Testimony of

Laurie L. Levenson

Professor of Law
Loyola Law School
February 6, 2007

Testimony of Professor Laurie L. Levenson
Senate Judiciary Committee Hearing

"Preserving Prosecutorial Independence: Is the Department of Justice Politicizing the Hiring and Firing of U.S. Attorneys?"

Feb. 6, 2007

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

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

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

insiders is demoralizing; it denigrates the work of hardworking and dedicated Assistant U.S. Attorneys and undermines public confidence in the work of their offices.

Recently, seven United States Attorneys were fired by the Attorney General during the middle of a presidential term. Several of them have excellent reputations for being dedicated, experienced and successful U.S. Attorneys. Nonetheless, they were given no reason for their dismissals and, in at least one case, have been replaced by someone who does not have the professional qualifications for the position, but comes from a deeply political, partisan background. Perhaps not so coincidentally, all of this is occurring on the heels of the Attorney General securing new statutory power to make indefinite interim appointments of U.S. Attorneys without review by the Senate or any other branch of government.

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

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

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

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

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

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

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

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

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

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

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

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

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

The public has great confidence in appointments made by the bench, whether they be of the Federal Public Defender, Magistrate Judges or interim prosecutors. Indeed, the Supreme Court itself has noted the benefits of having judges involved in the appointment of prosecutors. In Morrison, Chief Justice Rehnquist wrote, "[I]n light of judicial experience with prosecutors in criminal cases, it could be said that courts are especially well qualified to appoint prosecutors." Id. at 676 n.13 (emphasis added).

Last week, in a letter dated February 2, 2007, to Senator Patrick J. Leahy, Chairman of the Senate Judiciary Committee, Acting Assistant Attorney General Richard A. Hertling, claimed that it would be "inappropriate and inconsistent with sound separation of powers principles ... to

vest federal courts with the authority to appoint a crucial Executive Branch office such as a United States Attorney." He cited no authority in support of this principle; indeed, the case law, as represented by Morrison, goes against him on this point. The Supreme Court has made it quite clear that judges may properly have a role in appointing prosecutors and that such a procedure does not violate constitutional proscriptions or principles of separation of powers.

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

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

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