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110TH CONGRESS, 1st Session | HOUSE OF REPRESENTATIVES | REPORT 110–58

INTERIM APPOINTMENT OF UNITED STATES ATTORNEYS

MARCH 20, 2007.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. CONYERS, from the Committee on the Judiciary, submitted the following

R E P O R T

together with

SUPPLEMENTAL AND ADDITIONAL SUPPLEMENTAL VIEWS

[To accompany H.R. 580]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 580) to amend chapter 35 of title 28, United States Code, to provide for a 120-day limit to the term of a United States attorney appointed on an interim basis by the Attorney General, and for other purposes, having considered the same, reports favorably thereon with amendments and recommends that the bill as amended do pass.

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59–006

THE AMENDMENTS

The amendments (stated in terms of the page and line numbers of the introduced bill) are as follows:

Page 2, line 12, strike the quotation marks and second period.

Page 2, insert the following after line 12:

"(e) This section is the exclusive means for appointing a person to temporarily perform the functions of a United States attorney for a district in which the office of United States attorney is vacant.".

SEC. 2. APPLICABILITY.

(a) IN GENERAL.—The amendments made by this Act shall take effect on the date of the enactment of this Act.

(b) APPLICATION.—

(1) IN GENERAL.—Any person serving as a United States attorney on the day before the date of the enactment of this Act who was appointed under section 546 of title 28, United States Code, for a district may serve until the earlier of—

(A) the qualification of a United States attorney for that district appointed by the President under section 541 of that title; or

(B) 120 days after the date of the enactment of this Act.

(2) EXPIRED APPOINTMENTS.—If an appointment expires under paragraph (1)(B), the district court for the district concerned may appoint a United States attorney for that district under section 546(d) of title 28, United States Code, as added by this Act.

PURPOSE AND SUMMARY

H.R. 580 amends section 546 of title 28 of the United States Code to permit an individual appointed by the Attorney General to temporarily fill a vacancy in the office of the United States Attorney. Such individual may serve until the earlier of either: (1) the qualification of a United States Attorney appointed by the President pursuant to section 541 of title 28 of the United States Code; or (2) the expiration of 120 days after appointment by the Attorney General of such individual as an interim United States Attorney. In addition, the bill amends section 546 to add a new provision providing that if the 120-day period expires, the district court for such district may appoint a United States Attorney to serve until the vacancy is filled. H.R. 580 clarifies that section 546 is the exclusive means for appointing an individual to temporarily perform the functions of a United States Attorney, and applies to individuals already serving in an interim capacity.

BACKGROUND AND NEED FOR THE LEGISLATION

UNITED STATES ATTORNEYS AND THE PRESIDENTIAL APPOINTMENT AUTHORITY

There are 93 United States Attorneys across the country, one for each of the 94 United States district courts (Guam and the North-

ern Mariana Islands share one United States Attorney).[1] United States Attorneys conduct most of the trial work in which the United States is a party.[2] Their statutory responsibilities include the prosecution of criminal cases brought by the Federal Government, the prosecution and defense of civil cases in which the United States is a party, and the collection of debts owed the Federal Government that are administratively uncollectible.[3]

A United States Attorney exercises wide discretion in the use of resources to further the priorities of his or her district. Largely as a result of its origins as a distinct prosecutorial outpost of the Federal Government, the office of the United States Attorney traditionally has operated with an unusual level of independence from the Justice Department in a broad range of daily activities.[4] As one commentator noted, "U.S. Attorneys routinely decide [how] to focus limited investigative and prosecutorial resources [and these decisions are] informed by the U.S. Attorney's prosecutorial philosophy and her assessment of the particular problems and vulnerabilities within her district."[5]

United States Attorneys are appointed by the President with the advice and consent of the Senate.[6] Each United States Attorney so appointed is authorized to serve a 4-year term.[7] At the expiration of such term, the United States Attorney may continue to serve until a successor is appointed and qualifies.[8] A United States Attorney is subject to removal by the President without cause.[9]

The Senate's advise and consent process formally checks the power of the President by requiring the United States Attorney nominee to go through a confirmation process.[10] In conjunction with that process, Senators may play an influential informal role in the nomination of United States Attorneys.[11] Typically, a President, prior to nominating a United States Attorney, consults with the Senators from the State where the vacancy exists if they are members of the President's political party.[12] If neither Senator is a member of the President's political party, then the President may consult with House Members from that State in the President's political party, or other party leaders in that State.[13] Traditionally, the President has usually accepted the nominee recommended by

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[1] See U.S. Dep't of Justice, United States Attorneys' Manual § 1–2.500 (1997), *available at http://www.usdoj.gov/usao/eousa/foia—reading—room/usam/title1/2mdoj.htm#1–2.500;* Kevin M. Scott, U.S. Attorneys Who Have Served Less than Full Four-year Terms, 1981–2006, CRS Report for Congress, RL 33889, at 1 (Feb. 22, 2007) [hereinafter CRS Report].

[2] *See* U.S. Dep't of Justice, United States Attorneys' Manual § 1–2.500 (1997), *available at http://www.usdoj.gov/usao/eousa/foia—reading—room/usam/title1/2mdoj.htm#1-2.500.*

[3] 28 U.S.C. § 547 (2000).

[4] Ross E. Wiener, *Inter-Branch Appointments After the Independent Counsel: Court Appointment of United States Attorneys, 86* MINN. L. REV. 363, 383 (2001).

[5] *Id.* at 365–66.

[6] 28 U.S.C. § 541(a) (2000). The office of United States Attorney was established pursuant to the Judiciary Act of 1789. Act of Sept. 24, 1789, ch. 20, § 35, 1 Stat. 73, 92. As originally established, the United States Attorney appointed for a Federal judicial district acted independently and was answerable only to the President. Griffin B. Bell & Daniel J. Meador, *Appointing United States Attorneys, 9* J.L. & POL. 247 (1993). In 1870, Congress situated the office of United States Attorney in the Department of Justice under the jurisdiction of the Attorney General. *Id.* at 248.

[7] 28 U.S.C. § 541(b) (2000).

[8] *Id.*

[9] 28 U.S.C. § 541(c) (2000).

[10] Wiener, *supra* note 4, at 397.

[11] *Id.* at 393; Bell & Meador, *supra* note 6, at 249.

[12] *Id.*

[13] Wiener, *supra* note 4, at 394.

the Senator or other official.[14] This tradition, called "Senatorial courtesy," serves as an additional, informal check on the President's appointment power.[15]

UNITED STATES ATTORNEY VACANCIES AND INTERIM APPOINTMENTS

From the time of the Civil War until March 2006, the Federal judiciary was empowered to fill temporary United States Attorney vacancies.[16] In 1966, that authority was codified in section 546 of title 28 of the United States Code.[17] Thus, when a United States Attorney position became vacant, the district court in the district where the vacancy occurred named a temporary replacement to serve until the vacancy was filled by a United States Attorney appointed by the President with the advice and consent of the Senate.[18]

In response to a request by the Attorney General that its office be vested with authority to appoint interim United States Attorneys, Congress enacted former section 546(d) of title 28 of the United States Code in 1986.[19] Pursuant to this authority, the Attorney General was authorized to appoint an interim United States Attorney for 120 days and, if the Senate did not confirm a new United States Attorney within such period, the district court was then authorized to appoint an interim United States Attorney to serve until a permanent replacement was confirmed.[20] By retaining a role for the district court in the selection of an interim United States Attorney, former section 546(d) allowed the Judicial Branch to act as a check on Executive power. In practice, if a vacancy was expected, the Attorney General would typically solicit the opinion of the chief judge of the relevant district regarding possible temporary appointments.[21]

Twenty years after section 546(d) was enacted, the USA PATRIOT Improvement and Reauthorization Act of 2005 removed the court's role entirely on March 9, 2006.[22] As amended, section 546(c) now provides that "[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."[23]

The 2005 Act amended section 546 in two critical respects. It not only removed district court judges from the interim appointment process, vesting the Attorney General with the sole authority;[24] it also eliminated the 120-day limit on how long an interim United States Attorney appointed by the Attorney General could serve.[25] As a result of the Act, judicial input in the interim appointment process was eliminated and, perhaps more importantly, it created

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[14] *Id.*
[15] *Id.*
[16] Act of March 3, 1863, ch. 93, § 2, 12 Stat. 768 (1863).
[17] Pub. L. No. 89–554, § 4(c), 80 Stat. 618 (1966).
[18] *Id.*
[19] Pub. L. No. 99–646, § 69, 100 Stat. 3616 (1986) (codified as 28 U.S.C. § 546(d) (2000), *repealed by* USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109–177, title V, § 502, 120 Stat. 246 (2006)).
[20] *Id.*
[21] Wiener, supra note 4, at 399 (citing interview with David Margolis and Bernie Delia, Associate Deputy Attorneys General, in Washington, D.C. (Dec. 28, 2000)).
[22] USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109–177, tit. V, § 502, 120 Stat. 246 (2006).
[23] *Id.*
[24] *Id.*
[25] *Id.*

a possible loophole that could permit United States Attorneys appointed on an interim basis to serve indefinitely without Senate confirmation.

This provision was inserted quietly into the conference report on the 2005 Act, without debate. The only available explanation of the legislative intent of this amendment is one sentence that appeared in the conference report statement of managers: "Section 502 [effecting the amendments to section 546] is a new section and addresses an inconsistency in the appointment process of United States Attorneys."[26]

CONCERNS WITH CURRENT UNITED STATES ATTORNEY REMOVAL AND REPLACEMENT PROCESS

Potential to Disrupt Office and Undermine Independence

Although a United States Attorney serves at the pleasure of the President, his or her removal "as a result of political displeasure or for political reward . . . would undermine the confidence of the Federal judiciary, Federal and local law enforcement agencies, the public, and the thousands of Assistant United States Attorneys working in those offices."[27] As one former United States Attorney recently testified, "Maintaining the prosecutorial independence of the United States Attorneys . . . is vital to ensuring the fair and impartial administration of justice in our Federal system."[28]

The former United States Attorney went on to note how removing a United States Attorney disrupts the ongoing work of that office:

> Changing a United States Attorney invariably causes disruption and loss of traction in cases and investigations in a United States Attorney's Office. This is especially so in sensitive or controversial cases and investigations where the leadership and independence of the United States Attorney are often crucial to the successful pursuit of such matters, especially in the face of criticism or political backlash.[29]

As another former United States Attorney put it, "Sensitive investigations and prosecutions, most especially those of political or other public figures, should never be improperly derailed by a change of administration in the United States Attorney of a district."[30]

A related concern is that an abrupt, unexplained removal of a United States Attorney can adversely affect office morale, causing "profound uncertainty in the career staff of assistants and staff."[31] Professor Laurie Levenson explained, "It is deeply demoralizing for

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[26] H.R. REP. NO. 109–333, at 109 (2006).

[27] *H.R. 580, Restoring Checks and Balances in the Confirmation Process of U.S. Attorneys: Hearing before the Subcomm. on Commercial and Administrative Law of the H. Comm. on the Judiciary,* 110th Cong. (2007) (prepared statement of Atlee W. Wampler, III, President of the National Association of Former United States Attorneys).

[28] *Preserving Prosecutorial Independence: Is the Department of Justice Politicizing the Hiring and Firing of U.S. Attorneys?: Hearing Before the S. Comm. on the Judiciary,* 110th Cong. (2007) (prepared statement of Mary Jo White, former U.S. Attorney for the Southern District of New York).

[29] *Id.*

[30] *H.R. 580, Restoring Checks and Balances in the Confirmation Process of U.S. Attorneys: Hearing Before the Subcomm. on Commercial and Administrative Law of the H. Comm. on the Judiciary,* 110th Cong. (2007) (prepared statement of John A. Smietanka, former United States Attorney for the Western District of Michigan).

[31] *Id.*

them to now see capable leaders with proven track records of successful prosecutions summarily dismissed and replaced by those who lack the qualifications and professional backgrounds traditionally expected of United States Attorneys."[32]

Bypassing the Requirement of Senatorial Advice and Consent

Based on its preliminary analysis of data obtained from the Justice Department and secondary sources, the Congressional Research Service ("CRS") has made several significant findings. First, it identified several instances where the Attorney General made successive interim appointments pursuant to section 546 of either the same or different individuals. For example, one individual received a total of four successive interim appointments.[33]

Second, CRS identified at least 27 acting United States Attorneys who were appointed pursuant to the Federal Vacancies Reform Act of 1998 (Vacancies Act).[34] With limited exception, the Vacancies Act applies to Executive Branch officers whose appointment is required to be made by the President with the advice and consent of the Senate.[35] When there is a vacancy in such office, the Act permits an individual to be appointed to temporarily fill the vacant position and such individual may serve a maximum of 210 days.[36] When the Act is used in conjunction with successive appointments under section 546, the possibility arises that the Attorney General could effectively appoint an interim United States Attorney "whereby the advice and consent function of the Senate could be avoided to a significant degree even under the prior version of § 546."[37]

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[32] *Preserving Prosecutorial Independence: Is the Department of Justice Politicizing the Hiring and Firing of U.S. Attorneys?: Hearing Before the S. Comm. on the Judiciary,* 110th Cong. (prepared statement of Prof. Laurie L. Levenson, Loyola Law School).

[33] *H.R. 580, Restoring Checks and Balances in the Confirmation Process of U.S. Attorneys: Hearing Before the Subcomm. on Commercial and Administrative Law of the H. Comm. on the Judiciary,* 110th Cong. (2007) (prepared statement of T.J. Halstead, Legislative Attorney, American Law Division, Congressional Research Service).

[34] *Id.;* Pub. L. No. 105–277, div. C, tit. 1, § 151, 112 Stat. 2681, 2681–611 (1998) (codified at 5 U.S.C. §§ 3345–49d (2000)).

[35] 5 U.S.C. § 3345 (2000).

[36] 5 U.S.C. § 3346 (2000). Section 3346 provides:

(a) Except in the case of a vacancy caused by sickness, the person serving as an acting officer as described under section 3345 may serve in the office—

(1) for no longer than 210 days beginning on the date the vacancy occurs; or

(2) subject to subsection (b), once a first or second nomination for the office is submitted to the Senate, from the date of such nomination for the period that the nomination is pending in the Senate.

(b)(1) If the first nomination for the office is rejected by the Senate, withdrawn, or returned to the President by the Senate, the person may continue to serve as the acting officer for no more than 210 days after the date of such rejection, withdrawal, or return.

(2) Notwithstanding paragraph (1), if a second nomination for the office is submitted to the Senate after the rejection, withdrawal, or return of the first nomination, the person serving as the acting officer may continue to serve—

(A) until the second nomination is confirmed; or

(B) for no more than 210 days after the second nomination is rejected, withdrawn, or returned.

(c) If a vacancy occurs during an adjournment of the Congress sine die, the 210-day period under subsection (a) shall begin on the date that the Senate first reconvenes.

Id.

[37] *H.R. 580, Restoring Checks and Balances in the Confirmation Process of U.S. Attorneys: Hearing Before the Subcomm. on Commercial and Administrative Law of the H. Comm. on the Judiciary,* 110th Cong. (2007) (prepared statement of T.J. Halstead, Legislative Attorney, American Law Division, Congressional Research Service). CRS observed that Congress, if it so desired, could mandate that section 546 be the "exclusive method for making interim appointments to U.S. Attorney positions." *Id.*

RESIGNATIONS OF UNITED STATES ATTORNEYS SINCE MARCH 2006

Over the last few months, reports began to appear in the news media that various United States Attorneys had been asked to resign by the Justice Department.[38] Based on these reports, it now appears that at least seven United States Attorneys were asked to resign on December 7, 2006. An eighth United States Attorney was subsequently asked to resign. They include the following:

- H.E. Cummins, III, United States Attorney for the Eastern District of Arkansas;[39]
- John McKay, United States Attorney for the Western District of Washington;[40]
- David C. Iglesias, United States Attorney for the District of New Mexico;[41]
- Paul K. Charlton, United States Attorney for the District of Arizona;[42]
- Carol C. Lam, United States Attorney for the Southern District of California;[43]
- Daniel Bogden, United States Attorney for the District of Nevada;[44]
- Kevin Ryan, United States Attorney for the Northern District of California;[45] and

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[38] *See, e.g.,* David Johnston, Dismissed U.S. Attorneys Received Strong Evaluations, N.Y. TIMES, Feb. 25, 2007, at A19; Dan Eggen, *Justice Department Fires 8th U.S. Attorney; Dispute Over Death Penalty Cited,* WASH. POST, Feb. 24, 2007, at A2; Dan Eggen, *Fired Prosecutor Disputes Justice Dept. Allegation; He Calls Testimony "Unfair"; Meanwhile, Senate Panel Votes to Limit Attorney General's Power,* WASH. POST, Feb. 9, 2007, at A6; Marisa Taylor & Greg Gordon, *U.S. Attorneys' Selection Is Questioned,* SEATTLE TIMES, Jan. 28, 2007, at A8 (noting that the Attorney General "is transforming the ranks of the nation's top Federal prosecutors by firing some and appointing conservative loyalists from the Bush Administration's inner circle who critics say are unlikely to buck Washington, D.C."); Onell R. Soto & Kelly Thornton, *Lam to Resign Feb. 15 as Speculation Swirls; Some See Politics at Play in Ouster of U.S. Attorney,* SAN DIEGO UNION-TRIB., Jan. 17, 2007, at A1.

[39] Dan Eggen, *Prosecutor Firings Not Political, Gonzales Says; Attorney General Acknowledges, Defends Actions,* WASH. POST, Jan. 19, 2007, at A2; David Johnston, *Justice Dept. Names New Prosecutors, Forcing Some Out,* N.Y. TIMES, Jan.17, 2007, at A17; Linda Satter, *Prosecutor Post Is Filled in Recess,* ARK. DEMOCRAT GAZETTE, Dec.16, 2006, at A1.

[40] Dan Eggen, *Prosecutor Firings Not Political, Gonzales Says; Attorney General Acknowledges, Defends Actions,* WASH. POST, Jan. 19, 2007, at A2; Paul Shukovsky, *U.S. Attorney Who Led Fight Against Terrorism Steps Down,* SEATTLE POST-INTELLIGENCER, Jan. 15, 2006, at B1; Christine Clarridge, *U.S. Attorney McKay To Quit Prosecutor Job at End of Next Month,* SEATTLE TIMES, Dec. 16, 2006, at A1 (noting that Mr. McKay was described by his peers as a "rock-star attorney" and his firing came as a surprise to other U.S. Attorneys).

[41] David Johnston, *Justice Dept. Names New Prosecutors, Forcing Some Out,* N.Y. TIMES, Jan. 17, 2007, at A17; Mike Gallagher, *U.S. Attorney Plans To Resign, David Iglesias will leave the position 2 years early,* ALBUQUERQUE J., Dec. 19, 2006, at A1.

[42] Dennis Wagner, *U.S. Attorney Charlton Leaving Post for Law Firm,* ARIZ. REP., Dec. 20, 2006, at A12; Press Release, U.S. Dep't of Justice, U.S. Attorney Paul Charlton to Step Down at End of January, Dec. 19, 2006, *available at* http://www.usdoj.gov/usao/az/press—releases/2006/2006-270(Charlton).pdf.

[43] Kelly Thornton & Onell R. Soto, *Lam stays silent about losing job; Law enforcement defends her record,* SAN DIEGO UNION-TRIB., Jan. 13, 2007, at B1; Kelly Thornton & Onell R. Soto, *Lam is asked to step down; job performance said to be behind White House firing,* SAN DIEGO UNION-TRIB., Jan. 12, 2007, at A1.

[44] Sam Skolnik, *U.S. attorney leaves office with no word on successor,* LAS VEGAS SUN, Mar. 1, 2007; Francis McCabe, *Nevada U.S. Attorney Given Walking Papers,* LAS VEGAS REV. J., Jan. 15, 2007, at A1.

[45] Bob Egelko, *U.S. attorney was forced out, Feinstein says,* S.F. CHRON., Jan. 19, 2007, at B1; Bob Egelko, *U.S. Attorney for Bay Area resigns; Ryan investigated stock options fraud, violent gang crime and steroids in sports, faced criticism for his management style,* S.F. CHRON., Jan. 17, 2007, at A1; Evan Perez, *Attorney Vacancies Spark Concerns,* WALL ST. J., Jan. 16, 2007, at A4.

- Margaret M. Chiara, United States Attorney for the Western District of Michigan.[46]

Six of these former United States Attorneys testified at a hearing Before the Subcommittee on Commercial and Administrative Law on March 6, 2007. Although the Justice Department had claimed that they were removed for "performance-related reasons," most testified that the Justice Department had not given them any such reason.[47] In fact, two of them said it was not until the hearing itself that the Department offered any performance-related reason to explain their removal.[48]

Furthermore, suggestions by the Department that poor performance had anything to do with their removal appeared to be contradicted by the glowing assessments their offices had consistently received during their tenure in the Department's periodic evaluations, the so-called "EARS reports."[49] And there were indications that other motivations were actually at play.

Messrs. Charlton and Bogden said they had been advised at one point, by then Acting Assistant Attorney General William Mercer, that they were being terminated to, in essence, make way for other Republicans to burnish their resumes.[50] Messrs. Iglesias and McKay testified about inappropriate inquiries they had received from Members of Congress and their staff concerning matters under investigation, which they surmised may have led to their forced resignations.[51]

Internal Justice Department documents recently uncovered describe the Department's efforts to utilize section 546, as amended by the USA PATRIOT Improvement and Reauthorization Act of 2005, to bypass Senate confirmation. With respect to Mr. Cummins' resignation, for example, these documents detail efforts by the White House and Justice Department staff to have Tim Griffin, a former Republican National Committee researcher, named as the interim United States Attorney for the Eastern District of Arkansas.[52] These documents indicate that Justice officials sought to bypass the two Democratic senators in Arkansas, who normally

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[46] Dan Eggen, *Justice Department Fires 8th U.S. Attorney; Dispute Over Death Penalty Cited,* WASH. POST, Feb. 24, 2007, at A2; Nate Reens, *Judge Says U.S. Attorney Ousted; She's Said to be Part of a Wider Shake-up,* GRAND RAPIDS PRESS, Feb. 23, 2007, at A1.

[47] *H.R. 580, Restoring Checks and Balances in the Confirmation Process of U.S. Attorneys: Hearing Before the Subcomm. on Commercial and Administrative Law of the H. Comm. on the Judiciary,* 110th Cong. (2007) (prepared statement of Carol C. Lam *et al.*) (tr. at 80). The six former United States Attorneys who testified at this hearing were Carol C. Lam, former United States Attorney for the Southern District of California; David C. Iglesias, former United States Attorney for the District of New Mexico; H.E. Cummins, III, former United States Attorney for the Eastern District of Arkansas; John McKay, former United States Attorney for the Western District of Washington; Daniel Bogden, United States Attorney for the District of Nevada; and Paul K. Charlton, United States Attorney for the District of Arizona.

[48] *Id.* (testimony of Daniel Bogden and David C. Iglesias) (tr. at 83, 94).

[49] David Johnston, *Dismissed U.S. Attorneys Praised in Evaluations,* N.Y. TIMES, Feb. 25, 2007, available at *http://www.nytimes.com/2007/02/25/washington/25lawyers.html?ex=1330059600&en=ac6dec5b36df31f3&ei=5 088&partner=rssnyt&emc=rss*

[50] *H.R. 580, Restoring Checks and Balances in the Confirmation Process of U.S. Attorneys: Hearing Before the Subcomm. on Commercial and Administrative Law of the H. Comm. on the Judiciary,* 110th Cong. (2007) (testimony of Paul K. Charlton and Daniel Bogden) (tr. at 127–28, 134–35).

[51] *Id.* (testimony of David C. Iglesias and John McKay) (tr. at 95–98, 100, 106–08, 129–30, 133).

[52] *See, e.g.,* E-mail from Monica Goodling, Senior Counsel to the Attorney General and White House Liaison, U.S. Dep't of Justice, to Kyle Sampson, Chief of Staff to the Attorney General, U.S. Dep't of Justice (Aug. 18, 2006, 5:27 PM) (with attached prior e-mail exchanges) (on file with the H. Comm. on the Judiciary).

would have had input into this appointment.[53] To this end, Attorney General Chief of Staff D. Kyle Sampson suggested that the Attorney General exercise his newfound appointment authority pursuant to section 546, as amended by the USA PATRIOT Improvement and Reauthorization Act of 2005, to put Mr. Griffin in place until the end of President George W. Bush's term. He noted, "[I]f we don't ever exercise it then what's the point of having it?"[54] He further explained, "By not going the PAS route [the Senatorial advice and consent requirement for the appointment of a permanent United States Attorney pursuant to section 541 of title 28 of the United States Code], we can give far less deference to home-State Senators and thereby get (1) our preferred person appointed and (2) do it far faster and more efficiently, at less political cost to the White House."[55]

This recent spate of apparently politically motivated firings appears to be without precedent. Based on its preliminary analysis of available data for the period of 1993 through February 23, 2007, CRS was unable to identify "a similar pattern of contemporaneous departures that have been reported to stem from politically motivated dismissals of U.S. Attorneys."[56]

HEARINGS

The Committee's Subcommittee on Commercial and Administrative Law held 1 day of hearings on H.R. 580 on March 6, 2007. Testimony was received from William E. Moschella, Principal Associate Deputy Attorney General, United States Department of Justice; Carol C. Lam, former United States Attorney for the Southern District of California; David C. Iglesias, former United States Attorney for the District of New Mexico; H.E. Cummins, III, former United States Attorney for the Eastern District of Arkansas; John McKay, former United States Attorney for the Western District of Washington; Daniel Bogden, United States Attorney for the District of Nevada; Paul K. Charlton, United States Attorney for the District of Arizona; Representative Darrell Issa (R-CA); former Representative Asa Hutchinson (R-AR); John A. Smietanka, a former United States Attorney for the Western District of Michigan; George J. Terwilliger, III, former Deputy Attorney General, United States Department of Justice; T.J. Halstead, Legislative Attorney, American Law Division, Congressional Research Service;

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[53] *See, e.g.,* E-mail from Kyle Sampson, Chief of Staff to the Attorney General, U.S. Dep't of Justice, to Monica Goodling, Senior Counsel to the Attorney General and White House Liaison, U.S. Dep't of Justice (Dec. 18, 2006, 6:27 PM) (with attached prior e-mail exchanges) (on file with the H. Comm. on the Judiciary). Mr. Sampson advises:

> I think we should gum this to death: ask the Senators to give Tim [Griffin] a chance, meet with him, give him some time in office to see how he performs, etc. If they ultimately say, "no never" (and the longer we can forestall that, the better), then we can tell them we'll look for other candidates, ask them for recommendations, evaluate the recommendations, interview their candidates, and otherwise run out the clock. All of this should be done in "good faith," of course.

Id.

[54] *Id.*

[55] E-mail from Kyle Sampson, Chief of Staff to the Attorney General, U.S. Dep't of Justice, to Harriet Miers, White House Counsel (Sept. 13, 2006, 4:25 PM) (on file with the H. Comm. on the Judiciary).

[56] *H.R. 580, Restoring Checks and Balances in the Confirmation Process of U.S. Attorneys: Hearing Before the Subcomm. on Commercial and Administrative Law of the H. Comm. on the Judiciary,* 110th Cong. (2007) (prepared statement of T.J. Halstead, Legislative Attorney, American Law Division, Congressional Research Service).

and Atlee W. Wampler, III, President of the National Association of Former United States Attorneys.

COMMITTEE CONSIDERATION

On March 15, 2007, the Committee met in open session and ordered the bill H.R. 580 favorably reported with an amendment, by voice vote, a quorum being present.

COMMITTEE VOTES

In compliance with clause 3(b) of rule XIII of the Rules of the House of Representatives, the Committee advises that there were no recorded votes during the Committee's consideration of H.R. 580.

COMMITTEE OVERSIGHT FINDINGS

In compliance with clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee advises that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

NEW BUDGET AUTHORITY AND TAX EXPENDITURES

Clause 3(c)(2) of rule XIII of the Rules of the House of Representatives is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

In compliance with clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the Committee sets forth, with respect to the bill, H.R. 580, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, March 19, 2007.

Hon. JOHN CONYERS, Jr., *Chairman,*
Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: H.R. 580, a bill to amend chapter 35 of title 28, United States Code, to provide for a 120-day limit to the term of a United States attorney appointed on an interim basis by the Attorney General, and for other purposes.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Daniel Hoople, who can be reached at 226–2860.

Sincerely,

PETER R. ORSZAG,
DIRECTOR.

Enclosure

cc: Honorable Lamar S. Smith.

Ranking Member

H.R. 580—A bill to amend chapter 35 of title 28, United States Code, to provide for a 120-day limit to the term of a United States attorney appointed on an interim basis by the Attorney General, and for other purposes

CBO estimates that enacting H.R. 580 would have no significant impact on the Federal budget.

Under current law, the Attorney General may appoint an interim United States attorney to serve for an indefinite period of time until a vacancy is filled by the President with the advice and consent of the United States Senate. H.R. 580 would limit such interim appointments to a maximum of 120 days. Upon expiration of any interim appointment made by the Attorney General, the district court would be granted authority to appoint a United States attorney to serve until the vacancy is filled.

H.R. 580 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would not affect the budgets of State, local, or tribal governments.

On February 13, 2007, CBO transmitted a cost estimate for S. 214, the Preserving United States Attorneys Independence Act of 2007, as ordered reported by the Senate Committee on the Judiciary on February 8, 2007. The two bills are similar, and our cost estimates are the same.

The CBO staff contact for this estimate is Daniel Hoople, who can be reached at 226–2860. This estimate was approved by Peter H. Fontaine, Deputy Assistant Director for Budget Analysis.

PERFORMANCE GOALS AND OBJECTIVES

The Committee states that pursuant to clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, H.R. 580, as amended, is intended to clarify that section 546 of title 28 of the United States Code is the exclusive means for appointing an individual to temporarily preform the functions of a United States Attorney for a district in which the office of United States Attorney is vacant. It specifies that such individual may serve until the earlier of either: (1) the qualification of a United States Attorney appointed by the President pursuant to section 541 of title 28 of the United States Code; or (2) the expiration of 120 days after appointment by the Attorney General of the individual as interim United States Attorney. Upon the expiration of 120 days, and if no permanent United States Attorney has been appointed with Senate confirmation, the district court for such district may appoint a United States Attorney to serve until the vacancy is filled.

CONSTITUTIONAL AUTHORITY STATEMENT

Pursuant to clause 3(d)(1) of rule XIII of the Rules of the House of Representatives, the Committee finds the authority for this legislation in article 2, section 2, clause 2 of the Constitution.

ADVISORY ON EARMARKS

In accordance with clause 9 of rule XXI of the Rules of the House of Representatives, H.R. 580 does not contain any congressional

earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9(d), 9(e), or 9(f) of Rule XXI.

SECTION-BY-SECTION ANALYSIS

The following discussion describes the bill as reported by the Committee.

Sec. 1. Interim Appointment of United States Attorneys. This section revises section 28 U.S.C. § 546(c) to provide that an individual appointed as a United States Attorney in a district in which the office of the United States Attorney is vacant may serve until the earlier of either: (1) the qualification of a United States Attorney appointed by the President pursuant to 28 U.S.C. § 541; or (2) the expiration of 120 days after appointment by the Attorney General of an interim United States Attorney.

In addition, section 1 of the bill amends adds a new subsection (d) to section 546. Subsection (d) provides that if an appointment expires under subsection (c)(2), the district court for such district may appoint a United States Attorney to serve until the vacancy is filled. Pursuant to section 1 of the bill, the court must file the order of appointment with the clerk of the court.

Section 1 further amends section 546 to add a new subsection (e). Subsection (e) provides that section 546 is the exclusive means for appointing an individual to temporarily perform the functions of a United States Attorney for a district in which the office of United States Attorney is vacant.

Sec. 2. Applicability. Subsection (a) of this section provides that the amendments made by H.R. 580 shall take effect on the date of enactment of the bill. Subsection (b) of this section provides that any individual serving as a United States Attorney on the day before the date of the bill's enactment who was appointed pursuant to section 546 may serve until the earlier of: (1) the qualification of a United States Attorney for that district appointed by the President pursuant to section 541; or (2) 120 days after the date of enactment of H.R. 580. If an interim appointment expires after such 120-day period, the district court for the district concerned may appoint a United States Attorney for that district pursuant to section 546(d), as added by H.R. 580.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italics, existing law in which no change is proposed is shown in roman):

SECTION 546 OF TITLE 28, UNITED STATES CODE

§ 546. Vacancies

(a) * * *

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[(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.]

(c) A person appointed as United States attorney under this section may serve until the earlier of—

(1) the qualification of a United States attorney for such district appointed by the President under section 541 of this title; or

(2) the expiration of 120 days after appointment by the Attorney General under this section.

(d) If an appointment expires under subsection (c)(2), the district court for such district may appoint a United States attorney to serve until the vacancy is filled. The order of appointment by the court shall be filed with the clerk of the court.

(e) This section is the exclusive means for appointing a person to temporarily perform the functions of a United States attorney for a district in which the office of United States attorney is vacant.

SUPPLEMENTAL VIEWS

Section 502 of the USA PATRIOT Improvement and Reauthorization Act of 2005 [1] gave the Attorney General the authority to fill U.S. Attorney vacancies on an indefinite, interim basis, pending confirmation of new nominees by the Senate. Previously, the Attorney General could appoint interim U.S. Attorneys only for 120 days, after which interim appointment authority passed to the district courts until new nominees were confirmed.

The recent dismissals of eight U.S. Attorneys have triggered controversy over both the grounds for the dismissals and the Attorney General's open-ended interim appointments authority. Allegations that these dismissals were motivated by partisan politics, not performance, have been voiced by Members of Congress and in the press. These allegations range from accusations that the Administration has tried to strike back at U.S. Attorneys pursuing public corruption cases to complaints that positions were being cleared for political favorites, such as a former White House staff member. There also have been allegations that the dismissals were made so that interim appointees, who under the new law could avoid the need for Senate confirmation, could serve until the end of the Administration.

In the wake of these allegations, there have been calls both for oversight and for legislative action. H.R. 580, sponsored by Rep. Berman, would reinstitute the system which preceded the Patriot Act's reauthorization. The Subcommittee on Commercial and Administrative Law held an extensive hearing on Tuesday, March 6, 2007, into both H.R. 580 and the firings of the dismissed U.S. Attorneys. In light of recent emails made available by the Department of Justice, it appears likely that the Subcommittee will conduct more oversight on this issue in the coming weeks. The Minority remains committed to working with the Majority to ensure that all the facts of this case are made known to the American people.

Much of the factual record remains undeveloped at this time. As recently as the day of the mark-up, news stories proffered new facts relating to the provision of the Patriot Act at issue. The fact that the record is in flux makes it difficult for the Minority to know what changes to the law, if any, are necessary in this instance.

If changes are necessary, we would like to have worked with the majority in a bipartisan fashion to improve existing law. We believe that, permitted time to work together, we might have found a better solution. The rush to consider this legislation, however, has not allowed us to do so.

Under regular order, this bill would have been referred to the Subcommittee on Commercial and Administrative Law for mark-up. There, as the facts were sifted with more deliberation, we

[1] Pub. L. No. 109–177 (2006).

might have been able to avoid language that would have called for judges to appoint the very Executive Branch prosecutors practicing before them—judicial appointments that raise legal and practical concerns that we believe would have merited more consideration.

In these times of the War on Terror and the continuing, age-old war on crime, the service of U.S. Attorneys—the front line of federal law enforcement—is all the more a matter of first importance to the nation. Their appointment and dismissal is serious business.

Instead of rushing this legislation, we should have given it the time it deserves. In fact, Mr. Berman acknowledged at the hearing that "there may be reasons not" to enact his bill. Mr. Nadler, at the Committee's mark-up, suggested that Congress could reinstate the interim appointment authority at some future date for some other President. Likewise, the Majority's witnesses suggested that the more important issue here concerned expediting Presidential appointment and Senate confirmation of U.S. Attorneys. All of the witnesses acknowledged that the President could lawfully respond to the judicial appointments authorized by this bill by simply terminating the court-appointed interim U.S. Attorney, thus allowing the Attorney General to make a new 120-day appointment.[2] Further, the Majority's witnesses acknowledged that having a court appoint an interim U.S. Attorney does nothing to ensure that the President nominates and the Senate confirms a person to that position in an expeditious manner. The Majority's witness, John Smietanka, cited the example of Puerto Rico, where former President Clinton allowed a court-appointed interim U.S. Attorney to sit for over six years without ever nominating a permanent replacement.[3] These issues were not adequately addressed in the Majority's rush to mark-up this bill.

The practical concerns with this bill were highlighted by a last minute amendment offered by Rep. Sanchez. That amendment, which was adopted by the Majority, rendered unavailable the provisions of the Vacancy Reform Act[4] to allow for the temporary filling of U.S. Attorneys vacancies with all otherwise available individuals.

This amendment would be an unwise departure from the rules applicable to all other similar positions in the government, would hinder the availability of all qualified individuals with needed background checks and security clearances to fill these vital positions, and would still further create an anomaly for this one set of positions, those of U.S. Attorneys. Nothing was developed in the record of the hearing to show that such a departure from the norm was necessary.

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[2] *See, e.g., United States v. Hilario,* 218 F.3d 19, 27 (1st Cir. 2000) ("[I]nsofar as interim United States Attorney are concerned, the Executive Branch holds all the trump cards. For one thing, the President may override the judges' decision and remove an interim United States Attorney.").

[3] *See id.* at 21.

[4] 5 U.S.C. § 3345(a)(1).

We are deeply disappointed that the opportunity to consider this bill in a more deliberate fashion was not afforded. Had it been afforded to us, this bill might have been improved in important ways or proven to be unnecessary.

LAMAR SMITH.
STEVE CHABOT.
DANIEL E. LUNGREN.
CHRIS CANNON.
STEVE KING.
TOM FEENEY.
TRENT FRANKS.

ADDITIONAL SUPPLEMENTAL VIEWS

Many Members in the majority are clamoring for heads to roll, alleging the Bush Administration fired eight United States Attorneys using a little-noticed provision that was slipped into the PATRIOT Act Reauthorization Act in the middle of the night. Nothing could be further from the truth.

The provision permitting the Attorney General to fill U.S. Attorneys positions on an indefinite interim basis, pending confirmation of new nominees by the Senate, was added during conference negotiations between the House and Senate. When Justice Department officials approached Congress with the U.S. Attorney provision, both Republican and Democratic staffers were present, including staffers from then-Ranking Democrat on the Senate Judiciary Committee Patrick Leahy, and Senator Kennedy.

Under prior law, for almost two decades, the Attorney General was authorized to appoint an interim United States Attorney for 120 days. If a permanent replacement was not nominated by the President and confirmed by the Senate at the end of 120 days, the chief judge of the federal district in which the vacancy occurred would appoint an interim prosecutor to serve until a permanent replacement was confirmed.

The USA PATRIOT Improvement and Reauthorization Act of 2005 amended this provision to give the Attorney General the sole authority to appoint interim U.S. Attorneys to serve indefinitely when vacancies occurred.

The President's constitutionally assigned duties include complete control over executive branch appointments, and that the inexorable command of Article II is clear and definite: the executive power must be vested in the President of the United States. Let me be clear, this provision was not added to the PATRIOT Act to be abused by the Justice Department. Rather, it was added to correct a flaw in the law that permitted the judicial branch to appoint U.S. Attorneys.

In *Buckley v. Valeo,* the Supreme Court determined that the appointments clause permitted only the President, with the advice and consent of the Senate, to appoint officers to exercise executive authority. H.R. 580 flies in the face of this ruling.

I will continue to work with my colleagues across the aisle to learn all the facts pertaining to the dismissal of the U.S. Attorneys. If we learn that some officials in the Administration acted improperly, there should be consequences for such behavior.

However, regardless of how the facts may play out in this circumstance, this Committee should not be dictating how executive branch officials are appointed, and the judiciary should not exercise executive powers.

F. JAMES SENSENBRENNER, JR.

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