Kay Bailey Hutchison, Chairman
Bill Hughes, Staff Director

347 Russell Senate Office Building
Washington, DC 20510
202-224-2946
http://rpc.senate.gov

SENATE REPUBLICAN POLICY COMMITTEE

Legislative Notice

No. 6 March 16, 2007

S. 214 – U.S. Attorneys Act

Calendar No. 24

Reported by the Judiciary Committee on February 12, 2007 by a vote of 13-6, with an amendment, no written report.

Noteworthy

- On March 15, the Republican Leader and the Democratic Leader entered into a unanimous consent agreement regarding S. 214, a bill to "preserve the independence of U.S. Attorneys." The agreement provides for a limited time agreement and two amendments – one by Senator Kyl and one by Senator Sessions. The Senate will debate the bill beginning Monday, March 19 at 2:00 p.m.; on Tuesday, there will be up to 90 minutes of final debate, with votes on the two amendments and on final passage to begin no later than 11:30 a.m.

- Cloture was filed on the motion to proceed to S. 214 on March 13, 2007. However, it was vitiated as part of the March 15 unanimous consent agreement.

- S. 214 would revert the law regarding the naming of an interim U.S. Attorney to the practice that was in place between 1986 and 2006, which allowed the district court to fill the vacancy after 120 days.

Background/Overview

S. 214, the Preserving United States Attorney Independence Act of 2007, pertains to the appointment of U.S. Attorneys upon a vacancy in that position. The President is empowered to appoint U.S. Attorneys, by and with the advice and consent of the Senate.[1] This bill would amend current law to change the manner of filling the position prior to Senate confirmation of an appointee.

[1] Constitution, Article II, section 2. 28 U.S.C. § 541.

The law was most recently changed as a provision to the reauthorization of the Patriot Act in 2006. Prior to that law change, 28 U.S.C. § 546 provided that, in cases of a vacancy, the Attorney General could appoint an interim U.S. Attorney until one was nominated and confirmed by the Senate. 28 U.S.C. § 546 also provided that such an appointee could only serve until either he (or someone else) was confirmed to the position by the Senate, or the expiration of 120 days, whichever was earlier. In addition, 28 U.S.C. § 546 provided that if 120 days passed, the district court for the district in which the U.S. Attorney vacancy occurred *may* appoint the interim U.S. Attorney until the vacancy was filled by a Senate-confirmed appointee.

In 2006, the Patriot Act reauthorization law amended this posture to provide that the Attorney General is to appoint interim U.S. Attorneys in the case of a vacancy, and such an interim appointee may serve until the Senate confirms a replacement.[2] Because U.S. Attorneys are Executive Branch officials, this law change addressed some Constitutional and practical concerns (elaborated on, below).

S. 214, as reported, would revert the law back to its pre-2006 provisions. The bill was introduced by Senators Feinstein and Leahy on January 9, 2007 (currently, there are 14 cosponsors to the bill, including one Republican, Senator Specter). A similar bill, H.R. 580, was introduced in the House on the same day. On February 6, the Senate Judiciary Committee held a hearing on the bill; on February 8, the bill was amended and ordered reported. It was placed on the Senate Calendar February 12. On February 15, Majority Leader Reid stated his reason for his party's desire to consider the bill at this time:

> "The bill would protect U.S. Attorneys from being used as political pawns. . . . Last month, we learned that at least seven U.S. Attorneys had been directed by the Department of Justice to resign. . . . The Deputy Attorney General testified that the U.S. Attorneys who were forced out had 'performance issues.' As far as I am concerned, that is nonsense. . . . What is really going on here? According to news reports, the decision to remove U.S. Attorneys was part of a plan to 'build up the back bench of Republicans by giving them high-profile jobs.' So what has happened might well be called 'Crony-gate.' It may not be as far-reaching a scandal as Watergate, but it is a scandal nonetheless. It represents a breach of the long tradition of independence that allowed these powerful Federal prosecutors to do their jobs without fear of political retribution. Now every U.S. Attorney will be looking over his or her shoulder to see if Karl Rove or other White House aides approve of their decisions. . ."

[2] USA PATRIOT Improvement and Reauthorization Act, § 502, Pub. L. No. 109-177, 120 Stat. 192, 246 (2006).

House Action

The House has not acted on a similar bill, H.R. 580. The House Judiciary Committee held its full committee mark up March 15, and approved legislation by voice vote that would limit interim U.S. Attorney appointments to 120 days, and included an amendment by Ms. Linda Sanchez that would place the limitation on already serving interim U.S. Attorneys. Several Republicans objected to the bill on the grounds that it would create conflict of interest and separation of powers problems by granting appointment power to courts.[3]

Bill Provisions

S. 214 would return the terms of the law to what it was prior to 2006. It amends 28 U.S.C. § 546 to provide that the Attorney General is to make appointments when a vacancy occurs in the position of a U.S. Attorney, but that such appointee may only serve until either she or he (or someone else) is confirmed or the expiration of 120 days, whichever occurs first.

If the 120-day time period passes, then the district court may appoint someone as interim U.S. Attorney.

S. 214 makes itself applicable to any person serving as a U.S. Attorney on the day before enactment who was appointed under the terms of 28 U.S.C. § 546.

Constitutional and Practical Concerns

This bill, as reported, raises some mechanical and separation of powers concerns. These concerns are addressed in different ways by the Kyl amendment and the Sessions amendment (see Possible Amendments section for details).

Constitutional concerns

The primary Constitutional concern is that this bill provides that the district court would appoint Executive Branch officials who are to serve at the pleasure of the President. Article II of the Constitution, by its terms, vests the executive power in the President. There are certain instances in which that power is shared with the Legislative Branch, namely the Senate, and most notably the appointment power.[4] There are certainly no instances in which the Constitution stipulates that executive power is to be shared with the Judicial Branch.

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[3] See National Journal, "House Judiciary Votes to Limit U.S. Attorney Terms," ("That raises the prospect of Prosecutors appearing in courts run by judges who appointed them Rep. [and former California Attorney General] Dan Lungren, R-Calif. complained, possibly creating a conflict of interest … Rep. Jerold Nadler, D-NY, urged the panel to move the bill now and possibly come up with another solution after the next president is elected.")

[4] Article II of the Constitution states that the President "shall nominate, and by and with the consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States …; but Congress may by Law vest the Appointment of such inferior Officers, as they think

The name of the Act itself, the "Preserving United States Attorney Independence Act of 2007," also illustrates significant Constitutional concerns. U.S. Attorneys are not independent: the U.S. Attorney Mission Statement specifically states that U.S. Attorneys "are appointed by, and *serve at the discretion of, the President of the United States*, with advice and consent of the United States Senate."[5] These attorneys do have prosecutorial independence, which is the ability of U.S. Attorneys to choose the viability of cases for prosecution, but they assuredly are not independent of the President.[6] Even though the bill would reinstate the previous standing law, those provisions may have been Constitutionally suspect.[7]

A history of the appointments of interim Federal prosecutors shows that the practice of court involvement is long-standing, but its early entrance into the law surely made much more sense in its time than it does today. The first mention of the appointments of interim Federal prosecutors (then called district attorneys) in law occurred in 1863.[8] Note that the law was reinstated and modified in 1873,[1] 1898 and at other times before the Patriot Act reauthorization changed it to its current state. The Committee report in 1898[9] describes some of the reasons district courts and circuit courts were allowed to appoint Federal prosecutors (recall that in those times, communication with Washington was not readily available and Supreme Court Justices served as Circuit Justices when not at the Supreme Court):

> "[D]istrict attorneys are appointed for a term of four years. . . . [I]n practice it frequently occurs that the term of a district attorney or marshal expires during the active progress of a term of court. . . . [A] vacancy causes an interruption of the business of the court and often works great harm and expense to the Government as well as to litigants. . . . . [The bill] provides that vacancies in either of these offices may be filled by the district court for the district…"

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proper, in the President alone, in the Courts of Law, or in the Heads of Departments." Note that in *Edmond v. United States*, 520 U.S. 651, 117 S. Ct. 1573 (1997), the Supreme Court determined that "inferior officers" "connotes a relationship with some higher ranking officer or officers below the President … we think it evident that 'inferior officers' are officers whose work is directed and supervised at some level by others who were appointed by presidential nomination with the advice and consent of the Senate" (therefore, it can be argued that U.S. Attorneys are not "inferior officers" upon whom Congress can confer appointment authority to a court of law).

[5] http://www.usdoj.gov/usao/index.html (emphasis added).

[6] Prosecutorial discretion is essentially the power of prosecutors to independently make the important decisions in every phase of the prosecutorial process. Kenneth J. Melilli, *Prosecutorial Discretion in an Adversary System*, 1992 B.Y.U. L. Rev. 669, 671-72.

[7] Congressional Research Service, "U.S. Attorneys who have served less than full four-year terms, 1981-2006," RL33889, February 22, 2007, citing National Law Journal, "In Wake of Seven Firings, Branches Clash Over Interim U.S. Attorney Nominees," February 13, 2007.

[8] Chapter XCIII, "An Act to give greater efficiency to the Judicial System of the United States," 37th Cong., Sess. III, Ch. 92, 93 (March 3, 1863), states, "In the case of a vacancy in the office of … district attorney in any circuit, the judge of such circuit may fill such vacancy, and the person so appointed shall serve until an appointment shall be made by the President, and the appointee has duly qualified, and no longer."

[9] 55th Cong., Sess. II, House of Representatives, Report No. 1317 (to accompany S. 1726). The statute allowed Federal prosecutors to "continue to discharge the duties of their respective offices, unless sooner removed by the President, until their successors shall be appointed and qualify in their stead." Chap. 495, 55th Cong. Sess. II. (June 24, 1898).

In other words, in an earlier time when courts were not permanent institutions in each district and it was difficult to fill vacancies from Washington, Congress allowed district courts to fill a vacancy temporarily before it was filled permanently by the President. It is also worthy of note that Federal prosecutors often only took the position part of the year, maintaining a private practice on the side (as is often the case currently with town prosecutors), and were not expected to run large legal offices as they do today.

Practical concerns

The bill also raises several practical concerns. First, there would be a serious concern regarding the *appearance of impropriety* and favoritism.[10] Judicial ethics require all judges to avoid even the appearance of impropriety, and so even if judges were to make an appointment for an interim U.S. Attorney, the judge would be compelled to take extraordinary steps to avoid conflict of interest. Also, private counsel would most certainly feel compelled to object if he or she faced opposing counsel who was appointed by the judge trying the case. Second, the appointment process itself may be constrained, as U.S. District Court judges may have difficulty reviewing personnel and background security files (which are private by law) of potential appointees.

In fact, this lack of a background check has had serious repercussions in the past. In 1987, the District Court for the Southern District of West Virginia appointed an individual to the position of U.S. Attorney for the district. The court's appointee was not a DOJ-employee at the time and had not been the subject of any background investigation. The court's appointee came into the office and started making inquiries into ongoing public integrity investigations, including investigations into Charleston Mayor Michael Roark and the Governor Arch Moore, both of whom were later tried and convicted of various federal charges. The investigative files were immediately removed to Washington, D.C., and the Court appointee was subsequently replaced by a Senate-confirmed nominee in a matter of weeks.

Administration Position

A Statement of Administration Policy was not available at the time of publication. There have been media reports that the Administration will not object to the bill.[11]

Cost

The Congressional Budget Office has not issued a cost estimate on this bill.

[10] Judges are ethically bound to avoid not only impropriety, but even the *appearance* of impropriety. See, e.g., Commission on Judicial Conduct, http://www.cjc.state.wa.us/Gov_provision/code.htm, In re the Honorable Harry Slusher, CJC No 98-2776-F-83.

[11] E.g., *Washington Post*, "Gonzales Yields on Hiring Interim U.S. Attorneys," March 9, 2007, p. A1.

Possible Amendments

As noted on page 1, the unanimous consent agreement provides for only two amendments to be in order:

The Kyl amendment is expected to modify the bill by completely repealing the interim U.S. Attorney statute, thus barring either the President or district judges from appointing interim U.S. Attorneys. Any gap in the office of U.S. Attorney instead would be filled by an Acting U.S. Attorney pursuant to the Vacancies Act, which applies to all Senate-confirmed executive appointments. The Kyl amendment also would require that the President nominate a U.S. Attorney candidate within 120 days of a vacancy, and that the Senate act on the confirmation within 120 days of the nomination. Finally, the amendment provides that if the President fails to nominate a U.S. Attorney candidate in any district within that time limit, then the time limit on Senate consideration is void for all U.S. Attorney nominations for the remainder of that President's term in office.

Senator Kyl is likely to note that the need for the interim authority has largely been superseded by the Vacancies Act (5 USC 3345 et seq.), which allows another officer or employee (presumptively the most senior career Federal prosecutor in the district) to perform the functions and duties of the office in the event of a vacancy. This is the case in other parts of the Federal government: when a political appointee position is vacant, the most senior career (theoretically non-partisan) officer acts in that position until the President fills that position (e.g., Acting U.S. Attorney, Acting Assistant Secretary, Chargé at an embassy).

The Sessions amendment is expected to require that appointments of interim U.S. Attorneys made by the district court be made from a pool of Department of Justice (DOJ) employees or Federal law enforcement officers that have appropriate qualifications and security clearances. The appointee must have already been authorized to supervise the prevention, detection, investigation, or prosecution of any violation of Federal criminal law under 18 U.S.C., sec. 115. A district court would be prohibited from appointing any person as interim U.S. Attorney if he or she is the subject of an investigation or has been reprimanded by DOJ. Further, the district court would be required to inform the Attorney General of the selection seven days before the appointment is final.