Restoring Public Confidence in the Fairness of the Department of Justice's Criminal Justice Function

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Introduction

A Japanese proverb says: "The reputation of a thousand years may be determined by the conduct of one hour." Though the recent misconduct within the Department of Justice (the "Department") occurred over only a few years, the damage to the Department's reputation will likely not be so limited in duration. It has been painful for those who care deeply about the Department and the success of its mission to witness the testing of one the most significant institutions within the executive branch by a few political appointees with agendas. This testing has exposed vulnerabilities in the Department as an institution, and, in the process, has done a great disservice to the American public and the many dedicated career and non-career lawyers in the Department who decorously have continued to carry out their responsibilities untouched by political influence. It is imperative that the next President of the United States work to restore the Department and its reputation for the nonpartisan enforcement of federal criminal law.

Although the damage done to the Department has not been limited to its criminal law enforcement function, this Article will address the damage done to that function and how to remedy it. This Article will also touch upon a few examples outside of the criminal law enforcement function for illustrative purposes, with the understanding that other Articles in this issue specifically address problems with respect to other critical Department functions. This Article will describe the traditionally bipartisan nature of the core criminal law enforcement mission of the Department. After reviewing certain events during the administration of President George W. Bush that resulted in serious damage to the Department's reputation for impartial, nonpartisan enforcement of the criminal law, particularly during the tenure of former Attorney General Alberto Gonzales, it will also examine the lessons to be learned from the errors in judgment that caused the Department to stray from its traditional path of nonpartisan enforcement of the law. Finally, this Article will describe and endorse relevant portions of a set of Principles for

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Assuring Legitimacy to the Crucial Decisions of the Department drafted for The Constitution Project[1] under the leadership of Harvard Law Professor Philip Heymann, former Assistant Attorney General for the Criminal Division in the Carter Administration and former Deputy Attorney General in the Clinton Administration. In light of the damage done, the next Administration must make policy choices that will effect the necessary change within the Department. The Principles and this Article's recommendations not only propose changes to prior ways of thinking, but also propose specific actions to re-align the Department's course with its core criminal justice mission.

I. The Importance of Impartiality in the Department's Decisions

The Mission Statement of the Department reads:

> To enforce and defend the interests of the United States according to the law; to ensure public safety against threats foreign and domestic; to provide federal leadership in preventing and controlling crime; to seek just punishment for those guilty of unlawful behavior; and to ensure fair and impartial administration of justice for all Americans.[2]

The exercise of prosecutorial discretion, a fundamental power of the Department, must serve this mission. Carrying out such a mission necessarily involves making decisions about which types of offenses will receive enforcement priority from the Department, and then, which cases will be prosecuted and how they will be resolved. Whether the Department should allocate its limited resources by concentrating its efforts on the war on terror, the war on drugs, street or gun crimes, white collar crime, or pornography is a legitimate subject of public and political debate, as are the proper balance between the law enforcement responsibilities of the states and the federal government and the severity of punishment for crimes, including the use of the federal death penalty.

There are reasonable grounds for political disagreement about the "big picture" law enforcement priorities of the Department, but when it comes to the day-to-day administration of the laws of the United States, the misuse of the powers of the federal government for partisan, political purposes not only is improper, but seriously undermines this country's longstanding commitment to the rule of law, and it damages public confidence in the fairness

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[1] The Constitution Project is a bipartisan nonprofit organization that seeks consensus on controversial legal and constitutional issues through scholarship and activism. In 2007, the Constitution Project, working with former Deputy Attorney General Philip Heymann and me, facilitated the drafting and endorsement of the Principles by a bipartisan group of policy experts and legal scholars, many of whom served as high-ranking Department of Justices officials at some point in their careers. The Principles, found in Appendix A, are published here for the first time and are intended to accurately reflect their conclusions, but are not a product or policy position of the Constitution Project itself.

[2] United States Department of Justice, Mission Statement, http://www.usdoj.gov/02organizations (last visited Apr. 4, 2008).

of the government's evenhanded enforcement of the law. The Department's responsibility to uphold the rule of law is appropriately proclaimed in these words inscribed on the Robert F. Kennedy Justice Department Building in Washington, D.C.: "No Free Government Can Survive That Is Not Based on The Supremacy of Law. Where Law Ends, Tyranny Begins. Law Alone Can Give Us Freedom."

On April 1, 1940, then-Attorney General Robert H. Jackson,[3] in addressing the Second Annual Conference of United States Attorneys in the Department's Great Hall of Justice, said:

> [N]o prosecutor can even investigate all of the cases in which he receives complaints. If the Department of Justice were to make even a pretense of reaching every probable violation of federal law, ten times its present staff would be inadequate. . . . What every prosecutor is practically required to do is to select the cases for prosecution and to select those in which the offense is the most flagrant, the public harm the greatest, and the proof the most certain.[4]

This calculus was then, and should remain, independent from political considerations.

It is essential for the Department's credibility and for public confidence in the even-handed administration of the law that decisions in individual cases be based exclusively on the applicable law and the facts of the particular case, tempered by the prudent exercise of prosecutorial discretion, as outlined in the Department's United States Attorneys' Manual. Decisions in particular cases that are, or even appear to be, motivated by political or other improper considerations damage the fair administration of justice, as recent events at the Department have demonstrated so powerfully.

Former Attorney General Robert H. Jackson not only spoke to the United States Attorneys assembled in the Great Hall of Justice in 1940 about *how* to carry out their responsibilities; more importantly, he explained *why* they must carry out their responsibilities in that manner:

> The prosecutor has more control over life, liberty, and reputation than any other person in America. His discretion is tremendous. He can have citizens investigated and, if he is that kind of person, he can have this done to the tune of public statements and veiled or unveiled intimations. Or the prosecutor may choose a more subtle course and simply have a citizen's friends interviewed. 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,

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[3] Robert Jackson's career is examined in great detail in Constance L. Martin, *The Life and Career of Justice Robert H. Jackson*, 33 J. SUP. CT. HIST. 42 (2008).

[4] Robert H. Jackson, U.S. Att'y Gen., The Federal Prosecutor, Address at the Second Annual conference of United States Attorneys (Apr. 1, 1940), *in* 31 J. CRIM. L. & CRIMINOLOGY 3, 5 (1940).

> can cause the citizen to be indicted and held for trial. He may dismiss the case before trial, in which case the defense never has a chance to be heard. Or he may go on with a public trial. If he obtains a conviction, the prosecutor can still make recommendations as to sentence, as to whether the prisoner should get probation or a suspended sentence, and after he is put away, at whether he is a fit subject for parole. While the prosecutor at his best is one of the most beneficent forces in our society, when he acts from malice or other base motives, he is one of the worst.[5]

Justice Sutherland, in *Berger v. United States*,[6] penned these words about the role of the federal prosecutor, appropriately framed and displayed by many current and former prosecutors (including me):

> 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.[7]

The remediation of the Department will require a set of policies, principles, and personnel dedicated to the ideal of Justice Sutherland and then-Attorney General Jackson's demand for "a rededication to the spirit of fair play and decency that should animate the federal prosecutor."[8]

In recent years, through the actions of a few high ranking political appointees, the Department has departed from its mission and the ideals mentioned above. However, at least one component of the Department has recognized the need to restore credibility to its core mission. In November 2007, the Department's Office of Inspector General issued a report entitled *Top Management and Performance Challenges in the Department of Justice*. Under the caption "Restoring Confidence in the Department of Justice," the report said:

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[5] *Id.* at 3.
[6] 295 U.S. 78 (1935).
[7] *Id.* at 88.
[8] Jackson, *supra* note 4, at 4. For a more in-depth analysis of Robert Jackson's views on the Attorney General and federal prosecutors, see Geoffrey M. Klineberg & Janet Reno, *What Would Jackson Do? Some Old Advice for the New Attorney General*, 2 HARV. L. & POL'Y REV. 197 (2008).

> An immediate challenge facing Department of Justice leadership is the need to restore confidence in the Department and its operations, both with the Department employees and with the public. Recently, the Department has faced significant criticism of its actions and ongoing congressional and internal investigations on a variety of topics, including the removal of U.S. Attorneys and allegations of improper hiring practices for career attorney positions at the Department. These and other allegations regarding the integrity and independence of the Department have affected the morale of Department employees and public confidence in the decisions of Department leaders. This turmoil, combined with numerous high-level vacancies, creates an urgent challenge for the Department's leaders to reestablish public confidence in the independence and integrity of the Department.[9]

Also in November 2007, in response to the unprecedented actions of the Department's political leadership in seeking the resignations of a number of United States Attorneys apparently based on partisan political considerations, the bipartisan National Association of Former United States Attorneys took the unusual step of adopting a resolution making the point that "United States Attorneys must be free from even the appearance of improper political considerations in the exercise of their prosecutorial and litigative responsibilities."[10]

During congressional hearings regarding the terminations of the United States Attorneys, members of Congress from both political parties, particularly those who had previously served in the Department, like Senators Sheldon Whitehouse and Jeff Sessions, both former U.S. Attorneys, appropriately criticized the Department's actions in dealing with the terminations.[11]

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[9] GLENN FINE, OFFICE OF THE INSPECTOR GENERAL, TOP MANAGEMENT AND PERFORMANCE CHALLENGES IN THE DEPARTMENT OF JUSTICE 19 (2007), *available at* http://www.usdoj.gov/ag/annualreports/pr2007/sect4/p15-32.pdf.

[10] *Resolution Recognizing the Importance of the Position of the United States Attorney* (Appendix B).

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> SENATOR WHITEHOUSE: I'll spot you that, Attorney General. But my point is when you're making a decision like [the one involving the firing of former U.S. Attorney Carol Lam], there's a counterbalance to it. When you go to Carol Lam and say, "You know what, you're not doing enough immigration prosecutions, therefore you're fired," there are all sorts of collateral consequences of that—some of which are really quite damaging and evil, particularly when you're knocking off somebody who is known among her colleagues as being really the prime United States attorney in the country on public corruption prosecutions. It sends a really rough message. So in the balancing between the structural protections and the respect and all of that, and this question of policy, I would hazard to you that you can't let the policy question just run away with the issue. You first think it through thoughtfully, and I can't find a place in the whole tragic record of this situation, in which that careful thought was administered.

II. The U.S. Attorney Dismissals

Between June and December 2006,[12] eight U.S. Attorneys were asked by Main Justice to step down from their positions.[13] As a result, congressional oversight committees held hearings to determine the reasons for these mass dismissals. On January 18, 2007, then-Attorney General Alberto Gonzales testified before the Senate Judiciary Committee in an effort to explain the dismissals. Responding to Senator Dianne Feinstein's questioning on whether he asked U.S. Attorneys to resign in the previous year, Gonzales stated:

> [Asking U.S. Attorneys to resign] happens during every administration during different periods for different reasons. And so the fact that that's 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, and I have a responsibility to the people in your district that we have the best possible people in these positions. And that's 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 United States

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> GONZALES: No question about it. No question about it that we have to take into account how decisions may affect ongoing cases. There's no question about that.

Department of Justice Oversight: Hearing Before the S. Comm. on the Judiciary, 110th Cong. (2007) (testimony of Alberto Gonzales, Att'y Gen. of the United States), *available at* http://www.washingtonpost.com/wp-dyn/content/article/2007/04/19/AR2007041902035.html.

> SENATOR SESSIONS: Mr. Attorney General, I think the thing that caused a lot of us concern was, you had a press conference at the Department of Justice. It was a formal matter to address these issues. And in that press conference you stated, "I was not involved in seeing any memos; was not involved in any discussions about what was going on." And in a later press conference you said, "I don't recall being involved in deliberations involving the question of whether or not a United States attorney should or should not be asked to resign. I didn't focus on specific concerns about individuals." Now, Mr. Sampson then had testified that there was a meeting, a final meeting, I guess, when this was discussed in some detail and that you were present. Do you recall that meeting and where it took place?
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> GONZALES: Senator, I have searched my memory. I have no recollection of the meeting. My schedule shows a meeting for 9:00 on November 27th, but I have no recollection of that meeting.

Id.

[12] Bud Cummins (Eastern District of Arkansas) was asked to resign in June 2006 and his resignation was effective December 20, 2006. Allegra Hartley, *Timeline: How the U.S. Attorneys were Fired*, U.S. News & World Report, Mar. 21, 2007, http://www.usnews.com/usnews/news/articles/070321/21attorneys-timeline.htm.

[13] The remaining seven United States Attorneys were David Iglesias (District of New Mexico), Kevin Ryan (Northern District of California), John McKay (Western District of Washington), Paul Charlton (District of Arizona), Carol Lam (Southern District of California), Daniel Bogden (District of Nevada), and Margaret Chiara (Western District of Michigan). All seven were asked to step down on December 7, 2006 by then-Director of the Executive Office for United States Attorneys, Michael Battle. John McKay, *Train Wreck at the Justice Department: An Eyewitness Account*, 31 Seattle U. L. Rev. 265, 266 n.3 (2008).

> Attorney for political reasons or if it would in any way jeopardize an ongoing serious investigation. I just would not do it.[14]

Gonzales refused to disclose how many prosecutors were asked to resign.[15] His testimony was followed by that of then-Deputy Attorney General Paul McNulty on February 6, 2007, who echoed Gonzales's reasoning for the dismissal of the eight U.S. Attorneys, and cemented the Department's position on the issue.

> 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?
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> 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.[16]

Shortly thereafter, the dismissed U.S. Attorneys publicly challenged the Department's explanation that they were dismissed for performance-related reasons. John McKay stated that he was "told of no performance or management issues."[17] David Iglesias, in an op-ed piece for the *New York Times*, pointed out that he "had excellent office evaluations, the biggest political corruption prosecutions in New Mexico history, a record number of overall prosecutions[,] a 95 percent conviction rate," was "deemed a 'diverse up and comer,'" and "was asked to resign for no reason."[18] Bud Cummins wrote:

> When challenged by Congress, the leaders of the Department of Justice could have refused to explain [why the U.S. Attorneys were fired]. Or, they could have explained the truth. But apparently the truth behind some or all of the firings was embarrassing. So, instead, they said it was because of "performance." We didn't accept that, because it wasn't the truth. . . . To this day, we really don't know why we were singled out to be fired. I am not sure Department of Justice managers even know at this point.[19]

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[14] Democratic Policy Committee, *Senate Oversight Highlights Week of January 15, 2007*, http://democrats.senate.gov/dpc/dpc-new.cfm?doc_name=or-110-1-9#Link4 (last visited Apr. 4, 2008).

[15] Dan Eggen, *Prosecutor Firings Not Political, Gonzales Says*, WASH. POST, Jan. 19, 2007, at A2.

[16] *Preserving Prosecutorial Independence: Is the Department of Justice Politicizing the Hiring and Firing of U.S. Attorneys?—Part I: Hearing Before the S. Comm. on the Judiciary*, 110th Cong. 29 (2007) (testimony of Paul McNulty, Deputy Att'y Gen. of the United States), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_senate_hearings&docid=f:35798.pdf.

[17] Paul Shukovsky, *Ex-U.S. Attorney McKay Was Forced to Resign*, SEATTLE POST-INTELLIGENCER, Feb. 8, 2007, at B1.

[18] David Iglesias, Op-Ed., *Why I was Fired*, N.Y. TIMES, Mar. 21, 2007, at A21.

[19] Bud Cummins, *How Bush's Justice Department Has "Blown It,"* SALON.COM, Mar. 31, 2007, http://www.salon.com/opinion/feature/2007/03/31/cummins/.

In fact, the majority of the dismissed U.S. Attorneys had received decidedly positive evaluations.[20] Daniel Bogden, Paul Charlton, Bud Cummins, Carol Lam, David Iglesias and John McKay testified before Congress on March 6, 2007 to share their frustrations on how their government careers ended. That same day, Principal Associate Deputy Attorney General William Moschella testified before the House Judiciary Subcommittee on Commercial and Administrative Law that "[t]he department stands by the decisions" to fire the U.S. Attorneys[21] and that most of the firings had been performance related.[22]

Gonzales responded to the controversy surrounding the U.S. Attorney dismissals in an editorial in *USA Today* on March 6, 2007, in which he wrote:

> To be clear, it was for reasons related to policy, priorities and management—what have been referred to broadly as 'performance-related' reasons—that seven U.S. attorneys were asked to resign last December. . . . While I am grateful for the public service of these seven U.S. attorneys, they simply lost my confidence.[23]

Seven days later, Gonzales held a press conference at which he explained that he was "not aware of every bit of information that passes through the halls of the Department . . . nor [was he] aware of all decisions."[24] More importantly, Gonzales informed the public that he "was not involved in seeing any memos, was not involved in any discussion about what was going on" with the U.S. Attorneys' dismissals.[25]

The Department's stated rationale for the dismissals unraveled when Gonzales's ex-aide Kyle Sampson testified before the Senate Judiciary Committee on March 29, 2007. Sampson's testimony revealed that Gonzales had been aware of and involved in regular discussions regarding the U.S. Attorney dismissals from the beginning (in early 2005), including a November 27, 2006 meeting where the details of how to effect their departures were discussed.[26] Throughout his testimony, Sampson appeared ill-informed regard-

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[20] Dan Eggen, *6 of 7 Dismissed U.S. Attorneys Had Positive Job Evaluations*, WASH. POST, Feb 18, 2007, at A11.

[21] David Bowermaster & Alicia Mundy, *McKay Goes Down Fighting*, SEATTLE TIMES, Mar. 7, 2007, at A1.

[22] *Administration Officials Eyed in Attorney Probe*, NPR.ORG, Apr. 19, 2007, http://www.npr.org/templates/story/story.php?storyId=9656219.

[23] Alberto Gonzales, Op-Ed., *They Lost My Confidence*, USA TODAY, Mar. 7, 2007, at 10A.

[24] U.S. Department of Justice, Transcript of Media Availability with Attorney General Alberto R. Gonzales (Mar. 13, 2007), http://www.usdoj.gov/archive/ag/speeches/2007/ag_speech_070313.html.

[25] *Id.*

[26] Sampson testified that it was not "entirely accurate" to say that Gonzales "never saw documents," "never had a discussion about where things stood," and that the "Attorney General did not participate in the section of the U.S. attorneys to be fired." "The attorney general was aware of this process from the beginning in early 2005. He and I had discussions about it during the thinking phrase of the process." *Preserving Prosecutorial Independence: Is the Department of Justice Politicizing the Hiring and Firing of U.S. Attorneys?—Part III: Hearing*

ing the records and activities of the dismissed U.S. Attorneys, fueling suspicion that partisan politics determined how the "hit list" was developed.[27] Sampson also admitted that there was very little documentation reflecting the decisions made about the U.S. Attorneys and that no recommendations made to Gonzales were evidenced in writing.[28]

Attorney General Gonzales testified again before the Senate Judiciary Committee on April 19, 2007 to explain his prior comments. At that hearing, Gonzales identified specific factors used in the evaluation process, in which he acknowledged that the Deputy Attorney General should have been more involved.[29] He also attempted to justify the dismissals, but, as Senator Feingold stated, there was nothing in the record that demonstrated that Gonzales had made a "sufficient effort" to verify whether justifications given by the Department were in fact the reasons for the dismissals.[30] Senator Feingold added that Gonzales had "so little to do with the basis for the decision or why it was done, and [he] made so little effort to understand the reasons behind them, [that Gonzales] had no basis for telling the American people that the U.S. Attorneys had lost [his] confidence."[31] Gonzales's memory failed him more than fifty times, including on many key details,[32] and his testimony failed to reveal exactly who placed the fired U.S. Attorneys on the final list.[33]

The specifics of some of these dismissals are worth mentioning here as illustrations of the partisan nature of the dismissals. Former U.S. Attorney Iglesias was pressured by the Administration and lawmakers to aggressively pursue public corruption and voter fraud cases.[34] Kyle Sampson's testimony revealed complaints from Karl Rove on Iglesias's failure to prosecute certain cases, leading to the Department's decision to dismiss him.[35] Out of one hundred complaints of voter fraud, Iglesias found only one that merited federal prosecution.[36] It should be noted that, according to Iglesias, the Department and the FBI at the time did not disagree with his decision.[37]

Before the S. Comm. on the Judiciary, 110th Cong. (2007) [hereinafter *Preserving Prosecutorial Independence—Part III*] (testimony of Kyle Sampson, Former Chief of Staff to the Att'y Gen. of the United States), *available at* http://media.washingtonpost.com/wp-srv/politics/documents/sampson_transcript032907.html.

[27] *Id.*

[28] *Id.*

[29] *Department of Justice Oversight*, *supra* note 11 (statement by Sen. Feingold).

[30] *Id.*

[31] *Id.*

[32] David Johnston & Eric Lipton, *Gonzales Endures Harsh Session With Senate Panel*, N.Y. TIMES, Apr. 20, 2007, at A1.

[33] McKay, *supra* note 13, at 275.

[34] John Solomon & Dan Eggen, *White House Backed U.S. Attorney Firings, Officials Say*, WASH. POST, Mar. 3, 2007, at A1; Iglesias, *supra* note 18; *see also* Cummins, *supra* note 19; Bowermaster & Mundy, *supra* note 21.

[35] *Preserving Prosecutorial Independence—Part III*, *supra* note 26 (testimony of Kyle Sampson, Former Chief of Staff to the Att'y Gen. of the United States).

[36] Iglesias, *supra* note 18.

[37] *Id.*

In his defense, Iglesias stated that:

> As this story has unfolded these last few weeks, much has been made of my decision to not prosecute alleged voter fraud in New Mexico. Without the benefit of reviewing evidence gleaned from F.B.I. investigative reports, party officials in my state have said that I should have begun a prosecution. What the critics, who don't have any experience as prosecutors, have asserted is reprehensible—namely that I should have proceeded without having proof beyond a reasonable doubt. The public has a right to believe that prosecution decisions are made on legal, not political, grounds.[38]

Iglesias was one of two U.S. Attorneys in the country "to create a voter-fraud task force in 2004."[39] Further, the Department selected him to instruct other U.S. Attorneys on investigating and prosecuting voter fraud cases.[40] He was also described by Kyle Sampson as a "diverse up-and-comer."[41] With these qualifications and accolades, it is hard to argue that politics did not play a part, as Gonzales stated, in his dismissal due to "performance" on voter fraud prosecutions.

Politics in criminal prosecutions also appears to have influenced Kyle Sampson's suggestion of placing U.S. Attorney Patrick Fitzgerald on the dismissal "hit list."[42] At the time of this suggestion, Fitzgerald was a special prosecutor investigating White House personnel with respect to the "outing" of covert CIA Agent Valerie Plame. Sampson characterized his suggestion as a "lapse," but provided no explanation to refute that politics played a part in recommending Fitzgerald, one of the most respected career prosecutors in the Department, for dismissal.[43]

Todd Graves, a former U.S. Attorney for the Western District of Missouri, was fired by the Department almost a year before the eight U.S. Attorney dismissals.[44] Bradley Schlozman, then the Principal Deputy Assistant Attorney General for the Civil Rights Division,[45] was installed by Gonzales as United States Attorney for the Western District of Missouri under a new provision in the Patriot Act which allowed the Presidential appointment without Senate confirmation.[46] Within months, Schlozman indicted four

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[38] *Id.*

[39] *Id.*

[40] *Department of Justice Oversight*, *supra* note 11 (statement of Sen. Leahy).

[41] *Preserving Prosecutorial Independence—Part III*, *supra* note 26 (testimony of Kyle Sampson, Former Chief of Staff to the Att'y Gen. of the United States).

[42] *Id.*

[43] *Id.*

[44] Pam Fessler, *Justice Dept. Accused of Partisan Voter-Roll Purge*, NPR.ORG, Oct. 11, 2007, http://www.npr.org/templates/story/story.php?storyId=15198501.

[45] United States Attorney's Office, Western District of Missouri, Biography of Bradley J. Schlozman, http://www.usdoj.gov/usao/mow/aboutus/schlozman.html (last visited Apr. 4, 2008).

[46] Frank Morris, *Attorneys Scandal May Be Tied to Missouri Voting*, NPR.ORG, May 3, 2007, http://www.npr.org/templates/story/story.php?storyId=9981606. Schlozman had no

workers of ACORN, a liberal activist group accused of fraudulently filling out voter registration forms. Graves had refused to move forward on the voter registration cases just a few months before he was fired from his U.S. Attorney position.[47] ACORN had fired the individuals and alerted the authorities. Incidentally, the individuals were indicted just before the Missouri Senate elections.[48] The Democrats barely won the bid for the Senate seat.[49] During his Senate testimony last year, Schlozman stated that he was directed to bring the ACORN cases by career officials in Justice's Election Crimes Branch of the Public Integrity Section.[50] However, in a letter to the Senate Judiciary Committee which, to some extent, revised his testimony, Schlozman stated that although he consulted the Public Integrity Section, he took "full responsibility for the decision to move forward with the prosecutions related to ACORN while [he] was the U.S. attorney."[51]

Certainly, these prosecutors served at the pleasure of the President and the President was entitled to replace them if he so desired, especially if they were not adequately pursuing the Administration's priorities. Under federal law, "[e]ach United States attorney is subject to removal by the President."[52] Each of the dismissed U.S. Attorneys had served his or her four year term,[53] and thus the dismissals would have been unremarkable but for the revelation that political motives were involved. But, as a matter of law, the decisions were the President's to make, and not the Attorney General's or the Department's.[54]

The testimony before Congress and emails released by the Department revealed that members of Congress had tried to influence indictments by

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prosecutorial experience when he assumed the U.S. Attorney position. Charlie Savage, *Missouri Attorney a Focus in Firings*, BOSTON GLOBE, May 6, 2007, at A1.

[47] Morris, *supra* note 46. At the time, October of 2005, Schlozman was pursuing a case against the State of Missouri for failing to remove inaccuracies in the voter registration records. Tom Herrmann, *Voter Cases Enter Attorney Investigations*, DAILY REC., May 15, 2007, at 1, *available at* http://findarticles.com/p/articles/mi_qn4181/is_20070515/ai_n19114773. Schlozman authorized the suit after Graves refused to sign on, citing the fact that local jurisdictions were responsible for voter registration records, not the State. Ultimately, the Court agreed with Graves's view of the suit. *See also* Fessler, *supra* note 44.

[48] Morris, *supra* note 46.

[49] Garrett Epps, *Karl Rove's Big Election-Fraud Hoax*, SALON.COM, May 10, 2007, http://www.salon.com/opinion/feature/2007/05/10/voting_rights/index_np.html. "Some former career civil rights attorneys at Justice say prosecuting voter fraud this close to an election is a no no since it can 'chill' voter turnout." Laura Strickler, *Voter Fraud and US Attorneys*, CBSNEWS.COM, Mar. 29, 2007, http://www.cbsnews.com/blogs/2007/03/29/primarysource/entry2626365.shtml. Schlozman "did not think [the indictments were] going to influence the election at all." Dan Eggen, E*x-Prosecutor Says He Didn't Think Charges Would Affect Election*, WASH. POST, June 6, 2007, at A2.

[50] Terry Frieden, *Justice Official Revises Testimony in Voter-Fraud Case*, CNN.COM, June 13, 2007, http://www.cnn.com/2007/POLITICS/06/13/us.attorneys/; Jason Ryan, *Justice Department Official Sends Letter to Congress to 'Clarify' Past Testimony*, ABC NEWS, Jun. 12, 2007, http://www.bokefu.cn/TheLaw/Politics/story?id=3270365&page=1.

[51] Ryan, *supra* note 50; Frieden, *supra* note 50.

[52] 28 U.S.C. § 541(c) (2000).

[53] KEVIN M. SCOTT, CONG. RESEARCH SERV., U.S. ATTORNEYS WHO HAVE SERVED LESS THAN FULL FOUR-YEAR TERMS, 1981–2006 13–14 (2007), *available at* http://leahy.senate.gov/issues/USAttorneys/ServingLessThan4Years.pdf.

[54] 28 U.S.C. § 541(c) (2000).

communicating with prosecutors, and that the White House indirectly had urged prosecutors to bring specific prosecutions and had directed their timing. Notwithstanding the facts uncovered by prior testimony, the extent of the involvement of political operatives is, as of yet, not fully determined. The House of Representatives is continuing to press ahead to enforce subpoenas against Harriet Miers, former Counsel to the President, and former White House Chief of Staff Joshua Bolten.[55] Only a thorough investigation by Congress can reveal the actual involvement of the White House in the U.S. Attorney firings.[56]

The involvement of political operatives in the U.S. Attorney's firings may have occurred because Gonzales had never served in the Department prior to his appointment, and neither had his staff, which he brought with him from the White House Counsel's office. Because he and his staff had no experience in the Department, they failed, quite obviously, to appreciate the Department's strong nonpartisan values and traditions. The architects of the dismissal plan appeared not to understand the importance of avoiding actions that would constitute or appear to constitute the politicization of the Department. When Gonzales and his staff decided to secure the resignations (apparently without notifying or consulting the President), they committed an act that had been extremely rare in the history of the Department, even when committed legally, i.e., by the President himself, except in connection with the change of political administrations[57] or other egregious situations.[58]

The politicization of the Department has had another, perhaps more tangible, effect on criminal prosecutions than the dismissals of the U.S. Attorneys: some prosecutions have been tainted by the appearance of impropriety. The Department's politicization offers some defendants defenses of selective or vindictive prosecution where they claim that their prosecutions were motivated by improper political considerations. The politicization also poten-

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[55] Memorandum in Support of Plaintiff's Motion for Partial Summary Judgment, Comm. on the Judiciary, U.S. House of Representatives v. Miers, No. 08-00409 (D.D.C. Apr. 10, 2008).

[56] The House Judiciary Committee recently issued a report concluding that there is "troubling evidence" regarding selective and politically-motivated prosecutions by the Department. STAFF OF H. COMM. ON THE JUDICIARY, 110TH CONG., ALLEGATIONS OF SELECTIVE PROSECUTION IN OUR FEDERAL CRIMINAL JUSTICE SYSTEM i (2008), *available at* http://judiciary.house.gov/media/pdfs/selprosreport080417.pdf. Interestingly, the report stated that the Department has refused to provide non-public information or generally make its personnel available to the investigators. *Id.* at 6.

[57] President Grover Cleveland removed U.S. Attorney Lewis E. Parsons, Jr., then the U.S. Attorney for the Northern District of Alabama. *See In re* Parsons, 150 U.S. 150, 151–52 (1893). This case was decided prior to Congress making the President's removal right explicit in 28 U.S.C. § 541(c). Eighty years later, President Carter removed Philip Van Dam, then-U.S. Attorney for the Eastern District of Michigan, to make room for me as his replacement.

[58] President Reagan fired two U.S. Attorneys during his time as President. He fired William Kennedy, the U.S. Attorney in San Diego, for publicly confirming the identity of a key American intelligence source. Edward T. Pound, *U.S. Attorney in San Diego Dismissed*, N.Y. TIMES, Apr. 6, 1982, at A16. He also fired J. William Petro in connection with a Department investigation into whether Petro disclosed information regarding a pending indictment. Leslie Maitland Werner, *U.S. Attorney in Cleveland is Discharged by President*, N.Y. TIMES, Oct. 3, 1984, at A16.

tially undermines the credibility of the U.S. Attorneys and the Assistant U.S. Attorneys in courtrooms around the country. At a minimum, defendants now have the chance to defend themselves through public relations campaigns, particularly in public integrity or campaign finance cases. For example, in *United States v. Fieger*,[59] the defendant—a Democrat, former gubernatorial candidate,[60] and attorney—was accused of illegally donating money to the presidential campaign of Democrat John Edwards in 2004.[61] In his motion to dismiss the case, Fieger argued, in part, that the U.S. Attorney's Office of the Eastern District of Michigan and the Department's Public Integrity Division investigated him solely for political reasons and that the resulting indictment was selectively and vindictively filed.[62] Specifically, he argued that Karl Rove and the Department disparately targeted Democrats through the Department's Public Integrity Division.[63] Fieger's motion to dismiss was filed August 30, 2007, after the U.S. Attorney dismissals were well known. In fact, the exhibits to Fieger's Motion to Dismiss consist of newspaper articles, as well as emails and other documents related to the U.S. Attorney scandal.[64] Regardless of its merit, Fieger's defense was made possible, in large part, because Gonzales's Department's actions opened the door to claims that some DOJ investigations and prosecutions were tainted by political motivation.

The prosecution of ex-Alabama Governor Don Siegelman[65] is another example where the appearance of impropriety in a federal criminal prosecution lingers due to the politicization of the Department. Siegelman was first indicted for conspiracy and health care fraud in 2004 for his alleged involvement in a Medicaid scheme by the U.S. Attorney for the Northern District of Alabama.[66] That case was subsequently dismissed due to insufficient evi-

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[59] United States v. Fieger, No. 07-CR-20414, 2008 WL 659767 (E.D. Mich. Mar. 11, 2008).

[60] Matthew L. Wald, *The 1998 Elections: State by State–Midwest; Michigan*, N.Y. TIMES, Nov. 5, 1998, at B6.

[61] Indictment at 5, United States v. Fieger, No. 2:07-CR-20414 (E.D. Mich. Aug. 24, 2007), 2007 WL 3168724.

[62] Motion to Dismiss for Selective and Vindictive Prosecution at 1, United States v. Fieger, No. 2:07-CR-20414 (E.D. Mich. Aug. 28, 2007), 2007 WL 3168729.

[63] *Id.* at 8. *See also* Press Statement of Geoffrey Fieger (Aug. 24, 2007), *available at* http://info.detnews.com/2007/fiegerstatement.pdf.

[64] Motion to Dismiss for Selective and Vindictive Prosecution, *supra* note 62. The Motion to Dismiss was denied by the Court on March 20, 2008, with a full opinion to be issued at a later date. Order Denying Defendants' Motion to Dismiss, United States v. Fieger, No. 07-20414 (E.D. Mich. Mar. 20, 2008).

[65] Siegelman lost his 2002 re-election by a narrow margin to Republican Bob Riley when a "late-night" change in the tallies in a Republican county gave his opponent a 3,000 vote victory. Adam Cohen, Editorial Observer, *The Strange Case of an Imprisoned Alabama Governor*, N.Y. TIMES, Sept. 10, 2007, at A28.

[66] *Did Ex-Alabama Governor Get a Raw Deal?* CBSNEWS.COM, Feb. 24, 2008, http://www.cbsnews.com/stories/2008/02/21/60minutes/main3859830.shtml [hereinafter *Ex-Alabama Governor*].

dence supporting the conspiracy charge.[67] Two years later, the Department again indicted Siegelman on public corruption and bribery charges while Siegelman was campaigning to win back his job as Governor.[68] This time he was indicted in the Middle District of Alabama, where the U.S. Attorney was the spouse of the current Governor's 2002 campaign manager.[69] Eight months into the case, the U.S. Attorney recused herself personally, but allowed her office to continue handling the prosecution.[70] Siegelman lost the primary election[71] and was convicted of seven out of thirty-two counts of corruption and was sentenced to eighty-eight months in federal prison.[72] In addition to the appearance of impropriety raised by the U.S. Attorney's recusal, Dana Jill Simpson, a campaign operative and longtime Alabama G.O.P. activist, testified to the House Judiciary Committee that Karl Rove had urged the Department to pursue Siegelman after his first case was dismissed.[73] Siegelman's conviction by jury, which the prosecutors point to as evidence of his guilt, has not alleviated the public's suspicions of political foul play.[74] The "politics" involved in the Siegelman case was the subject of a *60 Minutes* program in 2008.[75] Perhaps due to the appearance of impropriety in the case, the Eleventh Circuit released Siegelman on bond pending the disposition of his appeal, which raised "a substantial question of law or fact."[76] In cases like *Fieger* and *Siegelman*, the Department now has to fight two battles as a result of the U.S. Attorney scandals: to prove the indictment allegations and show that politics played no part in the prosecutions.

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[67] Jason Getz, *Case Dropped Against Former Ala. Governor*, USATODAY.COM, Oct. 5, 2004, *http://www.usatoday.com/news/nation/2004-10-05-ala-governor_x.htm*. Once the conspiracy charge was dropped, the U.S. Attorney's Office moved to dismiss the case. *Id.*

[68] *Ex-Alabama Governor*, *supra* note 66; Cohen, *supra* note 65. Siegelman's attorney had said that he learned at the end of 2004 that Justice requested that the U.S. Attorneys Office perform a review of the case.

[69] *Ex-Alabama Governor*, *supra* note 66.

[70] *Id.*

[71] *Live with Dan Abrams (*MSNBC television broadcast Dec. 13, 2007), *available at* http://www.msnbc.msn.com/id/22259738.

[72] Adam Zagorin, *Rove Linked to Alabama Case*, TIME.COM, Oct. 10, 2007, http://www.time.com/time/nation/article/0,8599,1669990,00.html.

[73] *Id.*

[74] It should be noted that Attorney General Michael Mukasey stated during his confirmation hearings that he would be willing to look at evidence of political interference in the case after the appeals process is complete. Jay Carney, *Mukasey Says He'll "Take a Look" at Siegelman Case*, TIME.COM, Oct. 18, 2007, http://www.time-blog.com/swampland/2007/10/mukasey_says_hell_take_a_look.html.

[75] *See Ex-Alabama Governor*, *supra* note 66.

[76] Order Granting Renewed Motion to Release Pending Appeal at 2, United States v. Siegelman, No. 07-13163-B (11th Cir. Mar. 27, 2008), *available at* http://blog.al.com/bn/2008/03/sieg0327080001.pdf (declining to note the substantial questions raised on appeal). *See also*, Adam Nossiter, *Alabama Ex-Governor Ordered Freed Pending Appeal of Bribery Convicion*, N.Y. TIMES, Mar. 28, 2008, at A16.

III. The Hiring of Career Criminal Prosecutors

The Department also allowed politics to seep into the hiring process for career prosecutors. It is the longstanding policy and practice of the Department to hire career prosecutors, whose employment, by definition, often spans multiple political administrations, without considering their political affiliations or views.[77] The policies and practices ensure not only the smooth transition between political administrations, but also promise fairness through nonpartisanship in the day-to-day functioning of the criminal enforcement area of the Department. Consultation with career prosecutors protects the Department against partisan decision making by adding both a historical perspective to decisions and valuable expertise. During the stewardship of Attorney General Gonzales there has been widespread concern that career prosecutors have been excluded from participating in important Department decisions.

Monica Goodling, who served as both senior counsel to Attorney General Gonzales and the Department's liaison to the White House,[78] admitted in sworn testimony that political considerations were used in the hiring process during her tenure:

> GOODLING: 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.
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> . . . .
>
> JOHNSON: How many times did you use that power that you had to hire and fire with respect to hiring of U.S. — assistant U.S. attorneys and you used political reasons for making a decision not to hire? How many times did you do that?
>
> GOODLING: I can't give you an estimate.
>
> JOHNSON: Would you say less than 50 or more than 50?
>
> GOODLING: I hesitate to give you a reason, just because I can't — or, an estimate, because I can't remember. I don't think that I could have done it more than 50 times, but I don't know. I just — there were times when people came to the department and they were interested in career positions or political positions. And those people, I certainly asked political questions of . . . .[79]

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[77] Evan Perez & Jess Bravin, *Gonzales Ex-Aide Probed on Political Hiring Test*, Wall St. J., May 3, 2007, at A7; David Johnston & Eric Lipton, *Ex-Justice Aide Admits Politics Affected Hiring*, N.Y. Times, May 24, 2007, at A1.

[78] Alan Cooperman, *Bush Loyalist Rose Quickly at Justice*, Wash. Post, Mar. 30, 2007, at A15.

[79] *The Continuing Investigation into the U.S. Attorneys Controversy and Related Matters: Hearing Before the H. Comm. on the Judiciary*, 110th Cong. 15 (May 23, 2007) (testimony of

Goodling's use of political considerations in hiring extended to those hired in the Attorney General's Honors Program, the only program through which the Department hires entry-level attorneys.[80] In fact, Goodling's control over hiring was so great that applicants and career prosecutors whose political affiliations differed from hers were sometimes referred to as having a "Monica problem."[81] This practice was apparently so extreme that Goodling was known to block the hiring of prosecutors for career positions based only upon a résumé's hinting that an applicant was a Democrat.[82] The Department's Inspector General is also investigating whether Goodling may have had a role in dismissing a Department employee due to rumors that she was a lesbian.[83]

This approach was utterly inconsistent with the notion that line prosecutors must be nonpartisan. In addition, Goodling's actions were illegal, as she violated both Federal civil services laws governing the hiring of career employees[84] and the Hatch Act.[85] Such a practice tainted the offices of career prosecutors of the Department and understandably affected morale among those who endeavor to serve in nonpartisan positions. Restoring the integrity and credibility of the Department will necessarily involve re-establishing a proper hiring process for these career employees.

IV. Beyond the U.S. Attorney Scandal

Politicization has not been limited to the criminal enforcement function of the Department. The Office of Legal Counsel has been implicated in politically motivated actions, including the 2002 Torture Memo, which argued that the President could order torture regardless of laws prohibiting such acts.[86] In addition, politics have played a role in the Department's handling of civil rights enforcement litigation and the hiring of employees within the Civil Rights Division. Political appointees now oversee the hiring

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Monica Goodling, in response to questioning from Rep. Johnson), *available at* http://www.washingtonpost.com/wp-srv/politics/transcripts/goodling_testimony_052307.html.

[80] Dan Eggen, *Justice Dept. Expands Probe to Include Hiring Practices*, Wash. Post, May 31, 2007, at A4. Hiring for the Honors Program is now in the hands of career employees at the Department. *Id.*

[81] " 'You have a Monica problem,' Ms. Ashton was told, according to several Justice Department officials. Referring to Monica M. Goodling, a 31-year-old, relatively inexperienced lawyer who had only recently arrived in the office, the boss added, 'She believes you're a Democrat and doesn't feel you can be trusted.' " Eric Lipton, *Colleagues Cite Partisan Focus by Justice Official*, N.Y. Times, May 12, 2007, at A1.

[82] *Id.*

[83] Ari Shapiro, *Justice Probes Lawyer's Dismissal Amid Gay Rumor*, NPR.org, Apr. 2, 2008, http://www.npr.org/templates/story/story.php?storyId=89288713.

[84] 5 U.S.C. § 2301(b)(1), (2). *See also* Johnston & Lipton, *supra* note 77.

[85] 5 U.S.C. §§ 7321–7326 (2000). *See also* Jason McLure, *DOJ Probes Turn to Civil Rights Division*, Legal Times, June 4, 2007, at 14.

[86] David Luban, *Liberalism, Torture, and the Ticking Bomb*, 91 Va. L. Rev. 1425, 1455 (2005).

process, cutting career lawyers out of the hiring and policy decisions.[87] Further, between 2001 and 2005, the Civil Rights Division, under the leadership of the Bush Administration, filed just three lawsuits alleging discrimination against minority voters. None of the lawsuits involved African-Americans,[88] and as of December 2007 the Civil Rights Division has yet to pursue a voting discrimination case on behalf of African-Americans.[89]

In contrast, the Solicitor General's Office has shown signs of resisting the general politicization of the Department. That office recently demonstrated a willingness to contradict the Administration's stance on a case in favor of pursuing Departmental "best practices." In *Parker v. District of Columbia*,[90] the plaintiff filed suit challenging the District of Columbia's firearm ban on the ground that it violated his rights under the Second Amendment to the United States Constitution. The U.S. District Court for the District of Columbia dismissed the case after finding that there was no individual right to bear arms separate and apart from service in the Militia and that the plaintiffs did not assert membership in a militia.[91] The District Court was subsequently reversed by the Court of Appeals for the District of Columbia Circuit.[92] The Supreme Court granted certiorari in *District of Columbia v. Heller* to review the constitutionality of the D.C. firearm law.[93] For roughly sixty years, up until 2001, the position of the Department and the federal courts[94] had been that the possession of a firearm must be reasonably related to the preservation of a "well regulated militia."[95] Notwithstanding this tradition, in 2001 then-Attorney General John Ashcroft made the unprecedented decision to take the Department in a different direction. Ashcroft adopted the view of the Fifth Circuit in *United States v. Emerson*, which was the first appellate decision[96] to hold that the Second Amendment protected an individual's right to bear arms even when the purpose is unrelated to the functioning of a militia.[97] The Bush Administration has contin-

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[87] Charlie Savage, *Civil Rights Hiring Shifted in Bush Era*, BOSTON GLOBE, Jul. 23, 2006, at A1.

[88] Dan Eggen, *Civil Rights Focus Shift Roils Staff at Justice*, WASH. POST, Nov. 13, 2005, at A1.

[89] Dan Abrams, *Bush League Justice*, MSNBC.COM, Dec. 7, 2007, http://www.msnbc.msn.com/id/22150519; *Live With Dan Abrams* (MSNBC television broadcast Dec. 10, 2007), *available at* http://www.msnbc.msn.com/id/22221847.

[90] 311 F. Supp. 2d 103 (D.D.C. 2004).

[91] *Id.* at 109.

[92] Parker v. District of Columbia, 478 F.3d 370 (D.C. Cir. 2007).

[93] Parker v. District of Columbia, 478 F.3d 370 (D.C. Cir. 2007), *cert. granted sub nom.* District of Columbia v. Heller, 128 S. Ct. 645 (U.S. Nov. 20, 2007) (No. 07-290). I have signed on to an amici curiae brief supporting the District of Columbia, along with Janet Reno, Nicholas deB. Katzenbach, Eric Holder, Jr., Jamie Gorelick, Philip B. Heymann, Warren M. Christopher, Seth P. Waxman, Drew S. Days III, Jo Ann Harris, Roscoe C. Howard, Jr. Earl J. Silbert, and David Schertler.

[94] United States v. Miller, 307 U.S. 174 (1939).

[95] U.S. CONST. amend. II.

[96] United States v. Emerson, 270 F.3d 203, 260 (5th Cir. 2001).

[97] Memorandum from Attorney General Alberto Gonzales to All United States Attorneys (Nov. 9, 2001), *available at* http://www.usdoj.gov/ag/readingroom/emerson.htm.

ued to embrace this view as evidenced most recently by Vice President Dick Cheney's decision to sign on to a amicus curiae brief in support of the plaintiffs as President of the Senate—a brief that was already supported by 55 senators and 250 House members.[98] The Solicitor General's Office, by contrast, has refused to adopt such a position.

The United States' position in *Heller*, argued by Solicitor General Paul Clement, is that classifying handguns to be "arms" could endanger federal laws restricting the possession of guns.[99] Clement suggests that the case should be remanded to determine whether the District of Columbia's law is an unreasonable restriction.[100] Clement's ability to diverge from the Administration's position is a positive sign, and demonstrates that the Department is making strides to limit the political influence of the Bush Administration.

V. Lessons Learned and Recommendations

It should come as no surprise that the Department's actions described herein have created morale problems[101] within the Department and weakened the public's confidence in the Department.[102] On January 20, 2009, under the leadership of the new Administration, the Department will have the opportunity to implement policies and appoint persons capable of restoring the Department's culture of impartiality and its traditional respect for the law, both of which are necessary to an effective and fair criminal law enforcement function. This process will involve adhering to a small set of long-standing core principles that were forgotten by political appointees during the Bush Administration. These are old ideas that may now be recast as the lessons learned from the last eight years. Two bipartisan organizations, the National Association of Former United States Attorneys ("NAFUSA"),[103] and the

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[98] Tony Mauro, *The Firing Line*, Legal Times, Feb. 18, 2008, at 1; Robert Barnes, *Majority of Hill Stands Against D.C. Gun Ban*, Wash. Post, Feb. 8, 2008, at A2. The brief can be found at http://www.scotusblog.com/wp/wp-content/uploads/2008/02/heller-congress-brief-2-8-08.pdf.

[99] Mauro, *supra* note 98; Barnes, *supra* note 98. The United States' *Amicus Curiae* brief can be found at: http://www.gurapossessky.com/news/parker/documents/07-290tsacUnited States.pdf.

[100] Mauro, *supra* note 98; Barnes, *supra* note 98. The government is not a party to the action.

[101] Philip Shenon & Jim Rutenberg, *Justice Department Lawyers Join Chorus Criticizing Gonzales*, N.Y. Times, Jul. 28, 2007, at A11; Al Kamen, *For Ashcroft, Something Old, Something Nude*, Wash. Post, Nov. 16, 2007, at A31.

[102] Cummins, *supra* note 19; Fine, *supra* note 9; *See* Editorial, *Justice Must Regain Credibility, Respect*, Denver Post, Aug. 28, 2007, at B6. In its semiannual report to Congress, the Office of Inspector General stated that DOJ "has faced significant criticism of its actions . . . [that has] affected the morale of Department employees and public confidence in the decisions of Department leaders. This turmoil, combined with numerous high-level vacancies, creates an urgent challenge for the Department's leaders to reestablish public confidence in the independence and integrity of the Department." Fine, *supra* note 9, at IV-18.

[103] NAFUSA is an association made up of former United States Attorneys who served pursuant to presidential commissions, by court appointment, or by designation from the Attorney General as an Acting U.S. Attorney.

Constitution Project, recently proposed principles aimed at assuring the fair administration of justice and avoiding the actual or apparent interference of political considerations with prosecutorial decision making.[104] The NAFUSA principles apply specifically to the issues dealing with the U.S. Attorneys, whereas the Constitution Project's principles cover a broader range of issues affecting the appearance of legitimacy of the Department. Both organizations endeavor to formulate standards for the Department that reflect a set of historical best practices of the Department. As a NAFUSA member and former President, I also submitted the Constitution Project's Principles to a member of the NAFUSA Board of Directors with the suggestion that NAFUSA consider adopting the Principles. NAFUSA declined to adopt the Principles, instead adopting a Resolution more focused on the role of the United States Attorney's offices. It is important to note that because NAFUSA is bipartisan, it has rarely taken a critical view of any Administration or its policies. Reorienting the Department to these principles will be an important part of the new Administration's work and will be a great start to restoring the Department's creditability and raising employee morale. For ease of reference, I have included the Constitution Project's Principles and the NAFUSA resolution at the end of this Article as Appendices A and B, respectively.

The most important principle expressed by both organizations regarding criminal prosecutions is that political or partisan considerations should play no part in determining whether to bring a case or a particular case's timing.[105] This principle is particularly critical at times near elections, as was most recently demonstrated in the dismissal of former U.S. Attorney David Iglesias. Iglesias had been contacted by both Representative Heather Wilson and Senator Domenici, Republicans from New Mexico, just prior to the November elections of 2006, regarding corruption and voter fraud cases.[106] After ignoring their suggestions that he file charges before the election, complaints to the White House and the Attorney General from Senator Domenici, New Mexico Republican Party Chairman Allen Weh, and Karl Rove reportedly led to Iglesias's dismissal.[107] This violated historical practices, as well as longstanding legislation, including the Hatch Act of 1939.[108] Accordingly, each organization advocates a prohibition on communications between the Department and both Congress and the White House with regard to specific prosecutorial decisions.[109]

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[104] The Constitution Project, Principles for Assuring Legitimacy to the Crucial Decisions of the Department of Justice (2007) (Appendix A); *Resolution*, *supra* note 10.

[105] Constitution Project, *supra* note 104, at § A.1; *Resolution*, *supra* note 10, at 7.

[106] Iglesias, *supra* note 18.

[107] *Preserving Prosecutorial Independence—Part III*, *supra* note 26 (testimony of Kyle Sampson, Former Chief of Staff to the Att'y Gen. of the United States).

[108] 5 U.S.C. §§ 7321–7326 (2000). The Hatch Act prohibits U.S. Attorneys, among other federal employees, from engaging in partisan political activities while in office, reinforcing the separation of politics from federal employment.

[109] Constitution Project, *supra* note 104, at § A.2–3; *See Resolution*, *supra* note 10, at 7.

Notwithstanding these restrictions, the Constitution Project's Principles recognize political administrations' roles as policy makers, and therefore include allowances for some level of influence by elected officials on the prioritization of certain types of prosecutions, so long as such influence is delivered through proper channels. Thus, the Constitution Project Principles recognize that it is appropriate for the President, Attorney General, or a member of Congress to recommend that a particular category of cases, but not a specific prosecution, be prioritized as a matter of federal policy.[110] By this standard, the furnishing of "pertinent information or views to the Attorney General, the Deputy Attorney General, or the Associate Attorney General for his or her consideration" would be permissible, but would require a record to be kept of the information provided and any resulting action.[111]

Such policies limiting communications between the White House and the Department are not new. Following Watergate, the Ford, Carter, Reagan, and George H. W. Bush White Houses adopted polices to limit the contacts between the White House and the Department concerning criminal and civil cases, so as to avoid the possibility of abuse.[112] In addition, a policy was put in writing during the Clinton Administration strictly limiting communications regarding specific cases with the Department to those among four White House officials (the President, the Vice President, the Counsel to the President, and the Deputy Counsel to the President) and three officials at the Department (the Attorney General, the Deputy Attorney General, and the Associate Attorney General). In spite of such efforts, when Alberto Gonzales became White House counsel, the contacts policy was replaced with one that allowed 417 people at the White House to contact roughly 30 people at the Department.[113] In a positive effort to regain control over the White House's interactions with the Department, Attorney General Michael Mukasey announced in December 2007 that only he, the Deputy Attorney General, the Associate Attorney General and the Solicitor General may communicate with the White House, and even then they may only communicate with the President's counsel and deputy counsel.[114] This is a solid first step in limiting political influence; however, it should be noted that the policy does not apply to national security cases.[115] Also, the policy allows the top

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[110] The Constitution Project, *supra* note 104, at § A.5.

[111] *Id.* at § A.4.

[112] Ronald Klain, Former Chief of Staff to the Att'y Gen. of the United States, Remarks in the Panel Discussion "Principles to Guide the Department of Justice Under the Next Attorney General" 2 (Oct. 10, 2007), *available at* http://www.acslaw.org/files/Microsoft%20Word%20-%2010-10-07%20DoJ%20Panel%20Transcript.pdf.

[113] *Department of Justice Oversight*, *supra* note 11 (statement of Sen. Whitehouse); Karen Tumulty & Massimo Calabresi, *Inside the Scandal at Justice*, TIME, May 21, 2007, at 46.

[114] Editorial, *A Tighter Ship at Justice*, WASH. POST, Dec. 29, 2007, at A18; Dan Eggen, *Mukasey Limits Agency's Contacts with White House*, WASH. POST, Dec. 20, 2007, at A3; Associated Press, *Only Top 2 Justice Officials Can Talk About Criminal, Civil Suits with Presidential Counsel*, IHT.COM, Dec. 20, 2007, http://www.iht.com/articles/ap/2007/12/19/america/Justice-White-House.php.

[115] Editorial, *supra* note 114; Eggen, *supra* note 114; Associated Press, *supra* note 114.

four Department officials to authorize additional employees to speak with the White House on specific cases, which, thankfully, Attorney General Mukasey has limited to "the fewest number of people practical."[116] Still, more work needs to be done to limit White House and Congressional influence on the Department's law enforcement efforts.

The NAFUSA resolution responded directly to the U.S. Attorney dismissals, stating that a United States Attorney should never be asked to resign or be terminated due to a Congressional complaint to the White House. In addition, NAFUSA resolved that, in the event a U.S. Attorney is asked to resign, she should be afforded the opportunity to present her case to the Attorney General before any dismissal, and that dismissal would have to be approved by the Attorney General and the President, barring a change of administration or exigent circumstances. Given the scope of the recent dismissal scandal, such policies are the best way of protecting against similar events occurring again.

In addition to adopting the Constitution Project Principles and the NAFUSA resolution internally to assure the fair administration of justice, the Department will also need to restore the public trust. The most important principle in this endeavor will be transparency. Accordingly, and as the Constitution Project encouraged, the President or Attorney General should publicly announce any law enforcement priorities.[117] The Constitution Project also argues that, although the basis for prosecutorial discretion in a specific case need not be publicly explained, where a particular exercise of prosecutorial discretion could raise an inference of misuse for political purposes, that exercise should be made transparent.[118] In light of the defenses provided by suspicious prosecutions, the Department should promote transparency especially in cases involving political corruption and campaign finance issues.

Finally, creating a culture of integrity and credibility will require selecting the right leaders for the Department. Clearly, law enforcement credentials and experience should be valued over politics in choosing political appointees. Further, character and demonstrated belief in the core values of the Department, as articulated in its mission statement, should be key criteria for the Department's leadership.

The new President should look to a number of past Attorneys General, whose exceptional qualities exemplify the office and would be ideal to replicate in this period of renewal. At the top of this list is Robert H. Jackson, Attorney General to President Franklin Roosevelt, whose inspirational words are quoted in this Article. Jackson first served as Assistant Attorney General of the Tax Division and of the Anti-Trust Division before being confirmed as

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[116] Editorial, *supra* note 114; Eggen, *supra* note 114.
[117] The Constitution Project, *supra* note 104, at § E.1.
[118] *Id.*

Attorney General.[119] Jackson was well qualified for the position of Attorney General, and he "did much for morale within DOJ."[120] The message he delivered to the United States Attorneys in 1940 is worthy of repeating to prosecutors throughout the Department.

Ideally, the next Attorney General of the United States, as well as the Deputy Attorney General, Associate Attorney General, and other presidential appointees in the Department, would be men or women who are as close as possible to the "Lawyer-Statesman" that former Yale Law School Dean Anthony Kronman sought to describe in his book *The Lost Lawyer: Failing Ideals of the Legal Profession*.[121] Such a lawyer would be "a devoted citizen [who] cares about the public good and is prepared to sacrifice his own well being for it, unlike those who use the law merely to advance their private ends."[122] He or she "is a paragon of judgment, and others look to him for leadership on account of his extraordinary deliberative power."[123] According to Professor Kronman:

> The spirit of citizenship that sets the lawyer-statesman apart from the purely self-interested practitioner of the law can to that extent be understood in motivational terms. But it is not only his motives that make him a better citizen than most. He is distinguished, too, by his special talent for discovering the public good and for fashioning those arrangements needed to secure it. The lawyer-statesman is a leader in the realm of public life, and other citizens look to him for guidance and advice, as do his private clients.[124]

This is not the first challenge to the credibility of the Department and it is unlikely to be the last. Fortunately, in prior instances when grave challenges have questioned the Department's credibility, lawyer-statesmen have emerged to help get the Department back on course. Francis Biddle succeeded Jackson as Attorney General when Jackson was appointed to the Supreme Court. Biddle "reminded the nation that in time of war, hysteria and fear and hate run high, and every man who cares about freedom must fight to

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[119] Department of Justice, Biographies of the Attorneys General, http://www.usdoj.gov/jmd/ls/agbiographies.htm#jackson(last visited Apr. 1, 2008). By that time, he had already been appointed to serve on the Commission to Investigate the Administration of Justice in New York State by then-New York Governor Roosevelt, and as President, Roosevelt appointed him to serve as General Counsel for the Bureau of Internal Revenue. Robert H. Jackson Center, Jackson's Early Life and Career, http://www.roberthjackson.org/Man/theman2-1-1/ (last visited Apr. 1, 2008).

[120] Robert H. Jackson Center, Attorney General Jackson, http://www.roberthjackson.org/Man/theman2-2-2-3-4/ (last visited Apr. 1, 2008); *see also* Geoffrey R. Stone, *History Lessons Never Learned*, CHI. TRIB., Aug. 29, 2007, at 25.

[121] ANTHONY T. KRONMAN, THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION 3 (1993).

[122] *Id.* at 14.

[123] *Id.* at 15.

[124] *Id.* at 14.

protect it for other men as well as for himself."[125] During his tenure, Biddle resisted pressure from President Roosevelt to prosecute individuals critical of the president's policies, and he adamantly opposed the internment of individuals of Japanese descent, calling it "ill-advised, unnecessary and unnecessarily cruel."[126]

Another example of principled leadership is Elliot Richardson, Attorney General under President Nixon. In late 1973, after only a few months as Attorney General, Nixon ordered Richardson to fire the top lawyer investigating the Watergate scandal, Special Prosecutor Archibald Cox.[127] Nixon wanted Cox fired to slow the investigation of the June 17, 1972 Watergate break-in of the Democratic Party's headquarters. Richardson refused the order because "public confidence in the investigation [depended] on its being independent not only in fact, but in appearance."[128] As a result, he resigned from the Nixon Administration.[129] President Nixon then asked Richardson's second-in-command, Deputy Attorney General William Ruckelshaus to carry out the order.[130] To his credit, he also refused, and was subsequently fired.[131]

James Comey, Deputy Attorney General under Gonzales, was the Acting Attorney General in place of then-Attorney General John Ashcroft during his hospitalization in March 2004.[132] While Acting Attorney General, then-White House Counsel Gonzales and then-White House Chief of Staff Andrew Card approached Comey and requested that he recertify the legality of the Bush Administration's warrantless wiretapping program.[133] Comey refused recertification based upon his and Ashcroft's reservations regarding the legality of the program.[134] Undeterred by the Acting Attorney General's decision, Gonzales and Card approached Ashcroft in his hospital bed at George Washington University Hospital.[135] Although in intensive care, Ash-

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[125] Stone, *supra* note 120 (internal quotation marks omitted). Prior to his appointment as Attorney General, Biddle served as chairman of the National Labor Relations Board, Class C director and deputy chairman of the Federal Reserve Bank, chief counsel of the special joint congressional committee to investigate the Tennessee Valley Authority, a Third Circuit Court of Appeals Judge, and Solicitor General of the United States. Department of Justice, Biographies of the Attorneys General, http://www.usdoj.gov/jmd/ls/agbiographies.htm#biddle (last visited Apr. 3, 2008).

[126] Neil A. Lewis, *Elliot Richardson Dies at 79; Stood Up to Nixon and Resigned in 'Saturday Night Massacre*,' N.Y. TIMES, Jan. 1, 2000, at B7.

[127] *Id.*

[128] *Id.*

[129] *Id.*

[130] *Id.*

[131] *Id.*

[132] Associated Press, *White House Pushed Ashcroft on 2004 Wiretaps*, MSNBC.COM, May 15, 2007, *available at* http://www.msnbc.msn.com/id/18681432/. He previously served as Assistant United States Attorney for the Eastern District of Virginia, Deputy Chief of the Criminal Division in the Southern District of New York, and United States Attorney for the Southern District of New York. Deputy Attorney General James B. Comey, The White House, http://www.whitehouse.gov/government/comey-bio.html (last visited Apr. 3, 2008).

[133] Editorial, *Mr. Comey's Tale*, WASH. POST, May 16, 2007, at A14.

[134] Associated Press, *supra* note 132.

[135] *Id.*

croft explained to Gonzales and Card his reservations, and reiterated that Comey, not he, was Attorney General at that point in time.[136] Comey later testified that he had been prepared to resign after the incident, saying that "I couldn't stay, if the administration was going to engage in conduct that the Department of Justice had said had no legal basis."[137] As a result of Comey's decision to follow the prior legal opinion developed by the Department, President Bush agreed to fix the wiretapping program issues that were the Department's sticking points.[138]

Finally there is Edward Levi, former Attorney General under President Ford.[139] Levi, perhaps the most meaningful example of what President Bush's successor should strive for at Justice, took office in the difficult time after the Watergate scandal. Justice Antonin Scalia, who worked under Levi at the time, said that "there couldn't have been a tougher job in Washington where the whole executive branch was in disarray after Watergate."[140] And Levi faced other problems. The FBI had been conducting a program of secret surveillance domestically, along with the CIA, the NSA, and the Army, regarding Vietnam war protestors.[141] As Attorney General, Levi created guidelines that reaffirmed the rights of American citizen by setting limits on what those agencies could investigate.[142] Ironically, the guidelines that Levi fought so hard to create were "eviscerate[d]" by Gonzales.[143]

Conclusion

The Department is at a critical point in its history. It must now demonstrate that it has survived the testing of its strength as an institution during the Bush Administration. It is also of supreme importance that the next President and the next Attorney General restore the reality and the perception that the Department's decisions to investigate, charge, and dispose of criminal matters are completely nonpartisan and free from even the appear-

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[136] *Id.*

[137] Editorial, *supra* note 133.

[138] *Id.*

[139] Prior to his appointment as Attorney General, Levi was an assistant professor of law at the University of Chicago, special assistant to the Attorney General of the United States, an attorney in the Department's Antitrust Division, first assistant and head of the Consent Decree Section, first assistant in the Department's War Division, Chairman of the Interdepartmental Committee on Monopolies and Cartels, Dean of the University of Chicago Law School, Provost and then President of the University of Chicago, Chief Counsel to the Subcommittee on Monopoly Power of the House Judiciary Committee, a member of the White House Central Group on Domestic Affairs, as well as the White House Task Force on Education, a member of the Presidents' Task Force on Priorities in Higher Education, and a member of the National Commission on Productivity and the National Council on the Humanities. Department of Justice, Biographies of the Attorneys General, http://www.usdoj.gov/jmd/ls/agbiographies.htm#levi (last visited Apr. 3, 2008).

[140] Neil A. Lewis, *Edward H. Levi, Attorney General Credited with Restoring Order After Watergate, Dies at 88*, N.Y. Times, Mar. 8, 2000, at A3.

[141] Stone, *supra* note 120.

[142] Lewis, *supra* note 140; Stone, *supra* note 120.

[143] Stone, *supra* note 120.

ance of political influence. It is my hope that the next Administration, regardless of political affiliation, will learn from the hard lessons of recent years and make restoring the credibility of the Department a high priority. Under the right leadership, and with what I know from experience will be the full support of the Department's dedicated career professionals, the Department can once again fulfill its core mission of ensuring the fair and impartial administration of justice for all Americans.

Appendix A: Constitution Project Principles

Principles for Assuring Legitimacy to the Crucial Decisions of the Department of Justice.

A. Prosecution

1. Prosecutions should never be based on partisan considerations. Decisions to prosecute should be based solely on the facts and the law. Politics should play no part in determining either whether to bring the case or the timing for bringing the case.

2. Prosecutors should have no communications with Members of Congress or congressional staff relating to whether a criminal case will be brought or the timing of such case. Any such attempted communications should be reported to appropriate officials at the Department.

3. It is never appropriate for the President or a member of the White House staff to direct, urge, or suggest that a Federal prosecutor bring a specific prosecution or seek a particular sentence or terminate an investigation or case.

4. Elected officials and their staffs may furnish pertinent information or views to the Attorney General, the Deputy Attorney General, or the Associate Attorney General for his or her consideration and such disposition as he or she believes appropriate. Any such information should be memorialized regarding what was said and what was done with the information.

5. It is appropriate for the President or the Attorney General to direct, or for a member or committee of Congress to recommend, that special attention or resources be devoted to a particular category of cases as a matter of policy and federal priority.

B. Civil Enforcement Litigation

1. Civil enforcement actions are to be treated similarly to criminal prosecutions. Enforcement should never be based on partisan considerations. Decisions to enforce should be based solely on the facts and the law. Politics should play no part in determining either whether to bring the case, the timing for bringing the case, or settlement timing or terms.

2. Those engaged in civil enforcement should have no communications with Members of Congress or congressional staff relating to whether a civil enforcement case will be brought or the timing of such case or the terms of settlement. Any such attempted communications should be reported to appropriate officials at the Department.

3. It is never appropriate for the President or a member of the White House staff to direct, urge, or suggest that a Federal enforcer bring a specific civil enforcement action or seek a particular resolution or terminate an investigation or case.

4. Elected officials and their staffs may furnish pertinent information or views to the Attorney General, the Deputy Attorney General, or the Associate Attorney General for his or her consideration and such disposition as he or she believes appropriate. Any such information should be memorialized regarding what was said and what was done with the information.

5. It is appropriate for the President or the Attorney General to direct, or for a member or committee of Congress to recommend, that special attention or resources be devoted to a particular category of cases as a matter of policy and federal priority.

C. Supreme Court Litigation

1. It is appropriate for an administration to insist on the government adopting a particular position so long as the Solicitor General is satisfied that it is within the boundaries of reasonable, and therefore permissible, interpretation of the law.

2. The Attorney General and not the Solicitor General should authorize and sign any brief taking a position in the Supreme Court that the Solicitor General feels is not supported by law.

D. Advice as to the extent of and limits on presidential power.

1. The Attorney General and the Office of Legal Counsel must at all times give their best legal advice as to the powers of the President and as to the legality of proposed executive actions, unaffected by the politics or policies of the Administration except as these bear on their views of the law.

a. The Attorney General and the Assistant Attorney General for the Office of Legal Counsel should operate as independent advisors on the law and not as subordinates with duties of loyalty to their superiors when addressing any such question.

2. Insofar as possible, the Attorney General should be present, and in all cases should be advised, whenever the President or a member of the White House staff seeks to shape or change a proposed opinion regarding such matters. That notice is necessary to enable the Attorney General to make sure that the opinion of the Department of Justice on such matters remains quasi-judicial and unaffected by inappropriate political pressure.

3. In these, as in other situations, the President remains free, as the officer of the United States charged with executing the laws, to reject the legal advice of the Attorney General or the Office of Legal Counsel.

E. Restoring the trust that comes with transparency.

1. To the maximum extent possible and consistent with privacy concerns, the actions and decisions of the Department of Justice should be explained and made public.

a. In particular, any opinion of the Office of Legal Counsel that defines the President's powers in ways that are important and con-

troversial should be made public. If there are aspects that must be classified, they should be handled in a separate classified portion.

b. Any priorities of the President or Attorney General for criminal enforcement should be announced publicly.

c. The general criteria for hiring decisions should be made public.

d. In light of privacy concerns and fairness at trial, the basis for the exercise of prosecutorial discretion in a specific case need not be explained.

2. On any occasion where discretion that could be misused for political purposes is to be exercised, an effort should be made to explain the basis for the particular exercise of discretion.

3. National security classification should rarely, if ever, prevent the pattern of consultations and approvals among career and political officials of the Department of Justice who are normally responsible for such matters.

a. Necessary clearance should be obtained.

b. The importance of consultation creates a "need to know".

4. Security clearances should not be denied to those Department employees who need such clearances to perform their jobs.

F. The practices of the Department of Justice should recognize the great importance to public trust of the role played by career attorneys.

1. The legal prohibition on consideration of politics in hiring for career positions must be scrupulously honored.

2. An applicant for a career position should not be chosen or rejected on the basis of the congruence or lack of congruence of his political or policy beliefs with those of the administration.

a. An applicant's disagreement with administration policy in his or her area of intended employment is not an appropriate ground for rejecting an application.

b. Because career employees will serve under multiple administrations during their careers, every effort should be made to maintain a pattern of staffing that will be as useful to successor administrations, with their different political priorities, as it is to the incumbent with his or hers.

3. Career employees should not be excluded from the process of decision. Their participation is particularly critical in any situation where the boundaries of discretion or the misuse of discretion is a likely source of public concern.

4. The total proportion of career employees and the proportion in different units, should be made public and should include a tracking of changes over the last two administrations.

G. The Attorney General and the Department of Justice are symbols of American ideals of fairness as well as lawfulness.

1. The Attorney General and his senior staff should continue to play the role of the representative of concerns about fairness as well as lawfulness in governmental decisions, particularly in the national security and intelligence areas.

2. The Attorney General should assume a leadership role in improving the fairness as well as efficiency of the legal systems of the United States.

a. The Department should consider and recommend changes in the federal system (e.g., sentencing or procedural rules) to further fairness and accuracy, not simply the convenience or success of Department litigators.

b. The independence of reports from the offices of the Department charged with statistical analysis or scholarly research should be scrupulously maintained.

H. Maintaining the above conditions of legitimacy and trust should be the primary responsibility of the Attorney General of the United States.

Appendix B: NAFUSA Resolution

The National Association of Former United States Attorneys Resolution

Recognizing the importance of the position of the United States Attorney

Whereas:

• The Office of the United States Attorney was established by the Judiciary Act of 1789, which provided for the appointment in each judicial district of a "person learned in law to act as attorney for the United States . . . whose duty it shall be to prosecute in each district all delinquents for crimes and offenses cognizable under the authority of the United States shall be concerned . . ."

• The United States Attorney is appointed by the President, with the advice and consent of the Senate, to a term of four years. The United States Attorney serves at the pleasure of the President.

• The Mission Statement of United States Attorneys (USAM), states that United States Attorneys serve the nation's principal litigators and conduct most of the trial work in which the United States is a party. These responsibilities are conducted under the direction of the Attorney General, the nation's chief lawyer.

• United States Attorneys are the principle federal law enforcement official in their judicial district. In many districts, United States Attorneys are the ranking executive branch official in that district.

• United States Attorneys are charged with the responsibility to enforce the nation's laws, both criminal and civil, and to supervise the work of assistant U.S. attorneys and staff in their daily responsibilities.

• Each United States Attorney exercises broad discretion in the use of resources to further promote the priorities of the local jurisdictions and needs of the individual communities in which district they were appointed to serve.

• In the exercise of their discretion, and in consideration of the needs of their respective districts, and looked to by the public and community leaders to make appropriate judgments in the setting and implementation of criminal enforcement priorities and initiatives, and to coordinate the activities of federal, state, and local law enforcement.

• United States Attorneys are leaders in the respective districts, and looked to by the public and community leaders to make appropriate judgments in the setting and implementation of criminal enforcement priorities and initiatives, and to coordinate the activities of federal, state, and local law enforcement.

• United States Attorneys are the principal executive branch officials who communicate with federal judiciary, at the district and circuit court levels, on litigation and administrative matters relevant to the responsibilities of the office.

• As the district's chief lawyer, the United States Attorney answers to the communities which are served by the office to insure that the public has

confidence that the Department of Justice is meeting in law enforcement and civil justice responsibilities in a fair and even-handed manner.

• United States Attorneys take and oath of office to support and defend the Constitution of the United States against all enemies foreign and domestic, and faithfully discharge the duties of the office.

• By history and tradition, United States Attorneys are the representative not of an ordinary party to a controversy, but of a sovereign nation governed by the U.S. Constitution. The compelling interest is not that the United States should win a case, but that justice be done.

• United States Attorneys have established and maintained a strong tradition of ensuring that the Constitution and laws of the United States are faithfully executed, without regard to improper influenced of political considerations.

• The nation, the President, and the Department of Justice are best served by the appointment of highly qualified, dedicated, and motivated men and women of integrity who will independently, and without regard to any improper considerations, faithfully discharge the duties of United States Attorney.

Now, therefore, it is Resolved:

That the President, the Congress, the Attorney General and the Department of Justice are best served and, in turn, best serve the nation and fair administration of justice, by insuring: that the United States Attorneys are appointed by the President, with advise and consent of the Senate: that the institutions of government recognize and fully support integrity and independence of United States Attorneys in prosecutorial and litigative judgment as fundamental to the fair operation of the federal criminal and civil justice system; and that United States Attorneys must be free from even the appearance of improper political considerations in the exercise of their prosecutorial and litigative responsibilities.

That there have been a series of resignations and terminations of United States Attorneys who were performing their duties in an outstanding, professional manner in the finest tradition of United States Attorneys. It is imperative that all Executive and Legislative Branch officials respect these rules of conduct which are written to promote the essential independence of United States Attorneys in their districts and to promote the fair and impartial administration of justice.

1. Decisions by United States Attorneys regarding bringing a case should be made without regard to political issues and should be made in an impartial manner.

2. United States Attorneys should never be asked to conduct or not conduct an investigation or bring or not bring charges to assist any candidate or any party in an election.

3. Cases should never be brought by a United States Attorney in an attempt to assist a candidate or a party to win an election.

4. Decisions regarding indictments or prosecutions should be made without regard to the position of United States Senators or United States Representatives on those cases.

5. No Senator or Congressman should attempt to influence a United States Attorney regarding an investigation or prosecution.

6. A United States Attorney should never be asked to resign or be terminated from his or her position because a Senator or Representative has complained to the Department of Justice or White House regarding the U.S. Attorney's decisions regarding indictments or prosecutions.

7. United States Attorneys should never be asked to resign or be terminated from their position unless they have had an opportunity to present their position to the Attorney General and without the Attorney General and President approving the decision, barring a change of administration or exigent circumstances.

Adopted this 10 day of November, 2007 by the members of the National Association of Former United States Attorneys, Miami, Florida.