Testimony of Dick Thornburgh
Counsel, Kirkpatrick & Lockhart Preston Gates Ellis LLP
and former Attorney General of the United States

At a Hearing before the Committee on the Judiciary; Sub-Committee on Crime, Terrorism, and Homeland Security; and Sub-Committee on Commercial and Administrative Law of the United States House of Representatives

"Allegations of Selective Prosecution: The Erosion of Public Confidence In Our Federal Justice System"

Tuesday, October 23, 2007

Chairman Conyers, Ranking Member Smith, Chairman Scott, Ranking Member Forbes, Chair Sanchez, Ranking Member Cannon, and members of the Committee and Sub-Committee. Thank you for the opportunity to speak today about the significant dangers and serious harm that can be caused by politicizing federal criminal investigations and prosecutions by the Justice Department. With me today are my partners, Jerry S. McDevitt and Mark A. Rush.

First and foremost, let me affirm my belief that politics has no place in the decision-making process of whether or not to charge citizens of the United States with any crime, federal or otherwise. Confidence in the U. S. Department of Justice's decision-making authority in conducting criminal investigations and prosecutions, in particular, must be absolutely paramount. The citizens of the United States must have confidence that the Department is conducting itself in a fair and impartial matter without actual political influence or the *appearance* of political influence. Unfortunately, that may no longer be the case.

Let me begin by stating that I come before you as an advocate representing Dr. Cyril Wecht, the former elected Coroner of Allegheny County, who is currently under indictment in the Western District of Pennsylvania and in which proceedings my firm represents him. Although the indictment contains 84 counts, it is not the type of case normally constituting a

federal "corruption" case brought against a local official. There is no allegation that Dr. Wecht ever solicited or received a bribe or kickback. There is no allegation that Dr. Wecht traded on a conflict of interest in conducting the affairs of his elected office. None of the traditional indicia of public corruption are presented in this case. Instead, the prosecution of Dr. Wecht seeks to use unprecedented theories which seek to convert a hodgepodge of alleged violations of Home Rule Charters, County Codes, and State Ethic Provisions into federal felonies. Many of these alleged underlying violations do not even carry state mandated penalties, yet are now utilized as a vehicle for federal felony prosecutions which brand the accused as a corrupt public servant.

Dr. Wecht's case demonstrates that the oft expressed concerns of leading jurists, academicians, and commentators about the potential for abuse of the federal mail fraud statutes in political public corruption prosecutions have become reality in this most bizarre prosecution of one of Pittsburgh's most colorful, accomplished, and brilliant men, Dr. Cyril Wecht.[1]

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[1] See e.g., United States v. Murphy, 323 F.3d 102, 118 (3d Cir. 2003) ("[A] loose interpretation of the mail fraud statute creates 'a catch-all political crime which has no use but misuse.'"); United States v. Handakas, 286 F.3d 92, 107-08 (2d Cir. 2002) ("An indefinite criminal statute creates opportunity for the misuse of government power. To appropriate Judge Winter's phrase, the honest services doctrine renders mail fraud 'a catch-all . . . which has no use but misuse'") (quoting United States v. Margiotta, 688 F.2d 108, 144 (2d Cir. 1982) (Winter, J., dissenting)); United States v. Martin, 195 F.3d 961, 965 (7th Cir. 1999) (Posner, J.) ("Concern has long been expressed that the failure of the mail fraud statute to define 'fraud' invites prosecutorial overreaching . . . The concern has been exacerbated by Congress's restoration to the mail fraud statute of the "intangible rights" doctrine . . .") (citations omitted); Margiotta, 688 F.2d at 143, 144 (Winter, J., dissenting) ("[W]hat profoundly troubles me is the potential for abuse through selective prosecution and the degree of raw political power the free swinging club of mail fraud affords federal prosecutors . . . When the first corrupt prosecutor prosecutes a political enemy for mail fraud, the rhetoric of the majority about good government will ring hollow indeed"); see also Cleveland v. United States, 531 U.S. 12, 24 (2000) (Ginsburg, J.) (warning that, in the context of mail fraud, "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance in the prosecution of crimes") (quoting Jones v. United States, 529 U.S. 848, 858 (2000)); Coffey, Jr., John C., Modern Mail Fraud: The Restoration of the Public/Private Distinction, 35 Am. Crim. L. Rev. 427, 464 (1998) ("Both the vagueness doctrine and the separation of powers require that judges not view themselves as

Specifically, the concern that the generality and ambiguity of the mail fraud statutes could be used to expand federal jurisdiction so far into matters of state government that it could be used to regulate theft of "pencils from the office supply cabinet" has now come to pass.[2] Indeed, one central tenet of this prosecution, reflected in 23 of the counts, is that Congress made it a federal felony under the "honest services" branch of wire fraud to use an office fax machine for personal business. Not only is use of the office fax now a federal felony, so too is the use of "space" in the public office for items unrelated to the discharge of office, such as storage of personal files. That is now to be treated as the requisite "theft" within the meaning of 18 U.S.C. § 666, a statute which has also been used aggressively in the public corruption cases this Committee is investigating. The Congress might fairly be asked—"Is that what you intended?"

To date, no federal prosecutor in the Western District of Pennsylvania has ever made such an expansive assertion of federal power in the numerous political corruption cases brought through the generations of Allegheny County politics. Such an expansive view of federal criminal jurisdiction effectively transforms common everyday events in the public workplace into federal felonies. Under the expansive view of mail fraud jurisdiction asserted in this case, there is nothing done in a state official's office unrelated to the official function of office which is not capable of being treated as a federal felony, with the power to prosecute for such alleged infractions placed in the discretion of the political party in power, as is the case here. Although this exceedingly broad and liberal view of federal jurisdiction in derogation of powers reserved to the state is being used here to prosecute a Democrat, if it becomes precedential, the same legal

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authorized by § 1346 to expand the net of criminal liability as seems appropriate from time to time in light of the current social and political climate.").

[2] See United States v. Panarella, 277 F.3d 678, 692 (3d Cir. 2002).

principles will henceforth be available to any party in the future to wage war against political opponents using the federal courts.

Permit me to take a moment to review the 84 Count Indictment of Dr. Wecht to better illustrate the foregoing.

The Indictment opens with the charge that the mere use of the Coroner's fax machine four times in 2002, eleven times in 2003, eight times in 2004, and once in 2005 for personal business should be treated as 24 federal felonies.

Assuming the cost of a fax is one dollar, the "theft" of $24 worth of the office ink and paper over four years is now pyramided to twenty-four federal felonies. Even salutary uses of the office fax are now federal crimes. Count 20 alleges it was a wire fraud for Dr. Wecht to use the Coroner's fax machine to transmit his curriculum vitae and fee schedule to a public defender in a homicide case where the court had appointed him to provide his forensic pathology expertise. Merely faxing an executed contract for a teaching engagement is the crime charged in Count 4.

Counts 25-32 alleging honest services mail fraud are no better. The alleged mail fraud in those counts consists of the use of the office mail to send eight histological slides, mostly to attorneys in black lung cases who had consulted with Dr. Wecht seeking justice for their clients. Assuming that postage charges were 39 cents, the mere use of $3.20 of postage to mail four histological slides in 2003, and another four in 2004, is transformed into eight federal felonies.

The structure of the Indictment then segues into 47 felony charges of alleged private mail fraud in connection with expense billings to Dr. Wecht's private clients. Counts 33-42 allege expense billing irregularities in invoices sent to various attorneys throughout the country in cases where Dr. Wecht served as their expert. This is alleged to have occurred four times in 2002,

twice in 2003, thrice in 2004, and once in 2005. None of these clients ever claimed to have been defrauded, and many were not even interviewed before the charges were made.

The second component of Dr. Wecht's private matters is thirty-seven felony charges of mail fraud in connection with mileage charges. All these charges are based on the premise that Dr. Wecht used a county car when traveling to outlying counties to assist district attorneys and coroners in state criminal prosecutions and that he should not have charged the mileage charges because he used a county car. The total amount involved in all 37 of these alleged federal felonies over five years is $1,147.15, $229.43 per year, and an average of $31.00 per count. In fact, the Government's own evidence demonstrates that the total amount of the charged mail fraud in the 37 felony counts is .001 percent of the fees earned by Dr. Wecht during that period. Counsel for Dr. Wecht is unaware of any citizen ever being charged in the Western District of Pennsylvania (or elsewhere) with mail fraud charges of this nature.

The Indictment concludes with an equally radical expansion of 18 U.S.C. 666(a)(1)(A) by five counts which allege that, in each year from 2001 to 2005, Dr. Wecht stole "property valued at $5,000 or more." No allegation is made of anything remotely approximating the "classic theft" required by law for such a prosecution. Likewise, no "property" within the meaning of the charging statute is alleged to have been stolen. Instead, the sole premise is that Dr. Wecht's alleged use of county personnel, equipment, resources and yes, "space," of the Coroner's office to assist in his "private business activities" is the requisite "property". In other portions of the Indictment, these same items are referred to not as "property" but as office "resources." Under this amorphous theory, the Government actually contends it does not even have to prove the value of the "property" allegedly stolen—just somehow that it is at least $5,000.

There is, therefore, no serious question but that this prosecution is an extreme attempt to extend the reach of federal prosecutorial power far beyond traditional boundaries to the point where federal prosecutors determine how elected state officials use state cars, who does the typing, what they type, and the use of public office "space." Again, I suggest these do not seem to be the types of activities that Congress intended to criminalize federally.

We thus find ourselves asking, "Why would the U.S. Attorney's Office for the Western District of Pennsylvania attempt to make such a stretch of federal law?"

With that background, we came to learn in part from your Committee's investigation, as well as various news accounts, that the Department in its evaluation of United States Attorneys, in certain cases, fired United States Attorneys, not for performance-based reasons but for political ones. We came to learn that those United States Attorneys who, inter alia, aggressively pursued Democrats, as opposed to those that did not, remained in place or were promoted. In fact, we learned from the study conducted by Donald Shields and John Cragan, from the University of Minnesota, that this Administration is *seven times* more likely to prosecute Democrats than Republicans. Possessed of that information, the prosecution of Dr. Cyril Wecht takes on a different and troubling light.

Dr. Wecht is a prominent and highly visible Democrat in the predominantly Democratic region of the Western District of Pennsylvania. He is known nationally and internationally as one of the world's leading forensic pathologists. He often speaks and is retained to conduct autopsies in some of this country's highest profile cases. In addition to Dr. Wecht's renown in the area of forensic pathology, he has always been a contentious, outspoken, highly critical and highly visible Democratic figure in Western Pennsylvania. In other words, he would qualify as an ideal target for a Republican U.S. Attorney trying to curry favor with a Department which

demonstrated that if you play by its rules, you will advance. Ms. Buchanan must have observed this phenomenon first hand during her service as the Director of the Executive Office of U.S. Attorneys.

Dr. Wecht's case, although high profile, was not the only apparent political prosecution in Western Pennsylvania. In addition to Dr. Wecht, U.S. Attorney Buchanan conducted highly visible grand jury investigations of the former Democratic Mayor of Pittsburgh, Tom Murphy, and Peter De Fazio, the former Democratic Sheriff of Allegheny County (in which Pittsburgh is situated). She also prosecuted some lesser-known Democratic Party members in the Sheriff's Office. It should also be noted that of these three high profile, very public, Democratic prosecutions, one resulted in a misdemeanor macing plea; one resulted in no plea and an alternative resolution; and Dr. Wecht's case remains pending. All three Democrats were front-page stories during the run-up to the 2006 elections. The damage was done by widespread media coverage with little apparent concern as to whether justice was meted out.

During this same period not one Republican officeholder was investigated and/or prosecuted by Ms. Buchanan's office. Not one. Although a whistleblower in Republican Congressman Tim Murphy's office accused the Congressman of using paid staff members in his election campaign, no investigation was conducted that we are aware of. Despite a local outcry that former Republican Senator Rick Santorum was defrauding a local community by claiming residency, when he actually resided in Virginia, for the purposes of having the school district pay for his children's cyber schooling, we are aware of no investigation being conducted.

I cannot and do not opine on the merits of either case, but the fact that no investigation was undertaken stands out when Democrats in the Western District of Pennsylvania have been investigated in such a highly visible manner.

In the one instance where Republican State Representative Jeff Habay was prosecuted for using paid staffers for political campaigning, the U.S. Attorney took no action and let the local Democratic District Attorney prosecute the representative.

Allow me to now turn to certain other troubling aspects of the investigation and prosecution of Dr. Wecht that, in our view, further evidence that this prosecution may have involved more politics than justice.

The case opened with television coverage of search warrants being executed in Dr. Wecht's Coroner's office. These warrants were, in our view, general, overly broad, and clearly drafted as part of a Government fishing expedition. We would later learn that one of the FBI agents prominently depicted during the TV coverage of this search of a local political Democratic row office was one Bradley Orsini. It turns out that Agent Orsini of the FBI's Public Corruption Squad, the case agent for Dr. Wecht's case and the case against the former mayor, has an unseemly past. Agent Orsini, while in Newark, New Jersey, was investigated for years by the FBI's Office of Professional Responsibility ("OPR") and was found to have falsified official records and FBI Form 302s. He was reprimanded twice for falsification of evidence spanning years, demoted and suspended without pay for 30 days and placed on probation for one year before transferring to Pittsburgh in September 2004. According to the OPR's own conclusion, they were unable to determine the extent of the taint on all the evidence Orsini falsified. We recently learned in court proceedings that Orsini never signed another search warrant application for years following his reprimands. The first and only search warrant applications he has ever done since his reprimands were on April 7, 2005, when he executed three affidavits in applications for search warrants in the Dr. Wecht investigation. In the recent evidentiary hearings, Agent Orsini admitted he directly violated the Department of Justice's December 1996

Giglio Policy by not disclosing his past history of falsification of evidence to the prosecution. Department of Justice "Giglio Policy," see www.usdoj.gov/org/ag/readingroom/agmemo.htm. We further learned during recent hearings that, after these three search warrants were obtained, a prosecutorial decision was made to remove him from the warrant process and to attempt, unsuccessfully, to conceal his past from the defense and the public by filing for a protective order causing litigation that went all the way to the Third Circuit Court of Appeals in an effort to conceal his past. During that process, the Justice Department had advised three separate Courts, including the Court in the Wecht case, that the Government would not be sponsoring Agent Orsini as a witness. Despite all these irregularities, he remains the case agent on Dr. Wecht's case, and he was actually "promoted" to supervisor of an administrative unit effectively removing him from taking oaths following the disclosure of his past.

When the investigation of Dr. Wecht moved into the grand jury phase, it was not in secret as one would expect. There were frequent news reports concerning the investigation as it proceeded. The very public aspects of this case continued, culminating in a rambling news conference in January 2006 by Ms. Buchanan, where she touted the 84-count Indictment against Dr. Wecht. Interestingly, the press conference opened with a speech about the importance of public corruption cases, and how the Indictment restored faith and confidence in government officials. Ms. Buchanan then proclaimed that Dr. Wecht had provided unclaimed cadavers to a local Catholic university in exchange for lab space—an allegation which we will prove to be totally false and unfounded at trial, and which was never even discussed in pre-indictment audiences with Ms. Buchanan and her staff. Predictably, Dr. Wecht, the Democrat, scientist and educator, was forthwith labeled a "body snatcher" and a media feeding frenzy ensued. Ms.

Buchanan thus succeeded in the Department's apparent mission of casting Democrats in a negative light during the election year.

When the defense began to speak about problematical aspects of the case, Ms. Buchanan's office literally caused the specter of imprisonment to be held over counsels' heads, including immediately after we had fought successfully to expand the rights to speak by a Third Circuit decision indicating the public had a right to hear our views on the case. Ms. Buchanan's attempts to imprison us for commenting on her actions in the week before she made a behind-close-doors appearance to this Committee were given widespread publicity in local media outlets.

One might argue that Dr. Wecht is entitled to his day in court and he will have that day. But the public's perception of apparent politics at the Department of Justice will not be easily changed or remedied, no matter the outcome of his trial. Sally Kalson, a veteran columnist for the *Pittsburgh Post-Gazette*, wrote in her column of July 22, 2007, "An ambitious and enthusiastic Bush partisan like U.S. Attorney Mary Beth Buchanan might well consider Dr. Wecht a plum target, good for many brownie points at the White House." She further wrote, "The jury has yet to convene on Dr. Wecht, but the verdict on the Bush Administration is loud and clear: 100 percent political." This is the unfortunate manner in which this Department of Justice is viewed locally.

We should not allow any citizen of the United States to proceed to trial knowing that his prosecution may have been undertaken for political reasons as opposed to being done to serve the interests of justice. Sadly, that appears to have been so in the case against Dr. Wecht.

Congress may wish to consider reviewing and revising the relevant statutes which the current Administration used in a manner that is unprecedented and that seems well beyond what

Congress intended. The learned Judge Frank Easterbrook from the Seventh Circuit in United States v. Thompson, 484 F.3d 877 (7th Cir. 2007) recently expressed the growing misgivings of federal courts regarding overzealous applications of §§ 666 and 1346 while reversing a problematical conviction with political overtones:

> Sections 666 and 1346 have an open-ended quality that makes it possible for prosecutors to believe, and public employees to deny, that a crime has occurred, and for both sides to act in good faith with support in the case law. Courts can curtail some effects of statutory ambiguity but cannot deal with the source. This prosecution, which led to the conviction and imprisonment of a civil servant for conduct that, as far as this record shows, was designed to pursue the public interest as the employee understood it, may well induce Congress to take another look at the wisdom of enacting ambulatory criminal prohibitions. Haziness designed to avoid loopholes through which bad persons can wriggle can impose high costs on people the statute was not designed to catch.

Id. at 884.

We ask for Congress to take such a look on the basis of the facts involved in Dr. Wecht's prosecution.