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**This report with recommendation was received  
after the May 9 filing deadline and therefore has  
not been reviewed by the Committee on Rules  
and Calendar.**

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AMERICAN BAR ASSOCIATION

BAR ASSOCIATION OF THE DISTRICT OF COLUMBIA

REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATION

1     **RESOLVED**, that the American Bar Association shall undertake a study of, and make  
2     recommendations concerning, appropriate means by which the appointment, retention, and  
3     replacement of United States Attorneys and career government attorneys, and the exercise of  
4     their professional judgment and discretion, may be insulated from improper partisan political  
5     considerations.

## REPORT

Members of the House of Delegates, and the members of the ABA whom they represent, will have followed the Congressional hearings over the last several months on the dismissals of nine United States Attorneys, and, more generally, allegations of political interference with decision-making in the Department of Justice. There has been extensive coverage in the news media of these hearings, and related proceedings.

Whatever may be the conclusions ultimately reached by the Congressional investigators themselves, the significant professional concerns as to the administration of justice raised by these Congressional hearings should be examined from a professional, non-partisan perspective. The ABA, as the representative of our country's legal profession, is in the best position to undertake such a professional review of the issues, and to develop recommendations to safeguard against politicization of decision-making by United States Attorneys, or by career lawyers in the Department of Justice or other government departments and agencies. The ABA's Goal I is "To promote improvements in the American system of justice," and Goal II is "To achieve the highest standards of professionalism, competence, and ethical conduct." Goal III seeks "To preserve the independence of the legal profession . . ."

Without attempting to resolve the areas of controversy among witnesses at the hearings, the problems addressed there are, at all events, serious ones for the administration of justice. Eight U.S. Attorneys who had served a four-year term and then continued in office, were selected for dismissal under criteria which included -- in the e-mailed words of one of the Administration officials involved -- whether they were "loyal Bushies." For example, one of the U.S. Attorneys selected for dismissal (or non-retention) in December 2006 had won a high-

profile bribery prosecution against an incumbent Congressman a few months prior to the 2006 elections, and she was reportedly continuing to investigate corruption by other officials from the same political party as the convicted Congressman. Another U.S. Attorney stated that he was dismissed, following the November 2006 election, after he had responded in the negative to telephone inquiries shortly before the election, from his Senator and his Congresswoman, as to whether the United States Attorney was planning to bring a voter fraud indictment against supporters of the opposite political party. Still another U.S. Attorney maintained that he had been replaced, shortly before the November 2006 election, by a Justice Department attorney who was willing to bring a voter fraud case which the U.S. Attorney had declined to file because he believed it lacked merit.

One of the nine dismissed U.S. Attorneys was asked to resign in the middle of his term, apparently because an Administration official wished to give a politically-connected replacement an opportunity to serve in the job.

More disturbing is the attempt of a highly placed member of the Attorney General's staff to politicize the career staff of the Department of Justice. She testified (shortly after resigning her position) that she had "crossed the line" by inquiring into the political party affiliation of applicants for career positions at DOJ.

The Attorney General himself was subject to very critical and bipartisan questioning before the Senate Judiciary Committee by two highly respected Senators: Patrick Leahy of Vermont, Chairman of the Judiciary Committee, and Arlen Specter, ranking member and former Chairman of the Judiciary Committee. Both questioned the credibility of the Attorney General's responses, according to a detailed account of the exchanges in the *Washington Post*, July 25,

2007, pages A1 and A2 and Editorial, "Credibility Collapse" on page A14. (Senator Leahy has been particularly supportive of the ABA; coincidentally, when Senator Leahy was honored last month at the ABA Gavel Awards presentation ceremony, where Senator Leahy was the guest speaker for the ABA, he told the audience that he had just come from questioning the Attorney General, and quipped "I enjoyed it more than he did.")

The response to the Attorney General's testimony, by the leadership of the Senate Judiciary Committee, further indicates how important it is for the ABA to be heard on these issues.

The means for implementing the study recommended in this Resolution, if the Resolution is adopted by the House, would be determined by action of the Board of Governors. The Board might, for example, choose to establish a "Task Force", including representatives of ABA entities whose jurisdiction and interest encompasses aspects of the study, such as the Sections of Litigation, Criminal Justice, Administrative Law, and Individual Rights, and the Division of Government and Public Sector Attorneys. Or the Board might invite one interested Section to establish a Task Force which would seek out a broad cross-section of views -- such as the Task Force established by the Litigation Section which conducted an extensive study and formulated Recommendation Number 113 (dealing with the response of the justice system to calamities) which is pending before the House of Delegates at this Annual Meeting. The recommendations for legislation or rules, developed through whatever mechanism is chosen by the Board of Governors for implementation of the study, would then come before the House of Delegates for approval or modification.

One area in which changes might be considered by the study is in the selection process

for the President's nominees for positions as United States Attorney for the respective judicial districts. The influence of partisan political considerations in the selection process might be reduced, and the emphasis on professional qualifications enhanced, by providing for appointment of a Commission in each district, comprised of respected lawyers and lay leaders, to submit several names of prospective nominees to the President for his consideration. This would resemble the process used for Presidential appointments of judges to the District of Columbia's local courts. There, three names of recommended nominees for each vacancy which arises are submitted to the President by a Commission, including representatives chosen by the District of Columbia Bar, the Mayor, the Council, the President, and the United States District Court. Although the President is free to reject all three names and call for additional names to be submitted, so far this has not occurred during the 35 years that the Commission nomination system has been in effect. A similar "merits" commission arrangement for selecting and submitting several names of prospective nominees for various Federal judicial circuits, was employed during the Carter Administration.

Another reform that a Task Force study might consider, is a requirement that members of the House and Senate publicly disclose all contacts which they initiate with the United States Attorney from their jurisdiction, concerning any pending case or matter, or recommending any action to institute an investigation or prosecution. Such transparency would likely deter the type of contacts which were disclosed in the recent Senate Judiciary Committee hearings. Another area for consideration would be the adoption of stronger sanctions to deter hiring practices which "cross the line" against consideration of political affiliation in the hiring of career government attorneys.

The issues that have come before the House and Senate Judiciary Committees, arising from the dismissals of United States Attorneys, are by no means new, or limited to any one Administration. The Carter Administration, for example, at its very outset, became embroiled in a high-profile controversy over its attempt to replace a United States Attorney from Philadelphia who had been appointed during the previous Administration, and who publicly asserted that his removal from office would interfere with an on-going investigation.

The importance to the profession and the public of averting the risk of politicization in the administration of justice, and of precluding partisan considerations in the exercise by government attorneys of their professional judgment and discretion, warrants action by the American Bar Association to study this problem and to develop appropriate protective rules and legislation. Such measures should protect both United States Attorneys, appointed by the President and confirmed by the Senate, and career government attorneys in the civil service of their country.

The Bar Association of the District of Columbia urges the ABA House of Delegates to support this Recommendation for an ABA study.

Respectfully submitted,

The Bar Association of the District of Columbia  
by Robert L. Weinberg, BADC Delegate  
August 2007

GENERAL INFORMATION FORM

1. Brief summary of recommendation  
That the ABA undertake a study, and make recommendations, concerning appropriate means to insulate United States Attorneys, and career government attorneys, from being subjected to partisan political considerations in the exercise of their independent professional judgment and discretion.
2. Approval by submitting entity  
Approved by vote of the Board of Directors of the Bar Association of the District of Columbia in July, 2007.
3. Previously submitted to House of Delegates?  
No.
4. What existing Association policies are relevant to this recommendation?  

ABA Goal I.	To promote improvements in the American system of justice.
ABA Goal V.	To achieve the highest standards of professionalism, competence and ethical conduct.
ABA Goal XI.	To preserve the independence of the legal profession and the judiciary as fundamental to a free society
Resolution 5/67	supporting enhancement of professional status of lawyers in government.
5. Explain what urgency exists requiring action at this meeting.  
Ongoing hearings of the Senate and House Judiciary Committees are likely to generate legislative proposals in this session of the Congress.
6. Cost to the Association  
Such amount as the Board of Governors may budget for implementation of the proposed study, through a task force or other appropriate entity, if the Recommendation is adopted by the House of Delegates.
7. Conflicts of interest  
None
8. Referrals  
The Bar Association of D.C. will endeavor to circulate the proposal in advance of the Annual Meeting to the Division of Government and Public Sector Attorneys, and to Sections of Litigation, Criminal Law, Administrative Law, and Individual Rights.
9. Contact Person (prior to meeting)  
Robert L. Weinberg, Esq., 5171 N. 37<sup>th</sup> Road, Arlington, VA 22207-1825,  
phone (703) 534-3919, fax (703) 241-7504, e-mail [bob.weinberg@aya.yale.edu](mailto:bob.weinberg@aya.yale.edu)
10. Contact person/presenter (at the Annual Meeting)  
Same as no. 9.

## EXECUTIVE SUMMARY

## 1. Summary of the Recommendation

That the ABA undertake a study, and make recommendations, concerning appropriate means to insulate United States Attorneys, and career government attorneys, from being subjected to partisan political considerations in the exercise of their independent professional judgment and discretion.

## 2. Summary of the Issue That the Recommendation Addresses

Concerns as to possible politicization in the administration of justice in federal criminal and civil matters, as expressed by the Chairman of the Senate Judiciary Committee, Senator Leahy, and the ranking member, Senator Spector, and by other members of the Congress, at recent Congressional hearings concerning dismissals of United States Attorneys and related matters.

## 3. Please Explain How the Proposed Policy Position Will Address the Issue

The ABA is in a position to carry out a needed professional, non-partisan inquiry concerning these significant issues of professional and public concern, and to formulate recommendations to protect the independent exercise of professional judgment and discretion by attorneys for the United States.

## 4. Summary of Minority Views

The proponent is not aware of any minority views within the ABA with respect to the appropriateness of such a study.