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.

Silas, Adrien

From: Silas, Adrien
Sent: Monday, March 05, 2007 5:02 PM
To: Scott-Finan, Nancy
Subject: FW: H15, US Atty - ODAG Tstmny (Control -13441)

Attachments: USAttys01.doc with TFB comments.doc

USAttys01.doc with TFB comment...

Please see the attached.

-----Original Message-----
From: Silas, Adrien
Sent: Monday, March 05, 2007 2:54 PM
To: David Smith; Natalie Voris; Nowacki, John (USAEO)
Cc: Moschella, William; Scott-Finan, Nancy
Subject: H15, US Atty - ODAG Tstmny (Control -13441)

PARTIAL OMB passback of interagency comments on the draft ODAG statement on U.S. attorneys. Reaction?

-----Original Message-----
From: Simms, Angela M. [mailto:Angela_M._Simms@omb.eop.gov]
Sent: Monday, March 05, 2007 2:28 PM
To: Silas, Adrien
Cc: Justice Lrm
Subject: (Partial) Passback LRM AMS-110-37: Justice Testimony on S.580

Adrien,

Attached are comments from the Domestic Policy Council, and below are comments from OMB Counsel staff. However, I am still following up with offices that have not responded, so this is not a complete passback.
Please let me know Justice's response to the comments included in this e-mail.

Angie
202-395-3857

OMB Counsel Staff Comments:

I am OK with this, and I like the addition of specific problems under the prior statutory scheme. That said, DOJ needs to be certain that the anecdotes will survive scrutiny.

Has someone at DOJ run a NEXIS search on the two examples to see what local defenders of the relevant US Attorneys said at the time? Were there hearings/floor statements on the West Virginia example? I don't think we need this information in order to clear the testimony, but DOJ should know the landmines before Will uses this information in his oral testimony.

Silas, Adrien

From: Scott-Finan, Nancy
Sent: Monday, March 05, 2007 5:01 PM
To: Silas, Adrien
Subject: RE: Will's Testimony

What is the pass back?

-----Original Message-----
From: Silas, Adrien
Sent: Monday, March 05, 2007 4:58 PM
To: Scott-Finan, Nancy
Cc: Moschella, William; David Smith; Natalie Voris; Nowacki, John (USAEO)
Subject: FW: Will's Testimony

OMB has given us a partial passback and we are awaiting EOUSA's response to the partial passback. Additionally, OMB is awaiting response from the White House Counsel's office.

EOUSA?

-----Original Message-----
From: Scott-Finan, Nancy
Sent: Monday, March 05, 2007 3:35 PM
To: Silas, Adrien
Subject: Will's Testimony

What have we heard from OMB with to regard to the testimony.
Nancy Scott-Finan

FILE COPY
LEGISLATIVE AFFAIRS

Department Of Justice
Office Legislative Affairs
Control Sheet

Date Of Document: 02/26/07
Date Received: 02/26/07
Due Date: 03/06/07

Control No.: 070302-13505
ID No.: 435608

From: CONG. JOHN CONYERS, JR. CHMN, HOUSE JUDICIARY COMTE
(H.R.580, H.15) ((110TH CONGRESS))

To: RICHARD HERTLING ACTING AAG, OLA

Subject:
LETTER FROM THE CHAIRMAN, HOUSE JUDICIARY COMTE, INVITING A REPRESENTATIVE OF THE ADMINISTRATION TO TESTIFY AT A HEARING ON MARCH 6, 2007, ON H.R.580, RESTORING CHECKS AND BALANCES IN THE CONFIRMATION PROCESS OF U.S. ATTORNEYS. THE HEARING WILL TAKE PLACE A 2 PM IN ROOM 2141 - RAYBURN HOB. INVITES PAUL MCNULTY, DEPUTY ATTORNEY GENERAL, TO TESTIFY.

Action/Information:

Signature Level: OLA

Referred To:	Assigned:	Action:
OLA;SCOTT-FINAN	02/26/07	FOR APPROPRIATE ACTION

Remarks:

Comments:

File Comments:
Primary Contact: NANCY SCOTT-FINAN, 514-3752

Clifton, Deborah J

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

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

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

MR 590
P. 15

U.S. House of Representatives
Committee on the Judiciary
Washington, DC 20515–6216
One Hundred Tenth Congress

February 26, 2007

Mr. Richard A. Hertling
Acting Assistant Attorney General
Office of Legislative Affairs
Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

Dear Mr. Hertling:

I am writing to invite a representative of the Administration to testify at a hearing next Tuesday, March 6, 2007, on H.R. 580, Restoring Checks and Balances in the Confirmation Process of U.S. Attorneys. We would like to invite Paul McNulty, Deputy Attorney General, to testify.

The hearing will take place at 2:00 p.m. on March 6, in room 2141, Rayburn House Office Building. Mr. McNulty's written statement for submission to the Committee may be as extensive as you wish and will be included in the hearing record, and the most significant points of the written statement should be highlighted in an oral presentation lasting no more than five minutes. Oral testimony at the hearing, including answers to questions, will be printed as part of the verbatim record of the hearing.

To facilitate preparation for the hearing, an electronic copy of the written statement and curriculum vitae should be sent to the Committee 48 hours in advance of the hearing. The Committee will publish the statement on our website and, therefore, requests that the documents be provided in either Word Perfect, Microsoft Word, or Adobe Acrobat. We would appreciate it if all pages of the written statement are numbered and a cover page is attached with the witness' name, position, date, and title of hearing. The title of the hearing is: H.R. 580, Restoring Checks and Balances in the Nomination Process of U.S. Attorneys. These documents may be e-mailed to Elias Wolfberg on my staff at Elias.Wolfberg@mail.house.gov.

In addition, the Committee requests that 100 copies of the written statement be provided 48 hours in advance of the hearing. If a published document or report is to be introduced as part of the written statement, 50 copies should be provided. Due to delays with our mail delivery

system, the copies should be hand delivered in an unsealed package to Mr. Wolfberg in room 2138, Rayburn House Office Building.

If you have any questions or concerns, please contact Mr. Wolfberg or Eric Tamarkin at 226-7680. Thank you for your cooperation,

Sincerely,

John Conyers, Jr.
Chairman

JC:ew

U. S. HOUSE OF REPRESENTATIVES

FYI copy

Committee on the Judiciary
2138 Rayburn House Office Building
Washington, D.C. 20515
Fax: (202) 225-7680

FACSIMILE COVER LETTER

TO: Richard Hertling

FAX NO: 2025144482 # PAGES: 3 (including this page)

FROM:

____STACEY DANSKY	____LILLIAN GERMAN
____JONATHAN GODFREY	____MICHONE JOHNSON
____ELLIOT MINCBERG	____MATTHEW MORGAN
____MICHELLE PERSAUD	____ROBERT REED
____GEORGE SLOVER	____GAYE STAFFORD
____RENATA STRAUSE	____DWIGHT SULLIVAN
____TERESA VEST	X Eric Tamarkin

COMMENTS: _____

If parts of this transmission are unclear or transmission was faulted, please call: (202) 225-3951.

FILE COPY

LEGISLATIVE AFFAIRS

Department Of Justice
Office Legislative Affairs
Control Sheet

Date Of Document: 02/23/07
Date Received: 02/23/07
Due Date: 02/26/07 2 pm

Control No.: 070223-13441
ID No.: 435525

From: OLA (HOUSE JUDICIARY COMTE) (H.15) ((110TH CONGRESS))

To: HOUSE JUDICIARY COMTE

Subject:
ATTACHED FOR YOUR REVIEW AND COMMENT IS A COPY OF THE DRAFT STATEMENT OF WILLIAM MOSCHELLA, PRINCIPAL ASSOCIATE DEPUTY ATTORNEY GENERAL, REGARDING THE IMPORTANCE OF THE JUSTICE DEPARTMENT'S UNITED STATES ATTORNEYS, BEFORE THE HOUSE JUDICIARY COMTE, TO BE GIVEN ON MARCH 6, 2007

Action/Information: Signature Level: OLA

Referred To:	Assigned:	Action:
ODAG, JMD/PERSONNEL/GC, OARM, OLP, OLC, CRM, CIV, EOUSA	02/23/07	COMMENTS DUE TO OLA/SILAS BY 2 PM 02/26/07. CC: OLA/SCOTT-FINAN/ SEIDEL

Remarks:

Comments:

File Comments:
Primary Contact: ADRIEN SILAS, 514-7276

Clifton, Deborah J

From: Silas, Adrien
Sent: Friday, February 23, 2007 3:46 PM
To: Clifton, Deborah J
Subject: FW: Draft Testimony

Attachments: DRAFT Moschella Testimony.doc

DRAFT Moschella Testimony.doc ...

DEBBIE: Please circulate to:

ODAG
JMD/PERSONNEL
JMD/GC
Attorney Recruitment & Mgt
OLP
OLC
CRM
CIV
EOUSA

A-15

with commetns due to me by 2 p.m. on Monday. Thanks!

-----Original Message-----
From: Scott-Finan, Nancy
Sent: Friday, February 23, 2007 9:35 AM
To: Clifton, Deborah J
Cc: Elston, Michael (ODAG); Moschella, William; Sampson, Kyle; Goodling, Monica; Hertling, Richard; Silas, Adrien
Subject: FW: Draft Testimony

Attached is the testimony for the HJC hearing on March 6. We need internal clearance by COB Monday so we can get to OMB on Tuesday.

Monica, Kyle, Mike and Will,
I am giving it to you in advance for your edits.

Thanks much.

Nancy

Department of Justice

STATEMENT

OF

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

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES HOUSE OF REPRESENTATIVES

CONCERNING

"[[TITLE]]"

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

"[[Title]]"

March 6, 2007

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

As the chief federal law-enforcement officers in their districts, U.S. Attorneys represent the Attorney General before Americans who may not otherwise have contact with the Department of Justice. U.S. Attorneys are not only prosecutors, however; they are government officials charged with managing and implementing the policies and priorities of the Executive Branch. The Attorney General has set forth six key priorities for the Department of Justice, and in each of their districts, U.S. Attorneys lead our efforts to protect America from terrorist attacks and fight violent crime, combat illegal drug trafficking, ensure the integrity of government and the marketplace, enforce our immigration laws, and prosecute crimes that endanger children and families—including child pornography, obscenity, and human trafficking.

United States Attorneys serve at the pleasure of the President. Like any other high-ranking officials in

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

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

Turnover in the position of U.S. Attorney is not uncommon and should be expected, particularly after the position's four-year term has expired. When a presidential election results in a change of administration, every U.S. Attorney leaves and the new President nominates a successor for confirmation by the Senate. Moreover, U.S. Attorneys do not necessarily stay in place even during an administration. For example, approximately half

of the U.S. Attorneys appointed at the beginning of the Bush Administration had left office by the end of 2006. Of the U.S. Attorneys whose resignations have been the subject of recent discussion, each one had served out his or her four-year term prior to being asked to resign.

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

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

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

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

However, while that nomination process continues, the Department must have a leader in place to carry out the important work of these offices. To ensure an effective and smooth transition during U.S. Attorney

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

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

In most cases, of course, the district court simply appointed the Attorney General's choice as interim

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

We are aware of no other agency where federal judges—members of a separate branch of government—appoint the interim staff of an agency. Such a judicial appointee would have authority for litigating the entire federal criminal and civil docket before the very district court to whom he or she was beholden for the appointment. This arrangement, at a minimum, gives rise to an appearance of potential conflict that undermines the performance or perceived performance of both the Executive and Judicial Branches. A judge may be inclined to select a U.S. Attorney who shares the judge's ideological or prosecutorial philosophy. Or a judge may select a prosecutor apt to settle cases and enter plea bargains, so as to preserve judicial resources. *See* Wiener, Inter-Branch Appointments After the Independent Counsel: Court Appointment of United States Attorneys, 86 Minn. L. Rev. 363, 428 (2001) (concluding that court appointment of interim U.S. Attorneys is unconstitutional).

Prosecutorial authority should be exercised by the Executive Branch in a unified manner, consistent with the application of criminal enforcement policy under the Attorney General. Court-appointed U.S. Attorneys would be at least as accountable to the chief judge of the district court as to the Attorney General, which could, in some circumstances become untenable. In no context is accountability more important to our society than on

the front lines of law enforcement and the exercise of prosecutorial discretion, and the Department contends that the chief prosecutor should be accountable to the Attorney General, the President, and ultimately the people.

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.

Clifton, Deborah J

From: Scott-Finan, Nancy
Sent: Friday, February 23, 2007 9:35 AM
To: Clifton, Deborah J
Cc: Elston, Michael (ODAG); Moschella, William; Sampson, Kyle; Goodling, Monica; Hertling, Richard; Silas, Adrien
Subject: FW: Draft Testimony

Attachments: DRAFT Moschella Testimony.doc

DRAFT Moschella Testimony.doc ...

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Monica, Kyle, Mike and Will,
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Thanks much.

Nancy

Department of Justice

STATEMENT

OF

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

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES HOUSE OF REPRESENTATIVES

CONCERNING

"[[TITLE]]"

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

"[[Title]]"

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

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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 out his or her four-year term prior to being asked to resign.

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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 United States Attorney. Often, the Department looks to the First Assistant U.S. Attorney or another senior manager in the office to serve as U.S. Attorney on an interim basis. When neither the First Assistant nor another senior manager in the office is able or willing to serve as interim U.S. Attorney, or when the appointment of either would not be appropriate in the circumstances, the Department has looked to other, qualified Department employees.

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

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

However, while that nomination process continues, the Department must have a leader in place to carry out the important work of these offices. To ensure an effective and smooth transition during U.S. Attorney

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

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

In most cases, of course, the district court simply appointed the Attorney General's choice as interim

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

We are aware of no other agency where federal judges—members of a separate branch of government—appoint the interim staff of an agency. Such a judicial appointee would have authority for litigating the entire federal criminal and civil docket before the very district court to whom he or she was beholden for the appointment. This arrangement, at a minimum, gives rise to an appearance of potential conflict that undermines the performance or perceived performance of both the Executive and Judicial Branches. A judge may be inclined to select a U.S. Attorney who shares the judge's ideological or prosecutorial philosophy. Or a judge may select a prosecutor apt to settle cases and enter plea bargains, so as to preserve judicial resources. *See* Wiener, Inter-Branch Appointments After the Independent Counsel: Court Appointment of United States Attorneys, 86 Minn. L. Rev. 363, 428 (2001) (concluding that court appointment of interim U.S. Attorneys is unconstitutional).

Prosecutorial authority should be exercised by the Executive Branch in a unified manner, consistent with the application of criminal enforcement policy under the Attorney General. Court-appointed U.S. Attorneys would be at least as accountable to the chief judge of the district court as to the Attorney General, which could, in some circumstances become untenable. In no context is accountability more important to our society than on

the front lines of law enforcement and the exercise of prosecutorial discretion, and the Department contends that the chief prosecutor should be accountable to the Attorney General, the President, and ultimately the people.

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.