

Testimony of
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Statement of Mary Jo White
Senate Committee on the Judiciary
Hearing: "Preserving Prosecutorial Independence:
Is the Department of Justice Politicizing the Hiring and Firing of D.S. Attorneys?"
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My name is Mary Jo White. I am providing this written statement and testifying at this hearing at the invitation of Senator Patrick Leahy, the Chairman of the United States Senate Committee on the Judiciary.

By way of background, I spent over fifteen years in the Department of Justice (the "Department"), both as an Assistant United States Attorney and as United States Attorney. I served during the tenures of seven Attorneys General: Griffin B. Bell, Benjamin R. Civiletti, William French Smith, Richard L. Thornburgh, William P. Barr, Janet Reno and John Ashcroft. I was twice appointed as an Interim United States Attorney, first in the Eastern District of New York in 1992 by Attorney General Barr and then in 1993 by Attorney General Reno in the Southern District of New York. Most recently, I served for nearly nine years as the Presidentially-appointed United States Attorney in the Southern District of New York from September 1993 until January 2002. I was the Chair of the Attorney General's Advisory Committee from 1993-1994. Since April 2002, I have served as the Chair of the Litigation Group of Debevoise & Plimpton LLP, the law firm at which I started my legal career.

Maintaining the prosecutorial independence of the United States Attorneys, which is the subject of this hearing, is vital to ensuring the fair and impartial administration of justice in our federal system. Concerns have recently been raised as to whether that independence is being compromised by the reported installation by the Department of Justice of Interim United States Attorneys in replacement of a number of sitting Presidentially-appointed United States Attorneys who have allegedly been asked to resign in the absence of misconduct or other compelling cause. It has been variously suggested that at least some of these resignations have been sought from qualified United States Attorneys in favor of appointees who may be more politically and behaviorally aligned with the Department's priorities~ to replace a United States Attorney because of public corruption or other kinds of sensitive cases and investigations brought or in process; as a result of a Congressman's criticism; or just to give another person the opportunity to serve and have the high-profile platform of serving as a United States Attorney. These allegations, in my view, raise legitimate concerns for this Committee about the fair and impartial administration of justice, both in fact and in appearance. If the allegations were true, the actions being taken by the Department would appear to pose a threat to the independence of the United

States Attorneys and to diminish the importance of the jobs they are entrusted to do. There would be, at a minimum, a significant appearance issue.

A related concern has been raised about a recent change in the statutory framework for the appointment of Interim United States Attorneys embodied in the reauthorized USA Patriot Act.¹ Under the new provision, the Attorney General is accorded unilateral power to make appointments of Interim United States Attorneys for an indefinite period of time, without the necessity of obtaining the advice and consent of the United States Senate, which is required for every Presidentially-nominated United States Attorney. Previously, the law empowered the Attorney General to appoint Interim United States Attorneys for a period up to 120 days; thereafter, if no successor was nominated by the President and confirmed by the Senate, the chief judge of the relevant district court was accorded the power of appointment until a Presidentially-appointed successor was confirmed by the Senate.

For whatever assistance it may be to the Committee, I will provide my personal perspective on these issues. Before doing so, let me make very clear up front that I have the greatest respect for the Department of Justice as an institution and have no personal knowledge of the facts and circumstances regarding any of the reported requests for resignations of sitting United States Attorneys. And, with one exception, I do not know any of the United States Attorneys in question or their reported replacements. The one exception is the United States Attorney for the Southern District of California, a career prosecutor, whom I know and first came to know of when she was an Assistant United States Attorney doing very impressive work in the area of health care fraud. Because I do not know the precipitating facts and circumstances, I am not in a position to support or criticize the reported actions of the Department and do not do so by testifying at this hearing. I can and will speak only about my views about the importance of the United States Attorneys to our federal system of criminal and civil justice, the importance of preserving the independence of the United States Attorneys, and how I believe that casual or unwisely motivated requests for their resignations could undermine our system of justice and diminish public confidence. My views on the issues I understand to be before the Committee are as follows:

? United States Attorneys are political appointees who serve at the pleasure of the President. It is thus customary and expected that the United States Attorneys generally will be replaced when a new President of a different party is elected. There is also no question that Presidents have the power to replace any United States Attorney they have appointed for whatever reason they choose.

? In my experience and to my knowledge, however, it would be unprecedented for the Department of Justice or the President to ask for the resignations of United States Attorneys during an Administration, except in rare instances of misconduct or for other significant cause. This is, in my view, how it should be.

? United States Attorneys are, by statute and historical custom, the chief law enforcement officers in their districts, subject to the general supervision of the Attorney General.² Although political appointees, the United States Attorneys, once appointed, play a critical and non-political, impartial role in the administration of justice in our federal system. Their selection is of vital national and local interest.

? In his well-known address to the United States Attorneys in 1940, then Attorney General Robert H. Jackson, although acknowledging the need for some measure of centralized control and coordination by the Department, eloquently emphasized the importance of the role of the United States Attorneys and their independence: 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. These powers have been granted to our law enforcement agencies because it seems necessary that such a power to prosecute be lodged somewhere. This authority has been granted by people who really wanted the right thing done, wanted crime eliminated-but also wanted the best in our American traditions preserved. Because of this immense power to strike at citizens, not with mere individual strength, but with all the force of government itself, the post of United States Attorney from the very beginning has been safeguarded by presidential appointment, requiring confirmation of the Senate of the United States. You are thus required to win an expression of confidence in your character by both the legislative and the executive branches of the government before assuming the responsibilities of a federal prosecutor.

? Your responsibility in your several districts for law enforcement and for its methods cannot be wholly surrendered to Washington, and ought not to be assumed by a centralized Department of Justice. Your positions are of such independence and importance that while you are being diligent, strict, and vigorous in law enforcement you can also afford to be just. The federal prosecutor has now been prohibited from engaging in political activities. I am convinced that a good-faith acceptance of the spirit and letter of that doctrine will relieve many [United States Attorneys] from the embarrassment of what have heretofore been regarded as legitimate expectations of political service I think the Hatch Act should be utilized by federal prosecutors as a protection\ against demands on their time and prestige.... '

? Justice Jackson's remarks capture well the importance of both the role of United States Attorneys and the independence that is necessary to successfully fulfill their role. The Department of Justice should guard carefully against acting in ways that may be perceived to diminish the importance of the office of United States Attorney or of its independence.

? Changing a United States Attorney invariably causes disruption and loss of traction in cases and investigations in a United States Attorney's Office. This is especially so in sensitive or controversial cases and investigations where the leadership and independence of the United States Attorney are often crucial to the successful pursuit of such matters, especially in the face of criticism or political backlash. Replacing a United States Attorney can, of course, be necessary or part of the normal and expected process that accompanies a change of the political guard. But I do not believe that such changes should, as a matter of sound policy, be undertaken lightly or without significant cause. In this and most previous Administrations, the United States Attorneys appointed by the prior Administration were replaced in an orderly and respectful fashion over several months after the election to allow for a smooth transition. If wholesale change in the United States Attorneys is to occur, it should be done in this way. In my view, wholesale replacement of the United States Attorneys should not be done immediately following an election, as occurred at the outset of the Clinton Administration-such abrupt change is not necessary and can undermine the important work of the United States Attorneys' Offices. In some

instances, the President of a different party has allowed some of his predecessor's appointees to remain, as happened in New York, with the support of Senator Daniel Patrick Moynihan, when Jimmy Carter was elected President.

? If United States Attorneys are replaced during an Administration without apparent good cause, the wrong message can be sent to other United States Attorneys. We want our United States Attorneys to be strong and independent in carrying out their jobs and the priorities of the Department. We want them to speak up on matters of policy, to be appropriately aggressive in investigating and prosecuting crimes of all kinds and wisely use their limited resources to address the priorities of their particular district. The United States Attorneys are generally closest to the problems and needs of their districts and thus use their discretion and judgment as to how best to apply national initiatives and priorities. One size seldom fits all. There isn't one right answer or rigid plan that can be applied to achieve optimal justice in each district. The federal system has historically counted on the independence and good judgment of the United States Attorneys to carry out the Department's mission, tailored to the specific circumstances of their districts.

? In my opinion, the United States Attorneys have historically served this country with great distinction. Once in office, they become impartial public servants doing their best to achieve justice without fear or favor. As Justice Sutherland said in *Berger v. United States*: "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice be done. As such, he is in a peculiar and very definite sense the servant of the law. I am certain that the Department of Justice would not want to act in such a way or have its actions perceived in such a way to derogate from this model of the non-political pursuit of justice by those selected in an open and transparent manner.

? Finally, as to the issue of the optimal appointment mechanism for Interim United States Attorneys, I defer to Congress and the constitutional scholars to find the right answer. For what it is worth, as a practical matter, I believe that the Department of Justice, in the first instance, is ordinarily in the best position to select an appropriate Interim United States Attorney who will ensure the least disruption of the business of the United States Attorney's Office until a permanent successor can be selected and confirmed. I can, however, also appreciate the concern with permitting such appointments to be made for an indefinite period of time without the necessity of Senate confirmation. I personally thought the structure of allowing the Attorney General to appoint Interim United States Attorneys for a period of 120 days and then giving that power to the chief judge of the district generally worked well and achieved an appropriate balance. Thank you for giving me the opportunity to share my perspective with the Committee. I would be happy to answer any questions.

I USA Patriot Improvement and Reauthorization Act of 2005, Pub. L. 109-177, §502, 120 Stat. 192,246-47 (2006); 28 U.S.C. § 546 (2006).

228 U.S.c. §§ 519 & 521-50 (2006); *Nadler v. Mann*, 951 F.2d 301,305 (11th Cir. 1992); United States Attorneys Mission Statement ("Each United States Attorney exercises wide discretion in

the use of his/her resources to further the priorities of the local jurisdiction and needs of their communities. United States Attorneys have been delegated full authority and control in the areas of personnel management, financial management, and procurement."), <http://www.usdoj.gov/usao/index.html> (last visited Feb. 4, 2007); U.S. Attys' Manual § 3-2.100 ("the United States Attorney serves as the chief law enforcement officer in each judicial district. ... "); U.S. Attys' Manual § 3- 2.140 ("They are the principal federal law enforcement officers in their judicial districts .."), http://www.usdoj.gov/usao/cousa/foia_readingJoomlusamltitle3/2musa.htm#3-2.100 (last visited Feb 4, 2007).

3 Robert H. Jackson, The Federal Prosecutor, Address at the Second Annual Conference of United States Attorneys (Apr. 1, 1940), reprinted in 24 J. Am. Judicature Soc'y 18, 19 (1940); also available at <http://www.roberthjackson.org/Man/theman2-7-6-1/> (last visited Feb. 4, 2007).
4295 U.s. 78, 88 (1935).