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.

At no time, however, has the Administration sought to avoid the confirmation process in the Senate by appointing an interim U.S. Attorney and then refusing to move forward—in consultation with home-state Senators—on the selection, nomination, confirmation and appointment of a new U.S. Attorney. Not once. In every single case where a vacancy occurs, the Administration is committed to having a Senate-confirmed U.S. Attorney. And the Administration's actions bear this out. Every time a vacancy has arisen, 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. To ensure an effective and smooth transition during U.S. Attorney vacancies, the office of the U.S. Attorney must be filled on an interim basis. To do so, the Department relies on the Vacancy Reform Act ("VRA"), 5 U.S.C. § 3345(a)(1), when the First Assistant is selected to lead the office, or the Attorney General's appointment authority in 28 U.S.C. § 546 when another Department employee is chosen. Under the VRA, the First Assistant may serve in an acting capacity for only 210 days, unless a nomination is made during that period. Under an Attorney General appointment, the interim

U.S. Attorney serves until a nominee is confirmed the Senate. There is no other statutory authority for filling such a vacancy, and thus the use of the Attorney General's appointment authority, as amended last year, signals nothing other than a decision to have an interim U.S. Attorney who is not the First Assistant. It does not indicate an intention to avoid the confirmation process, as some have suggested.

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

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.

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

Silas, Adrien

From: Scott-Finan, Nancy
Sent: Tuesday, March 06, 2007 9:57 AM
To: Silas, Adrien
Subject: Have we heard from OMB about Will's testimony?

Silas, Adrien

From: Silas, Adrien
Sent: Tuesday, March 06, 2007 10:06 AM
To: 'Gibbs, Landon M.'; 'Oprison, Christopher G.'
Cc: 'Richard_E._Green@omb.eop.gov'; 'Simms, Angela M.'; Scott-Finan, Nancy; Hertling, Richard; Moschella, William
Subject: FW: US Atty - ODAG Tstmny

Attachments: USAttys01.doc.doc

Do we have your sign-off on the statement?

From: Silas, Adrien
Sent: Monday, March 05, 2007 10:18 PM
To: 'Gibbs, Landon M.'
Cc: 'Richard_E._Green@omb.eop.gov'; 'Simms, Angela M.'; Hertling, Richard; Moschella, William
Subject: US Atty - ODAG Tstmny

Please find attached revised Justice Department testimony on the United States Attorneys for tomorrow's hearing. Please advise as to White House clearance. Thank you.

USAttys01.doc.doc
(84 KB)

Silas, Adrien

From: Silas, Adrien
Sent: Tuesday, March 06, 2007 10:15 AM
To: Scott-Finan, Nancy; Hertling, Richard; Moschella, William
Subject: H15, US Atty - ODAG Tstmny (Control -13441)

Per Landon Gibbs, the White Counsel's office still is evaluating the written statement.

Silas, Adrien

From: Gibbs, Landon M. [Landon_M._Gibbs@who.eop.gov]
Sent: Tuesday, March 06, 2007 10:16 AM
To: Silas, Adrien
Cc: Green, Richard E.; Simms, Angela M.; Hertling, Richard; Moschella, William; Scott-Finan, Nancy
Subject: FW: Moschella Oral Testimony
Attachments: moschellafinal.2.doc; moschellafinal.1.doc

The oral testimony attached that Will just sent has been cleared by the EOP. We are still holding on the prepared testimony.

Thanks,

Landon

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

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 [redacted] 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.

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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.

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

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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 [redacted] to influence any public corruption case – and would never do so. Third, the Administration at no time intended to circumvent the confirmation process.

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I would be happy to take your questions.

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Silas, Adrien

From: Hertling, Richard
Sent: Tuesday, March 06, 2007 10:32 AM
To: Scott-Finan, Nancy; Silas, Adrien
Subject: FW: Moschella written testimony

WH is moving forward on clearing our written testimony.
-----Original Message-----
From: Oprison, Christopher G. [mailto:Christopher_G._Oprison@who.eop.gov]
Sent: Tuesday, March 06, 2007 10:31 AM
To: Hertling, Richard
Subject: Re: Moschella written testimony

Just sent a redline to Bill and Fred.
Christopher G. Oprison
Associate Counsel to the President

-----Original Message-----
From: Hertling, Richard
To: Oprison, Christopher G.
Sent: Tue Mar 06 10:26:58 2007
Subject: Moschella written testimony

Chris: I am wondering if you have had a chance to look over our revised written statement for this afternoon. We have attempted to tone down our opposition to the pending bill, but we would be happy to accommodate additional edits suggested by WHCO. We would, however, like to submit written testimony.

Silas, Adrien

From: Hertling, Richard
Sent: Tuesday, March 06, 2007 11:31 AM
To: Scott-Finan, Nancy; Silas, Adrien
Subject: Fw: Moschella written testimony

-----Original Message-----
From: Oprison, Christopher G. <Christopher_G._Oprison@who.eop.gov>
To: Hertling, Richard
Sent: Tue Mar 06 11:27:09 2007
Subject: RE: Moschella written testimony

Should be on its way to you from Landon Gibbs in our front office - redlined version with our comments. Please call if you have any questions about the changes

-----Original Message-----
From: Hertling, Richard [mailto:Richard.Hertling@usdoj.gov]
Sent: Tuesday, March 06, 2007 10:32 AM
To: Oprison, Christopher G.
Subject: RE: Moschella written testimony

Thank you!

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[mailto:Christopher_G._Oprison@who.eop.gov]
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Silas, Adrien

From: Scott-Finan, Nancy
Sent: Tuesday, March 06, 2007 11:33 AM
To: Silas, Adrien
Subject: Fw: Moschella written testimony

Nancy Scott-Finan

-----Original Message-----
From: Hertling, Richard
To: Scott-Finan, Nancy; Silas, Adrien
Sent: Tue Mar 06 11:30:57 2007
Subject: Fw: Moschella written testimony

-----Original Message-----
From: Oprison, Christopher G. <Christopher_G._Oprison@who.eop.gov>
To: Hertling, Richard
Sent: Tue Mar 06 11:27:09 2007
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Silas, Adrien

From: Gibbs, Landon M. [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

Attachments: Moschella Testimony.doc

Moschella
:stimony.doc (86 KB

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.

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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.

Deleted: It should come as no surprise to anyone that,

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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.¶

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.

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.

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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.

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Deleted: . To do so, the Department relies on the

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.

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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. ¶
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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.

Silas, Adrien

From: Oprison, Christopher G. [Christopher_G._Oprison@who.eop.gov]
Sent: Tuesday, March 06, 2007 11:37 AM
To: Gibbs, Landon M.; Silas, Adrien
Cc: Green, Richard E.; Simms, Angela M.; Hertling, Richard; Moschella, William; Scott-Finan, Nancy
Subject: RE: US Atty - ODAG Tstmny

Note on page 3 of the redline a question regarding the characterization of "approximately half of the U.S. Attorneys."

-----Original Message-----
From: Gibbs, Landon M.
Sent: Tuesday, March 06, 2007 11:35 AM
To: 'Adrien.Silas@usdoj.gov'
Cc: Green, Richard E.; Simms, Angela M.; 'Richard.Hertling@usdoj.gov'; 'William.Moschella@usdoj.gov'; 'Nancy.Scott-Finan@usdoj.gov'; 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

Silas, Adrien

From: Silas, Adrien
Sent: Tuesday, March 06, 2007 11:54 AM
To: Scott-Finan, Nancy; Hertling, Richard; Moschella, William; Nowacki, John (USAEO)
Subject: H15, US Atty - ODAG Tstmny (Control -13441)

Importance: High

1) Are we in agreement with the White House Counsel edits?

2) Is someone addressing the query on page three concerning U.S. Attorneys?

Silas, Adrien

From: Silas, Adrien
Sent: Tuesday, March 06, 2007 12:57 PM
To: Scott-Finan, Nancy
Cc: Goodling, Monica; Moschella, William; Hertling, Richard; Nowacki, John (USAEO)
Subject: H15, US Atty - ODAG Tstmny (Control -13441)

Importance: High

Attachments: USAttys01.doc.doc; USAttys01.doc.pdf

NANCY: The attached version of the written statement is cleared for transmittal to the Committee. Before transmitting the statement, please leaf through the document for any patent formatting errors.


USAttys01.doc.doc
(78 KB)


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

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 U.S. 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, 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.

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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.

Silas, Adrien

From: Nowacki, John (USAEO) [John.Nowacki@usdoj.gov]
Sent: Tuesday, March 06, 2007 12:53 PM
To: Silas, Adrien
Subject: RE: H15, US Atty - ODAG Tstmny (Control -13441)

Fine.

I don't see a query on page three.

From: Silas, Adrien
Sent: Tuesday, March 06, 2007 11:54 AM
To: Scott-Finan, Nancy; Hertling, Richard; Moschella, William; Nowacki, John (USAEO)
Subject: H15, US Atty - ODAG Tstmny (Control -13441)
Importance: High

1) Are we in agreement with the White House Counsel edits?

2) Is someone addressing the query on page three concerning U.S. Attorneys?

Silas, Adrien

From: Silas, Adrien
Sent: Tuesday, March 06, 2007 1:02 PM
To: Scott-Finan, Nancy
Cc: Goodling, Monica; Moschella, William; Hertling, Richard; Nowacki, John (USAEO); Freeman, Andria D
Subject: FW: H15, US Atty - ODAG Tstmny (Control -13441)

Importance: High

Attachments: USAttys01.doc.pdf; USAttys01.doc.doc

The attached version contains corrected spacing on page 3.


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(63 KB)


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(78 KB)

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Cc: Goodling, Monica; Moschella, William; Hertling, Richard; Nowacki, John (USAEO)
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Importance: High

NANCY: The attached version of the written statement is cleared for transmittal to the Committee. Before transmitting the statement, please leaf through the document for any patent formatting errors.

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

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