. But, it's more than just metrics, it's about forming friendships with many of you. I'll never forget going to Colombia and Mexico with Johnny Sutton, Paul Charlton and the late great Mike Shelby. I'll never forget visiting drug cartel lord Pablo Escobar's home in Medellin and realizing America saved Colombia from becoming the world's first "narcocracy." I'll never forget running in L.A.'s seedy MacArthur Park with Matt Whitaker in the early morning hours. I'll never forget speaking at Main Justice's Great Hall for Hispanic Heritage Month, or testifying before Congress, debating a member of Congress and Village Voice journalist on the Patriot Act , backseating an F-16, or getting an op-ed published on immigration reform in the Washington Times. I'll never forget former A.G. and Mrs. John Ashcroft giving us a walking tour of the Washington monuments at night. Heady stuff for a guy originally from Panama whose family is just one generation removed from substistence living in the jungle.

As one of just several US Attorneys born outside the United States, I know the America dream lives. I'd like to thank President Bush for nominating me to be the United States Attorney almost 6 years ago. I am grateful to have been allowed the honor of making a difference in my community. We need US Attorneys who "maintain justice and do what is right" (Isaiah 56:1) and are willing to pay the price for doing so.

After taking off the month of March to decompress and performing Navy duty overseas in April, I will begin my new job. I haven't decided which of my options to pursue, but in the interim you can reach me at . I wish you all success in the next 22 months in keeping America safe against all enemies, foreign and domestic.

Respectfully,

David

Elston, Michael (ODAG)

From: Hertling, Richard
Sent: Wednesday, February 28, 2007 5:29 PM
To: Nowacki, John (USAEO); Sampson, Kyle; Goodling, Monica; Moschella, William; Elston, Michael (ODAG)
Subject: RE: house subpoena

Attachments: spacer.gif; spacer.gif; logo_us_canadian_2.gif; spacer.gif; hline_purple.gif; spacer.gif; spacer.gif

spacer.gif (133 B) spacer.gif (133 B) logo_us_canadian_2.gif (2 KB) spacer.gif (133 B) hline_purple.gif (290 B) spacer.gif (133 B) spacer.gif (133 B)

thanks.

The others to be subpoenaed are Lam, McKay, and Iglesias.

From: Nowacki, John (USAEO) [mailto:John.Nowacki@usdoj.gov]
Sent: Wednesday, February 28, 2007 5:27 PM
To: Sampson, Kyle; Goodling, Monica; Moschella, William; Elston, Michael (ODAG); Hertling, Richard
Subject: FW: house subpoena

FYI -- From Bud Cummins.

From: Battle, Michael (USAEO)
Sent: Wednesday, February 28, 2007 5:04 PM
To: Nowacki, John (USAEO)
Subject: FW: house subpoena

FYI.

From: Bud Cummins [mailto:bud.cummins@aael.net]
Sent: Wednesday, February 28, 2007 4:50 PM
To: Battle, Michael (USAEO)
Subject: house subpoena

Mike,

FYI, house committee called today saying they intend to subpoena me and others (I didn't ask who) for next Tuesday, March 6. If I have any legal obligations to run this somehow through DOJ please let me know. If someone at DOJ wants to talk before the testimony, I am available to do that also.

Best regards,

Bud

Bud Cummins
Consultant

Fueling Our Future

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divider
divider

Elston, Michael (ODAG)

From: Elston, Michael (ODAG)
Sent: Monday, February 26, 2007 8:07 PM
To: Scott-Finan, Nancy; Hertling, Richard; Burton, Faith; Moschella, William; Margolis, David; Sampson, Kyle; Goodling, Monica; Battle, Michael (USAEO); Nowacki, John (USAEO); Macklin, Jay (USAEO); Scolinos, Tasia; Roehrkasse, Brian
Cc: Seidel, Rebecca; Tracci, Robert N
Subject: Re: HJC USA Briefing and Hearing Invitation

They'll have to be satisfied with Will -- Will says he is more photogenic anyway.

-----Original Message-----
From: Scott-Finan, Nancy
To: Hertling, Richard; Burton, Faith; Elston, Michael (ODAG); Moschella, William; Margolis, David; Sampson, Kyle; Goodling, Monica; Battle, Michael (USAEO); Nowacki, John (USAEO); Macklin, Jay (USAEO); Scolinos, Tasia; Roehrkasse, Brian
CC: Seidel, Rebecca; Tracci, Robert N
Sent: Mon Feb 26 18:25:44 2007
Subject: FW: HJC USA Briefing and Hearing Invitation

Attached is the hearing invitation letter for the March 6 HJC hearing on "Restoring Checks and Balances in the Confirmation Process of U.S. Attorneys." Please note that they specifically request Paul and do not indicate that this is a Subcommittee hearing. The second letter is the briefing request and request for the EARS reports---please note that they ask for the EARS reports for all US Attorneys who have resigned since March 9, 2006--we have had 16 vacancies since March 9th.

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Subject: HJC USA Briefing and Hearing Invitation

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The first document is a hearing invitation.

<<HJC Hearing Invitation USA.pdf>> <<HJC Briefing Request re USAs.pdf>>

Catalina Cabral
U.S. DEPARTMENT OF JUSTICE
Office of Legislative Affairs
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(202) 514-4828

Elston, Michael (ODAG)

From: Goodling, Monica
Sent: Saturday, March 03, 2007 3:31 PM
To: Sampson, Kyle; Moschella, William; Scolinos, Tasia; Roehrkasse, Brian; Hertling, Richard; Elston, Michael (ODAG); Scott-Finan, Nancy; Seidel, Rebecca
Subject: Updated USA documents - PUBLIC

Attachments: TPS - US Attorney vacancy-appointment points.pdf; FACT SHEET - USA appointments.pdf; Examples of Difficult Transition Situations.pdf; USA prosecution only stats.pdf; WHY 120 DAYS IS NOT REALISTIC.doc; Griffin Talkers.doc; Griffin resume.doc

Attached please find updated documents in advance of this week's hearing. (These include the resignations in Nevada and New Mexico, where we elevated the First Assistant to the position of Acting U.S. Attorney under the Vacancy Reform Act; no additional resignations are expected before mid-March, when Chiara departs.) Please let me know if you have any questions. Thanks!


TPS - US Attorney vacancy-appo...


FACT SHEET - USA appointments....


Examples of Difficult Transiti...


USA prosecution only stats.pdf...


WHY 120 DAYS IS NOT REALISTIC....


Griffin Talkers.doc (33 KB)


Griffin resume.doc (89 KB)

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

Overview:

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

- Our record since the AG-appointment authority was amended demonstrates we are committed to working with the Senate to nominate candidates for U.S. Attorney positions. Every single time that a United States Attorney vacancy has arisen, the President either has made a nomination or the Administration is working, in consultation with home-State Senators, to select candidates for nomination.
    - ✓ Specifically, since March 9, 2006 (when the AG's appointment authority was amended), the Administration has nominated 16 individuals to serve as U.S. Attorney (12 have been confirmed to date).

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

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

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

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

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

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

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

The Administration Must Ensure an Effective Transition When Vacancies Occur:

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

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

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

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

- Since March 9, 2006, when the appointment authority was amended, the Administration has nominated 16 individuals for Senate consideration (12 have been confirmed to date).

- Since March 9, 2006, when the appointment authority was amended, 18 vacancies have been created. Of those 18 vacancies, the Administration nominated candidates to fill 6 of these positions (3 were confirmed to date), has interviewed candidates for 8 positions, and is waiting to receive names to set up interviews for the remaining positions – all in consultation with home-state Senators.

The 18 Vacancies Were Filled on an Interim Basis Using a Range of Authorities, in Order To Ensure an Effective and Smooth Transition:

- In 7 cases, the First Assistant was selected to lead the office and took over under the Vacancy Reform Act's provision at: 5 U.S.C. § 3345(a)(1). That authority is limited to 210 days, unless a nomination is made during that period.

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

- In 10 cases, the Department selected another Department employee to serve as interim under AG appointment until such time as a nomination is submitted to the Senate. In 1 of those 10 cases, the First Assistant had resigned at the same time as the U.S. Attorney, creating a need for an interim until such time as a nomination is submitted to the Senate.

Amending the Statute Was Necessary:

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

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

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

- The statute was amended for several reasons:

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

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

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

FACT SHEET: UNITED STATES ATTORNEY APPOINTMENTS

NOMINATIONS AFTER AMENDMENT TO ATTORNEY GENERAL'S APPOINTMENT AUTHORITY

Since March 9, 2006, when the Congress amended the Attorney General's authority to appoint interim United States Attorneys, the President has nominated 16 individuals to serve as United States Attorney. The 16 nominations are:

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

All but Phillip Green, John Wood, Rosa Rodriguez-Velez, and Jeffrey Taylor have been confirmed by the Senate – 12 of 16 nominations.

VACANCIES AFTER AMENDMENT TO ATTORNEY GENERAL'S APPOINTMENT AUTHORITY

Since March 9, 2006, there have been 18 new U.S. Attorney vacancies that have arisen. They have been filled as noted below.

For 7 of the 18 vacancies, the First Assistant United States Attorney (FAUSA) in the district was selected to lead the office in an acting capacity under the Vacancies Reform Act, *see* 5 U.S.C. § 3345(a)(1) (first assistant may serve in acting capacity for 210 days unless a nomination is made) until a nomination could be or can be submitted to the Senate. Those districts are:

- **Central District of California** – FAUSA George Cardona is acting United States Attorney

- **Southern District of Illinois** – FAUSA Randy Massey is acting United States Attorney (a nomination was made last Congress for Phillip Green, but confirmation did not occur);
- **Eastern District of North Carolina** – FAUSA George Holding served as acting United States Attorney (Holding was nominated and confirmed);
- **Northern District of West Virginia** – FAUSA Rita Valdrini served as acting United States Attorney (Sharon Potter was nominated and confirmed);
- **Southern District of Georgia** – FAUSA Edmund A. Booth, Jr. is acting USA;
- **District of New Mexico** – FAUSA Larry Gomez is acting USA; and
- **District of Nevada** – FAUSA Steven Myhre is acting USA.

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

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

For 10 of the 18 vacancies, the Department selected another Department employee to serve as interim United States Attorney until a nomination could be submitted to the Senate, *see* 28 U.S.C. § 546(a) ("Attorney General may appoint a United States attorney for the district in which the office of United States attorney is vacant"). Those districts are:

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

- **Western District of Washington** – Jeff Sullivan was appointed interim United States Attorney when incumbent United States Attorney resigned;
- **District of Arizona** – Dan Knauss was appointed interim United States Attorney when incumbent United States Attorney resigned;
- **Northern District of California** – Scott Schools was appointed interim United States Attorney when incumbent United States Attorney resigned; and
- **Southern District of California** – Karen Hewitt was appointed interim United States Attorney when incumbent United States Attorney resigned.

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

The Attorney General has exercised the authority to appoint interim United States Attorneys a total of 14 times since the authority was amended in March 2006.

In 2 of the 14 cases, the FAUSA had been serving as acting United States Attorney under the Vacancies Reform Act (VRA), but the VRA's 210-day period expired before a nomination could be made. Thereafter, the Attorney General appointed that same FAUSA to serve as interim United States Attorney. These districts include:

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

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

- **District of Alaska** – Nelson Cohen

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

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

In the 10 remaining cases, the Department selected another Department employee to serve as interim United States Attorney until a nomination could be submitted to the Senate. Those districts are:

- **Eastern District of Virginia** – Pending nominee Chuck Rosenberg was appointed interim United States Attorney when incumbent United States Attorney

resigned to be appointed Deputy Attorney General (Rosenberg was confirmed shortly thereafter);

- **Eastern District of Arkansas** – Tim Griffin was appointed interim United States Attorney when incumbent United States Attorney resigned;
- **District of Columbia** – Jeff Taylor was appointed interim United States Attorney when incumbent United States Attorney resigned to be appointed Assistant Attorney General for the National Security Division;
- **District of Nebraska** – Joe Stecher was appointed interim United States Attorney when incumbent United States Attorney resigned to be appointed Chief Justice of Nebraska Supreme Court;
- **Middle District of Tennessee** – Craig Morford was appointed interim United States Attorney when incumbent United States Attorney resigned;
- **Western District of Missouri** – Brad Schlozman was appointed interim United States Attorney when incumbent United States Attorney and FAUSA resigned at the same time (John Wood was nominated);
- **Western District of Washington** – Jeff Sullivan was appointed interim United States Attorney when incumbent United States Attorney resigned;
- **District of Arizona** – Dan Knauss was appointed interim United States Attorney when incumbent United States Attorney resigned;
- **Northern District of California** – Scott Schools was appointed interim United States Attorney when incumbent United States Attorney resigned; and
- **Southern District of California** – Karen Hewitt was appointed interim United States Attorney when incumbent United States Attorney resigned.

WHY 120 DAYS IS NOT REALISTIC

- One hundred twenty days is not a realistic period of time to permit any Administration to **solicit and wait for home-state political leaders to identify a list of potential candidates**, provide the time needed to **interview and select a candidate for background investigation**, provide the FBI with adequate time to **do the full-field background investigation, prepare and submit the nomination**, and to be **followed by the Senate's review and confirmation** of a new U.S. Attorney.

- The **average number of days between the resignation of one Senate-confirmed U.S. Attorney and the President's nomination of a candidate for Senate consideration is 273 days** (including 250 USAs during the Clinton Administration and George W. Bush Administration to date). Once nominated, the Senate has taken an additional period of time to review the nominations of the Administration's law enforcement officials.

- The **average number of days between the nomination of a new U.S. Attorney candidate and Senate confirmation has been 58 days for President George W. Bush's USA nominees** (note - the majority were submitted to a Senate that was controlled by the same party as the President) and **81 days for President Bill Clinton's USA nominees** (note - 70% of nominees were submitted in the first two years to a Senate controlled by the same party as the President, others were submitted in the later six years to a party that was not).

- Simply adding the two averages of 273 and 58 days would mean a **combined average of 331 days from resignation of one USA to confirmation of the next.**

- The substantial time period between resignation and nomination is often due to factors outside the Administration's control, such as: 1) the Administration is waiting for home-state political leaders to develop and transmit their list of names for the Administration to begin interviewing candidates; 2) the Administration is awaiting feedback from home-state Senators on the individual selected after the interviews to move forward into background; and 3) the Administration is waiting for the FBI to complete its full-field background review. (The FBI often uses 2-4 months to do the background investigation -- and sometimes needs additional time if they identify an issue that requires significant investigation.)

UNITED STATES ATTORNEYS' PROSECUTION STATISTICS

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

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

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

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

Since the Attorney General's Appointment Authority Was Amended on March 9, 2006, the Backgrounds of Our Nominees Has Not Changed. Of the 16 Nominees Since that Time:

- 14 of the 16 had prior experience as prosecutors (88%) – *a higher percentage than before.*
    - 12 of the 16 had prior experience as federal prosecutors (75%) – *a higher percentage than before the change*; 11 were career AUSAs or former career AUSAs and 1 had federal prosecution experience as an Assistant Attorney General of the Civil Rights Division
    - 4 of the 15 nominees had experience as state or local prosecutors (27%)

Those Chosen To Be Acting/Interim U.S. Attorneys since the Attorney General's Appointment Authority Was Amended on March 9, 2006, Have Continued To Be Highly Qualified. Of the 18 districts in which new vacancies have occurred, 19 acting and/or interim appointments have been made:

- 18 of the 19 had prior experience as federal prosecutors (95%)

Examples of Difficult Transition Situations

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

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

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

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

This problem is not new ...

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

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

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

2. **South Dakota:**

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

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

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

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

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

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

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

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

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

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

- The Attorney General appointed Tim Griffin as the interim U.S. Attorney following the resignation of Bud Cummins, who resigned on Dec. 20, 2006. Since early in 2006, Mr. Cummins had been talking about leaving the Department to go into private practice for family reasons.

- Timothy Griffin is highly qualified to serve as the U.S. Attorney for the Eastern District of Arkansas.

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

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

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

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

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

- The Attorney General assured Senator Pryor that we are not circumventing the process by making an interim appointment and that the Administration intended to nominate Mr. Griffin. However, Senator Pryor refused to support Mr. Griffin if he was nominated. As a result of the lack of support shown by his home-state Senators, Mr. Griffin has withdrawn his name from consideration.

- While the Administration consults with the home-state Senators on a potential nomination, however, the Department must have someone lead the office – and we believe Mr. Griffin is well-qualified to serve in this interim role until such time as a new U.S. Attorney is nominated and confirmed.

J. TIMOTHY GRIFFIN

EDUCATION

Tulane University Law School. New Orleans, Louisiana. Juris Doctor, *cum laude*, May 1994. Cumulative G.P.A.: 3.25/4.00; Rank: 80/319, Top 25%. Common law and civil law curricula. Legal Research and Writing grade: A.

- Senior Fellow, Legal Research and Writing Program. Taught first year law students legal research and writing.
- Volunteer, The New Orleans Free Tutoring Program, Inc.

Oxford University, Pembroke College. Oxford, England. Graduate School, British and European History, 1990-1991.

- Under-secretary and Treasurer, Oxford University Clay Pigeon Shooting Club.

Hendrix College. Conway, Arkansas. Bachelor of Arts in Economics and Business, *cum laude*, June 1990. Cumulative G.P.A.: Major 3.79/4.00, Overall 3.78/4.00; Rank: 22/210, Top 10%.

- Oxford Overseas Study Course, September 1988-May 1989, Oxford, England.

LEGAL EXPERIENCE

U.S. Attorney (Interim). **Eastern District of Arkansas, U.S. Department of Justice.** Little Rock, Arkansas. December 2006-present.

- Served as a Special Assistant U.S. Attorney, Eastern District of Arkansas, September-December 2006.

Trial Counsel, U.S. Army JAG Corps. **Criminal Law Branch, Office of the Staff Judge Advocate.** Fort Campbell, Kentucky, September 2005-May 2006; August-September 2006.

- Successfully prosecuted U.S. v. Mikel, involving a soldier's attempted murder of his platoon sergeant.
- Provided legal advice to E Co., 1st and 3rd Brigade Combat Teams, 101st Airborne Division (Air Assault)(R)(P).
- Prosecuted 40 Army criminal cases at courts-martial and federal criminal cases as a Special Assistant U.S. Attorney, Western District of Kentucky and Middle District of Tennessee, and handled 90 administrative separations.

Brigade Judge Advocate, U.S. Army Judge Advocate General's (JAG) Corps. Operation Iraqi Freedom. Task Force Band of Brothers. **501st STB, 101st Airborne Division (Air Assault).** Mosul, Iraq, May-August 2006.

- Served on the Brigade Operational Law Team (BOLT), 172d Stryker Brigade Combat Team, FOB Marez, Iraq.
- Provided legal advice on various topics, including financial investigations, rules of engagement, and rule of law.

Special Assistant to the Assistant Attorney General. **Criminal Division, U.S. Department of Justice.** Washington, D.C. and Little Rock, Arkansas. March 2001-June 2002.

- Tracked issues for Assistant Attorney General Michael Chertoff and worked with the Office of International Affairs (OIA) on matters involving extradition, provisional arrest and mutual legal assistance treaties (MLATs).
- Prosecuted federal firearm and drug cases and served as the coordinator for Project Safe Neighborhoods, a strategy to reduce firearm-related violence through cooperation between state and federal law enforcement, as a Special Assistant U.S. Attorney, Eastern District of Arkansas, in Little Rock, September 2001-June 2002.

Senior Investigative Counsel. **Committee on Government Reform, U.S. House of Representatives.** Washington, D.C. January 1997-February 1998; June 1998-September 1999.

- Developed hearing series entitled "National Problems, Local Solutions: Federalism at Work" to highlight innovative and successful reforms at the state and local levels, including: "Fighting Crime in the Trenches," featuring New York City Mayor Rudolph Giuliani, and "Tax Reform in the States."
- Pursuant to the Committee's campaign finance investigation, interviewed Johnny Chung and played key role in hearing detailing his illegal political contributions; organized, supervised and conducted the financial investigation of individuals and entities; interviewed witnesses; drafted subpoenas; and briefed Speaker of the House Newt Gingrich.

Associate Independent Counsel. **U.S. Office of Independent Counsel David M. Barrett.** *In re: Henry G. Cisneros, Secretary of Housing and Urban Development (HUD).* Washington, D.C. September 1995-January 1997.

- Interviewed numerous witnesses with the F.B.I. and supervised the execution of a search warrant.
- Drafted subpoenas and pleadings and questioned witnesses before a federal grand jury.

Associate Attorney. **General Litigation Section. Jones, Walker, Waechter, Poitevent, Carrere & Denegre, L.L.P.** New Orleans, Louisiana. September 1994-September 1995.

- Drafted legal memoranda and pleadings and conducted depositions.

ADDITIONAL WORK EXPERIENCE

Special Assistant to the President and Deputy Director. **Office of Political Affairs, The White House.** Washington, D.C. April-September 2005. On military leave after mobilization to active duty, September 2005-September 2006.

- Advised President George W. Bush and Vice-President Richard B. Cheney.
- Organized and coordinated support for the President's agenda.

Research Director and Deputy Communications Director. **2004 Presidential Campaign, Republican National Committee (RNC).** Washington, D.C. June 2002-December 2004.

- Briefed Vice-President Richard B. Cheney and other Bush-Cheney 2004 (BC04) and RNC senior staff.
- Managed RNC Research, the primary research resource for BC04, with over 25 staff.
- Worked daily with BC04 senior staff on campaign and press strategy, ad development and debate preparation.

Deputy Research Director. **2000 Presidential Campaign, Republican National Committee (RNC).** Washington, D.C. September 1999-February 2001.

- Managed RNC Research, the primary research resource for Bush-Cheney 2000 (BC00), with over 30 staff.
- Served as legal advisor in Volusia and Brevard Counties for BC00 Florida Recount Team.

Campaign Manager. **Betty Dickey for Attorney General.** Pine Bluff, Arkansas. February 1998-May 1998.

SUMMARY OF MILITARY SERVICE

Major. **JAG Corps, U.S. Army Reserve.** Commissioned First Lieutenant, June 1996.

- Served on active duty in Mosul, Iraq with the 101st Airborne Division (Air Assault), and at Fort Campbell, Kentucky, September 2005-September 2006.
- Authorized to wear 101st Airborne Division (Air Assault) "Screaming Eagle" combat patch.
- Medals, Ribbons and Badges: Army Commendation Medal with Five Oak Leaf Clusters; Army Achievement Medal with Four Oak Leaf Clusters; Army Reserve Components Achievement Medal with Two Oak Leaf Clusters; National Defense Service Medal; Iraq Campaign Medal; Global War on Terrorism Service Medal; Armed Forces Reserve Medal with Bronze Hourglass and "M" Devices; Army Service Ribbon; and Army Reserve Overseas Training Ribbon with "3" Device; and Combat Action Badge.

ACTIVITIES AND ASSOCIATIONS

Arkansas Bar Association. Little Rock, Arkansas. *Member*, 1995-present. Annual Meeting Subcommittee on Technology, 2002. Admitted to Arkansas Bar, April 26, 1995.

Friends of Central Arkansas Libraries (FOCAL). Little Rock, Arkansas. *Life Member*.

Florence Crittenton Services, Inc. Little Rock, Arkansas. *Member*, Board of Directors, 2001-2002.

Louisiana State Bar Association. New Orleans, Louisiana. *Member*. Admitted October 7, 1994. Currently inactive.

The Oxford Union Society. Oxford, England. *Member*, 1990-present.

Pulaski County Bar Association. Little Rock, Arkansas. *Member*, 2001-2002. *Co-chair*, Law School Liaison Committee, 2001-2002.

Reserve Officers Association. Washington, D.C. *Life Member*.

Elston, Michael (ODAG)

From: Chiara, Margaret M. (USAMIW) [MM.Chiara@usdoj.gov]
Sent: Sunday, March 04, 2007 11:00 PM
To: McNulty, Paul J
Cc: Elston, Michael (ODAG)
Subject: WDMI

Paul: I respectfully request that you reconsider the rationale of poor performance as the basis for my dismissal. It is in our mutual interest to retract this erroneous explanation while there is still time. Please simply state that a presidentially appointed position is not an entitlement. No other explanation is needed.

As you know, I have assiduously avoided public comment by pursuing an informal version of the "witness protection program" in order to elude reporters! However, the legal community in Grand Rapids and organizations throughout Michigan are outraged that I am being labeled "a poor performer". Politics may not be a pleasant reason but the truth is compelling. Know that I am considered a personification of ethics and productivity. And as you surely realize, the unresolved Phil Green situation has definitely complicated the perception of DOJ in WDMI.

The notoriety of being one of the "USA-8" coupled with my age being constantly cited in the press is proving to be a formidable obstacle to securing employment. The best resolution with regard to both timing and outcome is the assistant director position at the NAC. I have already made it clear to the OLE Director that you do not consider former United States Attorney status a barrier to continued DOJ service. I ask that you endorse or otherwise encourage my selection for reasons discussed in previous e-mails. Given the quality and quantity of my contribution during the past 5+ years, I am confident that you are willing to provide affirmative assistance.

Margaret

Elston, Michael (ODAG)

From: Moschella, William
Sent: Monday, March 05, 2007 10:02 AM
To: Roehrkasse, Brian; Scolinos, Tasia; Sampson, Kyle; Goodling, Monica; Hertling, Richard; Elston, Michael (ODAG)
Subject: Opening statement

Attachments: Hearing1.doc

Hearing1.doc (34 KB)

William E. Moschella
Opening Statement

Madam Chairman, Mr. Cannon, and Members of the Subcommittee, I appreciate the opportunity to testify today on H.R. 580, and although this hearing is styled as a legislative hearing, I am sure that most questions will focus on the circumstances surrounding the Department's request that eight U.S. Attorneys resign. It is to these issues I will address my opening comments.

At the outset, I want to say that the Attorney General appreciates the service of all eight US Attorneys who were asked to resign. They are all professionals, and we have no doubt they will achieve success in their future endeavors.

Given the comments in the papers, these political appointees, who served at the pleasure of the President, disagree with the Attorney General's and Deputy Attorney General's explanation that they were selected because of performance reasons. Both the AG and DAG used the word performance broadly, and depending on the circumstances, performance could encompass issues relating to policy, priorities, management, and leadership.

Given the reaction, I agree with the Washington Post's editorial over the weekend that this situation was handled poorly. The US Attorneys who were asked to resign were not told the reasons simply to avoid protracted debate about the decision and not to prejudice negatively their future employment prospects. A decision was made to let them down easy; in fact, it seems, just the opposite happened. Human nature being what is it; many of them wanted to be told the reasons and in retrospect we should have. The Department's failure to tell them led to wild speculation about our motives and that is unfortunate because faith and confidence in our justice system is more important than any one individual.

That said, the Department stands by its decision. It is clear to us that after our closed door briefings with House and Senate members and staff, some agree with our decisions and some disagree – such is the nature of subjective judgments. Just because you might disagree with a decision, does not mean it was made for improper political reasons – there were reasons for each decision.

It is important to recognize, that one of the most important responsibilities the Attorney General has is to effectively manage the Department of Justice and that requires being willing to make tough decisions. Furthermore, it is the Attorney General's responsibility to ensure that the priorities that he sets and those of the President are carried out. The Attorney General has announced specific priorities and has every expectation that they will be followed. U.S. Attorneys and other political appointees in the Department, like all other departments under all other Presidents, understand that they are charged with carrying out those policies and that they serve at the pleasure of the President.

Let me say a word about the EARS evaluations. Several have made the point that these evaluations indicate good ratings for the US Attorneys. That is not so. The EARS evaluations

are evaluations of the office. The US Attorneys supervisors are the AG and Deputy AG. They are not asked about the U.S. Attorneys as part of these evaluations.

Finally, we are all privileged to have the opportunity to serve the nation at the Department of Justice, and yes, job security is not the same as if I were a member of the career civil service. No one is entitled to stay in these positions forever. Each US Attorney who was asked to move on served more than their entire four year term

One troubling allegation that has been made is that certain of the U.S. Attorneys were asked to move because actions they took or didn't take relating to public corruptions cases. These charges would be funny if they weren't so serious. Such charges are dangerous, baseless, and irresponsible. This Administration has never removed a United States Attorney in an effort to retaliate against them or interfere with or inappropriately influence a public integrity investigation.

The Attorney General and the FBI director have both made public corruption a very high priority. Integrity in government and trust in our public officials and institutions is paramount. The record of this Justice Department is without question one of great accomplishment and unmatched in recent memory. We have not pulled any punches and shown favoritism. Public corruption investigations should not be rushed or delayed for improper purposes.

In public corruption cases, the professionals at the Department know it is an area that will be scrutinized and we can take the criticism. For example, we have recently been criticized for the plea agreement entered into with President Clinton's former National Security Advisor and or executing search warrants in a particular matter close to an election. No Democrats criticized us for either. Now, however, there is a chorus of partisan criticism for events that have not occurred. There has been no retaliation for the Cunningham case. We applaud it; main Justice has assisted with it; and it continues. And there has been no retaliation for not proceeding fast enough in a public corruption case in New Mexico. According to Mr. Iglesias's comments reported it the press, that matter also continues. Let me make clear what the Attorney General has stated, [insert statement].

Some, particularly in the other body, claim that our reasons for excusing these U.S. Attorneys was to make way for preselected Republican lawyers or to circumvent the Senate's advise and consent role. The facts, however, prove otherwise. Setting aside the situation in Eastern Arkansas, which we have said is different from the rest, we did not have any lawyers identified for these positions. We worked with home state Senators only after we asked the seven to move on. The facts are that since March 9, 2006, the date the new appointment authority went into effect, the Administration has nominated 16 individuals to serve as US Attorney and 12 have been confirmed. Furthermore, 18 vacancies have been created since March 9, 2006. Of those 18 vacancies, the Administration has nominated candidates to fill six of these position (3 have been confirmed), we have interviewed candidates for 8 more, and are waiting to receive names for the remaining four positions – all in consultation with home-state Senators.

Let me repeat what we have said repeatedly and what the record reflects, in every single case it is the goal of the Bush Administration to have a U.S. Attorney that is confirmed by the Senate.

In conclusion, in hindsight, although the Department continues to believe our decision to remove these individuals was the correct one, it would have been much better to have addressed the relevant issues up front with each U.S. Attorney. Second, no decision was made for inappropriate political reasons and we have never taken [finish conclusion].

The Department remains focused on making sure that the good work being done by the career lawyers in all of those offices across the country continues uninterrupted and that qualified candidates are nominated as soon as possible for those positions.

Elston, Michael (ODAG)

From: Moschella, William
Sent: Monday, March 05, 2007 12:51 PM
To: Goodling, Monica; Sampson, Kyle; Elston, Michael (ODAG); Hertling, Richard; Scott-Finan, Nancy; Roehrkasse, Brian; Scolinos, Tasia
Subject: Opening Statement Revised

Attachments: Hearing1.doc

Hearing1.doc (34 KB)

William E. Moschella
Opening Statement

Madam Chairman, Mr. Cannon, and Members of the Subcommittee, I appreciate the opportunity to testify today on H.R. 580. Although this hearing is styled as a legislative hearing, I am sure that most of the questions will focus on the circumstances surrounding the Department's request that eight U.S. Attorneys resign. It is to these issues that I will address my opening comments.

At the outset, I want to say that the Attorney General appreciates the service of all eight U.S. Attorneys who were asked to resign. They are all talented lawyers, and we have no doubt they will achieve success in their future endeavors.

It is apparent that these political appointees, who served at the pleasure of the President, disagree with the Attorney General's and Deputy Attorney General's explanation that they were asked to resign for "performance-related" reasons. Both the Attorney General and Deputy used the word "performance" broadly to include issues relating to policy, priorities, or management.

In hindsight, the Department agrees with The Washington Post's editorial over the weekend that this situation was handled poorly. The US Attorneys who were asked to resign were not provided specific reasons for the request in an effort to avoid protracted debate about the decision and not prejudice negatively their future employment prospects. The Department would have preferred not to talk at all about those reasons, but disclosures in the press and requests for information from Congress altered those best laid plans. A decision was made to let them down easy; in fact, it seems, just the opposite happened. The Department's failure to provide reasons led to wild speculation about our motives and that is unfortunate because faith and confidence in our justice system is more important than any one individual.

That said, the Department stands by its decision. It is clear to us that after our closed door briefings with House and Senate members and staff, some agree with our decisions and some disagree – such is the nature of subjective judgments. Just because you might disagree with a decision, does not mean it was made for improper political reasons – there were reasons for each decision.

It is important to recognize that one of the most important responsibilities the Attorney General has is to manage effectively the Department of Justice and that requires being willing to make tough decisions. Furthermore, it is the Attorney General's responsibility to ensure that the priorities he sets and those of the President are carried out. The Attorney General has announced specific priorities and has every expectation that they will be followed. U.S. Attorneys and other political appointees in the Department, like all other departments under all other presidents understand that they are charged with carrying out those policies and that they serve at the pleasure of the President.

Let me say a word about the EARS evaluations. Several have made the point that these evaluations indicate good ratings for the US Attorneys. That is necessarily so as they are not evaluations of the U.S. Attorneys themselves. The EARS evaluations are evaluations of the

office. The US Attorneys supervisors are the AG and Deputy AG, and neither are asked about the U.S. Attorneys as part of these evaluations.

One troubling allegation that has been made is that certain of the U.S. Attorneys were asked to move on because actions they took or didn't take relating to public corruptions cases. These charges are dangerous, baseless, and irresponsible. This Administration has never removed a United States Attorney in an effort to retaliate against them or interfere with or inappropriately influence a public integrity investigation.

The Attorney General and the FBI Director have both made public corruption a very high priority. Integrity in government and trust in our public officials and institutions is paramount. The record of this Justice Department is without question one of great accomplishment and unmatched in recent memory. We have not pulled any punches or shown political favoritism. Public corruption investigations should not be rushed or delayed for improper purposes.

In public corruption cases, the professionals at the Department know it is an area that will be scrutinized, and we can take the criticism. For example, we have recently been criticized for the plea agreement entered into with President Clinton's former National Security Advisor and or executing search warrants related to a Republican congressman close to an election. No Democrats criticized us for either. Now, however, there is a chorus of partisan criticism for events that have not occurred. There has been no retaliation for the Cunningham case. We applaud it; main Justice has assisted with it; and it continues. And there has been no retaliation for not proceeding fast enough in a public corruption case in New Mexico. According to Mr. Iglesias's comments reported in the press, that matter also continues.

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In conclusion, let me make three points. First, although the Department continues to believe our decision to remove these individuals was the correct one, it would have been much better to have addressed the relevant issues up front with each U.S. Attorney. Second, we have not taken action to influence any particular public corruption case and would never do so. Third, we never intended to circumvent the confirmation process.

I would be happy to take you questions.

Elston, Michael (ODAG)

From: Elston, Michael (ODAG)
Sent: Monday, March 05, 2007 2:58 PM
To: Long, Linda E; Brinkley, Winnie
Subject: Fw:

Importance: High

-----Original Message-----
From: Sampson, Kyle
To: McNulty, Paul J; Moschella, William; Hertling, Richard; Scolinos, Tasia; Battle, Michael (USAEO)
CC: Elston, Michael (ODAG); Roehrkasse, Brian; Goodling, Monica; Washington, Tracy T
Sent: Mon Mar 05 14:48:36 2007
Subject: RE:

Okay -- two things:

1. We are set for 5pm at the White House. I need WAVES info from each of you: DOBs and SSNs.
2. Kelley says that among other things they'll want to cover (1) Administration's position on the legislation (Will's written testimony says that we oppose the bill, raising White House concerns); and (2) how we are going to respond substantively to each of the U.S. Attorney's allegations that they were dismissed for improper reasons.

From: Sampson, Kyle
Sent: Monday, March 05, 2007 2:30 PM
To: McNulty, Paul J; Moschella, William; Hertling, Richard; Scolinos, Tasia; Battle, Michael (USAEO)
Cc: Elston, Michael (ODAG); Roehrkasse, Brian; Goodling, Monica; Washington, Tracy T
Subject: FW:
Importance: High

All; please see the below. I propose to you all that I propose 5pm to Bill -- I assume they'll want us to go over there. Thoughts?

From: Kelley, William K. [mailto:William_K._Kelley@who.eop.gov]
Sent: Monday, March 05, 2007 1:57 PM
To: Sampson, Kyle
Subject:

Kyle--We've been tasked with getting a meeting together with you, Paul, Will, DOJ leg and pa, and maybe Battle -- today -- to go over the Administration's position on all aspects of the US Atty issue, including what we are going to say about the proposed legislation and why the US Attys were asked to resign. There's a hearing tomorrow at which Will is scheduled to testify, so we have to get this group together with some folks here asap. Can you look into possible times? Thanks, and sorry to impose.

Elston, Michael (ODAG)

Subject:	U.S. Attorneys Meeting
Location:	White House
Start:	Mon 3/5/2007 5:00 PM
End:	Mon 3/5/2007 6:00 PM
Show Time As:	Tentative
Recurrence:	(none)
Meeting Status:	Not yet responded
Required Attendees:	Sampson, Kyle; Goodling, Monica; Moschella, William; Elston, Michael (ODAG); Battle, Michael (USAEO); Hertling, Richard; Scolinos, Tasia; Roehrkasse, Brian

Attendees: Will Moschella, Mike Elston, Kyle Sampson, Monica Goodling, Mike Battle, Richard Hertling, Tasia Scolinos, Brian Roehrkasse

POC: Winnie

Elston, Michael (ODAG)

From: Moschella, William
Sent: Monday, March 05, 2007 7:58 PM
To: Sampson, Kyle; McNulty, Paul J; Elston, Michael (ODAG); Goodling, Monica; Hertling, Richard; Scolinos, Tasia; Roehrkasse, Brian
Subject: RE: Moschella Oral Testimony

In the second graph, replace "the President's and the Attorney General's priorities and the Department's policies" with "the Administration's policies and priorities".

In the last graph, I suggest replacing "taken any action" with "asked anyone to resign".

This is really good. Thanks everyone for the collaboration.

From: Sampson, Kyle
Sent: Monday, March 05, 2007 7:27 PM
To: McNulty, Paul J; Moschella, William; Elston, Michael (ODAG); Goodling, Monica; Hertling, Richard; Scolinos, Tasia; Roehrkasse, Brian
Subject: FW: Moschella Oral Testimony
Importance: High

Gang, I just sent the below draft Moschella Oral Statement to the White House. Let me know if you have any comments (though I wouldn't mind giving the pen up at this point; let me know).

From: Sampson, Kyle
Sent: Monday, March 05, 2007 7:25 PM
To: 'Kelley, William K.'
Cc: 'Oprison, Christopher G.'
Subject: Moschella Oral Testimony
Importance: High

Bill, can you forward this on to Dana and Cathie (and whomever else in the White House you deem appropriate) for review and approval? Thanks!

<< File: Moschella Oral Statement.doc >>

Kyle Sampson
Chief of Staff
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530
(202) 514-2001 wk.
(202) 305-5289 cell
kyle.sampson@usdoj.gov

Elston, Michael (ODAG)

From: Sampson, Kyle
Sent: Monday, March 05, 2007 10:24 PM
To: Moschella, William; Elston, Michael (ODAG); McNulty, Paul J
Subject: Re: Moschella Oral Testimony

No concerns here, though I would add your comments in.

-----Original Message-----
From: Moschella, William
To: Elston, Michael (ODAG); McNulty, Paul J
CC: Sampson, Kyle
Sent: Mon Mar 05 21:37:13 2007
Subject: FW: Moschella Oral Testimony

Thoughts. I have no problems with the changes.

From: Oprison, Christopher G. [mailto:Christopher_G._Oprison@who.eop.gov]
Sent: Monday, March 05, 2007 9:33 PM
To: Moschella, William
Cc: Sampson, Kyle; Kelley, William K.; Scudder, Michael Y.; Fielding, Fred F.; Gibbs, Landon M.
Subject: RE: Moschella Oral Testimony

Will - attached please find a redlined version with suggested edits. Thanks

Chris

From: Sampson, Kyle [mailto:Kyle.Sampson@usdoj.gov]
Sent: Monday, March 05, 2007 8:43 PM
To: Oprison, Christopher G.
Cc: Moschella, William
Subject: RE: Moschella Oral Testimony

Thx, Chris. Will now has the pen, so please send the comments to him directly (but cc me, if you would). Thx!

From: Oprison, Christopher G. [mailto:Christopher_G._Oprison@who.eop.gov]
Sent: Monday, March 05, 2007 8:40 PM
To: Sampson, Kyle
Subject: RE: Moschella Oral Testimony

we are gathering comments and should have this back to you shortly

---

From: Sampson, Kyle [mailto:Kyle.Sampson@usdoj.gov]
Sent: Monday, March 05, 2007 7:25 PM
To: Kelley, William K.
Cc: Oprison, Christopher G.
Subject: Moschella Oral Testimony
Importance: High

Bill, can you forward this on to Dana and Cathie (and whomever else in the White House you deem appropriate) for review and approval? Thanks!

<<Moschella Oral Statement.doc>>

Kyle Sampson
Chief of Staff
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530
(202) 514-2001 wk.
(202) 305-5289 cell
kyle.sampson@usdoj.gov

Elston, Michael (ODAG)

From: Goodling, Monica
Sent: Monday, March 05, 2007 10:48 PM
To: Moschella, William; Elston, Michael (ODAG)
Subject: RE: DRAFT

Elston -- re NV and AZ -- do you know the facts from CRIM's Obscenity task force regarding the details of what happened in those cases?

-----Original Message-----
From: Moschella, William
Sent: Monday, March 05, 2007 10:47 PM
To: Goodling, Monica
Subject: Re: DRAFT

What does it mean that they did not support the obscenity prosecution in their district? Were the cases brought anyway without their support?

Sent from my BlackBerry Wireless Handheld

-----Original Message-----
From: Goodling, Monica
To: Moschella, William
Sent: Mon Mar 05 21:55:56 2007
Subject: DRAFT

Full doc has all.

<<US Attorney leadership assessment writeup.doc>>

Elston, Michael (ODAG)

From: Elston, Michael (ODAG)
Sent: Tuesday, March 06, 2007 7:54 AM
To: Goodling, Monica; Moschella, William
Subject: Re: DRAFT

I do not. I remember Alice asking us to call them to encourage them to take the cases -- can't remember whether that happened or what became of those cases. Alice will know.

-----Original Message-----
From: Goodling, Monica
To: Moschella, William; Elston, Michael (ODAG)
Sent: Mon Mar 05 22:48:21 2007
Subject: RE: DRAFT

Elston -- re NV and AZ -- do you know the facts from CRIM's Obscenity task force regarding the details of what happened in those cases?

-----Original Message-----
From: Moschella, William
Sent: Monday, March 05, 2007 10:47 PM
To: Goodling, Monica
Subject: Re: DRAFT

What does it mean that they did not support the obscenity prosecution in their district? Were the cases brought anyway without their support?

Sent from my BlackBerry Wireless Handheld

-----Original Message-----
From: Goodling, Monica
To: Moschella, William
Sent: Mon Mar 05 21:55:56 2007
Subject: DRAFT

Full doc has all.

<<US Attorney leadership assessment writeup.doc>>

Elston, Michael (ODAG)

From: Moschella, William
Sent: Tuesday, March 06, 2007 8:10 AM
To: Elston, Michael (ODAG); Goodling, Monica
Subject: Re: DRAFT

Can you call her?

Sent from my BlackBerry Wireless Handheld

-----Original Message-----
From: Elston, Michael (ODAG)
To: Goodling, Monica; Moschella, William
Sent: Tue Mar 06 07:53:33 2007
Subject: Re: DRAFT

I do not. I remember Alice asking us to call them to encourage them to take the cases -- can't remember whether that happened or what became of those cases. Alice will know.

-----Original Message-----
From: Goodling, Monica
To: Moschella, William; Elston, Michael (ODAG)
Sent: Mon Mar 05 22:48:21 2007
Subject: RE: DRAFT

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<<US Attorney leadership assessment writeup.doc>>

Elston, Michael (ODAG)

From: Moschella, William
Sent: Tuesday, March 06, 2007 9:48 AM
To: 'Oprison, Christopher G.'
Cc: Sampson, Kyle; Kelley, William K.; Scudder, Michael Y.; Fielding, Fred F.; Gibbs, Landon M.; Scolinos, Tasia; McNulty, Paul J; Elston, Michael (ODAG); Goodling, Monica
Subject: RE: Moschella Oral Testimony
Attachments: moschellafinal.2.doc; moschellafinal.1.doc

All, attached is the final document. We accepted all of Chris's proposed changes. I have made some other small minor tweaks and those are tracked so that you can see them in "moschellafinal.1.doc" and the clean version is "moschellafinal.2.doc".

From: Oprison, Christopher G. [mailto:Christopher_G._Oprison@who.eop.gov]
Sent: Monday, March 05, 2007 9:33 PM
To: Moschella, William
Cc: Sampson, Kyle; Kelley, William K.; Scudder, Michael Y.; Fielding, Fred F.; Gibbs, Landon M.
Subject: RE: Moschella Oral Testimony

Will - attached please find a redlined version with suggested edits. Thanks

Chris

From: Sampson, Kyle [mailto:Kyle.Sampson@usdoj.gov]
Sent: Monday, March 05, 2007 8:43 PM
To: Oprison, Christopher G.
Cc: Moschella, William
Subject: RE: Moschella Oral Testimony

Thx, Chris. Will now has the pen, so please send the comments to him directly (but cc me, if you would). Thx!

From: Oprison, Christopher G. [mailto:Christopher_G._Oprison@who.eop.gov]
Sent: Monday, March 05, 2007 8:40 PM
To: Sampson, Kyle
Subject: RE: Moschella Oral Testimony

we are gathering comments and should have this back to you shortly

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From: Sampson, Kyle [mailto:Kyle.Sampson@usdoj.gov]
Sent: Monday, March 05, 2007 7:25 PM
To: Kelley, William K.
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Subject: Moschella Oral Testimony
Importance: High

Bill, can you forward this on to Dana and Cathie (and whomever else in the White House you deem appropriate) for review and approval? Thanks!

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William E. Moschella
Opening Statement

Madam Chairman, Mr. Cannon, and Members of the Subcommittee, I appreciate the opportunity to testify today.

Let me begin by stating clearly that the Department of Justice appreciates the public service that was rendered by the seven U.S. Attorneys who were asked to resign last December. Each is a talented lawyer who served as U.S. Attorney for more than four years, and we have no doubt they will achieve success in their future endeavors – just like the 40 or so other U.S. Attorneys who have resigned for various reasons over the last six years.

Let me also stress that one of the Attorney General's most important responsibilities is to manage the Department of Justice. Part of managing the Department is ensuring that the Administration's priorities and policies are carried out consistently and uniformly. Individuals who have the high privilege of serving as presidential appointees have an obligation to carry out the Administration's priorities and policies.

U.S. Attorneys in the field (as well as Assistant Attorneys General here in Washington) are duty bound not only to make prosecutorial decisions, but also to implement and further the Administration and Department's priorities and policy decisions. In carrying out these responsibilities they serve at the pleasure of the President and report to the Attorney General. If a judgment is made that they are not executing their responsibilities in a manner that furthers the management and policy goals of departmental leadership, then it is appropriate that they be asked to resign so that they can be replaced by other individuals who will.

To be clear, it was for reasons related to policy, priorities and management – what has been referred to broadly as "performance-related" reasons – that these U.S. Attorneys were asked to resign. I want to emphasize that the Department – out of respect for the U.S. Attorneys at issue – would have preferred not to talk at all about those reasons, but disclosures in the press and requests for information from Congress altered those best laid plans. In hindsight, perhaps this situation could have been handled better. These U.S. Attorneys could have been informed at the time they were asked to resign about the reasons for the decision. Unfortunately, our failure to provide reasons to these individual U.S. Attorneys has only served to fuel wild and inaccurate speculation about our motives, and that is unfortunate because faith and confidence in our justice system is more important than any one individual.

That said, the Department stands by the decisions. It is clear that after closed door briefings with House and Senate members and staff, some agree with the reasons that form the basis for our decisions and some disagree – such is the nature of subjective judgments. Just because you might disagree with a decision, does not mean it was made for improper political reasons – there were appropriate reasons for each decision.

One troubling allegation is that certain of these U.S. Attorneys were asked to resign because of actions they took or didn't take relating to public corruption cases. These charges are dangerous, baseless and irresponsible. This Administration has never removed a U.S. Attorney

to retaliate against them or interfere with or inappropriately influence a public corruption case. Not once.

The Attorney General and the Director of the FBI have made public corruption a high priority. Integrity in government and trust in our public officials and institutions is paramount. Without question, the Department's record is one of great accomplishment that is unmatched in recent memory. The Department has not pulled any punches or shown any political favoritism. Public corruption investigations are neither rushed nor delayed for improper purposes.

Some, particularly in the other body, claim that the Department's reasons for asking these U.S. Attorneys to resign was to make way for preselected Republican lawyers to be appointed and circumvent Senate confirmation. The facts, however, prove otherwise. After the seven U.S. Attorneys were asked to resign last December, the Administration immediately began consulting with home-state Senators and other home-state political leaders about possible candidates for nomination. Indeed, the facts are that since March 9, 2006, the date the Attorney General's new appointment authority went into effect, the Administration has nominated 16 individuals to serve as U.S. Attorney and 12 have been confirmed. Furthermore, 18 vacancies have arisen since March 9, 2006. Of those 18 vacancies, the Administration (1) has nominated candidates for six of them (and of those six, the Senate has confirmed three); (2) has interviewed candidates for eight of them; and (3) is working to identify candidates for the remaining four of them. Let me repeat what has been said many times before and what the record reflects: the Administration is committed to having a Senate-confirmed U.S. Attorney in every single federal district.

In conclusion, let me make three points: First, although the Department stands by the decision to ask these U.S. Attorneys to resign, it would have been much better to have addressed the relevant issues up front with each of them. Second, the Department has not asked anyone to resign to influence any public corruption case – and would never do so. Third, the Administration at no time intended to circumvent the confirmation process.

I would be happy to take your questions.

William E. Moschella
Opening Statement

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Deleted: the Department's

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That said, the Department stands by the decisions. It is clear that after closed door briefings with House and Senate members and staff, some agree with the reasons that form the basis for our decisions and some disagree – such is the nature of subjective judgments. Just because you might disagree with a decision, does not mean it was made for improper political reasons – there were appropriate reasons for each decision.

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Deleted: both

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Deleted: of them

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Deleted: taken any action

I would be happy to take your questions.

Deleted: .

Elston, Michael (ODAG)

From: Wade, Jill C
Sent: Tuesday, March 06, 2007 12:27 PM
To: Elston, Michael (ODAG)
Subject: Fw: Cummins email for WEM review

Attachments: Cummins Email.pdf

Perhaps I should have cc'd you on this email.

Jill C. Wade
U.S. DEPARTMENT OF JUSTICE
Office of Legislative Affairs
(202) 514-3597

-----Original Message-----
From: Wade, Jill C
To: Moschella, William; Scott-Finan, Nancy
CC: Seidel, Rebecca
Sent: Tue Mar 06 11:50:08 2007
Subject: Cummins email for WEM review

I would not be surprised if this email is raised at WEM hearing today. See attached. (I faxed to catalina just now bc I am on Hill). I will have a summary from this SJC hearing on us atty resignations asap. Hearing is still going strong.

J

Jill C. Wade
U.S. DEPARTMENT OF JUSTICE
Office of Legislative Affairs
(202) 514-3597

-----Original Message-----
From: Cabral, Catalina
To: Wade, Jill C; Scott-Finan, Nancy
Sent: Tue Mar 06 11:30:50 2007
Subject:

<<Cummins Email.pdf>>

Cummins Email.pdf
(57 KB)

Catalina abral
U.S. DEPARTMENT OF JUSTICE
Office of Legislative Affairs
Catalina.Cabral@USDOJ.gov
(202) 514-4828

From: H.E. Cummins [mailto:h
Sent: Tue 2/20/2007 5:06 PM
To: Dan Bogden; Paul K. Charlton; David Iglesias; Carol Lam; McKay, John (Law Adjunct)
Subject: on another note

Mike Elston from the DAG's office called me today. The call was amiable enough, but clearly spurred by the Sunday Post article. The essence of his message was that they feel like they are taking unnecessary flak to avoid trashing each of us specifically or further, but if they feel like any of us intend to continue to offer quotes to the press, or organize behind the scenes congressional pressure, then they would feel forced to somehow pull their gloves off and offer public criticisms to defend their actions more fully. I can't offer any specific quotes, but that was clearly the message. I was tempted to challenge him and say something movie-like such as "are you threatening ME???", but instead I kind of shrugged it off and said I didn't sense that anyone was intending to perpetuate this. He mentioned my quote on Sunday and I didn't apologize for it, told him it was true and that everyone involved should agree with the truth of my statement, and pointed out to him that I stopped short of calling them liars and merely said that IF they were doing as alleged they should retract. I also made it a point to tell him that all of us have turned down multiple invitations to testify. He reacted quite a bit to the idea of anyone voluntarily testifying and it seemed clear that they would see that as a major escalation of the conflict meriting some kind of unspecified form of retaliation.

I don't personally see this as any big deal and it sounded like the threat of retaliation amounts to a threat that they would make their recent behind doors senate presentation public. I didn't tell him that I had heard about the details in that presentation and found it to be a pretty weak threat since everyone that heard it apparently thought it was weak

I don't want to stir you up conflict or overstate the threatening undercurrent in the call, but the message was clearly there and you should be aware before you speak to the press again if you choose to do that. I don't feel like I am betraying him by reporting this to you because I think that is probably what he wanted me to do. Of course, I would appreciate maximum opsec regarding this email and ask that you not forward it or let others read it.

Bud

Elston, Michael (ODAG)

From: Elston, Michael (ODAG)
Sent: Tuesday, March 06, 2007 12:28 PM
To: 'Julie Elston'
Subject: FW: Cummins email for WEM review

Attachments: Cummins Email.pdf

-----Original Message-----
From: Wade, Jill C
Sent: Tuesday, March 06, 2007 12:27 PM
To: Elston, Michael (ODAG)
Subject: Fw: Cummins email for WEM review

Perhaps I should have cc'd you on this email.

Jill C. Wade
U.S. DEPARTMENT OF JUSTICE
Office of Legislative Affairs
(202) 514-3597

-----Original Message-----
From: Wade, Jill C
To: Moschella, William; Scott-Finan, Nancy
CC: Seidel, Rebecca
Sent: Tue Mar 06 11:50:08 2007
Subject: Cummins email for WEM review

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Cummins Email.pdf
(57 KB)

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To: Wade, Jill C; Scott-Finan, Nancy
Sent: Tue Mar 06 11:30:50 2007
Subject:

<<Cummins Email.pdf>>

Catalina Cabral
U.S. DEPARTMENT OF JUSTICE

Office of Legislative Affairs
Catalina.Cabral@USDOJ.gov
(202) 514-4828

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Bud

Elston, Michael (ODAG)

From: Scott-Finan, Nancy
Sent: Tuesday, March 06, 2007 12:54 PM
To: Goodling, Monica; Sampson, Kyle; Moschella, William; Elston, Michael (ODAG); Hertling, Richard
Subject: FW: US Atty - ODAG Tstmny

Attachments: Moschella Testimony.doc

Moschella
stimony.doc (86 KB

Do we want to accept the changes from OMB? Thanks.

-----Original Message-----
From: Gibbs, Landon M. [mailto:Landon_M._Gibbs@who.eop.gov]
Sent: Tuesday, March 06, 2007 11:35 AM
To: Silas, Adrien
Cc: Green, Richard E.; Simms, Angela M.; Hertling, Richard; Moschella, William; Scott-Finan, Nancy; Oprison, Christopher G.
Subject: FW: US Atty - ODAG Tstmny

The EOP approves the attached version of the testimony.

Thanks,

Landon Gibbs
Deputy Associate Director
Office of Counsel to the President
(202) 456-5214

Department of Justice

STATEMENT

OF

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

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES HOUSE OF REPRESENTATIVES

CONCERNING

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

PRESENTED ON

MARCH 6, 2007

Testimony
of

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

Committee on the Judiciary
United States House of Representatives

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

March 6, 2007

Chairwoman Sanchez, Congressman Cannon, and members of the Subcommittee, thank you for the invitation to discuss the importance of the Justice Department's United States Attorneys.

Although – as previously noted by the Attorney General and the Deputy Attorney General in their testimony, the Department of Justice continues to believe the Attorney General's current interim appointment authority is good policy, and has concerns about H.R. 580, the "Preserving United States Attorneys Independence Act of 2007," the Department looks forward to working with the Committee in an effort to reach common ground on this important issue. It should be made clear, however, that despite the speculation, it was never the objective of the Department, when exercising this interim appointment authority, to circumvent the Senate confirmation process.

Some background. As the chief federal law-enforcement officers in their districts, our 93 U.S. Attorneys represent the Attorney General and the Department of Justice throughout the United States. U.S. Attorneys are not just prosecutors; they are government officials charged with managing and implementing the policies and priorities of the President and the Attorney General. The Attorney General has set forth key priorities for the Department of Justice, and in each of their districts, U.S. Attorneys lead the Department's efforts to protect America from terrorist attacks and fight violent crime, combat illegal drug trafficking, ensure the integrity of government and the marketplace, enforce our immigration laws, and prosecute crimes that endanger children and families—including child pornography, obscenity, and human trafficking.

United States Attorneys serve at the pleasure of the President and report to the Attorney General in the discharge of their offices. Like any other high-ranking officials in the Executive Branch, they may be removed for any reason or no reason. The Department of Justice—including the office of United States Attorney—was created precisely so that the government's legal business could be effectively managed and carried out through a coherent program under the supervision of the Attorney General. Unlike judges, who are supposed to act independently of those who nominate them, U.S. Attorneys are accountable to the Attorney General. And while US Attorneys are charged with making prosecutorial decisions, they are also duty bound to implement and further the Administration's and Department's priorities and policy decisions. 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. In no

context is accountability more important to our society than on the front lines of law enforcement and the exercise of prosecutorial discretion. Thus, United States Attorneys are, and should be, accountable to the Attorney General.

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

Turnover in the position of U.S. Attorney is not uncommon and should be expected, particularly after a U.S. Attorney's four-year term has expired. When a presidential election results in a change of administration, every U.S. Attorney is asked to resign so the new President can nominate 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 [is this right? - I think it was only about 35] of the U.S. Attorneys appointed at the beginning of the Bush Administration had left office by the end of 2006. Of the U.S. Attorneys whose resignations have been the subject of recent discussion, each one had served longer than four years prior to being asked to resign.

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Deleted: 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.¶

Given the reality of turnover among the U.S. Attorneys, our system depends on the dedicated service of the career investigators and prosecutors. While a new Administration may articulate new priorities or emphasize different types of cases, the effect of a U.S. Attorney on an ongoing investigation or prosecution is, in fact, minimal, 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.

Deleted: and that is

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 U.S. Attorney. Often, the Department looks to the First Assistant U.S. Attorney or another senior manager in the office to serve as U.S. Attorney on an interim basis. When neither the First Assistant nor another senior manager in the office is able or willing to serve as interim U.S. Attorney, or when the appointment of either would not be appropriate in the circumstances, the Department has looked to other, qualified Department employees. For example, in the District of Minnesota and the Northern District of Iowa, the First Assistant took federal retirement at or near the same time that the U.S. Attorney resigned, which required the Department to select another official to lead the office.

As stated above, the Administration has not sought to avoid the confirmation process in the Senate by appointing an interim U.S. Attorney and then refusing to move forward—in consultation with home-state Senators—on the selection, nomination, confirmation and appointment of a new U.S. Attorney. In every case where a vacancy occurs, the Administration is committed to having a Senate-confirmed U.S. Attorney. And the Administration's actions bear this out. In each instance, the President either has made a nomination, or the Administration is working to select candidates for nomination. The appointment of U.S. Attorneys by and with the advice and consent of the Senate is unquestionably the appointment method preferred by the Senate, and it is unquestionably the appointment method preferred by the Administration.

Deleted: t no time, however, has

Deleted: Not once.

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Deleted: Every time a vacancy has arisen,

Since January 20, 2001, 124 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 18 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 16 individuals for Senate consideration since the appointment authority was amended, with 12 of those nominees having been confirmed to date. Of the 18 vacancies that have occurred since the time that the law was amended, the Administration has nominated candidates to fill six of these positions, has interviewed candidates for nomination for eight more positions, and is waiting to receive names to set up interviews for the remaining positions—all in consultation with home-state Senators.

However, while that nomination process continues, the Department must have a leader in place to carry out the important work of these offices and to ensure continuity of operations. 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, either under 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. Ensuring that the interim and permanent appointment process runs smoothly and effectively will be the focus of the Department's efforts to reach common ground with the Congress on this issue.

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

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Deleted: Under the VRA, the First Assistant may serve in an acting capacity for only 210 days, unless a nomination is made during that period. Under an Attorney General appointment, the interim U.S. Attorney serves until a nominee is confirmed the Senate. There is no other statutory authority for filling such a vacancy, and thus the use of the Attorney General's appointment authority, as amended last year, signals nothing other than a decision to have an interim U.S. Attorney who is not the First Assistant. It does not indicate an intention to avoid the confirmation process, as some have suggested.

Deleted: ¶
H.R. 580 would supersede last year's amendment to 28 U.S.C. § 546 that authorized the Attorney General to appoint an interim U.S. Attorney to serve until a person fills the position by being confirmed by the Senate and appointed by the President. Last year's amendment was intended to ensure continuity of operations in the event of a U.S. Attorney vacancy that lasts longer than expected. ¶

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Deleted: Prior to last year's amendment, the Attorney General could appoint an interim U.S. Attorney for the first 120 days after a vacancy arose; thereafter, the district court was authorized to appoint an interim U.S. Attorney. In cases in which 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. ¶
¶
Two examples demonstrate the shortcomings of the previous system. During President Reagan's Administration, the district court ... [1]

Prior to last year's amendment, the Attorney General could appoint an interim U.S. Attorney for the first 120 days after a vacancy arose; thereafter, the district court was authorized to appoint an interim U.S. Attorney. In cases in which 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.

Two examples demonstrate the shortcomings of the previous system. During President Reagan's Administration, the district court appointed in the Southern District of West Virginia an interim U.S. Attorney who was neither a Justice Department employee nor an individual who had been subject to a FBI background review. The court-appointed U.S. Attorney, who had ties to a political party, sought access to law-enforcement sensitive investigative materials related to the office's most sensitive public corruption investigation, which was targeting a state-wide leader of the same party. The problem was that the interim U.S. Attorney had no clearances and had not undergone a

background investigation so that the Attorney General and the Federal Bureau of Investigation could have complete confidence in the individual or his reasons for making inquiries into the case. The appointment forced the Department to remove the case files from the U.S. Attorney's Office in order to protect the integrity of the investigation and prohibit the U.S. Attorney from making any additional inquiries into the case. To resolve the problem, the Department expedited a nomination for the permanent U.S. Attorney and, with the extraordinary assistance of the Senate, he was confirmed to replace the court-appointed individual within a few weeks.

In a second case, occurring in 2005, the district court attempted to appoint an individual who similarly was not a Department of Justice or federal employee and had never undergone the appropriate background check. As a result, this individual would not have been permitted access to classified information and would not have been able to receive information from his district's anti-terrorism coordinator, its Joint Terrorism Task Force, or its Field Intelligence Group. In a post 9/11 world, this situation was unacceptable. This problem was only resolved when the President recess-appointed a career federal prosecutor to serve as U.S. Attorney until a candidate could be nominated and confirmed.

Notwithstanding these two notorious instances, the district courts in most instances have simply appointed the Attorney General's choice as interim U.S. Attorney, revealing the fact that most judges have 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 eliminated a procedure that in a minority of cases created unnecessary problems without any apparent benefit.

The Department's principal concern with H.R. 580 is that it would be inconsistent with separation of powers principles to vest federal courts with the authority to appoint a critical Executive Branch officer such as a U.S. Attorney. We are aware of no other agency where federal judges—members of a separate branch of government—appoint on an interim basis senior, policymaking 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. In no context is accountability more important to our society than on the front lines of law enforcement and the exercise of prosecutorial discretion. United States Attorneys are, and should be, accountable to the Attorney General.

The Administration has repeatedly demonstrated its commitment to having a Senate-confirmed U.S. Attorney in every federal district, thereby calling into question the need for H.R. 580. 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.

Elston, Michael (ODAG)

From: Scott-Finan, Nancy
Sent: Tuesday, March 06, 2007 1:16 PM
To: Sampson, Kyle; Goodling, Monica; Moschella, William; Elston, Michael (ODAG); Scolinos, Tasia; Roehrkasse, Brian
Cc: Henderson, Charles V; Clifton, Deborah J; Silas, Adrien
Subject: FW: Hearing on H.R. 580

Importance: High

Attachments: USAttys01.doc.pdf

We have provided the cleared statement to the Hill.

From: Scott-Finan, Nancy
Sent: Tuesday, March 06, 2007 1:11 PM
To: 'Mincberg, Elliot'; 'Tamarkin, Eric'; 'Johnson, Michone'; Jezierski, Crystal; 'Jeffries, Stewart'; Flores, Daniel; 'Iandoli, Matt'
Cc: Hertling, Richard; Tracci, Robert N; Seidel, Rebecca
Subject: Hearing on H.R. 580
Importance: High

All,
Attached is the Department's written statement which has just been cleared through the interagency clearance process. I apologize for the lateness of providing it to everyone. Hard copy will be hand delivered.

USAttys01.doc.pdf
(63 KB)

Department of Justice

STATEMENT

OF

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

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES HOUSE OF REPRESENTATIVES

CONCERNING

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

PRESENTED ON

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Testimony
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William E. Moschella
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Committee on the Judiciary
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"H.R. 580, Restoring Checks and Balances in the Nomination Process of U.S. Attorneys"

March 6, 2007

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consistent with the application of criminal enforcement policy under the Attorney General. In no context is accountability more important to our society than on the front lines of law enforcement and the exercise of prosecutorial discretion. Thus, United States Attorneys are, and should be, accountable to the Attorney General.

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

Turnover in the position of U.S. Attorney is not uncommon and should be expected, particularly after a U.S. Attorney's four-year term has expired. When a presidential election results in a change of administration, every U.S. Attorney is asked to resign so the new President can nominate a successor for confirmation by the Senate. Moreover, U.S. Attorneys do not necessarily stay in place even during an administration. For example, more than 40 percent of the U.S. Attorneys appointed at the beginning of the Bush Administration had left office by the end of 2006. Of the U.S. Attorneys whose resignations have been the subject of recent discussion, each one had served longer than four years prior to being asked to resign.

Given the reality of turnover among the U.S. Attorneys, our system depends on the dedicated service of the career investigators and prosecutors. While a new Administration may articulate new priorities or emphasize different types of cases, the effect of a U.S. Attorney on an ongoing investigation or prosecution is, in fact, minimal, 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 U.S. Attorney. Often, the Department looks to the First Assistant U.S. Attorney or another senior manager in the office to serve as U.S. Attorney on an interim basis. When neither the First Assistant nor another senior manager in the office is able or willing to serve as interim U.S. Attorney, or when the appointment of either would not be appropriate in the circumstances, the Department has looked to other, qualified Department employees. For example, in the District of Minnesota and the Northern District of Iowa, the First Assistant took federal retirement at or near the same time that the U.S. Attorney resigned, which required the Department to select another official to lead the office.

As stated above, the Administration has not sought to avoid the confirmation process in the Senate by appointing an interim U.S. Attorney and then refusing to move forward — in consultation with home-state Senators — on the selection, nomination, confirmation and appointment of a new U.S. Attorney. In every case where a vacancy occurs, the Administration is committed to having a Senate-confirmed U.S. Attorney. And the Administration's actions bear this out. In each instance, the President either has made a nomination, or the Administration is working to select candidates for nomination. The appointment of U.S. Attorneys by and with the advice and consent of the Senate is unquestionably the appointment method preferred by the Senate, and it is unquestionably the appointment method preferred by the Administration.

Since January 20, 2001, 124 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 18 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 16 individuals for Senate consideration since the appointment authority was amended, with 12 of those nominees having been confirmed to date. Of the 18 vacancies that have occurred since the time that the law was amended, the Administration has nominated candidates to fill six of these positions, has interviewed candidates for nomination for eight more positions, and is waiting to receive names to set up interviews for the remaining positions — all in consultation with home-state Senators.

However, while that nomination process continues, the Department must have a leader in place to carry out the important work of these offices and to ensure continuity of operations. 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, either under 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. Ensuring that the interim and permanent appointment process runs smoothly and effectively will be the focus of the Department's efforts to reach common ground with the Congress on this issue.

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

Elston, Michael (ODAG)

From: Chiara, Margaret M. (USAMIW) [MM.Chiara@usdoj.gov]
Sent: Tuesday, March 06, 2007 9:34 PM
To: McNulty, Paul J
Cc: Elston, Michael (ODAG)
Subject: WDMI

Importance: High

Today's Congressional events make clear that I am, indeed, among the "USA - 8".
Shortly after his opening statement, but before citing the perceived deficiencies of my former colleagues, Will Moschella stated that the two United States Attorneys not present were dismissed because of management problems. Apparently Kevin Ryan (whom I do not know) and I share the same reason for termination.

Michael Elston told me on more than one occasion, that the rationale for dismissal was on a continuum of sorts and that I am on the *de minimus* end after Dan Bogden. It is abundantly clear that this regrettable situation could have been better managed if the reasons for the dismissals were initially communicated to the affected United States Attorneys.

So, I now need to know what is the management problem to which Mr. Moschella referred?

Margaret

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

I yield to my colleague from Pennsylvania.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Senator Feingold.

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

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

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

SEN. SCHUMER: Without objection.

Senator Hatch.

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

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

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

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

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

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

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

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

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

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

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

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

Thank you, Mr. Chairman.

SEN. SCHUMER: Thank you, Senator Hatch.

And Senator Cardin had to leave.

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

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

Senator Pryor.

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

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

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

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

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

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

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

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

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

My office was later told by the administration that he was leaving on his own initiative and that Mr. Tim Griffin would be nominated. I did not know Mr. Griffin, but I spoke to him by telephone in August 2006 about his potential nomination. I told him that I know many lawyers in the state but I knew very little about his legal background. In other words, I did not know if he was qualified or if he had the right temperament or if he could be fair and impartial. I informed him that I would have trouble supporting him until the Judiciary Committee had reviewed these issues. I told him if he were to be nominated that I would evaluate my concerns in light of the committee process.

It should be noted that around this time, it we becoming clear that Mr. Cummins was being forced out, contrary to what my office had been told by the administration.

Sometime after the interview with Mr. Griffin, I learned that there were newspaper accounts regarding his work on behalf of the Republican National Committee about efforts that had been categorized as "caging African-American votes." This arises from allegations that Mr. Griffin and others in the RNC were targeting African-Americans in Florida for voter challenges during the 2004 presidential campaign.

I specifically addressed this issue to Mr. Griffin in a subsequent meeting. When I questioned him about this, he provided an account that was very different from the allegation. However, I informed him that due to the seriousness of the issue, this is precisely the reason why the nomination and confirmation process is in place. I told him I would not be comfortable until this committee had thoroughly examined his background. Given my concerns over this potential nominee, I as well as others protested, and Mr. Cummins was allowed to stay until the end of the year.

Rumors began to circulate in October of 2006 that the White House was going to make a recess appointment which, of course, I found troubling. This rumor was persistent in the Arkansas legal and political community. I called the White House on December 13, 2006 to express my concerns about a recess appointment and spoke to then-White House Counsel Harriet Myers. She told me that she would get back to me on this matter. I also called Attorney General Gonzales expressing my reservations. And he informed me that he would get back to me as well.

Despite expressing my concerns about a recess appointment to the White House and to the attorney general, two days later, on December 15, 2006, Ms.

Myers informed me that Mr. Griffin was their choice. Also on that same day, General Gonzales confirmed that he was going to appoint Mr. Griffin as an interim U.S. attorney. Subsequently, my office inquired about the legal authority for the appointment and was informed it was pursuant to the amended statute in the Patriot Act.

Before I say any more, I need to tell the committee that I respect and like General Gonzales. I supported his confirmation to be attorney general. I have always found him to be a straight shooter. And even though I disagree with him on this decision, it has not changed my view of him. I suspect he is only doing what he has been told to do. On December 20, 2006, Mr. Cummins' tenure as U.S. attorney was over. On that same day, Mr. Griffin was appointed interim U.S. attorney for the eastern district of Arkansas. The timing was controlled by the administration. On January 11, 2007, I wrote a letter to General Gonzales outlining my objections with regard to this appointment. First, I made clear my concern as to how Mr. Cummins was summarily dismissed. Second, I outlined my amazement as to the excuse given as the reason for the interim appointment which was due to the first assistant being on maternity leave. Third, I objected to the circumventing of the Senate confirmation process.

The attorney general's office responded on January 31, 2007 denying any discrimination or wrongdoing. I will address these issues now.

As more light was shed on the situation in Arkansas, it became clear that Bud Cummins was asked to resign without cause so that the White House could reward the Arkansas post to Mr. Griffin. Mr. Cummins confirmed this on January 13, 2007 in an article in the Arkansas Democrat-Gazette newspaper wherein he said he had been asked to step down so the White House could appoint another person. By all accounts, Mr. Cummins' performance has been fair, balanced, professional and just. Lawyers on both sides of the political spectrum have nothing but positive things to say about Mr. Cummins' performance. During his tenure, he established a highly successful anti-terrorism advisory council that brought together law enforcement at all levels for terrorism training. In the area of drug prosecutions, he continued at historic levels of quality, complex and significant Organized Crime Drug Enforcement Task Force drug prosecutions. He also increased federal firearm prosecutions, pursued public corruption and cyber crime investigations and led to lengthy prison sentences for those convicted.

In addition, I understand that his performance evaluations were always exceptional. On this last point, I would ask the committee to try to gather the service evaluations of Mr. Cummins and the other dismissed U.S. attorneys to determine how they were perceived by the Justice Department as having performed their jobs.

The reason I'm reciting Mr. Cummins' performance record is that it stands in stark contrast to General Gonzales' testimony before this committee when he stated, quote, "Some people should view it as a sign of good management. What we do is make an evaluation about the performance of individuals, and I have a responsibility to the people in your districts that we have the best possible people in these positions.

And that's the reason why changes sometimes have to be made. Although there are a number of reasons why changes get made and why people leave on their own, I think I would never, ever make a change in the United States attorney position for political reasons, or if it would in any way jeopardize an ongoing serious investigation. I just would not do it." End quote.

The attorney general then refused to say why Mr. Cummins was told to leave. However, it is my understanding that in other cases around the country, Justice Department officials have disclosed their reasoning for firing other U.S. attorneys. The failure to acknowledge that Bud Cummins was told to leave for a purely political reason is a great disservice to someone who has been loyal to the administration and who performed his work admirably. I have discussed in detail the events surrounding Mr. Cummins' dismissal. Now I would like to discuss the very troubling pretense for Mr. Griffin's appointment to interim U.S. attorney over the first assistant U.S. attorney in the Little Rock office.

The Justice Department advised me that normally, the first assistant U.S. attorney is selected for the acting appointment while the White House sends their nominee through the Senate confirmation process. This is based on 5 U.S.C., Section 3345A1. However, in this case the Justice Department confirmed that the first assistant was passed over because she was on maternity leave. This was the reason given to my chief of staff, as well as comments by the Justice Department spokesman Brian Rorchast (sp) -- and I'm not sure if I pronounced that name correctly -- wherein he was quoted in newspapers as saying, "When the U.S. attorney resigns, there is a need for someone to fill that position." He noted that often the first assistant U.S. attorney in the affected district will serve as the acting U.S. attorney until the formal nomination process begins for the replacement. "But in this case, the first assistant is on maternity leave." That's what he said.

In addition, this reason was given to me specifically by a Justice Department liaison at a meeting in my office. In my letter to the attorney general, I stated that while this may or may not be actionable in a public employment setting, it clearly would be in a private employment setting. Of all the agencies in the federal government, the Justice Department should not hold this view of pregnancy and motherhood in the workplace. I call this a pretense because it has become clear that Mr. Griffin was always the choice to replace Mr. Cummins. Before I close, let me address the circumvention of the Senate's confirmation process. General Gonzales has said that it is his intention to nominate all U.S. attorneys, and -- but that does not water in Arkansas. For seven months now, the administration has known of the departure of Mr. Cummins. Remember, they created his departure. It has now been 49 days since Bud Cummins was ousted without cause. If they were serious about the confirmation process, I cannot believe that it would have taken so long to nominate someone.

Now to be fair, in my most recent telephone call with General Gonzales, he asked me whether I would support Tim Griffin as my nominee for this position. I thought long and hard about this, and the answer is I cannot. If nominated, I would do everything I could to make sure he has an opportunity to tell his side of the story regarding all allegations and concerns to the committee, and I would ask the committee to give Mr. Griffin a vote as quickly as possible. It is impossible for me to say that I would never support his nomination because I do not know all the facts. That is why we have a process in the Senate. I know I would never consider him as my nominee because I just know too many other lawyers who are more qualified, more experienced and more respected by the Arkansas bar. I will advise General Gonzales about this decision shortly.

Regardless of the situation in Arkansas, I am convinced that this should not happen again. I'm also convinced that the administration and maybe future administrations will try to bypass the Senate unless we change this law. I do not say this lightly. Already a challenge has been made to the appointment

of Mr. Griffin in Arkansas as violating the U.S. Constitution because it bypassed Senate confirmation. While I have not reviewed the pleadings filed in this case -- I believe it's a capital murder case, I don't know all the situation there -- but I have not reviewed the pleadings there, I have read a recent article in the Arkansas Democratic Gazette that concerns me.

It is reported that, quote, "because United States attorneys are inferior officers, the appointment clause of the Constitution expressly permits Congress to vest their appointments in the Attorney General and does not require the advice and consent of the Senate before they're appointed," end quote. Please do not miss this point. The Justice Department has now pleaded in court that U.S. attorneys, as a matter of constitutional law, are not subject to the advice and consent of the United States Senate.

After a thorough review by this committee, I hope that you will reach the same conclusion I have, which is this. No administration should be able to appoint U.S. attorneys without proper checks and balances. This is larger than party affiliation or any single appointment. This touches our solemn responsibility as senators. I hope this committee will address it by voting for S.214, which I join in offering along with Senators Feinstein and Leahy. Thank you, Mr. Chairman.

SEN. SCHUMER: Thank you very much, Senator Pryor, for your really outstanding testimony. And we will pursue many of the things you bring up. I know that you have a busy schedule, and I would ask the indulgence of the committee that if we have questions of Senator Pryor, we submit them in writing. Would that be okay?

SEN. LEAHY: Well, Mr. Chairman, may I just ask one or two questions?

SEN. SCHUMER: Sure.

SEN. LEAHY: Thank you. (Cross talk.)

Senator Pryor, do you think that Mr. Griffin is not qualified for the job?

SEN. PRYOR: It's hard for me to say whether he is or isn't because I just know so little about his background. When I met with him, we talked about this, and I told him that it was my sincere hope that they nominate him so he could go through the process here. But it's impossible for me to say whether he is or isn't because I know so little about him. And just by the way of background on him, and this is probably more detail than the committee wants, is that he went to college in Arkansas, and then he went off to Tulane Law School in Louisiana. And then, more or less, he didn't come back to the state, I think he did maybe a year of practice in the U.S. attorney's office at some point, but basically he's -- his professional life has been mostly outside the state. So he's come back in, and the legal community just doesn't know him.

SEN. LEAHY: Well, fair enough. Do you think it ought to be a matter for the committee? I think that's the traditional way.

SEN. PRYOR: Certainly.

SEN. LEAHY: Do you think that his having worked for the Republican National Committee -- RNC -- or that he may be a protege' of Karl Rove is relevant in any way as to his qualifications?

SEN. PRYOR: To me, it I not relevant. I think we all come to these various positions with different backgrounds, and certainly if someone works for a political committee or a politician or an administration -- that doesn't concern me. Some of the activities that he may have been involved in do raise concerns. However, when I talked to him about that, he offered an explanation, like I said, that was very different than the press accounts of what he did. And here again, that takes me back to the process. That's why we have a process. Let him go through the committee, let you all and your staffs look at it, let him -- let everybody evaluate that and see what the true facts are.
SEN. LEAHY: Well, fair enough. The activities may bear. His conduct bears on his qualifications, but just the fact of working for the Republican National Committee and for Karl Rove is not a disqualifier.

SEN. PRYOR: No, not in my mind it's not.

SEN. LEAHY: Thank you very much for coming in, Senator Pryor. We know how busy you are, and you've made a very comprehensive analysis, and it's very helpful to have a senator appear substantively --

SEN. PRYOR: Thank you.

SEN. LEAHY: -- so thank you.

SEN. PRYOR: Thank you.

SEN. SCHUMER: Thank you, Senator Pryor. Any further questions?

Thank you so much.

Okay, our next witness is the honorable Paul J. McNulty. He's the deputy attorney general of the United States. He has spent almost his entire career as a public servant, with more than two decades of experience in government at both the state and federal levels. Just personally, Paul and I have known each other. When he served in the House, I knew him well. We worked together on the House Judiciary Committee. He's a man of great integrity. I have a great deal of faith in him and his personality, and who he is and what he does. From 2001 to 2006, of course, he served as U.S. attorney for the Eastern District of Virginia.

(The witness is sworn in.)

MR. MCNULTY: Thank you, Mr. Chairman, and thank you for your kindness.

I appreciate the opportunity to be here this morning and attempt to clear up the misunderstandings and misperceptions about the recent resignations of some U.S. attorneys, and to testify in strong opposition to S. 214, a bill which would strip the Attorney General of the authority to make interim appointments to fill vacant U.S. attorney positions.

As you know and as you've said, Mr. Chairman, I had the privilege of serving as United States Attorney for four and a half years. It was the best job I ever had. That's something you hear a lot from former United States attorneys -- "best job I ever had." In my case, Mr. Chairman, it was even better than serving as counsel under your leadership with the Subcommittee on Crime. Now why is it -- being U.S. Attorney -- the best job? Why is it such a great job? There are a variety of reasons, but I think it boils down to this.

The United States attorneys are the president's chief legal representatives in the 94 federal judicial districts. In my former district of Eastern Virginia, Supreme Court Chief Justice John Marshall was the first United States attorney. Being the president's chief legal representative means you are the face of the Department of Justice in your district. Every police chief you support, every victim you comfort, every citizen you inspire or encourage, and yes, every criminal who is prosecuted in your name communicates to all of these people something significant about the priorities and values of both the president and the Attorney General.

At his inauguration, the president raises his right hand and solemnly swears to faithfully execute the office of the president of the United States. He fulfills this promise in no small measure through the men and women he appoints as United States attorneys. If the president and the attorney general want to crack down on gun crimes -- if they want to go after child pornographers and pedophiles as this president and attorney general have ordered federal prosecutors to do, it's the United States attorneys who have the privilege of making such priorities a reality. That's why it's the best job a lawyer can ever have. It's an incredible honor.

And this is why, Mr. Chairman, judges should not appoint United States attorneys as S. 214 proposes. What could be clearer executive branch responsibilities than the attorney general's authority to temporarily appoint, and the president's opportunity to nominate for Senate confirmation, those who will execute the president's duties of office? S. 214 doesn't even allow the attorney general to make any interim appointments, contrary to the law prior to the most recent amendment.

The indisputable fact is that United States attorneys serve at the pleasure of the president. They come and they go for lots of reasons. Of the United States attorneys in my class at the beginning of this administration, more than half are now gone. Turnover is not unusual, and it rarely causes a problem because even though the job of United States attorney is extremely important, the greatest assets of any successful United States attorney are the career men and women who serve as assistant United States attorneys. Victim witness coordinators, paralegals, legal assistants, and administrative personnel -- their experience and professionalism ensures smooth continuity as the job of U.S. attorney transitions from one person to another.

Mr. Chairman, I conclude with these three promises to this committee and the American people on behalf of the attorney general and myself. First, we have -- we never have and never will seek to remove a United States attorney to interfere with an ongoing investigation or prosecution or in retaliation for prosecution. Such as act is contrary to the most basic values of our system of justice, the proud legacy of the Department of Justice and our integrity as public servants.

Second, in every single case where a United States attorney position is vacant, the administration is committed to fulfilling -- to filling that position with a United States attorney who is confirmed by the Senate. The attorney general's appointment authority has not and will not be used to circumvent the confirmation process. All accusations in this regard are contrary to the clear factual record. The statistics are laid out in my written statement. And third, through temporary appointments and nominations for Senate confirmation, the administration will continue to fill U.S. attorney vacancies with men and women who are well qualified to assume the important duties of this office. Mr. Chairman, if I thought the concerns you outlined in

your opening statement were true, I would be disturbed too. But these concerns are not based on facts. And the selection process we will discuss today I think will shed a great deal of light on that.

Finally, I have a lot of respect for you, Mr. Chairman, as you know. And when I hear you talk about the politicizing of the Department of Justice, it's like a knife in my heart. The AG and I love the department, and it's an honor to serve, and we love its mission. And your perspective is completely contrary to my daily experience, and I would love the opportunity -- not just today but in the weeks and months ahead -- to dispel you of the opinion that you hold.

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

SEN. SCHUMER: Well, thank you, Deputy Attorney General, and very much appreciate your heartfelt comments.

I can just tell you -- and it's certainly not just me but speaking for myself -- what I have seen happen in the Justice Department is a knife to my heart as somebody who's followed and overseen the Justice Department for many, many years. And perhaps there are other explanations, but on issue after issue after issue after issue -- I think Senator Specter alluded to it to some extent -- the view that executive authority is paramount. To the extent that many of us feel congressional prerogatives written in law are either ignored or ways are found around them, I have never seen anything like it. And there are many fine public servants in the Justice Department. I had great respect for your predecessor, Mr. Comey. I have great respect for you. But you have to judge the performance of the Justice Department by what it does, not the quality or how much you like the people in it. And so my comment is not directed at you in particular, but it is directed at a Justice Department that seems to me to be far more politically harnessed than previous Justice Departments, whether they be under Democrat or -- Democratic or Republican administrations.

There are a lot of questions, but I know some of my colleagues -- I know my colleague from Rhode Island wants to ask questions and has other places to go so I'm going to limit the first round to five minutes for each of us, and then we'll -- in the second round we'll go to more unlimited time if it's just reasonable, if that's okay with you, Mr. Chairman, okay?

First, I just -- you say in your testimony that a United States attorney may be removed for any reason or no reason, that's your quote. So my first question is do you believe that U.S. attorneys can be fired on simply a whim? Somehow the president (sneeze) or the attorney general -- bless you -- wakes up one morning and says, "I don't like him -- let's fire him." What's the reason? "I just don't like him." Would that be okay?

MR. MCNULTY: Well, Mr. --

SEN. SCHUMER: Well, let me say, is that legally allowed?

MR. MCNULTY: Well, if we're using just a very narrow question of can in a legal sense, I think the law is clear that "serve at the pleasure" would mean that there needs to be no specific basis.

SEN. SCHUMER: Right. But I think you would agree that that would not be a good idea.

MR. MCNULTY: I would agree.

SEN. SCHUMER: Okay. Now let me ask you this. You do agree that a United States attorney can't be removed for a discriminatory reason -- because that person is a woman or black or -- do you agree with that?

MR. MCNULTY: Sure. I --

SEN. SCHUMER: So there are some limits here?

MR. MCNULTY: Well, of course, and there would certainly be moral limits and -- I don't know the law in the area of removal and relates to those special categories, but I certainly know that as a -- an appropriate thing to do -- would be completely inappropriate.

SEN. SCHUMER: Okay. And you do believe, of course, that a U.S. attorney could be removed for a corrupt reason --

MR. MCNULTY: Right.

SEN. SCHUMER: -- in return for a bribe or a favor? Okay. Now let me ask you this. Do you think it is good for public confidence and respect of the Justice Department for the president to exercise his power to remove a U.S. attorney simply to give somebody else a chance at the job? Let's just assume for the sake of argument that that's the reason. Mr. X, you're doing a very, very fine job but we'd prefer -- and you're in the middle of your term -- no one objects to what you've done -- but we prefer that Mr. Y take over. Would that be a good idea? Would that practice be wise?

MR. MCNULTY: I think that if it was done on a large scale, it could raise substantial issues and concerns. But I don't have the same perhaps alarm that you might have about whether or not that is a bad practice. If at the end of the first four-year term -- and of course all of our confirmation certificates say that we serve for a four-year term -- at the end of that four-year term, if there was an effort to identify and nominate new individuals to step in -- to take on a second term, for example, I'm not so sure that would be contrary to the best interest of the Department of Justice. It's not something that's been done -- it's not something that's being contemplated to do. But the turnover has already been essentially like that. We've already switched out more than half of the U.S. attorneys that served in the first term, so change is not something that slows down or debilitates the work of the Department of Justice.

SEN. SCHUMER: Right. But -- and all of these, these seven that we are talking about, they had completed their four-year terms, every one of them, but then had been in some length of holdover period.

MR. MCNULTY: Right.

SEN. SCHUMER: They weren't all told immediately at the end, or right before the end of their four-year term, to leave. Is that right?

MR. MCNULTY: That's correct.

SEN. SCHUMER: Okay. I still have a few minutes left, but I now have a whole new round of questioning and I don't want to break it in the middle, so I'm going to call on Senator Specter for his five minutes.

SEN. SPECTER: (Audio break) -- Chairman.

Mr. McNulty, were you ever an assistant U.S. attorney?

MR. MCNULTY: No, I wasn't.

SEN. SPECTER: Well, I was interested in your comment that the best job you had was U.S. attorney, and that's probably because you were never an assistant U.S. attorney -- (laughter) -- because I was an assistant district attorney, and that's a much better job than district attorney.

MR. MCNULTY: I've heard that from a lot of assistants. That's true.

SEN. SPECTER: The assistants just get to go into court and try cases and cross-examine witnesses and talk to juries and have a much higher level of sport than administrators who are U.S. attorneys or district attorneys.

Mr. McNulty, what about Carol Lam? I think we ought to get specific with the accusations that are made. Why was she terminated?

MR. MCNULTY: Senator, I came here today to be as forthcoming as I possibly can, and I will continue to work with the committee to provide information. But one thing that I do not want to do is, in a public setting, as the attorney general declined to do, to discuss specific issues regarding people. I think that it's -- it is unfair to individuals to have a discussion like that in this setting, in a public way, and I just have to respectfully decline going into specific reasons about any individual.

SEN. SPECTER: Well, Mr. McNulty, I can understand your reluctance to do so, but when we have confirmation hearings, which is the converse of inquiries into termination, we go into very difficult matters. Now, maybe somebody who's up for confirmation has more of an expectation of having critical comments made than someone who is terminated, and I'm not going to press you as to a public matter. But I think the committee needs to know why she was terminated, and if we can both find that out and have sufficient public assurance that the termination was justified, I'm delighted -- I'm willing to do it that way.

I'm not sure that these attorneys who were terminated wouldn't prefer to have it in a public setting, but we have the same thing as to Mr. Cummins and we have the same thing as to going into the qualifications of the people you've appointed. But to find out whether or not what Senator Schumer has had to say is right or wrong, we need to be specific.

MR. MCNULTY: Can I make two comments on -- first on the question of confirmation process. If you want to talk about me, and I'm here to have an opportunity to respond to everything I've ever done, that's one thing. I just am reluctant to talk about somebody who's not here and has the right to respond. And I don't -- I just don't want to unfairly prejudice any --

SEN. SPECTER: But Mr. McNulty, we are talking about you when we ask the question about why did you fire X or why did you fire Y. We're talking about what you did.

MR. MCNULTY: And I will have to be -- try to work with the committee to give them as much information as possible, but I also want to say something else.

Essentially, we're here to stipulate to the fact that if the committee is seeking information, our position basically is that -- that there is going to be a range of reasons and we don't believe that we have an obligation to set forth a certain standard or reason or a cause when it comes to removal.

SEN. SPECTER: Are you saying that aside from not wanting to have comments about these individuals in a public setting which, again, I say I'm not pressing, that the Department of Justice is taking the position that you will not tell the committee in our oversight capacity why you terminated these people?

MR. MCNULTY: No. No, I'm not saying that. I'm saying something a little more complicated than that. What I'm saying is that in searching through any document you might seek from the Department, such as an -- every three years we do an evaluation of an office. Those are called "EARs" reports. You may or may not see an EAR report what would be of concern to the leadership of a department, because that's just one way of measuring someone's performance. And much of this is subjective, and won't be apparent in the form of some report that was done two or three years ago by a group of individuals that looked at an office.

SEN. SPECTER: Well, my time is up, but we're going to go beyond reports. We're going to go to what the reasons were.

MR. MCNULTY: Sure.

SEN. SPECTER: -- subjective reasons are understandable.

MR. MCNULTY: I understand -- (cross talk) --

SEN. SPECTER: I like -- I like to observe that red signal, but you don't have to. You're the witness. Go ahead.

MR. MCNULTY: No, I just -- the senator opened, the chairman opened with a reference to documentation, and I just wanted to make it clear that there really may or may not be documentation as you think of it, because there aren't objective standards necessary in these matters when it comes to managing the department and thinking through what is best for the future of the department in terms of leadership of offices. In some places we may have some information that you can read; in others, we'll have to just explain our thinking.

SEN. SPECTER: Well, we can understand oral testimony and subjective evaluations.

MR. MCNULTY: Thank you, Senator.

SEN. SPECTER: We don't function solely on documents.

SEN. SCHUMER: Especially those of us who've been assistant district attorneys.

SEN. SPECTER: That's the standard, Mr. McNulty. So your qualifications are being challenged here. You haven't been an assistant U.S. attorney. (Laughter.)

SEN. SCHUMER: The senator from Rhode Island.

SEN. SHELDON WHITEHOUSE (D-RI): Thank you, Mr. Chairman.

Mr. McNulty, welcome. You're clearly a very wonderful and impressive man. But it strikes me that your suggestion that there is a clear factual record about what happened and that this was just turnover are both just plain wrong.

I start on the clear factual record part with the suggestion that has been made to The Washington Post, that the attorney general also made to us, and I'm quoting from the Post article on Sunday: "Each of the recently dismissed prosecutors had performance problems," which does not jibe with the statement of Mr. Cummins from Arkansas that he was told there was nothing wrong with his performance, but that officials in Washington wanted to give the job to another GOP loyalist. So right from the very get-go we start with something that is clearly not a clear factual record of what took place; in fact, there's -- on the very basic question of what the motivation was for these, we're getting two very distinct and irreconcilable stories.

MR. MCNULTY: Senator --

SEN. WHITEHOUSE: And I don't think that, if it's true, that as The Washington Post reported, six of the prosecutors received calls notifying them of their firings on a single day. The suggestion that this is just ordinary turnover doesn't seem to pass the last test, really. Could you respond to those two observations?

MR. MCNULTY: Yes, sir. Thank you.

Senator, first of all, with regard to Arkansas and what happened there and any other efforts to seek the resignation of U.S. attorneys, these have been lumped together, but they really ought not to be. And we'll talk about the Arkansas situation, as Senator Pryor has laid it out.

And the fact is that there was a change made there that was not connected to, as was said, the performance of the incumbent, but more related to the opportunity to provide a fresh start with a new person in that position.

With regard to the other positions, however --

SEN. WHITEHOUSE: But why would you need a fresh start if the first person was doing a perfectly good job?

MR. MCNULTY: Well, again, in the discretion of the department, individuals in the position of U.S. attorneys serve at the pleasure of the president. And because turnover -- and that's the only way of going to your second question I was referring to turnover -- because turnover is a common thing is U.S. attorneys offices --

SEN. WHITEHOUSE: I know. I turned over myself as a U.S. attorney.

MR. MCNULTY: -- bringing in someone does not create a disruption that is going to be hazardous to the office. And it does, again, provide some benefits.

In the case of Arkansas, which this is really what we're talking about, the individual who was brought in had a significant prosecution experience -- he actually had more experience than Mr. Cummins did when he started the job -- and so there was every reason to believe that he could be a good interim until his nomination or someone else's nomination for that position went forward and there was a confirmed person in the job.

SEN. WHITEHOUSE: Mr. McNulty, what value does it bring to the U.S. attorneys office in Arkansas to have the incoming U.S. attorney have served as an aide to Karl Rove and to have served on the Republican National Committee?

MR. MCNULTY: With all --

SEN. WHITEHOUSE: Do you find anything useful there to be an U.S. attorney?

MR. MCNULTY: Well, I don't know. All I know is that a lot of U.S. attorneys have political backgrounds. Mr. Cummins ran for Congress as a Republican candidate. Mr. Cummins served in the Bush- Cheney campaign. I don't know if those experiences were useful for him to be a successful U.S. attorney, because he was.

I think a lot of U.S. attorneys bring political experience to the job. It might help them in some intangible way. But in the case of Mr. Griffin, he actually was in that district for a period of time serving as an assistant United States attorney, started their gun enforcement program, did many cases as a JAG prosecutor, went to Iraq, served his country there and came back. So there are a lot of things about him that make him a credible and well-qualified person to be a U.S. attorney.

SEN. WHITEHOUSE: Having run public corruption cases, and having firsthand experience of how difficult it is to get people to be willing to testify and come forward, it is not an easy thing to do. You put your career,