

# **PUBLIC POLICY FORUM: U.S. ATTORNEYS: ROLES AND RESPONSIBILITIES**

## **INTRODUCTION**

### **The Constitutional and Statutory Framework Organizing the Office of the United States Attorney**

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After decades if not centuries of relative stability, the operation and Office of the United States Attorney was thrown into deep political turmoil in 2006. What had long been considered a position defined by its independence, integrity, and commitment to principles of law, was suddenly being subject to largely covert partisan pressures and increasingly aggressive centralized management by the Department of Justice. The American public, and many of the U.S. Attorneys themselves, remained largely unaware of these backstage manipulations until the press announced the mass exodus of nine highly esteemed U.S. Attorneys from around the country, each of whom may have lost their job because of the perceived threat they individually and collectively posed to the Bush Administration's political hegemony and socio-legal agenda.

The termination of these high-performing U.S. Attorneys, together with a number of forced resignations occurring during the same period of time, has provoked substantial criticism and close scrutiny of the people who brought about these terminations and of the reasons for their actions. Indeed, given the constitutional, statutory, and historical basis of the Office of the United States Attorney, both the policies and practices of the current White House administration and the Department of Justice have

been called into serious question, and answers have not been readily forthcoming.

This shameful spectacle (which former Attorney General Alberto Gonzalez flippantly referred to as nothing more than “an overblown personnel matter”<sup>1</sup>) played itself out in the national news, and was characterized by ineffectual congressional inquiries, less-than-credible finger-pointing by current and former Administration officials, and the most remarkable loss of communal short term memory since the Iran-Contra debacle. Yet this is not simply an instance of the government circus run amok; it also represents a tremendous challenge to the pursuit of social justice. By ignoring the founding principles of political equality and faithful service of the rule of law, many actors in this political drama have willingly compromised the system of rules and procedures originally adopted to protect against the arbitrary abuse of government power.

The delicate balance anticipated by that system is reflected in the constitutional and statutory framework organizing the Office of the United States Attorney. Most saliently, the Constitution provides 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 . . . shall be established by law.”<sup>2</sup> While the United States Attorney is one of those officers “whose appointments shall be established by law,”<sup>3</sup> it is also the case that the Office is essential to the Executive’s obligation to “take Care that the Laws be faithfully executed.”<sup>4</sup> In general, presidential power to appoint ambassadors and officers of the United States, including U.S. Attorneys, is nearly plenary (assuming that the advice and consent of the Senate is obtained), and is construed as being essential to the discharge of the Executive office. Although it is nowhere mentioned in the Constitution itself, the President’s power of removal is inferred from the existence of

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1. Alberto R. Gonzales, *They Lost My Confidence*, USA TODAY, Mar. 7, 2007, at 10A.

2. U.S. CONST. art. II, § 2, cl. 2.

3. See 28 U.S.C. § 541 (a)–(c) (2006):

(a) *The President shall appoint*, by and with the advice and consent of the Senate, a United States attorney for each judicial district.

(b) Each United States attorney shall be appointed for a term of four years. On the expiration of his term, a United States attorney shall continue to perform the duties of his office until his successor is appointed and qualifies.

(c) *Each United States attorney is subject to removal by the President.*

*Id.* (emphasis added).

4. U.S. CONST. art. II, § 3.

the power to appoint, and is nearly as broad as that appointment power.<sup>5</sup> According to the few judicial decisions construing the removal power, the President's otherwise plenary authority is limitable only if independence in the position is constitutionally desirable, and only if the limitation does not prohibit removal altogether, but instead retains some version of a "good cause" provision.

Nevertheless, the U.S. Attorney position is one characterized by a broad delegation of the duty to enforce the laws of the United States, and to appear on behalf of the government in any civil action involving the United States or its revenues.<sup>6</sup> This delegation of duties necessarily entails the exercise of discretion, and that exercise of discretion necessarily depends on the United States Attorneys' independence of judgment.<sup>7</sup> The U.S. Attorney can thus be described as an agent with multiple principles, or a servant of two masters:<sup>8</sup> the U.S. Attorneys clearly serve at the "pleasure" of the President, must be responsive to the Department of Justice, and must also consider local conditions, and yet the Attorneys' ultimate duty is to serve, advance, and enforce the law while ensuring uniform application of just principles.<sup>9</sup> In this regard,

[t]he 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 . . . is not that it shall win a [given]*

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5. See 28 U.S.C. § 541(c), *supra* note 3.

6. See 28 U.S.C. § 547 (2006):

Except as otherwise provided by law, each United States attorney, within his district, shall—

- (1) prosecute for all offenses against the United States;
- (2) prosecute or defend, for the Government, all civil actions, suits or proceedings in which the United States is concerned;
- (3) appear in behalf of the defendants in all civil actions, suits or proceedings pending in his district against collectors, or other officers of the revenue or customs for any act done by them or for the recovery of any money exacted by or paid to these officers, and by them paid into the Treasury;
- (4) institute and prosecute proceedings for the collection of fines, penalties, and forfeitures incurred for violation of any revenue law, unless satisfied on investigation that justice does not require the proceedings; and
- (5) make such reports as the Attorney General may direct.

See also Judiciary Act of 1789, Sess. 1, Ch. 10, Sec. 35 ("And there shall be appointed in each district a . . . person learned in the law to act as attorney for the United States in such district, who shall be sworn or affirmed to the faithful execution of his office" whose duty "shall be to prosecute in such district all delinquents for crimes and offences, cognizable under the authority of the United States" and to prosecute "all civil actions in which the United States shall be concerned.").

7. JAMES EISENSTEIN, COUNSEL FOR THE UNITED STATES: U.S. ATTORNEYS IN THE POLITICAL AND LEGAL SYSTEMS, (The John Hopkins University Press, 1978) (1978).

8. See H. W. Perry, Jr., *United States Attorneys—Whom Shall They Serve?*, 61 LAW AND CONTEMP. PROBS. 129, 130 (1998).

9. *Id.* at 131–34.

*case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law.*<sup>10</sup>

While the U.S. Attorney serves in an at-will position and remains subject to removal by the President, the relationship between the U.S. Attorney and the Attorney General does not resemble that agent-principle structure. Indeed, the Office of the Attorney General and the Office of the United States Attorney were originally created in the same act of Congress and were clearly designed as peer law enforcement officers with separate jurisdictions.<sup>11</sup> Even today, the Attorney General does not possess supervisory authority, with respect to the United States Attorney, beyond the authority to direct the preparation of reports,<sup>12</sup> and is not legally authorized to appoint or remove persons serving in that role.<sup>13</sup> However, the United States Code was amended in March of 2006 in a little-noticed manner that substantially altered the balance of power between the President and the Senate and between the Attorney General and the United States Attorney specifically.

In the course of reauthorizing the USA PATRIOT Act, 28 U.S.C. § 546 was amended to (1) delete the preexisting 120-day time limit that had applied to the Attorney General's interim appointments (those necessary to fill vacancies that arise); (2) permit indefinite tenure of interim appointees so long as the President declines to appoint, or the Senate fails to approve, a permanent successor; and (3) completely eliminate the role previously played by the federal district court for the district in which the vacancy exists.<sup>14</sup> Thus, the Executive power ostensibly may be used to remove a United States Attorney from a position which is then filled, not by the President and Congress, but by the Attorney General, and for a term bounded only by the President's willingness to advance

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10. *Berger v. United States*, 295 U.S. 78, 88 (1935) (emphasis added).

11. Judiciary Act of 1789, *supra* note 6. ("And there shall also be appointed a . . . person, learned in the law, to act as an attorney general for the United States, who shall be sworn or affirmed to faithful execution of his office." The Attorney General's duty shall be "to prosecute and conduct all suits in the Supreme Court in which the United States shall be concerned" and "to give his advice and opinion upon questions of law when required by the President.")

12. See 28 U.S.C. § 547(5), *supra* note 6.

13. See 28 U.S.C. § 542 (2006) (providing that the Attorney general "may appoint one or more assistant United States Attorneys in any district when the public interest so requires," and that "each assistant United States Attorney is subject to removal by the Attorney General.")

14. See generally 28 U.S.C. § 546 (2006):

(a) Except as provided in subsection (b), the Attorney General may appoint a United States attorney for the district in which the office of the United States attorney is vacant.

(b) The Attorney General shall not appoint as United States attorney a person to whose appointment by the President to that office the Senate refused to give advice and consent.

(c) A person appointed as United States attorney under this section may serve until . . . the qualification of a United States attorney for such district appointed by the President under section 541 of this title.

new appointees.<sup>15</sup> Recognizing that it has been shut out of the process, both Houses of Congress have responded by proposing bills to restore the previous checks on the appointment and removal power and to limit the Attorney General's participation in vacancy-filling procedures.<sup>16</sup>

The questions implicitly raised by a review of these structural considerations are in many respects answered by the authors whose work is published in this Issue of the *Seattle University Law Review*. Between a leading expert on matters of law, government, and ethics, and perhaps *the* authority on the history and functioning of the U.S. Attorney's Office, and in conjunction with the reflections of a former holder of the Office who lived this experience, three voices of reason, courage, and integrity call us to reevaluate our own commitment to the ideal of justice as transcendent of partisan political corruption, and challenge us to manifest that ideal.

Starting us off where any thorough examination of law and government must, Professor James Eisenstein's article, *The U.S. Attorney Firings of 2006: Main Justice's Centralization Efforts in Historical Context*, richly describes the historical origins and evolution of the Office of the United States Attorney. The article evokes the inherent tension between the Department of Justice's effort to exert consistent managerial control from the "top," and the individual U.S. Attorney's need for decisional latitude, professional discretion, and political autonomy "in the field." While detailing the many ways in which politically accountable actors have a legitimate role to play in the selection, appointment, and supervision of United States Attorneys, he depicts a system which nevertheless left the individual U.S. Attorneys free to exercise their principled, professional judgment without the expectation of retaliation. Against that historical backdrop, the 2006 mass termination of nine U.S. Attorneys, all of whom had received positive performance reviews, appears as a singular example of politically driven interference by the executive branch.

Former United States Attorney John McKay brings that historical perspective into the present by describing his own, first-hand experience of ably serving his district and then subsequently being fired for unarticulated and largely unarticulable reasons. In *Train Wreck at the Justice Department: An Eyewitness Account*, Professor McKay documents in painstaking detail the way in which these events unfolded in late 2006 and early 2007, and provides a rock-solid accounting of the shadowy political forces that conspired to cleanse the Office of the U.S. Attorney

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15. *Id.*

16. See H.R. 520, S. 214, 110th Cong. (1st Sess. 2007).

of professionals who were not in perfect compliance with President Bush's and the Attorney General's preferred brand of ideology. Professor McKay's *Train Wreck* also provides a helpful discussion of the concrete legal issues raised by this alleged mismanagement or misconduct, analyzes a number of federal laws (both civil and criminal) that may have been broken in the process, and ultimately proposes several ways to guarantee better accountability by government actors in the future.

Finally, Professor Laurie Levenson effectively demonstrates that the "problem" of the U.S. Attorney terminations is not limited to the immediate effect of losing a talented and well-qualified government lawyer, but is in fact exacerbated by the process by which position-filling interim appointments are made. As a consequence of the passage of the PATRIOT Act and its recent reauthorization, responsibility for filling vacancies created by the Department of Justice now belongs to that same agency rather than to the United States District Court for the district in which the vacancy exists, as it previously had. In *Live and Learn: Depoliticizing the Interim Appointment of U.S. Attorneys*, Professor Levenson suggests that many of the interim appointees lacked the qualifications and experience of those they replaced, and includes interim appointments as among the factors leading to greater politicization and partisan control of this most important nationwide Office. Particularly useful, given the lack of concern and responsiveness shown by the Bush White House, are Professor Levinson's concrete proposals for legislative reform of the appointment procedures and her calls for greater participation by the Senate in both permanent and interim U.S. Attorney selection processes. To her great credit, Professor Levenson charts a path back to the robust congressional participation envisioned by the founding generation as a way to limit the accretion and abuse of Executive authority.

Individually, the three authors published in this Issue each present startling arguments about the failure of our legal system to ensure that the administration of justice remains oriented around public rather than private political values, and each presents a call for reform focused on a subsidiary element of the dysfunctional system. Collectively, the authors have painted a picture of the Bush Administration and its present practices that should serve as a wake-up call to any fair-minded individual who fears abusive oligarchies, and they have identified guideposts along a route leading to change and to restoration of traditional notions of just governance and the primacy of the rule of law. Because these critical assessments of the recent past and related calls for reform have such deep salience for the ultimate pursuit of anti-oppressive, equality-oriented social justice, it is a tremendous honor to showcase these experts in this issue of the *Seattle University Law Review*.