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House of Representatives

Committee on the Judiciary

**Subcommittee on Commercial and
Administrative Law**

Statement of the
Hon. George J. Terwilliger III
Washington, D.C.
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Madam Chairwoman and members of the Subcommittee,

Thank you for inviting me to appear today to testify regarding the appointment of interim United States Attorneys. Those filling the office of the United States Attorney in each district play a vital role in promoting the safety and well-being of all Americans. Altering the process for filling vacant United States Attorney positions therefore deserves careful and thoughtful consideration.

It was my privilege to serve as an Assistant United States Attorney for eight years, the United States Attorney for the District of Vermont for five years, and to supervise the nation's 93 United States Attorneys as Deputy Attorney General of the United States. While serving as Deputy Attorney General, I had the opportunity to comment on the merits of potential nominees for the office of United States Attorney, to consult with United States Attorneys as to their performance, and to be involved in the removal or resignation of United States Attorneys.

I considered these duties to be matters wholly within the Executive Branch. Because of the sensitive nature of these duties both to the Department and, obviously, to the persons whose careers were affected, I treated such matters as ones of great confidence. These matters were neither suitable for, nor amenable to, public discourse.

My current private practice brings me into frequent contact with United States Attorneys and their offices. While my practice sometimes places me in the position of persuading United States Attorneys and their Assistants to take another view of certain matters before them, I have the utmost respect, admiration, and, indeed, gratitude for the work that the United States Attorneys and their assistants perform. As a general proposition, but with rare and sometimes troubling exception, I find the United States Attorneys and their assistants to be among the most honorable and dedicated of professionals. I am before the Committee today because I believe strongly that protecting the integrity of the office of United States Attorney is essential to our system of justice.

It was my privilege to serve in the Department of Justice for 15 years. My comments today are informed by my experience and the high offices in which I had the privilege to serve. It is also a privilege for me to know personally much of today's leadership of the Department of Justice, including Attorney General Gonzalez and Deputy Attorney General McNulty. In addition, I am fortunate to enjoy the friendship of many of their staff members and of many long-serving career Department of Justice lawyers, men and women for whom I have sincere personal and professional admiration.

From my experience with the current leadership of the Department, I have every reason to believe that the Department's leaders completely share my views

about the importance of maintaining the integrity of and respect for the office of United States Attorney. I am, of course, aware that some level of controversy has ensued about recent changes in the leadership of several United States Attorneys' offices and the manner in which these changes were brought about. I know, or have had dealings of a professional nature with, some of the United States Attorneys involved. In my view, they are lawyers of considerably high professional reputation.

In my experience, particularly as Deputy Attorney General, there are a variety of reasons why a change in leadership at a United States Attorney's office may be appropriate, or even necessary. These reasons might generally be termed to be on account of "performance," but I would not interpret such a characterization as limited in reference to a level of performance that is either substandard or below some level of appropriate professional behavior. Rather, I would interpret a "performance-related" reason for making a change as having more to do with an overall assessment of the performance of an office. Such a broad assessment would include an office's implementation of the administration's law enforcement policies and priorities.

During my tenure as United States Attorney for the District of Vermont, I believe it would be fair to say that there were those who praised my performance and those who found it wanting. I received my fair share of criticism for both policy and operational decisions. Such criticism comes with the territory; if one does not want to suffer such criticism, one should not assume such an office. I considered the proper execution of my duties to require both a recognition that I served as a subordinate to the leadership of the Department of Justice and an awareness of my responsibility for forwarding within my district the goals and objectives of the administration. I held the United States Attorneys whom I supervised as Deputy Attorney General to the same standards. Where I and/or the Attorney General believed that performance in regard to these core responsibilities was wanting, we acted upon that belief.

United States Attorneys are, of course, political appointees of the President. Their position is, in fact, unique in the Executive Branch bureaucracy. United States Attorneys are responsible for securing the mission of the Executive Branch in their respective districts, and are therefore required, in my judgment, to facilitate teamwork and joint effort in the field among the several Executive agencies vested with law-enforcement, counterterrorism, and other responsibilities vital to the well-being and safety of Americans. It is decidedly not within the scope of a United States Attorney's responsibilities for her or him to execute her or his duties in a manner that is politically-driven. Nothing is more inimical to the administration of justice, and the public's perception of the government's interest that justice be done, than having a prosecutor utilize politics as a basis for, or determining the direction of, the prosecution of a federal case.

That said, it is part of United States Attorney's job, as an officer in a political administration, to carry out, within her or his district, the administration's policies and priorities. United States Attorneys are given an important voice, both as individuals and as a group, in setting those policies and priorities and in deciding how, in a given locale, they are best carried out. However, if a United States Attorney is unable to agree with such policies and priorities and to carry them forward, that United States Attorney does not have, in my judgment, the authority to simply ignore them. Rather, such a United States Attorney should either resign and move on to other pursuits, or, if she or he fails to do so, then the failure to execute such policies and priorities would be grounds for removal.

All of these factors are relevant to the selection of persons to have the privilege to serve in this great office. Given the substantial latitude and discretion that United States Attorneys are traditionally accorded, the selection of a person to serve in this office is a critical decision. I have been working in or with United States Attorneys' offices for my entire legal career, which, I am now forced to acknowledge, is approaching 30 years in duration. In that time, and having had occasion to historically examine the office of United States Attorney, it seems to me that there has been a studied effort to continually professionalize both the functions of those offices and to look more to professional than political credentials for those who should lead them. At least up to some time in the twentieth century, entire United States Attorney's offices, including all assistants, would be replaced with a change in administration. Today, Assistant United States Attorneys, while not in the civil service, are selected and appointed on the basis of their professional, rather than political, credentials. During my time in the Justice Department, it seemed to me that the ideal United States Attorney candidate was someone of experience and accomplishment as a lawyer and, ideally, as a prosecutor, who also had such a political background as to suggest an ability to lead, to carry out an administration's policies and priorities, and, perhaps above all, whose career indicated a soundness of judgment and intellect that would permit the candidate to carry out ably the duties of office if selected.

Considering the importance of the office to the administration of justice, it might, at first blush, seem appropriate for the judicial branch to have a role in appointing interim United States Attorneys in the event of a vacancy. However, upon reflection, I think returning to that process is not well advised. I say this knowing that I first assumed the office of United States Attorney when appointed by then Chief Judge of the United States District Court for the District of Vermont, the late Albert Coffrin, Jr., one of the finest judges and men whom I have had the privilege to know. Nonetheless, because the United States Attorney serves as a subordinate to the President, it is most appropriate that the authority to appoint an interim United States Attorney be delegated to the Attorney General, who is her- or himself, of course, a presidential appointee.

I realize there is some case law supporting the notion that judicial appointment of interim United States Attorneys does not offend the constitutional

principle of separation of powers. I think the holdings in these cases are suspect as matters of constitutional law and have been subject to question by learned minds.

Historical considerations also counsel against returning to the pre-2006 regime. The office of United States Attorney was not created as an appendage to federal courts, but rather began as a presidential appointment supervised by the Executive Branch. The Judiciary Act of 1789 established the office of federal “district attorneys.” These federal prosecutors were brought under the supervision of the Treasury Department in 1797, in light of the fact that most of district attorneys’ work in the new Republic involved debt collection.¹ It was not until the Civil War that Congress gave District Courts authority to fill interim vacancies arising in the office.² The District Courts retained this authority until 1986, when the Attorney General was allowed to make a 120-day interim appointment, upon the expiration of which the District Court had power to appoint an interim United States Attorney.³ In 2006, the interim appointment process came full circle when Congress vested interim appointment authority solely within the Executive Branch.⁴

Several practical concerns also favor leaving the current system in place. Suppose the District Court, for whatever reason, simply declined to act in making an appointment? The uncertainty that would ensue regarding the authority of the office to carry out its functions is inconsistent with the efficient and predictable administration of justice. Given the tenor of our times, take this supposition one step further and assume that the District Court is not in a position to act because it has been immobilized as a result of terrorism, or even a natural disaster. A vacancy in a United States Attorney position at such a time would be a critical gap that needs to be filled as rapidly as possible and with a person who understands that her or his appointment is firmly under Executive authority. Finally, as a practical matter, as learned and capable as chief judges of the various district courts tend to be, they may not know best about making appointments to Executive offices. The responsibility for the supervision and management of United States Attorney’s offices has been vested by Congress in the Attorney General and the Department of Justice. It seems to me, as both a practical and a legal matter, that such responsibility should carry with it the authority to appoint the persons necessary to carry it out. I do recognize and support the notion that the advice and consent process is critical to the balance of power between Congress and the Executive Branch. I would hope that both

¹ See Ross E. Wiener, Inter-Branch Appointments after the Independent Counsel: Court Appointment of United States Attorneys, 86 Minn. L. Rev. 363, 375-76 (2001).

² See United States v. Gantt, 194 F.3d 987, 998 (9th Cir. 1999) (citing Act of March 3, 1863, ch. 93, § 2, 12 Stat. 768 (1863) (Rev. Stat. 1873, § 793)).

³ See 28 U.S.C. § 546(a)-(d) (1986).

⁴ 28 U.S.C. § 546(c) (2006).

branches of government would act in a responsible manner to see that the nomination and appointment process necessary to fill a vacancy in the office of United States Attorney would move with dispatch.

In conclusion, I regret the circumstances which have led to this hearing. I would urge all parties to recall that the United States Attorneys serve at the pleasure of the President and may be removed for any reason, or no reason at all. I would most respectfully urge Congress, and this Committee, to accord deference to that fundamental aspect of the office and urge restraint in exploring any particular or individual decision regarding a particular office.

I thank the Chairwoman and the Sub-Committee for allowing me to be heard. I welcome the members' questions.