S. HRG. 109–748

# CHALLENGES FACING TODAY'S FEDERAL PROSECUTORS

## HEARING

BEFORE THE

SUBCOMMITTEE ON CRIME AND DRUGS

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED NINTH CONGRESS

SECOND SESSION

SEPTEMBER 13, 2006

**Serial No. J–109–109**

Printed for the use of the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE

32–149 PDF WASHINGTON : 2007

For sale by the Superintendent of Documents, U.S. Government Printing Office
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# CHALLENGES FACING TODAY'S FEDERAL PROSECUTORS

**WEDNESDAY, SEPTEMBER 13, 2006**

UNITED STATES SENATE,
SUBCOMMITTEE ON CRIME AND DRUGS,
COMMITTEE ON THE JUDICIARY,
*Washington, D.C.*

The Subcommittee met, pursuant to notice, at 2:50 p.m., in room SD–226, Dirksen Senate Office Building, Hon. Lindsey Graham, Chairman of the Subcommittee, presiding.

Present: Senators Graham and Sessions.

## OPENING STATEMENT OF HON. LINDSEY GRAHAM, A U.S. SENATOR FROM THE STATE OF SOUTH CAROLINA

Chairman GRAHAM. The hearing will finally come to order. I apologize for being late. It has been one of those crazy days.

I appreciate your coming in and talking about a very important subject matter to me and, I think, the Senate and Congress as a whole. And without further ado, I look forward to hearing from both of you, Mr. Battle and Ms. Brooks, about what we need to be doing as a Senate and a Congress to make sure you have the tools necessary to perform very vital jobs. And without further ado, Mr. Battle?

## STATEMENT OF MICHAEL A. BATTLE, DIRECTOR, EXECUTIVE OFFICE FOR U.S. ATTORNEYS, DEPARTMENT OF JUSTICE, WASHINGTON, D.C.

Mr. BATTLE. Thank you. Good afternoon, Chairman Graham. It is indeed my honor to be here representing the outstanding men and women of the 94 United States Attorneys' Offices, and on their behalf I thank you for your continuing support of their efforts.

My office provides oversight and coordination for the 94 U.S. Attorneys' Offices, which collectively employ over 5,500 Assistant U.S. Attorneys and over 5,000 support staff. We serve as liaison between the United States Attorneys and the Attorney General, the Deputy Attorney General, the Department's litigating divisions, and other components. Additionally, the office works with the United States Attorneys" Offices to implement the President's and the Attorney General's priority initiatives, including efforts to combat terrorism, violent crime, the exploitation of children, cybercrime, drug trafficking, and other areas. Federal prosecutors play a vital role in these and other priority law enforcement programs, and the President's budget requests have sought the fund-

ing levels necessary to allow the U.S. Attorneys' Offices to meet important mission requirements.

So we appreciate the opportunity to discuss the overall budget with you and to provide more details this afternoon. As you know, Mr. Chairman, the full House and Senate Appropriations Committee recently marked up the Department's appropriations bill. The House fully funded the President's request for the United States Attorneys at $1.664 billion and the Senate Appropriations Committee proposed just $18.2 million less than that amount.

Over the past several years, the cumulative effect of permanent rescissions and rising costs, such as a cost-of-living salary increase and rising rent, have contributed to the budget difficulties now faced by United States Attorneys' offices nationwide. Specifically from fiscal year 2003 through fiscal year 2006, United States Attorneys' appropriations have been reduced by rescissions of $67.2 million and absorption of another $52.8 million in cost-of-living salary increases. These two actions alone have effectively reduced the amount available to the United States Attorneys by $120 million over a 4-year period.

Despite the fact that the amount provided by Congress has increased from year to year, those increases have not kept pace with rising costs. Once amounts for centrally managed mandatory costs such as rent, the telecommunications network, and personnel benefits are set aside, the amount remaining to allocate to the district offices has not been sufficient to meet the baseline district expenses for each of these past fiscal years, specifically the past 3 years. The declining district allocations have occurred and grown despite significant cost-saving measures because rising costs have outpaced the savings realized and the funding that has been provided.

Because of these funding limitations, a majority of United States Attorneys' Offices nationwide have had to leave vacancies unfilled. The problem caused by fixed personnel and space costs rising at a faster rate than the g has particularly deep ramifications in an organization where 72 percent of the budget is attributed to personnel costs and another 15 percent addresses rent costs. This means that 87 percent of the annual budget needs to be devoted to people and space. When other essential costs are included, such as the nationwide telecommunications network and other necessary infrastructure and critical operational costs are considered, the discretionary budget segment is actually very small. That budget segment has been insufficient to offset the effects of the permanent rescissions and absorption of cost-of-living increases. As a result, over the past 3 years a need to generate cost savings that could not otherwise be attained has increased the number of vacant full-time equivalent work years from 198 in fiscal year 2004 and 465 in fiscal year 2005 to 775 FTE projected for fiscal year 2006. Just to keep pace with rising costs during this same period, the United States Attorneys needed increases of at least 3 percent per year, in addition to enhancements. In the three most recent budget cycles, however, the average increase was 2 percent per year after rescissions, which included amounts intended for enhancements. The base budget for the United States Attorneys is eroding.

The growing amount of unfilled FTE is affecting the number of cases filed and pending in the offices of the United States Attor-

neys. Between fiscal year 2004 and fiscal year 2006, the number of criminal cases filed is projected to decrease by almost 5 percent nationwide, going from 61,443 to 58,717. The number of pending or backlog of criminal cases increased by 8,567, or 13 percent, between fiscal year 2003 and fiscal year 2005. This upward trend is expected to continue in fiscal year 2006, and also in the civil area, affirmative civil cases filed have decreased by 1,062 cases, or 12 percent, between 2003 and 2005.

These data demonstrate the effect of the base erosion of the United States Attorneys' workforce and mission.

Full support of the President's fiscal year 2007 request will serve to reverse the trend of receiving less appropriations than needed to maintain current service levels and will put an end to the recent string of rescissions and absorptions that have caused the unfilled vacancies to continue to rise. The fiscal year 2007 budget request of $1.664 billion will support 10,262 positions. It will also provide $23.3 million in enhancements, which will support 149 more positions. Now, while it will not totally offset the effect of permanent rescissions and absorptions, it will better position our organization to gain important momentum to address these gaps. It will also better position Federal prosecutors to keep pace with the substantial growth in resources that have been provided to Federal investigative agencies and the cases that they are bringing to us.

We recognize that stewardship of appropriated funds is a serious responsibility. As the Nation's principal litigators, the United States Attorneys are on the front lines to keep Americans safe. The United States Attorneys have taken many new responsibilities over the past several years, and I thank you for the opportunity to discuss this budget with you today, sir.

Thank you.

[The prepared statement of Mr. Battle appears as a submission for the record.]

Chairman GRAHAM. Before Ms. Brooks speaks, we have Senator Sessions, who is my favorite U.S. Attorney, and who was really good at what he did. I am glad he is in the Senate.

Senator Sessions?

## STATEMENT OF HON. JEFF SESSIONS, A U.S. SENATOR FROM THE STATE OF ALABAMA

Senator SESSIONS. Thank you, Senator Graham. It just turns out that I have a conflict and would not be able to be with you, because this is close to my heart, having served as Assistant United States Attorney, I guess, for 2½ years and U.S. Attorney for 12, and I care about it and was proud of the work that our office did.

But I just want to make a couple of points because, Senator Graham, when I became a United States Attorney, my office had five AUSAs, and my secretary was the administrative officer in the office, and we just all tried cases. I tried as many as any assistant. By the time I left, we had 18 assistants, supervisors, and office managers, and debt collection units, and all of this. But I assure you the taxpayers got more productivity per assistant when we first started because we produced a lot with not a lot of help.

So I guess I am just wanting to ask you to be thinking about what management decisions you can make to make sure that productivity is at its highest possible level, No. 1.

Also, one thing that has happened is we got a lot of pushback saying you are bringing too many criminal cases in Federal court, these are smaller cases, they ought to be tried in State court. Two things have happened that I think make that maybe more viable today than 20 years ago, that is, State police are usually much better, and so are State prosecutors. And they are really more able sometimes to prosecute those.

Finally, I would ask, you know, you have got—and I do not guess there is any way to really deal with this, but you have got probably an aging group there because they were hired about the time we ramped up when I was coming along in the 1980's, and we had a surging crime rate. And so a lot of people are supervisors now and things, and I am not sure they are in the courtroom. The only thing we pay them to do is put people in the slammer if they deserve it.

And so I am very sympathetic and interested in trying to help, but I am not sure that we are aggressive enough at the Department of Justice level on down in trying to really challenge ourselves to find out how good we are doing and how we can enhance the prosecutions.

I guess maybe since I have made those remarks I might let them have a quick response, Senator Graham. Mr. Battle is at EOUSA, and he is the one that everybody writes letters to asking for more assistance. I bet I wrote a bunch of letters to the EOUSA asking I had to have more of this and more of that, and we got some, I have to admit.

Mr. BATTLE. Senator, that has not changed.

[Laughter.]

Senator SESSIONS. Would you comment on the thought that in a time of tight budgets, maybe there are some steps we could take. Maybe we do not have to take as many cases as we used to that States could handle. Maybe we could be more productive in handling the caseload we have.

Mr. BATTLE. Thank you, Senator. It would seem, Senator—and I was an Assistant U.S. Attorney in the 1980's also, and I remember when fundamentally the types of cases that we did were more in the genre of white collar. And, of course, I left the Department in the early 1990's and came back a number of years later, and a lot of things had changed.

And what I came to learn was that U.S. Attorneys' Offices were being to do a lot more than they did when I was an assistant, and they were partnering more with State and locals in areas of crime that we did not deal with in the mid- to late 1980's and the early 1990's. There tended to be more of a focus on violent crime. The number of drug cases had been ramped up, and the OCDETF units had grown in size. And we have now formalized things like Project Safe Neighborhoods, Project Safe Childhoods, and it seems that Assistant U.S. Attorneys and U.S. Attorneys' Offices are actually being asked to do a lot more. And that is not because we are trying to replace the number of cases or what is being done by the State and local people. It is that the nature of the crime that is finding

its way into our communities is straining the resources of our State and locals so they are asking us for help.

There is more partnering of prosecuting cases across the board between State prosecutors and Federal prosecutors for the sole purpose of keeping people safe, and people in the community have become sophisticated in their knowledge that that partnership is, in fact, taking place.

So it seems that I do not—I can get the actual number of what the average Assistant U.S. Attorney caseload is, but that would vary from community to community, with the number of cases, complexity of cases, and the types of crime that is going on in their communities. For example, the Attorney General announced his gang initiative about a year ago, and the level of gang activity in each community looks a little bit different. In some places, you have MI6, Bloods and Crips, in others you have smaller gangs, but they are all putting strain in a different way on their communities.

So the answer to your question is AUSAs are actually being asked to do more. With the priorities that are being asked by the President and the Attorney General, our caseloads are going up. And, in addition, the complexity of cases is going up, and that is a little bit different than what maybe you or I experienced several years ago.

Senator SESSIONS. And with very few exceptions, Mr. Chairman, that crime rate has gone down. Since 1980, I think the crime rate is about half what it was. And there are a lot of reasons for it. One of them, sadly, is that we have all the people in jail. It is not true that everybody commits crimes. Only a relatively small number do, and if you identify the repeat offenders, it does help bring down the crime rate.

Well, I wish I could stay. I have an unavoidable conflict. Senator Graham, thank you for listening to these fine folks.

Ms. Brooks, it is good to see you. There is a dispute over whether being an assistant is the best job in the world or U.S. Attorney. Which do you say?

Ms. BROOKS. I did not have the privilege of being an Assistant U.S. Attorney, so I came into the Department of Justice as a United States Attorney, and I think it is the best job in the world.

Senator SESSIONS. I liked it. They paid you good money to play cops and robbers, and you always get to be the good guy.

Ms. BROOKS. It is great work, Senator.

Senator SESSIONS. Great work.

Chairman GRAHAM. I feel like I am at a family reunion here. We will try to figure out what to do here. Anything else, Senator Session?

Senator SESSIONS. No. Thank you. I have to run.

Chairman GRAHAM. All right. Ms. Brooks?

**STATEMENT OF SUSAN W. BROOKS, U.S. ATTORNEY, SOUTHERN DISTRICT OF INDIANA, DEPARTMENT OF JUSTICE, WASHINGTON, D.C.**

Ms. BROOKS. Chairman Graham, Senator Sessions, I am Susan Brooks, United States Attorney for the Southern District of Indiana. It is my honor to be here representing the United States Attorneys who are the Nation's principal litigators and who are at the

forefront of our country's efforts to fight terrorism and to fight crime. I am also the Vice-Chair of what is called the Attorney General's Advisory Committee, or AGAC, and the Chair of its Office Management and Budget Subcommittee. The AGAC is a Committee of 16 United States Attorneys and one Assistant United States Attorney, representing various Federal judicial districts of varying sizes. We meet monthly to advise the Attorney General on policies affecting the United States Attorney community. The Office Management and Budget Subcommittee provides the full AGAC with recommendations on budget issues faced in our offices.

As a representative of the United States Attorney community, I want to add my voice to the Department's leadership and strongly urge Congress to fully fund the United States Attorneys' Offices across the country at the level requested by the President. I appreciate the opportunity to discuss the impact on our individual offices from our budgets being funded below the President's recent requests. The cumulative effects of not receiving the President's budget requests, the consequences of past rescissions, and the underfunded cost-of-living adjustments and the rising costs are the underlying causes of our budget difficulties faced by United States Attorneys. As you have heard, between fiscal year 2004 and fiscal year 2006, our offices' budgets have had to be reduced between 6 percent and 16 percent, depending on the size of our district, because of funding limitations.

The largest districts—typically in our largest communities—have traditionally had higher turnover rates in those offices. They have borne the burden of larger cuts because the turnover in those offices would help to generate savings as positions have been left unfilled. In smaller offices, turnover rates are typically not sufficient to generate savings so readily. So to avoid furloughs or reductions in force at many levels, the budget strategy would help the United States Attorneys across the country to remain within funding availability without permanent personnel reductions. In other words, this approach has been buying us time to implement savings strategies so we could try to lower our operating costs and avoid continuing to burden the larger offices for the benefit of the smaller offices.

Our budget challenges were especially significant at the beginning of fiscal year 2005 and 2006. The United States Attorneys collectively resolved to generate as much savings as possible, and we have generated some fairly significant cost-saving measures, which have included: we have looked at all of our space, we have reduced the space that we have; we have reduced video and telecommunications lines; we now use far more online library services rather than hard copies; we have limited the ordering of real-time or hourly transcripts; we have limited travel; and we have limited the use of translation services.

But even so, the savings that have been generated in these areas have not been sufficient to allow us to fill any meaningful amount of unfilled positions. More and more positions have been left vacant, just to make ends meet. As you have heard from Director Battle, the United States Attorneys' budget is personnel-intensive. Nearly 72 percent of our overall budget is devoted to salary and benefits of our people. District budgets are 98 percent payroll,

mainly due to the fact that some areas in our budget, such as employee benefits, rent, and basic infrastructure, are centrally funded through EOUSA. But as you have heard, the number of vacant full-time equivalent work years, or FTE, has grown from 198 vacancies in 2004 now to a projection of up to 775 vacancies in fiscal year 2006.

As of August 2006, our overall vacancy rate for the United States Attorney community as a whole is 10.3 percent, with 17 extra-large districts experiencing an average vacancy rate of 12.89 percent, which does include 12.08 percent for attorneys and 13.7 percent for support staff. As I noted earlier, these extra-large districts have taken larger reductions over the last several years solely because of their larger turnover rates. But it does come at the price of higher vacancy rates. There is no question that filling these vacancies would allow us to do more cases than we currently are able to do.

As Chair of the Office Management and Budget Subcommittee of the AGAC, I have worked diligently with my colleagues so that we may jointly address our budget situation. Our task is straightforward yet complex. It is straightforward because we know that if additional funds are not forthcoming, we do need to continue to lower costs of doing business. It is complex because the truly discretionary part of our budget is quite small, so the focus on cost savings necessarily points then to our workforce. Working with the Executive Office for United States Attorneys over the last several years, we have used the tool of what is called Voluntary Early Retirement Authority or Voluntary Separation Incentive Payments, called VERA/VSIPs, to create opportunities to lower our average work-year costs so that we may start filling vacancies with the savings that that would generate. But transforming the average costs of a significant workforce is slow going. Most positions left by the vacancy of the VERA/VSIP tool have not been backfilled, as the savings were needed just to help to remain within our funded levels. But the incentive to generate savings and to fill as many vacancies as possible is strong. We will continue on this path and other sound business management paths, as Senator Sessions suggested, to address our budget issues responsibly.

I very much appreciate the opportunity to appear before you today because I want to tell you that we are very committed as United States Attorneys. We do take our responsibility for our budgets to manage actively and responsibly while still meeting the demands of our mission. We appreciate the efforts that Congress has already made on our behalf in years past, but we need your continued support to meet our important mission of protecting this country. I am confident that by working together, we can quickly and effectively reverse the impact of these several years of rescissions and cost-of-living pay absorptions. But the first opportunity for us to jointly address this is now, as you consider these appropriations for fiscal year 2007.

So on behalf of all the United States Attorneys on the front lines, I am asking the Senate to help us by providing the United States Attorneys with the President's full budget request of $1.664 billion in fiscal year 2007. We ask that you fund the United States Attorneys at the level requested by the President, consistent with the

House of Representatives, and help us to avoid any rescissions that would take us below that level.

Thank you for the opportunity, and I look forward to answering any questions you might have.

[The prepared statement of Ms. Brooks appears as a submission for the record.]

Chairman GRAHAM. Well, thank you both. Well done. And I appreciate Senator Sessions' showing up.

Ms. Brooks, how serious a problem is the pay cap which prohibits increasing the pay of first assistants, chiefs, and other senior AUSAs? If the President's full budget is approved for 2007, will most AUSAs not subject to the pay cap receive a cost-of-living increase?

Ms. BROOKS. The pay cap that you are referring to—I am not exactly certain which pay cap you are referring to, Senator.

Chairman GRAHAM. The one that prohibits—the pay cap which prohibits increasing the pay of first assistants, chiefs, and other senior AUSAs.

Ms. BROOKS. The pay cap issue is a very complex issue, and as we talked earlier, I really believe that it will be necessary for us to provide further information for the record at a later time on the pay cap issue.

Chairman GRAHAM. Fair enough. When it comes to securing U.S. Attorneys' Offices, Mr. Battle, do we have the money to do it where we are at with the review?

Mr. BATTLE. If you would give me a second.

Chairman GRAHAM. Sure.

[Pause.]

Mr. BATTLE. Thank you, Mr. Chairman. At the Executive Office for United States Attorneys, we have been committed to providing this overtime, particularly when you go back to—

Chairman GRAHAM. Just very quickly, briefly if you could, is there enough money to implement the security measures that we believe are necessary?

Ms. BROOKS. Senator, I am aware that in the President's request for 2007, that is one of the enhancements. Physical security is an enhancement that was requested of $1.43 million. We do have ten districts that are in need of advanced electronic security systems, and we are required to improve our identification badging systems of 0.375. So that is an enhancement that we have requested in the President's request for physical security.

Chairman GRAHAM. Thank you. What programs do we have, Mr. Battle and Ms. Brooks, to retain Assistant U.S. Attorneys? Is there anything new and novel going on there? Because these are talented people, and you have got to do it more for the money because part of it is just patriotism, but the money does matter. Could you very briefly address that?

Mr. BATTLE. Yes, Mr. Chairman. As you know, we have a world-class training facility in South Carolina, the National Advocacy Center.

Chairman GRAHAM. We do.

Mr. BATTLE. There is no better place that I have ever experienced the level of training that goes on, and my office, of course, monitors that.

Chairman GRAHAM. Amen.

Mr. BATTLE. And what I hear from Mr. Bailey, who runs it for us, is that he has to turn people away. People are breaking down the door to get in there, and I have attended a number of the trainings down there, and I can tell you, as you know, it is the finest in the country.

In addition to that, we have a very aggressive mentoring program that was just started by the—

Chairman GRAHAM. I am sorry. I meant retaining, not training. Or does it all go together?

Mr. BATTLE. We think that training goes toward retention, yes.

Chairman GRAHAM. Okay. Great.

Mr. BATTLE. Because this is what the AUSA community is asking for in order to be better prepared.

Chairman GRAHAM. Okay.

Mr. BATTLE. Because we hear from the judiciary about the kinds of things that they need.

In addition to that, we provide opportunities for annual percentage raises, all sorts of opportunities to give awards and bonuses. We have a student repayment program and things of that nature that make life as an Assistant U.S. Attorney the place where people want to be.

Chairman GRAHAM. Ms. Brooks, have you found these things to be effective?

Ms. BROOKS. They have been efficiency, and we offer a couple of other things that other workplaces might not: in the appropriate cases, flexible work options; in the appropriate situations, we do have limited retention or relocation incentives that we can offer. We think it is very, very important for us to do what we can to retain the lawyers that we do spend a lot of time training, not just the lawyers but the other staff as well.

Chairman GRAHAM. Right. Thank you both. I have no further questions. I appreciate your testimony, and it has been—I know the challenges of the U.S. Attorneys' Offices post-9/11 are huge, and we need to make sure the budgets are there to meet those challenges. Thank you both for what you do. Please pass on from myself and the Committee the appreciation that we have for the assistants and all those administrative people who keep us safe. God bless.

Mr. BATTLE. Thank you, Mr. Chairman.

Ms. BROOKS. Thank you for your support.

Chairman GRAHAM. Thank you very much.

Mr. Shockley, I am going to have to leave in about 7 minutes. I apologize. I have got something else to go to, but I do appreciate your being here. From your association's point of view, please tell us what we need to be doing.

## STATEMENT OF WILLIAM I. SHOCKLEY, FORMER PRESIDENT, NATIONAL ASSOCIATION OF ASSISTANT U.S. ATTORNEYS, LAKE RIDGE, VIRGINIA

Mr. SHOCKLEY. I am not going to say things that are a great deal different than you have already heard, Mr. Chairman. But I think that it will come from a slightly different perspective.

I am honored to be here today, and on behalf of all Assistant United States Attorneys, we thank you for holding today's hearing and for your support for Federal prosecutors. We are especially appreciative, Mr. Chairman, of your leadership as Co-Chair of the Prosecutors Caucus.

As previously discussed by Ms. Brooks and Mr. Battle, U.S. Attorneys' Offices, or USAOs, face significant financial and human resource challenges that diminish their ability to effectively carry out the mission of the Department of Justice. My 24 years as an AUSA ended earlier this year with my retirement after service in Connecticut, Florida, Washington, D.C., and California. I have come to believe that we may be approaching a time when Americans will be less safe and our system of justice less certain because of shortfalls in staff and financial resources at the district level.

USAOs have responded to staffing constraints in part by raising local prosecution guidelines so that increases in criminal caseloads will not overwhelm the staff. Such adaptive measures are not available, however, on the civil side since, when the United States is sued, a civil AUSA must defend the lawsuit. When restitution or fines are imposed, collection must be sought. Since the civil attorneys in the USAOs in total collect more dollars than it takes to run all of the offices, it is difficult to understand, at least at the conceptual level, why funding should even be an issue.

In addition to the areas previously mentioned, the budgetary restrictions have had damaging effects in other ways, for example, limiting the Government's ability to obtain and process voluminous financial records; limiting funds for routine training; and causing shortage of supplies. Legal secretaries are often assigned to as many as five attorneys, and attorneys must stay late into the night to perform their legal work since much of their workday is consumed with tasks routinely performed by legal secretaries or clerks in other law offices.

For the attorneys and support staff alike, these conditions can be demoralizing. What may be acceptable over the short term becomes debilitating over the long haul. Additionally, we are risking losing the best of our highest-performing young attorneys because we are unable to provide them with pay increases, rewarding their outstanding performance.

For these reasons, Mr. Chairman, we agree with the Department's witnesses that it is essential that the Senate approve the administration's fiscal year 2007 requested funding level for U.S. Attorneys' Offices and, additionally, that Congress adequately protect the offices' funding from budgetary rescissions.

Very quickly, let me address a second important issue. There is a real need in U.S. Attorneys' Offices to achieve cost savings in personnel while improving the retention rate of younger but highly skilled AUSAs. The Department of Justice recognized this over 15 years ago when a high-level task force recommended the same approach that today is embodied in legislation pending before the Congress. It would provide AUSAs with the same retirement benefits as those received by Federal law enforcement officers. Numerous U.S. Attorneys have informally praised the legislation, which would accelerate the departure of retirement-eligible AUSAs while helping to stem the premature departure of skilled, experienced

mid-level prosecutors. Since on average AUSAs remain with the Department for only 8 years, these early departures represent a critical loss of litigation skill and experience to the Government. Frankly, the larger United States Attorneys' Offices have, in effect, become a Government-financed training ground for the litigation divisions of large law firms.

Equally important, the costs of the legislation proposed can be satisfied by the collections reform proposals that will improve DOJ's ability to collect restitution and judgments and increase Federal revenues.

Mr. Chairman, in conclusion, the significant challenges facing Federal prosecutors are surmountable with appropriate funding at the district level. We believe that NAAUSA's legislative proposal can and ought to be a substantial part of the remedy.

Thank you, Mr. Chairman, for your leadership and support on each of these fronts.

Chairman GRAHAM. Thank you for your association's support, and we will do everything within my power to try to get the money into the budget that will allow us to defend ourselves, and you, like other law enforcement agencies, the U.S. Attorney's Office is out there on the front lines in the war on terror. These Assistant U.S. Attorneys and U.S. Attorneys literally are under threat, and I just thank you for what you do. We will try our best to make sure the budget is robust.

Thank you very much, and with that the hearing will be adjourned, and the record will remain open for 1 week, and I would like to thank Bruce Moyer and Denise Boyd for bringing this important issue to our attention and assisting in the hearings. God bless. Thank you for what you do.

Mr. SHOCKLEY. Thank you, Senator Graham.

[The prepared statement of Mr. Shockley appears as a submission for the record.]

[Whereupon, at 3:22 p.m., the Subcommittee was adjourned.]

[Questions and answers and submissions for the record follow.]

[Additional material is being retained in the Committee files.]

SUBMISSIONS FOR THE RECORD

# Department of Justice

STATEMENT

OF
MICHAEL A. BATTLE
DIRECTOR
EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS

BEFORE THE

SUBCOMMITTEE ON CRIME AND DRUGS
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

CONCERNING

"CHALLENGES FACING TODAY'S FEDERAL PROSECUTORS"

PRESENTED ON

SEPTEMBER 13, 2006

**STATEMENT**
**OF**
**MICHAEL A. BATTLE**
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**BEFORE THE**
**UNITED STATES SENATE**
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**SUBCOMMITTEE ON CRIME AND DRUGS**

**"Challenges Facing Today's Federal Prosecutors"**

**September 13, 2006**

Chairman Graham, Members of the Subcommittee, I am Michael A. Battle, the Director of the Executive Office for United States Attorneys (EOUSA). It is my honor to be here representing the outstanding men and women of the 94 United States Attorneys' Offices, and I thank you on their behalf for your continuing support of their efforts.

EOUSA provides oversight and coordination to 94 United States Attorneys' Offices, which collectively employ over 5,500 Assistant United States Attorneys and over 5,000 support staff employees. EOUSA serves as a liaison between the United States Attorneys and the Attorney General, Deputy Attorney General, the Department's litigating divisions and other components. Additionally, the office works with the United States Attorneys' Offices (USAOs) to implement the President's and the Attorney General's priority initiatives, including efforts to combat terrorism, violent crime, the exploitation of our children, cybercrime, drug trafficking, civil rights violations, corporate and public corruption. Federal prosecutors play a vital role in these and other priority law enforcement programs, and the President's budget requests have sought the funding levels necessary to allow the United States Attorneys' Offices across the country to meet important mission requirements.

We appreciate the opportunity to discuss the overall budget of the United States

Attorneys and to provide more details on the demands on United States Attorneys' Offices nationwide. As you know, the full House and the Senate Appropriations Committee recently marked up the Department's appropriations bill, and we appreciate those efforts. The House fully funded the President's request for the United States Attorneys at $1.664 billion and the Senate Appropriations Committee proposed just $18.2 million less than that amount.

As you are aware, over the past several years the cumulative effect of permanent rescissions and rising costs, such as cost-of-living salary increases and rising rent, have contributed to the budget difficulties faced by the United States Attorneys' Offices. Specifically, from FY 2003 through FY 2006, the United States Attorneys' appropriations have been reduced by rescissions of $67.2 million and absorption of another $52.8 million in cost-of-living salary increases. These two actions alone have effectively reduced the amount available to the United States Attorneys by $120 million over a four-year period.

Despite the fact that the amount provided by Congress has increased from year to year, those increases have not kept pace with rising costs. Once amounts for centrally-managed mandatory costs such as rent, the telecommunications network, and personnel benefits are set aside, the amount remaining to allocate to the district offices has not been sufficient to meet baseline district expenses for each of the past three fiscal years. The declining district allocations have occurred and grown despite significant cost-saving measures because rising costs outpaced the savings realized and funding provided.

Because of these funding limitations, a majority of United States Attorneys' Offices nationwide have left vacancies unfilled. The problem caused by fixed personnel and space costs rising at a faster rate than the budget has particularly deep ramifications in an organization where 72 percent of the budget is attributed to personnel costs and another 15 percent addresses rent costs. This means that 87 percent of the annual budget needs to be devoted to people and space.

When other essential costs are included, such as the nationwide telecommunications network and other necessary infrastructure, or critical operational costs, such as case-related travel and critical training is considered, the truly discretionary budget segment is actually very small. That budget segment has been insufficient to offset the effects of the permanent rescissions and absorption of cost of living increases. As a result, over the past three years, a need to generate cost savings that could not otherwise be attained has increased the number of vacant full-time equivalent work years (FTE) from 198 in FY 2004 and 465 in FY 2005 to 775 FTE projected in FY 2006. Just to keep pace with rising costs during this same period, the United States Attorneys needed increases of at least 3 percent per year, in addition to enhancements. In the three most recent budget cycles, however, the average increase was 2 percent per year after rescissions, which *included* amounts intended for enhancements. The base budget for the United States Attorneys is eroding.

The growing amount of unfilled FTE is affecting the number of cases filed and pending in the offices of the United States Attorneys. Between FY 2004 and FY 2006, the number of criminal cases filed is projected to decrease by almost 5 percent nationwide, going from 61,443 to 58,717. The number of pending or backlog of criminal cases increased by 8,567, or 13 percent, between FY 2003 and FY 2005. This upward trend is projected to continue in FY 2006. In the civil area, affirmative civil cases filed decreased by 1,062 cases, or 12 percent, between FY 2003 and FY 2005.

These data demonstrate the effect of the base erosion on the Unites States Attorneys' workforce and mission.

Full support of the President's FY 2007 request will reverse the recent trend of receiving less appropriations than needed to maintain current service levels, and will put an end to the recent string of rescissions and absorptions that have caused the unfilled FTE levels to rise

significantly. The FY 2007 budget request of $1.664 billion will support 10,262 positions. It will also provide $23.2 million in enhancements, which will support 149 more positions. While it will not totally offset the effect of permanent rescissions and absorptions, it will better position the organization to gain important momentum to address those gaps. It will also better position federal prosecutors to keep pace with the substantial growth in resources that have been provided to federal investigative agencies and the cases they are generating.

We recognize that stewardship of appropriated funds is a serious responsibility. As the nation's principal litigators, the United States Attorneys are on the front lines to keep Americans safe from terrorists and other violent criminals, as well as to assert and protect the interests of the United States. The United States Attorneys have taken on many new responsibilities over the past several years, and they remain committed to sound financial management to conserve funds and develop efficiencies in order to maximize the results of our efforts. We believe that our FY 2007 budget request is a responsible one that is designed to address key priorities of the Administration. Continued budget shortfalls will only accelerate the existing trend and increase the difficulties faced by United States Attorneys in carrying out their mission.

Thank you for the opportunity to discuss the United States Attorneys' budget situation and priorities with you. We appreciate your continued support of our important work and the necessary resources to carry out our mission. I look forward to answering any questions that you may have.

# Department of Justice

STATEMENT

OF

SUSAN W. BROOKS
UNITED STATES ATTORNEY
SOUTHERN DISTRICT OF INDIANA
VICE-CHAIR
THE ATTORNEY GENERAL'S ADVISORY COMMITTEE
CHAIR
OFFICE MANAGEMENT AND BUDGET SUBCOMMITTEE

BEFORE THE

SUBCOMMITTEE ON CRIME AND DRUGS
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

CONCERNING

"CHALLENGES FACING TODAY'S FEDERAL PROSECUTORS"

PRESENTED ON

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**STATEMENT**
**OF**
**SUSAN W. BROOKS**
**UNITED STATES ATTORNEY FOR THE**
**SOUTHERN DISTRICT OF INDIANA**
**BEFORE THE**
**UNITED STATES SENATE**
**COMMITTEE ON THE JUDICIARY**
**SUBCOMMITTEE ON CRIME AND DRUGS**

**"Challenges Facing Today's Federal Prosecutors"**
**September 13, 2006**

Chairman Graham, Members of the Subcommittee, I am Susan W. Brooks, United States Attorney for the Southern District of Indiana. It is my honor to be here representing the United States Attorneys who are the nation's principal litigators and who are at the forefront of our country's efforts to fight crime and prevent terrorist attacks. I am also the Vice-Chair of the Attorney General's Advisory Committee (AGAC) and Chair of its Office Management and Budget Subcommittee. The AGAC is a committee of 16 United States Attorneys and one Assistant United States Attorney, representing various federal judicial districts of varying sizes, that meets monthly to advise the Attorney General on policies affecting the United States Attorney community. The Office Management and Budget Subcommittee provides the full AGAC with recommendations on budget issues faced by United States Attorneys' Offices.

As a representative of the United States Attorney community, I want to add my voice to the Department's leadership and strongly urge Congress to fully fund the United States Attorneys' Offices across the country at the level requested by the President. I appreciate the opportunity to discuss the impact on individual United States Attorneys' Offices from their budgets being funded below the President's recent requests. The cumulative effects of not receiving the President's budget requests, the consequences of rescissions and under funded cost-of-living adjustments, and rising costs are the underlying causes of the budget difficulties faced

by the United States Attorneys. Between FY 2004 and FY 2006, United States Attorneys' Office budgets had to be reduced between 6 percent and 16 percent, depending on the size of the district, because of funding limitations.

The largest districts – which traditionally have higher turnover rates – bore the burden of larger cuts because turnover would help to generate savings as positions were left unfilled. In smaller offices, turnover rates are not sufficient to generate savings so readily. To avoid furloughs or reductions in force at many levels, this budget strategy would help the United States Attorneys across the country to remain within funding availability without permanent personnel reductions. In other words, this approach was buying us time to implement savings strategies so that we could try to lower our operating costs and avoid continuing to burden larger offices for the benefit of smaller offices.

Our budget challenges were especially significant at the beginning of FY 2005 and FY 2006. The United States Attorneys collectively resolved to generate as much savings as possible. Most notably, these cost-saving measures have included the following:

- Reducing space;
- Reducing video and telecommunications lines;
- Utilizing on-line law library services rather than hard copies;
- Limiting ordering of real time or hourly transcripts;
- Limiting travel; and
- Limiting use of translation services.

Even so, the savings generated in these areas have not been sufficient to allow us to fill any meaningful amount of the unfilled positions. More and more positions have been left vacant, just to make ends meet. As you just heard from EOUSA's director, the United States Attorneys' budget is personnel-intensive, with nearly 72 percent of the overall budget devoted to salary and benefits. District budgets are 98 percent payroll, mainly due to the fact that some

budget areas such as employee benefits, rent, and basic infrastructure are centrally funded. The number of vacant full-time equivalent work years (FTE) has grown from 198 in FY 2004, to 465 in FY 2005, to our current FY 2006 projection of 775. As of August 2006, the overall vacancy rate for the United States Attorney community as a whole was 10.93 percent, with the 17 extra-large districts experiencing an average vacancy rate of 12.89 percent— including 12.08 percent for attorneys and 13.71 percent for support staff. As I noted earlier, these extra-large districts have taken larger reductions over the last several years solely because of the larger turnover rates that are there. But that comes at a price: higher vacancy rates. There is no question that filling these vacancies would allow us to take more cases than we currently are able to do.

As the Chair of the Office Management and Budget Subcommittee of the Attorney General's Advisory Committee, I have worked diligently to engage my colleagues so that we may jointly address our budget situation. Our task is both straightforward and complex. It is straightforward in that we know that if additional funds are not forthcoming, we need to lower costs of doing business. It is complex because the truly discretionary part of our budget is very small, so the focus on cost savings necessarily points to our workforce. Working with the Executive Office for United States Attorneys, over the last several years we have used Voluntary Early Retirement Authority/Voluntary Separation Incentive Payments (VERA/VSIP) to create opportunities to lower our average work-year costs so that we may start filling vacancies with the savings that would generate. But transforming the average costs of a significant workforce is slow going. Most positions left vacant by the VERA/VSIP tool have not been backfilled, as the savings were needed just to help to remain within funded levels. But the incentive to generate savings and to fill as many vacancies as possible is strong, and we will continue on this and other sound business management paths to address our budget issues responsibly.

I very much appreciate this opportunity to appear before you today because I want to tell you how committed we, the United States Attorneys, are to taking responsibility for our budgets

and to manage actively and responsibly while meeting the demands that our important mission dictates. We appreciate the efforts that Congress has already been made on behalf of the United States Attorneys, but we need your continued support to meet our very important mission to protect our country. I am confident that by working together, we can quickly and effectively reverse the impact of rescissions and cost-of-living pay absorptions. The first opportunity for us to jointly address this is now, as you consider the appropriations for FY 2007.

On behalf of all the United States Attorneys on the front lines, I am asking that the Senate help us by providing the United States Attorneys with the President's full budget request of $1.664 billion in FY 2007. We ask that you fund the United States Attorneys at the level requested by the President, consistent with the House of Representatives, and help us to avoid any rescissions that would take us below that level.

Thank you for the opportunity to discuss our budget situation, and I would be happy to respond to any questions that you may have.

**Statement for the Record**
**Challenges Facing Today's Federal Prosecutors**
**Senator Mike DeWine**

Thank you, Chairman Graham, for helping to draw our attention to a crucial piece of the law enforcement puzzle—the prosecution of crime. Congress routinely passes laws creating new criminal offenses. Often resources are authorized for the investigation of theses crimes, whether by the DEA, FBI, ATF or US Marshal Service. However, for the past few years, between lack of appropriations, recissions, and general cost of living increases, we have neglected to ensure funds were available to the U.S. Attorneys who prosecute these crimes. This is something that must be remedied.

U.S. Attorneys Offices are often running with fewer AUSAs than they have authorized—in my own state of Ohio, the Northern and Southern Districts have needed to leave 8% of their AUSA and support staff positions unfilled, as there is not enough money to fund their salaries. For those positions which are filled, there have been no merit increases, or any increases other than mandatory step increases and a small cost of living increase for several years. This, unfortunately, is not atypical for the 94 United States Attorneys' Offices nationwide.

Because US Attorneys' Offices are running short-staffed, their ability to prosecute cases is being severely impaired. Not only are fewer cases being filed, but the number of cases pending has been increasing substantially. Recent statistics show that more criminal investigations are successful, and more perpetrators are being caught. But unless they can be prosecuted, and in a timely manner, they will be released. We must not allow this to happen

The President's FY07 budget will enable the US Attorneys Offices to fully meet their staffing requirement, and our counterparts in the House have already approved this amount--$1.664 billion. The Senate's proposed funding is close to that amount, only just $18.2 million less, and I hope that as we work towards the final figure we keep in mind the tremendous importance of the work done by our federal prosecutors, and we find enough funding to enable our US Attorneys Offices to fill all available vacancies.

Thank you.

Statement of U.S. Senator Russell D. Feingold
Subcommittee on Crime and Drugs
Hearing on "Challenges Facing Today's Federal Prosecutors"

Wednesday, September 13, 2006

It is critical that federal prosecutors around the nation have the resources they need to fulfill their important duties. As the witness testimony demonstrates, the current under-funding of U.S. Attorney Offices makes it that much more difficult for them to do what we call on them to do. More federal prosecutors are needed, and U.S. Attorney's Offices need Congress to fully fund and support their mission.

Federal prosecutors are at the forefront of combating so many of our nation's crime problems, including gang violence and drugs. And with violent crime on the rise—FBI figures indicate that nationwide, violent crime increased 2.5 percent between 2004 and 2005 and 5.7 percent in the Midwest alone—the federal prosecutor's role is more important than ever. These hard-working government lawyers also serve on the front lines of the federal homeland security effort. Yet it is increasingly clear that the current level of funding for federal prosecutors is inadequate. Congress needs to ensure these offices have the funds they need to enforce federal law and to aid state and local law enforcement agencies.

Federal funding of state and local law enforcement grant programs is also vitally important to our nation's crime fighting efforts. I have long supported important federal law enforcement grant programs like the Community Oriented Policing Services (COPS) Program. These programs not only directly help the state and local officers who are on the front lines, but also indirectly benefit federal law enforcement efforts. Federal, state, and local law enforcement must work together to effectively combat crime in communities throughout the country. To take an example from my home state, federal prosecutors in the Eastern District of Wisconsin work closely with *local* police officers to help combat drugs and gang activity. The decline in federal grants to local law enforcement makes it that much harder for federal prosecutors who often rely on those local efforts. It is time for us to step up and make sure that these vital programs are adequately funded.

# STATEMENT OF

## WILLIAM I. SHOCKLEY

## FORMER PRESIDENT
## NATIONAL ASSOCIATION OF ASSISTANT
## UNITED STATES ATTORNEYS

## CONCERNING THE CHALLENGES
## FACING FEDERAL PROSECUTORS

## BEFORE THE
## COMMITTEE ON THE JUDICIARY
## SUBCOMMITTEE ON CRIME AND DRUGS
## UNITED STATES SENATE

## SEPTEMBER 13, 2006

Mr. Chairman and Members of the Subcommittee. On behalf of the National Association of Assistant United States Attorneys (NAAUSA), thank you for holding today's hearing on the challenges facing federal prosecutors. As the nation's principal litigators, the 93 United States Attorneys and 5,600 Assistant United States Attorneys serve on the frontline of our justice system. They are integrally involved in the war on terror and ongoing efforts to fight crime and drug trafficking. Today's hearing is important because federal prosecutors regrettably face significant financial and human resource challenges that undermine their mission and success. Put simply, Americans are less safe today and our system of justice less secure because of these shortfalls in staff and financial resources.

For more than twenty-four years, from 1981 until my retirement earlier this year, I served as an Assistant United States Attorney (AUSA) in Connecticut, Florida, and California. During a portion of that same period, I also served as president of the National Association of Assistant United States Attorneys and as a member of its executive committee until I retired.[1] I am deeply proud of my service to my nation, and

[1] The National Association of Assistant United States Attorneys (NAAUSA) was founded in 1993 to protect, promote, foster and advance the mission of AUSAs and their responsibilities in promoting and preserving the Constitution of the United States, encouraging loyalty and dedication among AUSAs in support of the Department of Justice and encouraging the just enforcement of laws of the United States. NAAUSA is the "bar association" for the more than 5,600 AUSAs throughout the country and the U.S. territories. NAAUSA's nineteen-member Board of Directors is comprised of criminal and civil AUSAs from large and small offices around the country. The association's membership includes AUSAs who are acknowledged experts on immigration, terrorism, social security, health care fraud, gang and narcotics prosecutions, bankruptcy litigation, asset forfeiture and collection of debts owed to the United States. From time to time, Congress has sought the association's advice on numerous legislative

share the same profound respect for justice and the rule of law that that federal prosecutors honor. But I am concerned about the current state of affairs because of the deteriorating ability of federal prosecutors to meet their responsibilities under the Constitution and the laws of the United States.

My testimony today focuses on two central points: the absolute need to assure adequate funding to permit the Government to hire sufficient numbers of AUSAs and support personnel to satisfy both civil and criminal prosecutorial demands, and the need to collect more aggressively the billions of dollars in outstanding judgments; and second, the need for a distinctly smarter approach in human resource management in United States Attorney Offices, one that prompts cost-savings in the short-term through the departure of some retirement-eligible AUSAs, and in the long-term better retains other highly skilled, litigation-savvy AUSAs to increase the government's litigation effectiveness.

**The Role of United States Attorney's Offices**

To fully appreciate the impact of the budget and human resource challenges facing United States Attorneys and their respective offices, it is important to understand the role that these extraordinary men and women play in the nation's law enforcement system. Each United States Attorney is the chief federal law enforcement officer of the United

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proposals addressing crime, prosecutorial latitude and effectiveness and other law enforcement issues.

States within his or her particular jurisdiction. United States Attorneys conduct most of the trial work in which the United States is a party. According to the United States Attorneys Annual Statistical Report for 2005, Assistant United States Attorneys constituted 58 percent of all DOJ attorneys and 71 percent of DOJ attorneys with prosecution or litigation experience.

The United States Attorneys have three statutory responsibilities under Title 28, Section 547 of the United States Code:

- The prosecution of criminal cases brought by the Federal government;
- The prosecution and defense of civil cases in which the United States is a party; and
- The collection of debts owed the Federal government which are administratively uncollectible.

**Impact of USAO Funding and Staffing Shortfalls**

Any discussion of the budget for the US Attorney Offices should begin by acknowledging two important facts:

(1) Collection of debts by the USAOs exceeds the annual budget of all the U.S. Attorney's offices combined. In 2005, AUSAs collected over $3.5 billion, more than twice the amount of the FY 2005 appropriation of $1.526 billion.

(2) Almost 72% of the annual USAO budgets are attributed to personnel costs. The labor-intensiveness of USAO efforts means that budget recissions and reductions to

annual appropriations cannot be absorbed by program, capital, grant or contract funds, which is possible in many other federal programs.

From fiscal year 2003 to 2006, recissions and unfunded cost of living increases have reduced funds available to the USAOs by $120 million. This in turn has constrained USAOs in their ability to hire sufficient AUSAs and support staff and keep up with caseloads. Consequently the total number of vacant FTEs in the USAOs has skyrocketed from 198 in fiscal year 2004 to over 750 by this summer. Recently, the National Association of Assistant United States Attorneys was advised that there were 382 vacant AUSA positions, almost seven percent of the total 5,693 authorized AUSA positions.

Based on the information NAAUSA has received from AUSAs around the country, the impact of the budget and staffing shortages has varied from office to office. However, it is clear that the capability of many United States Attorneys to effectively carry out their responsibilities has been diminished. This in turn has undermined the effectiveness of law enforcement efforts, for example against unlawful immigration and illicit drugs, despite increases in resources to DEA, FBI and ICE in connection with their investigation and apprehension of suspects. Put simply, funding and staffing shortages in United States Attorney offices has meant that there are not enough Assistant United States Attorneys to prosecute wrongdoers, despite significant increases in federal law enforcement funding.

The impact of insufficient USAO funding is not confined to criminal prosecutions. The impact is felt on the civil side as well. In immigration matters, the FBI is frequently unable to timely perform background investigations upon aliens applying for status change in the United States, leading to mandamus actions that must be defended by the USAO when statutory time limits for processing the immigration applications have passed. This increase in cases comes on top of increasing caseloads for defense of discrimination claims, torts, Bivens actions and social security benefits appeals. Shortage of support staff, shortage of funds for essential travel and for the employment of experts for trials, and antiquated computer systems all compound the civil AUSA's endeavors.

Assistant United States Attorneys are understandably frustrated by this situation. I have attached to my testimony an appendix containing the anecdotal accounts of several Assistant United States Attorneys, explaining in their own words the challenges they face due to budget shortages. (Appendix at pp. 10-14). FBI agents, DEA agents, Border Patrol officers and others are equally disillusioned because their valuable work is not being supported by prosecutions.[2]

It is clear on the basis of these accounts that USAO funding and staffing shortages have resulted in:

(1) An increase in the thresholds in USAO declination guidelines to exclude many cases previously eligible for prosecution in a wide variety of areas, including

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[2] *See e.g.*, Losey, Steve, "When alien smugglers go free, morale suffers at Border Patrol", *Federal Times*, June 7, 2006. Retrieved on September 11, 2006 at: *http://www.federaltimes.com/index.php?S=1844234.*

immigration, drug trafficking and gang-related crimes, bank robberies and white collar crime, to name but a few.

(2) An increase in the amount of uncollected restitution due crime victims under the Mandatory Victims Restitution Act (MVRA) of 1996;

(3) Drastic restriction of funds to satisfy essential yet common litigation expenses, such as travel for witness interviews and depositions, use of expert witnesses and the costs associated with the production of financial records pursuant to grand jury proceedings, all of which hinder the chance of prosecutorial success;

(4) The transfer of some federal cases to local District Attorney's offices.

On a case-by-case basis, the impact is also pernicious. For example, in one serious health care fraud case, the targets turned over hard drives likely containing valuable evidence. However, the government's inability to fund the conversion of the hard drives to written format curtailed the Government's ability to proceed, and the investigation was terminated. In the same USAO, another health-care fraud case remains uninvestigated because the government was unable to fund the scanning of three rooms full of documents seized pursuant to a search warrant.

**AUSA Staffing: Short-Term and Long-Term Challenges**

The challenges facing federal prosecutors are not limited to funding shortcomings. There also are a range of short-term and long-term staffing problems that undermine the effectiveness of US Attorney Offices. In the past, before the recent funding shortfalls

began to occur, USAOs had sufficient funds to hire AUSAs, but did not have the authorized positions or FTEs. Now, the situation is reversed. In spite of authorized slots and many qualified applicants for each AUSA position, many USAOs simply have not received sufficient funds to fill AUSA vacancies. In addition, there is a longer-term problem: many AUSAs do not remain employed long enough – due foremost to the insufficiency of their retirement benefits -- to assure an adequate return on the government's investment in their training and litigation expertise, which causes the government's overall prosecutorial effectiveness to suffer.

Viewing the short-term problem first, budget shortfalls have prompted the Executive Office of U.S. Attorneys to reduce payroll costs by encouraging senior-level AUSAs to voluntarily retire. Replacing hundreds of senior AUSAs, whose salaries average $140,000 per year, with younger AUSAs with average annual salaries of $75,000, yields significant immediate savings to the USAO budgets. Using existing authority to offer $25,000 cash incentives to retiring AUSAs, the Executive Office of U.S. Attorneys has conducted three "buy-outs" over the past three years, and another buy-out is planned for early FY 2007. However, the buy-outs reportedly have not met DOJ's workforce reduction goals.

I, along with many other AUSAs, believe a better approach exists. Rather than continuing to rely on buy-outs to achieve savings, a more powerful financial incentive to prompt AUSA retirement is embodied in pending legislation -- "The Assistant United States Attorney Retirement Benefit Equity Act," S. 2076 – that would equitably provide

AUSAs with the same retirement benefits enjoyed by all other federal law enforcement officers. The legislation clearly would accelerate the departure of retirement-eligible AUSAs. A 2004 survey conducted by NAAUSA indicated that, if a law enforcement officer-equivalent retirement benefit were made available to AUSAs, more than 1000 senior-level AUSAs likely would retire within five years. The succession of retirement-eligible AUSAs by younger, lower-paid AUSAs would produce significant cost savings over the next several years, possibly as much as $100 million over three years.

The longer-term human resources problem faced by some United States Attorney Offices is the premature departure of skilled, experienced federal prosecutors. The average AUSA remains with DOJ for only eight years, and these early departures cause a critical loss of litigation skill and experience to the Government. The retention problem varies from district to district, and is most dramatic in higher-cost districts. In the larger offices and in the metropolitan areas, USAOs have become training grounds for the litigation divisions of private law firms, the very same law firms that utilize their trained former AUSAs in litigation against the government.

DOJ internal studies and surveys have identified the AUSA retention rate as a significant problem and the enhancement of the AUSA retirement benefit as the foremost remedy. A 1989 report of the Attorney General's Advisory Committee concluded: "Clearly, career AUSAs should be authorized to receive retirement benefits afforded all of the other members of the federal law enforcement community since the majority of AUSA responsibilities relate to the investigation, apprehension or detention of

individuals suspected or convicted of criminal laws of the United States." The original reason for the disparity between law enforcement officer and AUSA retirement benefits -- due to the status of AUSAs as political appointees -- has long been superceded by the current hiring of AUSAs under a merit-based appointment process.

Once again, "The Assistant United States Attorney Retirement Benefit Equity Act," S. 2076, would remedy the AUSA retention problem. Bringing the pension benefits of Assistant United States Attorneys into line with the retirement benefit package received by the other tens of thousands of federal law enforcement employees[3], would prompt significant numbers of younger AUSAs to remain with the Department for a career. This process would help assure the government's retention of greater numbers skilled litigators to handle increasingly complex cases.[4] Numerous United States Attorneys informally have praised the legislation. We are confident that the costs of the legislation will be offset by the collections reform proposals formulated by the National Association of Assistant United States Attorneys and will additionally improve the Department of Justice's capacity to collect restitution and civil and criminal judgments and increase federal revenues.

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[3] These include Special Agents of the FBI, Secret Service, IRS and DEA, deputy U.S. Marshals, U.S. Postal Inspectors, probation and pretrial service officers and all Bureau of Prison employees.

[4] The legislation provides to AUSAs the same retirement benefit that law enforcement officers receive: for those under FERS, a basic annuity of 34% of salary after 20 years of service at age 50; and for those under CSRS, an annuity of 50% of salary, with no social security benefits, after 20 years of service at age 50. AUSAs under FERS currently receive a basic annuity of 20% of salary after 20 years of service at age 60; those under CSRS receive an annuity of 36.25% of salary, with no social security benefits, after 20 years of service at age 60.

Mr. Chairman, thank you for your leadership and concern for the challenges facing federal prosecutors. The National Association of Assistant United States Attorneys is deeply appreciative of your efforts and pledges its continued support of to work with you and other members of the Senate to address the problems outlined in my statement.

I will be happy to answer any questions you have.

## APPENDIX

## PERSONAL OBSERVATIONS OF ASSISTANT UNITED STATES ATTORNEYS ON THE CHALLENGES AND IMPACT OF FUNDING AND STAFFING SHORTAGES*

### Witness Interviews

"The negative effect of the curtailment of case-related travel for witness interviews and preparation cannot be overstated. Pretrial interviews over the phone or just prior to trial in the hallway are not the way USAOs have done business in the past, nor how they need to do business. Personal, face-to-face on site contacts with witnesses, whom we're asking to sometimes risk their and their families' lives, are essential, both to the cases' success and to basic witness services. Moreover, being at the witness' home/workplace invariably produces chances to readily access supporting documentation, photographs, business records, emails and additional witnesses that make testimony corroborated and far more meaningful to juries. These opportunities are squandered absent reasonable travel funding."

### Southwest Border Issues – Immigration, Drugs and Indian Reservations

"The budget shortfall has devastated the USAO for the District of Arizona. We have been down as many as 14 positions within the District. This at a time when illegal immigration is at an all-time high. Last year, Border Patrol in Arizona apprehended nearly 600,000 persons entering into the United States illegally. Each of these represents a potential federal prosecution, but because of limited resources we are able to prosecute less than 1% of these cases. Thus a system has been set up to try to prioritize the most serious offenders for prosecution. During this same time the Border Patrol in Arizona has been increased by 500 agents, and yet the United States Attorney's Office in the District has actually been reduced in size by budget cuts, hiring freezes and voluntary early retirement.

The same is true with drug offenses. Given the number of offenders and the limited number of AUSAs available to prosecute these offenses, priority has been given to port of entry drug cases, CPOTS, RPOTS, pipeline cases and other large

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* These anecdotal observations are submitted without attribution by members of the National Association of Assistant United States Attorneys in their personal capacity and are not intended to represent the views of the Department of Justice.

organizations. In other instances thresholds have been enacted to control the number of cases taken federally due to the lack of prosecutorial resources. In many instances this means that cases involving hundreds of pounds of marijuana being transported into the United States have to be deferred to local prosecution.

In addition to Arizona's 374 miles of border with Mexico and the large volume of immigration and drug cases associated with the border, the USAO for the District also has exclusive jurisdiction to prosecute all major crimes off of 21 Indian Reservations within the state. In fact, over 70 percent of the land in Arizona is federal land. Thus the USAO prosecutes all murders, assaults, rapes, child sexual abuse and other offenses arising from Indian Country. As with immigration offenses, our resources in this area have been decreased as well. A previously funded position to prosecute Child Sexual Abuse cases in Indian Country was not renewed. Nevertheless, the volume of offenses arising in Indian Country continues unabated despite the reduction in resources for prosecution. The USAO in Arizona has partnered with DEA, FBI, BIA, ATF and other state and tribal law enforcement agencies to enact an initiative aimed at the arrest and prosecution of methamphetamine dealers in Indian Country within the District. This has been done despite a lack of resources because of the importance of this issue and the prevalence of drug involvement (particularly methamphetamine) in so many Indian Country offenses. The goals is to reduce violent crime by targeting meth use and sales. But all of this has been done with what little resources are available to the District. No additional funding or positions have been given to the District to help with this important endeavor."

**Victim Restitution**

"The greatest challenge of being an AUSA in charge of the Financial Litigation Unit (FLU) is the lack of resources to perform our mission. In 1996, Congress enacted the Mandatory Victims Restitution Act (MVRA) which prioritized victims' rights and ensured that restitution would be imposed in most cases, in an effort to compensate victims for their losses. Significantly, though, no additional resources were provided to the FLUs, which are responsible for the enforcement of restitution on behalf of victims. In my district, the amount of restitution due victims has increased 15 times since the MVRA, from $22 million in 1995 to nearly $350 million in 2005. The total number of collection cases carried by our FLU has doubled during the same time period, to over 1,300 cases. Yet, our FLU has the same staffing that it did 10 years ago: one AUSA, one paralegal, and two legal assistants. Moreover, our district is one of the luckier ones to have an AUSA dedicated to the FLU for more than 50% of their time. The current budget constraints further limit the resources that are available. Our entire district has cut our operating expenses to the bone, even though the FLU's collections are significantly greater than the district's operating budget. The end result is that the lack of adequate

resources hampers the FLU's mission, as well as Congress' intent with respect to victims of crime."

Another FLU Attorney Commented: "I am the Financial Litigation Unit AUSA in the Western District of Texas. I and five support staffers are responsible for collecting criminal fines and restitution imposed in more than 19,000 cases. Of course, it is impossible to work every file with such a small staff, but our pleas for additional resources have gone unheeded. Without additional personnel, there is the risk that criminals may snub their noses at their monetary obligations. It is not just the front end, but also the back end of prosecutions that needs budgetary support. "

**Interpreters**

"The challenge in South Florida is multiple language barriers. It is practically impossible to prosecute a case without incurring the cost of interpreters for interviews, hearings, depositions and trials, and translators for the documents. Our office must pay its own interpreters for out-of-court proceedings, and in civil cases, for court hearings and trials as well."

**Federal Civil Cases**

"The budget cuts have impacted criminal prosecutions, but they have also impacted government civil defense efforts. This affects not only our Bivens defense of law enforcement personnel, but also our defense of Navy physicians sued for malpractice, and other federal civil cases. I currently have a $36,000,000 civil suit for which we have no paralegal to assign. I also have a potential $27,000,000 case with no paralegal, as well as numerous other multi-million dollar suits without any paralegal assigned. I have two large cases, one a $5,000,000 wrongful death action, and the other a $6,000,000 birth injury medical malpractice lawsuit, where a part-time paralegal has been made available. We just don't have sufficient support staff to go toe-to-toe with many law firms. When I started 11 years ago it was rare to be out-gunned by all but the biggest national firms. Now even the solo practitioners have more staff support than the civil AUSAs.

Civil AUSAs <u>never</u> have case-agents assigned to civil cases. Nor do we receive any consistently reliable agency support. Our increasingly alone, "Lone Ranger" status has now reached the point where we simply cannot deliver the same high-quality representation as when we had word processing staff to work on appeals and major motions, better staff/attorney ratios to assist the AUSAs, and adequate paralegal support. The predictable result is higher payouts by the Treasury's Judgment Fund that will

probably far out-weigh the theoretical "savings" alleged to be realized in the chronic budget cuts."

**Training**

No longer is training made available to AUSAs anywhere other than at the National Advocacy Center. Here's a recent case in point: we just found out that the federal Centers for Medicare and Medicaid Services (CMS) is offering training for law enforcement on the new Medicare Part D drug benefit program. We prosecute health care fraud, and need to understand how each Medicare program works. CMS had room for two people from our office. The training was for one day in Dallas, a cheap trip. Nevertheless, our office would not pay for the travel due to budget constraints. This is training directly relevant to our mission, but we cannot go unless we want to pay for it out of our own pocket. Our auditor/investigator is willing to drive on her own nickel if our office will pay for the hotel.

**Pay Problems**

"I work in the USAO Central District of California. I have worked as an AUSA since 1991. I am deeply saddened to see the damage that the current budget shortfall is inflicting on my office. AUSAs in my district have not received raises for the last two years, and have been told that they will not get raises until at least the end of 2008. Yet, the cost of living in Los Angeles continues to rise, meaning that it becomes harder and harder to maintain a quality lifestyle on an AUSA's salary. On the one hand, an AUSA can take a job in the private sector and make $200,000 - $1,000,000 a year at a law firm in Los Angeles, have a good secretary, and have virtually unlimited supplies and support.

On the other hand, staying at the USAO means staying underpaid, struggling to pay the bills, having to share a secretary with five other attorneys, doing your own copying at midnight, and being told that there is no money to issue financial subpoenas so you cannot even properly investigate your cases..... Especially for AUSAs with children, it becomes the only sensible decision to leave government service.
Bottom line --- we are steadily losing AUSAs. The AUSAs who remain are becoming more and more overworked, with less and less reward, office moral plummets, and more people leave. I am a career prosecutor. (I worked previously for the LA District Attorney and at main DOJ). Yet, even I am considering leaving. This latest budget crisis is like the straw that broke the camel's back."

**Impact on a Small United States Attorney Office**

"This concerns a small office normally staffed with less than 30 attorneys covering a main headquarters office with multiple branch offices.

The average AUSA is very experienced and is able to more easily carry a heavy and complex caseload. In the last 3 years, the District has lost multiple AUSAs to details. On these occasions, the USA approved their details only because the USA was guaranteed a backfill for each AUSA. The district has not received authorization to take the affirmative steps necessary to hire backfills...not even temporary backfills. This has resulted in the necessity for AUSAs to travel between offices, incurring travel expenses, to handle court proceedings and pick up the general caseload responsibilities of the absent AUSAs. While assisting other offices, with no idea as to when relief will arrive, these same AUSAs are not able to devote the time and attention to their own already heavy caseloads.

The District lost one Paralegal Specialist within the last year and has not been granted authorization to fill her FTE. She was invaluable in assisting in responding to habeas petitions (ever increasing in number due to the recent opening of a federal maximum security prison in the district) as well as traveling throughout the district to assist AUSAs in criminal and civil trial preparation. AUSAs are working additional overtime nights and weekends just to respond to habeas petitions and prepare discovery materials and are not able to use, in a number of instances, the ALS equipment previously purchased for more efficient court presentations.

The District also lost a Legal Assistant within the last year and now the District has only one Legal Assistant supporting multiple attorneys in an office which maintains an exceptionally heavy docket. No authorization to hire a replacement has been received. The district must send Legal Assistants from other district locations to spend several days at one time to assist in document filing, typing, and phone duties. The hotel and mileage expense budget for the district suffers as a result and the AUSAs and the remaining Legal Assistant at the branch office are experiencing serious morale problems.

The inability to fill AUSA and support staff vacancies is critically detrimental to the overall mission of DOJ in the district. Drug and white collar crime thresholds are continually being raised and agents are expressing frustration and disappointment over our continuing inability to address certain areas of crime due to lack of resources.

The District does not have sufficient funds to even grant Administrative Pay Review increases to the AUSAs who, although working harder and longer hours than ever before, are not capped out in pay. This is very demoralizing to these AUSAs who would otherwise be receiving performance pay raises if working in the private sector.

The District has not had enough money in 3 years to hold office conferences for training, which are always extremely beneficial for promoting team spirit and comaraderie as well as for providing a forum conducive to issue discussion and training on issues unique to the District."

September 19, 2006

The Honorable Lindsey Graham
Chairman
Subcommittee on Crime and Drugs
Committee on the Judiciary
United States Senate
Washington, DC 20510

**Re: September 13 Hearing on "Challenges Facing Today's Federal Prosecutors"**

Dear Mr. Chairman:

Thank you for your invitation to testify before the Subcommittee on Crime and Drugs on September 13 in connection with your important hearing on the challenges facing today's federal prosecutors. I sincerely regret that a family medical emergency prevented me from appearing before the Subcommittee. I therefore respectfully request that this letter be included in the hearing record and trust that these comments may be of use to the Subcommittee and Congress.

As a former Assistant United States Attorney, I believe my personal history about how I became a federal prosecutor and why I ultimately left the Department is one that truly reflects the experience and attitudes of many young federal prosecutors. These are the men and women who bravely stand on the on the front line in the nation's war against terror and the never-ending battle to protect the American public from the most dangerous and serious of criminals.

My story begins when I grew up as a poor kid in a bad suburb of Philadelphia. It was the kind of suburb that in 1950s appealed to the inner city poor with the lure of an affordable home and small piece of land. But this faded in the late 70s when the middle class moved out of the city to newer, nicer suburbs. My mother worked part time cleaning people's homes in a nearby retirement village and my father was on disability from the railroad with a severe case of Parkinson's disease. My sickly father instilled in me a strong sense of always

playing by the rules, a dream of being a police officer and a love for the Philadelphia Eagles. It was my father's dream that drove me to become a prosecutor, though unfortunately he would pass away before I graduated from college. I was quite fortunate growing up that I was gifted in math and computers. These skills enabled me to attend Millersville University in Pennsylvania on a small scholarship, where I obtained a degree in computer science. After college I spent a year as a programmer. However, like all sons I longed to fulfill my father's dream for me. So, because I did not possess the physical stature to join the police, I borrowed myself up to the hilt and attended one of the only law schools I could afford, the College of William and Mary, so that I could become a prosecutor.

During law school, I was exposed to the U.S. Attorney's Office in the Eastern District of Virginia. This office had a reputation of being one of the best offices in the country and only hiring the very best. Though I was turned down to work for free as a summer law clerk there, I still dreamed of working in this office. I would call current AUSAs in the office to try to get a leg up on the competition, and once was even told, somewhat jocularly, that it takes an Act of Congress to get into EDVA. My whole life I was told repeatedly that I did not have what it took, what it took to go to college, to get into a good law school and now to be an AUSA. This was exactly the motivation I needed.

So after law school, and after being rejected by the DOJ honor's program, I went to work for nearly two years at a small law firm, before joining the Delaware Attorney General's Office. This office was the equivalent of a District Attorney's Office, where I worked my way up from bail hearings to murder cases. I spent 7 1/2 years as a Deputy Attorney General and, almost from the start, I renewed my quest to join the Justice Department. If I had to count the number of resumes I sent out to U.S. Attorney Offices, I would say it was easily in the hundreds.

In early 2000, a defense attorney named Carl Schnee was appointed U.S. Attorney in the District of Delaware. Carl liked the fact that I was tough, yet fair, as a prosecutor, and though he did not have any openings, he found me a position as an AUSA in the Middle District of Florida, working for U.S. Attorney Donna Bucella. I moved my wife and 6-month old son to Orlando and began living my dream as an Assistant U.S. Attorney, handling cybercrime cases. Two years into this job, I received a call from U.S. Attorney Paul McNulty in the Eastern District of Virginia. Paul was opening a cybercrime section and

had heard of my expertise in cybercrime prosecutions and my computer background. I was exactly what he needed. So, although I did not have the blue-chip background typically required by EDVA, I was hired. Once again, I packed my wife and by then two young boys and moved to Springfield, Virginia.

In early 2002 I began what became a three-year stint with the U.S. Attorney's Office in the Eastern District of Virginia. Here, I was privileged to work with and learn from the some of the most recognized and respected federal prosecutors in the Justice Department. Names like Justin Williams, Nash Schott, Rob Spencer, Ken Melson, Jack Hanly, Kevin DiGregory and of course, Paul McNulty. These were the go-to guys on cases like Zacharia Moussoui, Robert Hansen, Aldrich Ames, and John Walker Lindh. I can tell you my time at EDVA was everything I dreamt it would be, having the opportunity to learn from so many of the best, always making decisions based upon principles of fairness. My computer background made me an immediate hit with my co-workers, as many of their cases had some type of computer involvement. I had a deep understanding of IP addresses, the domain name system and digital forensics. Whether it was a national security case, a drug case or even a health care fraud matter, I was often called in because my technical understanding was often as deep or deeper than the agents.

I hope I am giving you the sense that I loved working at the Justice Department, because I did. I was privileged, for example, to be the lead prosecutor on a case against Gary McKinnon, a United Kingdom citizen who hacked into over 100 Department of Defense computers right after September 11, causing a million dollars in damages. At EDVA you felt like you were a part of something special -- and indeed you were.

Regrettably, in 2005 I left the U.S. Attorney's Office to take a job with a major technology company. Why did I leave the great job I loved? Primarily because of the pay and retirement benefits that the position afforded. We had our third child, a baby girl in June of 2004, giving us 3 children under the age of 5. I had moved to Springfield, Virginia in the D.C. metro area and had bought a 30-year-old home with a 40-year mortgage. Yes, people do buy houses with 40-year mortgages. Money was tight, very tight. I drove a 10-year-old Dodge Intrepid with 150,000 miles, no air conditioning, no radio and that broke down interminably. Let me tell you that sitting in bumper-to-bumper traffic on the Washington beltway every evening, with no air conditioning was not a whole lot of fun. I started teaching two nights

a week as an adjunct faculty at George Washington University. Our home had 30-year old windows and was in desperate need of renovation. I was not saving anything at all, and after moving twice on my own dime in only several years, my meager savings had dwindled to $12,000 dollars. My dream was -- and remains -- to be able to pay for my kids to attend the best college they could attend, not the only school they could afford. So, when a high-tech company came to me, needing someone to manage their investigations, I left EDVA, packed the family again and moved to the west coast.

This was a very, very hard decision for me. I flip-flopped so many times, I can't tell you. I did not want to leave the Justice Department, but every time I saw those three faces of my children, I knew I could no longer indulge myself in my dream job. I simply couldn't pay the bills. These were tough economic times at DOJ and the government, with the ongoing war against terrorism, and DOJ pay raises not keeping up with inflation, much less my growing family. I was not moving any closer towards the pay cap, I was just treading water. Trust me, I was not living extravagantly, we did not go on vacations, my in-laws bought much of our furniture and I even worked at a local health club because I could not afford the membership. Though I was almost 40 years old, I could not afford to even contribute the necessary 5% to my 401(k) in the Thrift Savings Plan, to take advantage of the government's full match. When I looked at my financial picture, all of my part time jobs and the fact that I was missing the very best years of my young kids' lives, I knew I had to take the opportunity to leave the Department and work for a corporation. The pay and small pension I was earning simply did not allow me to provide the solid financial life that I wanted for my children.

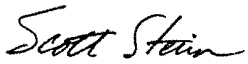
I was not looking to be rich. I just wanted for my family to be able to live a decent life, take a summer vacation, pay for most of my kids' college education, and retire with enough money to live comfortably. I do not think this was too much to ask. Frankly, the thought of an AUSA receiving a retirement benefit merely equal to what law enforcement officers already receive, along with pay raises not subject to rescissions, would have kept me at DOJ for life, I'm sure of that.

I think that if you were to look across the rank-and-file AUSAs in the Department, especially those in larger cities who have departed, you would find many like me. So many love the job, so many love the work, so many are so good, yet so many have left -- or will have to

leave shortly -- because they simply cannot pay the bills and because the current government pension for AUSAs does not provide a strong enough incentive to stay. I understand the difficult decisions you and the Congress must make when it comes to our nation's budget, but I do urge you to do what you can to keep as many AUSAs as you can. Experience matters, we need those with the knowledge and experience to prosecute those who would do us and our nation harm, and I am afraid what may happen if things do not improve.

Thank you for listening to my story and my reflections. And thank you for your leadership, your support of federal prosecutors, and your efforts to do the right thing.

Sincerely,



Scott J. Stein

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