Opening Statement of
Congressman Bill Pascrell, Jr.
Eighth Congressional District of New Jersey

House Committee on the Judiciary
Subcommittee on Commercial and Administrative Law

HEARING

Accountability, Transparency, and Uniformity in Corporate Deferred and Non-Prosecution Agreements

June 25, 2009

I want to thank Full Committee Chairman Conyers and Subcommittee Chairman Cohen for allowing me to testify before the Subcommittee on Commercial and Administrative Law on the issue of deferred prosecution agreements. My attention was first brought to this issue of deferred prosecution agreements in large part because of published reports regarding the actions taken by the U.S. Attorney's Office in New Jersey. It had been reported that U.S Attorney for the District of New Jersey, Christopher Christie had reached a $311 million settlement to end an investigation into kickbacks being made by leading manufacturers of knee and hip replacements. This settlement reportedly ended a two-year federal probe into allegations that these manufacturers paid surgeons millions of dollars to use and promote their knee and hip replacements, which would constitute a violation of Medicare fraud statutes. Within this agreement these manufacturers agreed to hire a federal monitor, selected by the U.S. Attorney, which would ensure they comply with the law and a strict set of reforms. However, I was initially concerned that there was little transparency within this provision of the agreement as it could allow the federal monitor to act with impunity while the manufacturers remain under the threat of prosecution.

Furthermore, this agreement raised questions about the discretion of the U.S. Attorney's Office to select federal monitors. In this case, Mr. Christie selected Ashcroft Group Consulting Services, which according to reports stands to collect as much as $52 million in 18 months for its monitoring of Zimmer Holdings of Indiana. Apparently, these compensation agreements for federal monitors are almost never known publicly and were only released in this instance because they were disclosed in the SEC filings for Zimmer Holdings of Indiana. I was concerned that under the continued threat of prosecution, any party being investigated seemingly has little choice but to agree to the selection of these federal monitors and their exorbitant fees. Therein the selection of these federal monitors by Mr. Christie could give the impression of impropriety and political favoritism.

I believe it is important that Mr. Christie has agreed to appear before the Subcommittee today. Mr. Christie is at the center of this investigation and has thus far failed to enlighten Members of Congress or the general public about the process by which he concluded deferred prosecution agreements. Furthermore, Mr. Christie has thus far failed to shed any light on his selection of federal monitors in this case.

There are a number of indisputable facts in this case that raise very troubling questions, which remain unanswered. First and foremost is the fact is that Mr. Christie selected former Attorney General John Ashcroft, his own former superior, for a highly lucrative federal monitoring contract. In addition, there were four other medical device manufacturers given deferred prosecution agreements under this case. In every instance Mr. Christie selected former Justice Department associates to serve as federal monitors under highly lucrative monitoring contracts. This was seemingly done without any negotiation of fees or any consideration of selecting monitors with whom he was not closely associated with. These actions are all the more troubling in the light of testimony by representatives of Zimmer Holdings to the Senate Special Committee on Aging that Mr. Christie never presented the evidence he held against them and that he never forewarned them to the fact that he would be selecting Ashcroft Group as their monitor. This representative also made clear that Zimmer Holdings felt compelled to consent to this deferred prosecution agreement because they feared being taken off the Medicare providers list, which would have crippled their business. Therefore, Mr. Christie held all the leverage in this agreement and dictated the terms completely as he saw fit.

In my mind, these monitoring agreements amount to no-bid federal contracts that are ripe for political considerations. In the end, Mr. Christie may defend himself by saying that he needed to select these monitors since he knew he could trust them. But, I must be clear when I say that the selection of close associates by a federal officer to take on highly lucrative contracts, which are not negotiated and in which outside contractors are not even considered, is the essence of political favoritism.

As I delved deeper into this issue involving U.S. Attorney Christie and former Attorney General Ashcroft I came to the realization that this case of deferred prosecution agreements encompassed an even larger issue of corporate prosecutions in the post-Enron era. In researching the history, I discovered that the practice of deferred prosecution agreements was made legal through the Speedy Trial Act of 1974 (Public Law 93-619, codified at 18 U.S.C. 3161(h)(2)), which first gave the attorney for the Government the right to have a period of delay during which prosecution is deferred pursuant to a written agreement with the defendant. In the beginning this remedy was rarely used by government prosecutors, except in small-scale drug cases involving diversion programs usually for marijuana-related offenses. However, the indictment and ensuing collapse of accounting giant Arthur Andersen in March 2002 made clear to both prosecutors and defense attorneys the susceptibility large corporations have to federal prosecutions and the consequences that result. In response to the large number of federal prosecutions against corporations, the Department of Justice issued a memorandum, known as the "Thompson Memo" after Deputy Attorney General Larry Thompson, which, instructed federal prosecutors to explicitly consider "granting a corporation immunity or amnesty or pretrial diversion…in exchange for cooperation when a corporation's timely cooperation appears to be necessary to the public interest and other means of obtaining the desired cooperation are unavailable or would not be effective."

However, it has become clear in the years since the 'Thompson Memo' that federal prosecutors hold even greater power and discretion through deferred prosecution agreements since oversight of such agreements seemingly has not existed through the federal government or the judiciary. In fact, a study conducted by Lawrence D. Finder and Ryan D. McConnell found that the number of deferred prosecution agreements between the Department of Justice and corporations grew to thirty-five last year from just five in 2003, highlighting the explosive use of this hidden policy. It is my contention that the intent of the Speedy Trial Act of 1974 was never to the scope and breadth of deferred corporate prosecutions now being brought by federal prosecutors. It seems clear that the Department of Justice in recent years has consistently worked to shield this practice from oversight by Congress and the courts.

I, along with my colleague Frank Pallone have introduced the *Accountability in Deferred Prosecution Act of 2009*, H.R. 1947. This legislation lays out four main principles, which I believe are key to bringing forth transparency and accountability in deferred prosecution agreements:

1) **Provides Real Guidelines on Deferred Prosecution Agreements-** Requires the Attorney General to provide public written guidelines for deferred prosecution agreements and nonprosecution agreements in order to promote uniformity and to assist prosecutors and organizations as they negotiate and implement deferred prosecution agreements and nonprosecution agreements.

2) **Restores Judicial Oversight of Deferred Prosecution Agreements-** Requires government prosecutors to file each and every deferred prosecution agreement in an appropriate United States district court, which must then approve the actual agreement between the parties.

3) **Takes the Selection of Federal Monitors Out of the Hands of U.S. Attorneys-** Sets forth rules for an open, public, and competitive process for the selection of such monitors through the creation of a national list of organizations and individuals who have the expertise and specialized skills necessary to serve as independent monitors.

4) **Requires Full Disclosure of Deferred Prosecution Agreements-** Requires the Attorney General to place the text of these agreements on the public website of the Department of Justice, together with all the terms and conditions of any agreement or understanding between an independent monitor appointed pursuant to that agreement and the organization monitored.

I can not stress more strongly the need to pass this comprehensive legislation regarding deferred prosecution agreements. This practice has clearly been created by the Department of Justice to generate unmitigated power for federal prosecutors in pursuing corporations, as is highlighted by the actions of U.S. Attorney Christie in this case. Corporate prosecutions are of critical importance to our nation because of the money, resources and jobs that can be at stake. However, an even more essential concern has emerged through these deferred prosecution agreements and that is the lack of any checks and balances within the system. We are all well versed on the checks and balances between the executive, legislative and judiciary branches of government. However, within each of these branches also exists its own set of checks and balances necessary to avoid the concentration of power. As Members of this Committee know, within the judiciary branch these checks and balances involve the powers and responsibilities of the defense, the prosecution and the courts. However, within the deferred prosecution system power is almost entirely concentrated in the hands of federal prosecutors. For example, if an individual is charged with a crime and strikes a plea bargain with the prosecution then that plea must go before a judge who has the power to deny and in some cases to alter that agreement based on judicial discretion. However, when it comes to these deferred prosecution agreements that are struck between federal prosecutors and corporations it means that neither party ever sees the inside of a courtroom let alone has to put these agreements before a judge.

No one here, including myself, is in a position of defending corrupt corporations or arguing against their full prosecution by the law. But the presumed innocence of defendants before trial and the balance between the prosecution and defense are hallmarks of our justice system. In this instance however, we are left with a deferred prosecution system that gives federal prosecutors unmitigated power to be judge, jury and sentencer. Truly, it was never the intent of our justice system to concentrate such power in the hands of any one individual or office. We must not allow deferred prosecution to become a form of deferred justice.

Again, I want to thank Chairman Conyers and Chairman Cohen for allowing me to testify before this Subcommittee. I look forward to continued investigation of this critical issue and moving the *Accountability in Deferred Prosecution Act of 2009* forward through this Committee

Thank You.