

Statement of
The Honorable Charles E. Schumer

United States Senator
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Opening Statement of Senator Charles E. Schumer

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

Senate Committee on the Judiciary

February 6, 2007, 9:30 A.M.

We are holding this hearing because many members of this Committee, including Chairman Leahy, have become increasingly concerned about the administration of justice and the rule of law in this country.

I have observed, with increasing alarm, how politicized the Department of Justice has become. I have watched, with growing worry, as the Department has increasingly based hiring on political affiliation; ignored the recommendations of career attorneys; focused on the promotion of political agendas; and failed to retain legions of talented career attorneys. I have sat on this Committee for eight years, and before that on the House Judiciary Committee for sixteen.

During those combined twenty-four years of oversight over the Department of Justice - through seven presidential terms, including three Republican presidents - I have never seen the Department more politicized and pushed further away from its mission as an apolitical enforcer of the rule of law.

And now, it appears, even the hiring and firing of our top federal prosecutors has become infused and corrupted with political, rather than prudent, considerations. Or at least, there is a very strong appearance that this is so.

For six years there has been little or no oversight of the Department of Justice. Those days are over.

There are many questions surrounding the firing of a slew of U.S. Attorneys. I am committed to getting to the bottom of those questions.

If we do not get the documentary information that we seek, I will consider moving to subpoena that material, including performance evaluations and other documents.

If we do not get forthright answers to our questions, I will consider moving to subpoena one or more of the fired U.S. Attorneys so that the record is clear.

So, with that in mind, let me turn to the issue at the center of today's hearing.

Once appointed, U.S. Attorneys, perhaps more than any other public servant, must be above politics and beyond reproach. They must be seen to enforce the rule of law without fear or favor.

When politics unduly infects the appointment and removal of U.S. Attorneys, what happens?

Cases suffer. Confidence plummets. And corruption has a chance to take root.

What has happened here over the last 7 weeks is nothing short of breathtaking.

Less than two months ago, seven or more U.S. Attorneys reportedly received an unwelcome Christmas present. As the Washington Post reports, those top federal prosecutors were called and terminated on the same day.

The Attorney General and others have sought to deflect criticism by suggesting that these officials all had it coming because of poor performance; that U.S. Attorneys are routinely removed from office; and that this was only business as usual.

But what happened here doesn't sound like an orderly and natural replacement of underperforming prosecutors; it sounds more like a purge.

What happened here doesn't sound like business as usual; it appears more reminiscent of a different sort of Saturday night massacre.

Here's what the record shows:

- * Several U.S. Attorneys were apparently fired with no real explanation.
- * Several were seemingly removed merely to make way for political up-and-comers.
- * One was fired in the midst of a successful and continuing investigation of lawmakers.
- * Another was replaced with a pure partisan of limited prosecutorial experience, without Senate confirmation.
- * And all of this, coincidentally, followed a legal change - slipped into the PATRIOT Act in the dead of night - which for first time in our history gave the Attorney General the power to make indefinite interim appointments and to bypass the Senate altogether.

We have heard from prominent attorneys - including many Republicans - who confirm that these actions are unprecedented, unnerving, and unnecessary:

? The former San Diego U.S. Attorney, Peter Nunez, who served under Reagan said: "[This] is like nothing I've ever seen before in 35-plus years." He went on to say that while the President has the authority to fire a U.S. Attorney for any reason, it is "extremely rare" unless there is an allegation of misconduct.

? Another former U.S. Attorney and head of the National Association of Former United States Attorneys said members of his group were in "shock" over the purge, which "goes against all tradition." [Washington Post, February 4, 2007].

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

And yet, the recent purge of top federal prosecutors reeks of politics. An honest look at the record reveals that something is rotten in Denmark:

? In Nevada, where U.S. Attorney Daniel Bogden was reportedly fired, a Republican source told the press that "the decision to remove U.S. attorneys . . . was part of a plan to 'give somebody else that experience' to build up the back bench of Republicans by giving them high-profile jobs." [Las Vegas Review-Journal, January 18, 2007].

? In New Mexico, where U.S. Attorney David Iglesias was reportedly fired, he has publicly stated that when he asked why he was asked to resign, he "wasn't given any answers."

? In San Diego, where U.S. Attorney Carol Lam was reportedly fired, the top-ranking FBI official in San Diego said: "I guarantee politics is involved." [Dan Dzwilewski, quoted in the San Diego Union-Tribune, January 13, 2007] And the former U.S. Attorney under President Reagan said, "It really is outrageous." [North County Times]

o Ms. Lam, of course, was in the midst of a sweeping public corruption investigation of Randy "Duke" Cunningham and his co-conspirators, and her office has outstanding subpoenas to three House Committees.

o Was her firing a political retaliation? There is no way to know. But the Department of Justice should go out of its way to avoid even the appearance of impropriety. That is not too much to ask. And, as I've said, the appearance here - given all the circumstances - is awful.

? Finally, in Arkansas, where U.S. Attorney Bud Cummins was forced out, there is not a scintilla of evidence that he had any blemish on his record. In fact, he was well-respected on both sides of the aisle, and was in the middle of a number of important investigations.

o His sin? Occupying a high profile position that was being eyed by an ambitious acolyte of Karl Rove, who had minimal federal prosecution experience, but was highly skilled at opposition research and partisan attacks for the Republican National Committee.

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

o In June of 2006, when Karl Rove was himself still being investigated by a U.S. Attorney, was he brazenly leading the charge to oust a sitting U.S. Attorney and install his own former aide?

Now, I ask, is this really how we should be replacing U.S. Attorneys in the middle of a Presidential term?

No one doubts the President has the legal authority to do it, but can this build confidence in the Justice Department? Can this build confidence in the administration of justice?

Of course, what makes these firings especially troubling is their timing: mere months after the Administration secured unprecedented power - under the PATRIOT Act - to appoint interim U.S. Attorneys indefinitely. For 20 years, the Attorney General could appoint an interim for 120 days, after which the chief judge had the authority to make the appointment, if the Senate had not yet confirmed a replacement. And for decades before that, the District Court alone had the authority to appoint an interim U.S. Attorney.

There is absolutely no Constitutional problem with the previous system, as every former DOJ official testifying here today acknowledges. Though the Department now "strongly opposes" any return to the old system, the Department cites no case in support of its view.

There is, however, a Supreme Court case, *Morrison v. Olson*, making it absolutely clear that interim federal prosecutors are inferior officers who may be appointed by the courts.

Moreover, almost a week after my staff asked for specific examples of judges making arguably unsuitable appointments, the Department was able to come up with precisely ONE in the last hundred years. I respectfully suggest that the Attorney General possibly has a worse track record for making unsuitable interim appointments in just the last seven weeks.

Let me finish by making three quick points. First, no one is saying that underperforming U.S. Attorneys should not be removed. Every President has done it, and should do it, and good management improves public confidence. That does not appear, in too many instances, to be at the bottom of what's happened here.

Second, no one is saying that politics doesn't play any role in the picking of U.S. Attorneys. They are, after all, political appointments. And no one is saying that some political experience or affiliation should render a candidate unsuitable. Indeed, just last year we unanimously approved a highly regarded counsel to Senator Specter to be U.S. Attorney in Utah.

Third, no one is accusing the Administration of blatantly removing a U.S. Attorney to put an end to an inconvenient and damaging public corruption investigation. But, some are rightly noting the appearance of such a conflict and are correctly asking the Department to demonstrate that retaliation was not a motive here.

In the end, justice must not only be done, it must be seen to be done.

I cannot improve on the words of former Attorney General, and later Supreme Court Justice Robert Jackson. Mary Jo White, in her own testimony, cites to this passage from a famous speech he gave to United States Attorneys in 1940:

"It would probably be within the range of that exaggeration permitted in Washington to say that assembled in this room is one of the most powerful peace-time forces known to our country. The prosecutor has more control over life, liberty, and reputation than any other person in America. His discretion is tremendous."

That is why we are holding this hearing. That is why this hearing is so important. And that is why I hope we get candid answers to our questions.

Now, let me turn to our Ranking Member, Senator Specter