

Train Wreck at the Justice Department: An Eyewitness Account

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In a series of early morning phone calls on December 7, 2006, seven United States Attorneys were ordered to resign. Despite initial denials, it would later be revealed that two other U.S. Attorneys had also been ordered to submit their resignations, bringing the total number to nine. Each was given no explanation for the dismissal and most were led to believe that they alone were being dismissed, raising the specter of unstated wrongdoing and encouraging silent departures. Those dismissed uniformly cited the maxim that they “served at the pleasure of the President” and most sought to avoid publicly disputing the Justice Department or the White House.

So what happened? Why were the nine dismissed? Were political considerations allowed to trump the proud heritage of non-partisan, independent prosecutions in a Justice Department widely trusted as the guardian of civil rights? Did the White House or senior Justice Department officials direct the removal of U.S. Attorneys for failing to satisfy local partisans or to retaliate for certain public corruption prosecutions? Have officials lied to cover up wrongdoing and to avoid criminal prosecution? Can the damage to the Justice Department be undone, restoring the role of federal prosecutors as disdainful of politics and devoted to accountability, fairness, and the firm execution of the nation’s laws?

These questions were the subject of a public forum on May 9, 2007, sponsored by Seattle University School of Law, and serve in part as the basis for this Article by one of the participants of the forum (and a fired U.S. Attorney).¹

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1. This Article follows Seattle University Law School’s “Public Policy Forum—United States Attorneys: Roles and Responsibilities” held in Seattle on May 9, 2007. The author is grateful to the

I. BACKGROUND TO A SCANDAL

When I arrived at my Seattle office early on the morning of December 7, 2006, a typically dark and rainy day, I had a message to call Michael Battle, then-Director of the Executive Office for United States Attorneys in the Department of Justice.² Although a friend, his tone was terse as he told me that “the Administration wanted a change” and that I should “move on” by the end of the following month.

Knowing that U.S. Attorneys were rarely, if ever, relieved for reasons other than misconduct in office, I asked Mike for an explanation. Offering none, he said the “Administration wanted to go in another direction.” After pondering this in silence for a few moments, Battle then offered that “sometimes it’s hard not to think you did something wrong when you get a call like this, but that’s not always the case.” Although circumspect in his remarks, I had just been given a clue that something was amiss. “Wait a minute,” I said slowly, “I’m not the only one getting this call, am I?” Battle awkwardly said, “John, I don’t have any information on that.” I suspected otherwise, but thanked Battle for the call, sincerely grateful that it had come from a friend and not one of those who lacked the courage to carry out their own misguided plans.

Hanging up the phone, I stared out the window into the gray morning Seattle skies with a faint smile, as I drummed my fingers on a conference table. “This will not end as they think it will,” I thought, and began to make plans to inform the First Assistant U.S. Attorney and to leave the office I had been so honored to lead for the past five years.

By the end of that day we would learn that six other United States Attorneys had received calls from Battle indicating that the “Administration” sought their resignations.³ Because U.S. Attorneys serve “at the pleasure” of the President, some questioned whether the President himself had ordered the resignations, but all understood that we would not have received such a call absent the explicit approval of the White House. We also knew that Attorney General Alberto Gonzales was a close friend of the President, and even those of us with political muscle were no match against this dynamic. Consequently, all nine U.S.

authors of other articles submitted herein, in particular Professor Emeritus James Eisenstein of Pennsylvania State University and Professor Laurie Levenson of Loyola Law School.

2. Battle had served as U.S. Attorney in the Western District of New York. He resigned from the Justice Department on March 16, 2007.

3. U.S. Attorneys serving in San Francisco, San Diego, Nevada, Arizona, New Mexico and the Western District of Michigan also received calls from Mike Battle on December 7 ordering them to resign. Earlier, U.S. Attorneys in Little Rock and Kansas City had been secretly told to step down.

Attorneys eventually tendered their resignations as instructed, most with little or no public comment.

II. BLOWING THE WHISTLE—CONGRESSIONAL OVERSIGHT AND THE BEGINNING OF ACCOUNTABILITY

This all changed on January 18, 2007, when Alberto Gonzales testified before the Senate Judiciary Committee and faced questioning by the senior senator from California about growing rumors that a number of U.S. Attorneys had been forced out:

SENATOR FEINSTEIN: Thank you. You and I talked on Tuesday about what is happening with U.S. Attorneys. It spurred me to do a little research, and let me begin. Title 28, Section 541 states, “[e]ach U.S. Attorney shall be appointed for a term of 4 years. On the expiration of his term, a U.S. Attorney shall continue to perform the duties of his office until his successor is appointed and qualified.”

Now, I understand that there is a pleasure aspect to it, but I also understand what practice has been in the past. We have thirteen vacancies. Yesterday you sent up two nominees for the thirteen existing vacancies.

ATTORNEY GENERAL GONZALES: There have been eleven vacancies created since the law was changed, eleven vacancies in the U.S. Attorney’s offices. The President has now nominated as to six of those. As to the remaining five, *we are in discussion with home-state senators*. So let me publicly sort of preempt, perhaps, a question you are going to ask me.

That is, I am fully committed, as the Administration is fully committed, to ensure that with respect to every U.S. Attorney position in this country, *we will have a presidentially-appointed, Senate-confirmed U.S. Attorney*.

I think a U.S. Attorney, who I view as the leader, law enforcement leader, my representative in the community, has greater imprimatur of authority if in fact that person has been confirmed by the Senate.

SENATOR FEINSTEIN: All right. Now, let me get at where I am going. How many U.S. Attorneys have been asked to resign in the past year?

ATTORNEY GENERAL GONZALES: Senator, you are asking me to get into a public discussion about personnel.

SENATOR FEINSTEIN: No. I am just asking you to give me a number—that is all.

ATTORNEY GENERAL GONZALES: I do not know the answer.

SENATOR FEINSTEIN: I am just asking you to give me a number.

ATTORNEY GENERAL GONZALES: I do not know the answer to that question. But we have been very forthcoming—

SENATOR FEINSTEIN: You did not know it on Tuesday when I spoke with you. You said you would find out and tell me.

ATTORNEY GENERAL GONZALES: I am not sure I said that.

SENATOR FEINSTEIN: Yes, you did, Mr. Attorney General.

ATTORNEY GENERAL GONZALES: Well, if that is what I said, that is what I will do. But we did provide to you a letter where we gave you a lot of information about—

SENATOR FEINSTEIN: I read the letter.

ATTORNEY GENERAL GONZALES: All right.

SENATOR FEINSTEIN: It does not answer the questions that I have. I know of at least six that have been asked to resign. I know that we amended the law in the Patriot Act and we amended it because if there were a national security problem the Attorney General would have the ability to move into the gap. We did not amend it to prevent the confirmation process from taking place.

I am very concerned. I have had two of them ask to resign in my state from major jurisdictions with major cases ongoing, with substantially good records as prosecutors. I am very concerned because, technically, under the Patriot Act, you can appoint someone without confirmation for the remainder of the President's term. I do not believe you should do that. We are going to try to change the law back.

ATTORNEY GENERAL GONZALES: Senator, may I just say that I do not think there is any evidence that that is what I am trying to do? In fact, to the contrary. *The evidence is quite clear that what we are trying to do is ensure that, for the people in each of these respective districts, we have the very best possible representative for the Department of Justice and that we are working to nominate people, and that we are working with home-state senators to get U.S. Attorneys nominated.* So the evidence is just quite contrary to what you are possibly suggesting. Let me just say—

SENATOR FEINSTEIN: Do you deny that you have asked, your office has asked, U.S. Attorneys to resign in the past year, yes or no?

ATTORNEY GENERAL GONZALES: Yes. No, I do not deny that. What I am saying is that happens during every administration, during different periods for different reasons. So the fact that that has happened, quite frankly, some people should view that as a sign of good management.

What we do, is we make an evaluation about the performance of individuals. I have a responsibility to the people in your district that we have the best possible people in these positions. That is the reason why changes sometimes have to be made, although there are a number of reasons why changes get made and why people leave on their own.

I think I would never, ever make a change in a U.S. Attorney position for political reasons or if it would in any way jeopardize an ongoing, serious investigation. I just would not do it.

SENATOR FEINSTEIN: Well, let me just say one thing. I believe very strongly that these positions should come to this committee for confirmation.

ATTORNEY GENERAL GONZALES: They are, Senator.

SENATOR FEINSTEIN: I believe very strongly we should have the opportunity to answer questions about it.

ATTORNEY GENERAL GONZALES: I agree with you.⁴

At least one U.S. Attorney, the author of this Article, observed this exchange between Senator Diane Feinstein (D-Cal.) and Attorney General Gonzales with complete dismay. After a flurry of phone calls among the U.S. Attorneys who had been ordered to resign, many of those former U.S. Attorneys concluded that the Attorney General was lying to the Senate about the intent of the Justice Department to seek Senate confirmation of their prospective replacements. In Seattle, for example, no known efforts had been underway by either the White House or the Justice Department to recruit or interview candidates for my replacement. In spite of my frequent requests for guidance, Justice officials had not revealed their plans, and no internal candidates had been contacted by the Justice Department or the White House. With only a few days remaining before our departures, it was clear the Justice Department planned to name their own interim U.S. Attorneys under the new powers granted them in the amendments to the USA PATRIOT Act.⁵ Other fired U.S. Attorneys confirmed similar patterns in San Francisco and San Diego, and we also knew that an interim U.S. Attorney had been serving in Kansas City for many months.⁶

Although much media speculation has focused on the later Senate testimony of then-Deputy Attorney General Paul J. McNulty,⁷ it was the Attorney General's exchange with Senator Feinstein that galvanized the

4. *Dep't of Justice Oversight Hearing Before the S. Comm. on the Judiciary*, 110th Cong. 47 (2007) (testimony of Alberto Gonzales) (emphasis added); see Dan Eggen, *Prosecutor Firings Not Political, Gonzales Says*, WASH. POST, Jan. 19, 2007, at A2.

5. See Pub. L. No. 109-177, § 502, 120 Stat. 192 (2006). With no debate, the Attorney General was given the authority to appoint interim United States Attorneys for indefinite terms without a Presidential nomination or confirmation by the Senate. Led by Senator Feinstein, the interim appointment authority was revoked, returning the interim appointment authority to the United States district courts, in the absence of a presidential appointment. See Pub. L. No. 110-34, 121 Stat. 224 (2007).

6. United States Attorney Todd Graves resigned on March 10, 2006, and was replaced by a former Civil Rights Division attorney, Bradley Schlozman. It would later be revealed that Graves had been ordered to resign as well, in order to make way for Schlozman and to facilitate voter fraud indictments previously rejected by Graves as lacking merit. Schlozman resigned as interim U.S. Attorney, never having been nominated by the President or facing Senate confirmation. In contentious hearings before the Senate Judiciary Committee on June 5, 2007, Mr. Schlozman denied wrongdoing in bringing indictments for voter registration fraud against four employees of the Association of Community Organizations for Reform Now (ACORN). *Dep't of Justice Oversight Hearing Before the S. Comm. on the Judiciary*, 110th Cong. (2007) (testimony of Bradley Schlozman), available at http://judiciary.senate.gov/testimony.cfm?id=2799&wit_id=6502.

7. McNulty testified that, with the exception of Little Rock U.S. Attorney Bud Cummins, who was removed to make way for Timothy Griffin, a protégé of Karl Rove, the fired U.S. Attorneys were dismissed for "performance reasons." See discussion and more complete testimony excerpt, *infra*, at pp. 6-9.

soon-to-be former U.S. Attorneys, who began to communicate with each other almost daily by e-mail and telephone conference calls. Although he would later characterize the affair as an “overblown personnel matter,”⁸ in one exchange with a United States Senator, Alberto Gonzales had managed to drive the fired U.S. Attorneys together and convince them that he was hiding a sinister purpose in their dismissals and lying to the Senate to cover it up.⁹

At the moment of the Attorney General’s responses to Senator Feinstein, I knew that my silence about my own forced resignation must end,¹⁰ and in private conversations with several of my colleagues I learned they had reached the same conclusion at the same moment. In my case, I believe that silence in the face of a lie is a form of complicity; despite my initial belief that it was my duty to leave office quietly, I could not be a part of Alberto Gonzales’ false and misleading testimony to the Senate. We anxiously awaited the February 6 testimony of McNulty in hopes that other senior officials would correct the record and reject the contention that we were dismissed to make way for others who would not be subject to Senate scrutiny. However, that was clearly *not* their plan.

On February 6, 2007, then-Deputy Attorney General McNulty made it clear that we could not expect an honest assessment of their intentions:

MR. McNULTY: First, we never have and never will seek to remove a United States Attorney to interfere with an ongoing investigation or prosecution or in retaliation for a prosecution. Such an act

8. In an Op-Ed piece timed for publication on the sixth day that the fired U.S. Attorneys were testifying under subpoena on Capitol Hill, then-Attorney General Gonzales wrote, “While I am grateful for the public service of these seven U.S. Attorneys, they simply lost my confidence. I hope that this episode ultimately will be recognized for what it is: an overblown personnel matter.” Alberto R. Gonzales, *They Lost My Confidence*, USA TODAY, Mar. 7, 2007, at 10A. He later testified that he regretted the characterization. *Dep’t of Justice Oversight Hearing Before the S. Comm. on the Judiciary*, 110th Cong. 46–47 (Apr. 19, 2007) (testimony of Alberto Gonzales, in response to question from Sen. Feingold), available at http://www.washingtonpost.com/wp-dyn/content/article/2007/04/19/AR2007041902035_5.html.

9. Kyle Sampson, then Gonzales’ Chief of Staff, had already outlined the Justice Department’s plan to bypass Senate confirmation with the appointment of replacement U.S. Attorneys. See E-mail from Kyle Sampson to then-White House Counsel Harriet E. Miers (Sept. 13, 2006) (“I strongly recommend that, as a matter of policy, we utilize the new statutory provisions that authorize the AG to make USA appointments.”), available at <http://judiciary.house.gov/Media/PDFS/DOJDocsPt7-070320.pdf#Page=46>; see also Dan Eggen & John Solomon, *Firings Had Genesis in White House*, WASH. POST, Mar. 13, 2007, at A1.

10. In announcing my resignation on December 14, 2006, I said only that I was “returning to the private sector.” *U.S. Attorney John McKay Announces Resignation*, SEATTLE TIMES, Dec. 14, 2006, at A1.

is contrary to the most basic values of our system of justice, the proud legacy of the Department of Justice, and our integrity as public servants.

Second, in every single case where a United States Attorney position is vacant, the Administration is committed to filling that position with a United States Attorney who is confirmed by the Senate. The Attorney General's appointment authority has not and will not be used to circumvent the confirmation process. All accusations in this regard are contrary to the clear factual record. The statistics are laid out in my written statement.

And third, through temporary appointments and nominations for Senate confirmation, the Administration will continue to fill U.S. Attorney vacancies with men and women who are well-qualified to assume the important duties of this office.

Mr. Chairman, if I thought the concerns you outlined in your opening statement were true, I would be disturbed, too. But these concerns are not based on facts, and the selection process we will discuss today I think will shed a great deal of light on that.

Finally, I have a lot of respect for you, Mr. Chairman, as you know. And when I hear you talk about the politicizing of the Department of Justice, it is like a knife in my heart. The AG and I love the Department, and it is an honor to serve. And we love its mission. And your perspective is completely contrary to my daily experience, and I would love the opportunity, not just today but in the weeks and months ahead, to dispel you of the opinion that you hold.¹¹

The Deputy Attorney General then announced the initial cover story for the dismissal of U.S. Attorneys:

SENATOR SCHUMER: All right. Now, let me ask you this: You admitted—and I am glad you did—that Bud Cummins was fired for no reason. Were any of the other six U.S. Attorneys who were asked to step down fired for no reason as well?

MR. McNULTY: As the Attorney General said at his oversight hearing last month, the phone calls that were made back in December were performance related.

11. *Dep't of Justice Oversight Hearing Before the S. Comm. on the Judiciary*, 110th Cong. 10 (Feb. 6, 2007) (testimony of Paul J. McNulty), available at <http://judiciary.house.gov/Media/PDFS/OAG1238-1281.pdf>.

SENATOR SCHUMER: Mm-hmm. All the others?

MR. McNULTY: Yes.

SENATOR SCHUMER: But Bud Cummins was not one of those calls because he had been notified earlier.

MR. McNULTY: Right. He was notified in June of—.

SENATOR SCHUMER: Okay, so there was a reason to remove all the other six?

MR. McNULTY: Correct.¹²

Later, Gonzales, McNulty and other Justice Department officials would have difficulty keeping their stories straight about the reasons for dismissing nine United States Attorneys in 2006. Faced with glowing performance evaluations for most of the discharged prosecutors,¹³ officials testified at various times to alleged performance, policy, administrative, and personality issues not mentioned in the reports; in many cases, these issues were simply not believable on their face.¹⁴

12. *Id.*

13. The Justice Department's evaluation process for United States Attorneys and their offices is overseen by the Executive Office for United States Attorneys. Periodic field visits conducted by professional staff and career attorneys and staff are reported on a multi-year basis in Final Evaluation (EARS) Reports. See U.S. Dep't of Justice, U.S. Attorneys, *Executive Office for United States Attorneys' Staffs*, <http://www.usdoj.gov/usao/eousa/staff.html#ears>. The EARS Report for the Western District of Washington was based on approximately 170 interviews by twenty-seven inspectors during March 2006 (report on file with U.S. Dep't of Justice).

14. See, e.g., Memorandum from Hon. John Conyers, Jr., Chairman of Comm. on the Judiciary (July 24, 2007), available at http://media.washingtonpost.com/wp-srv/politics/documents/contempt_memo_072407.pdf.

The case of John McKay is equally troubling. The Administration has now floated at least five different reasons for the placement of John McKay on the firing list. But those reasons appear pretextual. The Administration initially claimed that Mr. McKay was overly aggressive in a meeting on an information sharing program with Deputy Attorney General McNulty, and that he arranged the sending of a letter advocating for that program that put the Deputy in an uncomfortable position. Leaving aside the question whether a responsible Department of Justice would fire a well-performing U.S. Attorney for such apparently frivolous reasons, those events did not occur until late summer 2006, but John McKay was on Mr. Sampson's firing list as early as March 2005. At one point, the Administration claimed that Mr. McKay's office was not sufficiently aggressive in appealing certain criminal sentences that were below the Guidelines range, but that was an issue based on a January 2005 Supreme Court decision, and there would not have been time for follow-up litigation and collection of sentencing data for that controversy to have contributed to the decision to target McKay for firing two months later.

When further pressed for the reason why Mr. McKay might have been targeted for firing at that time, the Administration offered reasons that appear even more unlikely.

Summoned to Capitol Hill, Justice Department officials, led by the Attorney General, would display appalling losses of memory and inconsistent accounts of the firings. Beginning with public statements by Gonzales, and prior to the release of e-mails and other documents by the Justice Department, the Attorney General declared to gathered media that he “was not involved in seeing any memos, was not involved in any discussions about what was going on.”¹⁵ Later testimony by his own Chief of Staff, Kyle Sampson, together with e-mails showing his presence at a pivotal meeting in which the list of fired attorneys was approved, would clearly demonstrate the falsity of Gonzales’ claim.¹⁶ In his own Senate testimony on April 19, 2007, Attorney General Gonzales repeatedly claimed not to recall important events surrounding the forced resignations—a performance roundly criticized in editorials from around the country and parodied mercilessly by the nation’s comedians and late night talk show hosts.¹⁷ He has claimed he had delegated the evaluation and firing process to his Chief of Staff,¹⁸ who in turn claimed only to be an “aggregator” of names supplied by others.¹⁹ Gonzales initially claimed that he “erred” in not more fully involving Deputy Attorney General McNulty, but then upon McNulty’s resignation tried to lay the blame on him.²⁰

One Department witness commented that Mr. McKay had asked some difficult questions of Attorney General Ashcroft in a public setting that may have put Administration officials “on the spot,” which had occurred before McKay’s name was placed on the March 2005 firing list. Kyle Sampson testified that he may have heard complaints about Mr. McKay pressing too aggressively for Department action in the aftermath of the murder of one of McKay’s Assistant U.S. Attorneys in the time period before the March 2005 list. These would not seem to be credible reasons for the firing of an effective U.S. Attorney such as John McKay. As suggested above, the available evidence suggests that improper political factors played an important role in his firing.

Id. at 25–26.

15. Press conference of Alberto Gonzales (Mar. 13, 2007), *available at* http://www.usdoj.gov/ag/speeches/2007/ag_speech_070313.html.

16. *Dep’t of Justice Oversight Hearing Before the S. Comm. on the Judiciary, Part III*, 110th Cong. 15 (Mar. 29, 2007) (testimony of Kyle Sampson, in response to questions from Sen. Specter), *available at* http://media.washingtonpost.com/wp-srv/politics/documents/sampson_transcript032907.html.

17. *See, e.g., Uh, mmmm, maybe . . .*, SEATTLE TIMES, Apr. 20, 2007, *available at* <http://archives.seattletimes.nwsource.com/cgi-bin/texis.cgi/web/vortex/display?slug=gonzaled20&date=20070420&query=alberto+gonzales>; THE DAILY SHOW (Comedy Central, Apr. 23, 2007).

18. *Dep’t of Justice Oversight Hearing Before the S. Comm. on the Judiciary*, 110th Cong. 46–47 (Apr. 17, 2007) (opening statement of Alberto Gonzales), *available at* http://judiciary.senate.gov/testimony.cfm?id=2632&wit_id=3936.

19. *Hearing, supra* note 16 (opening statement of Kyle Sampson).

20. *Hearing, supra* note 8 (testimony of Alberto Gonzales); Alberto Gonzales, Remarks at the Nat’l Press Club, May 15, 2007, *available at* <http://thinkprogress.org/2007/05/15/gonzales-mcnulty/>.

At the end of the day, after hours and hours of both public and closed session testimony before committees of both the Senate and the House of Representatives, no Justice Department official would admit responsibility for placing even one of the fired U.S. Attorneys on the final list. Little wonder, then, that the focus of both congressional and media inquiry has been on the role of the White House.

III. SEEDS OF A SCANDAL—THE ROLE OF THE WHITE HOUSE

Although the White House has refused to provide witness testimony or records under claim of executive privilege, e-mails discovered at the Justice Department revealed that the idea of replacing *all* of the U.S. Attorneys originated at 1600 Pennsylvania Avenue.²¹ The reasons for such a replacement are not clear, although in the summer of 2006 White House Senior Counselor Karl Rove openly campaigned against perceived voter fraud abuse, mentioning by name several jurisdictions, including the states of Missouri, Nevada, New Mexico, Washington, and Wisconsin.²²

While rejecting the plan to fire all ninety-three U.S. Attorneys, steps to replace at least some of them, perhaps to appease the White House, began almost immediately upon Gonzales' arrival to the RFK Building as Attorney General. Gonzales' Chief of Staff D. Kyle Sampson, a lawyer with little trial experience and a former White House staffer, now began assembling a list of U.S. Attorneys to be fired. Claiming to be the "aggregator" of names, Sampson ignored formal evaluations long utilized by the Justice Department and appears to have compiled a "hit list" with the active participation of Attorney General Gonzales, Deputy Attorney General McNulty, McNulty's Chief of Staff Michael Elston, Senior Counselor (and White House Liaison) Monica Goodling, and Principal Associate Deputy Attorney General William Moschella.

Even as the role of the White House remains shrouded in its claims of executive privilege,²³ certain White House employees appear to have been heavily involved in the dismissal of U.S. Attorney Iglesias. In

21. Former White House Counsel Harriet Miers first broached the idea, but it was rejected by both Kyle Sampson and Gonzales. See E-mail from Harriet Miers, White House Counsel, to Kyle Sampson, Chief of Staff to Alberto Gonzales (Jan. 9, 2006) (referring to Miers' previous inquiry to whether President Bush should remove and replace all U.S. Attorneys), <http://judiciary.house.gov/media/PDFS/OAG12-22-NEW-.pdf#Page=09>. See Eggen & Solomon, *supra* note 9.

22. See Dan Eggen & Amy Goldstein, *Voter Fraud Complaints By G.O.P. Drove Dismissals*, WASH. POST, May 14, 2007, at A4.

23. Conyers Memorandum, *supra* note 14, at 42–47.

several e-mails it appears that these officials were reacting directly to the complaints of Senator Pete Domenici (R-N.M.) and the ongoing investigation into public corruption in New Mexico. For example, Deputy White House Counsel Bill Kelley smugly e-mailed Gonzales' Chief of Staff Kyle Sampson to report that Domenici's office was "happy as a clam" on learning of Iglesias' ouster.²⁴ Senior Counselor to the President Karl Rove bragged about Iglesias' dismissal by proclaiming "he's gone" to the New Mexico Republican Party Chairman, who had previously complained to Rove about Iglesias.²⁵

IV. HOME ALONE—DISREGARDING THE IMPORTANT ROLE OF UNITED STATES ATTORNEYS

With Gonzales and McNulty claiming to be not involved and out of the loop,²⁶ decisions regarding the careers of nine U.S. Attorneys were apparently left in the hands of Kyle Sampson, Michael Elston, Monica Goodling, and others having little or no experience themselves, and even less knowledge of the effectiveness, capability, or suitability of the nation's chief federal prosecutors.

Kyle Sampson, whom Alberto Gonzales claims led the "review" of U.S. Attorneys, was a 1996 law school graduate with virtually no trial experience, and no experience leading significant prosecutions.²⁷ This did not stop him, however, from seeking to himself become U.S.

24. E-mail from William Kelley, Deputy to White House Counsel Harriet Miers, to Kyle Sampson, Chief of Staff to Alberto Gonzales (Dec. 7, 2006) <http://judiciary.house.gov/Media/PDFS/DOJDocsPt30-070320.pdf#Page=25>. See Eggen & Solomon, *supra* note 9.

25. Adam Zagorin, *A White House Hand in the Firing?*, TIME, Mar. 13, 2007, available at <http://www.time.com/time/nation/article/0,8599,1598540,00.html>.

26. McNulty reportedly testified in closed session that he was not involved in most of this process. See David Johnston, *Gonzales Deputy Quits U.S. Justice Department*, INT'L HERALD TRIBUNE, May 15, 2007, available at <http://www.ihf.com/articles/2007/05/15/america/15attorney.php>.

While convenient in the face of congressional and Justice Department investigations, McNulty's claims are preposterous. U.S. Attorneys report through the Deputy Attorney General (DAG) and the idea that the DAG would not be involved in a process in which even one presidentially-appointed U.S. Attorney would be fired is highly suspect. The apparent deep involvement of McNulty's former Chief of Staff, Michael Elston, further undercuts his claims of ignorance, as does the contradicting testimony of Kyle Sampson. See *Hearing, supra* note 16; *Hearing, infra* note 31. Other than a flaccid question concerning the age and work experience of Dan Bogden, the fired U.S. Attorney in Nevada, see E-mail from Paul J. McNulty, Deputy Attorney Gen., to Kyle Sampson, Chief of Staff to Alberto Gonzales (Dec. 5, 2006), <http://judiciary.house.gov/Media/PDFS/DOJDocsPt2-1070319.pdf#Page=23>, McNulty at minimum did nothing to stop the firings and resulting disrepute to the Justice Department.

27. *Hearing, supra* note 16 (testimony of Kyle Sampson, responding to questions from Senator Whitehouse).

Attorney in Utah despite his lack of qualifications and in spite of the fact that the highly regarded incumbent had no intention of leaving.²⁸ Michael Elston, while an experienced Assistant U.S. Attorney, showed exceedingly poor judgment if, as alleged, he threatened U.S. Attorneys for speaking to the press and attempted to intimidate them in advance of the initial Senate testimony of Alberto Gonzales.²⁹

As for Monica Goodling, she has become the poster child for the under-qualified, overly-political young lawyer given far too much power at the Justice Department. A 1999 law school graduate of Regent University, she attended Messiah College in Pennsylvania and served stints in the Office of Public Affairs and the Executive Office for U.S. Attorneys, before her appointment as White House Liaison and Senior Counselor to the Attorney General.³⁰ With no significant experience as a prosecutor, and precious little as an administrator, Ms. Goodling played a key role in the dismissal of U.S. Attorneys; after first asserting her Fifth Amendment rights and demanding immunity, Goodling admitted that she “crossed the line” in considering political beliefs in hiring line attorneys.³¹

This apparent disregard for the importance of the role of U.S. Attorneys in the Administration and the Justice Department, while shocking to those who have served there, indicates either ignorance or disregard for the important historical role of these officials. United States Attorneys are appointed to their offices by the President, who “shall appoint by and with the advice and consent of the Senate, a United States Attorney for each Judicial District.”³² The statute further provides that “[e]ach United States Attorney is subject to removal by the President.”³³ In other words, the President appoints, the Senate confirms, and while in office U.S. Attorneys serve at the pleasure of the President. All

28. Eric Lipton, *Fast-Riser's High Hopes and Sudden Fall*, N.Y. TIMES, Mar. 13, 2007, available at http://www.nytimes.com/2007/03/13/washington/13sampsom.html?_r=1&oref=slogin.

29. Dan Eggen & Amy Goldstein, *Justice Dept. Official to Quit*, WASH. POST, June 16, 2007, at A6.

30. Alan Cooperman, *Bush Loyalist Rose Quickly at Justice*, WASH. POST, Mar. 30, 2007, at A15.

31. *Hearing on the Continuing Investigation into the U.S. Attorney Controversy and Related Matters*, 110th Cong. (May 23, 2007) (statement of Monica Goodling), available at http://www.washingtonpost.com/wp-srv/politics/transcripts/goodling_testimony_052307.html (“Nevertheless, I do acknowledge that I may have gone too far in asking political questions of applicants for career positions, and I may have taken inappropriate political considerations into account on some occasions. And I regret those mistakes.”). See also Dan Eggen & Amy Goldstein, *Ex-Aide to Gonzales Accused of Bias*, WASH. POST, May 3, 2007, at A1.

32. 28 U.S.C. § 541(a) (2006).

33. *Id.* § 541(c).

U.S. Attorneys know this, yet all are aware that very few U.S. Attorneys are dismissed by the President who appointed them.³⁴

While serving in office, U.S. Attorneys are considered the chief federal law enforcement official within their respective districts. They supervise most investigations in their districts by federal law enforcement agencies, including the Federal Bureau of Investigation; the Drug Enforcement Agency; Bureau of Alcohol, Tobacco, Firearms and Explosives; U.S. Marshal's Service; Bureau of Prisons; Immigration and Customs Enforcement; U.S. Secret Service; U.S. Coast Guard; Environmental Protection Agency; and many other agencies. In addition, important civil cases in which the United States is a party are overseen by Civil Divisions in each of the ninety-three U.S. Attorneys' Offices across the country.³⁵

To serve effectively, U.S. Attorneys must embrace their role as the *coordinator* of federal law enforcement. Strategic planning which identifies gaps in federal law enforcement and addresses these gaps through deployment of available resources and the development of new approaches can literally mean the life or death of innocent victims of crime. International and home grown terrorists, ruthless drug dealers, human traffickers, environmental polluters, and white collar and corporate criminals all vie for the attention of the U.S. Attorneys and the men and woman they lead. The relative paucity of resources at the federal level requires that federal law enforcement coordinate their work and share information with their local counterparts. For example, in the Western District of Washington, less than 150 FBI agents are available for criminal programs, including counterterrorism, while combined state and local law enforcement exceeds 10,000 for Washington State.³⁶ Any commitment to coordinated efforts to prevent and disrupt the next terrorist attack on our country requires the systematic sharing of law

34. KEVIN M. SCOTT, CONGRESSIONAL RESEARCH SERVICE, U.S. ATTORNEYS WHO HAVE SERVED LESS THAN FULL FOUR-YEAR TERMS, 1981–2006 (2007), *available at* <http://leahy.senate.gov/issues/USAttorneys/ServingLessThan4Years.pdf>. In his report, Mr. Scott finds that only eight U.S. Attorneys were dismissed or instructed to resign from office before expiration of their terms or the election of a new President. *Id.* at 6–7. Each of these circumstances had ample evidence of cause for their removals, including one in which it was alleged that an intoxicated U.S. Attorney bit a stripper. *Id.* at 7.

35. *See generally* JAMES EISENSTEIN, COUNSEL FOR THE UNITED STATES: U.S. ATTORNEYS IN THE POLITICAL AND LEGAL SYSTEMS (1978). Although somewhat dated, Dr. Eisenstein's book is seminal on the role of U.S. Attorneys and is read by many incoming appointees to the Office.

36. Paul Shukovsky, *Murray to FBI: You're Putting State at Risk*, SEATTLE POST-INTELLIGENCER, Sept. 18, 2007, *available at* http://seattlepi.nwsource.com/local/332032_fbi18.html; WASHINGTON STATE UNIFORM CRIME REPORT, Washington Association of Sheriffs & Police Chiefs, ii (2006), *available at* <http://www.waspc.org/index.php?c=Crime%20Statistics>.

enforcement records between federal, state, and local law enforcement. The only senior federal official with the ability to lead such sharing efforts and enforce the agreements between the agencies which protect privacy, advance technology, and secure sensitive information is the United States Attorney.³⁷

That U.S. Attorneys wield enormous power is well understood, particularly when considering their direct investigative oversight of gun-carrying federal agents and their ability to seek criminal arrest, indictment by federal grand juries, and if conviction is obtained, imprisonment or even execution. That such power should be wielded in a non-political fashion is axiomatic, as set forth by the U.S. Supreme Court in *Berger v. United States*:

The 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, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.³⁸

37. In the Western District of Washington, a strategic plan requires that the U.S. Attorney's Office do the following:

[T]ake the lead in bringing all communities in the District together to share intelligence and investigative information in the JTTF (Joint Terrorism Task Force) Information-Sharing Initiatives that will link investigations for terrorism as well as Organized Criminal Enterprise investigations. The local application of this initiative . . . will integrate Federal, state and local investigative records into a data base to be made available to all law enforcement agencies in the District.

Strategic Direction 2003–2008: Law Enforcement Community Crime Strategy—Western District of Washington, 25 (2003) (on file with the U.S. Attorney's Office, Seattle, Washington). This system, known as the Law Enforcement Information Exchange (LInX), was eventually developed in partnership with the Naval Criminal Investigative Service (NCIS), and was implemented by NCIS in U.S. Attorney-led initiatives in Washington State, Hawaii, south Texas, Norfolk-Hampton Roads, Virginia, and Jacksonville. LInX was widely sought after by U.S. Attorneys across the United States; however, then-Deputy Attorney General Paul McNulty withdrew the Justice Department support for meaningful information sharing shortly after the dismissal of the U.S. Attorneys in December 2006. See generally Memorandum from Paul J. McNulty, Deputy Attorney Gen., to Dep't of Justice Law Enforcement Components, "Law Enforcement Information Sharing Policy Statement and Directives," (Dec. 21, 2006), available at <http://i.a.cnn.net/cnn/2006/images/12/26/dag.onedoj.pdf>.

38. *Berger v. United States*, 295 U.S. 78, 88 (1935).

Warnings against prosecutorial arrogance and politicization were handed down long ago by Attorney General and later United States Supreme Court Justice Robert H. Jackson in words known to many United States Attorneys, past and present:

The prosecutor has more control over life, liberty, and reputation than any other person in America. . . . The prosecutor can order arrests, present cases to the grand jury in secret session, and on the basis of his one-sided presentation of the facts, can cause the citizen to be indicted and held for trial. . . . Because of this immense power to strike at citizens, not with mere individual strength, but with all the force of government itself, the post of Federal District Attorney from the very beginning has been safeguarded by presidential appointment, requiring confirmation of the Senate of the United States. . . . There is a most important reason why the prosecutor should have, as nearly as possible, a detached and impartial view of all groups in his community. . . . It is in this realm—in which the prosecutor picks some person whom he dislikes or desires to embarrass, or selects some group of unpopular persons and then looks for an offense, that the greatest danger of abuse of prosecuting power lies. It is here that law enforcement becomes personal, and the real crime becomes that of being unpopular with the predominant or governing group, being attached to the wrong political views, or being personally obnoxious to or in the way of the prosecutor himself.

....

The qualities of a good prosecutor are as elusive and as impossible to define as those which make a gentleman. And those who need to be told would not understand it anyway. A sensitiveness to fair play and sportsmanship is perhaps the best protection against the abuse of power, and the citizens' safety lies in the prosecutor who tempers zeal with human kindness, who seeks truth and not victims, who serves the law and not factional purposes, and who approaches his task with humility.³⁹

V. UNDER INVESTIGATION—THE PIVOTAL ROLE OF THE INSPECTOR GENERAL OF THE JUSTICE DEPARTMENT

The Inspector General for the Justice Department is empowered to both fully investigate the actions of the former Attorney General and his

39. Robert H. Jackson, Attorney Gen. & future Supreme Court Justice, Address to United States Attorneys' Dep't of Justice (Apr. 1, 1940) in 31 J. CRIM. L. & CRIMINOLOGY 3, 3–6 (1940), available at <http://www.roberthjackson.org/documents/The%20Federal%20Prosecutor.pdf>.

management team for “waste, fraud and abuse,”⁴⁰ and, if the facts warrant, refer for further investigation and prosecution individuals whom he concludes have violated criminal laws.⁴¹

In addition to the very public congressional investigations by both the Senate and House Judiciary Committees, the Justice Department’s Office of Inspector General and Office of Professional Responsibility are jointly engaged in a far reaching investigation.⁴² Justice Department Inspector General Glenn Fine has a wide purview to investigate “waste, fraud and abuse” within the Department, and to report his findings to Congress and the public.⁴³ The inquiry could well include the admitted management failures in the dismissal of U.S. Attorneys, improper political considerations in hiring decisions, misleading statements by Justice Department officials to Congress, threats and harassment directed toward former U.S. Attorneys for speaking out publicly and for testifying before Congress, possible violations of the criminal provisions of the Hatch Act, and obstruction of justice.

*A. New Mexico: Obstruction of Justice and
Criminal Violations of the Hatch Act*

Dramatic testimony given by former U.S. Attorney for New Mexico, David Iglesias, has raised the very real prospect of improper interference with an ongoing criminal investigation involving public corruption and the seeking of political advantage. Violations of the obstruction of justice statute may have occurred and should be investigated.

18 U.S.C. § 1503 provides:

Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any grand or petit juror or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding . . . or injures any such officer, magistrate judge or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or

40. 5 U.S.C. Appx. § 8(c) (2006).

41. *Id.* § 4(d).

42. Letter from Glenn Fine, Inspector Gen., Dep’t of Justice, to Sen. Patrick Leahy (Aug. 30, 2007), available at <http://www.talkingpointsmemo.com/docs/leahy-oig> (stating that the Office of the Inspector General will examine whether “statements made by the Attorney General were intentionally false, misleading or inappropriate”).

43. Inspector General Act of 1978, as amended, Pub. L. No. 95-452, 92 Stat. 1101 (1978).

impede, the due administration of justice, shall be punished as provided in subsection (b).⁴⁴

The elements of a *prima facie* case of obstruction of justice are (1) the existence of the judicial proceeding; (2) knowledge of or notice of the judicial proceeding; (3) acting “corruptly” with intent to influence, obstruct, or impede the proceeding in the due administration of justice; and (4) a nexus (although not necessarily one which is material) between the judicial proceeding sought to be corruptly influenced and the defendant’s efforts.⁴⁵ The omnibus clause of § 1503(a) is a “catchall” provision, which is broadly construed to include a wide variety of corrupt methods.⁴⁶

During 2006 in New Mexico, then-U.S. Attorney David Iglesias led an investigation which eventually resulted in the indictment and conviction of the Treasurer of the State of New Mexico, an elected Democrat. Iglesias has testified that he received phone calls from Senator Pete Domenici and U.S. Representative Heather Wilson (R-N.M.), in which he was allegedly pressured to accelerate the indictment in order for it to occur before the November re-election campaign of Representative Wilson. Iglesias responded to questions before the Senate on March 6, 2007:

SENATOR SCHUMER: Please describe for the committee now, as best you can, your entire recollection of that communication. Please tell us what Senator Domenici said and what you said.

DAVID IGLESIAS: Thank you, Sir. I was at home. This was the only time I’d ever received a call from any member of Congress while at home during my tenure as United States attorney for New Mexico.

Mr. Bell called me. I was in my bedroom. My wife was nearby. And he indicated that the senator wanted to speak with me. He indicated that there were some complaints by some citizens, so I said, “OK.” And he said, “Here’s the Senator.”

44. 18 U.S.C. § 1503(b)(3) (2006). The criminal penalty provision for obstruction of justice provides for “imprisonment for not more than 10 years, a fine under this title, or both.” *Id.*

45. See *In re Impounded*, 241 F.3d 308, 317 n.8 (3d Cir. 2001); *United States v. Cueto*, 151 F.3d 620, 633 (7th Cir. 1998).

46. *United States v. Andreas*, 39 F. Supp. 2d 1048, 1065 (N.D. Ill. 1998), *aff’d*, 216 F.3d 645 (7th Cir. 2000). Under this provision, the omnibus clause includes “endeavors to influence, obstruct or impede . . . the due administration of justice.” 18 U.S.C. § 1503(a) (2006).

So he handed the phone over, and I recognized the voice as being Senator Pete Domenici. And he wanted to ask me about the matters of the corruption cases that had been widely reported in the local media. I said, "All right." And he said, "Are these going to be filed before November?" And I said I didn't think so, to which he replied, "I'm very sorry to hear that." And then the line went dead.

SENATOR SCHUMER: So in other words, he hung up on you?

MR. IGLESIAS: That's how I took that. Yes, Sir.⁴⁷

Former Attorney General Gonzales has admitted he took multiple phone calls from Domenici urging that U.S. Attorney Iglesias be replaced, and has admitted that the President spoke with him about "problems" with Iglesias. Gonzales has even admitted that one of the reasons that Iglesias was fired was because Senator Domenici had "lost confidence" in Iglesias.⁴⁸ One of the last of the U.S. Attorneys to be added to the list of those to be fired, the name of David Iglesias appeared in October 2006; he was fired within six weeks.⁴⁹

While these allegations are troubling under any analysis, a thorough and independent investigation is necessary to determine whether criminal laws have been violated. Among the considerations facing the Inspector General is whether the actions of former Attorney General Gonzales in removing Iglesias constituted obstruction of justice. Attempts to

47. *Preserving Prosecutorial Independence, Part II: Hearing Before the S. Comm. on the Judiciary*, 110th Cong. (Mar. 6, 2007) (testimony of David Iglesias), available at http://media.washingtonpost.com/wp-srv/politics/documents/senatejudiciary_hearing_030607.htm.

48. *Preserving Prosecutorial Independence: Is the Department of Justice Politicizing the Hiring and Firing of U.S. Attorneys?*, *Hearing Before the S. Judiciary Comm. Part IV*, 110th Cong. 15 (May 10, 2007), available at http://www.washingtonpost.com/wp-srv/content/article/2007/05/10/gonzales_testimony_051007.html?hpid=moreheadlines.

Gonzales testified:

But I will tell you this: I was certainly aware of the fact that the senior senator had lost confidence in Mr. Iglesias beginning in the fall of 2005, and that we had had several phone conversations where he had expressed serious concerns or reservations about the performance of the person that he recommended for that position.

Id. (statement in response to question from Rep. Conyers). See also Dan Eggen, *Domenici Says He Contacted Prosecutor*, WASH. POST, Mar. 5, 2007, at A1.

49. E-mail from Kyle Sampson, Chief of Staff to Alberto Gonzales, to Monica Goodling, Dir. of Public Affairs for the Dep't of Justice (Sept. 13, 2006) (including Charlton, Lam, Chiara, Bogden and McKay, but not Iglesias, as "[U.S. Attorneys] we should now consider pushing out"), available at <http://judiciary.house.gov/Media/PDFS/DOJDocsPt32-070320.pdf#Page=27>. See also E-mail from Kyle Sampson, Chief of Staff to Alberto Gonzales, to Harriet Miers, White House Counsel & William Kelly, Deputy Assistant to the President and Deputy Counsel (Nov. 15, 2006) (including Iglesias on a list of U.S. Attorneys to be fired), available at <http://judiciary.house.gov/Media/PDFS/DOJDocsPt2070313.pdf#Page=15>; Eggen & Solomon, *supra* note 9.

influence Iglesias in his prosecution of the public corruption case in New Mexico, including a retaliatory firing, could well constitute obstruction of justice, and, at minimum, warrant a full investigation. Although Gonzales has claimed he did not create the list of U.S. Attorneys to be fired, he has admitted that he approved the firings. That he had knowledge of the high-profile public corruption case being investigated by Iglesias in New Mexico is virtually certain, given that he has admitted speaking to Domenici and would almost certainly be expected to have such knowledge as the leader of the Justice Department. Under the broad language of 18 U.S.C. § 1503(a), it would be hard to imagine that “corruptly influencing” would not extend to firing the United States Attorney in the middle of a public corruption case because he “lost the confidence” of a Senator who sought to manipulate the indictments for crass political advantage.

Other and equally serious questions have been raised by the conduct of the former Deputy Attorney General Paul McNulty, to whom U.S. Attorneys reported, and by Kyle Sampson, who was admittedly the “aggregator” of the list of U.S. Attorneys to be fired.⁵⁰ Were McNulty and Sampson aware of the New Mexico case being led by Iglesias? Did they also speak to Senator Domenici about the case and Iglesias’ role in it? Did McNulty, or Michael Elston, his Chief of Staff Sampson, Monica Goodling or others seek to punish Iglesias for falling into disfavor with Senator Domenici, Representative Wilson, or the New Mexico Republicans in his handling of the public corruption case? If the answer is yes, then all of them should be answering questions (or exercising their right not to incriminate themselves) before a grand jury.

Obstruction of justice is not the only crime which may have been committed with respect to the firing of David Iglesias. The criminal provision of the Hatch Act provides in part:

Whoever, being one of the officers or employees of the United States mentioned in section 602 of this title, discharges, or promotes, or degrades, or in any manner changes the official rank or compensation of any other officer or employee, or promises or threatens so to do, for giving or withholding or neglecting to make any contribution of money or other valuable thing for any political purpose, shall be fined under this title or imprisoned not more than three years, or both.⁵¹

50. *Hearing*, *supra* note 16 (testimony of Kyle Sampson).

51. 18 U.S.C. § 606 (2006).

In general, the Hatch Act “limits the political activities of federal employees in the interests of promoting efficient, merit-based advancement, *avoiding the appearance of politically-driven justice*, preventing the coercion of government workers to support political positions, and foreclosing use of the civil service to build political machines.”⁵²

Under this provision, the firing of Iglesias for failing to use his office to influence the election of Republicans, in this case the re-election of Representative Wilson, could constitute a violation of 18 U.S.C. § 606. The numerous complaints to Gonzales by Senator Domenici, the visits by Republican party leaders from New Mexico with Justice Department officials, and the possible subject matter of Gonzales’ conversation with the President could well become evidence that Iglesias was fired because he was not a “loyal Bushie” willing to use his office to help Republicans. Firing a United States Attorney for refusing to participate in such a blatantly political scheme could well result in the indictment of those government officials responsible for the firing if they were aware of and participating in the political purpose. Advancing the indictments in New Mexico could constitute “contribution of money or other valuable thing for any political purpose” as required by the Act. These terms are given broad reading by courts interpreting them,⁵³ and may be reasonably extended to include preserving the election for the candidate of a particular political party, or maintaining the majority in the U.S. House of Representatives in a close election.

B. Obstruction of Justice in the Southern District of California

As troubling and dramatic as the circumstances were in New Mexico, that state is not the only place where the firing of a U.S. Attorney may result in criminal charges for impeding justice. In the Southern District of California, U.S. Attorney Carol Lam was fired even as she was supervising the highest-profile public corruption prosecution in America.⁵⁴ Former U.S. Representative Randy “Duke” Cunningham, now serving an eight-year federal prison term, plead guilty and was sentenced on March 3, 2006, for conspiracy to commit bribery, mail and wire fraud,

52. *Burrus v. Vegliante*, 336 F.3d 82, 85–86 (2d Cir. 2003) (emphasis added).

53. See generally *United States v. Cicco*, 10 F.3d 980, 984 (3d Cir. 1994); *United States v. Schwartz*, 785 F.2d 673, 680–81 (9th Cir. 1986); *United States v. Singleton*, 144 F.3d 1343, 1350 (10th Cir. 1998), *rev’d on other grounds*, 165 F.3d 1297 (10th Cir. 1999).

54. Editorial, *Politics and the Corruption Fighter*, N.Y. TIMES, Jan. 18, 2007, available at <http://www.nytimes.com/2007/01/18/opinion/18thu2.html>.

and tax evasion.⁵⁵ In a high-profile investigation, U.S. Attorney Lam, a well respected former Assistant U.S. Attorney and state trial court judge in California, spoke out forcefully for the rule of law and against public corruption.⁵⁶ Paying no heed to the political fallout of having targeted a powerful Republican as an appointee of a Republican administration, Lam stated the following at the time of Cunningham's sentencing:

It is clear from the facts set forth in the plea agreement, facts that Mr. Cunningham admitted in his guilty plea, that this was a crime of unprecedented magnitude and extraordinary audacity. For more than four years, Mr. Cunningham asked for and accepted bribes totaling more than \$2.4 million from two defense contractors, who in return received favorable treatment from Mr. Cunningham. Mr. Cunningham used his public office to pressure and influence U.S. Department of Defense personnel to award and execute government contracts in a manner that would benefit the defense contractors. . . . Regrettably for the citizens in the 50th Congressional District, and for the nation that has a right to the honest services of its representatives, it is abundantly clear that Congressman Cunningham let greed take priority over his duty to serve the best interests of his constituents and his country. While Mr. Cunningham has reached a resolution of his case through a plea agreement and his entry of a guilty plea today, the investigation continues with respect to other co-conspirators.⁵⁷

The "co-conspirators" mentioned by Ms. Lam apparently included Kyle "Dusty" Foggo, the former Executive Director of the Central Intelligence Agency who resigned a few days in advance of the execution of search warrants on May 12, 2006.⁵⁸ Lam alerted the Justice Department that FBI agents would, at her direction, search Foggo's home in connection with the Duke Cunningham case.⁵⁹ The following day, Kyle

55. *Crooked Congressman Going to Prison*, CNN.COM, Mar. 3, 2007, available at <http://www.cnn.com/2006/LAW/03/03/cunningham.sentenced/index.html>.

56. *See Indictments Charge Defense Contractor Brent Wilkes With Corruption Involving Former CIA Executive Director Kyle 'Dusty' Foggo and Former Congressman Randy 'Duke' Cunningham*, PR NEWswire, Feb. 13, 2006, available at <http://www.prnewswire.com/cgi-bin/stories.pl?ACCT=104&STORY=/www/story/02-13-2007/0004527077&EDATE=>.

57. *Statement of U.S. Attorney Carol Lam*, Nov. 28, 2005 (on file with the U.S. Attorney's Office for the Southern District of California), available at <http://www.signonsandiego.com/news/politics/cunningham/20051128-1834-lamwords.html>.

58. Jerry Kammer and Marcus Stern, *Federal Agents Raid home of CIA's No. 3 Boss*, SAN DIEGO UNION-TRIBUNE, May 12, 2006, available at <http://www.signonsandiego.com/news/nation/20060512-0906-foggo.html>.

59. U.S. Attorneys are required to advise the office of the Attorney General and the Deputy Attorney General in advance of actions which involve politically sensitive or nationally important matters. Such reports are called "Urgent Reports."

Sampson e-mailed the White House from the Attorney General's office and decried "the real problem we have right now with Carol Lam that leads me to conclude that we should have someone ready to be nominated on 11/18, the day her 4-year term expires."⁶⁰ Given the wide publicity of the Cunningham political corruption case in U.S. Attorney Lam's district, it is reasonable to conclude that Gonzales, McNulty, Sampson, and other senior Justice Department officials were aware of the underlying judicial proceeding being handled by Carol Lam. As was the case in New Mexico with U.S. Attorney Iglesias, the Cunningham investigation led by Lam was very much ongoing, and continued through her eventual resignation as U.S. Attorney in March 2007.⁶¹ Gonzales, McNulty and Sampson at minimum will have to demonstrate that their complicity in the removal of Lam had nothing to do with her aggressive prosecution of powerful Republicans for public corruption. In addition to the Sampson e-mail urging Lam's dismissal, investigators will seek to establish whether other senior officials knowingly sought her removal in connection with the Cunningham investigation. If such evidence is found, removal of a United States Attorney in the middle of a high-profile political corruption investigation, particularly where the U.S. Attorney was personally supervising the case, would undoubtedly come within the omnibus provisions of the federal obstruction of justice statute, 18 U.S.C. § 1503(a).

*C. Additional Possible Criminal Violations in
the Removal of United States Attorneys*

If it is proven that a criminal conspiracy to obstruct justice or politicize the Justice Department occurred, the removal of all of the U.S. Attorneys could become a focus for the Inspector General and, eventually, a Special Prosecutor. For example, unreleased White House e-mail may indicate a more explicit effort to utilize United States Attorneys to obtain advantage in ongoing or questionable election fraud, voter fraud, or other criminal prosecutions. In connection with the public comments of Karl Rove complaining about voter and election fraud incidents,⁶² Kyle

60. E-mail from Kyle Sampson, Chief of Staff to Alberto Gonzales, to William Kelley, Deputy Assistant to the President and Deputy Counsel (May 11, 2006), *available at* <http://www.talkingpointsmemo.com/docs/lam-emails>. Sampson denies that this e-mail was related to the execution of search warrants by U.S. Attorney Lam in the Cunningham case. *Hearing, supra* note 16 (testimony of Kyle Sampson, in response to questions from Sen. Feinstein).

61. *Politics and the Corruption Fighter, supra* note 54.

62. David Kirkpatrick & Jim Rutenberg, *E-mail Shows Rove's Role in Fate of Prosecutors*, N.Y. TIMES, Mar. 29, 2007, *available at*

Sampson linked the dismissal of U.S. Attorneys to Rove in e-mails released by the Justice Department.⁶³

In Washington State, my dismissal from my post as U.S. Attorney was widely speculated as having been connected to the 2004 Governor's election, which the Justice Department has denied.⁶⁴ However, former Attorney General Gonzales has testified he was aware of criticism of the author for allegedly failing to intervene in the election by bringing criminal indictments.⁶⁵ No credible explanation for including me on a list to

<http://www.nytimes.com/2007/03/29/washington/29rove.html?hp>; see Eggen & Goldstein, *supra* note 22.

63. E-mail from Kyle Sampson, Chief of Staff to Alberto Gonzales, to Chris Oprison, Assoc. White House Counsel (Dec. 19, 2006), available at <http://judiciary.house.gov/Media/PDFS/DOJDocsPt3070313.pdf#Page=65> (Sampson tells the White House that appointing Timothy Griffin to replace Bud Cummins in Little Rock was "important to Karl" Rove).

64. See, e.g., David Bowermaster, *McKay Went From Hero to Zero with Justice Department*, SEATTLE TIMES, Mar. 21, 2007, available at http://seattletimes.nwsource.com/html/localnews/2003628399_mckay21m.html; see also Bowermaster, *GOP Chair Called McKay About '04 Election*, SEATTLE TIMES, Mar. 14, 2007, available at http://seattletimes.nwsource.com/html/localnews/2003616950_mckay14m.html.

65. *Hearing, supra* note 48 (testimony of Alberto Gonzales). During questioning before a House Judiciary Subcommittee, the former Attorney General admitted he was aware of complaints against me relating to alleged voter fraud in the 2004 Governor's election in Washington State:

WATT: Well, you obviously haven't listened to the testimony of some of the people in the department then, because that was an excuse that was advanced initially. And that's the problem here, Mr. Attorney General. There are so many different excuses advanced at different times, whenever it's convenient, that you have this appearance that there is something else there. And in this case, Mr. McKay also failed to aggressively, or as aggressively, prosecute, as some people thought he ought to prosecute, and pursue some voting fraud cases that were taking place after an election took place.

And it might have had some impact on a Democrat versus a Republican being elected. So if that concern that the public is concerned about, Mr. Attorney General—if that's at the bottom of this, that would be an improper motivation for a termination, and would be illegal. Wouldn't you agree?

GONZALES: I agree that if in fact there was pressure put on Mr. McKay to investigate a case which didn't warrant an investigation—but obviously, there may be circumstances where an investigation may have been warranted. And so we'd have to look at the circumstances of a particular case. I don't recall that when I made my—when I accepted the recommendation, Congressman, that that was a reason for it, is his efforts with respect to voter fraud. *But clearly, I do—going back and looking at the documents and the correspondences, there was a great deal of concern about his efforts with respect to voter fraud. Because I received a number of letters from groups and outside parties . . .*

WATT: So you didn't fire him for that reason, but somebody might have put him on the list for that reason? That's really what you're saying, Mr. Attorney General.

GONZALES: I don't—again, Congressman, I'm assuming that this committee has spoken with everyone who provided input. And, of course, the person who was compiling

be fired in March 2005 has been lodged, according to the House Judiciary Committee report, making it difficult for Gonzales, McNulty, and Sampson to contend that the dismissal was unrelated to the election fraud case. If prosecuted for obstruction of justice under these facts, the government would face serious obstacles in proving that each of them was aware of the criminal investigation underway by the Seattle Division of the FBI and the United States Attorney's Office, that this constituted a "judicial proceeding" in the absence of an active grand jury proceeding or the issuance of grand jury subpoenas,⁶⁶ and that the U.S. Attorney was fired to influence or retaliate for his actions on the matter.

In Arizona, the dismissal of U.S. Attorney Paul Charlton was admittedly based in part on Charlton's handling of a federal death penalty case in which he sought to speak with Attorney General Gonzales and overturn his direction to seek death against Charlton's recommendation.⁶⁷ Although the Justice Department later sought to characterize this dispute as a "policy" matter, a more likely explanation is that Charlton was targeted for removal simply because he exercised his duty to advise the Attorney General of the reasons for his recommendation against the death penalty in a particular case. As a general matter, it may be argued that any federal capital case involves ongoing appeals, potential clemency, and related matters such that it is a "judicial proceeding" as required by the obstruction of justice statute, 18 U.S.C. § 1503(a). Obviously, Gonzales, McNulty, and others were aware of the case, since each was aware of Charlton's views on the death penalty aspect, and that

the information, Mr. Sampson, would know better than I. Because I'm a fact witness. I haven't talked to these other fact witnesses about what happened here.

Hearing, supra note 48 (testimony of Alberto Gonzales).

66. Generally, a pending judicial proceeding is a prerequisite to prosecution under 17 U.S.C. § 1503. *See, e.g.,* United States v. Neal, 951 F.2d 630 (5th Cir. 1992). A proceeding is pending when the judicial machinery has been activated. *See* United States v. Gonzales-Mares, 752 F.2d 1485, 1491 (9th Cir. 1985), *cert. denied*, 473 U.S. 913 (1985). Courts generally require an active grand jury proceeding, including, for example, the issuance of grand jury subpoenas. *See, e.g.,* United States v. Walasek, 527 F.2d 676, 678 (3d Cir. 1975). However, if a special prosecutor determines that removal of a U.S. Attorney was in retaliation for actions taken in an investigation, the pending proceeding element is not required. *See* United States v. Roberts, 638 F.2d 134, 135 (9th Cir. 1981) (*per curiam*), *cert. denied* 452 U.S. 909 (1981).

67. E-mail from Michael Elston, Chief of Staff to Deputy Attorney General Paul McNulty, to Kyle Sampson, Chief of Staff to Alberto Gonzales (Aug. 15, 2006), <http://judiciary.house.gov/Media/PDFS/DOJDocsPt7-070320.pdf#Page=05>. "In the 'you won't believe this category,' Paul Charlton would like a few minutes of AG's time. I explained that he had already been given extensive, unusual process and that I did not think that it was a good idea for him to press this, but he insisted on me making the request. Your thoughts?" Sampson's one word reply: "Denied." *Id.*

Gonzales had overruled Charlton.⁶⁸ Would firing U.S. Attorney Charlton “corruptly influence” the death penalty proceeding? Further investigation could well be warranted if the Inspector General has evidence of efforts to intimidate U.S. Attorneys in death penalty eligible cases.

D. Possible False Congressional Testimony Charges

An additional area of inquiry, for both the Inspector General and for the congressional committees continuing their investigations, is the possibility that one or more Justice Department official has lied to Congress. Among the possible violations, subject to the facts uncovered by the Inspector General or the FBI, is obstruction of Congress. 18 U.S.C. § 1505 defines the offense and the punishment:

Whoever corruptly, or by threats or force, or by any threatening letter or communication influences, obstructs, or impedes or endeavors to influence, obstruct, or impede the due and proper administration of the law under which any pending proceeding is being had before any department or agency of the United States, or the due and proper exercise of the power of inquiry under which any inquiry or investigation is being had by either House, or any committee of either House or any joint committee of the Congress—Shall be fined under this title, imprisoned not more than 5 years

As in the § 1503(a) obstruction provision, a violator would have to be aware of the congressional inquiry and its lawful convening, and corruptly seek to impede the inquiry by intentionally supplying false testimony or records.⁶⁹ Other possible grounds for criminal prosecution include 18 U.S.C. § 1621 (perjury) and 18 U.S.C. § 1001 (false statements).

Senators have openly accused former Attorney General Gonzales of lying to them. Following the Senate questioning of Gonzales on April 19, 2007, Senator Mark Pryor (D-Ark.) was quoted as saying, “[t]he Attorney General not only lied to me as a person but, when he lied to me, he lied to the Senate and he lied to the people I represent.”⁷⁰ Among other problematic testimony is the former Attorney General’s statement to senators: “I would never, ever make a change in a United States

68. *Oversight of the Federal Death Penalty Before the S. Comm. on the Judiciary, Subcomm. on the Const.*, 110th Cong. (June 27, 2007) (statement of Paul K. Charlton), available at http://judiciary.senate.gov/testimony.cfm?id=2833&wit_id=6567.

69. See *United States v. North*, 910 F.2d 843, 884, (D.C. Cir. 1990), *withdrawn and superseded in part on reh’g*, 920 F.2d 940 (D.C. Cir. 1990).

70. *Hearing*, *supra* note 8 (testimony of Alberto Gonzales).

Attorney position for political reasons. . . . I would just not do it.”⁷¹ When juxtaposed with the testimony of then-Deputy Attorney General McNulty that U.S. Attorney Bud Cummins was replaced solely to make way for Karl Rove’s former aide, Timothy Griffin,⁷² the veracity before Congress of the former Attorney General is very much in question. Gonzales further testified before the House Committee on the Judiciary that he had refrained from discussing the facts of the U.S. Attorney firings with other Justice Department officials who might also be witnesses.⁷³ This testimony was dramatically disputed by former Justice Department employee, Monica Goodling, who testified that the Attorney General had rehearsed his recollections with her in an “uncomfortable” conversation in his office.⁷⁴

Yet, it is not only the former Attorney General who appears to have dissembled. Former Deputy Attorney General McNulty may have, according to the House Judiciary Committee Chairman, sought to assist the “Administration’s effort to minimize and obscure the role of White House personnel in the firings” when he made misleading statements concerning the role of the White House.⁷⁵ One committee report concludes this was “an incomplete statement that appears to have understated the involvement of White House individuals in the inception, development, and approval of the firing plan.”⁷⁶ McNulty also may have sought to conceal an important phone call from Senator Domenici regarding U.S. Attorney Iglesias, when he instructed Monica Goodling to delete reference to that call from his Senate testimony.⁷⁷

Others who likely have serious concerns (and even more likely, who have retained criminal defense lawyers) are Kyle Sampson and

71. *Hearing, supra* note 4 (testimony of Alberto Gonzales).

72. *Hearing, supra* note 12 (testimony of Paul J. McNulty, responding to questions from Sen. Schumer).

73. *Hearing, supra* note 48 (testimony of Alberto Gonzales, responding to question from Rep. Watt).

74. *Hearing, supra* note 31 (testimony of Monica Goodling, responding to question from Rep. Davis).

75. McNulty told Senate Judiciary Committee members that, “[t]hese are Presidential appointments . . . so the White House personnel, I’m sure, was [sic] consulted prior to making the phone calls (firing the U.S. Attorneys).” *Hearing, supra* note 12 (testimony of Paul J. McNulty, in response to question from Sen. Schumer). Disgraced former aide to Gonzales, Monica Goodling, has alleged that McNulty was “not fully candid with Congress” regarding the White House role in the firings. Dan Eggen, *Officials Say Justice Dept. Based Hires on Politics Before Goodling Tenure*, WASH. POST, May 26, 2007, at A2.

76. Conyers Memorandum, *supra* note 14, at 15.

77. *Hearing, supra* note 31 (testimony of Monica Goodling). Goodling has accused the former Deputy Attorney General of giving false testimony on four separate matters. *Id.* (in response to questions from Rep. Davis).

former McNulty staffers Will Moschella and Michael Elston. Sampson appears to have knowingly concealed from Congressional investigators the forced resignation of U.S. Attorney Todd Graves from the Western District of Missouri,⁷⁸ and the role of Karl Rove in securing the appointment of Timothy Griffin in the Eastern District of Arkansas to replace the U.S. Attorney Bud Cummins. Moschella served as the official spokesperson of the Justice Department and provided its responses to the six subpoenaed U.S. Attorneys before the Subcommittee on Commercial and Administrative Law of the House Committee on the Judiciary on March 6, 2007, maintaining that the White House was not involved in firing the U.S. Attorneys.⁷⁹ McNulty's resigned Chief of Staff Mike Elston, in addition to allegedly threatening former U.S. Attorneys if they testified before Congress,⁸⁰ may have lied concerning the development of the list of U.S. Attorneys to be fired.⁸¹

Although the resignations of Gonzales, McNulty, and others have slowed the pace of congressional inquiry for now, their evasive and conflicting testimony virtually guarantees further hearings before both the House and Senate Judiciary Committees. Future hearings, however, may take a back seat to the report by the Inspector General and the possibility of a criminal investigation.

VI. TOWARD ACCOUNTABILITY— SELECTION OF A SPECIAL PROSECUTOR

While the timing of the Inspector General's report is not publicly known, the Inspector General Act provides that, where merited, a referral for investigation of possible crimes may be made at the discretion of the Inspector General of the Justice Department.⁸² Such referrals are typically made to the United States Attorney's Office for the District of Columbia. As this office is currently occupied by a former staffer to

78. Murray Wass, *Administration Withheld E-mails About Rove*, NAT'L J., May 10, 2007, <http://news.nationaljournal.com/articles/070510nj1.htm>.

79. *H. Judiciary Comm., Subcomm. on Commercial and Admin. Law, Hearing on the Dismissals of U.S. Attorneys*, 110th Cong. (Mar. 6, 2007) (testimony of Will Moschella), available at http://media.washingtonpost.com/wp-srv/politics/documents/housejudiciary_hearing_030607.htm.

80. *Id.* (testimony of Bud Cummins, in response to questions from Rep. Cohen).

81. Mary Beth Buchanan, U.S. Attorney for the Western District of Pennsylvania and former Director of the Executive Office for U.S. Attorneys, has reportedly testified that Elston lied to her about how he gathered names for potential dismissals of U.S. Attorneys. See Conyers Memorandum, *supra* note 14, at 18.

82. See 5 U.S.C. App. § 8E (2006).

Alberto Gonzales,⁸³ the Justice Department must seek a special prosecutor who will be seen as independent of the White House and of the Justice Department itself. More urgently, a special prosecutor investigating a criminal referral from the Inspector General (or upon the direction of the Attorney General) must be acceptable to the Democrats who control both houses of Congress and must be seen by the public as trustworthy, capable, and independent. The following are among those who should be considered and possess the range of experience and capability to serve as Special Prosecutor:

Joseph E. diGenova, Washington, D.C. *Partner*, diGenova and Toensing; *U.S. Attorney for District of Columbia*, 1983–1988; *Counsel*, Senate Judiciary Committee, *Chief Counsel and Staff Director* Senate Rules Committee; numerous staff positions in Congress and the Justice Department.

Edward L. Dowd, Jr., St. Louis, Mo. *Partner*, Dowd Bennett LLP; *U.S. Attorney for the Eastern District of Missouri*, 1993–1999; *Counsel*, Senator John C. Danforth, Waco Investigation; *Assistant U.S. Attorney, Director*, Organized Crime Drug Task Force for South Central United States.

Ailee W. Wampler III, Miami, Fla., *Partner*, Wampler Buchanan Walker Chabrow & Banciella P.A.; *U.S. Attorney for Southern District of Florida*, 1980–1982; *Captain*, U.S. Army, Military Intelligence, 1968–1970; *Special Attorney U.S. Dep't of Justice*, Organized Crime and Racketeering, 1970–1975; *Attorney-In-Charge*, Miami Strike Force, Organized Crime and Racketeering, U.S. Dep't of Justice, 1975–1980.

Joe D. Whitley, Atlanta, Ga., *Partner*, Alston & Bird; *U.S. Attorney for the Middle District of Georgia*, 1981–1986; *U.S. Attorney for the Northern District of Georgia*, 1990–1993; *Acting Associate Attorney General of the U.S.*, *General Counsel*, U.S. Dep't of Homeland Security.

83. Jeffrey A. Taylor currently serves as the interim U.S. Attorney for the District of Columbia. He served on Attorney General Alberto Gonzales' personal staff as Counselor to the Attorney General.

VII. BINDING UP THE WOUNDS

Without question, the Justice Department needs healing.⁸⁴ The hard working women and men who serve as Assistant United States Attorneys, trial attorneys, and key support staff throughout the United States and in Washington, D.C. have been embarrassed by political leadership which has thoroughly failed them. To these dedicated professionals must be added the Special Agents who help lead investigations of serious federal crimes, not only in the five law enforcement components, but in all federal law enforcement agencies who depend on the Justice Department to advise them, prosecute their cases, and defend convictions won in large part through their efforts.

All have dedicated their careers to the search for the truth, and instead have been forced to watch while their senior leadership have feigned memory loss, failed to take responsibility for their actions, and sought to blame subordinates for their own failures. While these law enforcement professionals bravely continue their critical work keeping us safe and protecting us from violent criminals, they carry the heavy burden of broken trust.

The resignations of the Attorney General, the Deputy Attorney General, the Associate Attorney General⁸⁵ and much of their senior staff have undoubtedly been a relief to those who have observed the faulty memories, political maneuverings, and outright incompetence at the Justice Department.⁸⁶ With the resignation of Alberto Gonzales on September 14, 2007, the President and the Senate have the opportunity to restore

84. The Chairman of the Senate Committee on the Judiciary may have put this in perspective as well as any of the scores of newspaper editorials criticizing the Administration and the Justice Department during the last months of Alberto Gonzales tenure:

But these actions we've heard are from the administration. I really believe they threaten to undermine the effectiveness and professionalism of U.S. attorneys' offices around the country. Not since the Saturday night massacre, when I was a young lawyer and President Nixon forced the firing of the Watergate prosecutor Archibald Cox, have we witnessed anything of this magnitude. The calls to a number of U.S. attorneys across the country last December by which they were forced to resign were extraordinary. I don't know of any precedent for it. What is more disconcerting is that, unlike during Watergate, there is no Elliot Richardson or William French Smith seeking to defend the independence of the prosecutors. And any of us who have ever been a prosecutor know the independence is the most important thing you have. But instead in this case the Attorney General, the Deputy Attorney, the Executive Office of the U.S. Attorneys and the White House all collaborated in these actions. I think that's wrong.

Hearing, supra note 47 (statement of Sen. Leahy), available at http://media.washingtonpost.com/wp-srv/politics/documents/senatejudiciary_hearing_030607.htm.

85. William Mercer, the acting Associate Attorney General has relinquished this post, but continues to serve as U.S. Attorney for the District of Montana.

86. "He who commits injustice is ever made more wretched than he who suffers it." Plato

leadership to the Justice Department and preserve what has been risked: prosecutorial independence, compassion, fairness, and the nonpolitical exercise of government power in criminal prosecutions.⁸⁷

Attorney General Mukasey should move immediately to assure the Congress, the courts, and the American people of his belief in these principles and take steps to prevent the abuses of his predecessor. These steps should include (1) limiting the points of contact between the Justice Department and the White House; (2) eliminating all but specially designated congressional liaisons and requiring notification and approval of other contacts with members of Congress; (3) reaffirming Executive Branch support for presidential appointees and Senate confirmation for senior Justice Department appointees, including U.S. Attorneys; (4) affirming and supporting commitment to the independent role of U.S. Attorneys from both local and national politics; and (5) holding accountable Justice Department employees who have failed, or in the future fail to uphold the values of independence, truthfulness, nonpartisanship, and the nonpolitical pursuit of justice.

VIII. CONCLUSION

With the long-awaited resignation of Alberto Gonzales as Attorney General, the Justice Department has closed a disreputable chapter unprecedented in its history. With the most senior positions vacated by those tainted by this scandal, federal prosecutors and trial attorneys have done their very best to continue the critical day-to-day work of a proud but scarred institution. Though they have not been shown the gratitude they deserve, the men and women still serving as U.S. Attorneys, Assistant U.S. Attorneys, and the line trial attorneys serving in the Justice Department deserve our thanks and admiration. They have carried on protecting us from violent criminals, terrorists, spies, human traffickers and drug dealers, while those responsible for leading them dishonored their offices by attempting to politicize their work.

The next leaders of the Justice Department and of the United States Government have tremendous challenges ahead of them. We remain a nation at great risk of terrorist attack. We also remain a nation at risk of violating the very rights and laws which have distinguished us among the peoples of the earth.

87. On September 17, 2007, the President nominated retired U.S. District Judge Michael B. Mukasey, formerly of the U.S. District Court for the Southern District of New York, to the office of Attorney General of the United States. Judge Mukasey was confirmed by the Senate on November 8, 2007, and sworn into office on November 9, 2007. Attorney General Mukasey is a former Assistant U.S. Attorney in the Southern District of New York.

All Americans must recognize that keeping us safe and protecting our rights are both constitutional imperatives, and preserving them presents challenges requiring enormous commitment and competence. This can be done by careful, skillful and committed public servants. Yet, all who cherish our freedom know that one right cannot be pursued at the cost of the others, for if we do, we risk both our identity *and* our survival.

The Justice Department can never again be a home to those who view the rule of law as an obstacle to our security, who view the courts and federal judges as weak links in our pursuit of terrorists or spies, or who view United States Attorneys as political extensions of the White House or of the Republican or Democratic parties.