Statement of T.J. Halstead
Legislative Attorney, American Law Division
Congressional Research Service

Before

The Committee on the Judiciary
Subcommittee on Commercial and Administrative Law
House of Representatives

March 6, 2007

on

"Restoring Checks and Balances in the Confirmation Process of U.S. Attorneys"

Madam Chairman and Members of the Subcommittee:

My name is T.J. Halstead. I am a Legislative Attorney with the American Law Division of the Congressional Research Service at the Library of Congress, and I thank you for inviting me to testify today regarding the Committee's consideration of H.R. 580.

Recent press accounts indicating that a total of eight U.S. Attorneys have been asked to resign in the past three months have raised interest in patterns of departures of U.S. Attorneys. These apparent dismissals have also drawn congressional attention to the manner in which interim U.S. Attorneys are appointed, as the USA PATRIOT Improvement and Reauthorization Act of 2005 changed the statute governing the appointment of interim U.S. Attorneys to allow the Attorney General to fill a vacancy indefinitely, pending the confirmation of a U.S. Attorney by the United States Senate. Accordingly, my testimony today will focus on three relevant aspects of this matter: (1) Congressional Research Service (CRS) attempts to analyze available information pertaining to departures of U.S. Attorneys; (2) constitutional implications adhering to the new interim appointment structure as well as the current proposal to revert to the prior standard, and; (3) the interpretation and application of relevant statutes, such as the Vacancies Reform Act of 1998, that could be employed in a manner that may impact the advice and consent prerogatives of the Senate upon a return to the prior standard and that may affect the accomplishment of the legislative purpose in amending the current provision.

Regarding the first issue, CRS was initially unable to obtain official data from the Department of Justice. CRS began by contacting the Executive Office for United States Attorneys (EOUSA), which serves as the liaison between U.S. Attorneys and the Department of Justice. CRS first contacted the EOUSA on January 24, 2007, to seek records on the appointment and termination dates for U.S. Attorneys. As of February 20, 2007, the EOUSA had not provided the requested data. On February 22, 2007, CRS published a report, authored by my colleague Kevin Scott who serves in CRS's Government and Finance Division, that addresses the topic of U.S. Attorneys who served less than full four year terms for the period from 1981 through 2006.

On February 23, 2007, the Department of Justice provided to CRS information on U.S. Attorney appointments by date range, covering the period from April 1993, through February 23, 2007. Using that data in conjunction with information contained in the Legislative Information System (LIS), the following observations can be made. Between 1993 and 2006, the 103rd through 109th Congresses, the President nominated and the Senate confirmed 247 U.S. Attorneys. Of those 247, 73 remained in their positions as of March 1, 2007. The remaining 174 have left their positions. Of those who left, 77 were appointed by President Clinton but resigned in 2001, so CRS treated those departures as a product of normal turnover in positions requiring Senate confirmation where the appointees of a departing President leave to allow the incoming President to fill those positions. CRS focused on the remaining 97 departures of Senate-confirmed US Attorneys between 1993 and March 1, 2007. Explanations for those departures were sought, first, from the LIS. The LIS was used to determine if the departing U.S. Attorneys were nominated to another position that required Senate confirmation, either in the executive branch or as a federal judge. For those who were not nominated to another position requiring Senate confirmation, CRS used information provided by the Department of Justice on date of appointment of successor as a starting point to conduct searches of secondary sources, primarily national newspapers and newspapers published in a U.S. Attorney's district, to attempt to ascertain reasons for their departure. Generally, finding the exact reason for departures that were not for other jobs in the federal government, either in the executive branch or in the judiciary, proved to be quite difficult. After searching news reports, it appears that the following breakdown of departing U.S. Attorneys between 1993 and Feb. 23, 2007 represents the best currently available information on departing U.S. Attorneys who did not leave in 2001 (due to change in presidential administration):

- 21 became federal judges (20 Article III judges, one magistrate judge);
- 9 sought elective office;
- 8 took other positions in the executive branch;
- 3 retired;
- 2 took positions in state government;
- 2 became state judges;
- 1 took a position in local government;
- 1 died;
- 34 left for private practice;
- 16 resigned (no other classification was possible).

The final two categories represent those U.S. Attorneys for whom CRS was generally able to find the least information. This can occur because an individual may not state a reason for departure or because news reports do not provide the information. Within the class of 16 individuals who resigned, news reports suggested that, in six cases, their personal

or professional actions may have precipitated the resignation. Of the other ten U.S. Attorneys, CRS found news reports that one, the U.S. Attorney for the District of North Dakota, resigned in 2000 after being diagnosed with a malignant brain tumor. For the remaining nine, news reports generally did not indicate the reason for resignation. Five of the nine U.S. Attorneys (Daniel Bogden, Bud Cummins, David Iglesias, Carol Lam, and Kevin Ryan) who resigned and for whom CRS was unable to locate specific information were reported, in press accounts, to have been asked to resign by the Department of Justice in the past three months.[1] Two other U.S. Attorneys, Paul Charlton and John McKay, indicated that they were leaving their positions to return to the private sector. However, news reports indicate that they were also asked to resign by the Department of Justice. One other U.S. Attorney, Margaret Chiara, reportedly has also been asked to resign. Chiara appears to still be serving as a U.S. Attorney. In sum, press accounts indicate that a total of eight US Attorneys have been asked to resign in the past three months.[2] CRS has not independently verified any of these press reports. Research conducted thus far by CRS has not identified a similar pattern of contemporaneous departures that have been reported to stem from politically motivated dismissals of U.S. Attorneys. It is important to note, however, that research on this point is ongoing and may be aided by any future disclosure of information by the Department of Justice.

While the apparent dismissal of at least eight U.S. Attorneys in recent months has raised interest in patterns of departures, the current controversy has also drawn attention to the constitutionality of the appointment dynamic implemented by the Patriot Act Reauthorization, as well as the constitutional implications of H.R. 580, which would revert to the prior interim appointment structure. In its current iteration, 28 U.S.C. § 546 provides, in pertinent part, that "the Attorney General may appoint a United States attorney for the district in which the office of the United States attorney is vacant," and that any person so appointed may serve until the qualification of a presidentially appointed successor pursuant to the terms of 28 U.S.C. § 541. Section 541 does not require the President to nominate an individual for the position of U.S. Attorney within a certain time frame, giving rise to the possibility that a U.S. Attorney appointed by the Attorney General pursuant to § 546 may serve indefinitely, effectively obviating the advice and consent function reserved for the Senate with regard to U.S. Attorneys appointed by the President under § 541. Despite the institutional and political concerns adhering to the indefinite service of a non-Senate confirmed U.S. Attorney under § 546, a review of applicable judicial precedent establishes that there is no constitutional infirmity inherent in such a dynamic.

The Appointments Clause states that:

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but

---

[1] The resignations of both Bogden and Iglesias were reportedly effective on Feb. 28, 2007, which occurred after CRS received the data from the Department of Justice.

[2] *See* Dan Eggen, "6 of 7 Dismissed U.S. Attorneys Had Positive Job Evaluations," *Washington Post*, Feb. 18, 2007, p. A11; Nate Reens and John Agar, "Questions Swirl Around Chiara Resignation: Some Speculate U.S. Attorney Was Forced to Quit by White House," *Grand Rapids Press*, Feb. 24, 2007, p. A3.

> the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.[3]

Stated in practical terms, the Appointments Clause establishes that nomination by the President and confirmation by the Senate is the required protocol for the appointment of "principal officers" of the United States, but vests Congress with the discretionary authority to permit a limited class of federal officials to appoint "inferior officers" without confirmation. Accordingly, any argument that the current appointment structure is unconstitutional must center on the assertion that U.S. Attorneys are principal officers who must be appointed by and with the advice and consent of the Senate. However, principles delineated in two Supreme Court cases in recent years have led lower courts to hold that U.S. Attorneys are, in fact, inferior officers who may be appointed without Senate confirmation.

In *Morrison v. Olson*,[4] the Supreme Court held that the appointment of an independent counsel by a special court pursuant to the now-lapsed independent counsel provisions of the Ethics in Government Act did not violate the Appointments Clause, based on its determination that the independent counsel was an inferior officer because her duties were limited, her performance of them was cabined by Department of Justice policy, her jurisdiction was limited, her tenure was restricted, and she held office subject to removal by the Attorney General (thereby indicating that she was inferior to the Attorney General in rank and authority, even though not subordinate to him). In analyzing the issue, the Court stated that "[t]he line between 'inferior' and 'principal' officers is one that is far from clear, and the Framers provided little guidance into where it should be drawn." In reaching its decision, the Court refrained from identifying such a line, stating: "[w]e need not attempt here to decide exactly where the line falls between the two types of officers, because in our view appellant clearly falls on the 'inferior officer' side of that line. Subsequently, in *Edmond v. United States*,[5] the Supreme Court upheld the appointment of judges of the United States Coast Guard Court of Appeals by the Secretary of Transportation, finding that such judges were inferior officers. Regarding the distinction between principal and inferior officers, the Court in *Edmond* stated that:

> [T]he term "inferior officer" connotes a relationship with some higher ranking officer or officers below the President: whether one is an "inferior" officer depends on whether he has a superior. It is not enough that other officers may be identified who formally maintain a higher rank, or possess responsibilities of a greater magnitude. If that were the intention, the Constitution might have used the phrase "lesser officer." Rather, in the context of a clause designed to preserve political accountability relative to important government assignments, we think it evident that "inferior officers" are officers whose work is directed and supervised at some level by others who were appointed by presidential nomination with the advice and consent of the Senate.[6]

---

[3] U.S. Const. Art. II, § 2, cl. 2.

[4] 487 U.S. 654 (1988).

[5] 520 U.S. 651 (1997).

[6] cite

Applying these principles to U.S. Attorneys gives rise to the conclusion that they are inferior officers for purposes of the Appointments Clause. In *United States v. Hilario*,[7] for example, the Court of Appeals for the First Circuit held that when measured against the "benchmarks" established in *Morrison* and *Edmond*, "United States Attorneys are inferior officers." In reaching this determination, the court noted that Congress has vested plenary authority over U.S. Attorneys in the Attorney General; that they are subject to closer supervision than the officers at issue in *Edmond*; that they may be removed from participation in particular cases upon a determination by the Attorney General that such an action would be in the interests of the United States; and that the Attorney General may direct the location of U.S. Attorneys' offices, direct that they file reports, fix U.S. Attorneys' salaries, authorize office expenses, and approve staffing decisions. Similar reasoning led the Court of Appeals for the Ninth Circuit to declare that United States Attorneys are inferior officers in *United States v. Gantt*.[8] Based on these precedents, it seems evident that the provisions of § 546 comport with the strictures of the Appointments Clause.

At the same time, however, it is important to note that a return to the appointment scheme in place prior the passage of the PATRIOT Act reauthorization likewise would not be constitutionally problematic, for essentially the same reasons. In its prior iteration, § 546 established that "the Attorney General may appoint a United States attorney for the district in which the office of the United States attorney is vacant," and that any person so appointed could serve until the earlier of the qualification of a § 541 appointee or 120 days after the expiration of the appointment made under § 546. The prior version of the statute further provided that in instances where the appointment made by the Attorney General expired, the district court for such district could appoint a U.S. Attorney to serve until the vacancy was filled. H.R. 580 would amend § 546 to reinstate this appointment scheme. Despite the long history of judicial involvement in the selection of interim U.S. Attorneys, recent statements by Department of Justice officials indicate that the DOJ would view a return to the prior appointment scheme as inconsistent with the doctrine of separation of powers. However, a review of the cases noted above reveals that the courts have not validated such concerns.

Specifically, in addition to determining that the independent counsel was an inferior officer for purposes of the Appointments Clause, the Court in *Morrison v. Olson* held that the judicial role in the appointment of the independent counsel did not violate the strictures of Article III or other relevant separation of powers principles. Regarding Article III concerns, the Court held that a judge's role in appointing an independent counsel did not threaten the impartial adjudication of cases, given that the judges in question had no authority to review the actions of the independent counsel and were disqualified from participating in any related judicial proceedings. Turning to the argument that a judicial appointive function unduly intruded upon executive prerogative, the *Morrison* Court stated that it could discern "no inherent incongruity about a court having the power to appoint prosecutorial officers," adding that "in light of judicial experience with prosecutors in criminal cases, it could be said that courts are especially well qualified to appoint prosecutors." Addressing the constitutionality of judicial appointment of interim U.S. Attorneys specifically, the First Circuit in *Hilario* adopted the reasoning employed by the Court in *Morrison*. Regarding Article III implications, the First Circuit stated that it did not believe that the vesting of appointive authority in the courts served to undermine the integrity of the judiciary, further

---

[7] 218 F.3d 19 (1st Cir. 2000).

[8] 194 F.3d 987 (9th Cir. 1999).

noting that the *Morrison* Court had pointed to the judicial appointment of interim U.S. Attorneys to illustrate that the task is not incompatible with judicial functions. The First Circuit in *Hilario* likewise adopted the *Morrison* Court's determination that judicial appointment such officers did not impermissibly encroach upon executive powers, and went on to explain that the judicial appointment provision was tempered in such a fashion as to ensure the independence of an appointee.

These cases establish that there are no constitutional problems with either appointment dynamic. As it currently stands, § 546 allows the Attorney General to appoint a U.S. Attorney who may serve, without Senate confirmation, until such time as the President chooses to send up a nomination pursuant to § 541 that is then acted upon favorably by the Senate. Conversely, there is no constitutional impediment to the reestablishment of the prior standard, as is contemplated by H.R. 580. Accordingly, legislative action hinges not on constitutional inquiry, but upon the weighing by Congress of several competing institutional and policy considerations.

A key aspect of the current controversy centers on the stated concern that § 546, in its current iteration, will result in the prolonged circumvention of the Senate's traditional advice and consent function under § 541. Assuming that this concern will continue to factor prominently in the consideration of H.R. 580, Congress needs to be aware that even upon a return to the previous version of § 546, the possibility remains that the Department of Justice might rely upon pre-existing interpretations of applicable statutory provisions to effectively circumvent the Senate's advice and consent function under § 541.

On September 5, 2003, the DOJ's Office of Legal Counsel (OLC) issued an opinion concluding that the Department could rely on the provisions of the Vacancies Reform Act of 1998 (Vacancies Act) independently of and in conjunction with the provisions of § 546 (the pre-PATRIOT Act reauthorization version). This characterization is significant, as it allows the Department to employ the two statutes sequentially. The Vacancies Act establishes which individuals may be designated by the President to temporarily perform the duties and functions of a vacant office and, subject to certain exceptions, provides that such individuals may serve in an acting capacity for a period not to exceed 210 days. When used along with the prior version of § 546, this approach gives rise to the possibility that the Department could install an acting U.S. Attorney under the Vacancies Act, followed by a § 546 interim appointee (who could be the same person) for a minimum of 330 days without the advice and consent of the Senate (given that the 210 day time limit imposed by the Vacancies Act is tolled during the pendency of a nomination). While it could be argued that this approach runs contrary to the aim of the Vacancies Act, which was designed to protect the Senate's constitutional role in the confirmation process, the OLC opinion is based on a tenable construction of the Act. The current Administration appears to be the only one to have taken this approach, and has appointed at least 27 acting U.S. Attorneys pursuant to the Vacancies Act.

The current Administration also made successive § 546 appointments under the prior version of the statute. Based on the information supplied by the Department of Justice to CRS, there appear to be several instances in which the Attorney General made successive interim appointments of U.S. Attorneys under § 546, of either the same or different individuals. One individual received a total of four successive interim appointments pursuant to this approach. This use of § 546, coupled with the potential sequential use of the Vacancies Act could give rise to a dynamic whereby the advice and consent function of the

Senate could be avoided to a significant degree even under the prior version of § 546. If it so desired, Congress could make clear that § 546 is the exclusive method for making interim appointments to U.S. Attorney positions.

While the granting of successive interim appointments under the prior version of § 546 might seem legally problematic in light of the ability of a district court to appoint a U.S. Attorney who may serve until the vacancy is filled pursuant to § 541, there is at least one court decision which validates this approach, at least under certain circumstances. In *In re Grand Jury Proceedings*,[9] the District Court for the District of Massachusetts held that the successive interim appointment of a U.S. Attorney under § 546 was permissible, given the individual's nomination for the position was pending before the Senate, and where the appropriate district court had expressly declined to exercise its appointive authority under § 546.

Ultimately, as with the question of whether to retain the current appointment dynamic or to return to the previous standard, any decision will hinge upon a congressional determination as to whether the potential benefits of this statutory flexibility outweigh the danger such a dynamic poses to its institutional prerogatives.

- - - - -

Madam Chairman, that concludes my prepared statement. I would be happy to answer any questions that you or other Members of the Subcommittee might have, and I look forward to working with all Members and staff of the Subcommittee on this issue in the future.

---

[9] 671 F.Supp. 5 (D. Mass., 1987).