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House Calendar No. 145

110TH CONGRESS
1st Session

HOUSE OF REPRESENTATIVES

REPORT
110–423

RESOLUTION RECOMMENDING THAT THE HOUSE OF REPRESENTATIVES FIND HARRIET MIERS AND JOSHUA BOLTEN, CHIEF OF STAFF, WHITE HOUSE, IN CONTEMPT OF CONGRESS FOR REFUSAL TO COMPLY WITH SUBPOENAS DULY ISSUED BY THE COMMITTEE ON THE JUDICIARY

R E P O R T

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

together with

ADDITIONAL VIEWS AND MINORITY VIEWS

NOVEMBER 5, 2007.—Referred to the House Calendar and ordered to be printed

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NOVEMBER 5, 2007.—Referred to the House Calendar and ordered to be printed

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

R E P O R T

together with

ADDITIONAL VIEWS AND MINORITY VIEWS

[Including Committee Cost Estimate]

The Committee on the Judiciary, having considered this Report, reports favorably thereon and recommends that the Report be approved.

The form of Resolution that the Committee on the Judiciary would recommend to the House of Representatives for citing former White House Counsel Harriet Miers and White House Chief of Staff Joshua Bolten for contempt of Congress pursuant to this Report is as follows:

Resolved, That pursuant to 2 U.S.C. §§ 192 and 194, the Speaker of the House of Representatives shall certify the report of the Committee on the Judiciary, detailing the refusal of former White House Counsel Harriet Miers to appear before the Subcommittee on Commercial and Administrative Law of the Committee on the Judiciary as directed by subpoena, to the United States Attorney for the District of Columbia, to the end that Ms. Miers be proceeded against in the manner and form provided by law; and be it further

Resolved, That pursuant to 2 U.S.C. §§ 192 and 194, the Speaker of the House of Representatives shall certify the report of the Committee on the Judiciary, detailing the refusal of former White House Counsel Harriet Miers to testify before the Subcommittee on Commercial and Administrative Law of the Committee on the Judiciary as directed by subpoena, to the United States Attorney for

the District of Columbia, to the end that Ms. Miers be proceeded against in the manner and form provided by law; and be it further

Resolved, That pursuant to 2 U.S.C. §§ 192 and 194, the Speaker of the House of Representatives shall certify the report of the Committee on the Judiciary, detailing the refusal of former White House Counsel Harriet Miers to produce documents to the Subcommittee on Commercial and Administrative Law of the Committee on the Judiciary as directed by subpoena, to the United States Attorney for the District of Columbia, to the end that Ms. Miers be proceeded against in the manner and form provided by law; and be it further

Resolved, That pursuant to 2 U.S.C. §§ 192 and 194, the Speaker of the House of Representatives shall certify the report of the Committee on the Judiciary, detailing the refusal of White House Chief of Staff Joshua Bolten to produce documents to the Committee on the Judiciary as directed by subpoena, to the United States Attorney for the District of Columbia, to the end that Mr. Bolten be proceeded against in the manner and form provided by law.

BACKGROUND AND EXPLANATION

BACKGROUND OF COMMITTEE INVESTIGATION AND REQUESTS FOR INFORMATION FROM THE WHITE HOUSE AND HARRIET MIERS

A. House Judiciary Committee Hearings

Beginning in March 2007, the House Judiciary Committee and its Subcommittee on Commercial and Administrative Law have held a number of hearings on the U.S. Attorney terminations and related issues. These have included:

U.S. Attorneys & William Moschella. On March 6, 2007, six of the terminated U.S. Attorneys[1] and William E. Moschella, Principal Associate Deputy Attorney General, U.S. Department of Justice, among others, testified before the Subcommittee.[2] At this hearing (and in private briefings on February 28 and March 5 to Subcommittee members and staff that preceded it), Mr. Moschella testified, *inter alia,* as to the Justice Department's then-claimed reasons for firing these U.S. Attorneys. The terminated U.S. Attorneys testified, *inter alia,* that they had not been given reasons for their firing and, among other matters, responded to some of the Department's asserted reasons for their firing, and discussed political and other factors that may have been related to their firing.

Ensuring Executive Branch Accountability. On March 29, 2007, the Subcommittee heard testimony about the validity of White House assertions concerning executive privilege in the U.S. Attorney controversy.[3] Beth Nolan, former White House Counsel under

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[1] *H.R. 580, Restoring Checks and Balances in the Confirmation Process of U.S. Attorneys: Hearing Before the Subcomm. on Commercial and Admin. Law of the H. Comm. on the Judiciary,* 110th Cong. (2007) (prepared statement of Carol C. Lam *et al.*). The six former U.S. Attorneys who testified were Ms. Lam, Mr. Iglesias, Mr. Cummins, Mr. McKay, Mr. Bogden and Mr. Charlton.

[2] The other witnesses included the following: Representative Darrell Issa (R–CA); former Representative Asa Hutchinson (R–AR); John A. Smietanka, a former United States Attorney for the Western District of Michigan; George Terwilliger, former Deputy Attorney General of the U.S. Department of Justice; T.J. Halstead, Legislative Attorney, American Law Division, Congressional Research Service; and Atlee W. Wampler, III, President of the National Association of Former United States Attorneys.

[3] *Ensuring Executive Branch Accountability: Hearing Before the Subcomm. on Commercial and Admin. Law of the H. Comm. on the Judiciary,* 110th Cong. (2007). The witnesses at the hearing included John Podesta, former White House Chief of Staff to President Bill Clinton; Beth Nolan,

President Clinton, indicated that she testified four times before congressional Committees on matters directly related to her White House duties, including three times while she was serving in that position.[4]

James Comey. On May 3, 2007, former Deputy Attorney General James Comey testified before the Subcommittee.[5]

Alberto Gonzales. On May 10, 2007, Attorney General Gonzales appeared before the full Judiciary Committee for an oversight hearing that focused on the U.S. Attorneys controversy.[6]

Monica Goodling. After a grant of limited use immunity, Monica Goodling, former Senior Counsel to Attorney General Alberto Gonzales and the Department's White House Liaison, appeared before the full Committee on May 23, 2007.[7]

Paul McNulty. On June 21, 2007, Deputy Attorney General Paul McNulty testified before the Subcommittee.[8]

Harriet Miers. Former White House Counsel Harriet Miers refused to comply with a subpoena requiring her appearance before the Subcommittee on July 12, 2007.[9] Ms. Miers not only failed to provide testimony or documents, but she also failed even to appear for the hearing. Subcommittee Chair Sánchez proceeded to overrule Ms. Miers' claims of immunity and privilege and her ruling was sustained by Subcommittee members in a recorded vote of 7–5.[10]

B. Justice Department Documents and Staff Interviews

On March 8, 2007, Chairman Conyers and Subcomittee Chair Sánchez wrote to the Attorney General requesting documents and interviews with Department of Justice personnel concerning the U.S. Attorney matter.[11] Pursuant to that request, the Committee has received and reviewed thousands of pages of Justice Department documents. Many documents were initially produced only in redacted form, with Committee staff being granted a limited right to review the unredacted documents on Department premises. Additional Committee efforts to obtain additional documents voluntarily, including letters of March 22, March 28, and April 2, 2007, were not successful.[12] On April 10, 2007, the Committee issued a

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former White House Counsel to President Bill Clinton; Frederick A.O. Schwarz, Jr., Senior Counsel, Brennan Center for Justice; and Noel J. Francisco, former Associate Counsel to President George W. Bush.

[4] *Id.* (testimony of Beth Nolan, former White House Counsel to President Bill Clinton).

[5] *The Continuing Investigation into the U.S. Attorneys Controversy: Hearing Before the Subcomm. on Commercial and Admin. Law of the H. Comm. on the Judiciary,* 110th Cong. (2007) (testimony of James Comey, former Deputy Attorney General).

[6] *Oversight Hearing on the United States Department of Justice: Before the H. Comm. on the Judiciary,* 110th Cong. (2007) (testimony of Attorney General Alberto Gonzales).

[7] *The Continuing Investigation into the U.S. Attorneys Controversy and Related Matters: Hearing Before the H. Comm. on the Judiciary,* 110th Cong. (2007) (testimony of Monica Goodling, former Senior Counsel to Attorney General Alberto Gonzales and White House Liaison, U.S. Department of Justice).

[8] *The Continuing Investigation into the U.S. Attorneys Controversy and Related Matters: Hearing Before the Subcomm. on Commercial and Admin. Law of the H. Comm. on the Judiciary,* 110th Cong. (2007) (testimony of Paul McNulty, Deputy Attorney General).

[9] *The Continuing Investigation into the U.S. Attorneys Controversy and Related Matters: Hearing Before the Subcomm. on Commercial and Admin. Law of the H. Comm. on the Judiciary,* 110th Cong. (2007).

[10] *Id.*

[11] Letter from John Conyers, Jr., Chairman, H. Comm. on the Judiciary, and Linda Sánchez, Chair, Subcomm. on Commercial and Admin. Law, to Alberto Gonzales, Att'y Gen. of the United States (Mar. 8, 2007) (on file with the H. Comm. on the Judiciary).

[12] Letter from John Conyers, Jr., Chairman, H. Comm. on the Judiciary, and Linda Sánchez, Chair, Subcomm. on Commercial and Admin. Law, to Alberto Gonzales, Att'y Gen. of the United States (Mar. 22, 2007) (on file with the H. Comm. on the Judiciary); Letter from John Conyers,

Continued

subpoena to the Department for full production of all relevant documents in unredacted form. Negotiations to secure full compliance with the subpoena are continuing. A large number of additional documents have been produced as a result, and Committee staff expect a limited number of additional documents to be produced by the Department.

In addition to the initial Committee requests, Chairman Conyers, Subcommittee Chair Sánchez, Representative Zoe Lofgren, and Representative Keith Ellison have sent further requests for information pertinent to the U.S. Attorney controversies in Missouri[13] and Minnesota[14]. On July 17, 2007, Chairman Conyers, Subcommittee Chair Sánchez, Representative Artur Davis, and Representative Tammy Baldwin requested documents and information about several prominent prosecutions and convictions of Democratic officials or operatives in various parts of the country, in light of extensive allegations of selective, politically influenced prosecutions.[15] In addition, Majority and Minority staff from both the House and Senate Judiciary Committees have so far jointly conducted on-the-record interviews of twelve current and former Department of Justice officials.[16]

C. Requests for Information from the White House and Subpoenas Issued to Joshua Bolten and Harriet Miers

On March 21, 2007, the Subcommittee on Commercial and Administrative Law authorized Chairman Conyers to issue subpoenas to J. Scott Jennings, Special Assistant to the President, Office of Political Affairs; William Kelley, Deputy White House Counsel; Harriet Miers, former White House Counsel; Karl Rove, Deputy Chief of Staff and Senior Advisor to the President; Joshua Bolten, White House Chief of Staff; and Fred Fielding, White House Counsel, to obtain testimony and documents.[17] Both before and after March 21, letters were exchanged between the Committee and the White House to seek to resolve voluntarily the Committee's requests for information from the White House, but those efforts

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Jr., Chairman, H. Comm. on the Judiciary, and Linda Sánchez, Chair, Subcomm. on Commercial and Admin. Law, to Alberto Gonzales, Att'y Gen. of the United States (Mar. 28, 2007) (on file with the H. Comm. on the Judiciary); and Letter from John Conyers, Jr., Chairman, H. Comm. on the Judiciary, to Richard Hertling, Acting Assistant Att'y Gen., Office of Legislative Affairs, U.S. Department of Justice (Apr. 2, 2007) (on file with the H. Comm. on the Judiciary).

[13] Letter from John Conyers, Jr., Chairman, H. Comm. on the Judiciary, Linda Sánchez, Chair, Subcommittee on Commercial and Admin. Law, and Zoe Lofgren, Chair, Subcomm. on Immigration, Citizenship, Refugees, Border Security, and International Law, to Alberto Gonzales, Att'y Gen. of the United States (May 15, 2007) (on file with the H. Comm. on the Judiciary).

[14] Letter from John Conyers, Jr., Chairman, H. Comm. on the Judiciary, and Keith Ellison, Member, H. Comm. on the Judiciary, to Alberto Gonzales, Att'y Gen. of the United States (May 8, 2007) (on file with the H. Comm. on the Judiciary).

[15] Letter from John Conyers, Jr., Chair, H. Comm. on the Judiciary, Linda Sánchez, Chair, Subcomm. on Commercial and Admin. Law, Artur Davis, Member, Comm. on the Judiciary, and Tammy Baldwin, Member, Comm. on the Judiciary, to Alberto Gonzales, Att'y Gen. of the United States (July 17, 2007) (on file with the H. Comm. on the Judiciary).

[16] The Committee is also seeking to obtain documents from the Republican National Committee in this matter, consisting of e-mails on RNC servers sent by White House officials using RNC e-mail accounts, pursuant to a request on April 12, 2007, and a subpoena issued on July 13, 2007. *See* Memorandum from Subcommittee Chair Sánchez to Members of Subcomm. on Commercial and Admin. Law Re. Meeting to Consider the Issuing of a Subpoena to the Republican National Committee (July 11, 2007) (on file with the H. Comm. on the Judiciary).

[17] *Meeting to Consider Subpoena Authorization Concerning the Recent Termination of United States Attorneys and Related Subjects Before the Subcomm. on Commercial and Admin. Law of the H. Comm. on the Judiciary,* 110th Cong. (2007). In addition, the Subcommittee authorized Chairman Conyers to issue a subpoena for D. Kyle Sampson, former Chief of Staff to the Attorney General. Mr. Sampson has thus far voluntarily cooperated with the Committee's investigation.

were not successful. Committee letters (some of which were sent by Chairman Conyers and Senate Judiciary Committee Chairman Leahy) included letters of March 9, March 22, March 28, and May 21, 2007.[18]

On June 13, 2007, Chairman Conyers and Senate Judiciary Committee Chairman Patrick Leahy issued subpoenas to Joshua Bolten, White House Chief of Staff, or appropriate custodian, for relevant White House documents. The subpoenas were returnable on June 28, 2007. On June 13, the Chairmen also issued subpoenas to two former White House staffers: White House Counsel Harriet Miers was subpoenaed by Chairman Conyers for testimony and to produce documents before the Subcommittee on July 12, 2007, and White House Political Director Sara Taylor was subpoenaed by Chairman Leahy for testimony and to produce documents before the Senate Judiciary Committee on July 11, 2007.

On June 28, 2007, White House Counsel Fred Fielding wrote that the White House would refuse to produce any documents pursuant to the subpoena issued to Mr. Bolten based on executive privilege.[19] Chairman Conyers and Chairman Leahy requested that the White House provide a privilege log to set forth the factual and legal basis for any claims of privilege as to each document being withheld, as well as a signed statement by the President asserting any privilege by July 9, 2007.[20] In a letter dated July 9, 2007, Mr. Fielding declined.[21]

On July 9, Ms. Miers' counsel wrote to Chairman Conyers and Ranking Minority Member Smith stating that pursuant to letters received from Mr. Fielding, Ms. Miers intended not to produce any documents in her possession and not to provide testimony, as Mr. Fielding stated, concerning "White House consideration, deliberations, or communications, whether internal or external, relating to the possible dismissal or appointment of United States Attorneys."[22] Chairman Conyers and Subcommittee Chair Sánchez wrote letters to counsel for Harriet Miers reiterating their understanding that Ms. Miers was required to appear before the Subcommittee as provided in the subpoena. On July 10, Ms. Miers' counsel wrote that pursuant to another letter from Mr. Fielding,

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[18] Letter from John Conyers, Jr., Chairman, H. Comm. on the Judiciary, and Linda Sánchez, Chair, Subcomm. on Commercial and Admin. Law, to Fred Fielding, Counsel to the President (Mar. 9, 2007); Letter from John Conyers, Jr., Chairman, H. Comm. on the Judiciary, and Linda Sánchez, Chair, Subcomm. on Commercial and Admin. Law, to Fred Fielding, Counsel to the President (Mar. 22, 2007); Letter from John Conyers, Jr., Chairman, H. Comm. on the Judiciary, and Patrick Leahy, Chairman, S. Comm. on the Judiciary, to Fred Fielding, Counsel to the President (Mar. 28, 2007); and Letter from John Conyers, Jr., Chairman, H. Comm. on the Judiciary, and Linda Sánchez, Chair, Subcomm. on Commercial and Admin. Law, to Fred Fielding, Counsel to the President (May 21, 2007). All of these letters are on file with the House Committee on the Judiciary.

[19] Letter from Fred Fielding, Counsel to the President, to John Conyers, Jr., Chairman, H. Comm. on the Judiciary, and Patrick Leahy, Chairman, S. Comm. on the Judiciary (June 28, 2007) (on file with the H. Comm. on the Judiciary).

[20] Letter from John Conyers, Jr., Chairman, H. Comm. on the Judiciary, and Patrick Leahy, Chairman, S. Comm. on the Judiciary, to Fred Fielding, Counsel to the President (June 29, 2007) (on file with the H. Comm. on the Judiciary).

[21] Letter from Fred Fielding, Counsel to the President, to John Conyers, Jr., Chairman, H. Comm. on the Judiciary, and Patrick Leahy, Chairman, S. Comm. on the Judiciary (July 9, 2007) (on file with the H. Comm. on the Judiciary).

[22] Letter from Fred Fielding, Counsel to the President, to George Manning, Attorney for Harriet Miers (July 9, 2007), quoted in and enclosed with Letter from George Manning to John Conyers, Jr., Chairman, H. Comm. on the Judiciary, and Lamar Smith, Ranking Member, H. Comm. on the Judiciary (July 9, 2007) (on file with the H. Comm. on the Judiciary). Mr. Manning's July 9 letter also enclosed a June 28 letter from Mr. Fielding indicating that documents in Ms. Miers' possession should not be produced.

Ms. Miers would not appear at the hearing at all, based on a claim of absolute immunity raised by Mr. Fielding.[23] In fact, she failed to appear, notwithstanding a July 11 letter from Chairman Conyers and Subcommittee Chair Sánchez urging that she appear, explaining that specific assertions of privilege would be considered at the hearing, and warning of the possibility of contempt,[24] and despite the fact that Sara Taylor had appeared before the Senate Judiciary Committee in compliance with her subpoena the day before.

On July 12, the Subcommittee met as scheduled. At that meeting, when Ms. Miers failed to appear, Subcommittee Chair Sánchez issued a ruling that rejected Ms. Miers' privilege and immunity claims, and the Subcommittee, by a vote of 7 to 5, sustained that ruling.[25] The ruling specifically covered Ms. Miers' refusal to appear at all (as now reflected in the first count of the Resolution), her refusal to testify (as now reflected in the second count of the Resolution), and her refusal to produce documents (as now reflected in the third count of the Resolution), as required by the subpoena issued to her. Chairman Conyers and Subcommittee Chair Sánchez sent Ms. Miers' counsel a letter enclosing a copy of the ruling, and again urging compliance and warning of the possibility of contempt.[26] On July 17, 2007, Ms. Miers' counsel reiterated his client's refusal to comply.[27]

On July 17, 2007, Chairman Conyers and Subcommittee Chair Sánchez wrote to Mr. Fielding, notified him that the Subcommittee would formally consider the White House's privilege claims with regard to White House documents at a July 19, 2007 meeting, and again urged compliance with the June 13 subpoena.[28] Notwithstanding that letter, Mr. Bolten still did not comply with his subpoena. The Subcommittee met on July 19, Subcommittee Chair Sánchez ruled against the privilege claims with respect to Mr. Bolten's refusal to produce any documents pursuant to the subpoena issued to him (as now reflected in the fourth count of the Resolution), and that ruling was upheld by a 7–3 vote.[29] Chairman Conyers wrote to Mr. Fielding on July 19 enclosing a copy of the ruling, urging compliance, warning again of the possibility of contempt, and stating that the Committee would assume that Mr. Bolten would not comply unless Mr. Fielding notified him otherwise by the morning of Monday, July 23, 2007.[30] On July 23, Mr.

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[23] Letter from George Manning, Attorney for Harriet Miers, to John Conyers, Jr., Chairman, H. Comm. on the Judiciary and Linda Sánchez, Chair, Subcomm. on Commercial and Admin. Law (July 10, 2007) (on file with the H. Comm. on the Judiciary).

[24] Letter from John Conyers, Jr., Chairman, H. Comm. on the Judiciary, and Linda Sánchez, Chair, Subcomm. on Commercial and Admin. Law (July 11, 2007) (on file with the H. Comm. on the Judiciary).

[25] *The Continuing Investigation Into the U.S. Attorneys Controversy and Related Matters: Hearing Before the Subcomm. on Commercial and Admin. Law of the H. Comm. on the Judiciary,* 110th Cong. (2007).

[26] Letter from John Conyers, Jr., Chairman, H. Comm. on the Judiciary, to George Manning, Attorney for Harriet Miers, (July 13, 2007) (on file with the H. Comm. on the Judiciary).

[27] Letter from George Manning, Attorney for Harriet Miers, to John Conyers, Jr., Chairman, H. Comm. on the Judiciary (July 17, 2007) (on file with the H. Comm. on the Judiciary).

[28] Letter from John Conyers, Jr., Chairman, H. Comm. on the Judiciary, and Linda Sánchez, Chair, Subcomm. on Commercial and Admin. Law, to Fred Fielding, White House Counsel (July 17, 2007) (on file with the H. Comm. on the Judiciary).

[29] *The Continuing Investigation Into the U.S. Attorneys Controversy and Related Matters: Hearing Before the Subcomm. on Commercial and Admin. Law of the H. Comm. on the Judiciary,* 110th Cong. (2007).

[30] Letter from John Conyers, Jr., Chairman, H. Comm. on the Judiciary, to Fred Fielding, Counsel to the President (July 19, 2007) (on file with the H. Comm. on the Judiciary).

Fielding wrote Chairman Conyers and stated that the White House position remained unchanged.[31]

II. AUTHORITY AND LEGISLATIVE PURPOSE

The Committee on the Judiciary is a standing Committee of the House of Representatives, duly established pursuant to the Rules of the House of Representatives, which are adopted pursuant to the Rulemaking Clause of the Constitution.[32] House Rule X grants to the Committee legislative and oversight jurisdiction over, *inter alia,* "judicial proceedings, civil and criminal," and "criminal law enforcement"; the "application, administration, execution, and effectiveness of laws and programs addressing subjects within its jurisdiction"; the "operation of Federal agencies and entities having responsibilities for the administration and execution of laws and programs addressing subjects within its jurisdiction"; and "any conditions or circumstances that may indicate the necessity or desirability of enacting new or additional legislation addressing subjects within its jurisdiction."[33]

House Rule XI specifically authorizes the Committee and its subcommittees to "require, by subpoena or otherwise, the attendance and testimony of such witnesses and the production of such books, records, correspondence, memoranda, papers, and documents as it considers necessary."[34] The Rule also provides that the "power to authorize and issue subpoenas" may be delegated to the Committee chairman.[35] The subpoenas discussed in this report were issued pursuant to this authority.

The investigation into the U.S. Attorney matter and related concerns is being undertaken pursuant to the authority delegated to the Committee under rule X as described above.

The legislative purposes of this investigation fall into two categories: (1) investigating and exposing any possible malfeasance, abuse of authority, or violation of existing law on the part of the Executive Branch related to these concerns, and (2) considering whether the conduct uncovered may warrant additions or modifications to existing Federal law, such as more clearly prohibiting the kinds of improper political interference with prosecutorial decisions as have been alleged here.

HEARINGS

In its investigation into U.S. Attorney terminations and related matters, the Committee's Subcommittee on Commercial and Administrative Law held 5 days of hearings, on March 6, March 29, May 3, June 21, and July 12, 2007. In addition, the full Committee held 2 days of hearings, on May 10 and May 23, 2007. More discussion of these hearings is contained in the background section of this Report.

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[31] Letter from Fred Fielding, Counsel to the President, to John Conyers, Jr., Chairman, H. Comm. on the Judiciary (July 23, 2007) (on file with the H. Comm. on the Judiciary).

[32] U.S. Const., art. I, § 5, cl. 2.

[33] House Rule X(1)(k)(1) and (7); House Rule X(2)(b)(1)(A)-(C).

[34] House Rule XI(2)(m)(1)(B).

[35] House Rule XI(2)(m)(3)(A)(I).

COMMITTEE CONSIDERATION

On July 25, 2007, the Committee met in open session and ordered this Report favorably reported, without amendment, by a vote of 22 to 17, a quorum being present.

COMMITTEE VOTES

In compliance with clause 3(b) of rule XIII of the Rules of the House of Representatives, the Committee advises that the following recorded votes took place:

1. An amendment by Mr. Cannon to insert information into the Report concerning the names of present and former Department of Justice officials interviewed, with excerpts from the interviews. Defeated by a vote of 23 to 14.

ROLLCALL NO. 1

	Ayes	Nays	Present
Mr. Conyers, Jr., Chairman		X	
Mr. Berman		X	
Mr. Boucher		X	
Mr. Nadler		X	
Mr. Scott		X	
Mr. Watt		X	
Ms. Lofgren		X	
Ms. Jackson Lee		X	
Ms. Waters		X	
Mr. Delahunt		X	
Mr. Wexler		X	
Ms. Sánchez		X	
Mr. Cohen		X	
Mr. Johnson		X	
Ms. Sutton		X	
Mr. Gutierrez		X	
Mr. Sherman		X	
Ms. Baldwin		X	
Mr. Weiner		X	
Mr. Schiff		X	
Mr. Davis		X	
Ms. Wasserman Schultz		X	
Mr. Ellison		X	
Mr. Smith (Texas)	X		
Mr. Sensenbrenner, Jr.	X		
Mr. Coble	X		
Mr. Gallegly	X		
Mr. Goodlatte			
Mr. Chabot	X		
Mr. Lungren	X		
Mr. Cannon	X		
Mr. Keller	X		
Mr. Issa			
Mr. Pence			
Mr. Forbes	X		
Mr. King	X		
Mr. Feeney	X		
Mr. Franks	X		
Mr. Gohmert	X		
Mr. Jordan	X		
Total	14	23	

2. An amendment by Mr. Forbes to insert a description of the Committee's legislative and oversight jurisdiction under House Rule 10. Defeated by a vote of 22 to 16.

ROLLCALL NO. 2

	Ayes	Nays	Present
Mr. Conyers, Jr., Chairman		X	
Mr. Berman		X	
Mr. Boucher		X	
Mr. Nadler		X	
Mr. Scott		X	
Mr. Watt		X	
Ms. Lofgren		X	
Ms. Jackson Lee		X	
Ms. Waters		X	
Mr. Delahunt		X	
Mr. Wexler			
Ms. Sánchez		X	
Mr. Cohen		X	
Mr. Johnson		X	
Ms. Sutton		X	
Mr. Gutierrez		X	
Mr. Sherman		X	
Ms. Baldwin		X	
Mr. Weiner		X	
Mr. Schiff		X	
Mr. Davis		X	
Ms. Wasserman Schultz		X	
Mr. Ellison		X	
Mr. Smith (Texas)	X		
Mr. Sensenbrenner, Jr.	X		
Mr. Coble	X		
Mr. Gallegly	X		
Mr. Goodlatte	X		
Mr. Chabot	X		
Mr. Lungren	X		
Mr. Cannon	X		
Mr. Keller	X		
Mr. Issa	X		
Mr. Pence			
Mr. Forbes	X		
Mr. King	X		
Mr. Feeney	X		
Mr. Franks	X		
Mr. Gohmert	X		
Mr. Jordan	X		
Total	16	22	

Committee Oversight Findings

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

New Budget Authority and Tax Expenditures

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

COMMITTEE COST ESTIMATE

In compliance with clause 3(d)(2) of rule XIII of the Rules of the House of Representatives, the Committee believes that the cost incurred in carrying out the Report will be negligible.

PERFORMANCE GOALS AND OBJECTIVES

The Committee states that pursuant to clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, the Report will assist the Committee and the House of Representatives in vindicating Congress's responsibility to conduct appropriate oversight of the Executive Branch and vindicating the rule of law.

CONSTITUTIONAL AUTHORITY STATEMENT

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

ADVISORY ON EARMARKS

In accordance with clause 9 of rule XXI of the Rules of the House of Representatives, this Report does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9(d), 9(e), or 9(f) of rule XXI.

ADDITIONAL VIEWS OF CHAIRMAN CONYERS AND SUBCOMMITTEE CHAIR SÁNCHEZ

It was with great reluctance that the Committee on the Judiciary voted to refer to the full House of Representatives a Report and Resolution on the Refusal of Former White House Counsel Harriet Miers and White House Chief of Staff Joshua Bolten to Comply with Subpoenas by the House Judiciary Committee. The Committee did not take this action lightly, but only after concluding that it was necessary both to gain a complete picture of the facts regarding the U.S. Attorney firings that occurred last year – including the role of White House personnel – and more fundamentally to fulfill our constitutional obligations as a co-equal branch of government.

This issue – which involves fundamental prerogatives of the House – should not be seen as partisan or ideological, and it is our hope that the vote by the full House will be bipartisan and strong. The last time a contempt citation against an Executive Branch official who claimed executive privilege was considered on the full House floor, for example, the vote was 413 to 0.[1] With respect to the current controversy, members of both parties agree that the Judiciary Committee's subpoenas should be enforced. Former Reagan Justice Department official Bruce Fein and former Nixon White House Counsel John Dean have agreed that the White House's privilege claims are weak and that the Administration should comply with Congress's requests for information.[2] At a Judiciary Committee hearing on concerns about politicized prosecutions last month, Republican former Attorney General Richard Thornburgh agreed that the U.S. Attorney firings raised serious issues and that politically-motivated wrongdoing had been revealed, testifying "we came to learn, in part from your committee's investigation. . . that the Department of Justice, in its evaluation of its prosecutors, in certain cases, fired U.S. attorneys not for performance-based reasons, but for political ones."[3]

Observers across the political spectrum agree that the Committee's subpoenas must be enforced. The conservative Chicago Tribune has harshly criticized "White House stonewalling."[4] Following the Committee vote, the New York Times editorial board wrote: "The House Judiciary Committee did its duty yesterday, voting to cite Harriet Miers, the former White House counsel, and Joshua Bolten, the White House chief of staff, for contempt. The Bush administration has been acting lawlessly in refusing to hand over information that Congress needs to carry out its responsibility to oversee the executive branch and investigate its actions when needed. If the White House continues its obstruction, Congress should use all of the contempt powers at its disposal."[5]

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[1] Louis Fisher, *Congressional Investigations: Subpoenas and Contempt Power,* CRS Report for Congress, RL 31836, April 2, 2003, at 33.

[2] See Fein, *Executive Nonsense*, Slate, July 11, 2007; Dean, *New Developments in the U.S. Attorney Controversy*, Findlaw, Mar. 23, 2007.

[3] See Thornburgh, Oct. 23, 2007, Subcomms. on Crime, Terrorism and Homeland Security and on Commercial and Admin. Law, Testimony at 6.

[4] Editorial, *White House Stonewalling,* Chicago Tribune, July 25, 2007, at C20.

[5] Editorial, *Defying the Imperial Presidency*, New York Times, July 26, 2007.

The Committee's actions on this matter have been careful and deliberate. In order to pursue its investigation, the Committee has done what Congress has always done – it sought out documents and testimony, initially on a voluntary basis, and through compulsory process only as a last resort. The investigation did not begin with the White House, but has ended up there only after the review of thousands of pages of documents and testimony and interviews of 20 current and former Department of Justice employees did not uncover the truth. The Committee has been open at all times to reasonable compromise, and has been fully respectful and cognizant of the prerogatives of the Executive Branch. As of July 25, 2007, the Committee had written the White House eight times seeking to resolve this matter. As of this time, the White House Counsel has not even responded to Chairman Conyers's July 25 letter.

While the Committee has remained open to reasonable compromise, neither it – nor the Congress – can accept the "take it or leave it" offer made by the White House, which would not produce the information needed for the Committee's inquiry, would not allow for transcribed interviews, and would yield only the most limited sorts of information and then only if Congress agreed in advance not to ask any more questions in the future, regardless of what facts were learned. That is the only "proposal" the Committee has received from the White House Counsel. As an institutional matter for Congress, such an approach is clearly unacceptable.

This is not a confrontation the Committee – or the Congress – has sought, and it is one that may yet be avoided, but only if the Congress moves forward to enforce its process. On the merits, the case for contempt is strong. Unlike other disputes involving executive privilege, the President here has never personally asserted privilege, and the White House has maintained that the President was not personally involved in the U.S. Attorney firing decisions. No privilege log describing the materials being withheld has been provided to the Congress, and the claim of privilege is extraordinarily broad, covering even materials that were apparently submitted unbidden by private parties to Administration officials. Furthermore, even if the privilege were properly asserted, under the "balancing of interests" analysis that a court would conduct under governing law, the Committee clearly has the better of the argument and should prevail. Claims of executive privilege are especially weak where, as here, (i) the President was not personally involved, (ii) there is evidence of wrongdoing, (iii) Congress has exhausted all other avenues for obtaining the information, and (iv) there is no overriding issue of national security. It is for these reasons that four outside experts have written to the Committee supporting its position on the question of executive privilege.[6] And the refusal of former White House Counsel Harriet Miers even to attend a hearing pursuant to subpoena, especially when other former White House

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[6] For example, Professor Erwin Chemerinsky of Duke Law School explained that "it is difficult to imagine a more compelling case on behalf of Congress." Washington attorney Beth Nolan, herself a former White House counsel, states that the White House's claims are "inconsistent with the obligations of the Executive Branch in the constitutional accommodation process." Professor Charles Tiefer, former House Solicitor and General Counsel, writes that the executive privilege claims are "patently without merit." And former House counsel Stanley M. Brand concludes that the Committee's right to the information requested is "unassailable" and that it is "hard to envision a stronger claim." Their letters are also included with these additional views.

officials were permitted to testify on the U.S. Attorney matter before a Senate Committee[7], has absolutely no proper legal basis.

If the House is to conduct meaningful oversight in the future, it has little choice but to vote to cite Joshua Bolten and Harriet Miers in contempt for failure to comply with authorized Committee subpoenas. The following additional views on these issues, which consist in large part of information submitted to the Judiciary Committee in a memorandum of July 24, 2007, from Chairman Conyers, provide detailed factual and legal background for members as they consider this important matter.

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[7] The day after Ms. Miers refused to appear before the House Judiciary Committee as subpoenaed, Sara Taylor, former Deputy Assistant to the President and White House Director of Political Affairs, testified before the Senate Judiciary Committee pursuant to subpoena. Several weeks later, J. Scott Jennings, of the White House Office of Political Affairs, appeared before the Senate Judiciary Committee pursuant to subpoena.

TABLE OF CONTENTS

Executive Summary.....i

I. The Committee's Investigation Has Uncovered Significant Evidence of Wrongdoing.....1

A. There is Evidence of Politically-Biased Prosecutions and Removal of U.S. Attorneys.....3
B. Current and Former Justice Department Officials May Have Made False or Misleading Statements to Congress, Many Of Which Served to Obscure or Downplay the Role Played By White House Personnel in the Firings.....15
C. Civil Service Requirements and the Presidential Records Act May Have Been Violated.....20
D. Serious Questions About the U.S. Attorney Firings Remain Unanswered.....22

II. White House Information Is Essential For the Committee to Conduct Meaningful Oversight and to Consider Possible Federal Legislation.....33

A. White House Information is Needed to Conduct Meaningful Oversight.....33
B. White House Information is Needed to Consider Modifying or Enacting Federal Laws.....34

III. The Committee Has Made Extensive Efforts to Secure Documents and Testimony From the White House and Harriet Miers on a Cooperative Basis.....39

A. Efforts to Negotiate a Cooperative Solution With the White House.....39
B. Efforts to Negotiate a Cooperative Solution With Harriet Miers.....43

IV. Legal Analysis of the Executive Privilege, Immunity, and Related Claims Raised by the White House and Harriet Miers.....46

A. Claims of Immunity as to Harriet Miers.....46
B. Claims of Executive Privilege.....47
C. Defenses to Criminal Contempt Raised by Harriet Miers.....51
D. Recent Administration Claims Concerning Criminal Contempt.....53

Conclusion.....56

Appendix

A. Ruling of Chairwoman Linda Sánchez on Related Executive Privilege and Immunity Claims
B. Ruling of Chairwoman Linda Sánchez on White House Executive Privilege Claims
C. Letters from Legal Experts on White House Executive Privilege Claims

EXECUTIVE SUMMARY

To date, the Committee's investigation – which has reviewed materials provided by the Department of Justice in depth and obtained testimony from 20 current and former Department of Justice employees – has uncovered serious evidence of wrongdoing by the Department and White House staff with respect to the forced resignations of U.S. Attorneys during 2006 and related matters. This includes evidence that:

(a) the decision to fire or retain some U.S. Attorneys may have been based in part on whether or not their offices were pursuing or not pursuing public corruption or vote fraud cases based on partisan political factors, or otherwise bringing cases which could have an impact on pending elections;

(b) Department officials appear to have made false or misleading statements to Congress, many of which sought to minimize the role of White House personnel in the U.S. Attorney firings, or otherwise obstruct the Committee's investigation, and with some participation by White House personnel; and

(c) actions by some Department personnel may have violated civil service laws and some White House employees may have violated the Presidential Records Act.

Based on this evidence, and because of the apparent involvement of White House personnel in the U.S. Attorney firings and their aftermath, the Committee has sought to obtain relevant documents from the White House and documents and testimony from former White House Counsel Harriet Miers – who appears to have been significantly involved in the matter – on a voluntary basis and, only after taking all reasonable efforts to obtain a compromise, on a compulsory basis. The Committee's subpoenas have been met with consistent resistance, including wide-ranging assertions of executive privilege and immunity from testimony. This has gone so far that the Administration indicated in July that it would refuse to allow the District of Columbia U.S. Attorney's office to pursue any Congressional contempt citation against the White House's wishes. In addition to the many infirmities and deficiencies in the manner in which the White House Counsel has sought to assert executive privilege, in the present circumstance such privilege claims would be strongly outweighed by the Committee's need to obtain such information.

Evidence the Terminations May Have Been Motivated by Improper Political Factors/Reasons

- David Iglesias (D. N.M.) – There appears to have been a concerted effort by Republican Party officials in New Mexico to cause Mr. Iglesias to be terminated for failing to pursue vote fraud charges that would assist Republican electoral prospects. The head of the state Republican Party more than once asked then-White House Political Director Karl Rove to have Mr. Iglesias replaced, and he was told by Mr. Rove, before the firings were made public, that Iglesias was

"gone." Other state GOP officials also met with White House and Department personnel to press this request. Counselor to the Attorney General Matthew Friedrich testified that, shortly before David Iglesias was fired, several New Mexico Republicans had told him that they "were working towards" having Mr. Iglesias removed and that they had communicated with Karl Rove and Senator Domenici on that subject. President Bush himself passed on complaints concerning alleged vote fraud issues in New Mexico directly to the Attorney General, as did Senator Domenici. In addition, Mr. Iglesias testified he was pressured directly by both Representative Heather Wilson and Senator Pete Domenici (a political mentor to Rep. Wilson) to expedite indictments in a corruption case involving local Democrats on the eve of Rep. Wilson's tightly contested Congressional election.[8]

- John McKay (W.D. Wash.) – There are indications John McKay was forced to resign in part due to his failure to pursue non-meritorious vote fraud charges that could have impacted the outcome of the 2004 Washington Governor's race. Those charges by State Republican officials and complaints about Mr. McKay were forwarded to the Department of Justice and also made their way to the White House. When Mr. McKay was interviewed for a federal judgeship by Harriet Miers and her then-deputy William Kelley, he was asked why he had "mishandled" the vote fraud matter.

- Steven Biskupic (E.D. Wisc.) – There is also evidence Wisconsin U.S. Attorney Steven Biskupic was added to the firing list after he failed to pursue vote fraud charges advantageous to Republicans in his state, and that he was removed from the list only after he brought cases beneficial to Republican Party interests. State Republican Party officials brought their complaints to Karl Rove's attention, who later passed them on to Kyle Sampson, then-Chief of Staff for the Attorney General. In February 2005, just weeks before Mr. Biskupic was added to the firing list, Mr. Rove reviewed information about alleged vote fraud activity in Mr. Biskupic's district, as evidenced by a document with the notation "Discuss w/ Harriet." Later that year, Mr. Biskupic proceeded to bring 14 vote fraud cases – a total equal to ten percent of all vote fraud cases brought throughout the country in the four-year period through 2006 – of which he lost nine. He also brought a public corruption case in January 2006 that was used to argue that the Democratic Governor of Wisconsin was corrupt, and in that month Mr. Biskupic's name was removed from the firing list. Eventually, that case was thrown out by the Seventh Circuit, which found the evidence to be "beyond thin" and issued a remarkable

[8] At the Commercial and Administrative Law Subcommittee's March 6, 2007, hearing, Mr. Iglesias testified that Senator Domenici called him at home and asked about the timing of the potential indictments: "He wanted to know if they'd be filed before November, and I [said] I didn't think so....And then he said, 'Well, I'm very sorry to hear that,' and then the line went dead." Iglesias, Mar. 6, 2006, Subcomm. on Commercial and Admin. Law, H. Comm. on the Judiciary, Testimony at 9-10.

order directing that Ms. Thompson be immediately released on the very day of oral argument.

- Todd Graves (W.D. Mo.) – The Committee has received evidence that not only was the forced resignation of one U.S. Attorney concealed for a substantial portion of its investigation – that of Todd Graves in January 2006 – but that this termination may also have been linked to Republican concerns about enforcement of vote fraud matters regardless of the local prosecutor's judgment. Mr. Graves testified to the Senate Judiciary Committee that, in the fall of 2005, he "slow walked" a legal action challenging Missouri's maintenance of its voter rolls, which had been advocated by Bradley Schlozman, then the Principal Deputy Assistant Attorney General for the Civil Rights Division. Mr. Graves' name was added to the firing list in January 2006 soon after he showed this lack of enthusiasm for the voter rolls case and he was asked to resign in that same month. Bradley Schlozman, who was almost immediately appointed to replace Mr. Graves, pursued the voter rolls case (which was eventually dismissed by a federal district court), and also initiated a group of vote fraud actions shortly before the 2006 elections, in possible violation of the Department's guidelines for pursuing such sensitive actions shortly before elections.

- Carol Lam (S.D. Cal.) – There is evidence indicating that Carol Lam may have been terminated at least in part due to her aggressive pursuit of Republican corruption cases. Ms. Lam had successfully prosecuted former California Congressman Duke Cunningham for bribery, and was in the midst of pursuing the third ranking official in the CIA, Kyle "Dusty" Foggo, as well as Brent Wilkes, a defense contractor with links to several other Republican Congressmen. Tellingly, one day after Ms. Lam notified Main Justice officials that she was executing search warrants involving Mr. Foggo and Mr. Wilkes, Kyle Sampson wrote an email to William Kelley of the White House Counsel's Office stating that he wanted to talk to Mr. Kelley about "[t]he real problem we have right now with Carol Lam that leads me to conclude that we should have someone ready to be nominated on 11/18, the day her 4-year term expires." Ms. Lam told the Committee that her request to delay her departure to address case-related concerns was not well received and that she was told she should "stop thinking in terms of the cases in the office." These commands, she was told, came from "the very highest levels of the government." When the head of the FBI's San Diego Office was asked about her departure, he stated that "I guarantee politics is involved."

- Leura Canary and the Siegelman Case (M.D. Ala.) – The Committee has received evidence that Ms. Canary's office, may have been improperly pressed to prosecute former Democratic Governor Don Siegelman. The Committee has received an affidavit and taken sworn testimony from Ms. Dana Jill Simpson, a Republican attorney in Alabama who had worked for Mr. Siegelman's 2002 Republican

opponent, stating that she heard Mr. Canary say that Karl Rove and two U.S. Attorneys in Alabama were working to "take care of" Mr. Siegelman and that Mr. Rove had already "spoken with the Department of Justice" about the matter. Ms. Simpson further testified that she overheard an additional statement that Karl Rove was pressing the Justice Department to prosecute Siegelman in early 2005. And indeed, other evidence indicates that, at that very time, Department officials were pressing local prosecutors about the Mr. Siegelman investigation, and several months later a new case was brought against the former governor. Meanwhile, evidence that state Republican officeholders had engaged in the same conduct for which Mr. Siegelman was indicted does not appear to have been investigated or followed up.[9]

False or Misleading Statements and Efforts to Obstruct Committee Investigation

- Former Attorney General Alberto Gonzales – The former Attorney General stated publicly that he "was not involved in seeing any memos, was not involved in any discussions about what was going on" with the U.S. Attorney firings. Kyle Sampson contradicted that statement, however, testifying that he did not "think the Attorney General's statement that he was not involved in any discussions about U.S. attorney removals [was] accurate." Former Department of Justice Counsel and White House Liaison Monica Goodling also disputed that statement and Mr. Gonzales' calendar shows that he attended a meeting in his office on this very matter on November 27, 2006. The former Attorney General has also made sharply conflicting statements regarding the role played in the U.S. Attorney firings by former Deputy Attorney General McNulty, at some points stating that the then Deputy was a central actor whose views were critical to the ultimate decision to fire these prosecutors, and at other times that Mr. McNulty was minimally involved in the process. At least some of Mr. Gonzales' incompatible statements on that subject must not have been accurate. Finally, the former Attorney General's testimony to the Committee that he had not spoken to potential fact witnesses regarding the details of the U.S. Attorney firings in order to preserve the "integrity" of the pending investigations also appears to have been less than completely candid in view of Monica Goodling's testimony to the Judiciary Committee that, just before she left the Department, Mr. Gonzales rehearsed his recollections with her in an "uncomfortable" conversation.

- Former Deputy Attorney General Paul McNulty and his Principal Associate Will Moschella – Both of these individuals testified that the White House had a

[9] The resulting conviction of Mr. Siegelman has proved controversial, and is now under consideration by the Judiciary Committee as part of a potentially broader pattern of alleged selective or politically-motivated prosecution. On October 23, 2007, the Judiciary Committee's Subcommittee on Crime, Terrorism, and Homeland Security and its Subcommittee on Commercial and Administrative Law held a joint hearing on this subject; Nossiter, *Democrats See Politics in a Governor's Jailing*, New York Times, June 27, 2007; Zagorin, *Rove Linked to Alabama Case*, Time Magazine, Oct. 10, 2007; and Zagorin, *Selective Justice in Alabama?*, Oct. 4, 2007.

minimal role in the terminations, with Mr. McNulty testifying before the Senate Judiciary Committee merely that he had assumed that "White House personnel ... was consulted before making the phone calls," and Mr. Moschella testifying before the House Judiciary Committee only that the White House was "eventually" consulted "because these are political appointees." Subsequent to their testimony, the Committee has learned that White House personnel played an important role in the U.S. Attorney firings for at least two years; for example, the idea of replacing U.S. Attorneys originated with Karl Rove and was pressed by White House Counsel Harriet Miers. And Ms. Miers received multiple drafts of the firing list over a two-year period. Monica Goodling quite directly accused Mr. McNulty of having made false statements to the Senate Judiciary Committee about his knowledge of White House involvement and other matters, and stated that he went so far as to instruct Ms. Goodling not to attend a confidential briefing for Senate Judiciary Committee members because her presence might encourage Senators to ask questions about the White House. These do not appear to be insignificant or unintended omissions, as Kyle Sampson testified that former Attorney General Gonzales was upset about the contents of that briefing because it brought aspects of the White House role "into the public sphere," and he also described individuals in the White House as being equally upset that "that the White House had sort of been brought, you know, in a public way, into this rising controversy."

- Former Chief of Staff to the Attorney General, Kyle Sampson – Mr. Sampson appears to have made at least two significant misstatements to Congress. First, on January 18, 2007, he emailed the Senate Judiciary Committee Chief Counsel that "last year, eight USAs [were] asked to resign" and further assured him "per my prior reps to you, the number of USAs asked to resign in the last year won't change: eight." However, as the Committee subsequently learned, Mr. Graves was in fact forced to resign in January 2006 and including him in the list results in a total of nine U.S. Attorneys fired last year. Second, on February 23, 2007, Kyle Sampson drafted a Department letter, which was also approved by Chris Oprison of the White House Counsel's office, stating that Karl Rove did not play any role in the decision to appoint Tim Griffin as interim U.S. Attorney for the Eastern District of Arkansas. Documents subsequently came to light showing that before proposing that statement be made to Congress, Kyle Sampson had written to Mr. Oprison that the appointment of Mr. Griffin was "important to Harriet, Karl, etc.," and just a week before Mr. Oprison signed off on the statement, Tim Griffin had sent an email both Karl Rove and Mr. Oprison and others regarding the U.S. Attorney position.

- Former Chief of Staff to the Deputy Attorney General, Mike Elston – The Committee has received statements that at least three of the terminated U.S. Attorneys felt threatened by efforts by Mr. Elston to dissuade them from telling

their stories to the Committee after news of the firings broke. Of these communications, John McKay stated that "I greatly resented what I felt Mr. Elston was trying to do: buy my silence by promising that the Attorney General would not demean me in his Senate testimony." Mr. McKay also stated that the call seemed "sinister" and that he believed Mr. Elston was "prepared to threaten [him] further" if he did not stay quiet. Paul Charlton wrote that "In that conversation I believe that Elston was offering me a quid pro quo agreement: my silence in exchange for the Attorney General's." Bud Cummins wrote that "[Elston] essentially said that if the controversy continued, then some of the USAs would have to be thrown under the bus." Equally troubling, during the Committee's investigation, sitting U.S. Attorney Mary Beth Buchanan directly accused Mr. Elston of lying to her about how her name and others came to be identified as possible candidates for replacement. Ms. Buchanan asserted that, contrary to Mr. Elston's assertion that he had collected information from others in the Department in identifying names for possible removal, she believes he had suggested she be placed on the removal list simply so that a colleague of Mr. Elston's could have her job. Because Mr. Elston had made similar statements to the Committee in his formal interview, Ms. Buchanan's charge that the statements were false raises serious issues regarding the possible culpability of Mr. Elston.

Violations of Civil Service Requirements and the Presidential Records Act

- In her testimony before the Committee, Ms. Goodling admitted that she "crossed the line" and violated civil service requirements when she utilized political factors in making personnel decisions for career positions such as Assistant U.S. Attorneys and Immigration Judges. It has also been disclosed that White House staff may have violated the Presidential Records Act by failing to properly save emails sent using Republican National Committee email accounts that concerned official business, including the U.S. Attorney firings.

Based in part on the above evidence, and because of the continuing failure of any individual in the Administration to assume responsibility for developing the list of terminated U.S. Attorneys, the Committee has sought to obtain information from the White House and Ms. Miers. The Committee initially sought to obtain the information on a voluntary basis on March 9, 2007, and only issued subpoenas on June 13. On March 20, 2007, White House Counsel made a "take it or leave it" proposal, under which the Committee was offered limited availability of some documents and limited access to witnesses, but without any transcripts and under severe limitations as to permissible areas for questioning. The White House also insisted that a condition of its proposal was that the Committee commit in advance not to subsequently pursue any additional White House-related information by any other means, regardless of what the initial review of documents and informal discussions should reveal. The Committee sent many additional letters to the White House, attempting to work towards a compromise or at least open meaningful negotiations, but to no avail. In each case, the White House has responded by

merely repeating the same unreasonable terms of its "take it or leave it" offer. The Committee's requests have at all times been narrowly targeted and in direct response to its legitimate oversight and legislative needs stemming from the investigation.

The principal objection asserted by the White House has been an across-the-board assertion of executive privilege to every item of information the Committee has requested. Executive privilege is not cited expressly in the Constitution or in any federal statute; rather, it is a constitutional law doctrine recognized by the Supreme Court in 1974 in the U.S. v. Nixon case. There is ample precedent for White House cooperation with an inquiry like this one; the Congressional Research Service has found that presidential advisors have testified before Congressional committees on no less than 74 occasions. Between 1996 and 2001 alone, 17 top Clinton White House advisors provided testimony to Congress.

In the present case, executive privilege has not been asserted consistent with past legal practice or requirements. The President has never personally asserted the privilege, the Committee has never been given a privilege log and, most strikingly, the privilege is asserted on a subject as to which the White House concedes that the President had no personal involvement and received no advice from staff. Also, with regard to Ms. Miers, the White House has cited no cases supporting the remarkable idea that a former advisor is entitled to absolute immunity from even appearing at a hearing pursuant to subpoena.

Even if executive privilege were properly asserted, the privilege is not absolute, but rather is subject to a "balancing of interests" based on the needs of the President and the Congress. In the present case, where there is clear evidence of wrongdoing leading to the White House, where the information is important for considering possible legislative changes, where the Committee has sought to obtain the information elsewhere and has sought to obtain a reasonable accommodation, and where there is no overriding issue of national security, it is clear the Committee's oversight and legislative interests should prevail.

* * * * *

I. The Committee's Investigation Has Uncovered Significant Evidence of Wrongdoing

Over the past seven months, the Committee has uncovered a great deal about the forced resignations of nine U.S. Attorneys that occurred in 2006.[10] The idea to replace all or some U.S. Attorneys during President Bush's second term originated with Karl Rove in early 2005 (himself under investigation by a sitting U.S. Attorney at the time).[11] According to one report, "the plan to fire all 93 U.S. Attorneys originated with then-White House political adviser Karl Rove. It was seen as a way to get political cover for firing the small number of U.S. Attorneys the White House actually wanted to get rid of."[12] The idea was then apparently taken up by Harriet Miers and Kyle Sampson. As Mr. Sampson would later explain to Associate Attorney General Bill Mercer, apparently Ms. Miers was so enthusiastic about this idea that Mr. Sampson had needed to "beat back" the proposal in favor of a more limited removal plan.[13]

Over the next two years, more then twenty-five U.S. Attorneys were considered at one time or another for replacement.[14] The Congressional Research Service (CRS) has found the firings to be without precedent.[15] Prior to these nine forced resignations, the CRS identified only ten U.S. Attorneys forced to resign during the last twenty-five years other than routine turnover

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[10] The U.S. Attorneys forced to resign in 2006 were H.E. "Bud" Cummins, III, U.S. Attorney for the Eastern District of Arkansas; John McKay, U.S. Attorney for the Western District of Washington; David Iglesias, U.S. Attorney for the District of New Mexico; Paul K. Charlton, U.S. Attorney for the District of Arizona; Carol Lam, U.S. Attorney for the Southern District of California; Daniel Bogden, U.S. Attorney for the District of Nevada; Kevin Ryan, U.S. Attorney for the Northern District of California; Margaret Chiara, U.S. Attorney for the Western District of Michigan; and Todd Graves of the Western District of Missouri.

[11] OAG 180; VandeHei, *Rove Testifies 5th Time On Leak*, Washington Post, Apr. 27, 2007.

[12] Shapiro, *Documents Show Justice Ranking US Attorneys*, NPR, Apr. 13, 2007, available at http://www.npr.org/templates/story/story.php?storyId=9575434.

[13] ASG 001-04. The Department of Justice assigned each document produced to the Committee a unique "bates number" consisting of a three (or in one case five) letter prefix and a number. The assigned prefixes generally reference the office within the Department from which the documents were obtained. The most common prefixes are "OAG" for the Office of the Attorney General, "DAG" for the Office of the Deputy Attorney General, "OLA" for the Office of Legal Affairs, "ASG" for the Office of the Associate Attorney General, and "EOUSA" for the Executive Office of United States Attorneys. In some circumstances, the Department affixed an additional letter to the prefixes containing further information. Where the Department was required to substitute or correct a previously-produced document, it has added an "N" to the prefix. Where the Department has made unredacted versions of the documents available for review, it has added a "U" to the prefix. In this memorandum, the documents, which largely consist of email communications and associated materials, are cited by reference to those bates numbers. The Committee appreciates the well-organized and informative coding system used by the Department in producing documents on this matter.

In addition, all letters and interview transcripts cited in this Memorandum are on file with the House Committee on the Judiciary.

[14] Eggen & Goldstein, *Justice Weighed Firing 1 in 4*, Washington Post, May 17, 2007.

[15] Kevin M. Scott, *United States Attorneys Who Left Office Involuntarily, 1981-2006*, CRS Memorandum for Congress, Mar. 19, 2007.

when the presidency changes hands.[16] And those ten replacements appear to have been based on relatively obvious and undisputable reasons such as misconduct or unethical behavior.[17]

The Committee's investigation has also shown that the process conducted by Kyle Sampson resulting in these firings was not based on any recognizable concept of "performance." As described below, most of the fired U.S. Attorneys appear to have been top performers, and the reasons given to the Congress and the public in support of their removal have not been substantiated.[18] The Administration's decision to present such apparently pretextual reasons necessarily raises questions about the true motives behind the firings. The unwillingness of any Department of Justice person to claim responsibility for placing the majority of these prosecutors on the firing list only exacerbates such concerns.[19]

Politics appears to have been on the minds of the participants in this process from its very earliest days through the final approval of the plan. In the first email yet identified regarding the replacement plan, Kyle Sampson wrote: "if Karl thinks there would be political will to do it, then so do I."[20] And the email from then Deputy White House Counsel William Kelley approving the firings is similar: "We're a go for the US Atty Plan. WH leg, political, and communications have signed off and acknowledged that we have to be committed to following through once the pressure comes."[21]

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[16] Id.

[17] Id. At the July 25, 2007, House Judiciary Committee meeting to vote on contempt citations for Harriet Miers and Joshua Bolten, Ranking Member Lamar Smith asserted that President Clinton removed 139 U.S. Attorneys, while President Bush removed 56. See Smith, July 25, 2007, H. Comm. on the Judiciary, Hearing at 4. The numbers for President Clinton, however, appear to include all U.S. Attorneys who resigned at the outset of his Administration in keeping with traditional practice, plus all U.S. Attorneys who left during his two terms, while the numbers for President Bush include only those U.S. Attorneys who were replaced during his two terms and do not include the U.S. Attorneys who resigned at the outset of the Administration. As with past presidents who followed presidents of the opposite party, President Bush asked all Clinton-appointed U.S. Attorneys to resign after he took office. See Press Release, U.S. Department of Justice, "White House and Justice Department Begin U.S. Attorney Transition," Mar. 14, 2001, available online at http://www.usdoj.gov/opa/pr/2001/March/107ag.htm. If the numbers for Presidents Bush and Clinton are counted in a consistent manner and initial Administration-change resignations are not included for either President, it appears that 46 U.S. Attorneys left office during the Clinton Administration, while 56 left office during the George W. Bush Administration. See Kevin M. Scott, *Senate-Confirmed U.S. Attorneys Who Left Office For Reasons Other than Change In Presidential Administration, 1993-2007*, CRS Memorandum for Congress, Aug. 14, 2007, at 1. Further, there is no indication that all 46 of those U.S. Attorneys were "removed" by President Clinton; indeed, many left office to assume federal judgeships or Executive Branch positions and one was replaced because he died. Id. at 2-3.

Thus, no credible evidence contradicts CRS's conclusion that, over the 25 years before the nine 2006 firings, not including Administration-change resignations, a total of only ten U.S. Attorneys have been asked to resign involuntarily. Kevin M. Scott, *United States Attorneys Who Left Office Involuntarily, 1981-2006*, CRS Memorandum for Congress, Mar. 19, 2007.

[18] See Section I.D.1. below.

[19] See Section I.D.2. below.

[20] OAG 180.

[21] DAG 571-74.

Although the Committee has learned a great deal, with non-White House sources of information largely exhausted as to the U.S. Attorneys fired in 2006, serious questions remain open regarding the firings: If no one at the Justice Department identified most of these U.S. Attorneys for firing, who did? If the reasons given to Congress and the public to support the firings are false, what were the real reasons? If the White House role was innocent and routine, why was a concerted effort made to hide it? If criminal conduct or abuse of executive power occurred, who was involved and what is the degree of their culpability? Both the evidence of misconduct already discovered and such key unanswered questions clearly necessitate documents and testimony from White House sources.[22]

A. There is Evidence of Politically-Biased Prosecutions and Removal of U.S. Attorneys

The Committee's investigation suggests that U.S. Attorneys may have been placed on or removed from the firing list based on their actions in bringing or not bringing politically sensitive prosecutions. In other cases, it seems relatively clear that Republican complaints about the enforcement decisions made by some U.S. Attorneys in controversial vote fraud cases may also have led to their being placed on or removed from the list. Forcing a U.S. Attorney to resign for such reasons would clearly be an abuse of executive power; in some circumstances, it could also be a violation of law. As the venerable and nonpartisan American Judicature Society recently explained, the firing of these U.S. Attorneys "raises issues of prosecutorial fairness, the permissible roles of policy and politics, and the maintenance of citizen trust in the rule of law. From each of these perspectives, on the basis of the facts as we know them today, the dismissals are indefensible."[23]

1. David Iglesias (D. N.M.)

The Committee has obtained substantial evidence that the firing of David Iglesias may have been a political act.[24] The Department of Justice has claimed that David Iglesias was fired because he was an "absentee landlord" and a poor manager of the New Mexico U.S. Attorney's office.[25] As described in detail below, however, the "absentee landlord" theory arose only well after Mr. Iglesias had been fired and could not have actually played a role in the Department's

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[22] The Department of Justice's Office of the Inspector General and Office of Professional Responsibility are also reviewing these and related issues and apparently have interviewed some of the fired U.S. Attorneys. Reports also indicate that former Attorney General Gonzales has not cooperated with the investigation. See Morlin, *Gonzales Could be Prosecuted, McKay Says*, Spokane Spokesman Review, Oct. 20, 2007.

[23] American Judicature Society, *Putting Justice Back in the Department*, June 23, 2007.

[24] Mr. Iglesias appears to have reached this same conclusion, stating in private correspondence as the controversy unfolded that he was asked to move on for political reasons and that this had been a "political fragging, pure and simple." Available at http://joemonahansnewmexico.blogspot.com/2007_02_01_joemonahansnewmexico_archive.html#6695857227222791754#6695857227222791754.

[25] Moschella, Mar. 6, 2007, Subcomm. on Commercial and Admin. Law, H. Comm. on the Judiciary, Testimony at 9; Sampson, Mar. 29, 2007, S. Comm. on the Judiciary, Testimony Part 2 at 57, 61.

decision to force him out.[26] Furthermore, evidence that Mr. Iglesias was considered for promotions and praised as an "up-and-comer" prior to his removal casts further doubt on the Department's claim that he was fired because he was not an adequate U.S. Attorney.[27]

On the other had, the evidence of improper political motives appears compelling. The Committee's investigation to date suggests that Mr. Iglesias may have been targeted based on two distinct, but equally improper, political reasons, as described below. Unfortunately, because no one at the Justice Department has claimed responsibility for suggesting Mr. Iglesias be placed on the firing list, and because Kyle Sampson claims not to remember who made that suggestion even though Mr. Iglesias was one of the final U.S. Attorneys placed on the list,[28] it may not be possible to determine the exact role each such reason played in the firing without access to information from those at the White House who appear to have played a role in his removal.

The first reason that Mr. Iglesias may have been targeted for removal is that he appears to have angered sitting Members of Congress from New Mexico by his failure to bring politically useful indictments of Democratic figures prior to the November 2006 election. David Iglesias testified to the Judiciary Committee that he received disturbing telephone calls from Senator Pete Domenici and Representative Heather Wilson in October 2006 seeking information about the potential indictments.[29] Mr. Iglesias further testified that Senator Domenici was abrupt and hung up when Mr. Iglesias indicated indictments would not be coming before the election, and that Representative Wilson "was not happy with [his] answer."[30] Those calls were contemporaneous with Mr. Iglesias' being added to the firing list maintained by Kyle Sampson, which occurred sometime between October 17 and November 7, 2006.[31] And the record also contains evidence that Senator Domenici called then Deputy Attorney General McNulty during that same month and complained about David Iglesias.[32]

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[26] See Section I.D.2. below.

[27] OAG 155; OAG 158-62.

[28] Mr. Sampson testified to the Senate Judiciary Committee and also in an on-the-record interview with Committee investigators that he did not remember who suggested Mr. Iglesias be placed on the list. Sampson, Apr. 15, 2007, Interview at 143. He also told the Senate Judiciary Committee that Mr. Iglesias was one of a group of four U.S. Attorneys added to the firing list at the end of the process, three of whom were removed after a closer look. Sampson, Mar. 29, 2007, S. Comm. on the Judiciary, Testimony Part 2 at 13-15. However, that testimony appears to have been inaccurate. The Committee's review of unredacted copies of the firing list establishes that none of the other U.S. Attorneys who appear on the November 7, 2006, list – the first one that includes Mr. Iglesias, see DAG 010-011 – but who were ultimately taken off, were newly added at the time. Instead, the other U.S. Attorneys who appear on the unredacted version of that November 7, 2006, list had all appeared as possible candidates for removal on prior lists, some going back to the first known versions of the list. Thus, based on the evidence available at this point, there does not appear to have been a "group" of U.S. Attorneys added near the end of the process.

[29] Iglesias, Mar. 6, 2006, Subcomm. on Commercial and Admin. Law, H. Comm. on the Judiciary, Testimony at 9-10.

[30] Iglesias ,Mar. 6, 2006, Subcomm. on Commercial and Admin. Law, H. Comm. on the Judiciary, Testimony at 9-10; Iglesias, Mar. 6, 2007, S. Comm. on the Judiciary, Testimony at 12-13.

[31] Compare DAG 546-47 (Oct. 17 list without Iglesias) with DAG 010-11 (Nov. 7 list with Iglesias).

[32] DAG 2462, McNulty, Apr. 27, 2007, Interview at 53-54, 62.

To the extent such calls were intended to affect Mr. Iglesias' prosecutorial decisionmaking regarding pending investigative matters, they were clearly improper and may have constituted obstruction of justice or attempted obstruction.[33] And if David Iglesias was fired in order to affect the course of the pending investigations, that too could be unlawful. Firing a U.S. Attorney in order to impede or obstruct a pending criminal case, or a pending criminal investigation, could constitute an obstruction of justice.[34] And even former Attorney General Gonzales has acknowledged that replacing a U.S. Attorney to affect a pending matter would be improper.[35] Finally, to the extent Mr. Iglesias may have been fired in retaliation for his failure to bring a politically useful prosecution, the firing could also violate the criminal Hatch Act prohibition on retaliation contained in 18 U.S.C. § 606.[36] Under that provision, discharging a federal employee who failed to contribute a "valuable thing" for political purposes is a federal crime, and terms such as "valuable thing" or "thing of value" are traditionally given a very broad reading that could well reach failure to bring politically useful prosecutions.[37] While further information is needed to make final judgments on the potential violations that may have occurred with the firing of Mr. Iglesias, one twenty-five year Department veteran has publicly expressed his tentative views on the matter: "It is especially unheard of for U.S. attorneys to be targeted and removed on the basis of pressure and complaints from political figures dissatisfied with their handling of politically sensitive investigations and their unwillingness to 'play ball.' Enough information has already been disclosed to support the conclusion that this is exactly what happened here, at least in the case of former U.S. Attorney David C. Iglesias of New Mexico (and quite possibly in several others as well)."[38]

The other reason Mr. Iglesias appears to have been targeted for replacement is because he had drawn the ire of New Mexico state Republicans for his vote fraud enforcement decisions and for failing to bring a particular vote fraud matter that they wanted pursued. New Mexico Republican party Chief Allen Weh reportedly pressed Karl Rove through an aide to have Mr. Iglesias replaced in 2005 because he was dissatisfied by Mr. Iglesias' charging decisions in vote fraud matters.[39] That issue was apparently important enough to Mr. Weh that he raised his complaints about Mr. Iglesias again directly with Mr. Rove in December 2006 and was told by Mr. Rove at that time, apparently just one day after the firing calls were made, that "he's gone."[40]

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[33] See 18 U.S.C. § 1503. Press reports indicate that the House Ethics Committee has interviewed Mr. Iglesias regarding the call he received from Representative Wilson. See Brosnahan, *House Ethics Committee to ask Iglesias about call from Heather Wilson*, Albuquerque Times, July 31, 2007.

[34] See 18 U.S.C. §§ 1503, 1505, 1512(c)(2).

[35] Statement of Attorney General Alberto Gonzales Before the H. Comm. on the Judiciary, May 10, 2007, at 2.

[36] 18 U.S.C. § 606 provides in part that a federal employee who "discharges . . . any other officer or employee [for] withholding or neglecting to make any contribution of money or other valuable thing for any political purpose, shall be fined under this title or imprisoned not more than three years, or both."

[37] See, e.g. U.S. v. Cicco, 10 F.3d 980, 984 (3rd Cir. 1994); U.S. v. Schwartz, 785 F.2d 673, 680-81 (9th Cir. 1986); U.S. v. Singleton, 144 F.3d 1343, 1350 (10th Cir. 1998), reversed on other grounds by 165 F.3d 1297 (10th Cir. 1999), rehearing en banc.

[38] Koppel, *Bush justice is a National disgrace*, Denver Post, July 5, 2007.

[39] Talev & Taylor, *Rove was asked to fire U.S. Attorney*, McClatchy Newspapers, Mar. 10, 2007; Gisik, *Rove Played Role in Iglesias Dismissal*, Albuquerque Tribune, Mar. 12, 2007.

[40] Id.

Two other New Mexico Republicans, Mickey Barnett and Pat Rogers, came to Washington, D.C., in Summer 2006 and met with then aide to Karl Rove Scott Jennings, as well as Monica Goodling and Counselor to the Attorney General Matthew Friedrich.[41] Mr. Friedrich testified that Mr. Rogers and Mr. Barnett were concerned about Mr. Iglesias failing to bring a particular vote fraud case against the ACORN community organization – he stated that "they were not happy with Dave Iglesias."[42] Mr. Friedrich also testified that he met a second time with Mr. Barnett and Mr. Rogers over Thanksgiving 2006, and they informed him that they "were working towards" having Mr. Iglesias removed and that they had communicated with Karl Rove and Senator Domenici on that subject.[43]

In failing to satisfy state Republican concerns about the need for vigorous enforcement of alleged vote fraud cases, David Iglesias appears to have run up against a powerful political force.[44] The evidence shows that Karl Rove monitored this issue and heard complaints about some U.S. Attorneys on the subject, again including David Iglesias.[45] Mr. Rove's interest in this subject was so acute that, in April 2006, he spoke about the issue to the Republican National Lawyers Association and named a number of jurisdictions that supposedly posed heightened vote fraud risks, including New Mexico, Wisconsin, and Washington, as well as other politically important states such as Florida and Missouri, where U.S. Attorneys were at one point or another on the firing list.[46]

Trying to achieve political advantage by firing a U.S. Attorney who refuses to bring vote fraud cases that he has in good faith judged to be nonmeritorious or unworthy of prosecution would be, at a minimum, an abuse of executive power. Some commentators have argued that using the prosecutorial power in this fashion might violate the President's constitutional obligation to "take care" that the laws are faithfully executed.[47] While any undue pressure on a prosecutor to subordinate his or her personal judgment of the facts and law of a particular case to

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[41] OAG 114, 572; Friedrich, May 4, 2007, Interview at 31-40.

[42] Friedrich, May 4, 2007, Interview at 34-35.

[43] Friedrich, Mary 4, 2007, Interview at 38-39. Ultimately, after Mr. Iglesias was fired, Mr. Rogers' name was among those submitted by Senator Domenici as a possible replacement U.S. Attorney. OAG 1752.

[44] Such prosecutions are controversial because they risk intimidating voters and chilling or suppressing voter participation, and some experts believe that overzealous enforcement of nonmeritorious vote fraud cases could disproportionately affect potential Democratic voters, concerns that appear especially salient in the current political environment where members of the Election Assistance Commission are reported to have overruled staff experts and altered a non-partisan report that had concluded there was "little polling place fraud" in the United States. Urbina, *U.S. Panel is Said to Alter Finding on Voter Fraud*, New York Times, Apr. 11, 2007. See also Lipton & Urbina, *In 5-Year Effort, Scant Evidence of Voter Fraud*, New York Times, Apr. 12, 2007 ("Most of those charged have been Democrats, voting records show.").

[45] OAG 850-51; Sampson, Apr. 15, 2007, Interview at 26-27; Eggen & Goldstein, *Vote Fraud Complaints by GOP Drive Dismissals*, Washington Post, May 14, 2007 ("Rove, in particular, was preoccupied with pressing Gonzales and his aides about alleged voting problems in a handful of battleground states.").

[46] Apr. 7, 2006, Speech by Karl Rove to Republican National Lawyers Association, available at http://www.talkingpointsmemo.com/archives/013817.php.

[47] U.S. Const. Art. II, Section 3; see discussion available at http://balkin.blogspot.com/2007/03/did-anyone-in-white-house-act.html.

the partisan objectives of political bosses is improper, when the case at hand involves citizens' participation in the electoral process the harm would be especially acute.

Whether such misconduct would be unlawful raises complex issues and would depend on a range of facts not currently known. To the extent Mr. Iglesias or any of the prosecutors was fired in order to influence coming elections, the firing would possibly violate a civil portion of the Hatch Act, 5 U.S.C. § 7323(a)(1).[48] Indeed, the Office of Special Counsel, which has jurisdiction over non-criminal Hatch Act matters, has opened an investigation into that and related issues.[49] If Mr. Iglesias or another prosecutor was fired in retaliation for failing to bring vote fraud cases that lacked a reasonable legal or factual basis, the firing could also violate the criminal Hatch Act prohibition on retaliation contained in 18 U.S.C. § 606.[50]

To the extent a prosecutor was fired in order to bring in a more compliant individual to pursue politically advantageous cases, such misconduct could possibly violate the prohibitions on obstructing government proceedings contained in 18 U.S.C. § 1505[51] and 18 U.S.C. § 1512(c)(2).[52] In the vote fraud context, if such a firing was designed to signal to other U.S. Attorneys that politically advantageous vote fraud cases must be charged on pain of termination, regardless of the prosecutor's judgement of the merits of the particular case, that too could amount to an obstruction or interference with those investigations.

Finally, if the evidence is understood to reveal a plan to improperly utilize vote fraud laws in order to suppress or discourage citizens from exercising their constitutional right to vote, such misconduct may violate federal civil rights law.[53] Depending on the scope of the plan, of course, federal conspiracy and aiding and abetting laws would greatly widen the circle of potential defendants on these and all the other cited violations.[54]

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[48] 5 U.S.C. § 7323(a)(1) provides that a federal employee may not "use his official authority or influence for the purpose of interfering with or affecting the result of an election."

[49] Smith, *Task Force to Examine Alleged Improper Politicking*, Washington Post, April 25, 2007.

[50] 18 U.S.C. § 606 provides in part that a federal employee who "discharges . . . any other officer or employee [for] withholding or neglecting to make any contribution of money or other valuable thing for any political purpose, shall be fined under this title or imprisoned not more than three years, or both."

[51] 18 U.S.C. § 1505 provides in part: "Whoever corruptly . . . influences, obstructs, or impedes or endeavors to influence, obstruct, or impede the due and proper administration of the law under which any pending proceeding is being had before any department or agency of the United States . . . [s]hall be fined under this title, imprisoned not more than 5 years . . . or both."

[52] 18 U.S.C. § 1512(c)(2) provides in part: "Whoever corruptly . . . obstructs, influences, or impedes any official proceeding, or attempts to do so, shall be fined under this title or imprisoned not more than 20 years, or both."

[53] 18 U.S.C. § 242 provides in part that "Whoever, under color of any law . . . willfully subjects any person . . . to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States . . . shall be fined under this title or imprisoned not more than one year, or both."

[54] See, e.g., 18 U.S.C. §§ 2, 371.

2. John McKay (W.D. Wash.)

In the case of John McKay, no credible reason for his appearance on the March 2005 firing list[55] has been offered by any Department witness.[56] On the other hand, the Committee's investigation has established that Republican concerns about Mr. McKay's failure to bring vote fraud charges in the wake of the extraordinarily close 2004 gubernatorial election in Washington state were widely circulated in the months following that election,[57] including in correspondence with the Department of Justice.[58] And complaints by Washington state Republican officials that Mr. McKay had "mishandled" the 2004 election were well known to officials in the White House.[59] Mr. McKay described for the Committee being confronted with those Republican concerns by Harriet Miers and her then deputy, William Kelley, when Mr. McKay interviewed for a federal judgeship in August 2006, several months before he was fired.[60]

Committee concern that the firing was in large part a White House reaction to such partisan criticisms of Mr. McKay is only heightened by the fact that, during this same time, Kyle Sampson appears to have personally held a positive view of Mr. McKay's performance, complaining that "our U.S. Attorney, John McKay, got screwed by Washington's judicial selection commission" and stating just months before McKay was fired that "re John, it's highly unlikely that we could do better in Seattle."[61] A few days later, Mr. Sampson further wrote that "I already have raised, on behalf of AG, the [judgeship] issue with the White House folks (Counsel's office and political affairs)."[62] The nomination was not pursued, however, and just months later, White House personnel approved the firing of John McKay.

The firing of Mr. McKay raises substantial questions of improper, and possibly unlawful, conduct, including concerns about many of the possible legal violations described above, particularly those relating to imposing undue pressure on prosecutors' vote fraud enforcement activities and those regarding retaliation for a prosecutor's failure to deliver politically useful indictments. White House information may well be able to clear up the concerns raised by the available record, including those concerning the views and actions of Ms. Miers and Mr. Kelley regarding Mr. McKay.

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[55] OAG 005- OAGN 008.

[56] For a detailed analysis of the reasons offered to support the firing of John McKay, see Section I.B.2. below.

[57] Bowermaster, *GOP Chair Called McKay About '04 Election*, Seattle Times, March 14, 2007; Postman, *GOP Says Election Tainted By Fraud*, Seattle Times, May 18, 2005.

[58] OAG 754-73.

[59] Bowermaster, *McKay went from hero to zero with Justice Department*, Seattle Times, Mar. 21, 2007.

[60] John McKay Response to Questions From Subcommittee Chair Linda Sánchez (on file with the H. Comm. on the Judiciary).

[61] In an email discussion with Kyle Sampson, Debra Yang, then the U.S. Attorney for the Central District of California, further praises McKay, stating that he "would be terrific in that [judgeship], and has really done good work as the USA, but you know that already." Sampson responds that "And, re John, it's highly unlikely that we could do better in Seattle." Yang replies: "He's a great soldier." OAG 203-04.

[62] OAG 207-208.

3. Steven Biskupic (E.D. Wisc.)

No Justice Department witness has explained why Milwaukee U.S. Attorney Steven Biskupic appeared on the March 2005 firing list.[63] Kyle Sampson recalled only that Mr. Biskupic was not a "prominent" U.S. Attorney.[64] On the other hand, the Administration did produce documents describing vote fraud issues in Mr. Biskupic's district during the 2004 elections that Karl Rove appears to have printed and viewed just weeks before Mr. Biskupic was placed on the firing list, and which contain the handwritten notation "Discuss w/Harriet."[65] The record also contains a lengthy catalog of Republican complaints about Mr. Biskupic's failure to bring more vote fraud cases during this time, some of which reached Mr. Rove, and some of which Mr. Rove may have passed on to Kyle Sampson.[66]

It is also known that later, after he appeared on the firing list, Mr. Biskupic's office brought fourteen controversial vote fraud prosecutions relating to the 2004 election, a high level of activity on this issue that has been reported to make up more than ten percent of all federal vote fraud cases brought in the United States between 2002 and 2006.[67] And despite the generally high federal criminal conviction rate, convictions were secured in only five of those fourteen vote fraud cases, further raising concerns that Mr. Biskupic's charging decisions on this politically sensitive issue may have been overly aggressive and politically-tinged.[68]

At the same time, and also after he appeared on the firing list in 2005, Mr. Biskupic's office commenced an investigation into claims that Wisconsin civil servant Georgia Thompson wrongfully awarded a contract to a bidder whose director was a political contributor to Democratic Governor Jim Doyle.[69] An indictment was delivered in that case in January 2006, the very same month that Mr. Biskupic's name was removed from the firing list.[70] Mr. Biskupic's office continued with the prosecution, even though the firm awarded the contract had submitted the lowest bid and had tied for first place on the bid-scoring system, and also in the absence of any evidence that Ms. Thompson was aware of the questioned political

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[63] OAG 005 - OAGN 008. The Committee has only been provided with a redacted version of OAG 005 but Committee staff has reviewed the unredacted version of this document and can confirm public reports that Mr. Biskupic's name is one of those that Kyle Sampson states he has added to the list "based on some additional information I got tonight."

[64] Sampson, Apr. 18, 2007, Interview at 51-52.

[65] OAG 850-51.

[66] OAG 820-47; see also Unnumbered Documents produced by the Department of Justice on May 17, 2007, in response to Apr. 10, 2007, letter of Senator Patrick J. Leahy (on file with the H. Comm. on the Judiciary); Sampson, Apr. 15, 2007, Interview at 168-70; Bice, *State GOP Official Pushed Vote Fraud Issue*, Milwaukee Journal Sentinel, Apr. 7, 2007; Stein, *82 Felons May Have Voted in State*, Wisconsin State Journal, Apr. 13, 2007.

[67] Glauber, *Her First Vote Put Her In Prison*, Milwaukee Journal Sentinel, May 21, 2007; Lipton & Urbina, *In Five-Year Effort, Scant Evidence of Voter Fraud*, New York Times, Apr. 12, 2007 ("Of the hundreds of people initially suspected of violations in Milwaukee, 14 – most black, poor, Democratic and first-time voters – ever faced federal charges. . . . Even the 14 proved frustrating for the Justice Department. It won five cases in court.").

[68] Id.

[69] Barton, Forster, and Walters, *State Official Indicted*, Milwaukee Journal Sentinel, Jan. 24, 2006.

[70] Id.

contributions.[71] That verdict was recently overturned by the United States Court of Appeals for the Seventh Circuit, in a remarkable opinion issued immediately upon oral argument that declared Ms. Thompson innocent and ordered her immediate release, declaring the evidence to be "beyond thin."[72] This ruling came too late, of course, to prevent Governor Doyle's opponent from using the conviction to impact the 2006 election.[73] As Ms. Thompson's union explained in a letter to the Committee, "[D]uring that time, the Republican party spent millions of dollars on advertising portraying Ms. Thompson as a symbol of corruption of the incumbent Democratic regime."[74]

Whether any improper or unlawful conduct occurred regarding the prosecution of Ms. Thompson or the prosecution of any of the vote fraud cases brought during the time Mr. Biskupic was on the firing list is uncertain. Mr. Biskupic has forcefully stated that he did not ever know that he was on any Department of Justice firing list, and no evidence reviewed by the Committee contradicts that statement.[75] However, White House information has not yet been reviewed. If a prosecutor's selection of targets for investigation was based even partially on an effort to avoid losing his job, rather than on his judgment of the merits of the particular cases, that of course would be extremely troubling.[76]

4. Todd Graves (W.D. Mo.)

In the case of Todd Graves, the issue once again appears rather stark based on available information. So far during the Committee's investigation, the only reason suggested for the firing of Mr. Graves is Monica Goodling's assertion that he was asked to resign over what appears to have been a minor Hatch Act issue evaluated by the Inspector General.[77] Mr. Graves testified before the Senate Judiciary Committee, however, that the Inspector General's investigation had been opened at Mr. Graves' own request as a matter of caution after an employee raised the matter (which appears to have concerned his appearance at a fundraiser with the Vice President).[78] Because that investigation seems to have been closed with no finding of

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[71] U.S. v. Thompson, 484 F.3d 877, 878-79 (7th Cir. 2007).

[72] U.S. v. Thompson, 484 F.3d 877, 878 (7th Cir. 2007); Walters & Diedrich, *Ex-State Official Freed*, Milwaukee Journal Sentinel, Apr. 6, 2007.

[73] Lueders, *Biskupic tried to 'squeeze' Georgia Thompson*, Isthmus, May 17, 2007, available at http://www.thedailypage.com/isthmus/article.php?article=7081.

[74] Letter from Timothy E. Hawks and B. Michele Sumara, Atttorneys for AFT-Wisconsin, to John Conyers, Jr., Chairman, H. Comm. on the Judiciary, Oct. 10, 2007.

[75] Johnson, *Politics Had No Role, Biskupic Says*, Milwaukee Journal Sentinel, Apr. 15, 2007.

[76] In the wake of the 2004 election, Steven Biskupic and David Iglesias established Election Fraud Task Force operations. See Goldstein, *Justice Dept. Recognized Prosecutor's Work on Election Fraud Before His Firing*, Mar. 19, 2007. It is revealing that two prosecutors held up by the Department of Justice as expert on this subject would nevertheless receive such heavy political criticism on the issue from local Republicans, and that the Department would apparently respond to that criticism not by defending its challenged prosecutors but possibly by placing them on a firing list.

[77] Goodling, May 23, 2007, H. Comm. on the Judiciary, Testimony at 76.

[78] Graves, June 5, 2007, S. Comm. on the Judiciary, Testimony at 62-63.

wrongdoing by Mr. Graves, it is difficult to accept Ms. Goodling's suggestion that this was the reason Mr. Graves was forced to resign as U.S. Attorney.[79]

In these circumstances, there is a substantial concern that the real reason Mr. Graves was replaced was because he was insufficiently enthusiastic about a controversial lawsuit regarding Missouri's voter rolls that was pressed by Main Justice officials, including Bradley Schlozman, who almost immediately was appointed to replace Mr. Graves after he was directed to step down.[80] In validation of Mr. Graves' judgment, that case was dismissed by the district court in April 2007 for a host of reasons, including lack of evidence of vote fraud.[81]

The importance of vote fraud enforcement issues in the replacement of Mr. Graves with Mr. Schlozman is further suggested by Mr. Schlozman's decision to obtain and publicly announce four vote fraud indictments in the days just before the 2006 elections, a questionable act that may have violated the policies set forth in the Department's Election Crimes Manual.[82] According to press reports, at least one of those indictments had previously been "rejected by a Missouri prosecutor as being too weak and as inappropriate to pursue so close to the elections."[83] Mr. Schlozman's misleading testimony before the Senate Judiciary Committee, in which he claimed that Main Justice officials had "directed" him to bring those indictments at that time, and which he was compelled to "clarify" within days, only further heightens concern about the matter.[84]

5. Carol Lam (S.D. Cal.)

Carol Lam of San Diego was fired while conducting a major and expanding public corruption prosecution. The Department has claimed that Ms. Lam was fired because of ongoing problems regarding her District's immigration enforcement policies and gun crime prosecution statistics, but a fair look suggests those issues are far from clear. Ms. Lam provided a convincing explanation for her gun prosecution policies, and Mr. Comey, who supervised Ms. Lam on this issue, testified that gun numbers alone "tell you nothing in a vacuum" and that he did not consider Ms. Lam's gun performance a reason for her to be fired.[85] Furthermore, Mr. Comey

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[79] Graves ,June 5, 2007, S. Comm. on the Judiciary, Testimony at 62-63; Mchaffey, *US Attorney Todd Graves Report Disputes Monica Goodling Testimony*, Kansas City Daily Record, May 28, 2007.

[80] Savage, *Missouri attorney a focus in firings*, Boston Globe, May 6, 2007; Morris, *Attorney Scandal May Be Tied to Missouri Voting*, NPR, May 3, 2007, available at *http://www.npr.org/templates/story/story.php?storyId=9981606*.

[81] See *United States v. Missouri*, 2007 WL 1115204 (W.D. Mo., Apr. 13, 2007).

[82] See generally Schlozman, S. Comm. on the Judiciary, Testimony, June 5, 2007; Savage, *Missouri attorney a focus in firings*, Boston Globe, May 6, 200; Morris, *Attorney Scandal May Be Tied to Missouri Voting*, NPR, May 3, 2007, available at *http://www.npr.org/templates/story/story.php?storyId=9981606*.

[83] Gordon, *Politics may have played a role in voter fraud allegations in Missouri*, McClatchy Newspapers, June 9, 2007.

[84] See Schlozman, June 5, 2007, S. Comm. on the Judiciary, Testimony and June 11, 2007, letter of Bradley Schlozman to S. Comm. on the Judiciary Chairman Patrick J. Leahy purporting to "clarify" that testimony.

[85] See Carol Lam's Response to Questions from Subcommittee Chair Linda Sánchez (on file with the H. Comm. on the Judiciary); Comey, May 3, 2007, Subcomm. on Commercial and Admin. Law, H. Comm. on the Judiciary, Testimony at 15, 17-18.

testified that, of the group of U.S. Attorneys with low gun numbers that he contacted as part of an effort to manage U.S. Attorney production on this issue, only Carol Lam was fired.[86] In December 2006, at the very same time senior Department officials were demanding her resignation, the Department had also sent a delegation to meet with Carol Lam and "to study why the city of San Diego had [its] lowest violent crime rate in 25 years."[87] On immigration, at the same time the Department claims it was preparing to terminate Ms. Lam for her immigration performance, it was defending Ms. Lam's immigration enforcement approach to Senator Feinstein and Representative Issa.[88] Moreover, Will Moschella who worked on this issue while in the Office of Legislative Affairs told Committee investigators that he "knew about the issues relating to immigration and Carol Lam [and] certainly wouldn't have equated that in my mind with ... [g]rounds for termination."[89]

On the other hand, evidence collected to date suggests improper political factors may have been involved in the decision. On May 10, 2006, Kyle Sampson wrote to William Kelley in the White House Counsel's office stating that he wanted to talk to Kelley about "[t]he real problem we have right now with Carol Lam that leads me to conclude that we should have someone ready to be nominated on 11/18, the day her 4-year term expires."[90] According to press reports, which in turn quoted statements by Senator Feinstein, this email came just one day after Ms. Lam had notified Justice Department officials that she would be executing search warrants in the criminal investigation of CIA number three Kyle "Dusty" Foggo and politically-powerful defense contractor Brent Wilkes.[91] While it is certainly true that some in Congress and some in the Department of Justice had ongoing concerns about Ms. Lam's immigration enforcement approach, given the emphatic and time-specific language in this email ("the real problem we have right now with Carol Lam"[92]), it is difficult to credit Kyle Sampson's testimony that he was simply referring to the Department's concern about the long-simmering immigration issue when he sent this message to the White House Counsel's office.[93]

The circumstances and manner of Ms. Lam's firing have raised concerns about the Administration's true motives on the part of others as well. After Ms. Lam was fired, the head of the FBI's San Diego office Dan Dzwilewski (who would resign soon after these comments) stated: "Lam's continued employment as U.S. attorney is crucial to the success of multiple ongoing investigations. . . . I can't speak for what's behind all that, what's the driving force behind this or the rationale. I guarantee politics is involved."[94] The Department's refusal to

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[86] Comey, May 3, 2007, Subcomm. on Commercial and Admin. Law, H. Comm. on the Judiciary, Testimony at 17-18.

[87] Lam, Mar. 6, 2007, Subcomm. on Commercial and Admin. Law, H. Comm. on the Judiciary, Testimony at 22.

[88] ASG 255; DAG 467-70, 484-87, OAG 548-53, DAG 347-50.

[89] Moschella, Apr. 24, 2007, Interview at 39.

[90] OAG 22.

[91] Eggen, *Prosecutor's Firing Was Urged During Probe*, Washington Post, Mar. 19, 2007; Ragavan, *Note to Gonzales on CIA Prosecution Preceded Firing of U.S. Attorney*, US News and World Report, Mar. 19, 2007.

[92] Emphasis added.

[93] Sampson, Mar. 29, 2007, S. Comm. on the Judiciary, Testimony at 14, 26-27.

[94] Thornton, *Lam Stays Silent About Losing Job*, San Diego Union Tribune, Jan. 13, 2007.

consider an extension of time for Ms. Lam as she apparently worked to resolve questions regarding the potential indictments of Brent Wilkes and Dusty Foggo also raises concern, particularly since some of the U.S. Attorneys who do not appear to have been pursuing such politically sensitive matters were granted requested extensions.[95] According to Ms. Lam, she was told that her "request for more time based on case-related considerations was 'not being received positively' and that she should 'stop thinking in terms of the cases in the office.'"[96] These commands, Ms. Lam was told, came from "the very highest levels of the government."[97] The specific direction to Ms. Lam that she should not worry about "the cases in the office" on orders from "the highest levels of the government" only reinforces concern that the politics of those cases did in fact play a role in her firing.[98]

As noted above, the Department has certainly identified information making clear that some of her superiors were frustrated with Ms. Lam and what some considered her undue independence. On the other hand, other aspects of her dismissal give great cause for concern, especially given the political sensitivity of the investigation Ms. Lam was leading at the time she was replaced. White House information, such as follow up to Mr. Sampson's email stating that he needed to talk to William Kelley about the "real problem" with Carol Lam, is needed to bring clarity to this important issue.

6. Leura Canary and the Siegelman Case (M.D. Ala.)

Concerns about the apparently political nature of these firings are only heightened by the emerging allegations that some U.S. Attorneys who were retained by the Department – including the so-called "loyal Bushies"[99] – may have selectively prosecuted Democrats. The Judiciary Committee Subcommittees on Crime, Terrorism and Homeland Security and Commercial and Administrative Law held a hearing on this issue, at which Republican former U.S. Attorney General Richard Thornburgh as well as a former U.S. Attorney from Alabama expressed deep concern about prosecutions that may have been improperly impacted by political considerations. Bringing the force of the federal criminal justice apparatus to bear on an individual based in any

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[95] On January 5, 2007, for example, Kyle Sampson emailed several Department officials stating "we granted 1-month extensions for Dan and Margaret, but not Carol – right?" See DAG 2614.

[96] See Carol Lam's Response to Questions from Subcommittee Chair Linda Sánchez at 7 (on file with the H. Comm. on the Judiciary).

[97] Id.

[98] At the Committee's meeting to consider the contempt report, some Republican Members appeared to suggest that Ms. Lam's testimony at a Subcommittee hearing specifically contradicted the claim that such political factors played a role in her firing. See, e.g., July 25, 2007, Subcomm. on Commercial and Admin. Law, Hearing at 24 (comments of Representative Keller, asserting that Ms. Lam testified that "No, I have no such evidence."); id. at 27 (comments of Representative Lungren). Of course, there is no reason that Ms. Lam would have knowledge of the true motives of those who fired her. Indeed, her full testimony was: "Q: Do you have evidence that your role in prosecuting Duke Cunningham is the reason you were asked to resign? A: I was not looking for evidence. I don't have any indication one way or the other. Q: I know you weren't looking for it, but do you have any evidence that . . . that you were asked to resign as- A: No, sir." Lam, Mar. 6, 2007, Subcomm. on Commercial and Admin. Law, Hearing at 64 (emphasis added).

[99] OAG 180.

way on that person's political affiliation is a clear abuse of the prosecutorial function, and may well violate the person's civil rights.

Evidence that such wrongdoing may have occurred includes a recent academic study finding that federal prosecutors during the Bush Administration have indicted Democratic officeholders far more frequently than their Republican counterparts. According to updated data presented at the Subcommittees' hearing, of the 820 cases they identified, 47 involved independents, 142 involved Republicans, and 641 involved Democrats, and noted that local Democrats were five times as likely as Republicans to be subject to criminal charges from the Department of Justice.[100]

Against that background, cases like the 2006 conviction of Alabama's former Democratic Governor Don Siegelman have caused concern. In May 2007, Ms. Dana Jill Simpson, a Republican attorney in Alabama who had worked for Mr. Siegelman's 2002 Republican opponent, swore in an affidavit that she was told by a political associate of Karl Rove, Bill Canary, who was also the husband of Alabama U.S. Attorney Leura Canary, that Mr. Rove and the Alabama U.S. Attorneys were working to "take care of" Mr. Siegelman and that Rove had already "spoken with the Department of Justice" about the matter.[101] Committee staff interviewed Ms. Simpson under oath, who reaffirmed this information and described being told of further contacts by Mr. Rove with the Justice Department urging the prosecution of Mr. Siegelman in late 2004.[102] Furthermore, testimony at the Subcommittee's hearing on allegations of selective prosecution indicated that, at the very time Ms. Simpson asserts that she was told Mr. Rove was interceding with the Justice Department, Mr. Siegelman's attorneys were told that officials in the Department had ordered local prosecutors to give the case a "top to bottom" review and the prosecution did at that time take on a new and aggressive life.[103] There have been other reported irregularities in the case against Mr. Siegelman that raise questions about his prosecution, issues serious enough that 44 former state Attorneys General recently signed a petition "urging the United States Congress to investigate the circumstances surrounding the investigation, prosecution, sentencing and detention" of Mr. Siegelman.[104] Once again, further information, and in particular information from Mr. Rove in response to Ms. Simpson's serious allegations, is needed to address such suspicions and begin the process of restoring public confidence in the integrity and impartiality of the Justice Department in its enforcement of federal criminal law.

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[100] Shields, Oct. 23, 2007, Subcomms. On Crime, Terrorism, and Homeland Security and Commercial and Admin. Law, Testimony at 4.

[101] Simpson, May 21, 2007, Affidavit at 3.

[102] See Simpson, Sept. 14, 2007 Interview at 50-57; Nossiter, *Democrats See Politics In Governor's Jailing*, New York Times, Sept. 11, 2007.

[103] Jones, Oct. 23, 2007, Subcomms. On Crime, Terrorism, and Homeland Security and Commercial and Admin. Law, Hearing at 18.

[104] Letter from 44 former state attorneys general, to John Conyers, Jr., Chairman, H. Comm. on the Judiciary, and Patrick Leahy, Chairman, S. Comm. on the Judiciary, July 13, 2007.

B. Current and Former Justice Department Officials May Have Made False or Misleading Statements to Congress, Many of Which Served to Obscure or Downplay The Role Played By White House Personnel In The Firings

As the U.S. Attorney firings have come to light, Department of Justice personnel, apparently acting at times with the approval and encouragement of White House personnel, have made a number of conflicting, inaccurate, and misleading statements. Some of these misstatements have been formally retracted or corrected; others have not. The resulting confusion has hampered the Committee's investigation and distorted the American public's understanding of these important issues. It is possible that some of these false statements amount to perjury,[105] or criminal false statement violations,[106] or obstruction of Congressional proceedings.[107] More information, and particularly White House information, is needed to fully assess the degree of any illegality, and the appropriate defendants on any such charges.

1. Potentially Inaccurate Statements by Former Attorney General Alberto Gonzales

In March 2007, before the release of documents regarding the controversy, then-Attorney General Alberto Gonzales stated that he "was not involved in seeing any memos, was not involved in any discussions about what was going on."[108] That seems to have been an incorrect statement, as both Kyle Sampson and Monica Goodling later testified.[109] The former Attorney General has also made sharply conflicting statements about the role of former Deputy Attorney General McNulty in the firings, stating at one point that Mr. McNulty's views on the issue of replacing U.S. Attorneys were of paramount importance to him[110] and at another point that one of the biggest flaws of the process was that it did not sufficiently involve Mr. McNulty.[111] Even Mr. Gonzales' broad statement that "I would never, ever make a change in a United States attorney position for political reasons . . . . I just would not do it"[112] is arguably false since, at a minimum, firing Bud Cummins simply so that Rove aide Tim Griffin could have that position

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[105] 18 U.S.C. § 1621 provides in part: "Whoever . . . having taken an oath before a competent tribunal, officer, or person . . . that he will testify. . . truly . . . willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true. . . is guilty of perjury and shall, except as otherwise expressly provided by law, be fined under this title or imprisoned not more than five years, or both."

[106] 18 U.S.C. § 1001 provides in part: "whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully . . . makes any materially false, fictitious, or fraudulent statement . . . shall be fined under this title, imprisoned not more than 5 years, ... or both."

[107] 18 U.S.C. § 1505 provides in part: "Whoever corruptly. . .obstructs, or impedes or endeavors to influence, obstruct, or impede . . . the due and proper exercise of the power of inquiry under which any inquiry or investigation is being had by either House, or any committee of either House or any joint committee of the Congress . . . [s]hall be fined under this title, imprisoned not more than 5 years, ... or both."

[108] Transcript of Mar. 13, 2007, Press Statements by Attorney General Alberto Gonzales.

[109] Sampson, Mar. 29, 2007, S. Comm. on the Judiciary, Testimony at 15; Sampson, April 15, 2007, Interview at 20-21; Goodling, May 23, 2007, H. Comm. on the Judiciary, Testimony at 95-97.

[110] May 15, 2007, Remarks of Alberto Gonzales at the National Press Club at 12, 14.

[111] Gonzales, Apr. 19, 2007, S. Comm. on the Judiciary, Testimony at 46-47.

[112] Gonzales, Jan. 18, 2007, S. Comm. on the Judiciary, Testimony at 22.

appears to be a political act. And other fired U.S. Attorneys testified that they had been told the firings would allow their replacements to "build their resumes [and] get in experience as a United States attorney" to support future appointments to federal judgeships "or other political types of positions,"[113] which similarly appears to be a political basis for firing a U.S. Attorney.

Other statements of concern by the former Attorney General include his testimony regarding calls received from Senator Domenici in late 2005 and early 2006. Mr. Gonzales testified that, in those calls, the Senator criticized the performance of David Iglesias, which was useful testimony for the Administration because it suggested that Senator Domenici had concerns about Mr. Iglesias well before the controversy surrounding the 2006 election.[114] But Department documents and testimony of other witnesses strongly indicate that the calls actually concerned the Senator's request that more resources be provided to Mr. Iglesias' district. Principal Associate Deputy Attorney General Will Moschella, for example, was present during each of these calls and testified that he understood them all to be focused on the Senator's concern that more resources be provided to Mr. Iglesias.[115] Mr Moschella further testified that the Attorney General never relayed to him that the calls were critical of Mr. Iglesias.[116] Supporting Mr. Moschella's recollections of the calls, the email scheduling one of these calls states, "Senator Domenici would like to talk to the AG regarding his concerns about staffing shortages in the U.S. Attorneys office (District of NM)."[117] And in fact, in response to the Senator's concern, new prosecutorial resources were provided to Mr. Iglesias in July 2006.[118]

Mr. Gonzales also testified that he had not discussed the firings issue with other fact witnesses in order to preserve the integrity of the ongoing investigations.[119] Monica Goodling, however, told the Committee that he had rehearsed his recollections with her before she went on leave in an "uncomfortable" private conversation,[120] another matter of concern.[121]

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[113] See Bogden March 6, 2007, Testimony at 26; see also Charlton March 6, 2007, Testimony at 23 ("this was being done so that other individuals would have the opportunity to quote, 'touch base' end quote, as United States Attorneys before the end of the president's term.").

[114] Gonzales, May 10, 2007, H. Comm. on the Judiciary, Testimony at 10, 73, 100-04; Gonzales, April 19, 2007, S. Comm. on the Judiciary, Testimony at 13.

[115] Moschella, Apr. 24, 2007, Interview at 127-143.

[116] Id.

[117] OAG 185; see also DAG 2200-01, 2204-2207, 2370-74; OAG 65-80, 184-85, 196-98, 918-20, 940-42, 1817-18, 1226, 1228, 1230; ASG 009-10.

[118] Prepared Remarks of Attorney General Alberto R. Gonzales Announcing the Addition of Twenty-Five Federal Prosecutors to U.S./Mexico Border Districts, July 31, 2006, available online at http://www.usdoj.gov/ag/speeches/2006/ag_speech_0607311.html.

[119] Gonzales, May 10, 2007, H. Comm. on the Judiciary, Testimony at 8-9.

[120] Goodling May 23, 2007, H. Comm. on the Judiciary, Testimony at 173-78.

[121] On July 24, 2007, Mr. Gonzales confirmed that this conversation did in fact occur, although he asserted that he was not trying to coach Ms. Goodling but merely "to console and reassure an emotionally distraught woman" and to "reassure her, as far as I knew, no one had done anything intentionally wrong." Gonzales, July 24, 2007, S. Comm. on the Judiciary, Hearing at 69. It is questionable at best to suggest that it would have been consoling to Monica Goodling for the Attorney General to talk through his version of the facts of the U.S. Attorney firings with her at that time, and this issue is now under investigation by the Department's Office of the Inspector General and Office of Professional Responsibility.

2. Potentially Inaccurate Statements by Former Deputy Attorney General Paul McNulty and his Principal Associate Will Moschella

Potentially unlawful false statements also may have been made in support of the Administration's effort to minimize and obscure the role of White House personnel in the firings. For example, in February 2007, then Deputy Attorney General Paul McNulty testified before the Senate Judiciary Committee that "These are Presidential appointments . . . so the White House personnel, I'm sure, was consulted prior to making the phone calls,"[122] an incomplete statement that appears to have understated the involvement of White House individuals in the inception, development, and approval of the firing plan. No one within the Department or the White House ever formally corrected those statements, and Principal Associate Will Moschella provided similar misinformation to the House Judiciary Committee.[123]

Press reports around the time of Mr. Moschella's testimony reinforced this version of events, with articles in *The Washington Post* and *The New York Times* citing White House and Justice Department sources and inaccurately asserting that discussions about the firings began in October 2006, that White House personnel did not encourage the dismissals, and that the White House was merely consulted for final sign off as a matter of "standard operating procedure."[124] In one email regarding these articles, Kyle Sampson offers "kudos" to the Department's press aide and to Mr. McNulty for their work in shaping these articles, even though the articles contained a version of events minimizing the role played by White House personnel that Mr. Sampson must have known was inaccurate or incomplete.[125] That email was received by Mr. Moschella just days before he testified to this Committee, and he testified consistent with the inaccuracies in that article that were arguably approved or vouched for by Mr. Sampson.[126]

The Committee also has concern about the statements made by Mr. McNulty and Mr. Moschella to the Senate and House Judiciary Committees regarding the firing of David Iglesias. Neither official testified that the firing may have been based in whole or in part on a call received by Mr. McNulty from Senator Domenici in October 2006, even though Mr. McNulty stated during his subsequent interview with the Committee that such a call from Senator Domenici was at least important to his decision not to object to Mr. Iglesias' presence on the firing list.[127] Furthermore, the omission of that information may have been deliberate. Monica Goodling stated in her testimony before the Committee that the issue of the call from Sen. Domenici had come up during a preparation session in advance of Mr. McNulty's briefing

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[122] McNulty, Feb. 6, 2007, S. Comm. on the Judiciary, Testimony at 36.

[123] Moschella, Mar. 6, 2007, Subcomm. on Commercial and Admin. Law, H. Comm. on the Judiciary, Testimony at 14.

[124] Solomon & Eggen, *White House Backed U.S. Attorney Firings*, Washington Post, Mar. 3, 2007; Johnston, Lipton & Yardley, *A New Mystery to Prosecutors: Their Lost Jobs*, N.Y. Times, Mar. 4, 2007. See also OAG 1235-37, DAG 2520-22.

[125] OAG 1484.

[126] See Moschella, March 6, 2007, Subcomm. on Commercial and Admin. Law, H. Comm. on the Judiciary, Testimony at 12, 14 (stating that "It was a process starting [-] in October" and that the Department had sent its proposal to the White House to "let them know" and sign off).

[127] McNulty April 27, 2007, Interview 62.

to members of the Senate Judiciary Committee in early February 2007, and that Mr. McNulty directed her to omit that reference from the materials she was drafting for him to use.[128]

3. Potentially Inaccurate Statements by Former Chief of Staff to the Attorney General Kyle Sampson

Mr. Sampson has made a number of statements to Congress that may have been inaccurate. One such statement appears to have concealed the forced resignation of U.S. Attorney Todd Graves, which was not confirmed by the Department as a forced (as opposed to voluntary) resignation until May 2007. On January 18, 2007, Kyle Sampson emailed the Senate Judiciary Committee's Chief Counsel that "last year, eight USAs asked to resign" and further assured him, "per my prior reps to you, the number of USAs asked to resign in the last year won't change: eight."[129] Such misstatements hampered the Committee's investigation by concealing Mr. Graves' connection to the firing process while many hearings and interviews on the matter were conducted, and caused the Committee to expend substantial resources trying to learn which U.S. Attorneys had been forced to resign by the Department and which had not.[130]

Mr. Sampson also led the drafting of a letter sent by Richard Hertling on February 23, 2007, to several U.S. Senators that inaccurately stated that "The Department is not aware of Karl Rove playing any role in the decision to appoint Mr. Griffin," a letter that the Department subsequently acknowledged was in part "contradicted by Department documents."[131] Mr. Sampson's knowledge of the inaccuracy of his statement regarding Mr. Rove is shown by his prior email stating "getting [Mr. Griffin] appointed was important to Harriet, Karl, etc."[132] Mr. Sampson's effort to explain this contradiction to the Senate Judiciary Committee by claiming that he had merely assumed that the Griffin appointment was important to Mr. Rove, and had not truly "known" that fact, is hard to credit. White House information, and particularly documents of Mr. Rove, would be critical in determining whether Mr. Sampson's statements on this issue were truthful.

Mr. Sampson's testimony regarding the reasons for the firings and the development and maintenance of the firing list may itself prove to have been false or incomplete. As described below, many of the reasons offered by Mr. Sampson for the removal of these U.S. Attorneys do

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[128] Goodling May 23, 2007, H. Comm. on the Judiciary, Prepared Remarks at 2-3. Indeed, before the Committee, Monica Goodling directly accused the Deputy Attorney General of giving inaccurate testimony in four different respects. Id. at 1-2.

[129] OAG 1805-06.

[130] The Attorney General's prepared testimony to the House Judiciary Committee in May 2007 also suggested that only eight U.S. Attorneys had been fired, referencing "the decision to request the resignations of eight (of the 93) U.S. Attorneys," although there appears to be no fair basis for excluding Mr. Graves from the discussion of these issues other than the fact that the Committee had not learned at that time that Mr. Graves' resignation had been forced. See Alberto Gonzales May 10, 2007, H. Comm. on the Judiciary, Prepared Testimony at 2.

[131] Letter from Richard Hertling to John Conyers, Jr., Chairman, H. Comm. on the Judiciary, and Linda Sánchez, Chair, Subcomm. on Commercial and Admin. Law, Mar. 28, 2007.

[132] OAG 127.

not appear to hold up to scrutiny.[133] And Mr. Sampson's inability to remember many important details of the process, including critical recent details such as who suggested that David Iglesias be placed on the firing list just months prior to Mr. Sampson's testimony on the subject, is particularly troubling.[134] Finally, the Committee has some concern about the email described above, transmitted to Mr. Moschella as he was preparing to testify before this Committee, in which Mr. Sampson appeared to validate an inaccurate version of events.

4. Potentially Inaccurate Statements and Obstruction of Justice by the Former Chief of Staff to the Deputy Attorney General Mike Elston

The Committee has substantial concerns about calls placed by Mike Elston, former Chief of Staff to the Deputy Attorney General, to three of the fired U.S. Attorneys in January and March 2007. All three of the U.S. Attorneys have told the Committee that they viewed those calls as threatening. John McKay wrote that "I greatly resented what I felt Mr. Elston was trying to do: buy my silence by promising that the Attorney General would not demean me in his Senate testimony."[135] Mr. McKay also stated that the call seemed "sinister" and that he believed Mr. Elston was "prepared to threaten [him] further" if he did not stay quiet.[136] Paul Charlton wrote that "In that conversation I believe that Elston was offering me a quid pro quo agreement: my silence in exchange for the Attorney General's."[137] Bud Cummins wrote that "[Elston] essentially said that if the controversy continued, then some of the USA's would have to be 'thrown under the bus.'"[138] Mr. Elston has denied any effort to intimidate these witnesses,[139] but has not adequately explained how three experienced federal prosecutors all misinterpreted their separate discussions with him in such similar ways.

In her on-the-record interview, sitting U.S. Attorney for the Western District of Pennsylvania Mary Beth Buchanan accused Mike Elston of lying to her about how he generated a group of names as possible candidates for replacement in an email Mr. Elston sent to Kyle Sampson on November 1.[140] Mr. Elston offered the same allegedly untrue explanation for this email to the Committee and the public that he provided to Ms. Buchanan – that he collected the listed names after talking to various Department officials.[141] Ms. Buchanan, however, asserted at her interview that Mr. Elston made up this list of names himself and, in particular, that she was

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[133] See Section I.D.1. and I.D.2. below.

[134] Sampson, Apr. 15, 2007, Interview at 143.

[135] John McKay's Response to Questions from Subcommittee Chair Linda Sánchez at 2 (on file with the H. Comm. on the Judiciary).

[136] Id.

[137] Paul Charlton's Response to Questions from Subcommittee Chair Linda Sánchez at 2 (on file with the H. Comm. on the Judiciary).

[138] Bud Cummins's Response to Questions from Subcommittee Chair Linda Sánchez at 4 (on file with the H. Comm. on the Judiciary).

[139] Elston, Mar. 30, 2007, Interview at 141-42, 191-96, 201-02.

[140] Buchanan, June 15, 2007, Interview at 121-22. See also OAG 039; Ward, *Buchanan naming 'out of context,'* Pittsburgh Post Gazette, May 18, 2007.

[141] Elston, Mar. 30, 2007, Interview at 37, 64-65; Ward, *Buchanan naming 'out of context,'* Pittsburgh Post Gazette, May 18, 2007.

included in the list because Mr. Elston had a colleague who wanted to replace Ms. Buchanan as U.S. Attorney for the Western District of Pennsylvania.[142] The extent to which this investigation has included direct accusations by senior Department personnel that other Department officials have made untrue statements is highly disturbing and requires further investigation.

C. Civil Service Requirements and the Presidential Records Act May Have Been Violated

The Committee's investigation into the U.S. Attorney firings and related matters has indicated that, under the current Administration, the Department of Justice has been deeply politicized.[143] Kyle Sampson's March 2005 draft of the firing list, for example, specifically ranked U.S. Attorneys based on their "loyalty to the President and the Attorney General."[144] Multiple other Depart ment documents stress the importance of loyalty.[145] And John McKay has described a troubling address given by then Attorney General Gonzales in which Mr. Gonzales apparently told an assembly of U.S. Attorneys that "I work for the White House, you work for the White House," remarks that Mr. McKay and other attendees found inconsistent with traditional notions of prosecutorial independence.[146] The depth of the problem is plainly shown by the remarkable public comments of a twenty-five year Department veteran: "I can honestly say that I have never been as ashamed of the department and government that I serve as I am at this time. The public record now plainly demonstrates that both the DOJ and the government as a whole have been thoroughly politicized in a manner that is inappropriate, unethical and indeed

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[142] Buchanan, June 15, 2007, Interview at 121-22, 125-26.

[143] Apparently, the problem extends beyond the confines of the Justice Department, with recent reports confirming that detailed political briefings have been given by White House officials to members of the General Services Administration, to State Department officials, including sitting Ambassadors, to members of the U.S. Agency for International Development, and even at the Peace Corps. Babbington, *Senators Challenge White House Briefings*, Associated Press, July 24, 2007. The Office of Special Counsel recently concluded that GSA head Lurita Doan violated the Hatch Act in comments made at a briefing given to her agency by Scott Jennings, and that she made unsubstantiated and possibly witness-intimidating comments during the course of the OSC's investigation. See O'Harrow, Jr. & Higham, *GSA Chief Violated Hatch Act, Special Counsel's Report Alleges*, Washington Post, May 24, 2007.

[144] OAG 005.

[145] See OAG 180 (Kyle Sampson email describing favored U.S. Attorneys as "loyal Bushies"). Another example would be a memorandum from Kyle Sampson to Attorney General Ashcroft's Chief of Staff recommending a particular candidate be appointed to chair the Attorney General's Advisory Committee in part because that person was "loyal to the Attorney General." See OAG 147-48. Similarly, in June 2006, Monica Goodling sent an email asking U.S. Attorneys to recommend individuals who might wish to serve in Main Justice leadership positions, stating that she was seeking candidates "who [are] incredibly loyal." See OAG 567-68. And even after his firing, Kevin Ryan took pains to assure Department leadership that he remained a "company man." See OAG 896. Other documents show Department attention to Federalist Society membership as an apparent consideration in promotion. See OAG 203-04 (email from then U.S. Attorney Debra Yang describing a candidate for a federal position: "I think he's a comer. Got a great background, including military service and good looking family, federalist etc."); see also OAG 1152-54 (chart prepared by Monica Goodling listing U.S. Attorneys and noting membership in the Federalist Society).

[146] Bowermaster, *Charges may result from firings, say two former U.S. attorneys*, Seattle Times, May 9, 2007.

unlawful."[147] Donald Ayer, who served as Deputy Attorney General under the first President Bush, sees the problem in a similar light with respect to the U.S. Attorney firings and other issues: "And the really terrible thing that's gone on in the last few years is that Attorney General Gonzales apparently was sent to the department to continue to pursue a mission that for some reason President Bush wanted pursued, which was a mission to collapse the independence of the department."[148]

It is against this backdrop that the Congress must consider the testimony of White House liaison Monica Goodling that she "crossed the line" in considering inappropriate political factors in hiring career prosecutors and immigration judges, and in selecting individuals to be "detailed" into Department leadership offices from other agencies or other positions within the Department.[149] That testimony was echoed by Bradley Schlozman's acknowledgment to the Senate Judiciary Committee that he probably had boasted about hiring Republicans into the Department, statements that reinforced troubling allegations regarding Mr. Schlozman's political activities that had surfaced in the press.[150]

Ms. Goodling acknowledged that her politically-based hiring activities had violated civil service requirements. And while she downplayed her responsibilities as White House Liaison in her testimony to the Committee,[151] it is clear that further access to information on these issues is critical to assessing and remedying the scope of such violations, including information regarding whether Ms. Goodling's White House contacts had any knowledge of, or role in, her activities.

Committee efforts to obtain information regarding the U.S. Attorney investigation have also contributed to the exposure of some White House officials' apparently widespread use of non-governmental email accounts to conduct government business, in possible violation of the White House's own policies, and the White House's failure to preserve some such emails as required by the Presidential Records Act.[152] A number of documents obtained in response to Committee document requests and its subpoena to the Department of Justice demonstrate such possible misuse of private email accounts in connection with the U.S. Attorney firings or related

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[147] Koppel, *Bush justice is a national disgrace*, Denver Post, July 5, 2007.

[148] Inskeep, *Integrity Needed in DOJ Leadership*, NPR Morning Edition, Aug. 28, 2007.

[149] Goodling, May 23, 2007, H. Comm. on the Judiciary, Prepared Remarks at 6-7; Goodling, May 23, 2007, H. Comm. on the Judiciary, Testimony at 56-58, 73-74, 80-82.

[150] Schlozman June 5, 2007, S. Comm. on the Judiciary, Testimony at 17; Kiel, *DoJ Lawyer: Controversial Prosecutor Played Politics at Department*, TPM Muckracker, Apr. 24, 2007, available at http://www.tpmmuckraker.com/archives/003081.php.

[151] Goodling, May 23, 2007, H. Comm. on the Judiciary, Testimony at 53-54.

[152] The Committee on Oversight and Government Reform has conducted a detailed investigation of this important issue and released an interim report documenting potential violations of law. See *Investigation of Possible Violations of the Presidential Records Act*, Interim Report by the Majority Staff of the House Committee on Oversight and Government Reform, 110th Cong. (June 2007).

matters.[153] Discovery from the White House is needed to establish the extent and impact of any such misuse of private email accounts and related violations of law.

D. Serious Questions About the U.S. Attorney Firings Remain Unanswered

Although the Committee has learned a great deal about the firings, the inability or unwillingness of Justice Department witnesses to testify about many key issues has materially hampered the Committee's factfinding effort. Accordingly, despite vigorous efforts, important questions about the firings remain unanswered, such as why this process was undertaken in the first place, who in the Administration selected most of these U.S. Attorneys for firing and why, and what role White House personnel played. Many of the Administration's initial statements on these issues have turned out to be inaccurate. With non-White House sources of information largely exhausted, only fair access to White House documents and testimony can shed further light on these unprecedented events.

1. Why did the Administration Launch the Effort to Replace U.S. Attorneys?

It is now well established that, in the opening days of President Bush's second term, then Senior Presidential Advisor Karl Rove raised the idea with officials in the White House Counsel's office of replacing some or all U.S. Attorneys.[154] At this point, however, it is not known why Mr. Rove was interested in this issue, although he was at that time under investigation by a sitting U.S. Attorney and had testified three times before a federal grand jury in the matter.[155]

Mr. Rove's request was forwarded to Kyle Sampson, then a deputy Chief of Staff to the Attorney General, who responded that most U.S. Attorneys "are doing a great job, are loyal Bushies, etc." and that even "piecemeal" replacement of U.S. Attorneys would cause political upheaval.[156] "That said," Mr. Sampson wrote, "if Karl thinks there would be political will to do it, then so do I."[157] Newly installed White House Counsel Harriet Miers apparently took up

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[153] See, e.g., DAG 2458-59 (Karl Rove using a Republican National Committee email account to receive an email from Scott Jennings' White House account regarding the contacts between Senator Domenici and David Iglesias); OAG 1751 (Karl Rove using an RNC email account to receive recommendations for the New Mexico U.S. Attorney position, as well as unspecified "thanks for everything . . ." from Senator Domenici's Chief of Staff); OAG 572 (Scott Jennings using an RNC email account to arrange meetings between New Mexico Republican officials and Administration personnel regarding David Iglesias); OAG 1838 (Jennings using an RNC account to arrange a call with Monica Goodling and Kyle Sampson on the Griffin appointment); OAG 1812 (Sara Taylor using an RNC email account to discuss the Administration's response to Bud Cummins with Kyle Sampson); OAG 1814 (Sara Taylor using an RNC email account to discuss the Administration's response to Bud Cummins with Kyle Sampson).

[154] OAG 180; Greenburg, *E-Mails Show Rove's Role in U.S. Attorney Firings*, ABC News, Mar. 15, 2007; Shapiro, *Documents Show Justice Ranking US Attorneys*, NPR, Apr. 13, 2007 available at http://www.npr.org/templates/story/story.php?storyId=9575434.

[155] Novak, *Rove Testifies in Wilson Leak*, Time, Oct. 15, 2004; VandeHei, *Rove Testifies 5th Time On Leak*, Washington Post, Apr. 27, 2007.

[156] OAG 180.

[157] Id.

Mr. Rove's idea, and over the next two years received repeated drafts of the firing list from Mr. Sampson.[158] As with Mr. Rove, at this point the Committee has learned very little as to why Ms. Miers believed that an effort to replace sitting U.S. Attorneys should be launched.

The Justice Department has claimed that the purpose of this effort was to identify and replace weak-performing U.S. Attorneys, but the Committee's investigation has established that was clearly not the case. Most of the fired U.S. Attorneys had outstanding performance evaluations,[159] and witnesses in the investigation have vigorously praised many of them as top prosecutors.[160] The reaction to the firings in the U.S. Attorneys' home districts was generally one of surprise and dismay, with the comments of then Special Agent Dzwilewski described above being just one of many examples.[161] The Justice Department has sought to minimize the significance of its written performance evaluations but, with very few exceptions, the Department has offered virtually no other credible evidence suggesting that the fired U.S. Attorneys were such poor managers or weak prosecutors that removal was warranted on performance grounds, however flexibly the term "performance" is understood.

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[158] ASG 006; Mercer, Apr. 11, 2007, Interview at 85-87; OAG 005-008; OAG 20-22; OAG 34-35; DAG 14-17; OAG 45-48.

[159] See Final Evaluation Reports (EARS Reports) produced by the Department of Justice on Mar. 1, 2007. For example, John McKay's most recent EARS report states "United States Attorney McKay was an effective, well-regarded leader, and capable leader of the USAO and the District's law enforcement community." March 13-17, 2006 Final Evaluation Report, Western District of Washington. Bud Cummins was described as "very competent and highly regarded by the federal judiciary, law enforcement, and the civil client agencies." January 23-27, 2006, Final Evaluation Report, Eastern District of Arkansas. And the most recent evaluation of the District of Nevada stated "United States Attorney Bogden was highly regarded by the federal judiciary, the law enforcement and civil client agencies, and the staff of the USAO. He was a capable leader of the USAO . . . and had established an excellent management team and had established appropriate USAO priority programs that support Department initiatives." March 3-7, 2003, Final Evaluation Report, District of Nevada.

[160] For example, Mr. Comey stated "Paul Charlton was a very experienced -- still is -- very smart, very honest and able person. And I respected him a great deal." He also described Mr. Charlton as "one of the best." Mr. Comey stated that Dan Bogden was "straight as a Nevada highway, and a fired-up guy." former Deputy Attorney General Jim Comey Mr. Comey testified that David Iglesias was "a very effective U.S. attorney . . . very straight, very able." And Mr. Comey also offered strong praise of John McKay saying McKay was "one of [his] favorites" and a passionate, energetic advocate for important Department initiatives that both Mr. Comey and Mr. McKay supported, and that his overall view of Mr. McKay was "very favorable." See Comey, May 3, 2007, Subcomm. on Commercial and Admin. Law, H. Comm. on the Judiciary, Testimony at 20-22, 27-32. Other witnesses praised these U.S. Attorneys as well, with Mary Beth Buchanan, for example, stating that "I thought John McKay was a very good U.S. Attorney." Buchanan, June 15, 2007, Interview at 73.

[161] See, e.g., Werner, Associated Press *Ensign blisters DOJ over Bogden firing*, San Diego Union-Tribune, Mar. 13, 2007 ("'Everyone in Nevada thought Dan had done a superb job,' Ensign said. 'I believe a very good man was wronged and a process was flawed.'"); Senator Jon Kyl, Letter to the Editor of the Arizona Republic, Mar. 18, 2007 ("I was not 'fine' with the decision made by the attorney general to dismiss Charlton, despite the suggestion in an e-mail from a Justice Department staffer. In fact, when I was notified by the attorney general, I asked for a meeting to discuss his decision. At the conclusion of the meeting I asked that he reconsider his decision and allow Charlton to stay on. Charlton decided to leave the department before the attorney general acted on my request. Paul Charlton is an excellent lawyer and was a superb U.S. attorney. His reputation as such remains intact, which is more than I can say for officials at Justice."); Gomez, May 8, 2007, Interview at 12.

Other evidence strongly indicates that this was not a performance-based management review. One witness acknowledged that, if she had been asked to identify weak performers, she would have gathered information and made a responsible comparison of U.S. Attorney performance across the different federal districts.[162] But that was not done here. When information supposedly was identified that raised questions about U.S. Attorney performance, virtually no follow-up work was done, individuals with knowledge about the alleged performance issues were not consulted, and the fired U.S. Attorneys were not given any meaningful opportunity to respond to the alleged defects in their performance.[163] That informal and superficial approach stands in stark contrast to other cases during this Administration where U.S. Attorneys truly were asked to resign for poor performance or misconduct; in those cases, a careful and fully documented process was followed, and the U.S. Attorneys of concern were given ample notice of the issues and a fair opportunity to respond.[164]

Most tellingly, the Committee's investigation has established that Mr. Sampson essentially ignored the views of the two Deputy Attorneys General serving during the relevant time, Paul McNulty and Jim Comey, and also ignored the views of the Department's seniormost career official, David Margolis.[165] This is particularly significant because, as former Attorney General Gonzales acknowledged, it is the Deputy's office that directly supervises U.S. Attorneys and that would be in the best position to evaluate their work, and Kyle Sampson repeatedly claimed in his Senate testimony that Mr. Margolis had contributed to the process.[166]

For example, Mr. Comey testified that he identified a group of weak-performing U.S. Attorneys in response to a question from Kyle Sampson in February 2005.[167] However, of all the U.S. Attorneys Mr. Comey identified as problematic, only Kevin Ryan was ultimately replaced,[168] and Mr. Ryan was not added to the firing list until the very final days of the process, after a federal judge in California started raising substantial concerns.[169] In fact, just a few weeks after Mr. Comey identified Mr. Ryan as a weak performer, Mr. Sampson instead marked

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[162] Buchanan, June 15, 2007, Interview at 60-61.

[163] Sampson, Mar. 29, 2007, S. Comm. on the Judiciary, Testimony at 60-61.

[164] Margolis, May 1, 2007, Interview at 26-30; Comey, May 3, 2007, Subcomm. on Commercial and Admin. Law, H. Comm. on the Judiciary, Testimony at 35-37.

[165] A proposed amendment to the Contempt Report would have added a series of quotations from Department witnesses that they were not aware that any of the firings were intended to influence pending cases or of any suggestion that U.S. Attorneys should consider the political affiliation of a potential defendant in deciding whether or not to bring charges. See Proposed Amendment to the Report, Offered by Mr. Cannon of Utah, at 1-3 (containing quotations from David Margolis, Mary Beth Buchanan, and Kyle Sampson). Mr. Margolis and Ms. Buchanan made clear, however, that their involvement in the firings was limited, and their lack of knowledge is not probative. And the self-serving assurances of Kyle Sampson, who has already provided questionable testimony about many aspects of the process, do not dispel the concerns described above.

[166] Alberto Gonzales, May 15, 2007 Remarks at the National Press Club at 12, 14; Sampson, Mar. 29, 2007, S. Comm. on the Judiciary, Testimony Part 1 at 5, Part 2 at 46, 47, 57, 60.

[167] Comey, May 3, 2007, Subcomm. on Commercial and Admin. Law, H. Comm. on the Judiciary, Testimony at 10.

[168] Comey, May 3, 2007, H. Comm. on the Judiciary, Testimony at 10.

[169] OAG 44.

Mr. Ryan as a "strong U.S. Attorney who [has] produced, managed well, and exhibited loyalty to the President and Attorney General" on a draft list he sent to Harriet Miers.[170] Obviously, Mr. Comey's views were ignored.

Mr. Margolis, who Kyle Sampson repeatedly told the Senate Judiciary Committee provided input to this process, was similarly ignored. Mr. Margolis told Committee investigators that, when he was consulted by Kyle Sampson, he identified two individuals that he strongly believed should be replaced, and further identified a larger group of U.S. Attorneys that he felt less strongly about but that should also be considered for replacement.[171] One of the two worst performing U.S. Attorneys identified by Mr. Margolis was Kevin Ryan, who was nevertheless subsequently praised by Mr. Sampson as a strong U.S. Attorney and who was not added to the list until the last days of the process.[172] The other weak U.S. Attorney was apparently not considered for firing and serves to this day as a U.S. Attorney.[173] Of the other U.S. Attorneys identified as potential poor performers by Mr. Margolis, only one was ultimately replaced – Margaret Chiara.[174] Like that of Mr. Comey, Mr. Margolis's advice was disregarded in this process. In addition, although some have suggested that Mr. Margolis blessed this process, his testimony shows that he did not – he was deeply troubled by what happened here, and blamed himself for being overly deferential to his political superiors.[175]

Finally, the evidence shows that then Deputy Attorney General Paul McNulty was also largely cut out of the process. Mr. McNulty testified that he was not consulted on or involved in the development of the firing list until the final days of the process, when he was presented with a near-complete set of U.S. Attorneys to be fired.[176] Although he was given an opportunity to raise objections to the names on this list, Mr. McNulty also understood that he was to defer to the political personnel and individuals running the process in the Attorney General's office and the White House and, indeed, when Mr. McNulty twice raised concerns about the proposal to fire U.S. Attorney Dan Bogden, he was talked down and Mr. Bogden remained on the list.[177]

The two heads of the Executive Office of United States Attorneys during the relevant time also did not believe that most of these U.S. Attorneys were poor performers who deserved to be replaced. Former EOUSA head Mary Beth Buchanan testified that "certainly, based upon the information I had, I wouldn't have suggested – I wouldn't have fired any of these people."[178] Her successor Mike Battle similarly told the Committee that Kevin Ryan and Carol Lam were the only two fired U.S. Attorneys that he was aware had any issues within the Department, and that

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[170] OAG 005-008.
[171] Margolis, May 1, 2007 Interview at 39-45, 47, 51, 59.
[172] Id. at 42-43.
[173] Id. at 45.
[174] Id. at 43-45.
[175] Margolis, May 1, 2007, Interview at 72-74.
[176] McNulty, Apr. 27, 2007, Interview at 14-16, 23-24, 200-02.
[177] McNulty, Apr. 27, 2007, Interview at 19-20, 42-47.
[178] Buchanan, June 15, 2007, Interview at 60.

his general reaction to the firing list was that "there were names on there that, if they had problems, I wasn't aware of them."[179]

Based on the information available at this time, the Administration's assertion that this was an effort to identify and replace poorly performing U.S. Attorneys appears to be inaccurate.[180]

2. Who Recommended that these U.S. Attorneys Be Fired and Why?

The Judiciary Committee has made a vigorous effort to learn who recommended that these particular U.S. Attorneys be forced to resign their posts in 2006 and why. But what should have been a relatively simple question has proven surprisingly difficult to answer. In large part, this is because Kyle Sampson has been unable or unwilling to remember who suggested that virtually any of these U.S. Attorneys be placed on the firing list. Adding to the difficulty, the Administration has provided what appear to be inaccurate or misleading "reasons" for the placement of most of the U.S. Attorneys on the firing list, many of which apparently emerged after a "brainstorming" session conducted months after the firings occurred.[181] In January 2007, the Department's efforts to obscure the reasons for the firings were already underway. Regarding a planned meeting with counsel to a United States Senator, a Department official wrote to Mr. Sampson: "Phone call easier and may be easier to get out of (i.e. not trapped up there) when she doesn't get the info she wants (i.e. why they were fired)."[182] These comments raise similar concerns to ones made by the Department of Justice's chief press officer writing to White House officials Dan Bartlett and Cathie Martin that "We are trying to muddy the coverage up a bit."[183]

Many Department witnesses, including former Attorney General Gonzales himself, have described why they may have signed off on the firings or not objected to the presence of various of the fired U.S. Attorneys on the list, but those witnesses have not known whether their personal reasons actually influenced the decision to target the particular U.S. Attorneys for firing in the first place. At the core of the problem is this: as to most of the U.S. Attorneys forced to resign in 2006, no one at the Justice Department claims responsibility for suggesting that they be replaced.

For example, New Mexico U.S. Attorney David Iglesias was placed on the firing list sometime between October 17, 2006, and November 7, 2006. Kyle Sampson claims not to

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[179] Battle, Apr. 12, 2007, Interview at 60, 64.

[180] This judgment is reinforced by what appears to have been a telling slip by former Attorney General Gonzales during his July 24, 2007, appearance before the Senate Judiciary Committee. While struggling to answer the question how many U.S. Attorneys he had fired, Mr. Gonzales acknowledged the nine fired U.S. Attorneys that have been the focus of this investigation and then stated: "I'm not aware, sitting here today, of any other U.S. attorney who was asked to leave, <u>except there were some instances where people were asked to leave, quite frankly, because there was legitimate cause</u>." Gonzales, July 24, 2007, S. Comm. on the Judiciary, Hearing at 29 (emphasis added). Such testimony, whether intentional or not, indicates that Mr. Gonzales perceives a difference between the nine fired U.S. Attorneys and others who may have been asked to resign "because there was legitimate cause."

[181] Margolis, May 1, 2007, Interview at 256-58.

[182] OAG 1121.

[183] OPA 42-44

remember who suggested that Mr. Iglesias be replaced.[184] When asked why Mr. Iglesias was fired, the Department first stated that he had delegated too much authority to his First Assistant and that he was an absentee landlord.[185] But David Margolis has explained that the issue of Mr. Iglesias being a so-called "absentee landlord" arose after Iglesias already had been fired when, during an interview to be considered to replace Iglesias, the First Assistant explained that he had been delegated substantial authority and so was well-prepared to succeed Mr. Iglesias.[186] Furthermore, the First Assistant told Committee investigators that Mr. Iglesias did not *over*delegate and was an excellent U.S. Attorney.[187] David Iglesias was not fired for being an absentee landlord.

Eventually, after Mr. Iglesias came forward and stated that he had been contacted about a pending investigation by Senator Pete Domenici and Representative Heather Wilson, the Department offered a new story – that Mr. Gonzales and Mr. McNulty had received complaints about Mr. Iglesias' performance on vote fraud, corruption, and other matters from Senator Domenici.[188] But, Department records and witness testimony strongly indicate that, despite the former Attorney General's testimony to the contrary, the calls he received from the Senator – which occurred in late 2005 and early 2006 – do not appear to have involved complaints about Mr. Iglesias. Instead, those calls seem to have instead addressed concerns raised by Senator Domenici regarding the Department's provision of resources to Mr. Iglesias' district, and would not have contributed to Mr. Iglesias being placed on the firing list.[189] By contrast, an October 2006 call from the Senator to Mr. McNulty, which was closely contemporaneous with the Senator's call to David Iglesias about a pending investigation, appears more likely to have relayed complaints about Mr. Iglesias, and may have had some bearing on the decision to fire him.[190] That call, however, was intentionally omitted from briefings and testimony to Congress explaining the firings.[191]

The case of John McKay is equally troubling. The Administration has now floated at least five different reasons for the placement of John McKay on the firing list. But those reasons appear pretextual. The Administration initially claimed that Mr. McKay was overly aggressive in a meeting on an information sharing program with then Deputy Attorney General McNulty, and that he arranged the sending of a letter advocating for that program that put the Deputy in an

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[184] Sampson, Apr. 15, 2007, Interview at 143.

[185] DAG 222; Moschella, Mar. 6, 2007, S. Comm. on Commercial and Admin. Law, H. Comm. on the Judiciary, Testimony at 8-9; Sampson, April 18, 2007, Interview at 29-30.

[186] Margolis, May 1, 2007, Interview at 127-28, 205.

[187] Gomez, June 8, 2007, Interview at 9-12.

[188] Gonzales, May 10, 2007, H. Comm. on the Judiciary, Testimony at 10, 73, 100-04; Gonzales, April 19, 2007, S. Comm. on the Judiciary, Testimony at 13.

[189] Moschella, Apr. 24, 2007, Interview at 127-143; *Remarks of Attorney General Gonzales Announcing the Addition of 25 Federal Prosecutors to U.S./Mexico Border Districts*, U.S. Newswire, July 31, 2006; DAG 2200-01, 2204-2207, 2370-74; OAG 65-103, 184-85, 196-98, 918-20, 940-42, 1817-18, 1226, 1228, 1230; ASG 009-1.

[190] DAG 2462; McNulty, Apr. 27, 2007, Interview at 53-54, 62.

[191] Goodling May 23, 2007, Written Statement; McNulty, June 21, 2007, Subcomm. on Commercial and Admin. Law, H. Comm. on the Judiciary, Testimony at 39-40.

uncomfortable position.[192] Leaving aside the question whether a responsible Department of Justice would fire a well-performing U.S. Attorney for such apparently frivolous reasons, those events did not occur until late summer 2006, but John McKay was on Mr. Sampson's firing list as early as March 2005.[193] At one point, the Administration claimed that Mr. McKay's office was not sufficiently aggressive in appealing certain criminal sentences that were below the Guidelines range, but that was an issue based on a January 2005 Supreme Court decision and there would not have been time for follow up litigation and collection of sentencing data for that controversy to have contributed to the decision to target McKay for firing two months later.[194]

When further pressed for the reason why Mr. McKay might have been targeted for firing at that time, the Administration offered reasons that appear even more unlikely. One Department witness commented that Mr. McKay had asked some difficult questions of Attorney General Ashcroft in a public setting that may have put Administration officials "on the spot," which had occurred before McKay's name was placed on the March 2005 firing list.[195] Kyle Sampson testified that he may have heard complaints about Mr. McKay pressing too aggressively for Department action in the aftermath of the murder of one of McKay's assistant U.S. Attorneys in the time period before the March 2005 list.[196] These would not seem to be credible reasons for the firing of an effective U.S. Attorney such as John McKay. As suggested above, the available evidence suggests that improper political factors played an important role in his firing.

Reasons supplied as to a number of the other firings appear equally flawed. The only reason offered so far to support the Administration's firing of Todd Graves is that he was at one point under investigation by the Department's Inspector General; but Mr. Graves testified that he initiated that investigation himself, after an employee raised concerns about Mr. Graves' presence at a fundraiser with the Vice President, and further testified that he was cleared of any improper conduct.[197] It is hard to believe that Mr. Graves was fired for that reason. As to Bud Cummins, the Administration has not even been able to decide whether he was forced out for performance reasons or simply to make room for Karl Rove's former aide Tim Griffin to serve as U.S. Attorney.[198] At times, the Department has claimed that it was proper to bring in Mr. Griffin

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[192] Moschella, Mar. 6, 2007, Subcomm. on Commercial and Admin. Law, H. Comm. on the Judiciary, Testimony at 8; Sampson, Apr. 15, 2007, Interview at 144-45.

[193] OAG 005 - OAGN 008; DAG 126-27, 137-38, 144-45, 510-23, 2167-68.

[194] Sampson, Apr. 15, 2007, Interview at 145; *United States v. Booker*, 543 U.S. 220 (2005) (issued Jan. 12, 2005).

[195] The witness did not suggest that those questions actually contributed to the decision to fire Mr. McKay, but described them as the only negative information she had about Mr. McKay notwithstanding her overall high regard for him as a prosecutor. See Buchanan, June 15, 2007, Interview at 69-71.

[196] Sampson, Apr. 15, 2007, Interview at 145. Indeed, former Deputy Attorney General Comey testified that Mr. McKay's actions regarding that horrifying murder were perfectly appropriate. See Comey, May 3, 2007, Subcomm. on Commercial and Admin. Law, H. Comm. on the Judiciary, Testimony at 20-21.

[197] Graves, June 5, 2007, S. Comm. on the Judiciary, Hearing at 62-63; Mehaffey, *US Attorney Todd Graves Report Disputes Monica Goodling Testimony*, Kansas City Daily Record, May 28, 2007. Goodling, May 23, 2007, H. Comm. on the Judiciary, Hearing at 76; Graves, June 5, 2007, S. Comm. on the Judiciary, Hearing at 62-63.

[198] Compare McNulty, Feb. 6, 2007, S. Comm. on the Judiciary, Testimony at 22-23 (Cummins forced out merely so Griffin could serve) with OAG 005 - OAGN 008 (listing Bud Cummins as one of the "weak U.S. Attorneys who have been ineffectual managers and prosecutors").

because, before they did so, the press had already reported that Mr. Cummins planned to move on.[199] But Mr. Cummins explained to this Committee that those reports were based on comments he had made after he had been directed to resign in order to smooth his and Mr. Griffin's transition in an effort to be discreet about the circumstances.[200]

The Administration's suggestion that Paul Charlton, described by former Deputy Attorney General Jim Comey as "a very strong U.S. attorney, one of the best,"[201] was fired because he pressed too hard for reconsideration of a death penalty decision, or because he moved too quickly toward a policy for recording criminal interrogations, also appears implausible.[202] The taping policy was never in fact implemented by Mr. Charlton and had substantial support within the Justice Department.[203] And, as Mr. Comey explained, Mr. Charlton had previously had success seeking reconsideration of Main Justice decisions on death penalty matters.[204] Does the Department really believe that U.S. Attorneys should passively accept any and all determinations on a subject of such importance? Furthermore, the suggestion that Mr. Charlton was fired for this reason seems particularly difficult to square with the testimony on July 24, 2007, by then-Attorney General that he had no recollection of the case.[205] If the case was so insignificant that Mr. Gonzales has no recollection of it just one year later, it does not seem very likely that it contributed to the Department's decision to fire Mr. Charlton.

Furthermore, those issues regarding Mr. Charlton arose after he was first targeted as a potential candidate for removal. And other reasons offered by Department personnel for the firing of Mr. Charlton, such as the notion that Monica Goodling suggested he be removed

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[199] Moschella, Mar. 6, 2007, Subcomm. on Commercial and Admin. Law, H. Comm. on the Judiciary, Testimony at 8. Ms. Taylor also reportedly testified that "To the best of my knowledge, Mr. Cummins had been considering leaving. Mr. Cummins had announced in the press that he was leaving." *See* Koppelman, *Cummins: My Professional Reputation Has Already Been Slandered*, July 11, 2007, available at http://www.salon.com/politics/war_room/2007/07/11/cummins/index.html.

[200] Cummins, Mar. 6, 2007, Subcomm. on Commercial and Admin. Law, H. Comm. on the Judiciary, Testimony at 27-28. In a recent interview with Salon, Mr. Cummins further discussed this subject, and noted that he had once mentioned to a local reporter that he might not remain in his position for President Bush's entire second term: "Sometime in 2005, Cummins did tell a reporter for the Arkansas Times, a local newsweekly, that he was not likely to stay through the entirety of Bush's second term. (Salon could not determine the exact date of that article, as it did not appear in searches on Google or Lexis-Nexis and no one answered the phone at the Arkansas Times.) But he thinks that article was not seriously considered by those who made the decision to replace him. 'If they're suggesting that, A) they monitor our free weekly tabloid in Arkansas to keep tabs on what their U.S. attorneys' plans are, and B) that they held on to that clipping for a year and a half and remembered it in June of 2006 without even picking up the phone and talking to me, it's kind of silly.'" Koppelman, *Cummins: My Professional Reputation Has Already Been Slandered*, July 11, 2007, available at http://www.salon.com/politics/war_room/2007/07/11/cummins/index.html.

[201] Comey, May 3, 2007 Subcomm. on Commercial and Admin. Law, H. Comm. on the Judiciary, Testimony at 27.

[202] Moschella, Mar. 6, 2007, Subcomm. on Commercial and Admin. Law, H. Comm. on the Judiciary, Testimony at 9-10.

[203] DAG 1975.

[204] Comey, May 3, 2007, Subcomm. on Commercial and Admin. Law, H. Comm. on the Judiciary, Testimony at 27-28.

[205] Gonzales, July 24, 2007, S. Comm. on the Judiciary, Hearing at 17-18.

because he had not been sufficiently cooperative during a U.S. Attorneys conference held in his district, which required Ms. Goodling to take on extra work managing the conference,[206] appear non-credible on their face.

The Administration has hardly bothered to explain its decision to fire Dan Bogden, telling the Committee that "there was no particular deficiency. There was interest in seeing renewed energy and renewed vigor in that office."[207] At other times the Administration has referenced a disagreement about an adult obscenity prosecution, but that assertion too has withered under scrutiny.[208]

During the course of this investigation, many possible justifications for these firings have been offered. Some are more persuasive than others; many are unreasonable on their face. Certainly, different U.S. Attorneys may have been suggested for firing by different people for different reasons at different times. In the end, however, the Administration's inability to credibly explain to the Congress and the American people who suggested that these U.S. Attorneys be fired and why suggests that the true actors and their motives remain concealed.

3. What Role Did White House Personnel Play in the Firings and their Aftermath?

Although the Administration has now explicitly stated that the President had "no personal involvement"[209] in the U.S. Attorney firings, beyond that bald assertion it remains unclear exactly what role other White House staff played in identifying U.S. Attorneys to be replaced and in handling the aftermath of the firings. One reason for this uncertainty is the Administration's strenuous effort to conceal or minimize the role played by White House personnel in the firings. As described above, both former Deputy Attorney General McNulty and his Principal Associate Will Moschella provided incomplete or misleading accounts of the role played by White House personnel in the firings in their early testimony to the House and Senate Judiciary Committees on this matter.

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[206] Buchanan, June 15, 2007, Interview at 105-06, 189.

[207] Moschella Mar. 6, 1007, Subcomm. on Commercial and Admin. Law, H. Comm. on the Judiciary, Testimony at 8-10.

[208] As to the obscenity case, the email records show that this issue arose and was being considered after Bogden appeared on draft firing lists, and press reports cast serious doubts on any assertion that Bogden's hesitation about the case actually contributed to the decision to fire him. For example, according to a knowledgeable law enforcement source, the proposed prosecution "was 'woefully deficient.' ... 'They [meaning Main Justice] didn't have a target fully identified, they had no assets -- they didn't even know where the guy was managing his server.' Porn offenses are difficult to prosecute successfully, since prosecutors must show that the materials have violated local 'community standards.' And Bogden is based in Las Vegas. . . . Nevertheless, Bogden['s] office agreed to put together a proposal for pursuing the case, outlining the additional work and resources needed to build it, the official said. The implication that Bogden was refusing to take on a 'good case' in that instance, the official said, 'is totally absurd.'" Follman, *Smearing the U.S. Attorneys*, Salon, Mar. 19, 2007.

[209] Press Background Briefing by [anonymous] Senior Administration Officials on Executive Privilege, June 28, 2007.

The effort to conceal the role played by White House personnel in the firings had other aspects. Monica Goodling testified that Mr. McNulty told her not to attend a confidential briefing for Senate Judiciary Committee members because, given her position as White House liaison, her presence might encourage Senators to ask questions about the White House.[210] Kyle Sampson testified that then Attorney General Gonzales was upset about the contents of that briefing because it brought aspects of the White House role "into the public sphere."[211] He also described individuals in the White House being equally upset that "that the White House had sort of been brought, you know, in a public way, into this rising controversy."[212] On February 23, 2007, the Justice Department sent a letter to several Senators on the Tim Griffin appointment, incorrectly stating that Karl Rove did not have any role in the decision to appoint Tim Griffin as interim U.S. Attorney for the Eastern District of Arkansas. That inaccurate letter, which the Department was subsequently forced to disavow,[213] was drafted by Kyle Sampson and apparently approved by Christopher Oprison in the White House Counsel's office, despite the fact that each had extensive knowledge of the Tim Griffin situation at the time.[214] Mr. Sampson, of course, had previously written that "getting [Mr. Griffin] appointed was important to Harriet, Karl, etc."[215] And just a week before he signed off on this letter, Mr. Oprison had received an email from Tim Griffin discussing the appointment controversy that also was addressed to Karl Rove, suggesting that Mr. Oprison may have knowingly played a role in giving incorrect information to Congress.[216]

Despite these efforts, the Committee does know that White House personnel played an important role in developing and approving the firing list. Department documents show that the very idea of replacing U.S. Attorneys originated with Karl Rove and was pressed by White House counsel Harriet Miers.[217] Justice Department documents show that multiple drafts of the firing list were presented to Ms. Miers and her deputies by Kyle Sampson over a two year period.[218] Kyle Sampson testified that he attended weekly Judicial Selection Committee meetings, also attended by Ms. Miers and Mr. Rove or one of his aides, where the U.S. Attorney replacement issue was sometimes discussed.[219] In September 2006, just as the firing process was entering its final stage, Kyle Sampson and Monica Goodling are reported to have attended a political briefing led by Karl Rove at the Eisenhower Executive Office Building.[220] White House documents subpoenaed by the Committee, the Administration has acknowledged, discuss "the

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[210] Goodling, May 23, 2007, H. Comm. on the Judiciary, Prepared Remarks at 3.

[211] Sampson, Apr. 15, 2007, Interview at 162.

[212] Sampson, July 10, 2007, Interview at 59.

[213] Letter from Richard Hertling to John Conyers, Jr., Chairman, H. Comm. on the Judiciary, and Linda Sánchez, Subcomm. on Commercial and Admin. Law, Mar. 28, 2007.

[214] OAG 127-29, 971-73, 978-85, 990-1002, 1130-34, 1781-82, 1841, 1850, 1853-59; OLA 03-04, 08-10.

[215] OAG 127-29.

[216] OAG 1753-55.

[217] OAG 180; ASG 001-004.

[218] OAG 20-21; OAG 34-35; DAG 14-17; OAG 45-48.

[219] Sampson, Mar. 29, 2007, S. Comm. Judiciary, Testimony at 8; Sampson, Apr. 15, 2007, Interview at 62.

[220] Letter from Richard Hertling, Principal Deputy Assistant Attorney General, to Henry Waxman, Chairman, H. Comm. on Oversight and Government Reform, June 14, 2007, at 1, 3-4; Eggen & Kane, *Gonzales Now Says Top Aides Got Political Briefings*, Washington Post, Aug. 4, 2007.

wisdom of [the] proposal, specific U.S. Attorneys who could be removed, potential replacement candidates, and possible responses to congressional and media inquiries about the dismissals."[221]

In addition, as the controversy was unfolding in early March 2007, Justice Department personnel were summoned to a White House meeting to go over the Administration's position "on all aspects of the US Atty issue including what we are going to say about . . . why the US Attys were asked to resign."[222] At that meeting, Karl Rove apparently spoke and told the Department officials they needed to "explain what it was that you did and why you did it,"[223] a curious statement from Mr. Rove given the involvement in the firing process of both White House and Department personnel, and one that could be construed as a direction to the Department to continue the effort to downplay the role of White House personnel.

Other information obtained by the Committee refutes Administration statements that the replacement plan was a Department effort that was merely given final approval in the White House. Just this month, Kyle Sampson testified that "in nearly every decision it was a collaborative back and forth" between White House personnel and the Justice Department.[224] One recently produced email shows White House official Sara Taylor explaining why "we" forced Bud Cummins to resign, apparently taking White House ownership of that decision.[225] David Margolis testified that one reason Kevin Ryan may not have been placed on the firing list at the outset of the process was that, despite his poor job performance, he was too politically powerful to be "sold" to the White House for removal.[226]

In the case of David Iglesias, the White House role is perhaps most apparent. The Committee's investigation has established that several New Mexico Republican operatives had complained to Department personnel and White House officials, including Karl Rove, about Iglesias' failure to bring a particular vote fraud case that they wanted pursued, and the White House has confirmed that Mr. Rove relayed complaints about Mr. Iglesias to the White House Counsel's office and to the Justice Department.[227] And similar concerns of Mr. Rove or others may have influenced other aspects of the firing list. It appears, for example, that Mr. Rove viewed and printed information about vote fraud enforcement issues in Milwaukee just weeks before Milwaukee U.S. Attorney Steve Biskupic was placed on the firing list.[228] Harriet Miers was aware of vote fraud enforcement issues regarding the 2004 gubernatorial election in Washington state that may have led to the decision to fire John McKay, given that, in summer

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[221] Letter of Acting Attorney General Paul Clement to the President, June 27, 2007, at 2.

[222] DAG 1072.

[223] McNulty, Apr. 27, 2007, Interview at 129.

[224] Sampson, July 10, 2007, Interview at 145.

[225] OAG 1814.

[226] Margolis, May 1, 2007, Interview at 278.

[227] Hutcheson, *White House says Rove Relayed Complaints About Prosecutors*, McClatchy Newspapers, Mar. 11, 2007; Friedrich, May 4, 2007, Interview at 31-40; Sampson, Apr. 15, 2007, Interview at 26-27.

[228] OAG 850-51.

2006, she and her then deputy William Kelley had confronted Mr. McKay with Republican criticism of his decisions in that area.[229]

The investigation to date has thus ascertained that White House personnel played a significant role in the U.S. Attorney firings and the Administration's subsequent effort to manage the resulting controversy.[230] Indeed, as the American Judicature Society recently commented in a unsigned editorial: "the fingerprints of the White House are very visible in the case of the firings[.]"[231] Many important questions remain unanswered, however, regarding the particular decisions made by White House personnel and their motives, and their complicity in any improper conduct or violation of law. Fair access to White House information is needed to fully evaluate those issues.

II. White House Information Is Essential For the Committee to Conduct Meaningful Oversight and to Consider Possible Federal Legislation

The Committee's investigation has accomplished a great deal. It has already raised substantial questions about politicization of the U.S. Attorney corps and possible abuse of power and improper or unlawful conduct within the Executive Branch. It has also already led to the enactment of one law, and several other legislative actions are under active consideration at this time. The Committee's continued efforts on both the oversight and legislative fronts, however, have become greatly constrained by lack of access to White House information. Without the full story regarding the U.S. Attorney firings and related matters, neither Committee purpose can be fully or adequately achieved.

A. White House Information is Needed to Conduct Meaningful Oversight

The Committee clearly has authority under the Constitution, as reflected in Supreme Court decisions and Rules of the House of Representatives, to investigate and expose possible violations of law and abuses of executive power. As the Supreme Court ruled in the Watkins case fifty years ago, Congress has "broad" power to investigate "the administration of existing

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[229] John McKay's Response to Questions from Subcommittee Chair Linda Sánchez (on file with the H. Comm. on the Judiciary); Bowermaster, *McKay went from hero to zero with Justice Department*, Seattle Times, Mar. 21, 2007.

[230] At the Committee's hearing on the contempt report, one proposed amendment would have introduced Paul McNulty's statement that "I still see it as something the Department initiated when it went forward with putting together those names." Proposed Amendment to the Report, Offered by Mr. Cannon of Utah. However, Mr. McNulty's opinion as expressed in this statement is not consistent with the documents produced by the Department of Justice showing the substantial role of White House personnel which included pushing the project forward, nor with the testimony of other witnesses, which describe a "collaborative process" between the White House and the Department that began with an idea raised by Karl Rove and taken up by Harriet Miers, all as described in the text above. Furthermore, Mr. McNulty testified that he had only limited involvement in the process and that he did not even learn about it until the list was nearly complete. McNulty, Apr. 27, 2007, Interview at 15-16.

[231] American Judicature Society, *Putting Justice Back in the Department*, June 23, 2007.

laws" and to "expose corruption, inefficiency or waste," or similar problems in the Executive Branch.[232]

As discussed above, the evidence obtained in the investigation thus far raises serious concerns about whether federal laws have been broken in the U.S. Attorney matter – including laws prohibiting obstruction of justice, laws like the Hatch Act prohibiting political retaliation against federal employees, and laws prohibiting make false or materially incomplete statements to Congress or obstructing Congressional investigations. And regardless of whether laws were broken, it is clearly important for Congress and the American people to know whether executive power was abused by, for example, firing U.S. Attorneys who refused to bring vote fraud or other politically advantageous cases that the prosecutors had judged without merit, or because they pursued corruption or other cases against Republicans. Investigating such possible abuses by Executive Branch officials is an important and legitimate purpose of the Committee's investigation.

B. White House Information is Needed to Consider Modifying or Enacting Federal Laws

Congress must also obtain more complete information on what happened in the U.S. Attorneys matter to consider whether to modify or enact federal laws. This is a well-recognized basis for authorizing Congress to conduct investigations and obtain Executive Branch information, as the Supreme Court stated in McGrain v. Daugherty.[233]

First, a variety of legislation is already under consideration regarding the manner of appointment of U.S. Attorneys in response to issues surfaced by our investigation, and one statute has already been enacted and signed by the President. Congress's authority to legislate on this subject derives from Article II, Section 2, of the Constitution: "Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments."[234] Under that provision, Congress may permit certain officials—the president, courts, or the heads of departments—to appoint "inferior officers" of the United States and may establish the rules governing such appointments, and federal courts have held that U.S. Attorneys are such "inferior officers."[235] Congress acted pursuant to that constitutional authority when it created the existing statutory processes for the appointment, removal, and replacement of U.S. Attorneys.[236]

The process for filling U.S. Attorney vacancies has been amended three times since 1898.[237] Between 1898 and 1986, when a U.S. Attorney position became vacant, the district

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[232] Watkins v. United States, 354 U.S. 178, 187 (1957).

[233] 273 U.S. 135, 174 (1927).

[234] U.S. Const. Art. II, § 2, cl. 2.

[235] U.S. v. Hilario, 218 F.3d 19, 25 (1st Cir. 2000); U.S. v. Sotomayor Vazquez, 69 F.Supp.2d 286, 291 (D.P.R. 1999).

[236] 28 U.S.C. § 541.

[237] 28 U.S.C.A. § 546 (2007).

court in the district where the vacancy occurred named a temporary replacement.[238] The temporary U.S. Attorney would serve in that capacity until the President nominated and the Senate confirmed a replacement.[239] In 1986, Congress enacted 28 U.S.C. § 546(d), under which the Attorney General could appoint an interim U.S. Attorney for up to 120 days.[240] If the Senate had not confirmed a new U.S. Attorney by the end of the 120-day period, the district court could then appoint the same or a different interim U.S. Attorney to serve until a permanent replacement was confirmed.[241]

On March 9, 2006, section 502 of the USA PATRIOT Reauthorization Act amended the law to remove district court judges from the interim appointment process, and granted the Attorney General the sole power to appoint interim U.S. Attorneys.[242] The amended statute eliminated the 120-day limit on service of an interim U.S. Attorney appointed by the Attorney General.[243] Thus, not only did the amended statute eliminate judicial input in the interim appointment process, but it also had the significant effect of permitting interim appointments to serve indefinitely without Senate confirmation.

In recently passing S. 214,[244] the House acted to address that problem and remove the Attorney General's power to appoint interim U.S. Attorneys to successive 120-day terms, potentially circumventing the Senate confirmation process. This legislation returned the interim appointment process to the status quo that existed before the signing of the USA PATRIOT Act reauthorization.[245] As the investigation of Department of Justice actions and White House involvement has continued, other concerns have surfaced, and the Committee seeks additional information to help formulate and determine whether to enact additional legislation on this subject, or to further revise the interim appointment process.

Second, while U.S. Attorneys serve at the pleasure of the President, it is widely accepted that they should not be dismissed for improper purposes, such as to influence prosecutions or to retaliate for the exercise of prosecutorial judgment in a manner that was not beneficial to a particular political party. Based on the ongoing investigation, the Congress may wish to consider some limitation on removal of U.S. Attorneys, such as requiring that they may be replaced only for some cause, or imposing other procedural or substantive limits on the removal of U.S. Attorneys in the middle of a presidential term.

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[238] See U.S. v. Sotomayor Vazquez, 69 F.Supp.2d 286, 295 (D.P.R. 1999); Pub. L. No. 99-646, § 69, Nov. 10, 1986, 100 Stat. 3616.

[239] U.S. v. Sotomayor Vazquez, 69 F.Supp.2d 286, 295 (D.P.R. 1999).

[240] Pub. L. No. 99-646, § 69, Nov. 10, 1986, 100 Stat. 3616.

[241] 28 U.S.C. § 546(d) (2000), *amended by* 5 U.S.C. § 502 (2006).

[242] Pub. L. No. 109-177, Title V, § 502, Mar. 9, 2006, 120 STAT. 246 (2006).

[243] 28 U.S.C. § 546© (2006).

[244] S. 214 was passed by the House by a vote of 306 to 114. It was signed by the President on June 14, 2007, and became P.L. 110-34. 153 Cong. Rec. H3036 (daily ed. Mar. 26, 2007); Pub. L. No. 110-34, 121 Stat. 224 (2007).

[245] Compare 28 U.S.C. § 546 (2007) with Pub. L. No. 99-646, § 69, Nov. 10, 1986, 100 Stat. 3616.

Third, information concerning other aspects of U.S. Attorney appointment and replacement continues to come to light in the investigation, suggesting other possible legislation. The Committee has examined data illustrating how every appointment and temporary replacement of a U.S. Attorney was handled in the previous ten years. Review of this data showed frequent use by the Bush Administration of the Federal Vacancies Reform Act to temporarily fill U.S. Attorney vacancies. Temporary appointments made under the Vacancies Reform Act last for 210 days.[246] Despite Congress specifically having enacted a process for interim replacement of U.S. Attorneys, the Vacancies Reform Act has been used nearly 30 times during the Bush Administration for this purpose.[247] On at least ten occasions during the Bush Administration, the Vacancies Reform Act was used in conjunction with 28 U.S.C. § 546 to produce temporary/interim appointments that lasted for 330 days.[248] This too may be an area ripe for further legislative action.

Fourth, the Committee's investigation has revealed that the process of dual appointment under which sitting U.S. Attorneys also hold full time leadership positions at the Department of Justice has been widely used by the administration, and that traditional rules establishing U.S. Attorney residence requirements have been altered to facilitate that practice.[249] Indeed, Department officials have acknowledged that one specific change to the residency provision was made especially to allow Montana U.S. Attorney Bill Mercer to live in Washington, D.C., and continue to serve simultaneously as Principal Associate Deputy Attorney General and U.S. Attorney for Montana.[250] In order to specifically shield U.S. Attorney Mercer from the traditional

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[246] 5 U.S.C. § 3346.

[247] USA Appointments by date range, 01/01/1990 to Present," Document from the Department of Justice, Feb. 27, 2007 (on file with the House Committee on the Judiciary).

[248] Id. When the Committee considered H.R. 580, Congresswoman Linda Sánchez offered an amendment making clear that 28 U.S.C. § 546 was intended to be the exclusive means for appointing an individual to temporarily perform the functions of a United States Attorney. Interim Appointment of United States Attorneys, House Rpt. 110-58, Comm. on the Judiciary, 110th Cong. 2 (2007). This amendment was meant to close the gap that the Administration perceives to have been created by the Federal Vacancies Reform Act. The Sánchez amendment was adopted by the Committee and was part of H.R. 580 when it was approved overwhelmingly in the House. H.R. 580 passed the House of Representatives on March 26, 2007, by a vote of 329 to 78. See 153 CONG. REC. H3036 (daily ed. Mar. 26, 2007). However, this language was not included in P.L. 110-34. Just hours before President Bush signed S. 214 into law cutting off the indefinite interim appointment power of the Attorney General, Attorney General Gonzales made one last interim appointment. He appointed George Cardona to serve as Interim U.S. Attorney for the Central District of California. Wheeler, *Cardona's Appointment Extended Using PATRIOT*, The Next Hurrah, June 14, 2007, available online at http://thenexthurrah.typepad.com/the_next_hurrah/contributoremptywheel/index.html. Cardona was 206 days into a 210-day appointment under the Federal Vacancies Reform Act. Id. The Committee and House may wish to consider whether to safeguard against future use of the Vacancies Reform Act as a way to circumvent the limitations set out on 28 U.S.C. § 546.

[249] Pub. L. No. 109-177, Title V, § 501(a), Mar. 9, 2006, 120 Stat. 246 (2006).

[250] The Washington Post reported that "Mercer spent an average of three days a month in Billings." "Montana's chief federal judge often criticized Mercer's absences and asked Gonzales to replace him. The attorney general refused and assured the judge in a November 2005 letter that Mercer's appointment was lawful. On the same day that letter was written, however, Mercer instructed a GOP staff member to insert language into a USA PATRIOT Act reauthorization bill allowing federal prosecutors to live outside their districts to serve in other jobs, according to documents and interviews." Eggen, *Third-in-Command at Justice Dept. Resigns*, Washington Post, June 23, 2007, A4.

residency rules, that change was made retroactive, so as to cover the entire period when Mr. Mercer started work in Washington, D.C.[251] Mr. Mercer subsequently assumed the position of Acting Associate Attorney General, the number three position at the Department of Justice.[252] Though he recently resigned that position, Mr. Mercer maintains his position as U.S. Attorney in Montana.[253] Given the widespread use of this practice by the current Administration,[254] the Committee may wish to consider whether the changes to the residency rules best serve the American people, whether the traditional requirement that U.S. Attorneys reside in the district in which they are appointed to serve should be restored, or whether safeguards should be added to the statutes in this area so that the practice of dual appointment is not abused.

Fifth, the Congress may wish to consider legislation to address the difficult issues that arise when elected or appointed political officials or members of the public lobby Administration officials for action on particular criminal investigations or for replacement of particular U.S. Attorneys. Such contacts were made regarding a number of the fired U.S. Attorneys.[255] To help prevent improper political influence in such prosecutions, the Committee and the House may wish to consider requiring disclosure of such contacts, as under the Tunney Act,[256] or limiting the number of White House officials who can contact Department employees about prosecutions, as has previously occurred by administrative practice.[257] Again, obtaining information from the White House about the prevalence and impact of such contacts would be vital in fashioning and considering such legislation.

Sixth, information from the pending investigation may well lead the Committee and the House to consider legislation in the area of improper politicization of the Department of Justice. For example, Monica Goodling, the former White House Liaison at the Department of Justice, testified that she "crossed the line" of at least civil service rules when she took partisan political leanings of candidates for career Department positions into consideration, and the Committee

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[251] Pub. L. No. 109-177, Title V, § 501(b), Mar. 9, 2006, 120 Stat. 246 (2006).

[252] See Eggen, *Third-in-Command at Justice Dept. Resigns,* Washington Post, June 23, 2007, A4.

[253] See id.

[254] For example, Kevin O'Connor, U.S. Attorney for Connecticut, also serves as an Associate Deputy Attorney General; Mary Beth Buchanan, U.S. Attorney for Pittsburgh, also serves as acting director in the Office of Violence against Women; and Michael Sullivan, U.S. Attorney for Boston, also serves as acting director of the Bureau of Alcohol, Tobacco, and Firearms. 153 Cong. Rec. S6061 (daily ed. May 14, 2007) (statement of Senator Feinstein).

[255] For example, testimony and other information has already revealed that White House advisor Karl Rove contacted the Department about vote fraud prosecutions and that several elected federal officials contacted U.S. Attorney David Iglesias about a public corruption case shortly before he was fired. See generally Hutcheson, Taylor & Talev, *White House says Rove Relayed Complaints About Prosecutors*, McClatchy Newspapers, Mar. 12, 2007; *Political interference is alleged in the sacking of a U.S. attorney*, McClatchy Newspapers, Feb, 28, 2007; Matthew Daly, *McKay says Hastings staffer contacted him about 2004 WA election,* Associated Press, Mar. 7, 2007; *Restoring Checks and Balances in the Confirmation Process of U.S. Attorneys:* Hearing before the Subcomm. on Commercial and Admin. Law, H. Comm. on the Judiciary, 110th Cong. (2007).

[256] 15 U.S.C. § 16.

[257] Bills are currently pending in the House and Senate to provide for a reporting requirement concerning communications between the White House and the Justice Department relating to civil and criminal investigations. See H.R. 3848, 110th Cong. (2007); S. 1845, 110th Cong. (2007).

may wish to consider whether the legal rules defining the appropriate role of political factors in agency hiring decisions should be clarified or modified.[258] Given Ms. Goodling's status as White House liaison, the subpoenaed information is crucial to understanding and assessing the appropriate relationship between Agency personnel and the president's political and other advisors on agency hiring matters.

Also, current law provides for civil penalties, including removal, debarment from federal employment for up to 5 years, or a civil penalty up to $1,000, if a federal employee commits a prohibited personnel practice, including basing personnel decisions on a candidate's religion or political affiliation.[259] However, personnel decisions by federal officials in confidential, policy-making, policy-determining, or policy-advocating positions appointed by the president are not subject to review by the independent Merit Systems Protection Board. Instead, their cases are referred to the president himself.[260] Based on the results of the ongoing investigation, Congress may well consider whether it is appropriate to leave to the sole review of the president punishment of high-level employees who have committed prohibited personnel practices, particularly basing employment decisions on political affiliation. Similarly, under existing law, coercing a federal employee to engage in political activity, including but not limited to voting or refusing to vote for any candidate, is punishable by fine or imprisonment for not more than three years, or both.[261] Based on the results of the ongoing investigation, the Congress may well consider whether criminal penalties are appropriate to prohibit the conditioning of federal employment on political affiliation or previous political activity on behalf of a particular candidate or party.

Seventh, the Committee and the House may similarly consider whether current provisions prohibiting coercion of political activity are adequate to address circumstances in which the decision to hire or terminate a U.S. Attorney is made for political purposes, or whether legislation providing criminal penalties for obstruction of justice should be strengthened. Similarly, whether existing law appropriately prevents misuse of prosecutorial power to serve partisan goals is also under evaluation. Understanding the facts concerning the relationship and contacts between political officials in the White House and Justice Department prosecutors is critical to assessing whether the reach of current law is sufficient.

Eighth, the Committee and the House may similarly determine, based on the ongoing investigation, that laws prohibiting the misleading of Congress or obstruction of justice should be strengthened as well.

Ninth, the Committee and the House may consider laws strengthening the penalties for violating the Presidential Records Act and clarifying the rules regarding use of non-government email or similar communication methods. Information from the White House personnel who are

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[258] *The Continuing Investigation into the U.S. Attorneys Controversy and Related Matters:* Hearing before the H. Comm. On the Judiciary, 110th Cong. 57 (2007).

[259] 5 U.S.C. § 1215(a)(3); 5 U.S.C. § 2302(b).

[260] 5 U.S.C. § 1215(b).

[261] 18 U.S.C. § 610.

most directly affected by that statute's requirements is critical to understanding the scope and nature of compliance issues raised by the existing statutory regime, and to fashioning appropriate remedies and a workable legislative approach that addresses national priorities regarding the preservation of Executive Branch documents and that keeps pace with rapid technological change.

Finally, information gathered during or as a result of the pending investigation may well affect Congressional decisions regarding the appropriation of funds for Department of Justice or other executive activities.[262]

III. The Committee Has Made Extensive Efforts to Secure Documents and Testimony From the White House and Harriet Miers on a Cooperative Basis

The Committee has proceeded with great caution and has followed a thorough, careful and deliberative process at each stage of its investigation. It has made repeated and extensive efforts to obtain needed information from White House sources on a voluntary or cooperative basis. Those efforts, however, have been rebuffed again and again. Even after the July 25 contempt vote, Chairman Conyers wrote again to White House Counsel Fred Fielding seeking to resolve the matter, but has received absolutely no response to date.[263] The White House simply has not engaged in constructive dialog with the Committee regarding finding a workable compromise and, instead, has only escalated its rhetoric and hardened its position as the matter has carried on. Although the Committee continues to hope that White House cooperation will be forthcoming, it now has little choice but to proceed to enforce its outstanding subpoenas.

A. Efforts to Negotiate a Cooperative Solution With the White House

From the outset of the controversy, it has been clear that White House personnel played a material role in the U.S. Attorney firings. The documents produced by the Department of Justice, including some internal White House communications, and witness testimony at congressional hearings and interviews, make this general fact clear. In an effort to uncover the truth about the firings and the possible politicization of the U.S. Attorney corps and related matters, and to understand the nature and scope of the role played by White House personnel, the Committee has attempted for months to obtain relevant information from the White House.

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[262] This was explicitly referenced as justifying the Congressional request for information considered in McGrain v. Daughtery, 273 U.S. 135, 178 (1927):

> "Plainly the subject was one on which legislation could be had and would be materially aided by the information which the investigation was calculated to elicit. This becomes manifest when it is reflected that the functions of the Department of Justice, the powers and duties of the Attorney General, and the duties of his assistants are all subject to regulation by congressional legislation, and that the department is maintained and its activities are carried on under such appropriations as in the judgment of Congress are needed from year to year."

[263] Letter from John Conyers, Jr., Chairman, H. Comm. on the Judiciary, to Fred Fielding, Counsel to the President, July 25, 2007.

Following testimony during a March 6, 2007, hearing before the Judiciary Committee's Subcommittee on Commercial and Administrative Law regarding the U.S. Attorney matter, Chairman Conyers and Subcommittee Chair Linda Sánchez wrote to White House Counsel Fred Fielding requesting information pertaining to the U.S. Attorney firings and related matters.[264] For example, the letter mentioned fired U.S. Attorney John McKay's testimony that he was asked during an interview for appointment to the federal bench with then-White House Counsel Harriet Miers to explain why he had allegedly "mishandled" a criminal vote fraud investigation, a charge that apparently was based on complaints from Washington state Republicans.[265] The letter asked for specified documents and interviews with particular White House officials and requested that Mr. Fielding provide the requested information by March 16, 2007.[266]

Instead of providing the requested documents, however, Mr. Fielding responded with a March 20, 2007, letter claiming that he believed that the *Justice Department's* production of documents effectively satisfied the *White House's* obligation to Congress.[267] Mr. Fielding explained that he was prepared to make some White House officials available for interviews with the Senate and House Judiciary Committees on a joint basis, but his offer was conditioned on unreasonably limiting preconditions and scope restrictions.[268]

Mr. Fielding's offer required that the interviews be confined to "the subject of (a) communications between the White House and persons outside the White House concerning the request for resignations of the U.S. Attorneys in question; and (b) communications between the White House and members of Congress concerning those requests."[269] Questioning on internal White House discussions of any kind and by personnel at any level would not be allowed. Regarding the Judiciary Committees' request for documents, Mr. Fielding stated that the White House would only provide documents in the same two categories. Once again, Mr. Fielding's offer excluded all *internal* White House communications regarding the firings of the U.S. Attorneys, even though some documents reflecting such internal communications had already been provided by the Justice Department. In addition, Mr. Fielding required that the interviews "be private and conducted without the need for an oath, transcript, subsequent testimony, or the subsequent issuance of subpoenas."[270] In other words, no matter what was revealed, no other testimony or documents could be requested from the White House.

In light of Mr. Fielding's unreasonably restrictive offer, the House Judiciary Committee's Subcommittee on Commercial and Administrative Law voted on March 21, 2007, to authorize Chairman Conyers to issue subpoenas for the testimony of former White House Counsel Harriet

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[264] Letter from John Conyers, Jr., Chairman, H. Comm. on the Judiciary, and Linda Sánchez, Chair, Subcomm. on Commercial and Admin. Law, to Fred Fielding, Counsel to the President, Mar. 9, 2007.

[265] Id.

[266] Id.

[267] Letter from Fred Fielding, Counsel to the President, to Patrick Leahy, Chairman, S. Comm. on the Judiciary, John Conyers, Jr., Chairman, H. Comm. on the Judiciary, Lamar Smith, Ranking Member, H. Comm. on the Judiciary, and Linda Sánchez, Chair, Subcomm. on Commercial and Admin. Law, Mar. 20, 2007.

[268] Id.

[269] Id.

[270] Id.

Miers, former Deputy Chief of Staff and Senior Advisor to the President Karl Rove, and other specified White House officials.[271] Furthermore, the Subcommittee authorized Chairman Conyers to issue subpoenas for documents in the custody or control of these officials and White House Chief of Staff Joshua Bolten.[272] Chairman Conyers and Subcommittee Chair Sánchez explained that the White House offer of interviews on limited subjects, without a transcript, and without the possibility for subsequent public testimony was unacceptable and that the White House had failed to respond to letters and proposals to discuss or negotiate other options.

Chairman Conyers and Subcommittee Chair Sánchez again wrote to Mr. Fielding on March 22, 2007.[273] That response explained the futility of conducting interviews on a matter of this gravity without transcripts because, as they noted, it would be "an invitation to confusion and will not permit [the relevant Committees] to obtain a straightforward and clear record."[274] Additionally, the letter noted that "limiting the questioning (and document production) to discussions by and between outside parties will further prevent our Members from learning the full picture . . . ." Nonetheless, the letter made clear that the Committee was still willing to negotiate with the White House, and accordingly Chairman Conyers withheld issuing subpoenas at that time.[275]

In a further effort to work with the White House to move beyond its "take it or leave it" offer, Chairman Conyers along with Senate Judiciary Committee Chairman Patrick Leahy, wrote to Mr. Fielding on March 28, 2007, explaining the importance of acquiring not only communications between White House personnel and outside parties, but also communications reflecting internal discussions. For example, a hypothetical communication from Karl Rove to Harriet Miers suggesting that a particular U.S. Attorney be considered for removal would be highly material to the investigation, but would not be produced or identified during questioning under Mr. Fielding's restrictive proposal.[276] The letter also referenced the newly discovered evidence that White House officials had been using Republican National Committee email accounts for official White House business, and therefore requested documents on that issue as well.[277] Chairmen Conyers and Leahy suggested that a useful initial step would be for the White House to produce the documents that it had already indicated a willingness to produce, such as communications between White House personnel and outsiders. On April 12, 2007, Mr. Fielding responded to these outstanding letters by rejecting the Committees' proposals and instead repeating the initial "take it or leave it" offer.

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[271] *Meeting to Consider Subpoena Authorization Concerning the Recent Termination of United States Attorneys and Related Subjects Before the Subcomm. on Commercial and Admin. Law of the H. Comm. on the Judiciary*, 110th Cong. (2007).

[272] Id.

[273] Letter from John Conyers, Jr., Chairman, H. Comm. on the Judiciary, and Linda Sánchez, Chair, Subcomm. on Commercial and Admin. Law, to Fred Fielding, Counsel to the President, Mar. 22, 2007.

[274] Id.

[275] Id.

[276] Letter from Patrick Leahy, Chairman, S. Comm. on the Judiciary, and John Conyers, Jr., H. Comm. on the Judiciary, to Fred Fielding, Counsel to the President, Mar. 28, 2007.

[277] Id.

In yet another attempt to obtain voluntary cooperation from the White House, Chairman Conyers and Subcommittee Chair Sánchez sent another letter to Mr. Fielding on May 21, 2007. Explaining that it would be "constitutionally irresponsible" to accept the White House's unreasonably restrictive "offer," they once again repeated the Committee's willingness to "work out a voluntary resolution of our requests for information from the White House." They explained that, if the White House persisted in holding to its unsatisfactory initial March 20 offer, the Committee would have no other alternative but to begin resort to compulsory process.[278] On June 7, 2007, Mr. Fielding rejected this overture as well.[279]

After repeated White House rejection of efforts to negotiate, and after numerous Justice Department interviews had been conducted and thousands of Justice Department documents had been reviewed – which only continued to heighten concern about the role played by White House personnel in the firings – the Committee was placed in a position in which it had little choice but to subpoena the necessary documents and information. To that end, on June 13, 2007, Chairmen Conyers and Leahy issued three previously authorized subpoenas to current and former White House personnel. The subpoenas issued by Chairman Conyers were to Joshua Bolten, White House Chief of Staff, or the appropriate custodian of records, for documents and electronic information, with a due date of June 28, 2007,[280] and to former White House Counsel Harriet Miers for both production of documents and appearance before the Committee for testimony, with a due date of July 12, 2007.[281]

Mr. Fielding responded on June 28, 2007, by refusing to produce any documents on asserted executive privilege grounds.[282] The next day, Chairman Conyers and Chairman Leahy wrote to Mr. Fielding concerning the "unprecedented" nature of the Administration's legal assertions and reiterating that the documents should be provided.[283] If not, the letter directed, the White House should at a minimum provide a privilege log, and a signed statement from the

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[278] Letter from John Conyers, Jr., Chairman, H. Comm. on the Judiciary, and Linda Sánchez, Chair, Subcomm. on Commercial and Admin. Law, to Fred Fielding, Counsel to the President, May 21, 2007.

[279] Letter from Fred Fielding, Counsel to the President, to John Conyers, Jr., Chairman, H. Comm. on the Judiciary, Linda Sánchez, Chair, Subcomm. on Commercial and Admin. Law, June 7, 2007.

[280] Cover Letter from John Conyers, Jr., Chairman, H. Comm. on the Judiciary, to Fred Fielding, Counsel to the President, Transmitting Subpoena, June 13, 2007. Chairman Leahy also issued a similar subpoena for relevant documents to Mr. Bolten and another for testimony and documents to former White House Political Director Sara Taylor for a hearing scheduled on July 11, 2007.

[281] Cover Letter from John Conyers, Jr., Chairman, H. Comm. on the Judiciary, to Harriet Miers, Transmitting Subpoena, June 13, 2007.

[282] Letter from Fred Fielding, Counsel to the President, to Patrick Leahy, Chairman, S. Comm. on the Judiciary, John Conyers, Jr., Chairman, H. Comm. on the Judiciary, June 28, 2007. Mr. Fielding's letter included a supplemental letter from Acting Attorney General Paul Clement to the President in support of his privilege claims, but which acknowledged that internal White House documents actually contained information directly responsive to the Committee's subpoena. According to Mr. Clement, those documents specifically discussed "the possible dismissal and replacement of U.S. Attorneys," the "wisdom of such a proposal, specific U.S. Attorneys who could be removed, potential replacement candidates, and possible responses to congressional and media inquiries about the dismissals."

[283] Letter from Patrick Leahy, Chairman, S. Comm. on the Judiciary, and John Conyers, Jr., Chairman, H. Comm. on the Judiciary, to Fred Fielding, Counsel to the President, June 29, 2007.

President *himself* asserting executive privilege, by July 9, 2007, "before [the Committee] move[s] to proceedings to rule on [the White House's] claims and consider whether the White House is in contempt of Congress."[284] On July 9, Mr. Fielding refused to provide documents, a privilege log, or a signed statement of the president.[285]

Chairman Conyers and Subcommittee Chair Sánchez accordingly informed Mr. Fielding that the Judiciary Committee's Subcommittee on Commercial and Administrative Law would be meeting on July 19, 2007, to consider the executive privilege claims that he had asserted in response to the June 13 document subpoena.[286] The letter further advised that if Subcommittee Chair Sánchez overruled the privilege claims, Mr. Bolten could be subject to contempt proceedings.[287] Chairman Conyers and Subcommittee Chair Sánchez urged Mr. Fielding to "reconsider, and [to] produce the documents called for by the subpoena."[288] To date, there has been no response. The Subcommittee met on July 19 and upheld a ruling made by Chair Sánchez rejecting the White House privilege claims by a 7-3 vote. Chairman Conyers wrote to Mr. Fielding on that date, enclosing a copy of the ruling, urging compliance, warning again of the possibility of contempt, and stating that the Committee would assume that Mr. Bolten would not comply unless Mr. Fielding stated otherwise by Monday morning, July 23. On July 23, 2007, Mr. Fielding informed the Committee that the White House's position "remains unchanged."[289]

B. Efforts to Negotiate a Cooperative Solution Concerning Harriet Miers

Harriet Miers served as White House Counsel from 2004 until she resigned on January 31, 2007.[290] Emails provided by the Justice Department show that Ms. Miers played a significant role in the plans to remove U.S. Attorneys during President Bush's second term; for example, the Department official who compiled the lists of U.S. Attorneys to be fired, Kyle Sampson, was in regular contact with her on the subject.[291] Accordingly, Chairman Conyers and Chair Sánchez wrote to Ms. Miers on March 9, 2007, and requested to interview her on a voluntary basis about her knowledge and activities concerning the U.S. Attorney firings and related matters, a letter to which no response was received.[292] Chairman Conyers then attempted to engage the White House regarding the terms and conditions of interviews involving White House witnesses, including Ms. Miers, as discussed above. Once it became clear that the White House would not depart from its "take it or leave it" offer, and after numerous attempts to negotiate a satisfactory

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[284] Id.

[285] Letter from Fred Fielding, Counsel to the President, to Patrick Leahy, Chairman, S. Comm. on the Judiciary, John Conyers, Jr., Chairman, H. Comm. on the Judiciary, July 9, 2007.

[286] Letter from John Conyers, Jr., Chairman, H. Comm. on the Judiciary, and Linda Sánchez, Chair, Subcomm. on Commercial and Admin. Law, to Fred Fielding, Counsel to the President, July 17, 2007.

[287] Id.

[288] Id.

[289] Letter from Fred Fielding, Counsel to the President, to John Conyers, Jr., Chairman, H. Comm. on the Judiciary, July 23, 2007.

[290] Leinwand, *Congress subpoenas two former Bush administration figures*, USA Today, June 14, 2007.

[291] OAG 005 - OAGN 008, OAG 20-21, OAG 22, OAG 34-35, DAG 14-17, OAG 45-48.

[292] Letter from John Conyers, Jr., Chairman, H. Comm. on the Judiciary, and Linda Sánchez, Chair, Subcomm. on Commercial and Admin. Law, to Harriet Miers, Mar. 9, 2007.

route to acquire necessary information on a cooperative basis, the Committee was forced to subpoena documents from the White House as discussed above, and testimony and documents from Ms. Miers.[293] Ms. Miers was directed to appear for testimony and with documents before the House Judiciary Subcommittee on Commercial and Administrative Law on July 12, 2007.

Notwithstanding the Committee's pending subpoenas, Mr. Fielding wrote to Ms. Miers' attorney, Mr. George Manning, on June 28, 2007, and "directed" Ms. Miers not to produce any documents to the Committee.[294] In addition, Mr. Fielding in a July 9, 2007, letter also "directed" Ms. Miers not to provide testimony to the Committee concerning "White House consideration, deliberations, or communications, whether internal or external, relating to the possible dismissal or appointment of United States Attorneys."[295] On July 9, Mr. Manning informed that Committee that Ms. Miers intended to comply with the White House "direction."[296] In response, Chairman Conyers and Subcommittee Chair Sánchez wrote to Mr. Manning the next day emphasizing that it was incumbent on Ms. Miers to appear so that the Subcommittee could consider claims of privilege concerning specific documents or in response to particular questions posed at the hearing.[297]

Mr. Manning wrote back stating that Ms. Miers would in fact *not* appear at the July 12 hearing, citing and enclosing a letter, dated that very day, from the White House "directing" Ms. Miers not to appear at the July 12, 2007, hearing based on a new theory of "absolute immunity."[298] Chairman Conyers and Subcommittee Chair Sánchez immediately responded to Mr. Manning, explaining the long-established legal principle that a "congressional subpoena, such as the one issued to Ms. Miers, carries with it two obligations: the obligation to appear, and the obligation to testify and/or produce documents."[299] They further explained that the Committee had not found any court decision that "supports the notion that a former White House official has the option of refusing to even appear in response to a Congressional subpoena."[300]

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[293] Cover Letter from John Conyers, Jr., Chairman, H. Comm. on the Judiciary, to Harriet Miers, Transmitting Subpoena, June 13, 2007.

[294] Letter from Fred Fielding, Counsel to the President, to George Manning, Attorney for Harriet Miers, June 28, 2007.

[295] Letter from Fred Fielding, Counsel to the President, to George Manning, Attorney for Harriet Miers, July 9, 2007.

[296] Letter from George Manning to John Conyers, Jr., Chairman, H. Comm. on the Judiciary, and Linda Sánchez, Chair, Subcomm. on Commercial and Admin. Law, July 9, 2007.

[297] Letter from John Conyers, Jr., Chairman, H. Comm. on the Judiciary, and Linda Sánchez, Chair, Subcomm. on Commercial and Admin. Law to George Manning, Attorney for Harriet Miers, July 10, 2007. In subsequent correspondence, Mr. Manning has claimed that, contrary to the understanding of Chairman Conyers and Chair Sánchez in the July 10th letter, he had not previously indicated that Ms. Miers intended to attend the July 12th hearing as required by the subpoena. This factual dispute is irrelevant to the validity of Ms. Miers' refusal to appear before the Subcommittee, was not considered by Ms. Sánchez in her July 12 ruling, and neither the Subcommittee nor the Committee has sought to resolve it.

[298] Letter from George Manning to John Conyers, Jr., Chairman, H. Comm. on the Judiciary, and Linda Sánchez, Chair, Subcomm. on Commercial and Admin. Law, July 10, 2007, with enclosed Letter from Fred Fielding, Counsel to the President, to George Manning, Attorney for Harriet Miers, July 10, 2007.

[299] Letter from John Conyers, Jr., Chairman, H. Comm. on the Judiciary, and Linda Sánchez, Chair, Subcomm. on Commercial and Admin. Law, to George Manning, Attorney for Harriet Miers, July 11, 2007.

[300] Id.

They also observed that sitting and former White House officials have testified before Congress numerous times. In fact, as the letter explained, former White House Counsel Beth Nolan had described in testimony to the Judiciary Committee's Subcommittee on Commercial and Administrative Law that she had testified before Congressional committees four times on matters directly related to her official duties, "three times while serving as White House counsel and once as former White House counsel."[301] Moreover, a Congressional Research Service study had documented approximately 74 instances where serving White House advisers had testified before Congress since World War II.[302]

Chairman Conyers' and Chair Sánchez's letter further cautioned that a refusal to appear in response to the Committee's subpoena could subject Ms. Miers to contempt proceedings and urged Mr. Manning and his client, Ms. Miers, to reconsider their position.[303] Later that day, Mr. Manning responded to Chairman Conyers and Subcommittee Chair Sánchez's letter by reaffirming that his client, Ms. Miers, would not appear.[304]

On July 12, 2007, Ms. Miers failed to appear for the House Judiciary Subcommittee hearing, in notable contrast to former White House Political Director Sara Taylor's appearance and testimony before the Senate Judiciary Committee the previous day.[305] At the July 12 hearing, Chair Sánchez considered and rejected Ms. Miers' executive privilege and immunity claims and, after discussion, the Subcommittee sustained her ruling by a 7 to 5 vote.[306]

On the following day, Chairman Conyers sent a letter to Mr. Manning expressing his disappointment regarding his client's noncompliance with the subpoena, enclosing a copy of the July 12 ruling and explaining again Ms. Miers' legal obligation to appear. The letter notified Mr. Manning that Ms. Miers' failure to mitigate her noncompliance with the subpoena could subject her to contempt proceedings and asked Mr. Manning to indicate by July 17, 2007, whether she would seek to comply.[307] Mr. Manning informed Chairman Conyers on July 17, 2007, that his client intended to remain noncompliant with the subpoena.[308]

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[301] Id.

[302] Harold C. Relyea & Todd B. Tatelman, *Presidential Advisers' Testimony Before Congressional Committees: An Overview,* CRS Report for Congress, RL 31351, April 10, 2007.

[303] Letter from John Conyers, Jr., Chairman, H. Comm. on the Judiciary, and Linda Sánchez, Chair, Subcommittee on Commercial and Admin. Law, to George Manning, Attorney for Harriet Miers, July 11, 2007.

[304] Letter from George Manning, Attorney for Harriet Miers, to John Conyers, Jr., Chairman, H. Comm. on the Judiciary, and Linda Sánchez, Chair, Subcomm. on Commercial and Admin. Law, July 11, 2007.

[305] Although Ms. Taylor appeared and testified pursuant to the subpoena issued by Senator Leahy on June 13, she did refuse to answer some questions.

[306] *The Continuing Investigation into the U.S. Attorneys Controversy and Related Matters:* Hearing before the Subcomm. on Commercial and Admin. Law of the H. Comm. On the Judiciary, 110th Cong. (2007) (Ruling of Subcommittee Chair Linda Sánchez on Related Executive Privilege and Immunity Claims).

[307] Letter from John Conyers, Jr., Chairman, H. Comm. on the Judiciary, to George Manning, Attorney for Harriet Miers, July 13, 2007.

[308] Letter from George Manning, Attorney for Harriet Miers, to John Conyers, Jr., Chairman, H. Comm. on the Judiciary, July 17, 2007.

IV. Legal Analysis of the Executive Privilege, Immunity, and Related Claims Raised by the White House and Ms. Miers

In refusing to comply with the June 13 subpoenas, the White House and Ms. Miers have sought to raise related executive privilege and immunity claims. All these claims were thoroughly considered and rejected by Commercial and Administrative Law Subcommittee Chair Linda Sánchez, and her rulings were upheld by votes of the Subcommittee on July 12 and July 19, 2007. Those rulings are enclosed with these additional views and are incorporated by reference herein. Because of the extraordinary nature of several of these claims and additional arguments raised by Ms. Miers' attorney in his letter of July 17, 2007, and others, however, the serious legal and factual fallacies of these claims are discussed below.

In addition, four legal experts have independently concluded that the Committee was correct to reject the legal claims of the White House and Ms. Miers. Their letters are also included with these additional views. For example, Professor Erwin Chemerinsky of Duke Law School explained that "it is difficult to imagine a more compelling case on behalf of Congress." Washington attorney Beth Nolan, herself a former White House Counsel, states that the White House's claims are "inconsistent with the obligations of the Executive Branch in the constitutional accommodation process." Professor Charles Tiefer, former House Solicitor and General Counsel, writes that the executive privilege claims are "patently without merit." And former House counsel Stanley M. Brand concludes that the Committee's right to the information requested is "unassailable" and that it is "hard to envision a stronger claim."[309]

A. Claims of Immunity as to Harriet Miers

Even more extraordinary than the executive privilege claims in this matter is the assertion that Ms. Miers, a former White House official not currently employed by the federal government, is absolutely immune from even appearing before the Subcommittee as directed by subpoena. The Supreme Court has specifically held that even a President, while serving in that capacity, can be subpoenaed by a court and can be required to participate in a civil lawsuit for damages by a private party.[310] The Court's holding in Jones flies in the face of the claim that a former White House official is somehow immune from even appearing in response to a Congressional subpoena. As with Sara Taylor, who received a subpoena similar to Ms. Miers' but chose to appear and answer some questions before the Senate Judiciary Committee, no one can doubt that

[309] Even Attorney-General nominee Michael Mukasey expressed some guarded skepticism about the breadth of the Administration's privilege claim under questioning, during his October 17, 2007, confirmation hearing. Asked to comment on the notion that communications between private parties outside the White House and lower-level Administration officials were covered by executive privilege, Judge Mukasey noted that he would have to know more about the facts but further stated "I will admit to you that my first reaction to that section of the [Administration's] letter was, 'Huh?'" Mukasey, Oct. 17, 2007, S. Comm. on the Judiciary, Hearing at 65.

[310] See Clinton v. Jones, 520 U.S. 681, 703-06 (1997). As the Court noted in United States v. Bryan, 339 U.S. 323, 331 (1950), "persons summoned as witnesses have certain minimum duties and obligations which are necessary concessions to the public interest in the orderly operation of legislative and judicial machinery. ...We have often iterated the importance of this public duty, which every person within the jurisdiction of the Government is bound to perform when properly summoned."

Ms. Miers would have been asked some questions that would not have fallen within even the broadest assertion of executive privilege, but Ms. Miers simply refused to attend her hearing altogether. The ruling upheld by the Subcommittee on July 12 further explains the basis for rejecting this remarkable claim by the White House and Ms. Miers.[311] The first count of the contempt resolution specifically concerns Ms. Miers' refusal even to appear before the Subcommittee as required by subpoena.

B. Claims of Executive Privilege

Common to the refusal of both Harriet Miers and Joshua Bolten to comply with the June 13 subpoenas are claims of executive privilege. These claims were rejected for four reasons.

First, the claim of executive privilege is not properly asserted because, despite Chairman Conyers' request in his letter of June 29, there has been no signed or personal statement from the President himself asserting the privilege. Not only have the courts stated that a personal assertion of executive privilege by the President is legally required, but this principle has also been recognized in House contempt proceedings. In rejecting a "protective" privilege claim in the course of finding several present and former Clinton White House officials in contempt, the House Committee on Oversight and Government Reform noted in 1996 that there had been no "official presidential invocation of executive privilege" via "signed claims" of privilege by the President pursuant to "procedures established by President Reagan" in 1982.[312] In fact, on the previous occasion on which the President asserted executive privilege in this Administration, President Bush personally signed a memorandum doing so, in accordance with the Reagan procedure.[313]

Ms. Miers' attorney asserts that this principle should not apply because the D.C. Circuit recognized the assertion of executive privilege through White House Counsel in In re Sealed Case, 121 F.3d 729 (D.C. Cir. 1997). But Ms. Miers' attorney neglects to point out that in that case, the party contesting privilege did not raise this issue on appeal, and the court specifically

[311] Part of the basis for the absolute immunity claims by the White House and Ms. Miers was a July 10, 2007, memorandum by the Department of Justice's Office of Legal Counsel. While the July 12 ruling explains why this memorandum has no proper legal basis, several Senators have also recently written to Attorney General Gonzales raising a "serious question about whether this OLC opinion was properly issued." Letter from Senators Durbin, Leahy, Kennedy, and Feingold to Attorney General Alberto Gonzales, July 19, 2007.

[312] Proceedings against John M. Quinn, David Watkins, and Matthew Moore (Pursuant to Title 2, United States Code, Sections 192 and 194), House Rpt. 104-598, H. Comm. on Government Reform and Oversight, 104th Cong., 2nd Sess. at 38, May 29, 1996.

[313] See Memorandum for the Attorney General re Congressional Subpoena for Executive Branch Documents, December 12, 2001 (signed memorandum asserting privilege by President Bush). See also "Procedures Governing Responses to Congressional Requests for Information," issued on November 4, 1982; "Assertion of Executive Privilege in Response to Congressional Demands for Law Enforcement Files," 6 Op. Off. of Legal Counsel 31 (1982).

acknowledged, in the very footnote cited by Ms. Miers' attorney, that applicable case law suggested that the President must "personally" assert executive privilege.[314]

Second, the courts have required that a party raising a claim of executive privilege in refusing to produce subpoenaed documents provide a privilege log describing specifically each document being withheld, as directed by the subpoenas in this matter. Neither Mr. Bolten nor Ms. Miers complied with that provision in the subpoena. In fact, Chairman Conyers specifically requested such an itemization in a June 29 letter to White House Counsel Fred Fielding, but the White House refused.[315]

Third, neither the White House nor Ms. Miers has demonstrated that the presidential communications executive privilege even applies in this case. The Committee has made clear that it was not expecting at this point to learn the content of any communications to or from the President himself, but instead communications involving Ms. Miers, Karl Rove, and other White House staff. While the Supreme Court has not spoken to the issue, one court of appeals has extended executive privilege to some White House staff in some circumstances, but only with respect to communications to or from such staff "in the course of preparing advice for the President" for a decision to be made by the President.[316] In this case, however, the White House itself has maintained that the President never received any advice on, and was not himself

[314] In re Sealed Case, 121 F.3d 729, 745 n. 16 (D.C. Cir. 1997). Ms. Miers' attorney also claims that the case cited by the D.C. Circuit, Ctr. on Corporate Responsibility, Inc. v. Shultz, 368 F.Supp. 863 (D.D.C. 1973), is "inapposite" because there "the President did not himself assert the privilege." Letter from George Manning, Attorney for Harriet Miers, to John Conyers, Jr., Chairman, H. Comm. on the Judiciary, July 17, 2007 at 3. In fact, the assertion of executive privilege in Shultz, where White House Counsel stated in an affidavit that he was "'authorized to advise the Court that the White House is claiming executive privilege,'" is similar to the assertion of executive privilege here. Shultz, 368 F.Supp. at 871. If anything, the executive privilege claim in Shultz was stronger, as it was asserted in an affidavit, rather than just a letter, from White House Counsel. The point of Shultz was that "[t]he President, as head of the 'agency,' the White House, must make the formal claim." Shultz, 368 F.Supp.at 873. In reaching this conclusion, the Shultz court pointed to cases where privilege was properly asserted: Nixon v. Sirica and Cox, 487 F.2d 700, 704 (D.C. Cir. 1973), where President Nixon personally asserted executive privilege in a letter to the District Court, and United States v. Reynolds, 345 U.S. 1, 7-8 (1954), where the Secretary of the Air Force, as head of the agency whose documents were sought, claimed a military secrets privilege in a letter. Here, as in Shultz, these proper procedures have not been followed; White House Counsel cannot properly "activate a formal claim of executive privilege" on behalf of the President. Shultz, 368 F.Supp. at 873.

[315] In addition to the cases cited in the ruling in the Subcommittee on this matter, see, e.g., Landry v. FDIC, 204 F.3d 1125, 1135 (D.C. Cir. 2000); In re Sealed Case, 121 F.3d 729, 735 (D.C. Cir. 1997).

[316] In re Sealed Case, 121 F.3d 729, 752 (D.C. Cir. 1997).

involved in, the U.S. Attorney firings.[317] The presidential communications executive privilege simply does not apply.[318]

Fourth, even assuming that the documents and other information subpoenaed fell within the scope of a properly asserted executive privilege, any such privilege is outweighed by the compelling need for the House to have access to this information. In addition to the specific arguments contained in the rulings enclosed with this memorandum, the important reasons why the House seeks this information, both to consider possible legislation and to uncover possible wrongdoing, are discussed above. As the Supreme Court made clear in United States v. Nixon, 418 U.S. 683 (1974), executive privilege is not absolute and can be overcome by a sufficient showing of necessity.[319] In this case, the relevant information does not concern national security and is necessary to enable the Committee to investigate potentially serious wrongdoing and consider the enactment of corrective legislation. This is not a situation in which the Committee seeks access to information because of generalized fears or speculative concerns; instead, specific evidence amply supports the need for this information.

It is particularly troubling that the Administration is apparently asserting executive privilege despite the fact that, among its other purposes, Congress is investigating wrongdoing by government officials. Previous Administrations have themselves acknowledged that in

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[317] In addition to the White House statement referred to in Subcommittee Chair Sánchez's ruling, for example, in response to a question about any conversations in which the President participated about the U.S. Attorneys before they were fired, a White House spokeswoman stated on March 27, 2007, that "I have said on the record for several weeks now that there is no indication that the President knew about any of the ongoing discussions over the two years, nor did he see a list or a plan before it was carried out." See Transcript of White House Press Briefing by Dana Perino, March 27, 2007, *available online* at http://www.whitehouse.gov/news/releases/2007/03/20070327-4.html.

[318] Although the letters from the White House and the Department of Justice in this matter suggest that it is the presidential communications privilege that is being claimed, to the extent that it is the deliberative process privilege that is being asserted, that claim fails because the courts have clearly stated that any deliberative process privilege "disappears altogether when there is any reason to believe government misconduct has occurred." In re Sealed Case, 121 F.3d 729, 746 (D.C. Cir. 1997). The reason for this is that "where there is reason to believe the documents sought may shed light on government misconduct, the privilege is routinely denied on the grounds that shielding internal government deliberations in this context does not serve the public's interest in honest, effective government." Id. at 737-38 (internal quotations and citations omitted). As already discussed, the Committee is clearly involved in an investigation of "government misconduct" and therefore the deliberative process privilege is not properly asserted by the Administration.

[319] Accord, e.g., In re Sealed Case, 121 F.3d 729, 745, 746 (D.C. Cir. 1997) (explaining that the presidential communications privilege "can be overcome by an adequate showing of need" based on a "balance [of] the public interests at stake"). Although the Department of Justice has sought to rely on an earlier, pre-Nixon D.C. Circuit decision to suggest that the Committee must show that the subpoenaed material is "demonstrably critical to the responsible fulfillment of the Committee's functions," Senate Select Committee on Presidential Campaign Activities v. Nixon, 498 F.2d 725, 731 (D.C. Cir. 1974), the Congressional Research Service has noted that this standard is "not reflected in any of the subsequent Supreme Court or appellate court rulings establishing a balancing test for overcoming the qualified presidential privilege" and neglects the "unique and limiting nature of the case's factual and historical context" and "arguably misreads" its "carefully circumscribed holding." Morton Rosenberg, *Presidential Claims of Executive Privilege*, CRS Report for Congress, RL30319, July 5, 2007, at 5-6, 4. Regardless of how the appropriate legal test is phrased, however, it is clear that the Committee's compelling need for the information outweighs any privilege claimed.

circumstances involving communications "relating to investigations of personal wrongdoing by government officials, it is our practice not to assert executive privilege, either, in judicial proceedings or in congressional investigations and hearings."[320] The Department of Justice itself has stated that "the privilege should not be invoked to conceal evidence of wrongdoing or criminality on the part of executive officers."[321] President Reagan himself proclaimed that "[w]e will never invoke executive privilege to cover up wrongdoing."[322] Accordingly, even based on previous Executive Branch practice, the White House should not have asserted privilege here, and the need for the information clearly outweighs the Administration's desire to conceal possible evidence of "wrongdoing by government officials."[323]

Finally, there is an additional reason that Ms. Miers' claims concerning executive privilege were and should be rejected. When a private party like Ms. Miers is subject to a subpoena, it is improper for the subpoenaed person simply to refuse to produce subpoenaed documents in its possession or testify based on an assertion of privilege by a third party – in this case, the White House. In 1976, for example, when AT&T received a House Subcommittee subpoena for documents to which the White House objected, the White House instructed AT&T to refuse to comply with the subpoena.[324] However, AT&T "felt obligated to disregard these instructions and to comply with the subpoena," resulting in a lawsuit by the Administration to seek to enjoin such compliance.[325] To the extent that the White House objected to the subpoena to Ms. Miers as a private citizen, therefore, its proper recourse – which would have been more than adequate to protect its own asserted rights – would have been to seek a court order, rather than unilaterally "directing" Ms. Miers to disobey a lawful subpoena herself.

In fact, the courts have ruled in several cases that private parties like Ms. Miers do not have standing to assert governmental privileges like executive privilege. As one court noted in a different case involving AT&T, "defendants, which are private parties, lack standing to assert" executive privilege.[326]

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[320] *Memorandum for all Executive Department and Agency General Counsels from Lloyd N. Cutler, Special Counsel to the President,* Congressional Requests to Departments and Agencies for Documents Protected by Executive Privilege at 1, Sept. 28, 1994, available in Frederick M. Kaiser et al., *Congressional Oversight Manual*, CRS Report for Congress, RL 30240 at Appx. C, May 1, 2007.

[321] *Congressional Subpoenas of Department of Justice Investigative Files*, 8 U.S. Op. Off. Legal Counsel 252 at 41 (1984).

[322] Public Papers of the Presidents (1983) I at 239, cited in L. Fisher, The Politics of Executive Privilege 51 (2004). For additional examples of such statements during the Reagan and Eisenhower administrations, see id. at 50.

[323] In addition to the cases previously cited, see, e.g., Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 453 (1977) (explaining that there is a "substantial public interest[]" in preserving President Nixon's records so that Congress, pursuant to its "broad investigative power," could examine them to understand that events that led to President Nixon's resignation "in order to gauge the necessity for remedial legislation."); Senate Select Comm. on Presidential Campaign Activities v. Nixon, 498 F.2d 725, 731 (D.C. Cir. 1974).

[324] U.S. v. American Tel. & Tel. Co., 551 F.2d 384 (D.C. Cir. 1976).

[325] Id. at 387.

[326] U.S. v. American Tel. & Tel. Co., 524 F.Supp. 1331, 1332 (D.D.C. 1981). See also Reynolds v. U.S., 345 U.S. 1, 7 (1953) ("The [military and state secrets] privilege belongs to the Government and must be asserted by it; it can neither be claimed nor waived by a private party."). Cf. Snierson v. Chemical Bank, 108 F.R.D. 159, 161 (D.Del. 1985) (noting that a civil litigant could not assert his wife's right to privacy in seeking to prevent

C. Defenses to Criminal Contempt Raised by Harriet Miers

In his letter of July 17, 2007, Ms. Miers' attorney makes several arguments claiming that she should not be liable for criminal contempt for her conduct. These arguments are legally invalid.

Initially, Ms. Miers' attorney notes that "the contempt statute does not apply where a witness has an 'adequate excuse'" and then baldly asserts that the White House's directives to Ms. Miers "constitute a manifest 'adequate excuse' in these circumstances."[327] He cites no case law, however, for the proposition that the White House has authority to "direct" a former employee to ignore a Congressional subpoena, and makes no argument as to why this constitutes an "adequate excuse."[328] Indeed, the analysis discussed above demonstrates precisely the opposite.

Ms. Miers' attorney also claims that the White House's "invocation of Executive privileges and immunities" forecloses a finding that Miers acted "willfully" as required by the contempt statute, 2 U.S.C. § 192.[329] Again, this argument lacks merit.

Initially, if this claim were true, the contempt statute would be toothless vis-a-vis the Executive Branch. Under this reasoning, current and former Executive Branch officials would *never* have to comply with congressional subpoenas; they could always avoid a contempt citation by merely pointing to an executive privilege assertion, regardless of its validity. Congress, in enacting the statute, clearly did not intend such a result. Indeed, this is clear from the legislative history of the law, during which the House expressly rejected an amendment that would have prevented application of the statute to the Executive Branch.[330] Moreover, this statute has already been applied to members of the Executive Branch, including those invoking executive privilege: since 1975, congressional committees or subcommittees or a full house of Congress have cited ten Executive Branch officials with contempt.[331]

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enforcement of a subpoena for bank records because the litigant "has standing to challenge ... discovery of [the bank] only because *he* claims a privilege. He has no standing to assert the privilege of another non-party.").

[327] Letter from George Manning, Attorney for Harriet Miers, to John Conyers, Jr., Chairman, H. Comm. on the Judiciary, July 17, 2007 at 1.

[328] While Ms. Miers' attorney does cite one Reagan-era Office of Legal Counsel opinion asserting that the contempt statute "does not apply to executive officials who assert claims of executive privilege at the direction of the President," even this refers only to current, and not former, Executive Branch officials. See "Prosecution for Contempt of Congress of an Executive Branch Official Who Has Asserted a Claim of Executive Privilege," 8 U.S. Op. Off. of Legal Counsel 101 (1984). As discussed in the ruling upheld by the Subcommittee, moreover, OLC opinions have no legal force whatsoever and are simply Executive Branch views as to what it wishes the law to be.

[329] Letter from George Manning, Attorney for Harriet Miers, to John Conyers, Jr., Chairman, H. Comm. on the Judiciary, July 17, 2007 at 2.

[330] See Cong. Globe, 34th Cong., 3d Sess. at 429 (Jan. 22, 1857) (statement of Mr. Marshall of Maryland) (stating that "[t]he bill proposes to punish equally the Cabinet officer and the culprit who may have insulted the dignity of this House").

[331] See Frederick M. Kaiser et al., *Congressional Oversight Manual*, CRS Report for Congress, RL 30240 at 37, May 1, 2007. According to a recent CRS report, House Committees alone found Administration officials in contempt on seven occasions since 1975 in which executive privilege was claimed, and "in each instance there was

In addition, the cases cited by Ms. Miers' attorney to support the assertion that her refusal to comply with the subpoena is not "willful" are inapposite. The cited cases involve a defendant pleading that s/he acted in good faith in reasonable reliance on an undisputed official governmental representation that his/her actions were legal.[332] That is certainly not the situation here. Unlike the defendants in these cases, Ms. Miers was faced, at best, with a competing official representation by a different government entity of what the law requires. Thus, Ms. Miers was not being misled by a government entity into thinking she was acting lawfully, but instead she *chose*, with full knowledge of the possible consequences, to follow the White House's flawed "directive." As the entity which issued the subpoena to Ms. Miers, only the Committee was in a position to give her "reasonable reliance" that she could lawfully refuse to comply, but in fact the Committee did precisely the opposite and made clear that she was required to obey her subpoena.

The inaptness of the attempted analogy to the cited "reasonable reliance" cases is most powerfully demonstrated by Ms. Miers' attorney's reliance on Raley v. Ohio, 360 U.S. 423 (1959). In that case, the Ohio Commission whose questions the defendant witnesses refused to answer had advised the witnesses they were entitled to invoke their privilege against self-incrimination and later sought to charge the witnesses with contempt.[333] Thus, the court held that the defendants could not, consistent with due process, be held in contempt of that body, even though the Court found that Ohio law did not actually allow invocation of the privilege against self-incrimination in that situation.[334] By contrast, here the House Judiciary Committee has unequivocally informed Ms. Miers of the opposite, that she is *not* entitled to invoke executive privilege.

Finally, precedent establishes that a mistaken belief that the law permits refusing to answer a congressional subpoena is not a defense under the criminal contempt law.[335] Indeed, finding a "willful" violation of the contempt statute does not require showing "a bad purpose or

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either full or substantial compliance with the demands of the Committee that had issued the subpoena" after the contempt vote. Rosenberg, et al, *Congress' Contempt Power: Law, History, Practice and Procedure*, CRS Report for Congress RL 340967 ("CRS Contempt Report") at 33, July 24, 2007.

[332] See United States v. Laub, 385 U.S. 475, 487 (1967); Raley v. Ohio, 360 U.S. 423, 438 (1959); United States v. Pa. Indus. Chem. Corp., 411 U.S. 655, 674-75 (1973); Cox v. Louisiana, 379 U.S. 559, 571 (1965); United States v. Levin, 973 F.2d 463, 468-69 (6th Cir. 1992); United States v. Barker, 546 F.2d 940, 947-48 (D.C. Cir. 1976). The only case Ms. Miers' attorney cited that does not fall into this category, Townsend v. United States, 95 F.2d 352, 361 (D.C. Cir. 1938), involved a defendant claiming he did not act "willfully" under the contempt statute because he acted in good faith reliance on the advice of counsel that refusal to answer a committee's questions was lawful. But the court rejected the defendant's claim, did not reach the question of whether the contempt statute would ever permit such a defense, and further cautioned that "[a] witness may exercise his privilege of refusing to answer questions and submit to a court the correctness of his judgment in so doing, but in the event he is mistaken as to the law it is no defense...." Id.

[333] Raley v. Ohio, 360 U.S. 423, 425 (1959).

[334] Raley v. Ohio, 360 U.S. 423, 437-38 (1959).

[335] See Braden v. U.S., 272 F.2d 653, 662 (5th Cir. 1959), *affirmed* 365 U.S. 431 (1961) ("The mistaken belief that the law justifies a refusal to answer is not a defense, whether the belief is induced by the misreading of a judicial opinion, by the advice of counsel or otherwise.").

evil motive"[336] or "specific criminal intent."[337] Rather, "willfulness" is established where "the refusal was deliberate and intentional and was not a mere inadvertence or an accident."[338] In fact, in a 1996 memorandum used in a House Committee contempt proceeding, the American Law Division of the Library of Congress specifically indicated that this would establish willfulness even in a case where an Administration official refused to comply with a subpoena on the basis of a presidential invocation of privilege.[339] There is no valid legal basis for Ms. Miers' attorney's attempted defenses to a contempt charge against her.

D. Recent Administration Claims Concerning Criminal Contempt

On the eve of the Committee contempt vote, Principal Deputy Assistant Attorney General Brian Benczkowski wrote to Chairman Conyers asserting that the criminal contempt of Congress law does not apply when Administration officials refuse to respond to Congressional subpoenas on the grounds of executive privilege. This letter largely relied on a 1984 Office of Legal Counsel ("OLC") opinion by Theodore Olson.[340] One expert on executive privilege described this assertion as "astonishing" and "almost Nixonian in its scope and breadth," since it would provide that the Executive Branch alone would "define the scope and limits of its own powers." [341] For several reasons, this latest claim has no proper basis in this matter.

Initially, the 1984 OLC opinion being relied on does not apply here. In its very first sentence, the 1984 OLC opinion stated that it concerned a situation in which a current Executive Branch official was asserting a claim of executive privilege "in response to written instructions from the President of the United States."[342] As discussed above, however, executive privilege has not been properly invoked in this matter, because there has been no signed statement or similar invocation of executive privilege by the President himself, which both the courts and Congress have required in such cases.

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[336] Dennis v. United States, 171 F.2d 986, 990 (D.C. Cir. 1948), *affirmed* 339 U.S. 162 (1950).

[337] Barsky v. United States, 167 F.2d 241, 251 (D.C. Cir. 1948).

[338] Field v. United States, 164 F.2d 97, 100 (D.C. Cir. 1947).

[339] See *Constitutional Necessity for Appearance Before a Committee of a Custodian of Subpoened Documents Prior to a Vote to Hold the Custodian in Contempt of Congress*, Memorandum from American Law Division to the Honorable Bill Clinger, Chairman, H. Comm. on Government Reform and Oversight, *printed in Business Meeting in the Proceedings Against John M. Quinn, David Watkins, and Matthew Moore as part of the Committee Investigation into the White House Travel Office Matter*, H. Comm. on Government Reform and Oversight, 104th Cong., 2nd Sess., Transcript at 36, June 1996.

[340] Letter from Brian A. Benczkowski, Principal Assistant Deputy Attorney General, to John Conyers, Jr., Chairman, H. Comm. on the Judiciary, July 24, 2007. The letter followed on the heels of a July 20, 2007, Washington Post article in which unnamed Administration officials "unveiled a bold new assertion of executive authority" and claimed that "the Justice Department will never be allowed to pursue contempt charges initiated by Congress against White House officials once the president has invoked executive privilege." Eggen and Goldstein, *Broader Privilege Claimed in Firings*, Washington Post, July 20, 2007.

[341] Dan Eggen and Amy Goldstein, *Broader Privilege Claimed in Firings*, Washington Post, July 20, 2007 (quoting Mark Rozell, professor of public policy at George Mason University).

[342] "Prosecution for Contempt of Congress of an Executive Branch Official Who Has Asserted a Claim of Executive Privilege," 8 Op. O.L.C. 101 (May 31, 1984). See also id. at 16 (noting that "the President implemented this decision in a memorandum dated November 30, 1982, to the EPA Administrator, which instructed her to withhold" documents based on executive privilege).

In addition, the 1984 OLC opinion specifically concerned a current Executive Branch official who was withholding documents based on executive privilege. The opinion makes clear that it applied only to the specific situation before it.[343] There is not the slightest indication that it would apply to a situation where a former Executive Branch official like Ms. Miers refuses even to appear in response to a valid congressional subpoena. As discussed above, that complete refusal clearly constitutes contempt under federal law, and there is not the slightest indication in the 1984 OLC opinion that it cannot or should not be prosecuted under the federal criminal contempt statute.

Although the Department of Justice's July 24 letter to the Committee baldly asserts that its "position" against prosecution under the criminal contempt law should apply to Ms. Miers' refusal to appear, it refers to absolutely no supporting precedent or even practice from any previous Administration, Republican or Democratic, for this remarkable claim. The notion that political officials at the White House or Department would thus interfere with a U.S. Attorney's performance of his/her duty under law, in order to forestall a congressional investigation into alleged political interference with U.S. Attorneys performing their duty under law, is truly astonishing.

The 1984 OLC opinion's analysis of the criminal contempt law and related factors, moreover, contains serious flaws. As discussed above, the legislative history of the contempt statute makes clear that it was intended to apply to Executive Branch officials, and a number of such officials attempting to invoke executive privilege to withhold documents have been cited for contempt by Congress or its committees, notwithstanding Executive Branch claims to the contrary.[344]

And as for the OLC's audacious claim that the statutory language mandating that the U.S. Attorney "shall" refer a Congressional contempt citation to a grand jury can effectively be ignored because of asserted separation of powers issues, the highly specific description of the duty to refer, as well as the overarching implications in this particular context for a well-functioning democracy, make this a dangerous argument to entertain seriously. The concerns under investigation here, regarding evidence of possible politicization of prosecutorial power by high-level Executive Branch officials, possible obstruction of justice, and other possible criminal and civil violations, in addition to abuse of executive power, make those dangers particularly acute. Generalized notions of prosecutorial discretion are simply not enough to convince the Committee that the Framers of the Constitution intended, or that the courts would find, such a

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[343] Id. at 5.

[344] See discussion of liability of Ms. Miers for criminal contempt above. In addition, the legislative history of the criminal contempt law indicates that Congress recognized that under the statute, as under the practice in the British Parliament, governmental and other witnesses would not be excused from providing information to Congress based on recognized common law and other governmental privileges. See 42 Cong. Globe 431 (statement of bill sponsor Rep. Orr) (explaining that Congress would continue to follow Parliamentary practice which "does not exempt a witness from testifying upon any such [privilege] ground"). In fact, a proposed amendment to expressly recognize the attorney-client privilege in the statute was specifically defeated. Id. at 441-43 (rejecting proposed privilege amendment). For further discussion of the legislative history of the criminal contempt law, and of other problems with the OLC Opinion's analysis, see CRS Contempt Report at 30-33.

fundamental weakness in the checks and balances that the Framers so carefully constructed to prevent the Nation from falling into despotism.

In fact, numerous federal statutes require that Executive Branch officials "shall" take specified actions. Some of these statutes, for example, require that the President "shall" act as Congress has provided.[345] Other laws require that U.S. Attorneys "shall" bring specified types of prosecutions or take other particular actions.[346] With respect to each of these statutes, as with the criminal contempt law, Congress passed the provisions and the President had the opportunity to sign or veto. Carrying out such laws is clearly consistent with, and indeed required by, separation of powers principles and the Constitution.

As discussed in the Subcommittee's ruling on the privilege and immunity claims concerning Ms. Miers, moreover, OLC opinions are not law, but represent simply the Executive Branch's views. In the very dispute referred to in the 1984 OLC opinion, the Executive Branch made effectively the same arguments in a lawsuit claiming that Congress should not have held an EPA Administrator in contempt for refusing to turn over documents on executive privilege grounds. The court declined to so rule, and commented specifically that the criminal contempt provisions "constitute 'an orderly and often approved means of vindicating constitutional claims arising from a legislative investigation," and that after the contempt citation is delivered to the U.S. Attorney, he "is then required to bring the matter before the grand jury."[347] Indeed, the court had explained years earlier that when a contempt charge is so delivered, Congress "left no discretion" and the U.S. Attorney is "required, under the language of the statute, to submit the facts to the grand jury."[348] As the D.C. Circuit pointedly noted in another case in which OLC claimed that a statute would be unconstitutional if not interpreted in accord with its views, "[t]he

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[345] See, e.g., Military Commissions Act, § 6(a)(3), Pub. L. No. 109-366, Oct. 17, 2006, 120 Stat. 2632, Note to 18 U.S.C. § 2441(providing that, as occurred this past week, the "President shall issue" interpretations of Geneva Convention provisions by executive order to be published in the Federal Register); 5 U.S.C. § 903(b) (mandating that the "President shall also submit" background or other information "as the Congress may require" for its consideration of agency reorganization plans). Cf. Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 127 S.Ct. 2518, 2531 (2007) (holding that "the statutory language" of the Clean Water Act – which states that the EPA "shall approve" states' applications for pollution permitting authority under certain circumstances – "is mandatory").

[346] See, e.g., 2 U.S.C. § 190l (stating that when a Congressional committee asks a U.S. attorney to participate in a proceeding concerning a private claim against the U.S., it "shall be his duty to attend in person" or through an assistant to do so); 33 U.S.C. § 413 (providing that it "shall be the duty of United States attorneys to vigorously prosecute" offenses concerning the protection of navigable waters when so requested by the Secretary of the Army and other designated officials). As a court explained concerning 33 U.S.C. § 413, this section imposes mandatory requirements and "no discretion is to be exercised in these respects." State of South Carolina ex rel. Maybank v. South Carolina Elec. & Gas Co., 41 F.Supp. 111, 118 (D.S.C. 1941).

[347] U.S. v. House of Representatives, 556 F.Supp. 150, 151-52 (D.D.C. 1983). The court in that case dismissed the action and urged the parties to resolve the dispute, which did in fact occur when the Executive Branch agreed to provide access to the requested documents. See L. Fisher, The Politics of Executive Privilege 128-29 (2004). It is hoped that the Executive Branch will reach such an agreement with the Committee in this case.

[348] Ex parte Frankfeld, 32 F.Supp. 915, 916 (D.D.C. 1940). Cf. Wilson v. United States, 369 F.2d 198, 203-04 (D.C. Cir. 1966) (stating that the Speaker of the House is required to exercise discretion on referring a House contempt citation to the U.S. Attorney when the House is not in session).

federal judiciary does not, however, owe deference to the Executive Branch's interpretation of the Constitution."[349] The same is true for Congress as well.

On July 22, the New York Times commented that the "stance" that the Justice Department simply will not pursue criminal contempt charges in this matter "tears at the fabric of the Constitution and upends the rule of law."[350] As the newspaper explained:

> There is no legal basis for this obstructionism. The Supreme Court has made clear that executive privilege is not simply what the president claims it to be. It must be evaluated case by case by a court, balancing the need for the information against the president's interest in keeping his decision-making process private. Mark Rozell, an expert on executive privilege at George Mason University, calls the administration's stance "almost Nixonian in breadth," because of its assertion that "the mere utterance of the phrase executive privilege" means that "no other branch has recourse."...This showdown between a Democratic Congress and a Republican president may look partisan, but it should not. In a year and a half, there could be a Democratic president, and such extreme claims of executive power would be just as disturbing if that chief executive made them. Congress should use all of the tools at its disposal to pursue its investigations. It is not only a matter of getting to the bottom of some possibly serious government misconduct. It is about preserving the checks and balances that are a vital part of American democracy.[351]

CONCLUSION

The refusals of Joshua Bolten and Harriet Miers to comply with the authorized subpoenas directing them to produce documents, and the refusal of Ms. Miers to testify or even appear pursuant to subpoena, have no proper legal basis. Such complete refusal to comply with lawful subpoenas, or even to negotiate to seek to resolve disputes over documents and testimony, significantly threatens the ability of this Committee, and every House Committee, to carry out its legislative and oversight functions. The House cannot accept a process where our subpoenas can be readily ignored, where a private individual witness under a duly authorized subpoena does not even bother to show up, and where executive privilege can be asserted on the thinnest of bases and in the broadest possible manner. This serious problem compels the Committee to seek action by the full House in this matter.

JOHN CONYERS, JR.
LINDA T. SÁNCHEZ.

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[349] Public Citizen v. Burke, 843 F.2d 1473, 1477 (D.C. Cir. 1988).
[350] Editorial, *Power Without Limits,* New York Times, July 22, 2007, at A9.
[351] Id.

Ruling of Chairwoman Linda Sánchez on White House Executive Privilege Claims

We have received letters from White House Counsel Fred Fielding on June 28 and July 9 refusing to produce documents concerning our U.S. Attorney investigation that were called for in our June 13 subpoena to White House Chief of Staff Joshua Bolten, and further refusing to even provide the necessary information to explain his purported executive privilege claim. On July 17, Chairman Conyers and I again wrote to Mr. Fielding, notified him we would formally consider those privilege claims today, and again urged compliance with the June 13 subpoena.

Let me say at the outset that we take executive privilege claims seriously, and treat them with the careful consideration we believe is appropriate. In this case, we have given the White House's privilege claims careful consideration, and the Chair is prepared to rule that those claims are not legally valid and that Joshua Bolten of the White House is required pursuant to subpoena to produce the documents called for.

After I make my ruling, I will entertain a motion to sustain it, but first I would like to set forth the legal grounds for it. A number of these grounds are similar to the grounds in the ruling sustained by this Subcommittee on July 12 overruling the related executive privilege and immunity claims sought to be raised by Harriet Miers through her counsel, and where appropriate, I will incorporate the reasoning and legal authorities by reference. The grounds for my ruling today are as follows:

First, the claims of executive privilege are not properly asserted. We have not received a statement from the President himself asserting the privilege, even though Chairman Conyers has specifically requested one. As stated in my July 12 ruling and as incorporated by reference herein, the courts have ruled that a personal assertion of executive privilege by the President is legally required for the privilege claim to be valid, as, for example, in the Shultz case.[1]

The **second** basis for my ruling is essentially the same as the fourth ground for my July 12 ruling as to Ms. Miers, which is incorporated by reference herein. The courts have required a party raising a claim of executive privilege as to documents to provide a "descriptive, full and specific itemization of the various documents being claimed as privileged" and "precise and certain reasons for preserving their confidentiality."[2] Such a privilege log has been specifically requested from the White House, both in the subpoena and in a subsequent letter, and the White House has specifically refused. In other words, the White House is refusing not only to produce documents pursuant to subpoena, but also to even explain why the documents are being withheld. In effect, the White House is asking Congress and the American people to simply trust on blind faith that the documents are appropriately being kept secret. Our system of government does not permit the White House to demand this type of blind faith and secrecy.

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[1] Center on Corporate Responsibility v. Shultz, 368 F. Supp. 863, 872-73 (D.D.C. 1973).

[2] Smith v. FTC, 403 F. Supp. 1000, 1018 (D. Del. 1975); Black v. Sheraton Corp., 371 F.Supp. 97, 101 (D.D.C. 1974).

The **third** basis for my ruling is essentially the same as the third ground for my July 12 ruling as to Ms. Miers, which is incorporated by reference herein. The White House has failed to demonstrate that the documents we are seeking from the White House are covered by executive privilege, because they do not concern communications to or from the President, or to or from White House advisers "in the course of preparing advice for the President."[3] Indeed, the White House has unequivocally asserted that the President **never received any advice on, and was not himself involved in,** the U.S. Attorney firings. Therefore, under the Espy case and other relevant case law, the presidential communications privilege simply does not apply here.

The **fourth** basis for my ruling is essentially the same as the fifth ground for my July 12 ruling as to Ms. Miers, which is incorporated by reference herein. Even assuming that the information we have asked for falls within the scope of a properly asserted executive privilege, any such privilege is outweighed by the compelling need for the House and the public to have access to this information. In addition to my explanation for this basis for my ruling on July 12, it should also be noted that the White House claim is weakened by the fact that the Administration itself, through the Justice Department, has released a number of White House e-mails on this subject, including even internal White House e-mails, and that the White House has offered to make more such material available as part of its "all-or-nothing" proposal that certain White House aides be interviewed without either an oath or a transcript. How can it be credibly argued, therefore, that Executive Branch interests will be seriously harmed when a significant amount of the very same type of information has been, or has been offered to be, publicly released?

For all the foregoing reasons, I hereby rule that the refusal of Joshua Bolten of the White House to comply with the June 13 subpoena and produce documents as directed cannot be properly justified on executive privilege grounds and that Mr. Bolten is legally required to produce these documents.

These reasons are without prejudice to one another and to any other defects that may after further examination be found to exist in the asserted privilege.

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[3] In re Sealed Case, 121 F.3d 729, 752 (D.C. Cir. 1997).

Ruling of Chairwoman Linda Sánchez on Related Executive Privilege and Immunity Claims

According to letters we have received from Ms. Harriet Miers' counsel, her refusal to answer questions and produce relevant documents in accordance with her obligations under the subpoena served on her June 13 is based on letters she has received from current White House Counsel Fred Fielding, asserting related claims of executive privilege and immunity. Many of these claims had already been raised and communicated to us previously.

We have given all these claims careful consideration, and I hereby rule that those claims are not legally valid and that Ms. Miers is required pursuant to the subpoena to be here now and to produce documents and answer questions.

I will presently entertain a motion to sustain this ruling, but first I would like to set forth the grounds for it. They are as follows:

First, the claims of privilege and immunity are not properly asserted. Ms. Miers is no longer an employee of the White House and is simply relying on a claim of Presidential executive privilege and immunity communicated by the current White House Counsel. No one is here today on behalf of the White House raising that claim.

In previous cases, when a private party such as Ms. Miers has been subpoenaed and the Executive Branch has objected on privilege grounds, the private party has respected the subpoena and the Executive Branch has been obliged to go to court to seek to prevent compliance with the subpoena.

We have not even received a statement from the President himself asserting privilege, even though Chairman Conyers has asked for one. The courts have stated that a personal assertion of executive privilege by the President is legally required for the privilege claim to be valid.

For instance, the Shultz case stated that even a statement from a White House counsel that he is authorized to invoke executive privilege is "wholly insufficient to activate a formal claim of executive privilege," and that such a claim must be made by the "President, as head of the 'agency,' the White House."[1]

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[1] Center on Corporate Responsibility v. Shultz, 368 F. Supp. 863, 872-73 (D.D.C. 1973).

Second, we are aware of absolutely no possible proper basis for Ms. Miers' refusing even to appear today as required by subpoena. The White House Counsel's letter to Ms. Miers's attorney, and her attorney's letters to the Subcommittee, fail to cite a single case in support of the notion that a witness under federal subpoena may simply decline to show up to a hearing. Indeed, no court decision that we are aware of supports the White House's astounding claim that a former White House official has the option of refusing to even appear in response to a Congressional subpoena.

To the contrary, the courts have made clear that no present or former government official – even the President – is so above the law that he or she may completely disregard a legal directive such as the Committee's subpoena.

And in keeping with this principle, both present and former White House officials have testified before Congress numerous times, including incumbent and former White House Counsels. For example, I mentioned earlier that Beth Nolan has told our Subcommittee that she appeared before Congressional committees four times on matters directly related to her duties as White House Counsel, three of those times while she was still in that position.

As I also mentioned earlier, a Congressional Research Service study documents some 74 instances where White House advisers have testified before Congress since World War II.[2]

Moreover, even the 1999 Office of Legal Counsel opinion referred to in Mr. Fielding's July 10 letter refers only to **current** White House advisers, and not to former advisers; and it acknowledges that the courts might not agree with its conclusion as to current advisors. Such Justice Department opinions, including a new one issued just yesterday to try to support this claim, are not law, they state only the Executive Branch's own view of the law, and have no legal force whatsoever.

It is also noteworthy that both of the Justice Department opinions relied on by the White House and Ms. Miers fail to support a single court case in support of their novel legal conclusions.

Just yesterday, another former White House adviser, Sara Taylor, appeared before the Senate Judiciary Committee pursuant to subpoena and testified about at least some of the relevant facts in this matter despite the White House's assertion of executive privilege.

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[2] Harold C. Relyea & Todd B. Tatelman, Presidential Advisers' Testimony Before Congressional Committees: An Overview, CRS Report for Congress, RL 31351 (April 10, 2007).

This White House's asserted right to secrecy goes beyond even Richard Nixon, who initially refused to allow his White House Counsel, John Dean, to testify before Congress, on almost exactly the same grounds being asserted now, but then agreed that Mr. Dean and other White House officials could testify.[3]

Third, the White House has failed to demonstrate that the information we are seeking from Ms. Miers – testimony and documents as called for by the subpoena – is covered by executive privilege. We were not expecting Ms. Miers to be revealing any communications to or from the President himself, which is the most commonly recognized scope of the presidential communications privilege.

In fact, as recently as June 28, a senior White House official at an authorized background briefing specifically stated that the President had "no personal involvement" in receiving advice about the firing of the U.S. Attorneys or in approving or adjusting the list. Ms. Taylor testified yesterday that she was not aware of any personal involvement by the President. We are seeking information from Ms. Miers and other White House officials about their **own** communications and their **own** involvement in the process.

The White House claims that executive privilege nevertheless applies, because it also covers documents and testimony by White House staff who **advise** the President, apparently based on the Espy decision.[4]

But the Espy court made clear that its expansion of the presidential communications privilege applied only when information is sought in a judicial proceeding and "should not be read as in any way affecting the scope of the privilege in the congressional-executive context."[5]

And the Espy court also made clear that the privilege extends only to communications from or to presidential advisers "in the course of preparing advice for the President."[6] But the White House has maintained that the President **never received any advice on, and was not**

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[3] L. Fisher, The Politics of Executive Privilege 59-60 (2004).

[4] In re Sealed Case, 121 F.3d 729, 752 (D.C. Cir. 1997).

[5] Id. at 753.

[6] Id. at 752.

himself involved in, the U.S. Attorney firings. The presidential communications privilege, even as expanded by the Espy case, simply does not apply here.

Fourth, with respect to our subpoena's request for documents from Ms. Miers, the courts have required a party raising a claim of privilege to provide a "descriptive, full, and specific itemization of the various documents being claimed as privileged" and "precise and certain reasons for preserving their confidentiality."

These words are from the Smith v. FTC case and the Black v. Sheraton case.[7]

Here, no such itemized privilege log has been provided by Ms. Miers or her counsel. In effect, the White House is telling Congress and the American people that documents and testimony are privileged without deigning to explain why. In other words, the White House is simply saying, "Trust us. We will decide."

Fifth, even assuming that the information we have asked for fell within the scope of a properly asserted executive privilege, any such privilege is outweighed by the compelling need for the House and the public to have access to this information.

As the Supreme Court held in U.S. v. Nixon, claims of executive privilege are not absolute, and depend on a balancing of the need for privilege versus the need for the information being sought. Here that balance clearly weighs against sustaining any privilege claim.

The privilege claims here are weak. In addition to the points I have made already, it is important to note that the claims by the White House are not limited to specific discussions or documents but are an attempt at a blanket prohibition against **any** documents being provided and **any** testimony from present or former aides whatsoever, including concerning communications with people outside the Executive Branch altogether.

And the need for the information we seek from the White House is very strong. We have tried extensively to obtain information from other sources, including reviewing thousands of documents provided by the Justice Department, and hearing testimony or conducting on-the-record interviews with 20 current or former DOJ officials.

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[7] Smith v. FTC, 403 F. Supp. 1000, 1018 (D. Del. 1975); Black v. Sheraton Corp., 371 F.Supp. 97, 101 (D.D.C. 1974).

Yet we still don't know, for example, how or why or by whom Mr. Iglesias was put on the list to be fired. We still don't know what actions, if any, were taken by Karl Rove or other White House officials on the firing of Mr. Iglesias.

Similar questions remain unanswered about the firing of other U.S. Attorneys and about the involvement of White House officials in the misleading information provided to Congress on this subject.

Why is this important? For several reasons. For one, the evidence obtained thus far raises serious concerns about whether federal laws have been broken in the U.S. Attorney matter – including laws prohibiting obstruction of justice, laws like the Hatch Act against retaliating against federal employees for improper political reasons, and laws prohibiting misleading or obstructing Congress.

The courts have made clear that executive privilege is generally overcome when the information sought concerns government misconduct. Indeed, the court in the Espy case stated that when there is "any reason to believe government misconduct occurred," the deliberative process element of executive privilege "disappears altogether."[8]

In addition, obtaining more complete information on what happened in the U.S. Attorneys matter may well reveal problems warranting new legislation by Congress. This is a well-recognized ground for authorizing Congress to obtain Executive Branch information, as the Supreme Court stated in the case of McGrain v. Daugherty.[9]

Indeed, we have already passed legislation changing the rules for interim appointment of U.S. Attorneys as an outgrowth of our investigation so far.

The White House claims that Congress' role is limited because the appointment of U.S. Attorneys is done by the President with the Senate's approval. That is true, however, only because of a law passed by Congress itself.

Under the Constitution, both the courts and the Department itself have recognized that U.S. Attorneys are considered "inferior officers," and that rules for their appointment and

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[8] In re Sealed Case, 121 F.3d at 746.

[9] 273 U.S. 135, 174 (1926).

removal are not vested in the sole discretion of the President, but can be set by Congress, just as we did recently in passing the law on interim appointment of U.S. Attorneys.[10]

Finally, even assuming it is never proven that any laws were broken here, the evidence already clearly indicates an abuse of power and legal authority by this Administration in the U.S. Attorneys matter. Investigating and exposing such abuses is clearly within the oversight authority of Congress and justifies obtaining the kind of information we seek.

As the Supreme Court ruled in the Watkins case fifty years ago, Congress has "broad" power to investigate "the administration of existing laws" and to "expose corruption, inefficiency, or waste" or similar problems in the Executive Branch.[11]

Regardless of whether laws were broken, it is clearly important for Congress and the American people to know, for example, whether any of these U.S. Attorneys were fired because they refused to bring vote fraud or other cases that Republicans wanted for partisan reasons, or because they pursued corruption or other cases against Republicans.

For all the foregoing reasons, I hereby rule that Ms. Miers's refusal to comply with the subpoena and appear at this hearing, and to answer questions and provide relevant documents regarding these concerns, cannot be properly justified on executive privilege or related immunity grounds.

These reasons are without prejudice to one another and to any other defects that may after further examination be found to exist in the asserted privilege.

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[10] See, e.g., United States v. Sotomayor Vazquez, 69 F.Supp.2d 286 (D.Puerto Rico 1999); 2 U.S. Op. Off. Legal Counsel 58 (Feb. 28, 1978).

[11] Watkins v. United States, 354 U.S. 178, 187 (1957).

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September 20, 2007

Hon. John Conyers
Chairman,
House Committee on the Judiciary
2138 Rayburn House Office Building
Washington, D.C. 20515

Dear Representative Conyers,

I am writing because I have been asked to evaluate the strength of the executive privilege claims concerning the subpoenas of former White House Counsel Harriet Miers and White House Chief of Staff Joshua Bolten as part of the investigation of the firing of United States attorneys. My conclusion is that it is very important for Congress to act to enforce these subpoenas and that it is difficult to envision a more compelling case on behalf of Congress. From a constitutional perspective, the claims of executive privilege are not sufficient to overcome Congress's constitutional responsibility to conduct meaningful oversight and to consider possible federal legislation. Simply put, this is a situation where the claim of executive privilege is weak and the need for congressional access to the information is strong.

The leading Supreme Court decision on executive privilege is *United States v. Nixon*, 418 U.S. 683 (1974). The Court recognized that there is executive privilege for conversations with and memoranda to the President, but that executive privilege is not absolute. The Court declared that "neither the doctrine of separation of powers, nor the need for confidentiality of high-level communications, without more, can sustain an absolute, unqualified presidential privilege of immunity from judicial process under all circumstances."

The Court stressed that executive privilege must yield if there is an overriding need for information. The Court explained that executive privilege cannot be used to keep another branch of government from performing its duties under the Constitution.

Under the reasoning of *United States v. Nixon*, Congress has a compelling case for enforcing its subpoenas in connection with its continuing investigation of the U.S. Attorney firings and related matters. It is not even clear that executive privilege applies in this situation. *United States v. Nixon* ruled that executive privilege applies to communications with the President. None of the information requested from Ms. Miers or Mr. Bolton involved communications with President Bush.

Although the Supreme Court has not considered whether executive privilege protects communications with other than the President, the United States Court of Appeals for the District of Columbia Circuit has ruled that executive privilege extends to communications to and from staff "in the course of preparing advice for the President" for a decision to be made by the President." *In re Sealed Case*, 121 F.3d 729, 752 (D.C. Cir. 1997). However, no one has claimed that President Bush was in any way involved in communications concerning the United States Attorneys or the decisions to fire them. The President and his advisors have said that he was not involved.

Nor is Congress seeking sensitive information, concerning foreign policy decision-making where *United States v. Nixon* recognizes a special need for executive privilege. In fact, the Bush administration has said that it would allow its officials to testify, but only in non-public sessions and not under oath. This undercuts any claim that its motivation is keeping information secret to protect national interests.

It also must be noted that the prerequisites for invoking executive privilege have not been met. Ms. Miers did not appear in response to subpoenas. "Privilege logs" have not been provided, even though courts are clear that an individual raising a claim of privilege must provide a "descriptive, full, and specific itemization of the various documents claimed as privileged" and "precise and certain reasons for preserving their confidentiality." *Smith v. Federal Trade Commission,* 403 F.Supp. 1000, 1018 (D.Del. 1975); *Black v. Sheraton Corp.*, 371 F.Supp. 97, 101 (D.D.C. 1974).

While the justifications for executive privilege in this situation are weak or non-existent, there is a great need for Congress to have access to this information. Congress is investigating whether there was a serious abuse of power, including the possibility of obstruction of justice, in firing United States Attorneys to stop pending investigations for political reasons or for their failure to initiate prosecutions sought for partisan reasons.

The United States Court of Appeals for the District of Columbia has held that executive privilege is overcome when there is "any reason to believe government misconduct occurs." *In re Sealed Case*, 121 F.3d at 746. Although there is a privilege for deliberations of those in the executive branch, the court made clear that the need to protect the deliberative process "disappears altogether" when there are allegations of serious misconduct.

As explained above, *United States v. Nixon* holds that executive privilege does not allow the withholding of information that would interfere with ability of another branch of government to perform its constitutionally assigned duties. That is exactly the situation here. The Supreme Court long has recognized that Congress has the responsibility to investigate conduct by the executive branch. *McGrain v. Dougherty*, 273 U.S. 135, 174 (1926). Your memo, dated July 24, 2007, to members of the House Judiciary Committee, details the serious allegations of impropriety that may constitute obstruction of justice. Additionally, as you explain, congressional investigations here could lead to new legislation concerning the process for removing United States Attorneys. Congress cannot perform these tasks without full access to information.

Finally, it must be noted that the broad assertion of privilege in these instances is unprecedented. If President Nixon had taken this position, the Senate Select Committee on Watergate never would have been able to investigate that matter. Initially, President Nixon sought to prevent White House Counsel John Dean from testifying, but then relented and allowed this testimony. As with Watergate, there is the need for Congress to investigate whether there were serious abuses of power. Under the Constitution, in these circumstances, executive privilege cannot be used to frustrate Congress in fulfilling its constitutional duty.

Please do not hesitate to let me know if I can be of assistance in any way.

Sincerely,

Erwin Chemerinsky

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September 21, 2007

The Honorable John Conyers
Chairman, House Committee on the Judiciary
By fax: 202 225-3951

Dear Chairman Conyers:

Now that the Judiciary Committee is reporting on contempt for the White House staff in the investigation of the U.S. Attorney firings, I write in support of the contempt report and accompanying memo.

I was General Counsel (Acting), Solicitor, and Deputy General Counsel of the House of Representatives in 1984-1995. In the post I worked actively, including major testimony, on executive privilege and contempt battles during the Reagan and Bush I administrations. In particular, there was a relatively less-known, but highly successful, House Foreign Affairs investigation of Ferdinand Marcos's hidden wealth, chaired by Rep. Stephen Solarz (D-N.Y.), for which I basically did all the counsel's work, soup to nuts, including the whole drafting of the successful contempt report that passed the House – the last contempt report to do so. And, even Chairman Dan Burton (R-Ind.), no political soulmate of mine, brought me in as lead witness in his successful 2003 hearings that broke the formal executive privilege claim made by the Bush Administration as to the Boston FBI memos.

Since 1995, I have been a professor of law with a long list of books and articles on related subjects. So I know Congressional contempt and executive privilege, with about as much hands-on experience as anyone can have. To put it differently, three successful Speakers – Tip O'Neil, Jim Wright, and Tom Foley – put their trust in me, personally, on issues of Congressional investigations, and, in one tough battle after another, I never let them down. Ask Rep. Henry Waxman, whom I have loyally served for two decades now. I have closely followed the current House Judiciary investigation and the executive privilege claim – in fact, numerous media, from the Washington Post to Legal Times, have sought and reported my commentary on it.

I consider the contempt report from the House Judiciary Committee to be thoroughly meritorious, and I unequivocally and without reservation support it – and support bringing it to a House floor vote.

Let me treat my support under these headings:

(1) The merit and soundness in the Judiciary Committee's inquiry, at the technical as well as the larger-context level, and the lack of merit in the Administration's sweepingly overbroad executive privilege claim.

(2) The need to bring this to a House vote, lest this Administration reach its end successfully treating House oversight as feckless and toothless.

First I address: the merit and soundness in the Judiciary Committee's inquiry, and the lack of merit in the Administration's sweepingly overbroad executive privilege claim.

The investigation by the Judiciary Committee of the U.S. Attorney firings will go down in history as one of the House's best. It took on a subject – this Administration's politicization of the administration of justice – sorely needing oversight but hidden behind the high walls of the Department of Justice. The Judiciary Committee proceeded systematically, step by step, exactly as I would have preached doing "by the book" – building a case on the evidence, extracting DOJ documents and e-mails, extracting testimony from lesser functionaries like the Attorney General's chief of staff, exposing (former) Attorney General Gonzalez as having a serious problem of selective amnesia, and finally helping to clarify the reasons an extended tenure for Karl Rove and Gonzalez would be inadvisable.

Although many evaluate these matters at the larger-context level, my own experience and expertise perhaps makes my comments of moment as to the merit and soundness of the Judiciary Committee's inquiry at the technical level. The contempt report and memo are excellent. The memo documents, as it should, at full length, the legislative purpose of the inquiry – that there is a great deal of legislation all around the subject of appointment of U.S. Attorneys, and that there may well be a need for additional revision besides what the inquiry has already sparked. This is very important. And, it unveils, as it should, at full length, the fatally flawed nature, on technical as well as larger-context grounds, of the executive privilege claim.

As for the executive privilege claim, I would note that I gave the lead testimony that led to the dropping of the one formal executive privilege claim by the Bush Administration, in 2003, so I have been deeply immersed in the issue of its executive privilege claims as to scandals emanating from the Justice Department. The privilege claim that has been sweepingly made for all the White House staff at any level, and all the White House documents and e-mails at any level, is patently without merit. These have been probed many, many times in the past, in every Administration since Watergate. The subject of tampering with the administration of justice is one that has proved, again and again, to warrant the probing of White House staff, documents, and e-mails (or similar older media

of communications like calls and letters). It is nonsense to contend that the President's nomination power is so absolute that it is a total shield for every staffer and document in the White House, particularly on a matter, such as this one, where President Bush has said he was not himself personally involved and informed about what was going on. Since literally nothing of what is being asked about, involves communication to or from the President himself, the confidentiality interest supporting the claim of executive privilege is so diminished as not to give it even a small part of what the grossly sweeping claim being made here by the White House would require.

Moreover, at the technical level, there are multiple fatal issues undermining the executive privilege claim. The President did not himself provide the formal signed claim required by the 1982 Memo that this Administration has confirmed, as its predecessors did, sets the rules for valid executive privilege claims. Mere heresay about Presidential verbiage just does not measure up. And, the White House never indexed or logged, even at the most general level, the documents claimed to be privileged. That is fatal under the Supreme Court case law about Congressional documentary subpoenas – case law which encompasses how constitutional privilege claims, as well as any other privilege claims, must be justified in detailed ways. Overall, the case against executive privilege made in this instance compares very favorably to the case made in 1982-83 concerning the EPA, Superfund, and Anne Gorsuch-Burford – the classic contempt case against executive privilege that established the "gold standard" of Congressional oversight overcoming Executive recalcitrance by the proper process of acting via contempt resolution.

Second I address: The need to bring this to a House vote, lest this Administration reach its end successfully treating House oversight as feckless and toothless.

For a long list of reasons, it is vital to bring this to a House vote. First, unlike many previous executive privilege confrontations, on this one, the White House has shown zero willingness to negotiate in good faith. I personally took part in several such past confrontations, and I know the difference between negotiation – however tough the White House stance – and mere stalling. Here there has just been stalling. Second, if the matter is not brought to a House vote, the stalling will be a success. The White House will describe itself as having triumphed, and many who are not hardened about such descriptions will buy into the claim of triumph. With the Administration now most of the way through 2007, and with 2008 an election year, there may not be time for the Administration's stonewalling on other issues to ripen to the point that it could be brought in this way to a House vote. The White House has demonstrated a full bag of stalling methods. So if this matter does not come to such a vote, it is quite possible that none will.

Third, this is a uniquely suitable subject for such a confrontation. Unlike matters such as illegal surveillance, other abuses justified as part of national or homeland security, or the scandals of the Iraq war, this issue is free from Presidential claims of national security powers. Even in previous administrations, such claims of national security powers were used to frustrate Congressional inquiry, and in this one, overblown security claims have

been epidemic. It is vital that when a subject, like the politicization of the administration of justice, is presented that is free from such claims, the occasion not be skipped.

I know that a question to be considered is raised by the Presidential rhetoric for press consumption that contempt under 2 U.S.C. 192 cannot go forward because the U.S. Attorney for the District of Columbia is ordered not to do what the law obliges him to do. There are many different answers to this, which have different appeal to different observers. I will answer just for myself. The job of the House is to bring appropriate contempts to a floor vote, and what happens after that, although important, is not the job of the House to concern itself about unduly. The vote itself puts the House on record that contempt occurred. Whether a successful prosecution ensues is dependent on others – prosecutor, grand jury, judge, jury – and the House cannot consume itself with worry that they will fail to do their proper job. Wrongful "nullification" of a proper contempt report can occur, whether it is jury nullification (as occurred when one jury in the early 1980s accepted the witness's contention she did not come to the hearing because she had a sore throat that day) or some other kind of nullification. The House cannot worry unduly about the possibility of such nullification. Since it would be wrongful, the House works on the assumption that either it will not occur, or, in the end, it being wrongful, it would be a negative mark against those who engage in the wrongful act, not against the House.

Moreover, Presidential rhetoric of this kind does not match reality. For example, since this investigation started, Attorney General Gonzalez resigned. He will be replaced, presumably by the nominee, Judge Mukasey. The single biggest question all will ask about the new Attorney General: is he independent enough in his commitment to clean up the politicization of the administration of justice? – which can only happen if the sunlight of Congressional inquiry, the best disinfectant, is allowed to shine into the dark corners of this sordid episode. Far from withholding from the Justice Department the chance to purge itself by responding appropriately to a House vote on this contempt report, the House should give it precisely such an opportunity.

For these reasons, I consider the contempt report from the House Judiciary Committee to be thoroughly meritorious, and I unequivocally and without reservation support it – and support bringing it to a House floor vote.

Cordially,

Charles Tiefer

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October 1, 2007

Honorable John Conyers
Chair
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

As a follow-up to my March 29, 2007 testimony before the Subcommittee on Commercial and Administrative Law of the House Judiciary Committee, you have requested brief additional views on the claims of executive privilege in the U.S. Attorney investigation.

Since my testimony, the Committee has issued subpoenas to the White House and former Counsel to the President Harriet Miers. The White House and Ms. Miers have refused to comply with those subpoenas, citing executive privilege and an absolute immunity from compelled testimony for Ms. Miers. The Committee has referred to the full House of Representatives a report and resolution citing Ms. Miers for contempt of Congress for refusing to appear, testify, or produce documents, and White House Chief of Staff Joshua Bolten for refusing to produce documents, as required by the subpoenas.

A House Resolution finding presidential advisers—either current or former—in contempt of Congress is a profoundly serious matter. As a former White House Counsel, I understand the value and importance to the presidency of protecting internal deliberations from inappropriate scrutiny and, indeed, of protecting close presidential advisers from being compelled to appear before Congress whenever a congressional committee decides to issue a subpoena. I therefore believe that Congress should make every effort to respect the legitimate constitutional interests of the Executive—a coordinate branch of government—consistent with its own constitutional responsibilities. Similarly, while we should expect the President to defend his constitutional prerogatives vigorously, the President also has a responsibility to acknowledge and respect the legitimate constitutional interests of the Legislature.

United States v. Nixon and *Senate Select Committee on Presidential Campaign Activities v. Nixon* instruct that the President's constitutional authority to assert executive privilege is not absolute, but is instead to be

balanced against the legitimate needs of the coordinate branches of government in undertaking their constitutionally assigned responsibilities. The accommodation process requires each branch to negotiate in good faith as part of that constitutional process.

In this matter, the balance of interests supports the Committee's view that, under all the circumstances present here, it is entitled to at least some information and some testimony from White House officials. Certainly, specific documents or portions of them, as well as responses to particular questions during testimony, could still be subject to claims of executive privilege that would have to be addressed and resolved by the two branches. The Committee might well respect certain of those claims and therefore might not receive all information in which it is interested. But, the White House refusal to provide any documents (or portions of them) at all, and Ms. Miers' refusal even to appear before the Committee and answer those questions that would not implicate the privilege, are inconsistent with the obligations of the Executive Branch in the constitutional accommodation process.

Even if Congress were seeking presidential communications—those communications to and from White House staff "in the course of preparing advice for the President," *see In re Sealed Case*, 121 F.3d 729, 752 (D.C. Cir. 1997)—the privilege would still be a qualified one. In this matter, however, it appears that the communications were not made for the purpose of assisting presidential decisionmaking. In my view, this diminishes the strength of the White House claim.

The Committee has met the strict standard set forth by the district court in *Senate Select Committee* that a Congressional Committee must show that the privileged information is "demonstrably critical to the responsible fulfillment of the Committee's function." It has identified specific and substantial legislative interests in receiving documentary and testamentary evidence. It has moved incrementally, and has sought first to obtain the information it needs from other sources before moving to compel the White House and Ms. Miers. To that end, it sought White House information on a voluntary basis, a process that failed when Fred Fielding, Counsel to the President, agreed only to make a limited amount of information available through controlled interviews and document reviews, with conditions (such as requiring that the Committee agree there would be no subsequent subpoenas, apparently no matter what it learned in these initial interviews) that could well impede Congress's ability to exercise its constitutional authorities. Moreover, the Committee obtained information and testimony from numerous Department of Justice officials before issuing the subpoenas to the White House and Ms. Miers. The information and evidence developed

in that process included contradictory and incomplete accounts that the Committee believes can be resolved only by seeking information directly from the White House.

The actions of the Committee show that it has sought in good faith to accommodate the constitutional interests of the Executive Branch, and taken the step of issuing subpoenas only upon determining that substantial legislative needs could not be met without information from the White House.

With respect to the testimony of Ms. Miers, the Department of Justice has opined that she is entitled to absolute immunity from compelled testimony before Congress, citing to, among other authorities, a 1971 opinion from Assistant Attorney General Rehnquist, and a 1999 opinion from Attorney General Reno (which addressed a subpoena directed to me, as Counsel to the President). Changes in the law and practices since 1971 appear to have prompted the Attorney General in 1999 to rely not only on that long-standing Executive Branch view, but also to balance Executive and Legislative interests in the particular matter, before concluding that my testimony was protected from Congressional compulsion. For the reasons discussed above, I believe the balance of interests—even applying a strong presumption against compelling such testimony—favors the Committee's position that it is entitled to the testimony of Ms. Miers.

This is especially true because there is one significant difference between the prior opinions and the current situation: Ms. Miers is a former presidential aide, whose duties to the President no longer require her full-time attention. Were she to appear before the Committee, she would likely be precluded from answering certain—perhaps many—questions because of executive privilege, at least as a preliminary matter. The Committee, and ultimately Congress, would then have to address and consider those privilege assertions. But her refusal to appear at all, in the face of a subpoena to do so, is not supported by the law.

Very truly yours,

Beth Nolan

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October 1, 2007

VIA ELECTRONIC MAIL

The Honorable John Conyers
Chairman of the House Committee on the Judiciary
2426 Rayburn Building
Washington, DC 20515

Re: House Judiciary Committee's Claim for Documents and Testimony from DOJ and White House

Dear Mr. Chairman:

You have asked for my views concerning the House Judiciary Committee's claim for documents and testimony from the Department of Justice and White House relating to the firing and replacement of United States Attorneys. The President has asserted executive privilege over these documents.

The Committee has oversight jurisdiction over both the Department of Justice and the administration of the statutes and programs which Congress has consigned to the Department. Supreme Court precedent explicates the investigative power of the Congress inherent in its Article I legislative power and the Committee has established a foundation that the evidence sought is "pertinent"[1] to its investigation of Department of Justice and White House misfeasance. *See* Memorandum from John Conyers, Jr., Chairman, to Members of the Committee on the Judiciary, "Full Committee Consideration of a Report on the Refusal of Former White House Counsel Harriet Miers and White House Chief of Staff Joshua Bolton to Comply With Subpoenas by the House Judiciary Committee" (July 24, 2007). The Committee's right to these materials is unassailable against an Executive branch assertion of a presumptive privilege which the

[1] 2 U.S.C. § 192

courts have found can be overcome by, among other things, the needs of a prosecutor in a criminal case, *United States v. Nixon*, 418 U.S. 683 (1974), and a civil litigant pursuing a breach of contract against an agency and claiming White House interference in agency decision making. *Sun Oil Company v. United States*, 514 F.2d 1020, 1026 (Ct Cl. 1975).

In short, it is hard to envision a stronger claim for evidence than the one advanced by your Committee. Indeed, the history of legislative oversight of law enforcement provides a case directly on point. In *McGrain v. Daugherty,* 273 U.S. 135 (1926), a Senate Committee investigated charges that the Department of Justice had failed to prosecute public corruption, antitrust violations and other directly applicable matters. In validating congressional authority to examine and inquire into specific enforcement decisions by the Justice Department, the Supreme Court stated:

> The subject to be investigated was the administration of the Department of Justice – whether its functions were being properly discharged or were being neglected or misdirected and particularly <u>whether the Attorney General and his assistants were performing or neglecting their duties in respect of the institution and prosecution of proceedings</u> ... the subject would be materially aided by the information [sought] ... the functions of the Department of Justice, the powers and duties of the Attorney General and the duties of his assistants, are all subject to regulation by congressional legislation and ... the department is maintained and its activities are carried on under such appropriations as in the judgment of Congress are needed from year to year.

McGrain, 273 U.S. at 177-78 (emphasis added)

McGrain's holding is directly applicable to this Committee's inquiry into the decisions to replace United States Attorneys and White House staff involvement in such decisions. As already cited, even civil litigants have overcome the President's presumptive privilege upon a proper showing and have even obtained, for purposes of discovery, documents constituting communications to the President from his advisors and among his closest White House advisers. *Dellums v. Powell,* 561 F.2d 242, 245-46 (D.C. Cir. 1977). Surely, Congress's Article I power to investigate both the due and proper functioning of the Department of Justice and the White House's interference in

that function is at least as strong, if not stronger than the claims of a civil litigant in a contract dispute with the federal government.

Sincerely,

Stanley M. Brand

SMB:lls

MINORITY VIEWS

On the resolution and report recommending to the House of Representatives that former White House Counsel Harriet Miers and White House Chief of Staff Joshua Bolten be cited for contempt of Congress

"The great enemy of the truth is very often not the lie – deliberate, contrived and dishonest – but the myth: persistent, persuasive and unrealistic."
-- John F. Kennedy[1]

I. Introduction

In March 2007, the House Committee on the Judiciary and its Subcommittee on Commercial and Administrative Law began investigating the replacement of several United States Attorneys. The Committee's apparent aims were to review the background of the replacements, to identify the reasons that the U.S. Attorneys were asked to resign, and to determine whether the U.S. Attorneys were replaced for improper reasons. Ostensibly, the overall objective of the investigation was to make sure that the Department of Justice, through the requested resignations of U.S. Attorneys, had not become improperly politicized, and that prosecutorial independence had not become threatened. In pursuit of the investigation, the Committee and Subcommittee spent months reviewing thousands of pages of documents, interviewing and deposing witnesses, and holding a host of hearings.

As part of the Committee's investigation, on June 13, 2007, the Chairman of the Committee issued two subpoenas duces tecum. The first ordered the White House to produce by June 28, 2007, documents relating to the replacement of the U.S. Attorneys. White House Chief of Staff Joshua Bolten received this subpoena as the custodian of the documents. The second, issued to former Counsel to the President Harriet Miers, ordered her to appear before the Subcommittee on July 12, 2007, and to bring with her any and all documents she had in her possession related to the replacement of the U.S. Attorneys. On June 28, 2007, the White House, through Fred F. Fielding, Counsel to the President, informed the Committee that it would direct Mr. Bolten and Ms. Miers not to comply with the subpoenas, asserting that there had been no demonstration that the requested documents or testimony were critically important to the Committee's legislative and oversight interests and, moreover, that the documents and testimony were covered by executive privilege. Consistent with this directive, Ms. Miers and Mr. Bolten informed the Committee that they were unable to comply with the subpoenaes issued.

In response to the White House's assertion of executive privilege, the majority of this Committee regrettably chose to put this Congress on the path towards a constitutional confrontation. They did so by voting to recommend that the full House find Harriet Miers and Joshua Bolten to be in contempt of Congress, and, after a delay of several long, silent months, transmitting that recommendation to the floor of the House.

Holding these individuals in contempt of Congress has long since ceased to be an urgent priority of the majority. We believe that is appropriate, since to seek to hold them in contempt

[1] Hon. John F. Kennedy, President of the United States, Commencement Address at Yale University (1962).

would be to invite the considerable weakening of the institutional prerogatives of Congress. This is because such an attempt would force the White House into a court battle that precedent from both the U.S. Supreme Court and the U.S. Court of Appeals for the District of Columbia Circuit suggest that the Congress, given the facts at hand, might very well lose. Such a loss could make it substantially more difficult for this and future Congresses to oversee meaningfully the activities of the Executive.

The majority's chosen course of action is all the more unfortunate when one considers that the majority has continued to reject the White House's longstanding offer to make White House staff and documents available to the Committee under certain reasonable conditions. Had this offer been accepted, the Committee would have been able to speak to Ms. Miers, Karl Rove (who has since become a former White House employee), Scott Jennings (also now a former White House employee), and William Kelley. The Committee also would have been able to review correspondence between the White House and the Department, as well as correspondence between third parties such as Congress and their staffs. The rejection of the White House's offer has always cut against the established tradition of Congress and the Executive Branch of working together to accommodate each others' institutional interests. It has for unknown reasons prevented us from long ago finding out what is claimed to be lacking from our knowledge of the White House's involvement in this affair. And it has given us strong reason to conclude that what the majority actually seeks is not the truth, but political confrontation, and even that at only a politically opportune moment.

The White House's offer, moreover, stands on top of the 8,500 pages of documents the Department of Justice has already made available to the Committee – including documents that contain communications with White House personnel.[2] Notably, the Department of Justice produced those documents even though the Solicitor General, who is the Acting Attorney General for this matter, has advised the President that the documents are covered by executive privilege.[3] Likewise, the Committee and Subcommittee have held a host of hearings and meetings, and have heard and reviewed the testimony of over twenty current or former Department officials, given on the record and under oath or other pain of criminal sanction. Through this extensive discovery, we have found no more than a poorly managed process for the selection of U.S. Attorneys to be asked to resign and the explanation of that process to Congress – nothing improper has been uncovered with regard to the replacement of the U.S. Attorneys. This, too, heightens our suspicion that the majority seeks not so much the truth, but politically driven confrontation. This is particularly so since we already have one side of the conversation between the Department and the White House in this matter, the side that was essential to the Department acting on whatever the White House may have said.

Further, it must not be forgotten that this investigation also has proceeded against the backdrop of President Clinton's summary dismissal of 93 U.S. Attorneys when he took office in 1993. President Clinton exercised the very same authority President Bush used with respect to the eight U.S. Attorneys in question in this investigation. He did so, moreover, with regard to 93

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[2] As the Acting Attorney General noted, those documents included "many sensitive, deliberative documents related to the resignation requests, including e-mails and other communications with White House officials." Letter from Paul D. Clement, Acting Attorney General, to the President, at 3–4 n.2 (June 27, 2007).
[3] *See id.* at 6–7.

of the 94 U.S. Attorneys then serving. His action had the troubling effects of dismissing the U.S. Attorney for the Eastern District of Arkansas who was investigating him and his First Lady, Hillary Clinton, as well as the U.S. Attorney for the District of Columbia who was investigating President Clinton's key congressional ally, Representative Dan Rostenkowski. If the majority's argument is that the dismissal of a U.S. Attorney is presumptively an attempt to affect pending cases—or at least certain high profile cases—then it must also be argued that the effect of President Clinton's action was far more profound and disturbing than that of President Bush. Yet President Clinton's action has been defended by the majority.

In short, although there have been many accusations that the Department of Justice and the White House engaged in improper, partisan mischief in seeking these resignations, those accusations have been not been borne out. Rather, they have been refuted. In light of the Executive's offer of accommodation, the thousands of documents already reviewed by the Committee, the voluminous testimony already taken, and the fact that the Committee's investigation has uncovered no wrongdoing in the dismissal of the U.S. Attorneys, there is no need for a constitutional confrontation with the Executive Branch. At the end of this long, regrettable process, no good purpose would be served by the spectacle of holding either Harriet Miers or Joshua Bolten in contempt of Congress so that the Committee may recklessly pursue a myth. The majority's willingness to deprive Ms. Miers and Mr. Bolten of their personal liberty for transparent political purposes demeans the constitutional authority of Congressional oversight, and should be rejected.

II. Background on the White House Subpoenas

On March 20, 2007, during the early days of this investigation, White House Counsel Fred F. Fielding sent a letter to the Judiciary Committees of both houses of Congress offering to make available for interviews the President's former Counsel; the President's Deputy Chief of Staff and Senior Advisor; the White House's Deputy Counsel; and a Special Assistant in the White House's Office of Political Affairs. The White House offered to make these Presidential advisors available to discuss, first, communications between the White House and persons outside of the White House concerning the request for resignations of the U.S. Attorneys in question, and, second, communications between the White House and Members of Congress concerning those requests. Additionally, the White House offered to provide the Committees with two categories of documents: (1) communications between the White House and the Department of Justice concerning the requests for resignations; and (2) communications on the same subject between White House staff and third parties, including members of Congress or their staffs on the subject.

Hastily rejecting the White House's offer, the Subcommittee, on March 21, 2007, voted to authorize the full Committee Chairman to issue subpoenas for current and former White House officials Karl Rove, Harriet Miers, William Kelley, and Scott Jennings, as well as for documents that the Committee has not yet received. The vote on the authorization was by voice; the Members of the minority urged further investigation before taking the dramatic step of authorizing subpoenas.

This was a significant step in the investigation and an indication of the majority's motivations. Had the Committee accepted the White House's offer, the Committee would have been allowed unprecedented access to presidential advisors and would have been able to obtain the information the majority claims is critical to the investigation. The majority's refusal to accept this offer raises the question of whether the majority is less interested in obtaining answers and more interested in the perceived political gain of a constitutional showdown between the majority and President Bush.

Without consulting the Members of the Committee's minority, on June 13, 2007, the Committee issued two subpoenas. One subpoena was to Joshua Bolten, White House Chief of Staff, or the appropriate custodian of records. The subpoena rather colorfully called for the production of "any and all documents in the possession, custody, or control of the White House related to the Committee's investigation into the preservation of prosecutorial independence and the Department of Justice's politicization of the hiring and firing of United States Attorneys." The documents were to be produced by June 28, 2007, at 10:00 a.m.

The other subpoena was to former White House Counsel Harriet Miers. The Miers subpoena requested that she appear before the Committee on July 12, 2007 to provide testimony, and that she produce any and all documents in her possession, custody, or control related to the Committee's investigation. It was couched in similarly barbed terms.

A. White House response to the subpoenas

The White House, on June 28, 2007, informed the Committee that the President had decided to assert executive privilege, and that the White House therefore would not be making any production in response to the subpoena for documents. The White House also informed the Committee that counsel for Ms. Miers had been made aware of the President's decision to assert executive privilege and had been asked to relay to Ms. Miers a direction from the President not to produce any documents.

The White House explained that the "President's assertion of Executive Privilege [was] not designed to shield information in a particular situation, but to help protect the ability of Presidents to ensure that decisions reflect and benefit from the exchange of informed and diverse viewpoints and open and frank deliberations." Moreover, the White House reasoned that "there [was] no demonstration that the documents and information [the Committee] seek[s] by subpoena [were] critically important to any legislative initiatives that [the Committee] may be pursuing or intending to pursue."

On July 9, 2007, the White House further informed the Committee that the "President [felt] compelled to assert Executive Privilege with respect to the testimony sought from . . . Harriet E. Miers covering White House consideration, deliberations or communications, whether internal or external, relating to possible dismissal or appointment of United States Attorneys."[4] The White House's letter, however, renewed the President's voluntary offer to provide documents and make available senior White House officials for interviews.

[4] Letter from Fred F. Fielding, Counsel to the President, to Chairmen Leahy and Conyers, at 2 (July 9, 2007).

The White House additionally sent a letter to George T. Manning, Ms. Miers's legal counsel, informing him that "the President ha[d] directed [Ms. Miers] not to provide . . . testimony" to the Committee related to the U.S. Attorneys matter.[5] On July 10, 2007, the White House further informed Ms. Miers's legal counsel that the Department of Justice had advised that "Ms. Miers has absolute immunity from compelled testimony as to matters occurring while she was a senior advisor to the President."[6] The Department's legal opinion was attached to the letter. That opinion, quoting an opinion from Attorney General Janet Reno, stated that "the President and his immediate advisors are absolutely immune from testimonial compulsion by a Congressional committee."[7] This is because "[s]ubjecting a senior presidential advisor to the congressional subpoena power would be akin to requiring the President himself to appear before Congress on matters relating to his constitutionally assigned functions."[8] The legal opinion further noted that, as Assistant Attorney General William Rehnquist explained in a 1971 memorandum:

> The President and his immediate advisers—that is, those who customarily meet with the President on a regular or frequent basis—should be deemed absolutely immune from testimonial compulsion by a congressional committee. They may not be examined with respect to their official duties, but they may not even be compelled to appear before a congressional committee.[9]

The Department's legal opinion explained that Ms. Miers' status as a former Counsel to the President did not alter the analysis: "Separation of powers principles dictate that former Presidents and former senior presidential advisors remain immune from compelled congressional testimony about official matters that occurred during their time as President or senior presidential advisors."[10] The President, therefore, "directed [Ms. Miers] not to appear at the House Judiciary Committee hearing on Thursday, July 12, 2007."[11]

Finally, on July 24, 2007, the Department, in a letter to Chairman Conyers, informed the Committee that it believed that "it [was] important that the Committee appreciate[d] fully the longstanding Department of Justice position, articulated during Administrations of both parties, that 'the criminal contempt of Congress statute does not apply to the President or presidential subordinates who assert executive privilege.'"[12] The Department observed that more than

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[5] Letter from Fred F. Fielding, Counsel to the President, to George T. Manning (July 9, 2007).
[6] Letter from Fred F. Fielding, Counsel to the President, to George T. Manning (July 10, 2007).
[7] *Assertion of Executive Privilege With Respect to Clemency Decision*, 23 Op. O.L.C. 1, 4 (1999) (opinion of Attorney General Janet Reno) (quoting Memorandum from John C. Harmon, Assistant Attorney General, Office of Legal Counsel, *Re: Executive Privilege* at 5 (May 23, 1977)).
[8] 23 Op. O.L.C. at 5; *see also* Memorandum from Robert Lipsuhtz, Counsel to the President, *Re: Congressional Testimony by Members of the White House Staff* (February 8, 1979) ("While the investigative power of Congressional committees is extremely broad, the personal staff of the President is immune from testimonial compulsion by Congress.").
[9] Memorandum from William H. Rehnquist, Assistant Attorney General, Office of Legal Counsel, *Re: Power of Congressional Committee to Compel Appearance or Testimony of "White House Staff"* at 7 (February 5, 1971).
[10] Memorandum from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Immunity of Former Counsel to the President from Compelled Congressional Testimony"* at 2 (July 10, 2007).
[11] Letter from Fred F. Fielding, Counsel to the President, to George T. Manning (July 10, 2007).
[12] Letter from Brian A. Benczkowski, Principal Deputy Assistant Attorney General, Office of Legislative Affairs, to John Conyers, Jr., Chairman, Committee on the Judiciary, at 1 (July 24, 2007) (quoting *Application of 28 U.S.C.*

twenty years ago Assistant Attorney General Theodore Olson had expressed the opinion that, when an Executive Branch official in good faith relies on a presidential assertion of executive privilege, "a United States Attorney is not required to refer a contempt citation . . . to a grand jury or otherwise prosecute [the] Executive Branch official who is carrying out the President's instruction."[13] Furthermore, the Department pointed out that this position had been endorsed by former Assistant Attorney General Walter Dellinger during the Clinton Administration. In a published legal opinion, Assistant Attorney General Dellinger recognized that "the criminal contempt of Congress statute does not apply" where executive privilege has been asserted, because "application of the contempt statute against an assertion of executive privilege would seriously disrupt the balance between the President and Congress."[14]

Accordingly, the Department concluded that, as the President had asserted executive privilege, Ms. Miers could not be subject to prosecution under 2 U.S.C. § 194, if she followed the President's direction and did not appear in response to the subpoena.

B. Harriet Miers's response to the Committee's subpoena

Harriet Miers, through her legal counsel, George T. Manning, informed the Committee on July 9, 2007, that "in light of the President's assertion of Executive Privilege, Ms. Miers cannot provide the documents and testimony that the Committee seeks."[15] On July 10, 2007, Mr. Manning further informed the Committee that, on direction of the President, Ms. Miers would not appear before the Committee on July 12, 2007.

On July 17, 2007, Mr. Manning provided a more detailed explanation of the reasons Ms. Miers did not appear and explained to the Committee why the contempt statute, 2 U.S.C.§ 194, is inapplicable to Ms. Miers. His letter explained that the Committee, by subpoenaing Ms. Miers, was demanding that "Ms. Miers do precisely what the President had prohibited her from doing."[16] He further pointed out that "[i]n these circumstances it cannot reasonably be asserted that 'Ms. Miers . . . made her own decision to disregard' the Committee's subpoena."[17]

Additionally, Mr. Manning observed that the criminal contempt statute does not apply to situations where executive privilege has been asserted. As he wrote:

> [T]he cases cited in your letter confirm that the contempt statute is inapplicable to Ms. Miers. None of these cases involves an assertion of the Executive privileges and immunities at issue here. More importantly, as your letter acknowledges, these cases hold that the contempt statute does not apply where a witness has an

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§ 458 to Presidential Appointments of Federal Judges, 19 Op. O.L.C. 350, 356 (1995) (opinion of Walter Dellinger, Assistant Attorney General, Office of Legal Counsel)).

[13] *Prosecution for Contempt of Congress of an Executive Branch Official Who Has Asserted a Claim of Executive Privilege*, 8 Op. O.L.C. 101, 102 (1984) (opinion of Assistant Attorney General Theodore Olson).

[14] *Application of 28 U.S.C. § 458 to Presidential Appointment of Federal Judges*, 19 Op. O.L.C. 350, 356 (1995) (opinion of Assistant Attorney General Walter Dellinger).

[15] Letter from George T. Manning to John Conyers Jr., Chairman, and Lamar Smith, Ranking Member, Committee on the Judiciary (July 9, 2007).

[16] Letter from George T. Manning to John Conyers, Jr., Chairman, Committee on the Judiciary, at 1 (July 17, 2007).

[17] *Id.*

> "adequate excuse." The directives received by Ms. Miers from the President constitute a manifest "adequate excuse" in these circumstances.[18]

Mr. Manning reasoned that:

> Supreme Court cases foreclose any justifiable basis to support a determination that Ms. Miers is in contempt of Congress. The contempt statute requires that Ms. Miers act "willfully." The invocation of Executive privileges and immunities by the President in response to the subpoena to Ms. Miers forecloses such intent. The Supreme Court has explained that sanctioning "a citizen for exercising a privilege which the State clearly told him was available" would be "the most indefensible sort of entrapment by the State."[19]

Accordingly, Mr. Manning concluded that, even if Congress were to hold Ms. Miers in contempt, prosecution under the statute would be futile.

III. Background on the Investigation

The subpoenas, of course, arose in the course of Congress's investigation of the Department's requests for the resignations of several U.S. Attorneys. We turn, then, to the facts and circumstances of the Department's actions and the ensuing investigation.

A. The requests for resignations

On December 7, 2006, the Department of Justice asked for the resignations of seven U.S. Attorneys: Daniel Bogden, District of Nevada; Paul Charlton, District of Arizona; Margaret Chiara, Western District of Michigan; David Iglesias, District of New Mexico; Carol Lam, Southern District of California; John McKay, Western District of Washington; and Kevin Ryan, Northern District of California. Earlier in the year, the Department had also asked for the resignation of H.E. "Bud" Cummins, Eastern District of Arkansas.

These dismissals provoked considerable controversy among Members of Congress and in the press. Complaints over the dismissals initially centered on two issues: first, whether the dismissals were based on improper grounds, such as to gain a partisan advantage in the prosecution of cases; and, second, whether the dismissals were made to allow for long-term interim appointments that would circumvent the Senate confirmation process. Allegations or insinuations of improper grounds for the dismissals ranged over a wide spectrum, including, for example: retribution for pursuit of public corruption cases or investigations against Republican officials;[20] retribution for lack of pursuit of public corruption and vote fraud cases or investigations against Democrat officials or interests;[21] retribution for resistance to the policies of Department headquarters, such as those on prosecution of immigration cases and the use of the

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[18] *Id.* (citations omitted).
[19] *Id.* at 2 (citations omitted).
[20] *E.g.*, Rep. Cunningham in the Southern District of California. This type of allegation also has been leveled with regard to the dismissals of the U.S. Attorneys in the District of Arizona and the District of Nevada.
[21] *E.g.*, in the District of New Mexico.

death penalty;[22] retribution for failure to intervene in a disputed gubernatorial race;[23] and, in one case, a desire to clear the way to reward a White House official with a U.S. Attorney's position.[24]

B. The Department's explanation of the dismissals

The Department explained the dismissals as consistent with the President's authority to be served by whom he pleases, and to dismiss his officials for any reason or no reason at all.[25] This fundamental principle, which lies at the heart of the Department's explanation of its actions, should not be subject to dispute. As mentioned above, President Clinton, upon taking office in 1993, fired all 93 U.S. Attorneys serving at the time. By this means, President Clinton ensured that he would only have U.S. Attorneys who served at his pleasure.[26] The majority has not contended that this unquestionably extreme exercise of authority was improper.

The Department also emphasized its need to carry out a consistent program, under the Attorney General's supervision, throughout all of the judicial districts in the nation.[27] As the Department put it before the Senate, "unlike judges, who are supposed to act independently of those who nominate them, U.S. Attorneys are accountable to the Attorney General, and through him, to the President . . . For these reasons, the Department is committed to having the best person possible discharging the responsibilities of that office at all times and in every district."[28]

The Department suggested that the dismissals involved in this instance were generally for performance-related reasons and that the level of turnover they represented should not come as a surprise.[29] The Department emphatically stated that the disputed dismissals were made neither for retaliatory reasons nor to circumvent the Senate confirmation process.[30]

The Department has since provided voluminous documentary evidence and testimony concerning the basis for its performance-related concerns over these U.S. Attorneys, as well as the process by which it reached its decisions to request these officials' resignations.

C. Initial hearings

The Congress first inquired into these dismissals during then Attorney General Gonzales's January 2007 oversight hearing before the Senate Judiciary Committee. Attorney General Gonzales at that hearing stated that he would never have dismissed a U.S. Attorney for improper political purposes, but he did not discuss the grounds for the dismissals in any detail.

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[22] *E.g.*, in the Southern District of California (immigration) and the District of Arizona (death penalty).
[23] *E.g.*, in the Western District Washington.
[24] *E.g.*, in the Eastern District of Arkansas.
[25] Statement of Paul J. McNulty, Deputy Attorney General, at 2 (Feb. 6, 2007) ("McNulty Statement").
[26] Interestingly, as noted above, the U.S. Attorneys dismissed by President Clinton included one investigating him and First Lady Hillary Clinton in the Eastern District of Arkansas and another investigating Clinton ally Dan Rostenkowski in Washington, D.C.
[27] McNulty Statement at 2.
[28] *Id.*
[29] *Id.*
[30] *Id.* at 2-4.

On February 6, 2007, then Deputy Attorney General Paul McNulty testified before the Senate committee. At that hearing, Deputy Attorney General McNulty explained that the dismissals by and large were related to performance reasons. Deputy Attorney General McNulty offered a more detailed, private briefing on those reasons on February 13, 2007.[31]

Mr. McNulty's public attribution of these dismissals to performance triggered a firestorm of controversy, including protestations from Representatives, Senators and the dismissed U.S. Attorneys themselves.

On March 6, 2007, the Subcommittee on Commercial and Administrative Law held a hearing on the dismissals. The Department's witness at that hearing, Mr. William Moschella, Principal Associate Deputy Attorney General, stated for the first time publicly details of the Department's performance-related concerns, as well as additional justifications for the Department's actions.[32] The performance-related explanations were essentially as follows:

- Mr. Bogden was asked to leave because the Department wanted a stronger presence for Las Vegas, a large city that was a potential terror target and had the violent gun crime issues associated with most large cities.

- Mr. Charlton was asked to leave because of issues of insubordination. First, he failed to file a request to seek the death penalty in a capital case, although the Attorney General had determined that the penalty should be requested. He also pushed forward a policy with respect to videotaping interviews of certain targets without the approval of the Department's headquarters, and over the objection of other federal law enforcement partners in his jurisdiction.

- Mr. Iglesias was asked to submit his resignation because the Department's leadership believed he was not sufficiently hands-on in his office's management. It was thought that he was not aware of the day-to-day activities in his office.

- Ms. Lam was asked to leave because she had failed over a long period to make immigration and gun crime enforcement sufficient priorities in her district. Both of these areas were top priorities of the President and the Department.

- Mr. McKay was viewed as insubordinate for his conduct in promoting a policy on information-sharing with state and local partners which the Department at the time had not yet come to support. His district also had a poor record of obtaining

[31] Counsel for the Senate Committee on the Judiciary and Sen. Feinstein had previously received a private briefing in the matter, in January 2007.

[32] Evidence gathered through our investigation has indicated that, at a White House meeting with the Department the night before the March 6th hearing, Karl Rove, who attended briefly, joined in advice to the Department that it simply explain at the hearing what it did and why. *See, e.g.*, Transcript of Interview with Paul J. McNulty at 129 (April 27, 2007) ("McNulty Int. Tr."). We find this to be telling evidence that the White House did not intend a cover-up in this matter. Regrettably, when the Department did precisely what the White House prescribed, the Department encountered only deaf majority ears, and a majority perhaps bent on nothing so much as to contrive the downfall of Mr. Rove and the tarring of other White House officials.

sentences within sentencing guidelines and appealing sentences that were below guideline levels.

- Mr. Ryan and Ms. Chiara were both removed for significant management issues, including the loss of confidence of their career attorneys and a general lack of control in their offices.

It was also explained that Mr. Cummins was asked to resign because of a desire to place another individual in the Eastern District of Arkansas, and because Department leadership believed that Mr. Cummins himself was already seeking employment elsewhere. [33]

At this hearing, former U.S. Attorneys Bogden, Charlton, Cummins, Iglesias, Lam, and McKay testified as well. Most of these individuals also testified the same day before the Senate Judiciary Committee.

After the initial hearings, this Committee and its Subcommittee on Commercial and Administrative law held fifteen hearings and meetings on this matter. These included the Committee's May 10, 2007 oversight hearing with Attorney General Gonzales and May 23, 2007 hearing with Monica Goodling, Mr. Gonzales's former White House liaison. They also included the Subcommittee's June 21, 2007 hearing with Deputy Attorney General McNulty; May 3, 2007 hearing with former Deputy Attorney General James B. Comey; July 12, 2007 hearing, at which the assertion of executive privilege with regard to Harriet Miers was considered; July 19, 2007 meeting, at which the assertion of executive privilege with regard to Joshua Bolten and the production of White House documents was considered; the Committee's July 25, 2007 meeting to consider the instant report and resolution regarding alleged contempt of Congress; and numerous other proceedings.

In addition, the Committee received and reviewed many thousands of pages of documentary evidence from the Department of Justice, much of which includes documentation of communications between the Department and the White House in this matter. The Committee also interviewed every Department of Justice official who had a significant role in this process, as well as several Department officials who had less than significant roles. These officials included:

- D. Kyle Sampson, former chief of staff to Attorney General Gonzales, who was interviewed three times;

- Deputy Attorney General McNulty;

- the former Associate Attorney General, William Mercer (currently serving as U.S. Attorney for the District of Montana);

- the Principal Associate Deputy Attorney General;

[33] Mr. Cummins resigned on June 14, 2006.

- the Associate Deputy Attorney General, David Margolis;
- Deputy Attorney General McNulty's former Chief of Staff, Michael Elston;
- the former Director of the Executive Office of United States Attorneys (EOUSA), Michael Battle;
- Mr. Battle's predecessor as the Director of EOUSA, Mary Beth Buchanan (currently serving as the U.S. Attorney for the Western District of Pennsylvania);
- the current Counsel to the Attorney General, Matthew Friedrich;
- the Counsel to the Director of EOUSA, John Nowacki; and
- the current acting U.S. Attorney for the District of New Mexico, Larry Gomez.

These hearings, interviews and documents have given us extensive information and ample opportunities to explore the potential for White House involvement through all of the significant windows available at the Department. The following summary of the evidence presents our views as to what the evidence tells us.

D. Summary of investigation results

Through the abundant body of evidence we have gathered, the contours of this matter have become quite clear. In our view, the evidence demonstrates that this was, at most, an innocent but poorly managed affair on the part of the Department of Justice, and that the White House exerted no improper influence on the Department. Because the focus of the instant proceeding is on facts concerning the role of the White House, we begin with a discussion of the facts most pertinent to the White House's involvement.

1. The Role of the White House

a. Highlights of testimony by Mr. Sampson, Attorney General Gonzales and Ms. Goodling

The process of reviewing and removing U.S. Attorneys was first stimulated by an inquiry from Harriet Miers, of the White Housel Counsel's office, shortly after the 2004 election.[34] As part of an Administration-wide effort to review political appointees, Ms. Miers inquired directly of Mr. Sampson whether all U.S. Attorneys could be removed.[35] Mr. Sampson indicated that

[34] *See, e.g.,* Transcript of Interview with D. Kyle Sampson at 107-09 (April 15, 2007) ("Sampson I Int. Tr.") (We note that certain pages of Mr. Sampson's interview transcripts contain corrections per Mr. Sampson's submitted corrections.).
[35] *See, e.g., id.*

they could, but advocated that they not be, for various policy reasons.[36] His recommendation appears to have been accepted.[37]

Mr. Sampson also believed, however, that a more limited review and removal process could be of benefit to the Administration and the Department.[38] He therefore set about the process of performing the review that culminated in the eight controversial resignations.[39] We note that Mr. Margolis, the Department's top career official, shared Mr. Sampson's view that this process would be beneficial.[40]

This process proceeded in fits and starts from early 2005 through the end of 2006.[41] It appears that Ms. Miers checked in on the process at least once, in September 2006, to see how it was proceeding.[42] The occurrence of this inquiry may have led to Mr. Sampson's final push to complete the process in the fall of 2006.[43]

Ms. Miers also seems to have inquired about the process in March of 2006, and the process may have been discussed with the Department on the margins of White House meetings on judicial selection and U.S. Attorney issues on as much as a quarterly basis.[44] These discussions were brief at best, it appears. On the whole, the picture that emerges is one of a process that was dormant for long stretches of time, and which the White House allowed to remain dormant, although it checked in on it from time to time.[45] Such a course, obviously, was inconsistent with the notion that the White House was trying to force through replacements of U.S. Attorneys to obtain partisan advantages in cases or investigations in any district, to exact retribution for any partisan failures, or to promote other partisan ends.

Consistent with this observation, Mr. Sampson has specifically testified that the White House never, to his knowledge, sought the resignation of any of the dismissed U.S. Attorneys in order to seek a partisan advantage in a given case or investigation or for any other reason unrelated to ordinary performance concerns.[46] Mr. Sampson did not witness or hear of such an attempt by Ms. Miers.[47] He did not witness or hear of such an attempt by Mr. Rove.[48] He did not witness or hear of such an attempt by Mr. Kelley.[49] He did not witness or hear of such an

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[36] *See, e.g.*, *id.* at 107-08; OAG 20-21.
[37] *See, e.g.*, Sampson I at 107-08.
[38] *See, e.g.*, *id.*, at 109-10; OAG 20-21; U.S. Senate Judiciary Committee Holds a Hearing on U.S. Attorney Firings at 8 (March 29, 2007) ("Sampson Senate Hrg. Tr.")
[39] *See, e.g.*, Sampson I Int. Tr. at 109-10.
[40] Transcript of Interview with David Margolis at 34-35 (May 1, 2007) ("Margolis Int. Tr.").
[41] *See, e.g.*, Transcript of Interview with D. Kyle Sampson at 126 (July 10, 2007) ("Sampson III Int. Tr."); Sampson I Int. Tr. at 65-66.
[42] *See, e.g.*, Sampson I Int. Tr. at 64-66.
[43] *See, e.g.*, *id.* at 64-67; Transcript of Interview with D. Kyle Sampson at 20 (April 18, 2007) ("Sampson II Int. Tr.").
[44] *See, e.g.*, Sampson III Int. Tr. at 176.
[45] *See, e.g.*, *id.* at 79, 126-27.
[46] *Id.* at 122-26.
[47] *See id.* at 124
[48] *Id.* at 124-25.
[49] *Id.* at 125.

attempt by Mr. Jennings.[50] He did not witness or hear of such an attempt by Sara Taylor.[51] He did not witness or hear of such an attempt by Chris Oprison.[52] He did not witness or hear of such an attempt by anyone at the White House, ever.[53]

This is critical, because Mr. Sampson was the key White House contact at the Department on this issue, and was trusted by the White House, based on his former service there in this administration. Further, Mr. Sampson and other witnesses from within the Department have testified that it was to Mr. Sampson that the input of Department officials was provided at various stages throughout the process.[54] Thus, Mr. Sampson was the fulcrum of all interaction within the Department and between the White House and the Department during the course of the U.S. Attorney review. We also note Attorney General Gonzales's testimony that he generally passed off the U.S. Attorney review to Mr. Sampson for the latter to manage.[55] It is only fair to presume that, had Attorney General Gonzales received an important request from the White House with regard to the review, he would have passed that on to Mr. Sampson as well.

Accordingly, had the White House in any way, through any person, sought to obtain the resignation of any U.S. Attorney to obtain a partisan advantage in a case or investigation or for any other partisan reason, Mr. Sampson assuredly would have known. Indeed, it is inconceivable that Ms. Miers, the principal White House official involved in the matter, never would have mentioned such a U.S. Attorney to Mr. Sampson by name. Mr. Sampson nevertheless testifies that Ms. Miers mentioned only two specific names to him, being that of Mr. Cummins in the Eastern District of Arkansas, who Tim Griffin was available to replace, and that of Debra Yang, the U.S. Attorney in the Central District of California.[56] Ms. Yang, like Mr. Cummins, was correctly understood to be leaving or considering leaving the Department.[57] Ms. Miers mentioned both only to see if there might be a place for someone else to have an opportunity to serve, not to obtain a partisan advantage or retaliate for partisan reasons.[58]

This testimony of Mr. Sampson's is consistent with the other evidence we have. At his May 10, 2007 Committee hearing, for example, Attorney General Gonzales was asked directly: "Did the White House ever ask you to seek the resignation of any U.S. attorney in order to retaliate for, interfere with, or gain a partisan advantage in any case or investigation, whether about public corruption or any other offense?"[59] Attorney General Gonzales answered "Not that I recall . . . I don't believe that the White House ever did."[60]

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[50] *Id.*
[51] *Id.* Ms. Taylor was a deputy assistant to the president and director of the Office of Political Affairs.
[52] *Id.*
[53] *Id.* Mr. Oprison was an Associate Deputy Counsel to the President who also was involved in the matter to a degree.
[54] *See, e.g.*, Sampson I Int. Tr. at 111-13; Margolis Int. Tr. at 48; Transcript of Interview with Michael J. Elston at 35-36 (March 30, 2006) ("Elston Int. Tr.").
[55] *See* Oversight Hearing on the United States Department of Justice: Before the House Committee on the Judiciary, 110th Congress at 16-17 (May 10, 2007) (CQ Transcripts Wire) ("Attorney General Hrg. Tr.").
[56] Sampson III Int. Tr. at 123.
[57] *Id.* at 123-24.
[58] *Id.*
[59] Attorney General Hrg. Tr. at 13.
[60] *Id.*; *see also id.* at 40.

The testimony of Monica Goodling, the Department's former White House liaison, also runs counter to the theory that the White House exerted any improper influence on the U.S. Attorneys review. In her testimony during her May 23, 2007 Committee hearing, Ms. Goodling stated as follows:

> To the best of my recollection, I've never had a conversation with Karl Rove or Harriet Miers while I served at the Department of Justice. And I'm certain that I never spoke to either of them about the hiring or firing of any U.S. attorney.
>
> Although I did have discussions with certain members of their staffs regarding specific aspects of the replacement plan, I never recommended to them that a specific U.S. attorney be added to or removed from Mr. Sampson's list. And I do not recall that they ever communicated any such recommendation to me.[61]

With regard to the actions of people at the Department, Ms. Goodling further stated: ". . . I'm not aware of anybody within the department ever suggesting the replacement of these U.S. attorneys to interfere with a particular case or in retaliation for prosecuting or refusing to prosecute any particular case for political advantage."[62]

These three officials – Mr. Sampson, who ran the review, Attorney General Gonzales, who ran the Department, and Monica Goodling, who was the Department's White House liaison – were the key officials to whom the White House would have had to have communicated any desire to remove a U.S. Attorney for an improper partisan reason. Each of these officials, however, refuted that the White House ever made any such communication. They did so, moreover, with a disunity of interests. Kyle Sampson offered his testimony after his resignation as Attorney General Gonzales's chief of staff. Monica Goodling testified after resigning her position as White House liaison and counsel to Attorney General Gonzales, and after having obtained use immunity for her testimony – immunity that she could have jeopardized only by lying to the Committee. That these three figures, each of whom was central to an understanding of this matter, but each of whom had different interests, offered consistent testimony, speaks strongly to the credibility of that testimony. This conclusion is strengthened, moreover, by the fact that each spoke at a different time, against the backdrop of an evolving record.

b. Highlights of other evidence illuminating the role of the White House

Like Mr. Sampson, Attorney General Gonzales and Ms. Goodling, none of the other DOJ officials examined recalled any mention by White House staff of the dismissed U.S. Attorneys, other than Mr. Cummins, as candidates for dismissal. Moreover, other evidence we have gathered also supports the conclusion that the White House did not attempt to influence the review process for partisan gain in cases or investigations or for other questionable partisan reasons.

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[61] The Continuing Investigation into the U.S. Attorneys Controversy and Related Matters: Hearing Before the House Committee on the Judiciary, 110th Congress at 8 (May 23, 2007) (CQ Transcripts Wire) ("Goodling Hrg. Tr.").
[62] *Id.* at 9.

i. The case of David Iglesias

The case of Mr. Iglesias is a fitting example. Some allege that Mr. Iglesias was removed so that his district might bring public corruption or vote fraud cases that Mr. Iglesias failed to bring against Democrats. Leaving aside whether such cases, due to their merits, should have been brought by whoever was U.S. Attorney in New Mexico, the evidence we have discovered is inconsistent with the view that Mr. Iglesias was removed to clear the path for partisan activity, such as the bringing of partisan cases by a partisan replacement.

First and foremost, this is because Mr. Iglesias was replaced, not by a political appointee, but by the career First Assistant United States Attorney (FAUSA) already sitting in his office, Mr. Larry Gomez.[63] To this day, Mr. Gomez is the acting U.S. Attorney in the District of New Mexico.[64] Had the administration sought to remove Mr. Iglesias for partisan purposes, Mr. Gomez is precisely the opposite of the sort of person whom the administration would have installed as Mr. Iglesias's replacement – a long-term career prosecutor from within the district.[65]

This conclusion is all the more plain when one considers that Mr. Gomez had been Mr. Iglesias's FAUSA for quite some time.[66] In fact, Mr. Gomez had been taking care of the day-to-day management of the district during much of Mr. Iglesias's tenure.[67] Had Mr. Iglesias been failing to move cases the White House or the Department wanted to move for partisan reasons, Mr. Gomez would have been part and parcel of that very same failure. It would have been nonsensical for the administration to have replaced Mr. Iglesias with Mr. Gomez, if it had wanted to seize the alleged partisan advantage.

In addition, as was highlighted from the start of the investigation, when Mr. Iglesias's and the other U.S. Attorneys' resignations were sought, the administration had authority under the Patriot Act to replace the dismissed U.S. Attorneys indefinitely, through the end of the administration, without any need to go to the Senate for a Senate-confirmed replacement. Had the administration sought to achieve a partisan advantage in New Mexico, surely it would have used that authority to replace Mr. Iglesias with a trustworthy partisan, not Mr. Gomez. Yet it chose Mr. Gomez, and there he still sits. The obvious conclusion is that the administration was not seeking a partisan advantage in New Mexico at all.

Indeed, if we look to the one instance in which any officials did consider using the Patriot Act authority to avoid Senate confirmation, our conclusion regarding the administration's action in New Mexico is strengthened. That instance was with regard to the Eastern District of Arkansas, where Mr. Sampson and some White House staff considered the option of using the Patriot Act to install Mr. Griffin while avoiding the need for Senate confirmation. Even in that instance, where there is no allegation that the administration sought to place Mr. Griffin for a

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[63] Sampson III Int. Tr. at 148; Transcript of Interview with Larry Gomez at 6 (May 8, 2007) ("Gomez Int. Tr.").
[64] *See* Gomez Int. Tr. at 6.
[65] In all but one of the other districts involved, the resigning U.S. Attorney similarly was replaced by a career Department employee. *See, e.g.*, Sampson III Int. Tr. at 149. The only exception was the Eastern District of Arkansas, in which Mr. Griffin replaced Mr. Cummins. There is no allegation that an attempt to gain a partisan advantage in a case or investigation may have been at play in this district.
[66] *See* Gomez Int. Tr. at 6.
[67] *See, e.g.*, *id.* at 8; Margolis Int. Tr. at 255-56.

partisan advantage, the evidence is clear that Attorney General Gonzales rejected such a use of the Patriot Act authority, contrary to the suggestion of his chief of staff and the sense of some at the White House.[68] Such a course of action in the Eastern District of Arkansas hardly bespeaks a disposition on the Department's part to engage in or cave in to partisan impulses in the District of New Mexico or any other district, or that the White House could have orchestrated such partisan activity, had it wanted to.

Finally, we note Mr. Sampson's testimony that the White House did not resist the Department's appointment of any career acting or interim U.S. Attorney.[69] In Mr. Iglesias' case and in the others, this is consistent with the view that the White House was not trying to remove U.S. Attorneys for partisan reasons, to clear the way for partisan replacements.

The interview testimony of Mr. Friedrich also pointed against the conclusion that the Department and the White House sought a partisan advantage or otherwise acted out of partisan reasons when seeking Mr. Iglesias's resignation. That testimony showed that contacts by the White House about vote fraud issues in three judicial districts, including New Mexico, as well as similar contacts by New Mexico citizens, were not associated with partisan influence on the Department. Indeed, they showed that the Department handled the information conveyed in a way that helped protect against partisan influence.

In the first instance, Mr. Sampson, upon having received information about the White House's concerns, passed the matter on to Mr. Friedrich.[70] Mr. Friedrich, in turn, passed the information along to the Department's Criminal Division.[71] When he had received the Criminal Division's relevant information about issues in the districts (which was mixed), he passed it on to Mr. Sampson.[72] Mr. Friedrich does not recall having heard of any particular action having resulted from this incident.[73] In connection with these issues, he also received from Mr. Sampson a packet of information that appeared to be from Mr. Rove or Mr. Rove's office, including what appeared to be newspaper clippings about the issues.[74] When Mr. Sampson passed the information on to Mr. Friedrich, Mr. Friedrich asked what the information meant.[75] Mr. Sampson suggested simply that the sender wanted the Department to take a look at it.[76] After a pause, Mr. Sampson instructed Mr. Friedrich simply to "Do with it what you will."[77] Mr. Friedrich did nothing with it, other than place it in his files.[78] Mr. Sampson, for his part, never followed up on these contacts with Mr. Friedrich.[79]

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[68] *See, e.g.,* Sampson Senate Hrg. Tr. at 23-24; Sampson I Int. Tr. at 86-93.
[69] Sampson Int. Tr. III at 149-50.
[70] Transcript of Interview with Matthew W. Friedrich at 20, 22 (May 14, 2007) ("Friedrich Int. Tr.").
[71] *Id.* at 23.
[72] *Id.* at 27.
[73] *Id.*
[74] *Id.* at 28-30.
[75] *Id.* at 29.
[76] *Id.*
[77] *Id.*
[78] *Id.* at 29-31.
[79] *Id.* at 63.

Separately, Mr. Friedrich also recalled that Monica Goodling referred to him in June 2006 individuals from New Mexico who had visited the White House the same day, and who wanted to discuss vote fraud issues with the Department.[80] Mr. Friedrich met with them, heard a description of their concerns, and indicated that they ought to relay their information to the Department's Public Integrity Section.[81] Mr. Friedrich subsequently called the Public Integrity Section and alerted it that it might receive a contact from these individuals.[82] He indicated that, regardless of whether the individuals mentioned that they had spoken with Mr. Friedrich, the Section ought to treat the matter as they would anything else with regard to whether a case should be opened; the decision was up to them.[83] As was the case with the incident involving Mr. Sampson, Ms. Goodling never followed up on this issue with Mr. Friedrich.[84]

The majority has alleged that these incidents suggest that the Department may have been influenced for partisan reasons. What they actually show is that, whether or not any contacts may have been attempted for partisan reasons, the Department defused the potential for partisan effects. In other words, when the Department received information about U.S. Attorneys and their districts from White House officials or individuals who might be perceived as partisan, it knew how to process the information so that it could be appropriately evaluated by the appropriate office, and also knew how to let any information it did not believe truly merited any action to die a quiet, bureaucratic death. This refutes the view that the Department acted in an improper partisan manner upon receiving information that might concern one of the U.S. Attorneys affected by the U.S. Attorneys review. We also note that, had the White House been conveying information in this way to seek a U.S. Attorney dismissal for improper partisan reasons, it would seem highly unlikely that Mr. Sampson and Ms. Goodling would never have followed up on their initial contacts with Mr. Friedrich. In short, these incidents bespeak a process that was immune from improper partisanship, not one that succumbed to it.[85]

ii. Other cases emphasized by the majority

The majority also suggests that improper partisanship affected Ms. Lam, Mr. McKay, Steven Biskupic, who is the sitting U.S. Attorney in the Eastern District of Wisconsin, Todd Graves, the former U.S. Attorney in the Western District of Missouri, and Leura Canary, the sitting U.S. Attorney in the Middle District of Alabama. As with Mr. Iglesias, the majority's allegations are misplaced.

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[80] *Id.* at 32-33.
[81] *Id.* at 33-35.
[82] *Id.* at 36.
[83] *Id.*
[84] *Id.* at 63-64.
[85] The majority, citing a newspaper report, also points to a conversation Mr. Rove allegedly had in late 2006 with individuals from New Mexico, in which Mr. Rove reportedly said that Mr. Iglesias was "gone." Memorandum to Members of the Committee on the Judiciary from John Conyers, Jr., Chairman at i, 5 (July 24, 2007) ("Majority Memorandum"). Mr. Rove's statement, if it was ever made, may have been mere puffery. In any event, the key fact is that DOJ officials consistently testify that neither Mr. Rove nor anyone else at the White House ever mentioned Mr. Iglesias' name to the Department as a candidate for dismissal.

a. The case of Carol Lam

In Ms. Lam's case, the Department ascribed her dismissal to shortcomings in immigration and gun-crime prosecution in the Southern District of California. The majority speculates that, instead, the dismissal may have been in retribution for Ms. Lam's successful prosecution of Republican former-Rep. Randy "Duke" Cunningham.

During the Subcommittee's March 6, 2007 hearing, Rep. Keller directly questioned Ms. Lam and Rep. Issa, who appeared as a witness, about Ms. Lam's performance failures on immigration. Their testimony confirmed that Ms. Lam's immigration record had long been a concern to both members of Congress and the Department.[86] Rep. Keller also recounted his own, first-hand observations of these problems, gained during his visit to Ms. Lam's district in January 2006.[87]

Moreover, with regard to the allegation that Ms. Lam had been asked to resign in retaliation for her prosecution of Duke Cunningham, Rep. Keller made clear that congressional concern over Ms. Lam's failings related to immigration prosecutions had begun more than a year prior to the breaking of the Duke Cunningham story, exposing the weakness in the suggestion that it was the Cunningham prosecution that lay behind the request for Ms. Lam's resignation.[88] Indeed, Rep. Keller specifically elicited from Ms. Lam admissions that she had no evidence to support that allegation, and that the Department had never discouraged her from bringing the Cunningham prosecution.[89]

The documentary evidence produced by the Department following the Subcommittee's March 6th hearing is replete with information further substantiating the long history of Ms. Lam's immigration and gun crime failures. In addition, interview and hearing testimony from Department witnesses corroborates the Department's explanation of Ms. Lam's dismissal.[90] For example, Mr. Sampson testified that an urgent communication sent in the spring of 2006 with regard to the Department's desire to replace Ms. Lam – a communication the majority seeks to associate with events in the Cunningham matter – was in fact related to Ms. Lam's immigration failures, and congressional activity on immigration that was pressing precisely at that time.[91] And, tellingly, Mr. Margolis recounted that, when he discussed Ms. Lam's dismissal with her, she herself divulged her sense that it was about her record on gun and immigration crime.[92]

In short, the assertion that Ms. Lam's failures with regard to immigration and gun crime were not the real reason for her dismissal is clearly refuted by the record.

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[86] Transcript of Hearing on H.R. 580: Restoring Checks and Balances in the Confirmation Process of U.S. Attorneys at 118-120, 164-67 (March 6, 2007).
[87] *Id.* at 165.
[88] *Id.* at 164.
[89] *Id.* at 116-17.
[90] *See, e.g.*, McNulty Int. Tr. at 14, 84-86; Transcript of Interview with William W. Mercer at 66-67, 115-17, 139-140, 165, 189-90, 193-99, 214-24 (April 11, 2007) ("Mercer Int. Tr.") (We note that certain pages of Mr. Mercer's interview transcript contain corrections per Mr. Mercer's submitted corrections.); Margolis Int. Tr. at 143-45; Sampson I Int. Tr. at 13-14.
[91] *See, e.g.*, Sampson Senate Hrg. Tr. at 21-22.
[92] Margolis Int. Tr. at 146.

b. The case of John McKay

In Mr. McKay's case, the Department ascribed its dismissal decision principally to Mr. McKay's insubordination on issues concerning information-sharing among law enforcement agencies and the very poor record of Mr. McKay's district in achieving sentences within federal sentencing guidelines and pursuing appeals of sentences falling below those guidelines. The majority queries whether Mr. McKay instead was dismissed for failure to pursue a vote fraud case involving a recent Washington state gubernatorial race, which was lost by the Republican candidate.

The majority, for example, claims that we should disregard the factors cited by the Department, because it believes that these concerns had not yet been raised when Mr. McKay first appeared on the dismissal list. Latching onto that question, the majority leaps toward the conclusion that Mr. McKay must have been placed on the list because of his failure to prosecute Democrats in the gubernatorial race case. The majority also highlights evidence that Washington State Republicans brought the matter to the Department's attention, and that Ms. Miers questioned Mr. McKay about his handling of that case during Mr. McKay's subsequent interview for a federal judgeship, which judgeship Mr. McKay did not obtain.

The majority's reasoning suffers from a variety of important flaws. First, Mr. Sampson has testified that he was aware of concerns on the part of Larry Thompson, who served as a deputy attorney general during President Bush's first term, over Mr. McKay's conduct in connection with an investigation into the murder of an assistant U.S. Attorney prior to 2005.[93] Although Mr. Sampson does not recall precisely why Mr. McKay first appeared on the list,[94] this may well have been the reason.

More important, the key question is not why Mr. McKay first appeared on the list, but why he stayed on the list, and why Attorney General Gonzales eventually accepted his staff's consensus recommendation that he be dismissed. The answer to that question seems consistent with the Department's explanation. For example, as the record shows, Mr. McKay's insubordination on information-sharing was clear, directly involved Deputy Attorney General McNulty, who had invested a good deal of time in the issue, and was unmistakably troubling to Mr. McNulty, on whose views Attorney General Gonzales said he most relied.[95] That Mr. McKay's insubordination on this issue would have exposed him to dismissal as an at-will, political appointee is readily apparent. As Mr. Margolis, the person responsible for the Department's misconduct dismissals, put it:

> [I]f he didn't have a -- if he didn't have an adequate explanation to me, if I'm making the calls, then I don't -- I am not certain I would give him a second chance. This isn't, you know, Douglas factors for a career government employee.

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[93] Sampson II Int. Tr. at 45-47; Sampson III Int. Tr. at 78-80.
[94] Sampson III Int. Tr. at 79.
[95] *See, e.g.*, McNulty Int. Tr. at 125, 211-18; Margolis Int. Tr. at 263; Attorney General Hrg. Tr. at 66.

> That kind of insubordination, if true, might be a capital offense to me. It might very well be a capital offense.[96]

And so it appears to have been.

Third, and most important in the instant context, regardless of how or why Mr. McKay first appeared on the list, regardless of how or why Mr. McKay stayed on the list, and even regardless of whether Ms. Miers asked Mr. McKay questions about his decision in the gubernatorial race case, the record establishes that neither Ms. Miers nor anyone else at the White House identified Mr. McKay to the Department as a candidate for dismissal.

We should not, moreover, let the majority's attempt to spin the Washington gubernatorial race issue go at that. The majority is mistaken to assume that any concern about Mr. McKay's action in that case would necessarily have been partisan in motivation. On the contrary, the accusations in that case were of serious misconduct in a closely contested election involving the highest office in a State. This is a vital area of concern for law enforcement and the public, regardless of the party involved. As quoted in the record, the allegations included that:

> 1. Over 1,000 felons cast illegal votes;
>
> 2. At least 45 votes were cast in the name of deceased persons, at least 15 people voted twice, and at least 2 non-citizens voted;
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> 3. More than 660 unverified provisional ballots were inserted into tabulating machines at the polls;
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> 4. Some signatures collected by party workers to validate provisional ballots were apparently forged;
>
> 5. Almost 900 more absentee ballots were counted in King County than the number of registered voters who sent in absentee ballots;
>
> 6. King County reconciliation records from the year 2000 general election are missing;
>
> 7. Election officials illegally modified – enhanced – ballots;
>
> 8. Selected absentee ballots were set aside and not counted; voters who were disenfranchised were not notified.
>
> 9. There was an apparent organized effort to register voters who had been judged mentally incompetent;
>
> 10. King County election officials have been unable to reconcile polling place results and are withholding election results to cover up error and possible fraud;

[96] Margolis Int. Tr. at 134.

11. King County illegally registered individuals who gave the County Courthouse as their residence and mailing address; and

12. King County illegally registered individuals who gave invalid residence addresses.[97]

We offer no opinion on the merits of these allegations. We do, however, emphasize that Mr. McKay was a candidate for a federal judgeship when Ms. Miers reportedly questioned him about his handling of the case. Questions about Mr. McKay's decision on whether to pursue a judicial remedy, when confronted with these kinds of accusations, were more than pertinent to the evaluation of whether he had the mettle to be a federal judge who would be responsible for overseeing the judicial consideration of such a case.

We also emphasize that it is eminently reasonable for citizens to bring to their government such serious questions concerning vote fraud as those advanced in the wake of the Washington gubernatorial race. Indeed, it is a civic duty. Moreover, it is the duty of officials at the White House and at the Department, consistent with Article II of the Constitution and the statutes of the land, to receive information concerning alleged criminal activity in this and other areas, and to explore diligently whether that information has merit. That citizens from Washington or officials within the White House would or might have passed on to the Department concerns about the vote fraud allegations described above ought not to be "criminalized" by the majority. Rather, such sharing of information ought to be encouraged – regardless of whether the allegations point to potential criminal activity by one political party or another. We believe that the truest cause for concern in this regard is not the referral of information to or within the government, but the majority's one-sided, high-stakes attack on the referral, receipt, and consideration of information by Republicans that might point to criminal activities by the majority's members or associates. One of the last things this investigation should do is chill the provision by citizens or the processing by government of information concerning potential criminal activity in the electoral process.

c. The cases of Steve Biskupic, Todd Graves and Leura Canary

The majority also seeks to cast aspersions on the Department's actions or non-actions with regard to Mr. Biskupic, Mr. Graves and Ms. Canary. Like the cases described above, these cases, too, are spurious.

First and foremost, we again recur to the record evidence that no one at the White House identified any of these individuals to the Department as a candidate for dismissal.

Second, with respect to Mr. Biskupic, the majority's own concessions defeat their accusations. The assertion with regard to Mr. Biskupic is that he appeared on one of Mr. Sampson's early dismissal lists, but that, after bringing several vote fraud and public corruption cases, he was no longer on the list. The implication is that Mr. Biskupic delivered a quid pro quo

[97] Sampson III Int. Tr. at 129-30.

for his removal from the list. But as the majority concedes, "Mr. Biskupic has forcefully stated that he did not ever know that he was on any Department of Justice firing list, and no evidence reviewed by the Committee contradicts this statement."[98] Need we a constitutional confrontation with the White House to reason out this issue? We think decidedly not.

The case with regard to Mr. Graves is similarly lacking. The majority's suggestion is that Mr. Graves was removed because he crossed swords with Bradley Schlozman and Main Justice over the bringing of a vote fraud case in the Western District of Missouri, that the Department replaced him with Mr. Schlozman in order to bring this case, and that the case was brought for partisan reasons.[99] The Department witnesses, however, consistently have testified that the Department never dismissed a U.S. Attorney in order to gain a partisan advantage in a particular case.[100] In addition, Mr. Sampson specifically testified that, to his recollection, Mr. Graves's resignation was not related to the U.S. Attorney review process Mr. Sampson led, but rather to issues within Mr. Margolis' area of responsibility – e.g., review of misconduct allegations concerning U.S. Attorneys.[101] The record also establishes that Mr. Schlozman learned the news of Mr. Graves' departure only after it became public, inquired sua sponte as to whether he might serve as the interim U.S. Attorney, and obtained that position through a competitive interview process in which Mr. Margolis played a prominent role.[102] Again, we do not believe we need a constitutional confrontation with the White House to conclude our investigation into this issue.

Finally, with regard to Ms. Canary, the majority suggests that investigation of the prosecution by Ms. Canary's office of former Democrat governor Don Siegelman would help facilitate the "clearing of the air" regarding whether the Department has engaged in partisan prosecutions or other partisan activity. To begin with, there is no suggestion that Mr. Siegelman's prosecution had anything to do with the U.S. Attorney review process. Further, this investigation has not heretofore focused on this issue, and an immediate leap to a constitutional confrontation with the White House would not be a prudent way to proceed in any investigation of this matter. Lastly, the Department has vehemently rebutted the majority's suggestions, stating, for example, that "[t]his case was brought by career prosecutors, following the May 2002 recusal of U.S. Attorney Leura Canary, based upon the law and the evidence."[103] As the Department has further explained:

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[98] Majority Memorandum at 9.

[99] Majority Memorandum at 10. The majority also points to Mr. Schlozman's bringing of several vote fraud cases prior to the 2006 election, ostensibly in violation of Department policy. *Id.* The record makes clear, however, that those prosecutions were not in violation of Department policy, and had been cleared as such by the career officials expert in the implementation of the relevant policy. *See, e.g.,* Senate Judiciary Committee Holds a Hearing on the U.S. Attorney Firings at 7-8, 25-26, 56-57, 63-65 (June 5, 2007) (CQ Transcripts Wire) ("Schlozman/Graves Hrg. Tr.").

[100] *See, e.g.,* Attorney General Hrg. Tr. at 8, 12; Sampson II Int. Tr. at 75-76, 91-92; Sampson III Int. Tr. at 138, 142; Goodling Hrg. Tr. at 14-15; House Judiciary Committee Subcommittee on Commercial and Administrative Law at 12, (June 21 2007) (CQ Transcripts Wire) ("McNulty Hrg. Tr."); McNulty Int. Tr. at 95-98, 299-300; Margolis Int. Tr. at 205-06; Mercer Int. Tr. at 225-26; Transcript of Interview with Mary Beth Buchanan at 182-83 (June 15, 2007) ("Buchanan Int. Tr.") (We note that certain pages of Ms. Buchanan's interview transcript contain corrections per Ms. Buchanan's submitted corrections.).

[101] Sampson III Int. Tr. at 101.

[102] Sampson III Int. Tr. at 107-08, 113-115, 153-54; Schlozman/Graves Hrg. Tr. at 53.

[103] Letter from Brian A. Benczkowski, Principal Deputy Assistant Attorney General, to the Honorable John Conyers, Jr., at 2-3 (September 4, 2007).

> The focus of recent controversy has been a May 2007 affidavit signed by Alabama attorney Jill Simpson. Ms. Simpson signed the affidavit almost a year after Mr. Siegelman's conviction, and it has never been filed in the case. In the affidavit, Ms. Simpson claims to have overheard statements she attributes to U.S. Attorney Leura Canary's husband . . . .
>
> At the time Ms. Simpson alleges the purported statements were made, Mr. Siegelman was already under federal investigation. The existence of the investigation had been widely reported in newspapers and television reports, some released more than ten months before the alleged conversation. The alleged conversation described by Ms. Simpson has been denied by all of the alleged participants except Ms. Simpson. Indeed, even Mr. Siegelman states that Ms. Simpson's affidavit is false as it relates to him. Moreover, according to Ms. Simpson, she met with Mr. Siegelman and his co-defendant Richard Scrushy for several months before signing the statement at their urging. She also claims to have provided legal advice to them. She contends she drafted but did not sign a motion filed by Mr. Scrushy seeking to have the federal judge removed from the case. [104]

Again, we are concerned that the majority may be manipulating insufficiently founded allegations, not in an attempt to uncover genuine wrongdoing, but in an effort to tar the current Republican administration and chill the referral, receipt, consideration, and prosecutions of matters involving public corruption and vote fraud by Democrats. Such manipulation and abuse of this body's authority and proceedings would be beneath the dignity of this body, and provide no basis for provoking a constitutional confrontation with the White House.

c. Summary of the White House's role and pervasive flaws in the majority's analysis

Consistent with the Department's original explanation, and based on the ample evidence we have gathered from the Department, the U.S. Attorney resignations do not appear to have been associated with undue partisan influence from the White House. We thus see no need for a constitutional confrontation to understand the White House's role. The majority's insistence that such a confrontation should be sought rests largely on three, principal flaws in their approach to this matter.

First, the majority ignores the voluminous evidence of innocence contained in the record we have compiled. We encourage the members of the House to review the entire record, so that they do not repeat this error. Further, so that as much of this evidence is placed before the public as is possible at this time, we include in an appendix to these views: (1) those portions of the House and Senate hearing record that are important to an understanding of what truly happened in this matter; and (2) those portions of the interview record that we cite specifically herein.

We summarize what this evidence tells us in these views, both above, with regard to the White House's role, and below, with regard to what happened more strictly within the Department. The evidence which we attach runs into the hundreds of pages, and the interview

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[104] *Id.*

and hearing record as a whole runs into the thousands of pages of testimony addressing the issues in this matter. We believe that open-minded, impartial individuals reviewing this evidence will come to the position we have, that there appears to have been no wrongdoing in the U.S. Attorney dismissals.

Second, the majority maintains that testimony offered by the Department witnesses is not credible. We do not believe, however, that there is a significant basis to question the credibility of the witnesses. Rather, we suspect that the majority simply does not wish to believe the truth of what it has heard.

Many indicia, for example, point to the credibility of the key witness, Mr. Sampson. We begin with the question of whether Mr. Sampson ever appears to have attempted to mislead Congress, and thus might appear to be an untruthful witness.

Allegations to this effect began with the perception that Mr. Sampson may have denied information about White House involvement to Mr. McNulty and Mr. Moschella as they prepared respectively to testify before the Senate in February 2007 and the House in March 2007. There is no clear evidence, however, that either White House or Department personnel were involved in any improper activity in encouraging or conducting the review of U.S. Attorneys or seeking their resignation. Thus, it seems more likely than not that Mr. Sampson perceived no need to cover up any facts about either White House involvement or other issues.

At the same time, moreover, we have clear evidence that, promptly after Mr. Moschella's hearing, Mr. Sampson not only searched for but disclosed the very evidence that confirmed that White House involvement was more extensive than Congress had been given to believe through Mr. McNulty's and Mr. Moschella's appearances.[105] Had Mr. Sampson been inclined to cover up those facts prior to those appearances, it would seem fairly inexplicable that, immediately after those appearances were concluded, and aware that Congress had been under-informed, he would have shared the damaging information known to him with anyone. Rather, he would more likely have attempted to keep to himself the evidence in his possession, thus maximizing the likelihood that it would remain hidden.

In addition, there was no great incentive for Mr. Sampson to lie in this matter. On the contrary, he had every professional interest as a lawyer in telling the truth and being perceived to tell the truth. Mr. Sampson voluntarily agreed to testify in a withering all-day hearing before the Senate committee and three subsequent, comprehensive interviews by staff of both committees. He did so in circumstances that should have alerted him fully that he might be subjected to direct questioning concerning his alleged failure to completely inform Mr. McNulty and Mr. Moschella or otherwise provide information fully and truthfully, and that any intentional misleading of Congress in his hearing or interviews could subject him to criminal sanctions. Had Mr. Sampson truly intended through his preparation of Mr. McNulty and Mr. Moschella or his own testimony to mislead Congress in any way, it is much more likely that he would have resisted any voluntary appearance to explain his part in that preparation, and quite probable that he would have invoked his Fifth Amendment rights instead.

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[105] *See, e.g.*, Sampson I Int. Tr. at 97-98; Margolis Int. Tr. at 81-83.

We also find significant the testimony of David Margolis concerning Mr. Sampson, as well as the behavioral indicia of truthfulness manifested by Mr. Sampson during his staff interviews. Mr. Margolis, the Associate Deputy Attorney General, highest ranking career official at the Department, and a Department veteran of 42 years, testified that Mr. Sampson was a man of high integrity who had repeatedly taken the high road in matters on which they had worked together, even when it cost him politically or was otherwise difficult to do so.[106] Mr. Margolis, an apparently gruff and no-nonsense career official close to retirement, would seem to have neither the disposition nor the incentive to be anything other than entirely truthful in his assessment of Mr. Sampson. As for Mr. Sampson's interview testimony, which was exhaustive, it appeared to be candid, forthright, and lacking in any of the evasiveness, nervousness, self-contradiction, or other manifestations that might indicate that Mr. Sampson was attempting to lie. When asked directly at the conclusion of one interview whether he had ever intended to mislead or withhold needed information from Congress, Mr. Sampson immediately, authoritatively, and categorically stated that he had not, showing no signs of mendacity whatsoever.[107] We believe that to have been consistent with his disposition throughout this investigation.

In addition, as noted above with regard to the testimony of Mr. Sampson, Attorney General Gonzales and Ms. Goodling, each of these witnesses testified against the backdrop of an evolving record, with a disunity of interests. Their testimony, however, was consistent. Moreover, Ms. Goodling and Attorney General Gonzales, like Mr. Sampson, stood to lose a great deal by any attempt to lie to the Committee. As mentioned above, only by lying could Ms. Goodling have lost the immunity from prosecution that was the key to obtaining her testimony. It is extremely doubtful that she would have risked that benefit. Attorney General Gonzales, moreover, testified at a time when he was committed to remain at the Department and fix whatever problems the Committee's investigation revealed. Key to his success in that tenure and those efforts was his credibility before Congress, the Department and the public. Likewise, he testified while supporting as the Department's head the production of voluminous testimonial and documentary evidence from the Department and its officials, and having independently referred these matters to the Department's Office of the Inspector General and Office of Professional Responsibility.[108] He surely knew that any attempt to offer false testimony to the Committee could easily be revealed by the content of evidence that was yet to be produced by others, and would be heavily scrutinized by Congress, the public and the very Department investigative bodies that he had engaged.

We similarly found all of the other Department witnesses to be credible. And, again, we emphasize that Mr. Sampson and each of the other witnesses did not only testify under oath or threat of criminal sanction for falsehood. Each of them did so knowing that a voluminous documentary trail and testimonial record had been and would continue to be produced, containing evidence that might well contradict any falsehood they might offer. They also faced a Congress that they must have known would surely not let pass even a whiff of falsehood, given the heated rhetoric of the majority as it pursued its investigation of this case.

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[106] Margolis Int. Tr. at 307-11.
[107] Sampson II Int. Tr. at 94.
[108] *See, e.g.,* Attorney Gen. Hrg. Tr. at 8; Gonzales Testifies before Senate Panel at 23, 83 (April 19, 2007) (CQ Transcripts Wire) ("Attorney General Senate Hrg. Tr.").

Third, the majority claims that no one at the Department will say who put the U.S. Attorneys on the dismissal list. This claim, too, is spurious. Mr. Sampson, of course, put the names on the list, as he admits. As to who caused him to put each name on the list, it is clear that we know to a reasonable certainty who put Kevin Ryan and Margaret Chiara on the list (i.e., David Margolis and Paul McNulty).[109] We also know to a certainty that numerous senior Department officials whom Mr. Sampson consulted during the process were aware of and shared the concerns over immigration and gun prosecutions that led to Carol Lam being on the list.[110] Likewise, we know that Bud Cummins appeared on the list to allow an opportunity for Mr. Griffin to serve, and there is no serious allegation of undue partisanship in this dismissal. We do not know to a precise certainty who caused Mr. Sampson to put Mr. Bogden, Mr. Charlton, Mr. Iglesias, and Mr. McKay on the list. However, we do know that senior Department officials whom Mr. Sampson consulted were aware of the performance issues that caused them to be dismissed by Attorney General Gonzales following the opportunity for these officials to provide input.[111]

Most important, of course, we know from Mr. Sampson's testimony and the testimony of other Department officials that the White House did not cause Mr. Sampson to put the names of the dismissed U.S. Attorneys on the list, with perhaps the modest exception of Mr. Cummins. That is because the White House never identified any of the other U.S. Attorneys to the Department's officials as possible candidates for dismissal.[112]

In short, the precise details of who caused Mr. Sampson to put each and every person on the list are to some extent known, and to some extent lost in the mists of imperfect memories. There is no need, however, for White House testimony to establish whether it was the White House who caused the names to be put on the list.

For the above reasons, we find no need to pursue procedures to compel further White House testimony or document production. The voluminous evidence already at hand sufficiently demonstrates that the White House's role was not improper.

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[109] *See, e.g.,* Margolis Int. Tr. at 39-45, 118; McNulty Int. Tr. at 22-23, 41; Sampson Senate Hrg. Tr. at 96, 140.

[110] *See, e.g.,* McNulty Int. Tr. at 14, 27-28, 84, 86, 230-31, 255; Mercer Int. Tr. at 43, 53, 66, 100-05, 107, 114-17, 139-41, 165; Margolis Int. Tr. at 54, 75, 144-45, 233; Sampson I Int. Tr. at 10-15; Buchanan Int. Tr. at 25-26, 48-49, 54-55, 58-59, 164-65, 181-82; *see also* McNulty Int. Tr. at 193 (discussing knowledge other U.S. attorneys had of Ms. Lam's issues).

[111] *See, e.g.,* McNulty Int. Tr. at 28-29, 53-54, 58-59, 60-61, 125, 158-61, 206-08, 211-18, 222-26, 231; Margolis Int. Tr. at 132-34, 136; Mercer Int. Tr. at 161-63, 172-74, 230; Buchanan Int. Tr. at 76-77, 80, 100-06, 189; Sampson I Int. Tr. at 22-23, 28-29, 121-23, 144-46, 148-50. We note that, although the reasons given for Mr. Bogden's dismissal never advanced beyond general assertions that more vigorous leadership was desired in his office, the majority does not assert with vigor that Mr. Bogden was dismissed for partisan reasons. *See, e.g.,* McNulty Int. Tr. at 208-10. We also note that the evidence of Mr. Charlton's insubordination was at least as significant as that concerning Mr. McKay. Finally, the record is clear that Mr. Iglesias had lost the confidence of his Senatorial sponsor, and that others were aware of concerns regarding him. Given the always tenuous nature of at-will, political employment, it is not hard to understand why Mr. Iglesias lost his position, and, based on the evidence discussed above, it is quite difficult to conclude that his dismissal was rooted in partisan action by the Department or the White House, rather than his own performance.

[112] *See, e.g.,* Sampson III Int. Tr. at 122-26; Attorney General Hrg. Tr. at 13; Goodling Hrg. Tr. at 8; McNulty Int. Tr. at 132; Margolis Int. Tr. at 79-81; Mercer Int. Tr. at 141-42; Buchanan Int. Tr. at 151-52.

2. The Process at the Department of Justice.

To provide a complete context, we also summarize what overall conclusions the evidence supports concerning events at the Department of Justice. Those conclusions are that: (1) consistent with the Department's original explanation, the dismissals, with the exception of Mr. Cummins's, were requested by the Department based on performance reasons; and (2) the dismissals were concomitantly not sought by the Department to gain partisan advantage.

The Department's explanation that the dismissals of the U.S. Attorneys were performance-related was well substantiated during document review, hearings and interviews post-dating Mr. McNulty's and Mr. Moschella's testimony at their February and March hearings. During the interviews, for example, numerous witnesses were asked questions regarding the performance issues that were related to the requests. The witnesses provided a substantial amount of credible information concerning the performance grounds at issue.[113] We do not believe that, at this point, there is significant reason to doubt the Department's performance-based explanation of the dismissals, particularly given the always delicate hold on employment that any political employee must expect, and the very high level of performance that any U.S. Attorney must achieve in order to best discharge his or her duties in the service of the President.

This is, moreover, consistent with the testimony of both Attorney General Gonzales and Deputy Attorney General McNulty regarding their re-evaluation of the requests for resignations after the eruption of this controversy. As both officials explained, following a reconsideration of whether the U.S. Attorneys should have been requested to resign based on performance considerations, they re-concluded that the requests were justified on these grounds, and that they therefore continued to stand by the resignations.[114]

a. The initiation of the process

As stated above, the process of reviewing U.S. Attorneys was stimulated by an initial inquiry by Ms. Miers concerning all of the U.S. Attorneys as the Bush Administration began its second term. The Department, through Mr. Sampson, pretermitted consideration of whether all U.S. Attorneys might be changed. Mr. Sampson also suggested, however, that a more limited review be conducted, and that review was allowed to proceed.

It is possible that Attorney General Gonzales knew something of the history of the process from the very outset, given his position as White House Counsel in late 2004 and into 2005. Attorney General Gonzales certainly testified that he became aware of the process at some early point, but he indicated that he simply delegated responsibility over the process to Mr. Sampson, who was then his chief of staff.[115]

In delegating the matter to Mr. Sampson, Attorney General Gonzales testified that he understood that Mr. Sampson would coordinate with appropriate senior officials at the

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[113] *See, e.g.,* McNulty Int. Tr. at 27, 84-89, 206-229.
[114] *See, e.g.,* McNulty Int. Tr. at 291-92.
[115] *See, e.g.,* Attorney General Hrg. Tr. at 9.

Department, in order to gather relevant and sufficient information.[116] Mr. Gonzales did not, however, probe the degree to which Mr. Sampson actually did so. In hindsight, it appears that, although Mr. Sampson did confer with the appropriate senior officials, he did so in a way that was overly casual, unstructured and undocumented.[117]

b. Mr. Sampson's discharge of the review

At the outset, Mr. Sampson consulted at least briefly with Mr. Margolis, the Associate Deputy Attorney General and top career official in the Department, who was very knowledgeable about U.S. Attorneys and matters concerning them.[118] Mr. Sampson also consulted early on with Mr. Comey, the Deputy Attorney General until August 2005, and Mr. Mercer, who was the Principal Associate Deputy Attorney General and later Associate Attorney General, and Ms. Buchanan, then-Director of EOUSA.[119] At some later point, Mr. Sampson consulted Deputy Attorney General McNulty, and by at least October 2006 he also consulted Mr. McNulty's chief of staff, Mr. Elston.[120] Finally, Mr. Sampson also contacted Mr. Battle, who succeeded Ms. Buchanan as Director of EOUSA, as well as Ms. Goodling.[121]

Individuals in this group, to varying degrees, discussed with Mr. Sampson some U.S. Attorneys who presented performance-related problems for the Department.[122] Each was in a position to know information important to a senior-management-level evaluation of U.S. Attorneys and decisions regarding whether to remove any U.S. Attorneys.[123] None, however, recalled being engaged in any more than sporadic communications with Mr. Sampson about the individuals considered, and Mr. Sampson kept no significant documentation of the input he gathered.[124] In addition the individuals Mr. Sampson contacted generally were not fully aware of who else might be participating in the process.[125]

In carrying out the review, Mr. Sampson kept a simple, running list of all of the U.S. Attorneys in the nation, marking in a simple way which ones appeared to be candidates for removal, based on his conversations with others.[126] Various U.S. Attorneys were marked and unmarked over time, as Mr. Sampson's brief inquiries produced relevant information. By late 2006, Mr. Sampson believed that he had reached a consensus over who should be included in the final group of U.S. Attorneys whose resignations should be requested.[127] No formal evaluation was conducted, and no probing examination of any underlying documentation, elicitation of

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[116] *See, e.g.,* id. at 9-10.
[117] *See, e.g.,* id. at 8.
[118] *See, e.g.,* Margolis Int. Tr. at 33-36, 39-42
[119] *See, e.g.,* Sampson I Int. Tr. at 112; Mercer Int. Tr. at 79-80; Buchanan Int. Tr. at 17.
[120] *See, e.g.,* McNulty Int. Tr. at 15; Sampson I Int. Tr. at 113; Elston Int. Tr. at 26-27.
[121] *See, e.g.,* Sampson I Int. Tr. at 113.
[122] *See, e.g.,* Margolis Int. Tr. at 39-42; Mercer Int. Tr. at 93-99; McNulty Int. Tr. at 15, 23-24; Elston Int. Tr. at 26-27, 33-37; Buchanan Int. Tr. at 17-18; Sampson Int. I Tr. at 130.
[123] *See, e.g.,* McNulty Int. Tr. at 8-10, 26-27; Margolis Int. Tr. at 9-11, 55; Elston Int. Tr. at 18-22, 31; Buchanan Int. Tr. at 7-9; Transcript of Interview with Michael A. Battle at 15-16 (Apr. 12, 2007).
[124] *See, e.g.,* McNulty Int. Tr. at 15, 23-24; Margolis Int. Tr. at 52-53; Mercer Int. Tr. at 93-95, 114-115; Elston Int. Tr. at 26-27, 33-35; Buchanan Int. at 17-19; Sampson I Int. Tr. at 51-52, 110-13.
[125] *See, e.g.,* Margolis Int. Tr. at 53; Mercer Int. Tr. at 99-100; Elston Int. Tr. at 30.
[126] *See, e.g.,* Sampson I Int. Tr. at 37-40, 94-95.
[127] *See, e.g.,* Sampson Senate Hrg. Tr. at 8-9, 93-95, 121.

thorough and detailed knowledge from the above officials or any other Department officials, or discussions with the concerned U.S. Attorneys themselves about the looming requests for their resignations ever appears to have been undertaken.

c. Mr. Gonzales's role in the decision to request resignations

Attorney General Gonzales had intermittent, brief discussions about the process with Mr. Sampson, through which he was occasionally updated on the status of the process.[128] Mr. Sampson only recalled Attorney General Gonzales being particularly involved in deliberations at the very end of the process.[129] It is agreed that the results of the process were presented to Mr. Gonzales on November 27, 2006, via the consensus recommendations that Mr. Sampson had informally assembled. Before or as part and parcel of that meeting, it became apparent that each of the senior Department officials involved, including Mr. McNulty, Mr. Margolis and the other officials whom Mr. Sampson had consulted and who were then serving, concurred in the recommendations.[130]

Attorney General Gonzales did not probe the recommendations at the November 27th meeting.[131] In a number of cases, however, he found the recommendations to be corroborated by his own understanding of a given U.S. Attorney's performance.[132] For example, in the case of Mr. Iglesias, based at least on conversations in April and October 2006, it appears that Mr. Gonzales was aware that Mr. Iglesias had lost the confidence of his sponsor, Senator Domenici, who appeared to believe that Mr. Iglesias was in over his head in the post he occupied.[133] Documents in the matter, as well as press reports, suggest that Senator Domenici specifically discussed with Attorney General Gonzales his concerns over Mr. Iglesias's performance.[134]

Mr. Gonzales attested that he himself made the decisions to seek removals, and that he made them based on the recommendations of staff.[135] He did not recall, however, when he made the decisions, although it is generally agreed that the November 27, 2006 meeting constituted a final action meeting, and it would seem unusual if the decision had not been made that day.[136] In addition, Mr. Gonzales did not recall what grounds were given him in support of the recommendations that Mr. Bogden and Ms. Chiara be asked to resign.[137] Nevertheless, he trusted the judgment of those who had contributed to the process, and decided to seek their resignations along with the others.[138]

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[128] *See, e.g.,* Attorney General Hrg. at 46.
[129] *See, e.g.,* Sampson I Int. Tr. at 193-94.
[130] *See, e.g., id.* at 9.
[131] *See, e.g.,* Attorney General Senate Hrg. Tr. at 53-54.
[132] *See id.* at 53, 56.
[133] *See, e.g.,* Attorney General Hearing Tr. at 11-12; *see also* Attorney General Senate Hrg. Tr. at 13.
[134] Mr. McNulty similarly testified that, in early October of 2006, Sen. Domenici called him and briefly expressed concerns over the performance of David Iglesias. *See, e.g.,* McNulty Int. Tr. at 53-54. These concerns were that Mr. Iglesias was not generally up to the job, was not getting things done, and was not the person for the job. *Id.* at 53. Mr. McNulty did not remember Sen. Domenici mentioning any specific cases. *Id.* Mr. McNulty also did not remember Sen. Domenici specifically asking that Mr. Iglesias be terminated. *Id.* at 54.
[135] *See, e.g.,* Attorney General Senate Hrg. Tr. at 22-23, 41.
[136] *See id.* at 57-58, 61.
[137] *See id.* at 27, 29.
[138] *See, e.g., id.* at 14, 22-23.

d. Whether the Department acted for partisan reasons

Attorney General Gonzales himself recognized before us that this process was insufficiently structured and managed, and Mr. Gonzales identified a number of additional features to build into any such process undertaken in the future, in part based on input from multiple meetings with the remaining 80-plus U.S. Attorneys.[139] He disavowed repeatedly and categorically that he and the Department ever sought the resignation of a U.S. Attorney to interfere with litigation for partisan political reasons.[140] Other witnesses testified to the same effect.[141]

For example, Mr. Margolis testified that the Department's review of U.S. Attorney performance was a welcome innovation, about which he was so excited that he did not stop sufficiently to consider whether the methods by which it was conducted were sufficiently rigorous.[142] He stated that he encouraged the process, and did not appear to have detected a whiff of improper motive about the exercise.[143]

Thus, when asked whether he ever heard "anyone suggest that the terminations of these eight U.S. Attorneys . . . or the request for their resignations . . . were to influence a political corruption case," Mr. Margolis answered:

> Well, I've read newspaper articles after the fact, and I've read Iglesias' public statements after the fact and some statements from John McKay. But you don't mean that. You mean anybody in a position of authority. Absolutely not, and they would get my sharp stick in the eye if they suggested that.[144]

When asked whether "you ever hear[d] from anyone in the administration, either at the Department of Justice or the White House, that they were terminating these--or asking for the resignations of these eight U.S. Attorneys in order to chill or jump-start a particular case," Mr. Margolis answered, simply and forthrightly: "No." [145]

In addition, when Mr. Margolis was asked questions concerning a contact by a member of the New Mexico congressional delegation that Mr. Iglesias failed to report to the Department, Mr. Margolis answered as follows:

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[139] *See, e.g.,* Attorney General Hrg. Tr. at 8-9, 28-29.
[140] *See, e.g., id.* at 8, 12.
[141] *See, e.g.,* Sampson III Int. Tr. at 125-26; McNulty Int. Tr. at 299-300; Margolis Int. Tr. at 205-206; Buchanan Int. Tr. at 182-83.
[142] *See* Margolis Int. Tr. at 34-35, 302-04, 306-07; *see also id.* at 298-300.
[143] *See id.* at 34, 72-74, 205-06. The significance of Mr. Margolis' testimony should not be underestimated. As stated above, Mr. Margolis is a 42-year veteran of the Department. He has risen to the Department's top career position, has been a line prosecutor, has been heavily involved with criminal strike force activities, and is currently the Department official responsible for determinations concerning the discharge of Department officials such as U.S. Attorneys for misconduct. It is reasonable to conclude that Mr. Margolis, if anyone, would have detected whether there was an odor of misconduct about the U.S. Attorney review process. He did not, and we find that to be a significant indicia that there was no such misconduct.
[144] Margolis Int. Tr. at 205-06 (May 1, 2007).
[145] *Id.* at 206.

> I would be remiss if I didn't point out that I am furious at Mr. Iglesias for not reporting that. And I don't think I'd be sitting here answering questions if he had reported that, because the way we react at the department when something like that comes up is, we run the other way to make sure that nobody thinks we're fixing the case. So that's unforgivable, and his explanation was unforgivable. His explanation was, oh, this guy was my mentor. That's what – we hold out an independent U.S. Attorney to the public. To say, oh, well, I'm not going to follow the rules if I like this guy or something like that, I am furious about that.[146]

In part on the basis of this failure of Mr. Iglesias's, and also on the basis of his view that he himself could have easily have ensured a more robust review and removal process, Mr. Margolis assigned the greatest shares of responsibility for this entire controversy to Mr. Iglesias and himself.[147]

Ms. Buchanan's testimony provided another fitting example concerning whether improper partisanship may have played a role in the Administration's dealings with U.S. Attorneys, particularly since she is not only a U.S. Attorney, but a former head of EOUSA:

> Nobody ever suggested to me who should be considered for investigation or prosecution within the Western District of Pennsylvania. I am not aware of any United States attorney in any district who the Department has made suggestions with regard to who should or should not be investigated. Never in my career at the Department of Justice have I ever heard politics of a defendant to ever be taken into consideration in whether an individual should be investigated. It is offensive for anyone to suggest otherwise.[148]

As a final example, we note that Deputy Attorney General McNulty categorically denied ever having heard anyone from the Department or the White House advocate during the process that a U.S. Attorney be removed to impede or spur a political prosecution.[149] And, as discussed above, other direct and circumstantial evidence also is to the same effect. This includes the evidence that in every district, other than the Eastern District of Arkansas, a non-political, career official replaced the resigning U.S. Attorney.

In hindsight, it certainly seems clear that Attorney General Gonzales and other members of the Department's leadership should have focused more on this process, its execution, its results, and its potential for adverse fallout.[150] Attorney General Gonzales himself admitted that. However, it appears that he did not personally focus on or engage in the process for understandable reasons. Mr. Gonzales, like others in this process, simply did not believe that this process was of sufficient relative priority, compared to the myriad other vital duties of the Department, to merit more attention, and he entrusted it to the responsibility of others more

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[146] *Id.* at 130.
[147] *Id.* at 130, 171, 302-04, 306-07.
[148] Buchanan Int. Tr. at 182-83.
[149] McNulty Int. Tr. at 299-300.
[150] *See, e.g.,* Attorney General Hrg. Tr. at 8; Attorney General Senate Hrg. at 10.

familiar with the details of U.S. Attorney standards and performance as well as personnel matters in general. Attorney General Gonzales and others in the Department seemed to have taken as a given that the bar for the dismissal of a U.S. Attorney was very low, given that each U.S. Attorney is an at-will, political appointee of the President's.[151] Further, as Mr. Margolis put it, the idea of reviewing the performance of U.S. Attorneys to determine where the Department could do better over the remainder of a Presidential term was a good one that for whatever reason had never before been tried.[152] In their enthusiasm to implement this sound and straightforward idea, it simply did not occur to officials such as Mr. Margolis that there was a need for additional procedure to strengthen the process and protect it against any potential for corrupt influence or the perception, however erroneous, of such influence.[153] There was, moreover, no sign of actual impropriety that would have put Department officials on the alert for a need to do more to strengthen and protect the process.

Allegations, of course, have been made that the White House was the real force behind the review and removal of U.S. Attorneys. We do not believe that to be the case, consistent with all of the above discussion. After having reviewed the extensive evidence to date, we believe that the process was instead more like that described by, for example, Deputy Attorney General McNulty during his interview. As he put it:

> Even with all those e-mails that I have now come to understand and see, the extensive back and forth that existed between Kyle and the White House and so forth, I still understand the process at its final stage having -- requiring an initiative by the Department to identify who these individuals are and put them together in a list and then send them to the White House.
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> As I sit here today, my view is that if Kyle had decided not to do that or just never gotten around to it, we may have not done this. So that is why I still see it as being something the Department initiated when it went forward with putting together those names.[154]

There is, of course, a great deal more testimonial and documentary evidence in this matter than we have cited directly herein. The thrust of that evidence, however, is consistent with the above. We attach much of that evidence to these views in an appendix.[155] It would only be by ignoring the voluminous exculpatory evidence and the credibility of the witnesses, and by exaggerating the importance of minor discrepancies and gaps in the witnesses' testimony and the documents, that we might even consider a genuine possibility that the information subpoenaed from the White House might be necessary to a sufficient understanding of the matter. We find

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[151] Attorney General Hrg. Tr. at 40, 78; Sampson Senate Hrg. Tr. at 9; Margolis Int. Tr. at 306.
[152] Margolis Int. Tr. at 34-35, 243-42, 298-300.
[153] *See, e.g., id.* at 306.
[154] *Id.* at 49.
[155] To avoid any confusion as to the extent of the evidence on which we rely in these views, we also hereby incorporate by reference the entire body of documentary and testimonial evidence we have received in this matter, whether through hearings, interviews or document productions by the Department of Justice, the Republican National Committee, or any other source. Our views of the evidence are based, not just on the pieces of evidence cited specifically in these views, or on other portions of the hearing and interview record contained in the appendix, but also on our review of the entire body of the evidence which we have received.

the witnesses to be credible, however, as discussed above, and as befits such senior Department of Justice officials. Moreover, we do not believe that even an exaggerated emphasis on the gaps and minor discrepancies in the details of the testimony or documents or the memories of the witnesses would be sufficient to help us overcome the demands, discussed below, placed upon us by caselaw in attempting to overcome the President's assertion of executive privilege.

There, in short, stands our understanding of this affair. We recognize that, although we have gathered an enormous quantity of evidence in this matter, there remain some gaps in our knowledge of the details. These gaps, however, are neither critical nor particularly important to our understanding of what matters in the instant context. The question is whether we need to know more from the White House and Ms. Miers about the White House's role in the resignations process to determine sufficiently whether that role was nefarious. The answer to that question is "No." The White House's key Department contact, Mr. Sampson, specifically refuted the allegation that the White House's role was in any way untoward. The testimony of other witnesses, including, for example, that of Attorney General Gonzales, Deputy Attorney General McNulty, David Margolis, Ms. Goodling, Mr. Friedrich, and Ms. Buchanan, corroborates Mr. Sampson's. Mr. Sampson's testimony also is corroborated by the documentation we have of communications between the Department and the White House, none of which shows the White House seeking the resignation of a U.S. Attorney to seek a partisan advantage, and some of which specifically demonstrates Ms. Miers's view that the dismissals were performance-based.[156] Other direct and circumstantial evidence points the same way.

To conclude, then, we may not yet know every jot and tittle about who told Kyle Sampson what and when. We may not yet know in every case, for example, whose information put whom, and when, on the list of U.S. Attorneys whose resignations might be sought. Likewise, we may not yet know every word that was exchanged between the Department and the White House. We do know, however, what counts. That is that the White House's role in this process was not substantial, was primarily passive, and was free of any attempt to seek resignations in order to obtain a partisan advantage in any case or investigation or to accomplish any other improper partisan purpose.

In this posture, we turn to a consideration of whether, under the applicable law, there is any basis for us to believe that we might overcome the President's claim of executive privilege over Ms. Miers's information and the subpoenaed White House documents. We preface this discussion with the reminder that the White House asserts not only executive privilege, but that Ms. Miers and Mr. Bolten cannot be prosecuted under 2 U.S.C. § 194 for contempt of Congress, because the President has directed them to comply with his assertion of privilege. We articulate no position on this argument by the Executive, because we believe that to do so is not necessary to demonstrate that the House should refrain from a court battle over privilege in this matter. We do note, however, that eminent Republican and Democrat authorities appear to believe that this argument has substantial merit. Further, we emphasize that a court loss on this issue could deal a heavy blow to the Congress' oversight authorities.

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[156] *See* OAG 1795-97 (e-mails dated January 16, 2007).

IV. Legal Precedent on Executive Privilege

Neither the congressional right to conduct investigations nor the Executive's right to resist disclosure of information to Congress is expressly granted by the Constitution. Given the implicit nature of both rights, it is not surprising that members of the majority are advocating a different view of the constitutional allocation of power than are the President and his legal counsel. As neither political branch has incontestable authority to withhold information or force its disgorgement, traditionally, these disputes have been settled through negotiation, compromise, and sometimes capitulation by one side or the other. However, the U.S. Court of Appeals for the District of Columbia Circuit's decision in *In re Sealed Case*[157] "heightens the chances that a litigated dispute between Congress and the President will be resolved in the President's favor."[158]

The executive privilege embodying the President's side of this allocation encompasses several components. In this case, the testimony and documents subpoenaed by the Committee appear to be covered by the presidential communications privilege. Although this privilege has not been invoked in litigation to the same extent as, for example, the deliberative process privilege, cases from the U.S. Supreme Court and the D.C. Circuit have developed its contours.

The D.C. Circuit, in *In re Sealed Case*, described the parameters of the presidential communications privilege as follows, citing the *Nixon* cases:

> The President can invoke the privilege when asked to produce documents or other materials that reflect presidential decisionmaking and deliberations and that the President believes should remain confidential. If the President does so, the documents become presumptively privileged. However, the privilege is qualified, not absolute, and can be overcome by an adequate showing of need. If a court believes that an adequate showing of need has been demonstrated, it should then proceed to review the documents in camera to excise non-relevant material. The remaining relevant material should be released. Further, the President should be given an opportunity to raise more particularized claims of privilege if a court rules that the presidential communications privilege alone is not a sufficient basis on which to withhold the document.[159]

A. Purpose of the privilege

The Supreme Court has described the presidential communications privilege as "fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution."[160] At its core, the presidential communications privilege is rooted in the President's "need for confidentiality in the communications of his office,"[161] in order to

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[157] 121 F.3d 729 (D.C. Cir. 1997).
[158] Nelson Lund & Douglas Cox, *Executive Power and Governmental Attorney-Client Privilege: The Clinton Legacy*, 17 J. L. & Politics 631, 661 (2001).
[159] *In re Sealed Case*, 121 F.3d at 744–45.
[160] *United States v. Nixon*, 418 U.S. 683, 708 (1974).
[161] *Id.* at 712–13.

effectively and faithfully carry out his Article II duties and "to protect the effectiveness of the executive decision-making process."[162] If disclosure of certain communications to those outside of the Executive Branch would impair the President's ability to fulfill his constitutional duties or result in impermissible involvement of other branches in the enforcement of the law, then the President may understandably need to claim executive privilege to preserve his constitutional prerogatives.

"Freedom of communication vital to fulfillment of the aims of wholesome relationships is obtained only by removing the specter of compelled disclosure. . . . [Government] . . . needs open but protected channels for the kind of plain talk that is essential to the quality of its functioning."[163] The Supreme Court has recognized,

> [t]he expectation of a President to the confidentiality of his conversations and correspondence, like the claim of confidentiality of judicial deliberations, for example, has all the values to which we accord deference for the privacy of all citizens and, added to those values, is the necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decisionmaking. A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately.[164]

Accordingly, it is beyond question that the separation of powers mandated by the Constitution permits the President to refuse to disclose certain Executive Branch communications under the doctrine of executive privilege, and that the President's ability to invoke the privilege is fundamental to his ability to fulfill his constitutionally prescribed duties.

B. Executive privilege covers communications that are not held directly with the President

Of particular importance in this case, the D.C. Circuit has clearly determined that the presidential communications privilege covers communications made by presidential advisors in the course of preparing advice for the President, even when such communications are not held directly with the President.[165] As the circuit reasoned in *In re Sealed Case*:

> Presidential advisers do not explore alternatives only in conversations with the President or pull their final advice to him out of thin air—if they do, their advice is not likely to be worth much. Rather, the most valuable advisers will investigate the factual context of a problem in detail, obtain input from all others with significant expertise in the area, and perform detailed analyses of several different policy options before coming to closure on a recommendation for the Chief Executive. The President himself must make decisions relying substantially, if not entirely, on the information and analysis supplied by advisers. . . . In the vast

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[162] *In re Sealed Case*, 121 F.3d at 742 (internal quotations omitted).
[163] *Carl Zeiss Stiftung v. V. E. B. Carl Zeiss, Jena*, 40 F.R.D. 318, 325 (D.D.C. 1966).
[164] *Nixon*, 418 U.S. at 708.
[165] *In re Sealed Case*, 121 F.3d at 749–50, 752.

> majority of cases, few if any of the documents advisers generate in the course of their own preparation for rendering advice to the President, other than documents embodying their final recommendations, will ever enter the Oval Office. Yet these pre-decisional documents are usually highly revealing as to the evolution of advisers' positions and as to the different policy options considered along the way. If these materials are not protected by the presidential privilege, the President's access to candid and informed advice could well be significantly circumscribed.[166]

Moreover, the D.C. Circuit has held that, in order "to provide sufficient elbow room for advisers to obtain information from all knowledgeable sources," the presidential communications privilege "must also extend to communications authored or received in response to a solicitation by members of a presidential adviser's staff, since in many instances advisers must rely on their staff to investigate an issue and formulate the advice to be given to the President."[167]

At the same time, the D.C. Circuit has articulated limitations on how far the privilege extends, indicating that the privilege covered only communications "authored or solicited and received by members of an immediate White House adviser's staff who have broad and significant responsibility for investigating and formulating the advice to be given the President on the particular matter to which the communications relate."[168] Thus, "[i]n particular, the privilege should not extend to staff outside the White House in executive branch agencies,"[169] unless the communications were solicited and received by senior White House Officials.

Interestingly, *In re Sealed Case* is analogous to the current situation, in that in that case "the documents in question were generated in the course of advising the President in the exercise of his appointment and removal power, a quintessential and non-delegable Presidential power."[170] Of the presidential appointment and removal power as it related to the subpoena, the D.C. Circuit noted that:

> In many instances, presidential powers and responsibilities, for example the duty to take care that the laws are faithfully executed, can be exercised or performed without the President's direct involvement, pursuant to a presidential delegation of power or statutory framework. But the President himself must directly exercise the presidential power of appointment or removal. As a result, in this case there is assurance that even if the President were not a party to the communications over which the government is asserting presidential privilege, these communications nonetheless are intimately connected to his presidential decisionmaking. In addition, confidentiality is particularly critical in the appointment and removal context; without it, accurate assessments of candidates and information on official misconduct may not be forthcoming.[171]

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[166] *Id.* at 750.
[167] *Id.* at 752.
[168] *Id.*
[169] *Id.*
[170] *Id.* at 752–53.
[171] *Id.* (internal citations omitted).

C. The standard of need necessary to overcome the privilege

Importantly, Presidential communications are "presumptively privileged."[172] In *Nixon*, however, the Supreme Court held that this presumption could be overcome by a "demonstrated, specific need for evidence in a pending criminal trial."[173] The admittedly nebulous "demonstrated, specific need" requirement announced in *Nixon* was somewhat clarified in *In re Sealed Case*, which set forth a two-part standard.

Under *In re Sealed Case*, a party seeking to overcome a claim of presidential privilege must demonstrate: (1) that each discrete group of the subpoenaed materials likely contains important evidence, and (2) that this evidence is not available with due diligence elsewhere. "The first component, likelihood of containing important evidence, means that the evidence sought must be directly relevant to issues that are expected to be central to the trial."[174] "The second component, unavailability, reflects *Nixon's* insistence that privileged presidential communications should not be treated as just another source of information."[175] Accordingly, "[e]fforts should first be made to determine whether sufficient evidence can be obtained elsewhere, and the subpoena's proponent should be prepared to detail these efforts and explain why evidence covered by the presidential privilege is still needed."[176]

In short, "to overcome the presidential privilege it is necessary to demonstrate with specificity why it is likely that the subpoenaed materials contain important evidence and why this evidence, or equivalent evidence, is not practically available from another source."[177] In *Senate Select Committee on Presidential Campaign Activities v. Nixon*, the D.C. Circuit refused to enforce a subpoena for tapes issued by the Senate Committee investigating illegal activities connected to the 1972 election, on the grounds that the Senate Committee had not demonstrated that the tapes were "demonstrably critical to the responsible fulfillment of the Committee's functions."[178]

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[172] *Nixon*, 418 U.S. at 708 (citing *Nixon v. Sirica*, 487 F.2d 700, 717 (D.C. Cir. 1973)).
[173] *Id.* at 713.
[174] *In re Sealed Case*, 121 F.3d at 754.
[175] *Id.* at 755.
[176] *Id.*
[177] *Id.* at 754.
[178] 498 F.2d 725, 731 (D.C. Cir. 1974).

D. Congressional investigations v. criminal proceedings

Most of the limited authority on the presidential communications privilege has come up in the context of criminal investigations. There is still less guidance on how the factors balance out in the context of a congressional investigation. However, a few observations can be made as to how a court confronted with the enforcement of a congressional subpoena may analyze the application of the privilege. Moreover, as legal scholars have noted, "[n]otwithstanding the [*In re Sealed Case*] court's statement that the decision applies only in the context of judicial proceedings, it would be surprising if the courts were to give the privilege a narrower scope in the context of a [congressional] inquiry into the President's policy-development process than it has in the context of a serious criminal investigation. One reason for this is that Congress has much less need for judicial supervision over presidential claims of privilege than the courts themselves require."[179]

How, then, might the factors play out in a case involving a congressional investigation? We note, first, that in allowing a special counsel to overcome the privilege in the criminal context, the courts have placed an emphasis on the importance of obtaining privileged information in specific regard to the fair administration of criminal justice. Thus, the Supreme Court has observed that, although the presidential communications privilege is constitutional in nature, "[t]he right to the production of all evidence at a criminal trial similarly has constitutional dimensions."[180] A key factor in the Court's decision to override the privilege in *Nixon* was the need of the criminal justice system:

> The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence. To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense.[181]

An open question, therefore, is whether Congress's need to overcome an assertion of executive privilege is as great as the criminal justice system's need to overcome an assertion of executive privilege where criminal conduct is alleged.

In *Senate Select Committee*, the D.C. Circuit shed some light on the dimensions of Congress's need for privileged information. According to that decision, Congress's need does not turn on "the nature of the presidential conduct that the subpoenaed material might reveal, but, instead, on the nature and appropriateness of the function in the performance of which the material was sought, and the degree to which the material was necessary to its fulfillment."[182] Congress's need for privileged material thus will be measured in court by the importance of the

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[179] Lund, *supra* at 665.
[180] *Nixon*, 418 U.S. at 711.
[181] *Nixon*, 418 U.S. at 708.
[182] *Senate Select Comm.*, 498 F.2d at 731.

material to the oversight Congress is conducting or the legislation Congress is considering. Moreover, in assessing Congress's need, the courts will consider the nature and appropriateness of the oversight or legislation.

With regard to oversight there is fairly strong language in *Senate Select Committee* stating that oversight would not override the privilege; however, that language is tempered by the fact that the House already had the privileged material and the court therefore viewed the Senate committee's request as merely cumulative (although the court did note that the House's investigation was specifically related to its constitutional power to impeach).

With regard to legislation, the D.C. Circuit held that legislative interests would not overcome the assertion of executive privilege:

> There is a clear difference between Congress's legislative tasks and the responsibility of a grand jury, or any institution engaged in like functions. While fact-finding by a legislative committee is undeniably a part of its task, legislative judgments normally depend more on the predicted consequences of proposed legislative actions and their political acceptability, than on precise reconstruction of past events; Congress frequently legislates on the basis of conflicting information provided in its hearings. In contrast, the responsibility of the grand jury turns entirely on its ability to determine whether there is probable cause to believe that certain named individuals did or did not commit specific crimes . . . . We see no comparable need in the legislative process, at least not in the circumstances of this case.[183]

Second, in *Nixon*, the Court relied on the fact that the frequency at which the privilege would have to be put aside for criminal prosecutions was minor and, therefore, the Court could not "conclude that advisers will be moved to temper the candor of their remarks by the infrequent occasions of disclosure because of the possibility that such conversations will be called for in the context of a criminal prosecution."[184] The same may not be true of a congressional investigation—it is possible that a court would find that congressional investigations that call for privileged material are much more frequent than criminal prosecutions that call for privileged material. Under this rationale, the courts may not be as willing to override the privilege in the context of a congressional investigation, because doing so very well could temper the candor of presidential advisors.

In sum, it appears that congressional efforts to use the judiciary (for example through the criminal contempt statute) to attempt to overcome an assertion of executive privilege will likely not be as successful as attempts by the criminal justice system. This is not to say that Congress will never be successful in overcoming executive privilege through the court system; rather, it means that, given the nature of Congress's functions, it will not as often need privileged material for the "precise reconstruction of past events," and Congress must therefore tailor its privilege battles with the Executive accordingly.

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[183] *Id.* at 732.
[184] *Nixon*, 418 U.S. at 712.

V. Contempt of Congress is not the Appropriate Approach under the Circumstances

In light of the above, under the facts and law applicable here, it is not appropriate for the Committee to recommend to the full House that either Harriet Miers or Joshua Bolten be held in contempt of Congress. The Committee has already reviewed 8,500 pages of documents, held a multitude of hearings and meetings, and heard and reviewed the testimony of over twenty witnesses. It has not turned up any evidence that any of the U.S. Attorneys were asked to resign for an improper purpose, much less due to improper partisan purposes of the White House. Additionally, it would be inappropriate and unseemly to hold these individuals in contempt of Congress—a misdemeanor crime—when there is a realistic possibility of pursuing a civil remedy instead of criminal contempt. We also cannot overemphasize that, in terms of congressional oversight prerogatives, an executive privilege battle could lead to a strengthening of the presidential communications privilege that will necessarily weaken Congress's ability in the future to gain information from the Executive through compromise. Finally, if the full House follows the recommendation of the majority of this Committee, it may be immersed in a protracted court battle over executive privilege that will take years to bring to a resolution, while the White House has on the table an offer that will allow the Committee to learn what senior White House officials knew about the plan to replace certain U.S. Attorneys.

As the D.C. Circuit has observed, "[t]he framers . . . expect[ed] that where conflicts in scope of authority arose between the coordinate branches, a spirit of dynamic compromise would promote resolution of the dispute in a manner most likely to result in efficient and effective functioning of our governmental system."[185] For this reason, "each branch should take cognizance of an implicit constitutional mandate to seek optimal accommodation through a realistic evaluation of the needs of the conflicting branches in the particular fact situation."[186] Similarly, Attorney General William French Smith observed that "[t]he accommodation required is not simply an exchange of concessions or a test of political strength. It is an obligation of each branch to make a principled effort to acknowledge, and if possible to meet, the legitimate needs of the other branch."[187]

Unfortunately, the Committee's refusal to consider the offer of accommodation by the White House, and its failure to offer any constructive alternatives of its own, have needlessly and irresponsibly precipitated a constitutional confrontation between coordinate branches of government of a kind the framers hoped we would work assiduously to avoid. There is no need to hold either Ms. Miers or Mr. Bolten in contempt of Congress under the circumstances of this investigation. Rather, there is a need for the majority to retreat from its approach.

A. The investigation has shown no wrongdoing or illegal activity in the dismissals of U.S. Attorneys

As discussed above, the investigation to date, as it relates to the replacement of U.S. Attorneys, has not produced any evidence of wrongdoing. The investigation has instead revealed

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[185] *United States v. AT&T*, 567 F.2d 121, 127 (D.C. Cir. 1977).
[186] *Id.*
[187] *Assertion of Executive Privilege in Response to a Congressional Subpoena*, 5 Op. O.L.C. 27, 31 (1981) (opinion of Attorney General William French Smith).

simply that the Department of Justice did a less than adequate job of managing the process by which the U.S. Attorneys were selected to be asked to resign and of preparing certain Department officials to testify before Congress. The investigation has also revealed that certain lower level Department officials may have improperly taken political considerations into account in the hiring of career employees. The Department's Office of the Inspector General and Office of Professional Responsibility are conducting an investigation into these revelations.

We support the investigation by OIG and OPR, and we await their final results. We emphasize in the instant context, however, that this Committee's and the Senate Judiciary Committee's investigations have not identified any weighty and credible evidence of wrongdoing on the part of Department or White House officials in the dismissal of U.S. Attorneys.

To the contrary, the evidence strongly supports the conclusion that the Department and the White House engaged in no wrongdoing in seeking the U.S. Attorney resignations, consistent with the Department's and the White House's longstanding explanations of the resignations.[188] For example, the evidence supports concluding that:

- The review of U.S. Attorney performance was simply part of an Administration-wide review of the performance of political appointees after the 2004 general election.

- The White House generally left the review of U.S. Attorney performance to the Department, and did not attempt to force the Department in any particular direction or along any particular timeline that might be associated with any attempt to obtain partisan advantages in particular Department cases or investigations.

- The White House did not request that the Department remove any specific individual for reasons that might be associated with an attempt to obtain such a partisan advantage.

- The Department replaced the resigning U.S. Attorneys with career prosecutors in each office in which it has been suggested that either the Department or the White House might have sought such a partisan advantage. This practice directly contradicts the theory that either the Department or the White House was attempting to gain such a partisan advantage.

During the course of the investigation, Congress and the Department agreed that it would be improper to replace a sitting U.S. Attorney "in order to impede or speed along particular criminal investigations for illegitimate reasons."[189] The witnesses heard from during hearings

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[188] We note our concern that neither these views nor the majority's views undermine in any way OIG's and OPR's ability to reach and to take action consistent with whatever conclusions their investigation eventually yields. Given the majority's action in recommending contempt citations, however, as well as the legal standards applicable to an analysis of whether the House may overcome the President's assertion of executive privilege, we find ourselves compelled to offer the conclusions we have at this point formed.

[189] Alberto R. Gonzales, Attorney General, Statement Before the U.S. Senate Committee on the Judiciary (April 17, 2007) (quoting Walter Dellinger and Christopher H. Schroder, "What Congress Gets to Know," *Slate* (March 26, 2007)).

and at interviews consistently testified that neither Department nor White House officials ever sought the resignation of a U.S. Attorney for this improper reason.

With specific regard to Harriet Miers, the witnesses with knowledge of her role in the process of reviewing the performance of U.S. Attorneys and seeking resignations of U.S. Attorneys have testified specifically, under penalty of criminal sanction, that Ms. Miers did not seek the resignation of a U.S. Attorney in order to obtain a partisan advantage in any Department case or investigation. Furthermore, documentary evidence obtained in the investigation of Ms. Miers's communications in the matter is consistent with the testimony of witnesses that the U.S. Attorney resignations were sought due to reasons of the U.S. Attorneys' overall performance in office, and not to obtain a partisan advantage in any Department case or investigation.[190]

In brief, this Committee has now heard at hearings, interviewed, or obtained documentary evidence from every Department official who had a significant role in the process of seeking the U.S. Attorney resignations. The investigation has revealed that the selection of U.S. Attorneys for replacement was made from within the Department and not from within the White House. With this in mind, it is hard to see what, if any, additional, important information internal White House documents or testimony from Ms. Miers could reveal about the replacement of the U.S. Attorneys.

B. It would be unseemly to hold the Executive in contempt when a civil remedy is available

Throughout this nation's history, Executive Branch officials have rarely been held in contempt of Congress. In fact, since the criminal contempt of Congress provisions were enacted in 1857, only once has a full body of Congress voted a criminal contempt citation against the head of an executive department or agency. This is because the two branches have traditionally been able to compromise in a manner that preserves the institutional interests of each of the co-equal branches of government.

The majority on this Committee has rejected the possibility of compromise as a means of avoiding a constitutional confrontation. In casting compromise aside, however, criminal contempt of Congress is not the only avenue to resolving the dispute over executive privilege. There appear to be at least two civil remedies to the current dispute: (1) enacting a jurisdictional bill to give the district court jurisdiction over the matter; or (2) bringing a civil action under the general federal question jurisdiction granted in 28 U.S.C. § 1331.[191]

The former route, enacting a jurisdictional statute granting the district court jurisdiction over the matter, was used during Watergate to give the U.S. District Court for the District of Columbia jurisdiction to enforce subpoenas issued by the Senate Select Committee on Presidential Campaign Activities. That jurisdictional statute conferred jurisdiction on the district

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[190] *See* OAG 1795-97 (e-mails dated January 16, 2007).

[191] The Ethics in Government Act authorizes the Office of Senate Legal Counsel to file civil enforcement actions against a witness who fails to comply with a Senate subpoena. 28 U.S.C. § 1365. The Act does not apply, however, to officers or employees of the federal government acting in their official capacities. *Id.*

court for any civil action brought "to enforce or secure a declaration concerning the validity of any subpoena."[192]

The latter route, bringing suit under federal question jurisdiction, was attempted in *Senate Select Committee on Presidential Campaign Activities v. Nixon.*[193] The Senate Select Committee "deliberately chose not to attempt an adjudication of the matter by resort to a contempt proceeding under Title 2, U.S.C. § 192, or via Congressional common-law powers which permit the Sergeant at Arms to forcibly secure attendance of the offending party."[194] According to the Senate Select Committee "[e]ither method . . . would here be *inappropriate* and *unseemly*."[195] The Senate Select Committee's lawsuit was dismissed on jurisdictional grounds for failing to meet the amount in controversy requirement then-included in 28 U.S.C. § 1331. However, because Congress has since eliminated the amount in controversy requirement, federal question jurisdiction should now provide a means short of contempt for enforcing congressional subpoenas.[196]

The minority believes that, just as the Senate Select Committee determined, it would be inappropriate and unseemly to hold a current or former White House official in contempt of Congress under the circumstances presented in this investigation. Therefore, in the minority's view, rather than holding Ms. Miers or Mr. Bolten in contempt of Congress, the better course would be to either enact special legislation conferring jurisdiction on the U.S. District Court for the District of Columbia for the enforcement of congressional subpoenas or bringing an enforcement action under the federal question jurisdiction already conferred on the district courts under 28 U.S.C. § 1331. Of course, the best solution of all would be to accept the White House's offer of voluntary testimony and document production, and we urge that route again.

C. The Subcommittee's rulings on executive privilege do not support a contempt citation

In the rush to confrontation, at the Subcommittee's July 12, 2007 hearing, at which former Counsel to the President Harriet Miers was subpoenaed to testify, the Chairwoman of the Subcommittee ruled that executive privilege did not apply to the information for which the President has asserted the privilege. The next week, on July 19, 2007, at a meeting of the Subcommittee on the subpoena to Joshua Bolten for White House documents, the chairwoman similarly ruled that executive privilege did not apply to the subpoenaed documents. The chairwoman based her ruling on several grounds; however, the bases for the chairwoman's ruling are incorrect as a matter of law. This, too, provides a powerful reason not to proceed towards a contempt citation.

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[192] Pub. L. No. 93-190 (Dec. 19, 1973).
[193] 366 F. Supp 51 (D.D.C. 1973).
[194] *Id.* at 54.
[195] *Id.*
[196] After the lawsuit was dismissed in the district court on jurisdictional grounds the case was appealed to the D.C. Circuit. While the case was pending before the circuit, Congress enacted a jurisdictional statute conferring jurisdiction on the district court.

1. The "claims of privilege and immunity are not properly asserted"

In both of the chairwoman's rulings on executive privilege, she erroneously ruled that, to invoke executive privilege, the President himself must send the Committee a statement invoking the privilege. In support of this ruling, the chairwoman averred to an opinion of the D.C. district court, stating that "the *Schultz* case stated that even a statement from a White House counsel that he is authorized to invoke executive privilege is 'wholly insufficient to activate a formal claim of executive privilege.'"[197] While the chairwoman's statement is an accurate quote from the district court opinion, it is not an accurate reflection of the law.

In *In re Sealed Case*, the D.C. Circuit held that a statement by the White House counsel that "the President . . . has specifically directed me to invoke formally the applicable privileges," is sufficient to invoke executive privilege.[198] Here, White House Counsel Fielding wrote in a letter to the Committee: "I write at the direction of the President to advise and inform you that the President has decided to assert Executive Privilege."[199] Under *In re Sealed Case*, this statement by Mr. Fielding is a proper way for the President to invoke executive privilege; therefore, the chairwoman's ground for sustaining her ruling is incorrect as a matter of law.

Moreover, the D.C. Circuit in *In re Sealed Case* acknowledged the *Schultz* decision cited by the chairwoman in support of her ruling, and, as can be seen from the D.C. Circuit's discussion in footnote 16, felt that: (1) the language from *Schultz* would not apply where the White House Counsel has been directed by the President that executive privilege will be invoked; and (2) *Schultz* is not binding precedent and rather the question is open in the D.C. Circuit (stating "We need not decide whether the privilege must be invoked by the President personally").[200]

Thus, from *In re Sealed Case* it is evident that the White House Counsel may inform the Congress or the courts of the President's decision to invoke executive privilege. The President does not have to personally author a document invoking the privilege. Additionally, it is evident that in the D.C. Circuit the question of whether the President must personally invoke the presidential communications privilege is an open question. Accordingly, there was no basis in the law for the chairwoman to rule against the President's claim of executive privilege on grounds that the Committee has "not even received a statement from the President himself asserting privilege."

2. "No possible proper basis" for Ms. Miers's refusing to appear before the Subcommittee

In support of the chairwoman's ruling that Ms. Miers was required to appear before the Subcommittee, the chair reasoned that she was "aware of absolutely no possible proper basis for Ms. Miers' refusing even to appear today as required by subpoena." The chairwoman based her

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[197] *Ruling of Chairwoman Linda Sanchez on Related Privilege and Immunity Claims* at 1 (July 12, 2007) (citing *Center on Corporate Responsibility v. Schultz*, 368 F. Supp 862, 872–73 (D.D.C. 1973).
[198] *In re Sealed Case*, 121 F.3d at 744 n.16 (alteration in original).
[199] Letter from Fred F. Fielding, Counsel to the President, to Chairmen Leahy and Conyers (June 28, 2007).
[200] *See* 121 F.3d at 744 n.16.

ruling on the assertion that there are no court decisions that support the White House's claim that a former White House official, being absolutely immune from being compelled to testify before Congress, may refuse to appear in response to a congressional subpoena. The chairwoman also based her ruling on the assertion that 74 White House advisers have testified before Congress since World War II. In context, the White House's assertion of absolute immunity for former senior advisors has significantly more support than the chairwoman acknowledges.

The theory of absolute immunity for White House officials has been shared by numerous administrations, Republican and Democratic, for over 60 years. As Attorney General Janet Reno advised, "[s]ubjecting a senior presidential advisor to the congressional subpoena power would be akin to requiring the President himself to appear before Congress on matters relating to his constitutionally assigned functions."[201] This is because, as Assistant Attorney General Theodore Olson observed, "[t]he President is a separate branch of government. He may not compel congressmen to appear before him. As a matter of separation of powers, Congress may not compel him to appear before it. The President's close advisors are an extension of the President."[202] The immunity for Presidential advisors, it is thus argued, "is absolute and may not be overborne by competing congressional interests."[203]

This rationale would apply to former senior White House advisors as well. Since "[a]n immediate assistant to the President may be said to serve as his alter ego . . . the same considerations that were persuasive to former President Truman [when he declined to comply with a congressional subpoena for his testimony] would apply to justify a refusal to appear by . . . a former staff member."[204] According to the Office of Legal Counsel, "[s]eparation of powers principles dictate that former Presidents and former senior presidential advisers remain immune from compelled congressional testimony about official matters that occurred during their time as President or senior presidential advisers."[205]

The chairwoman's reference to prior appearances of White House officials also weakens under scrutiny. The chairwoman based her assertion on a 2004 Congressional Research Service study that noted that there have been 74 instances of congressional testimony by White House officials since World War II. That the White House may in some instances have allowed

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[201] *Assertion of Executive Privilege with Respect to Clemency Decision* (Sept. 16, 1999) (opinion of Janet Reno, Attorney General); *see also, e.g.,* Memorandum from John M. Harmon, Assistant Attorney General, Office of Legal Counsel, *Re: Executive Privilege* at 5 (May 23, 1977) ("The President and his immediate advisors are absolutely immune from testimonial compulsion by a Congressional committee."); Memorandum from William H. Rehnquist, Assistant Attorney General, Office of Legal Counsel, *Re: Power Congressional Committee to Compel Appearance or Testimony of "White House Staff"* at 7 (Feb. 5, 1971) ("The President and his immediate advisors . . . not only may not be examined with respect to their official duties, but they may not even be compelled to appear before a congressional committee.").

[202] Memorandum from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel, at 2 (Jul. 29, 1982).

[203] Memorandum from John M. Harmon, Assistant Attorney General, Office of Legal Counsel, *Re: Executive Privilege* at 5 (May 23, 1977).

[204] Memorandum from Roger C. Crampton, Assistant Attorney General, Office of Legal Counsel, *Re: Availability of Executive Privilege Where Congressional Committee Seeks Testimony of Former White House Official on Advice Given President on Official Matters* at 6 (Dec. 21, 1972).

[205] Memorandum from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Immunity of Former Counsel to the President from Compelled Congressional Testimony* at 2 (July 10, 2007).

officials to appear, rather than invoke a claim to absolute immunity, however, does not mean that there can never be a basis to invoke immunity.

The CRS study, moreover, noted that the vast majority of these 74 appearances occurred during three separate episodes: Watergate (6 instances); various investigations of President Clinton's tenure (46 instances); and the creation of the Department of Homeland Security (9 instances). In many of these instances, furthermore, the presidential advisors were called to testify regarding matters that fell outside of their official roles. For example, one of the first instances of congressional testimony by a White House official was Harry H. Vaughn, Military Aide to the President, who was called upon to testify regarding his personal involvement in certain government procurement contracts.[206] Another early instance of congressional testimony was that of Donald S. Dawson, Administrative Assistant to the President, to discuss allegations he had attempted to "dominate" the Reconstruction Finance Corporation and influence appointments to that body.[207] More recently, numerous Clinton White House officials offered congressional testimony related to whether White House aides had inappropriately learned details of a Resolution Trust Corporation investigation of the failed Madison Guaranty Savings and Loan.[208] Obviously, congressional testimony by a White House official on matters that fall outside of his official duties is not precedent for a White House official testifying on matters that fall within his official duties.

Finally, as Mort Rosenberg, the noted CRS scholar, has observed, "[t]he complete and correct picture, I believe, is not that of Congressional dominance or Executive recalcitrance but a dynamic process of continuous sparring, confrontation, negotiation, and ultimate accommodation." Consistent with this principle, the White House is not claiming that: (1) dual purpose White House officials (those with statutory obligations) are not required to be available to testify regarding their statutory obligations; or (2) that less-senior White House officials are absolutely immune. Inconsistent with this principle, however, the majority is rushing to assert congressional dominance.

3. "The White House has failed to demonstrate" that the information withheld is covered by executive privilege

In support of both of her rulings on executive privilege, the chairwoman stated that "the White House has failed to demonstrate that the information we are seeking . . . – testimony and documents as called for by the subpoena – is covered by executive privilege." On this point, the chairwoman reasons that the burden of demonstrating that the information is privileged is on the President, and that the President will not be able to meet that burden here because the President never received any advice on, and was not himself involved in, the replacement of U.S. Attorneys. The chairwoman's ruling on this point is flawed for at least two reasons.

First, the burden is not on the President to demonstrate that the information being withheld is covered by executive privilege. To the contrary, presidential communications are,

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[206] Harold C. Relyea & Todd B. Tatelman, *Presidential Advisers' Testimony Before Congressional Committees: An Overview*, CRS Report RL 31351 (April 10, 2007).
[207] *Id.*
[208] *Id.*

according to the U.S. Supreme Court, "presumptively privileged."[209] Thus, the burden is on the party seeking the privileged communications.

Second, the information at issue here may be covered by the presidential communications privilege, regardless of whether the President was involved in the communications. Under *In re Sealed Case*, the presidential communications privilege covers communications made by presidential advisors in the course of preparing advice for the President, even when such communications are not held directly with the President.[210] As the D.C. Circuit explained,

> the President himself must directly exercise the presidential power of appointment or removal. As a result, in this case there is assurance that even if the President were not a party to the communications over which the government is asserting presidential privilege, these communications nonetheless are intimately connected to his presidential decisionmaking.[211]

Indeed, the circuit further reasoned that, although "[i]n the vast majority of cases, few if any of the documents advisers generate in the course of their own preparation for rendering advice to the President . . . will ever enter the Oval Office," the communications are still covered by executive privilege.[212]

Thus, whether or not the President was involved in the process by which the U.S. Attorneys were asked for their resignations, at the end of the day the power to appoint and remove was and is the President's. Therefore, communications by senior advisors, such as his counsel, with regard to how the President should exercise his power to appoint and remove, may be covered by the presidential communications privilege.

4. The party raising a claim of privilege must provide a privilege log

Both of the chairwoman's rulings on executive privilege rested on the basis that the President did not provide the Subcommittee with a "descriptive, full, and specific itemization of the various documents being claimed as privileged" and "precise and certain reasons for preserving their confidentiality." In support of her view, the chairwoman cited two district court cases that required privilege logs of the party asserting a privilege. Those cases, however, did not involve Congressional-Executive Branch disputes, and the privilege logs were presented once the claims reached court, not before. It is unclear what purpose a privilege log would serve before the Subcommittee. Unlike the two district court cases cited by the chairwoman, where the court could serve as a neutral arbiter to decide where the privilege applied and whether it either did not apply or was overcome by a showing of need, there is not a neutral arbiter to make such decisions here.

Of course, if the current dispute over executive privilege makes its way to court – and we firmly believe it should not – a privilege log might be produced if requested by the court. At the

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[209] *Nixon*, 418 U.S. at 708 (citing *Nixon v. Sirica*, 487 F.2d 700, 717 (D.C. Cir. 1973)).
[210] *In re Sealed Case*, 121 F.3d at 749–50, 752.
[211] *Id.* (internal citations omitted).
[212] *Id.*

current stage of the dispute, however, where a court is not involved to make decisions on privilege, a privilege log does not seem to serve any essential purpose.

5. Any privilege claimed by the President is outweighed by the "compelling" need for the information

As a final ground for both of her rulings, the chairwoman asserted that, even if executive privilege applied, the privilege is outweighed by the "compelling" need for the House and the public to have access to the subpoenaed information. While the chairwoman was correct in asserting that claims of executive privilege are not absolute and can be overcome by a demonstrated, specific need, that need has not been shown here.

First, it appears that it will be difficult for the House to assert that the testimony and documents at issue are "demonstrably critical" to its investigation. This is because in the course of the investigation the Committee has already been given over 8,500 pages of documents, has heard abundant testimony before the Subcommittee as well as the Committee and its Senate counterpart, and has heard on-the-record interview testimony from all the relevant non-White House witnesses. None of the documents or testimony reveals a critical need to pierce the executive privilege in furtherance of the investigation. For example, the key contact between the Department and the White House, Kyle Sampson, was interviewed repeatedly by Committee staff, and his testimony did not reveal any evidence of wrongdoing on the part of the White House. The Committee already has one side of the dialogue between the White House and the Department – indeed, it has the key side – and there is no evidence that any additional, important information would come to light by overruling the President's assertion of executive privilege. It thus seems quite possible that the courts would find the House unable to meet its burden of demonstrating that its need for the privileged information is critical. (This likelihood seems only enhanced, of course, by the majority's months-long delay in moving the recommendation of contempt to the floor of the House. How critical could the information sought be, if the attempt to seek it could lie fallow for months on end?)

Second, also in the courts' consideration of whether to overrule the President's assertion of privilege would be the fact that the action at issue here, appointment and removal of U.S. Attorneys, is a core Executive Branch function. The oversight power of Congress follows its legislative power. In those areas where Congress has a direct hand, it has a strong claim to exercise oversight over the Executive, but where the Constitution has directly delegated a power to the Executive, Congress's claim to exercise of oversight is weaker. This is how Attorney General Janet Reno and the White House Counsel's office successfully rebuffed a Republican Congress's demand for documents related to President Clinton's decision to commute the sentences of sixteen Armed Forces of National Liberation (FALN) terrorists. It is questionable whether Congress can pass any legislation bearing on the President's pardon power. The situation is almost exactly analogous with the U.S. attorneys. The President's power to hire and fire U.S. Attorneys is nearly absolute. There may be little, if any, legislative role for Congress to play in these executive decisions. Thus, the President's power to protect information pertaining to his decision-making process is at a high ebb, and Congress's power to acquire information is at a low ebb.

D. The Committee may fail to overcome an assertion of executive privilege unless it can show that the information sought is demonstrably critical to the responsible fulfillment of the Committee's functions

As stated above, to overcome the President's assertion of executive privilege, the Committee will be required to show in court that the information it seeks in the subpoenas is "demonstrably critical to the responsible fulfillment of the Committee's functions"[213] (assuming, of course, that the Committee can first overcome any argument asserted that Ms. Miers and Mr. Bolten cannot even be prosecuted under the criminal contempt statute). The identified Committee functions, furthermore, must advance Congress's legitimate legislative responsibilities, as Congress has oversight authority "to enable it efficiently to exercise a legislative function belonging to it under the Constitution."[214]

Here, Congress is endeavoring to exercise oversight over the dismissal and replacement of U.S. Attorneys. Accordingly, as a threshold matter, it is not clear that the internal White House communications sought by the Committee fall within the scope of Congress's legislative functions. The Supreme Court has held congressional oversight authority does not reach "matters which are within the exclusive province of one of the other branches of the Government."[215] As the Acting Attorney General observed in his opinion to the President on this matter, "[t]he Senate has the authority to approve or reject the appointment of officers whose appointment by law requires the advice and consent of the Senate (which has been the case for U.S. Attorneys since the founding of the Republic), but it is for the President to decide whom to nominate to such positions and whether to remove such officers once appointed."[216] A U.S. Attorney is, as the Supreme Court has reasoned, part of "one of the units in the executive department and, hence, inherently subject to the exclusive and illimitable power of removal by the Chief Executive, whose subordinate and aid[e] he is."[217] Because the appointment and removal power rests with the President alone, the Congress's ability to overcome the presumption of executive privilege for the subpoenaed information is questionable.

Even to the extent that the Committee does have oversight authority over the President's appointment and removal of these U.S. Attorneys, it is clearly questionable whether the internal White House communications and testimony from White House officials, such as Harriet Miers, that the Committee seeks are "demonstrably critical" to any "legislative judgments" that Congress may be able to exercise over either this matter in particular or the appointment and removal of U.S. Attorneys in general. In the letter the majority sent to the White House regarding the subpoenas the Committee issued on June 13, 2007, the majority asserted that "[c]ommunications among the White House staff involved in the U.S. Attorney replacement plan are obviously of paramount importance to any understanding of how and why these U.S.

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[213] *Senate Select Comm.*, 498 F.2d at 731.
[214] *McGrain v. Daugherty*, 273 U.S. 135, 160 (1927).
[215] *Barenblatt v. United States*, 360 U.S. 109, 112 (1959).
[216] Letter from Paul S. Clement, Acting Attorney General, to the President at 2 (June 27, 2007).
[217] *Humphrey's Ex'r v. United States*, 295 U.S. 602, 627 (1935); *see also Myers v. United States*, 272 U.S. 52, 122 (1926) ("The power of removal is incident to the power of appointment, not to the power of advising and consenting to appointment, and when the grant of the executive power is enforced by the express mandate to take care that the laws be faithfully executed, it emphasizes the necessity for including within the executive power as conferred the exclusive power of removal.").

Attorneys were selected to be fired."[218] A broad generalized assertion that information is of "paramount importance," however, is insufficient under the "demonstrably critical" standard. Rather, the majority must "point[] to . . . specific legislative decisions that cannot responsibly be made without access to [the privileged] materials."[219]

It is entirely unclear what specific legislative decisions cannot be made in this case without the aid of the information contained in the privileged White House communications. As the D.C. Circuit has observed, "legislative judgments normally depend more on the predicted consequences of proposed legislative actions and their political acceptability, than on the precise reconstruction of past events."[220] Indeed, the circuit noted that "Congress frequently legislates on the basis of conflicting information provided at its hearings."[221]

The majority's argument that the legislative functions it has asserted cannot be undertaken without the privileged information it has subpoenaed are entirely unavailing. For instance, the majority has asserted that it might need the subpoenaed information to amend 28 U.S.C. § 546 to make clear that it is the exclusive means for appointing an individual to temporarily perform the functions of a U.S. Attorney. This assertion is easily defeated, however, by simple reference to the fact that the House already passed an amendment by a vote of 329 to 78 that made clear that 28 U.S.C. § 546 was the exclusive means of filling such vacancies. How could Congress possibly need the information subpoenaed from the White House to legislate in this area, given that the amendment to 28 U.S.C. § 546 was crafted and overwhelmingly passed without the privileged information? This certainly is not a legislative decision that "cannot responsibly be made without access to [the privileged] materials" – unless the majority is somehow alleging that when the above discussed amendment was passed in the House, those voting in favor were acting irresponsibly.

Another area of legislation to which the majority has pointed involves removing the U.S Attorney appointment authority granted in section 502 of the USA PATRIOT Reauthorization Act. Of course, this appointment authority has already been removed without access to the privileged materials the Committee has subpoenaed.[222] The majority has suggested that it might need the subpoenaed information to "help formulate and determine" whether additional legislation on this subject is needed. How so, we ask? Certainly the Congress in removing the PATRIOT Act authority significantly altered the interim appointment authority without the subpoenaed information. Moreover, it is not merely a question of whether information would *help* in formulating and determining legislation—it is a question of whether there is a *demonstrably critical* need for the privileged information.

In short, it is more than possible that none of the grounds asserted by the majority for the proposition that the privileged information is needed for a legislative function would meet the demonstrably critical need standard in court.

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[218] Letter from the Hon. John Conyers, Jr., Chairman, House Judiciary Committee, to Fred F. Fielding, Counsel to the President, at 2 (June 13, 2007).
[219] *Senate Select Comm.*, 498 F.2d at 733.
[220] *Id.* at 732.
[221] *Id.*
[222] S.214 was signed by the President on June 14, 2007, and became Public Law 110-34. Pub. L. No. 110-34, 121 Stat. 224 (2007).

E. The threat an executive privilege dispute poses for Congressional prerogatives

During the Clinton administration, the White House asserted executive privilege on a host of different fronts, only to be defeated in a series of court cases. The lesson from the Clinton-era executive privilege disputes is that testing privilege claims in court should be studiously avoided. What is doubly sad for the Executive is that, as the Clinton administration lost that string of court cases related to executive privilege, it did so while using executive privilege "in controversies that were sharply removed from areas of official conduct or matters of state."[223]

The majority ignores the lesson it should have learned from the Clinton administration's mistakes, pushing ahead with the battle for access to the President's senior advisors and their documents related to the replacement of U.S. Attorneys. The simple fact is that the majority already has the information it needs to conclude this investigation without piercing executive privilege, and that the push for confrontation over more information is transparently political. With that in mind, it seems unlikely that a court would rule in favor of the House on the question of whether executive privilege should be set aside in this case. Consequently, the majority should not force a fight on this issue where the President's position is strong—a court victory by the President can only serve to weaken congressional prerogatives.

This is because there is an inverse relationship between Congress's power to investigate the Executive and the Executive's power to withhold information from Congress. If a court decision strengthens the executive privilege, Congress's investigative prerogatives are necessarily weakened. The contrary is true as well. Therefore, executive privilege disputes are traditionally settled through negotiation, compromise, and sometimes capitulation. As is discussed above, in this case it appears likely that the courts would not allow the Congress to pierce executive privilege. That is, it does not appear that the Congress can meet the two-prong test from *In re Sealed Case*. Under such circumstances, it would be imprudent for the Congress to press its case in court. (Of course, were the reverse true, it would be imprudent for the Executive not to turn over the privileged materials.)

At this point, it is the ability of Congress to get information from the Executive in the future that it most at stake in this fight. Throughout the course of the current controversy, the Executive Branch made documents and senior officials available to the Congress with regard to the replacement of U.S. Attorneys. That enabled the Congress to gather the information it essentially needed. As a result, ironically, if Congress loses a court battle over executive privilege, that will not unduly hamper this investigation. What it very much may hamper is Congress' ability to conduct future investigations, since the Executive Branch will be in a stronger position and therefore less likely to turn over information to the Congress. One need not look far for how this might affect the Congress. During this very investigation, the Executive

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[223] Jonathan Turley, *Symposium: Paradise Lost: The Clinton Administration and the Erosion of Executive Privilege*, 60 Md. L. Rev. 205, 208 (2001). Professor Turley further notes that "[w]here prior administrations had almost exclusively raised privilege arguments with regard to official duties, the Clinton administration aggressively pursued the application of privileges in matters relating to the President's private conduct." *Id.*

Branch turned over numerous documents that the Acting Attorney General has advised the President are covered by executive privilege. If Congress loses a court fight over executive privilege now, the Executive Branch will likely be much less inclined to turn over such documents in the future.

We note once again, moreover, that the majority tempts not only a battle over executive privilege as traditionally fought out in the courts. It also tempts decisions on the arguments that senior White House aides are absolutely immune from compulsion to appear before Congress, and that officials complying with the President's assertion of executive privilege are not subject to prosecution under 2 U.S.C. § 194. A loss on either of these issues could strike a powerful blow at the Congress' oversight prerogatives.

F. All that will come of contempt is a lengthy court battle; Congress should therefore take the White House up on its offer of accommodation

Even leaving the relatively weak legal merits of the majority's position aside, forcing this dispute also would only create a lengthy court battle that would probably not be resolved before the end of the Bush administration. Such a lengthy battle would get the Committee no closer to the information that the majority deems to be of "paramount importance" to the investigation. This suggests to us that it is political confrontation, not the information, that is of paramount importance to the majority.

What is more, the courts may ultimately punt the executive privilege issue back to the political branches, as was done in *United States v. United States House of Representatives*. In that case, the district court admonished the parties that, "[t]he difficulties apparent in prosecuting [an Executive Branch official] for contempt of Congress should encourage the two branches to settle their differences without further judicial involvement. Compromise and cooperation, rather than confrontation, should be the aim of the parties."[224] Given that there has been little effort on the part of the majority to compromise with the White House—the White House made an offer, the Committee issued a subpoena—there is a good chance that the courts will send the case back for further negotiations. In any event, even if the courts hear the case on its merits, the length of time involved in litigation should dissuade the majority from the uphill battle that a contempt citation portends.

Moreover, as discussed above, there is a strong possibility that, after a lengthy battle over any contempt citation, the Executive will win. Congress could thus well still be left without the testimony from Ms. Miers or the documents the Committee subpoenaed. Such a court loss would also likely foreclose the opportunity to conduct the informal interviews with Ms. Miers and other White House officials and to receive the documents that the White House has offered voluntarily. Given the likelihood of a negative court decision, the majority should take the White House up on its offer, not force litigation, if it truly believes that the White House has critical information that this Committee has not already heard. Granted, further documents and interviews with White House officials are likely to shed little, if any, new, important light on this investigation. The White House's offer, however, may afford the only opportunity to hear what those officials have to say and to obtain those documents.

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[224] *United States v. House of Representatives*, 556 F. Supp. 150, 153 (D.D.C. 1983).

The majority has complained that the White House offer does not encompass on-the-record interviews. There is little difference, however, between on- and off-the-record interviews, in terms of available Committee action at the end of this investigation. For example, if a White House official testified off-the-record that an improper reason was the cause of a particular U.S. Attorney's dismissal, we doubt that the Committee's remedy would be any different than if that admission had been made on-the-record. Either way, the Committee would be aware of the improper reason, and could take appropriate steps to respond.

Accordingly, if the majority truly wants to know what White House officials have to say, it should take the White House up on its offer of informal interviews.

G. Previous Presidential assertions of executive privilege

Finally, we think it worth a review of prior assertions of executive privilege before the House determines what to do in the face of this one. In the light of this review, the President's assertion of executive privilege with respect to testimony and documents detailing internal White House communications about the replacement of U.S. Attorneys appears neither remarkable, nor sweeping, nor unprecedented. Indeed, given the separation of powers issues at stake, the President's assertion of executive privilege over the information sought by the Committee should have been expected.

Since at least 1792, when President Washington discussed with his cabinet how to respond to a congressional inquiry into the military debacle that befell General St. Clair's expedition, Presidential claims of a right to preserve the confidentiality of information and documents in the face of legislative demands have figured prominently, though intermittently, in Executive-Congressional relations. The President's assertion of executive privilege in the current matter is consistent with previous assertions of the privilege. It also bears emphasis that this President's assertions of executive privilege have been few in number, have related to his official duties, and, in comparison to a number of prior assertions, have been quite strong.

A review of the various circumstances surrounding invocations over recent decades indicates that for the most part, until the Clinton administration, the assertion of the privilege was reserved for requests for information that involved national security or military information, law enforcement information, or the testimony of White House advisors:

- President Kennedy asserted the privilege twice. The first instance was his direction to the Secretary of Defense not to allow the names of speech writers and educators to be provided to a Senate subcommittee investigating military Cold War education and speech review polities.[225] The second was his direction that his military adviser not testify in front of Congress regarding the Bay of Pigs.[226]

[225] Morton Rosenberg, *Presidential Claims of Executive Privilege: History, Law, Practice and Recent Developments*, CRS Report RL 30319 (July 5, 2007).
[226] *Id.*

- It is believed that President Johnson did not personally invoke executive privilege. However, there are three situations in which executive branch officials refused to comply with congressional requests for information.[227]

- President Nixon asserted the privilege six times in total. Three assertions related to the Watergate investigations (in response to subpoenas from Congress, a grand jury, and in a jury trial), two involved the release of information to congressional committees (one involving law enforcement information from the FBI and the other involving information on military assistance programs), and the sixth was made so that a White House advisor would not testify on a settlement during the Senate's consideration of an Attorney General nomination.[228]

- President Ford invoked the privilege to direct his Secretary of State to withhold documents from Congress during an investigation of recommendations from the State Department to the National Security Council.[229]

- President Carter invoked the privilege to direct his Secretary of Energy to withhold documents related to a petroleum import fee.[230]

- President Reagan asserted the privilege three times. These assertions involved congressional requests for information from the Secretary of the Interior regarding Canadian oil leases, from the Environmental Protection Agency Administrator regarding Superfund enforcement practices, and in memos that former Chief Justice William Rehnquist authored as Assistant Attorney General for the Department of Justice's Office of Legal Counsel, during confirmation proceedings for Justice's Rehnquist's nomination to be Chief Justice of the U.S. Supreme Court.[231]

In contrast, President Clinton made sweeping assertions of executive privilege, many in investigations that alleged improper or illegal behavior by either the President, his First Lady, Hillary Clinton, or his advisors. President Clinton invoked executive privilege fourteen times. Six assertions were related to the Lewinsky investigations, two were related to the Whitewater investigations, one was related to the investigation of false statements made by Secretary Espy, one was related to the White House Travel Office investigation, one involved the Hubbell investigation, and one involved President Clinton's decision to grant clemency to sixteen members of the terrorist group, Armed Forces of National Liberation (FALN). Another two assertions appeared to involve documents related to law enforcement and foreign policy decisions. In more detail, the specific claims of executive privilege made during the Clinton administration, a compiled by the CRS, were as follows:

- In 1995, executive privilege was initially raised by William H. Kennedy, III (former Associate Counsel in the White House Counsel's Office under President Clinton)

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[227] *Id.*
[228] *Id.*
[229] *Id.*
[230] *Id.*
[231] *Id.*

with regard to the investigation of the Special Committee to Investigate Whitewater Development Corporation and Related Matters administered by the Committee on Banking, Housing, and Urban Affairs in the U.S. Senate.

- In 1996, White House Counsel Jack Quinn refused to cooperate with the House Committee on Government Reform's investigation into firings in the White House Travel Office. The Committee ultimately pursued contempt against Mr. Quinn. That contempt resolution was reported out of the Committee, although it did not receive floor consideration.

- Again in 1996, executive privilege was asserted over a FBI-DEA Drug Enforcement Memo sought by the House Judiciary Committee.

- A third assertion in 1996 was for documents related to the Haiti Political Assassination sought by the House International Relations Committee.

- In *In re Grand Jury Subpoena Duces Tecum*, 112 F. 3d 910 (8th Cir. 1997), the President invoked executive privilege, but then withdrew the assertion in the district court. The Court of Appeals then rejected applicability of the common interest doctrine to communications with attorneys from the White House counsel's office and private attorneys for the First Lady.

- In *In re Sealed Case*, 121 F. 3d 729 (D.C. Cir. 1997), the President asserted executive privilege with regard to documents that Congress believed would demonstrate that Mr. Espy made false statements during the course of a background investigation related to his appointment as Secretary of Agriculture.

- In *In re Grand Jury Proceedings*, 5 F. Supp. 2d 21 (D.D.C. 1998), executive privilege was asserted but was held overcome because testimony of close advisors was relevant and necessary to a grand jury investigation of the Lewinsky matter and was unavailable elsewhere.

- In 1997, Thomas "Mack" McLarty claimed the privilege at the direction of the President during the Web Hubbell investigation.

- In 1998, Nancy Hernreich claimed the privilege at the direction of President in the Lewinsky investigation.

- Again in 1998, Sidney Blumenthal claimed executive privilege with regard to the Lewinsky investigation. The claim was rejected by the District Court, *see In re Grand Jury Proceedings,* F. Supp. 2d at 28-29, and dropped on appeal.

- In 1998, executive privilege was also claimed with regards to Cheryl Mills' testimony on the Lewinsky investigation.

- On August 4, 1998, Lanny Breuer claimed executive privilege in regards to the Lewinsky investigation. This assertion was denied by the district court on August 11. *In re Grand Jury Proceeding*, (Unpublished Order) (Under Seal) (August 11, 1998).

- On August 28, 1998, Bruce Lindsey claimed executive privilege with regard to the Lewinsky investigation.

- In 1999, the President invoked executive privilege in relation to the House Government Reform Committee's investigation (specifically in response to the issuance of subpoenas) of the President's decision to grant clemency to sixteen members of the terrorist group FALN.

It is through the prism of the sweeping assertions of executive privilege on a myriad of different fronts made during the last administration that the current administration's assertions of executive privilege should be viewed. As of the time the Committee voted on whether to recommend contempt, President George W. Bush had invoked executive privilege three times, including twice in this current controversy. The first instance was in 2001 in the face of a congressional request seeking law enforcement documents related to the Clinton-era campaign finance investigations. The second was when the President invoked the privilege and directed current and former officials not to produce documents related to the U.S. Attorney matter. The third was when the President directed Ms. Miers and Ms. Taylor not to provide testimony regarding the U.S. Attorney matter. The President's assertions are in keeping with the traditional assertions made prior to President Clinton's tenure, and are more likely to be respected by the courts. The majority's actions are consistent with the Clinton administration's abuse of privilege issues for political purposes, and are less likely to be respected.

VI. Conclusion

The threat that a losing court battle poses to the institutional interests of the Congress, and the fact that no wrongdoing in the U.S. Attorney dismissals has thus far even been remotely proven, strongly counsel against finding Harriet Miers or Joshua Bolten in contempt of Congress. We believe that, at most, the Committee should take the Executive up on its offer of accommodation, allowing this Committee to wrap up its oversight into the resignations of the U.S. Attorneys in the most expeditious manner possible. To be sure, the minority is committed to oversight of the Department of Justice. The current investigation, however, has run its course, producing no evidence of misconduct as it relates to the replacement of U.S. Attorneys. Moreover, evidence has long since begun to emerge that the investigation is unduly compromising the Department's ability to perform its mission of prosecuting cases.[232]

It is thus time to draw this investigation to a close, not to ratchet it up to constitutional proportions. To recur to the late Sir Arthur Conan Doyle, speaking through the figure of his great detective, Sherlock Holmes:

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[232] *See, e.g.*, Richard Schmitt, *US Attorneys Fallout Seeps into the Courts*, Los Angeles Times (Jun. 18, 2007)

> It is one of those cases where the art of the reasoner should be used rather for the sifting of details than for the acquiring of fresh evidence . . . [W]e are suffering from a plethora of surmise, conjecture, and hypothesis. The difficulty is to detach the framework of fact – of absolute undeniable fact – from the embellishments of theorists and reporters. Then, having established ourselves upon this sound basis, it is our duty to see what inferences may be drawn and what are the special points upon which the whole mystery turns.[235]

It is at precisely this type of moment that we find ourselves. The Committee should follow this instructive admonition, and perform the duty it recommends. We have done so, and we have duly concluded that there is no need for a sally at the White House's executive privilege to understand the White House's role in this case. It is because the majority has not so sifted the evidence, or because, if it has, it has refused to accept the conclusion it must draw, that the majority seeks to hound the White House and Ms. Miers through the course of contempt. That is a course that the House as a whole and the people should reject.

LAMAR SMITH.
F. JAMES SENSENBRENNER, JR.
HOWARD COBLE.
ELTON GALLEGLY.
BOB GOODLATTE.
STEVE CHABOT.
DANIEL E. LUNGREN.
CHRIS CANNON.
RIC KELLER.
DARRELL ISSA.
MIKE PENCE.
J. RANDY FORBES.
STEVE KING.
TOM FEENEY.
TRENT FRANKS.
LOUIE GOHMERT.
JIM JORDAN.

[233] Conan-Doyle, Sir Arthur, *Silver Blaze*, reprinted at http://sherlock-holmes.classic-literature.co.uk/silver-blaze/.

Minority Views

APPENDIX

A. Excerpts of Interview of D. Kyle Sampson, April 15, 2007

B. Interview of D. Kyle Sampson, April 18, 2007

C. Interview of D. Kyle Sampson, July 10, 2007

D. Interview of Paul J. McNulty, April 27, 2007

E. Statement of Paul J. McNulty, February 6, 2007

F. Interview of Michael J. Elston, March 30, 2007

G. Interview of William W. Mercer, April 11, 2007

H. Interview of David Margolis, May 1, 2007

I. Interview of Mary Beth Buchanan, June 15, 2007

J. Interview of Michael A. Battle, April 12, 2007

K. Interview of Matthew W. Friedrich, May 4, 2007

L. Interview of Larry Gomez, June 8, 2007

M. Excerpts of Hearings before the House Judiciary Committee and the Senate Judiciary Committee

PART A

Excerpts of Interview of D. Kyle Sampson, April 15, 2007

U.S. SENATE
COMMITTEE ON THE JUDICIARY
Investigation

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In the Matter of: :
PRESERVING PROSECUTORIAL :
INDEPENDENCE: IS THE DEPARTMENT :
OF JUSTICE POLITICIZING THE :
HIRING AND FIRING OF U.S. :
ATTORNEYS? :
- - - - - - - - - - - - - - - - - - -x

Sunday
April 15, 2007

The interview of D. KYLE SAMPSON, Former Chief of Staff to the Attorney General, Department of Justice, was convened, pursuant to notice, at 1:19 p.m. in Room SR-385, Russell Senate Office Building.

APPEARANCES:

PREET BHARARA, ESQ.
Counsel for the Majority
Senate Committee on the Judiciary

MATTHEW S. MINER, ESQ.
Counsel for the Minority
Senate Committee on the Judiciary

ELLIOTT M. MINCBERG, ESQ.
Counsel for the Majority
House of Representatives Committee on the Judiciary

DANIEL M. FLORES, ESQ.
Counsel for the Minority
House of Representatives Committee on the Judiciary

1 of United States Attorneys to resign.

2 Do you recall that the Attorney General made some

3 statements at around the time that you resigned from the

4 Department of Justice saying, in effect, that he had not

5 been involved in the process? Do you recall those

6 statements?

7 MR. SAMPSON: Yes.

8 MR. BHARARA: And do you recall that you have

9 testified that certain of those statements about the

10 Attorney General's involvement were not accurate? Do you

11 recall that testimony?

12 MR. SAMPSON: Yes.

13 MR. BHARARA: I want to ask you some questions

14 about clarifications that the Attorney General has made with

15 respect to his initial statements on March 13th or 14th of

16 2007. The Attorney General, in clarifying what he meant

17 about his involvement, said, "What I meant was that I--I had

18 not been involved, was not involved in the deliberations

19 over whether or not United States Attorneys should resign"

20 and "I was never focused on specific concerns about United

21 States Attorneys as to whether or not they should be asked

22 to resign."

23 I want to ask you about those statements with

24 reference to a few particular cases.

25 First, I want to ask you about Carol Lam. I want

1 to show you a document that I will ask the court reporter to
2 mark as Sampson Exhibit 1, and the Bates number on that
3 document is ASG257.
4 [Sampson Exhibit No. 1 marked
5 for identification.]
6 MR. BHARARA: Mr. Sampson, could you take a look
7 at that document? You will notice that it is an e-mail from
8 you to Bill Mercer, with a cc to Michael Elston, dated June
9 1st of 2006. Is that right?
10 MR. SAMPSON: Yes.
11 MR. BHARARA: The first sentence of that e-mail,
12 you write, "Bill, this relates (certainly in the AG's
13 mind)"--by "AG" you are referring to the Attorney General?
14 MR. SAMPSON: Yes.
15 MR. BHARARA: "This relates...to the e-mail I just
16 sent to Elston, cc to you, re our pressing need to, in the
17 very short term, generate some deliverables on immigration
18 enforcement, and in the long term insulate the Department
19 from criticism by improving our numbers."
20 And then the next sentence says, "AG"--again, the
21 Attorney General--"has given ~~addition~~ additional thought to the SD
22 situation"--I assume that is the San Diego situation.
23 "...has given additional thought to the SD situation and now
24 believes that we should adopt a plan, something like the
25 following..." Do you see that?

1 MR. SAMPSON: Yes.

2 MR. BHARARA: Was it, in fact, the case that the

3 Attorney General had given thought to the situation relating

4 to Carol Lam with reference to the specific issue of

5 immigration enforcement?

6 MR. SAMPSON: That's my recollection. During this

7 time in May and--in April and May and June of 2006, there

8 had been discussions in the senior management offices of the

9 Department about immigration enforcement, and there had been

10 a specific discussion about the immigration enforcement

11 efforts in the U.S. Attorney's Office in San Diego.

12 MR. BHARARA: I want to take you through a couple

13 of the bullet points in that e-mail. Number one is, "Have a

14 heart-to-heart with Lam about the urgent need to improve

15 immigration enforcement in San Diego." Do you see that?

16 MR. SAMPSON: Yes.

17 MR. BHARARA: The second is, "Work with her to

18 develop a plan for addressing the problem, to include

19 alteration of prosecution thresholds, additional DOJ

20 prosecutors, additional DHS SAUSA resources." Is that

21 Special Assistant U.S. Attorney resources?

22 MR. SAMPSON: Yes.

23 MR. BHARARA: Number three, "Put her on a very

24 short leash." What do you understand the Attorney General

25 to have meant by a plan that would include putting her on a

1 very short leash?

2 MR. BERENSON: Preet, I am not sure we have

3 established that that specifically was the Attorney

4 General's formulation or language.

5 MR. BHARARA: Well, let me ask you the question.

6 In the preamble to those bullet points, you write, "The AG

7 has given additional thought to the SD situation and now

8 believes that we should adopt a plan, something like the

9 following..." Was it the Attorney General's intent through

10 you to cause the creation of a plan that included putting

11 Carol Lam, colloquially, on a very short leash?

12 MR. SAMPSON: What I remember is that the Attorney

13 General was very concerned about immigration enforcement and

14 was very concerned based on information he'd received about

15 the performance of the U.S. Attorney's Office in San Diego.

16 And reviewing this e-mail reminds me that he had spoken with

17 me and others about his concern about that.

18 I don't recall specifically whether these ideas in

19 these five bullets were his or mine. I can speculate. I

20 think they're a combination of his ideas and my ideas. And

21 I believe, to the best of my recollection, I offered them up

22 to Mr. Mercer as a way to prod a response from him about how

23 action might be taken here.

24 MR. BHARARA: But at a minimum, is it fair to say,

25 based on your recollection being refreshed from this e-mail,

1 that the Attorney General was focused on a specific concern
2 of immigration enforcement in San Diego?
3 MR. SAMPSON: Yes.
4 MR. BHARARA: Okay. The next bullet says, "If she
5 balks on any of the foregoing or otherwise does not perform
6 any measurable way by July 15--my date--remove her." Do you
7 see that?
8 MR. SAMPSON: Yes.
9 MR. BHARARA: Was it part of the Attorney
10 General's plan generally that if Ms. Lam did not perform in
11 a measurable way that she should be removed?
12 MR. SAMPSON: I don't remember specifically. I
13 remember he was very concerned about her office's
14 performance, or lack thereof, with regard to immigration
15 enforcement.
16 MR. BHARARA: Let me ask you this: Did you have
17 conversations prior to the sending of this e-mail with the
18 Attorney General about the specific situation in San Diego?
19 MR. SAMPSON: I believe so.
20 MR. BHARARA: As part of those conversations,
21 would you have written an e-mail that part of the plan
22 should be to remove her without that having been part of
23 your conversation with the Attorney General? In other
24 words, would you have taken the liberty to write as part of
25 the plan--that appears to have been suggested by the

1 Attorney General--removal without having had such a
2 conversation with the Attorney General?
3 MR. SAMPSON: I really don't remember. I remember
4 general discussions in the senior leadership of the
5 Department among Mr. Mercer and Mr. Elston and myself and
6 others, and the substance of those conversations were that
7 Carol Lam has got to go, her performance in that office is a
8 problem for the Department of Justice with regard to gun
9 enforcement and at this time immigration enforcement.
10 It may very well be that the Attorney General was
11 a party to those conversations. I think he was, or at least
12 he knew the general sense of the leadership of the
13 Department. But I don't have a specific memory of him
14 saying, you know, "Put her on a short leash or she will have
15 to be removed." I don't remember that.
16 MR. BHARARA: Take a look at the last bullet. It
17 says, "The AG then appoints a new U.S. Attorney (USA) from
18 outside the office." Does that refresh your recollection on
19 whether or not there was a discussion with any degree of
20 particularity with the Attorney General about whether or not
21 Carol Lam, if she didn't improve her performance, would be
22 removed?
23 MR. SAMPSON: It really doesn't. That could have
24 just been me--the discussion that was going on at this time,
25 to the best of my recollection, was that that office just

1 needed to change the way it approached immigration
2 enforcement. And so I may have just suggested that it
3 needed to be a U.S.--someone from outside the office
4 appointed in order to shake things up in that office. I
5 just don't remember specifically talking to the Attorney
6 General at that level of specificity.
7 MR. BHARARA: You will see the last part of that
8 e-mail, you request that Bill Mercer "prepare to present
9 such a plan to the AG tomorrow or early next week for his
10 approval and execute the plan next week." Do you see that?
11 MR. SAMPSON: I do.
12 MR. BHARARA: Was that ever done, by the way?
13 MR. SAMPSON: I don't think so. I remember having
14 some frustration that the Deputy's office had not been
15 responsive to this request.
16 MR. BHARARA: Could you take a look at another
17 document I'm going to hand to you, which I will ask the
18 court reporter to mark as ASG329--I mean, it is ASG329. We
19 will mark it as Sampson Exhibit 2.
20 [Sampson Exhibit No. 2 marked
21 for identification.]
22 MR. BHARARA: Did you take a look at the document?
23 MR. SAMPSON: Yes.
24 MR. BHARARA: That is what appears to be a
25 calendar entry for a meeting on June 5, 2006. The title of

1 discussions and concerns about her office's performance
2 formed the basis for Ms. Lam being added to the list of U.S.
3 Attorneys who would be asked to resign in December of 2006,
4 which list was ultimately approved by the Attorney General.
5 So I guess what I think, to the best of my
6 recollection, is he was sort of generally--he was certainly
7 aware of the concerns about Carol Lam, and he was generally
8 aware about the notion that she would be added to a list of
9 U.S. Attorneys who might be considered to be asked to
10 resign.
11 So taken in that context, as you read it to me,
12 that statement seems inaccurate.
13 MR. BHARARA: Okay. And--
14 MR. SAMPSON: Or at least not complete.
15 MR. BHARARA: And just two more questions on it.
16 And so fair to say that the Attorney General was involved in
17 discussing specific concerns about the U.S. Attorney's
18 Office in San Diego? Is that right?
19 MR. SAMPSON: Yes.
20 MR. BHARARA: All right. And those specific
21 concerns in this case was an alleged issue with respect to
22 immigration enforcement?
23 MR. SAMPSON: Yes.
24 MR. BHARARA: So the other part of that statement
25 from the Attorney General that "I was never focused on

1 specific concerns about United States Attorneys as to
2 whether or not they should be asked to resign," based on
3 what you understand to be true and what we have discussed,
4 is that an accurate statement with respect to Carol Lam?
5 MR. SAMPSON: I don't know how to speak to what he
6 was focused on or not. I mean, I was focused on it. I
7 guess he wasn't. But based on what I observed, he was aware
8 of the concerns about Carol Lam, and ultimately he
9 understood that she was asked to resign as a result of those
10 concerns.
11 MR. BHARARA: Okay. I want to ask you about David
12 Iglesias. You had conversations specifically about David
13 Iglesias with the Attorney General. Is that right?
14 MR. SAMPSON: Yes.
15 MR. BHARARA: In fact, during your testimony on
16 March 29th in front of the Senate Judiciary Committee, I
17 believe you testified that, "I do remember learning, I
18 believe, from the Attorney General that he had received a
19 complaint from Karl Rove about U.S. Attorneys in three
20 jurisdictions, including New Mexico, and the substance of
21 the complaint was that those U.S. Attorneys weren't pursuing
22 voter fraud cases aggressively enough."
23 Do you recall that testimony?
24 MR. SAMPSON: Yes.
25 MR. BHARARA: And do you stand by that testimony?

1 MR. SAMPSON: I do.

2 MR. BHARARA: The reference to New Mexico, would

3 that be a reference to the United States Attorney in New

4 Mexico, David Iglesias?

5 MR. SAMPSON: I understood the complaint from Mr.

6 Rove to the Attorney General to be about three U.S.

7 Attorneys--U.S. Attorneys in three districts, including New

8 Mexico. So I understood that to be about David Iglesias.

9 MR. BHARARA: There is only one U.S. Attorney in

10 New Mexico, right?

11 MR. SAMPSON: Yes.

12 MR. BHARARA: Okay. Do you remember what the

13 other two districts ~~are~~ were?

14 MR. SAMPSON: I do.

15 MR. BHARARA: And what were they?

16 MR. SAMPSON: It was the U.S. Attorney in

17 Philadelphia--

18 MS. BURTON: I object to this. Unless they were

19 U.S. Attorneys who were removed, I think this is an area--

20 MR. BHARARA: We do not have an agreement as to

21 scope with the Department of Justice with respect to this

22 interview, so--

23 MS. BURTON: It is the Department's position that

24 this interview--that the same scope limitations that applied

25 to the others apply to this insofar as talking about

1 individuals who were considered for removal but not removed.
2 MR. BHARARA: Ms. Burton, there is no agreement as
3 to scope, even with respect to the interviews with the
4 Department of Justice officials, as we made abundantly clear
5 at the last two meetings. The Department has a position,
6 and the Committee's investigators have a position. And with
7 respect to this witness, if he is prepared to answer the
8 question, I would ask that the witness answer the question.
9 MS. BURTON: And I am stating the Department's
10 position with regard to this subject area and the
11 Department's objection that by putting this information on
12 the record, it lays a foundation for it to become public,
13 and that's the Department's objection. That is the basis
14 for the Department's objection as set forth in our letters
15 of March 27th and April 13th. We have concerns about the
16 disclosure of this information.
17 MR. BHARARA: Can I just say two things?
18 Number one, your objection is noted. We don't
19 agree with it.
20 Number two, I believe it is the case with respect
21 to this particular question, this information was revealed
22 by Dan Bartlett nationally on television in speaking about
23 Philadelphia and Milwaukee. So I don't know what the
24 particular concern is here. I am trying to--
25 MR. MINCBERG: And let me add, third, that Mr.

1 MR. SAMPSON: It may have. I don't remember
2 specifically, but it may very well have.
3 MR. BHARARA: Did you have any other conversations
4 with the Attorney General about Mr. Iglesias?
5 MR. BERENSON: Ever, on any subject?
6 MR. BHARARA: On any complaints having to do with
7 Mr. Iglesias.
8 MR. SAMPSON: I remember learning that he had
9 received some calls from Senator Domenici complaining about
10 Mr. Iglesias. I'm not sure I remembered that at the time in
11 September, October, November of 2006, but, you know, in
12 preparing for this and reviewing documents, I came to be
13 reminded of that. And towards the end of the process, of
14 course, as I stated in my testimony, the Attorney General
15 was briefed and approved the list and approved the idea of
16 going forward and asking these U.S. Attorneys to resign.
17 MR. BHARARA: I got you. And do you know what the
18 specific concerns raised by Mr. Domenici with respect to Mr.
19 Iglesias were?
20 MR. SAMPSON: I don't remember knowing that. I
21 don't know that I ever knew that.
22 MR. BHARARA: But with--
23 MR. SAMPSON: Well, let me say this: I remember
24 hearing, again--and I don't remember whether I heard this at
25 the time the calls came in or in October of 2006 or after

1 this controversy arose. But I remember learning that
2 Senator Domenici had complained that Iglesias was not up to
3 the job and in over his head. But, again, I'm not sure when
4 I learned that. And I didn't hear that from Senator
5 Domenici. I heard that, you know, reported from the
6 Attorney General.
7 MR. BHARARA: So based on your understanding, at a
8 minimum the Attorney General had heard complaints about Mr.
9 Iglesias from both Karl Rove and Senator Domenici from New
10 Mexico. Is that right?
11 MR. SAMPSON: Yes.
12 MR. BHARARA: All right. And then he ultimately
13 approved, did he not, the decision to ask Mr. Iglesias to
14 resign?
15 MR. SAMPSON: He did.
16 MR. BHARARA: So let me just back to a statement
17 made by the Attorney General, which was a clarifying
18 statement, and ask you based on what you just told us you
19 believe it was an accurate statement. "I was never focused
20 on specific concerns about United States Attorneys as to
21 whether or not they should be asked to resign." Is that an
22 accurate statement based on your knowledge and understanding
23 of the situation with respect to David Iglesias?
24 MR. SAMPSON: Again, I don't know how to speak to
25 what he was focused on. I am just not sure what he was

1 MR. BHARARA: Do you see that document?
2 MR. SAMPSON: Yes.
3 MR. BHARARA: Have you had a chance to look at it?
4 MR. SAMPSON: I have.
5 MR. BHARARA: Okay. It is an e-mail from--well,
6 it is an e-mail chain, the first of which is on May 31 from
7 you to Bill Mercer. Is that right?
8 MR. SAMPSON: Yes.
9 MR. BHARARA: Do you remember writing that e-mail?
10 MR. SAMPSON: I don't really have any specific
11 recollection of it, but I believe I did.
12 MR. BHARARA: Okay. You have a series of
13 questions in that e-mail, the first of which is: "Has
14 ODAG"--is that the office of the Deputy Attorney General?
15 MR. SAMPSON: Yes.
16 MR. BHARARA: Has ODAG ever called Carol Lam and
17 woodshedded her re immigration enforcement? Has anyone?"
18 What is the response you get from Bill Mercer?
19 MR. SAMPSON: "I don't believe so. Not that I'm
20 aware of."
21 MR. BHARARA: Could you explain what you meant to
22 communicate by "woodshedded"?
23 MR. SAMPSON: I understood that, as I mentioned
24 before, in April and May of 2006, there had been a
25 discussion in the senior management offices of the

1 Department, primarily the Attorney General's office and the
2 Deputy Attorney General's office, about the issues and
3 concerns related to immigration enforcement in the Southern
4 District of California. And I understood that the Attorney
5 General had asked the Deputy Attorney General to focus on
6 that to see what could be done to improve immigration
7 enforcement in that office. This was a time when
8 comprehensive immigration reform legislation was being
9 debated, when Hispanics were marching in the streets, when
10 the President ordered the National Guard to the border, and
11 the Attorney General was concerned. Everywhere he went and
12 spoke, people asked questions of him as a Mexican American,
13 what his views were on immigration, and conservatives,
14 frankly, were really being very critical about the
15 Department's immigration enforcement efforts.
16 And my recollection is that sometime in April ~~of~~ or
17 May, the Attorney General had specifically tasked the Deputy
18 Attorney General's office with working with the San Diego
19 U.S. Attorney's Office to improve immigration enforcement
20 there, and I believe that this e-mail from me--I don't
21 remember it specifically--was following up on that, was
22 following up to see if the Deputy's office had taken any
23 action as directed by the Attorney General.
24 MR. BHARARA: And the answer you got was no.
25 MR. SAMPSON: That's right.

1 MR. BHARARA: And it was case--as far as you
2 understand, did anyone at the Department of Justice ever
3 specifically relate to Carol Lam any Department of Justice
4 concerns about the way she was handling immigration
5 enforcement?
6 MR. SAMPSON: Well, in reviewing documents for
7 this, I believe that at some point Bill Mercer prepared a
8 memorandum that he sent to Ms. Lam and asked her to respond
9 to. But I don't think I had knowledge of that at the time.
10 I don't really remember that specifically.
11 MR. BHARARA: I want to ask you about that memo.
12 If you could take a look at a document that I will ask the
13 court reporter to mark as Sampson No. 5. The Bates number
14 is DAG2442.
15 I am sorry. It is a three-page document, 2440
16 through 2442.
17 [Sampson Exhibit No. 5 marked
18 for identification.]
19 MR. BHARARA: If you would just focus on the third
20 page of the document, DAG2442, you will see at the bottom of
21 that page there is an e-mail from Will Moschella to Bill
22 Mercer dated March 5th of 2007. Am I correct that that was
23 the day before Will Moschella was scheduled to testify in
24 the House?
25 MR. SAMPSON: I think that's right.

1 MR. BHARARA: And he asked Bill Mercer an
2 important question: How do we communicate to Carol our
3 displeasure with her immigration numbers? And you will see
4 the response is that Bill Mercer said he sent her a memo in
5 2006, to which apparently she responded, and let me read the
6 last sentence of Bill Mercer's response. "She responded
7 after I left the Office of the Deputy Attorney General, but
8 it seemed like mumbo-jumbo when I heard about it." And what
9 is Will Moschella's response? I mean, he forwards that e-
10 mail then to Daniel Fridman at the Office of the Deputy
11 Attorney General, and what is his response?
12 MR. SAMPSON: What is Moschella's response?
13 MR. BHARARA: Moschella's response.
14 MR. SAMPSON: It appears to be three question
15 marks.
16 MR. BHARARA: Do you have any understanding of
17 what that signified about Mr. Moschella's response or
18 reaction to the statement by Bill Mercer about whether or
19 not Ms. Lam had received communications about unhappiness
20 about how she was conducting her immigration enforcement?
21 MR. SAMPSON: Well, I am not a party to these e-
22 mails, but I can speculate. Do you want me to give you my
23 best guess?
24 MR. BHARARA: Are you familiar with Will Moschella
25 and are you familiar with the circumstances surrounding Ms.

1 and provide assurances that none of the U.S. Attorneys had
2 been asked to resign to influence a case for improper
3 political reasons; and that the position of the
4 administration was going to be to hold that line.
5 And I just thought that if Mr. Cummins testified,
6 he would inevitably cross that line, and I understood that
7 Mr. Cummins had declined to testify and was asking whether,
8 if given the choice, the Department thought he should
9 testify. And my view was that, given the choice, he should
10 not testify.
11 MR. BHARARA: At the time you wrote that e-mail on
12 February 1st, what was your understanding of the reason why
13 Mr. Cummins had been asked to resign?
14 MR. SAMPSON: I understood that Mr. Cummins had
15 appeared on--had been listed as someone we might consider
16 asking to resign because he had not so distinguished himself
17 as being someone who wouldn't be on the list of people we
18 might ask to resign, and also that the White House had
19 inquired as to whether a place could be made for Tim Griffin
20 to be appointed and have the opportunity to serve as United
21 States Attorney.
22 MR. BHARARA: Were those equal reasons?
23 MR. SAMPSON: In my mind, they were first--the
24 first one was necessary. If Mr. Cummins had been--it was my
25 belief that if Mr. Cummins had been a star performer U.S.

1 Attorney and the White House asked, you know, if the
2 Department would be fine with asking him to resign to make
3 way for someone else, the Department would have said no to
4 that. And so I thought they were sort of the two-step
5 reasons. The first one was necessary before the second one
6 could even be considered.
7 MR. BHARARA: So are you saying that had Bud
8 Cummins not--withdrawn.
9 Are you saying that the interest in appointing Tim
10 Griffin or appointing someone else to replace Bud Cummins
11 was not the sole reason for Mr. Cummins being asked to
12 resign?
13 MR. SAMPSON: To my knowledge, in my mind, it was
14 not the sole reason.
15 MR. BHARARA: And so to the extent there is
16 another reason, that other reason, are you saying, is based
17 on his performance as a U.S. Attorney?
18 MR. SAMPSON: In my view, yes.
19 MR. BHARARA: And do you understand that or is it
20 your recollection that Mr. McNulty testified on February 6th
21 of 2007 before the Senate Judiciary Committee that the sole
22 reason Mr. Cummins was asked to resign was to provide an
23 opportunity for another person to serve in that spot?
24 MR. SAMPSON: It's my understanding that that is
25 how he testified now. I didn't come to realize that until

1 Selection Committee.

2 Mr. Rove participated--my experience and

3 observation was that Mr. Rove participated in Judicial

4 Selection Committee maybe half the time in the first term,

5 and then almost never in the second term.

6 MR. BHARARA: Do you have any understanding as to

7 why his participation fell off in the second term?

8 MR. SAMPSON: I don't know.

9 MR. BHARARA: Okay. I want to show you a document

10 now that I will ask the court reporter to mark as Sampson

11 Exhibit 9. Those documents are Bates number--it is a two-

12 page document Bates numbered OAG32 to 33.

13 [Sampson Exhibit No. 9 marked

14 for identification.]

15 MR. BHARARA: Take a moment to look at that

16 document, please.

17 [Witness perusing document.]

18 MR. SAMPSON: Okay.

19 MR. BHARARA: You will see again, this is--not

20 "again." I am sorry. The first page, OAG32, is an e-mail

21 from you to Harriet Miers. Is that right?

22 MR. SAMPSON: Yes.

23 MR. BHARARA: And it's dated September 13, 2006.

24 Is that right?

25 MR. SAMPSON: Yes.

1 MR. BHARARA: And could you just describe
2 generally what this document is and what the intent of this
3 document is?
4 MR. BERENSON: Preet, I think it is from Harriet
5 Miers to Kyle, not the other way around.
6 MR. BHARARA: On OAG32--
7 MR. BERENSON: Is 32 the second page?
8 MR. BHARARA: 32 is the first page.
9 MR. BERENSON: Oh, I am sorry. The first page.
10 MR. SAMPSON: I think it is an e-mail in response
11 to Harriet Miers' inquiry to me.
12 MR. BHARARA: Right. And what was her inquiry to
13 you?
14 MR. SAMPSON: It was twofold: first, any current
15 thinking on holdover U.S. Attorneys; and, second, any recent
16 word on a particular U.S. Attorney's intentions.
17 MR. BHARARA: And do you understand why she was
18 making that inquiry?
19 MR. SAMPSON: Well, as I testified, starting in
20 early 2005, there was an inquiry as to whether all United
21 States Attorneys should be replaced. I thought that was
22 unwise, as did others, and a general determination was made
23 ~~identifying~~ to identify a subset of U.S. Attorneys who, for whatever
24 reason, were underperforming in that general sense, that a
25 subset of such U.S. Attorneys could be identified for

1 consideration for asking them to resign sometime after their
2 4-year terms had expired. And that process bumped along in
3 an episodic way without any real traction, and I understood
4 that Ms. Miers was asking me where things stood on that in
5 this e-mail.
6 MR. BHARARA: And what is the substance of your
7 response and how you prepared your response?
8 MR. SAMPSON: I gave her the breakdown of all the
9 U.S. Attorneys, where things stood. She had inquired about
10 a specific U.S. Attorney, and so I responded to that. And
11 then the summary response that I gave her was as stated here
12 in the--
13 MR. BHARARA: Okay. Take a look at the summary
14 for a moment. Could you just read aloud the first two
15 sentences of the summary?
16 MR. SAMPSON: "I am only in favor of executing on
17 a plan to push some USAs out if we really are ready and
18 willing to put in the time necessary to select candidates
19 and get them appointed. It would be counterproductive to
20 DOJ operations if we push USAs out and then don't have
21 replacements ready to roll immediately."
22 MR. BHARARA: Could you also read the next
23 sentence?
24 MR. SAMPSON: "In addition, I strongly recommend
25 that, as a matter of administration policy, we utilize the

1 new statutory provisions that authorize the AG to make USA
2 appointments."
3 MR. BHARARA: Why were you so concerned about
4 proceeding with a plan without having candidates at the
5 ready?
6 MR. SAMPSON: What I remember is feeling that the
7 judicial selection process and the adjunct to that, which
8 was the U.S. Attorney selection process, was getting sclerotic, that
9 it was hard to get decisions out of the Counsel's office.
10 And so to the best of my recollection, I was kind of
11 pounding on the table saying, you know, you asked me what
12 our views are with holdover U.S. Attorneys and if we're
13 going to move forward with that idea of identifying some
14 U.S. Attorneys who might be asked to resign. But my
15 comeback is, look, we can do that but only if you're serious
16 about it.
17 MR. BHARARA: And what precisely did you mean to
18 say by--what was it that you wanted to have done as a matter
19 of administration policy?
20 MR. SAMPSON: As I said in my testimony, I
21 recommended this course of action, to use the Attorney
22 General's appointment authority and not deal with Senators.
23 And that was a bad staff idea that was rejected.
24 MR. BHARARA: I think you were asked some
25 questions about this by--I think you were asked some

1 he wanted you to find other possible candidates for the
2 Eastern District of Arkansas consistent with working in good
3 faith with the Arkansas senators?
4 MR. SAMPSON: The direction I remember him giving
5 was that arrangements be made for Mr. Griffin to meet with
6 Senator Pryor.
7 MR. BHARARA: Did you when you wrote this
8 December 19th email about gumming the process, running out
9 the clock, did you believe in your own mind that you were
10 acting inconsistently with what you understood the Attorney
11 General wanted you to be doing?
12 MR. SAMPSON: I don t remember.
13 MR. BHARARA: Was it your standard practice to
14 act in a way that was blatantly inconsistent with what you
15 understood the Attorney General s directions to you to be?
16 MR. SAMPSON: It wasn t, but I guess in
17 retrospect, I regret this email. It was an email, and it
18 was dashed off, you know, quickly. I don t remember sitting
19 there thinking what is the Attorney General s state of mind.
20 MR. BHARARA: Maybe this will be my last
21 question. Not withstanding what you understood the Attorney
22 General to be intending, and not withstanding what you heard
23 the Attorney General say with Senator Pryor, you wrote this
24 email when it was your standard practice not to go against
25 the directions and instructions of the Attorney General, is

1 that right?

2 MR. SAMPSON: I think what I have testified to is

3 that I understood that the Attorney General, I believed that

4 he was sincere in his conversation with Senator Pryor. I

5 also wasn t sure that he had rejected the bad staff idea.

6 MR. BHARARA: How were those consistent with each

7 other?

8 MR. SAMPSON: Well, they are consistent with each

9 other because it might be the case that Senator Pryor would

10 meet with ~~Senator Griffin, with~~ Tim Griffin, and decide to

11 support him for nomination and confirmation. That was the

12 hope.

13 MR. BHARARA: I want to fast forward to January

14 of 2007 and ask you whether or not you are aware of the

15 Attorney General having conversations with Senator Feinstein

16 about issues of the appointment of United States attorneys

17 in California.

18 MR. SAMPSON: I don t remember. Sitting here

19 right now, I can t remember if he did.

20 MR. BHARARA: Okay. Let me -

21 MR. SAMPSON: I m looking at Senator Feinstein s

22 counsel. I think he must have. Just sitting here right

23 now, I can t remember.

24 MR. BHARARA: It s not a memory test. I m going

25 to show you a document. I ve got a lot of documents. I m

1 going to show you a document. I believe some weeks ago I
2 provided that email to your counsel - provided it to your
3 counsel.
4 It is an email dated January 17th of 2007, I
5 believe. We ll mark it was Sampson Exhibit 11.
6 [Sampson Exhibit No. 11 marked
7 for identification.]
8 MR. BHARARA: Have you had a chance to look at
9 the document?
10 MR. SAMPSON: Yes.
11 MR. BHARARA: I just want to ask you a couple of
12 questions about it. The last email of the series is one
13 between you and Jennifer Duck, who is, as you understand it,
14 Chief Counsel to Senator Feinstein, is that right?
15 MR. SAMPSON: yes.
16 MR. BHARARA: And it is cc d to Richard Hertling,
17 who is the Acting - what was his position at the time?
18 MR. SAMPSON: Acting Assistant Attorney General
19 for the Office of Legislative Affairs.
20 MR. BHARARA: What was the purpose of your
21 sending this email to Ms. Duck?
22 MR. SAMPSON: I had ~~forgot~~ forgotten about this until you
23 all provided the email to us, and I even forgot about it
24 again here today.
25 But my understanding was that, my best

1 conclusively establish as much.

2 That last bullet point, am I correct that you made

3 it a point that it was not true that the administration

4 intended to go around the Senate and avoid confirmation of

5 U.S. attorneys, is that right?

6 MR. SAMPSON: Yes, that s what the email says.

7 MR. BHARARA: And am I also correct that at the

8 time you wrote this email, that you had still not gotten

9 this specific rejection from the White House Counsel s

10 Office or anyone else at the White House about the staff

11 plan that you described, whose purpose was to go around the

12 Senate and do exactly that, avoid confirmation of U.S.

13 attorneys?

14 MR. SAMPSON: My recollection, as I testified on

15 March 29th, I think, I don t remember getting specific

16 rejection from the White House about that bad staff plan

17 with regard to the Eastern District of Arkansas.

18 As I said before, with regard to every other

19 district, that bad staff plan never went anywhere. But with

20 regard to the Eastern District of Arkansas, there were

21 discussions with White House staffers about that bad staff

22 plan.

23 I don t remember any specific rejection of that

24 from the White House.

25 MR. BHARARA: Okay. I am going to move onto

1 another topic.

2 MR. SAMPSON: I do remember that the Attorney

3 General rejected that specifically sometime before this

4 January 17th time frame.

5 I remember having a conversation with him where I

6 said look, there are some people at the White House that

7 think that we should stay behind Griffin and just leave him

8 in there.

9 My recollection is the Attorney General rejected

10 that. I remember him saying, you know, they can take that

11 up to the President then if that s their view, but my view

12 is that we should not go that way.

13 MR. BHARARA: But am I right, it s the White

14 House that makes nominations, correct?

15 MR. SAMPSON: The President nominates people.

16 MR. BHARARA: Right. And so people in the White

17 House, in other words, the White House counsel has an

18 important role in determining who the nominees should be for

19 these attorney positions, correct?

20 MR. SAMPSON: Yes.

21 MR. BHARARA: And so -

22 MR. SAMPSON: If I may?

23 MR. BHARARA: Yes.

24 MR. SAMPSON: There had been turnover in the

25 White House counsel position at this time. And so my

1 recollection is that the Attorney General s view was that s
2 a bad staff plan, we re not going to go that way, and there
3 wasn t, you know, there wasn t anyone higher than a White
4 House staff person that was advocating for that. So he was
5 not concerned about his rejection of that idea, even though
6 it is the President that makes the nominations.
7 MR. BHARARA: You mentioned a minute ago I
8 believe, correct me if I m wrong, that you told the Attorney
9 General that there were some people who believed that you
10 should stand behind, the administration should stand behind
11 Tim Griffin.
12 Did you mean by that to suggest that there were
13 people who believed that the bad staff plan as you described
14 it, should be pursued?
15 MR. SAMPSON: Yes.
16 MR. BHARARA: Who are those people?
17 MR. SAMPSON: I understood them to be Chris
18 Oprison, who is an Associate Counsel to the President, Scott
19 Jennings, who was a Special Assistant to the President in
20 the Office of Political Affairs, and Sarah Taylor, who was
21 the Director of the Office of Political Affairs.
22 MR. BHARARA: So at all times prior to the
23 Attorney General s rejection of the plan to avoid
24 confirmation, Senate confirmation for U.S. ~~attorneys~~ Attorneys -
25 Eastern Division of Arkansas, Chris Oprison, Scott Jennings,

1 and Sarah Taylor were all in favor of the plan that you
2 described to bypass the homestate senators?
3 MR. SAMPSON: I m sorry. Could you just state
4 that again? I just didn t follow it.
5 MR. BHARARA: Could the court reporter read the
6 question back?
7 MR. SAMPSON: That would be helpful.
8 [Whereupon, the question was read back.]
9 MR. BHARARA: Let me ask you a different way. At
10 the time that the Attorney General specifically rejected the
11 plan to bypass homestate senators with respect to the U.S.
12 Attorney position in the Eastern District of Arkansas, who
13 remained in favor of that plan?
14 MR. SAMPSON: Based on my knowledge and
15 impressions, it was Sarah Taylor, Scott Jennings, and
16 perhaps Chris Oprison who may have just been reflecting
17 their views. I m not 100 percent sure.
18 MR. BHARARA: What about at the Justice
19 Department? Off the record.
20 [Off the record.]
21 MR. BHARARA: I asked you what about in the
22 Justice Department.
23 MR. SAMPSON: I mean, I think it would be fair to
24 say that I was open to the idea, and I believe Monica
25 Goodling also.

1 MR. BHARARA: What about Paul McNulty?
2 MR. SAMPSON: I don t know.
3 MR. BHARARA: What about Mike Elston?
4 MR. SAMPSON: I don t know.
5 MR. BHARARA: What about Will Moschella?
6 MR. SAMPSON: I don t know.
7 MR. BHARARA: What about David Margolis?
8 MR. SAMPSON: I don t know.
9 MR. BHARARA: Anyone else at the Justice
10 Department who had an opinion one way or the other?
11 MR. SAMPSON: Not that I know of.
12 MR. BHARARA: Do you know with respect to the
13 White House, specifically whether or not Harriet Miers was
14 in favor of the plan, even at the time the Attorney General
15 rejected the plan?
16 MR. SAMPSON: I don t know. I believe she had
17 left, was gone by that time.
18 MR. BHARARA: By January 17th of 2007?
19 MR. SAMPSON: I thought she left in December, but
20 I could be wrong.
21 MR. BHARARA: I m told that she was there until
22 January 31st. Either way, you don t know?
23 MR. SAMPSON: The answer is I don t know.
24 MR. BHARARA: Do you know specifically about
25 whether or not Karl Rove had any idea about the plan?

1 MR. SAMPSON: I don t know

2 MR. BHARARA: Did you ever discuss with Sarah

3 Taylor, Scott Jennings, or anyone else whether or not Mr.

4 Rove had any knowledge of a plan to help keep Tim Griffin

5 office by avoiding the homestate senators?

6 MR. SAMPSON: I don t remember ever having any

7 such conversation.

8 MR. BHARARA: Okay. After you stated that the

9 Attorney General specifically rejected the plan, did you

10 communicate that rejection to anyone?

11 MR. SAMPSON: My recollection is the way that it

12 was communicated was in the draft letter, I believe to Senator

13 Feinstein, where for the first time that language was used

14 that the administration is committed to having a Senate

15 confirmed U.S. attorney in every federal district.

16 MR. BHARARA: That was the first time that

17 language was used in a letter to a member of Congress you re

18 saying?

19 MR. SAMPSON: I think so. To the best of my

20 recollection.

21 MR. BHARARA: Do you recall if the Attorney

22 General had ever used language to that effect in his

23 conversations a month earlier with Senator Pryor?

24 MR. SAMPSON: I don t remember.

25 MR. BHARARA: Did you communicate the Attorney

1 General s objection of that plan internally to anyone at the
2 Justice Department?
3 MR. SAMPSON: As I said, it was teed up in the
4 drafting of that response to Senator Feinstein s letter. So
5 I don t have a specific recollection, but the standard
6 practice would be to circulate it for comment at the
7 Department of Justice, and I remember circulating it for
8 comment to the White House because it involved -
9 MR. BHARARA: Here s what I m asking. Separate
10 and apart from having other people at the White House or the
11 Justice Department learn about the rejection of the plan by
12 inference from reading a letter that was being sent to a
13 Senator, did you specifically have a conversation with
14 anyone at the Justice Department or at the White House to
15 indicate that the Attorney General had rejected the plan?
16 MR. SAMPSON: I don t remember specifically, but
17 I think I did. We drafted the letter and circulated it
18 widely, and I remember - I don t remember really having
19 discussions with people at the Department of Justice about
20 it, but I do remember - I remember one conversation with
21 Sarah Taylor, and I think I remember one conversation with
22 Bill Kelly where that letter was drafted and there was a
23 discussion about that. I said, these are the Attorney
24 General s views.
25 MR. BHARARA: Do you remember if there was ever a

1 communication that you had with Bill Kelly to indicate that
2 he was aware of the idea of bypassing homestate senators in
3 favor of, in a way that would keep Tim Griffin in office
4 until President Bush s term ended?
5 MR. SAMPSON: I think he was aware of that, but I
6 don t remember a specific conversation.
7 MR. BHARARA: Okay. I want to ask you, do you
8 recall when you notified other people of the Attorney
9 General s rejection of the plan, what the reaction was?
10 Either one of disappointment, acceptance, or agreement?
11 MR. SAMPSON: I remember that Sarah Taylor was
12 not happy about that. But again, I remember the Attorney
13 General saying if anyone wants to take that up with the
14 President, they can do that. These are my views.
15 That s the only memory that I have of anyone being
16 not pleased with that issue.
17 MR. BHARARA: How about Monica Goodling? Do you
18 recall any conversation with her about her being displeased
19 about the Attorney General s objection?
20 MR. SAMPSON: I don t remember specifically. I m
21 sure we talked about it, and I don t remember her being
22 displeased. I think she understood that to be the Attorney
23 General s determination.
24 MR. BHARARA: Okay. I want to move onto a
25 different line of questions.

1 You testified on March 29th that you kept files
2 relating to the issue that we re discussing here today in a
3 drop file. Can you describe again where you were keeping
4 those files?
5 MR. SAMPSON: I think I also testified that it is
6 maybe too much to call it a file. I don t know that I have
7 much to add from my testimony.
8 MR. BHARARA: Okay. I just want to explore a
9 couple of details about what you had, where it was, and what
10 became of it, if there is anything more you can add.
11 Why don t you finish answering the first question,
12 and then I ll ask you a second.
13 MR. SAMPSON: Well, as I said at my hearing, the
14 Executive Office of U.S. Attorneys, EOUSA, kept a chart that
15 they would update periodically of all of the United States
16 attorneys.
17 When they had been appointed, their name, the
18 district, and when their term expired. That would get you
19 through about 70 districts, and there would be about 20
20 districts that were in states of flux where there was a
21 vacancy or an interim or people had been interviewed, and so
22 the chart kept track of that.
23 I got that chart every time it was updated,
24 somebody would email it to me. I can t remember if that was
25 every couple of weeks or every month, I m not sure. I

1 would, not every time, but sometimes print it off and throw
2 it in a little file I had in the lower right-hand desk
3 drawer. It was sort of a personnel file.
4 I had a lot of resumes in there that would just
5 come in, and then the front would be this chart of U.S.
6 attorneys. During the thinking phase of this process, it
7 was very episodic. At different times I used that chart and
8 would highlight folks who had, U.S. attorneys for whom
9 issues and concerns had been raised.
10 But then I would replace that chart with another
11 chart when it came, and I would just throw the chart in the
12 burn box. As I said, this process was not scientific or
13 very well documented. That was really the process. Then I
14 would look at that chart if someone asked, and send them an
15 email. Here are the six people that right now are folks
16 that we might consider asking to resign when their four-year
17 term expires. That s the substance of the file really.
18 MR. BHARARA: When you say there wasn t an active
19 file, was there a folder? Was there a - can you describe
20 physically what you would keep those lists and other
21 documents relating to those lists in?
22 MR. SAMPSON: It is a hanging file, a little
23 right-hand corner, probably 2 inches thick of resumes, and
24 ~~on~~ in the front, I would just drop that U.S. ~~attorney~~ Attorney chart.
25 MR. BHARARA: You reviewed the production made by

1 the Department of Justice?

2 MR. SAMPSON: Only ~~has~~ as a non-employee, in the

3 same way you did. I have not had access to the unredacted

4 stuff.

5 MR. BHARARA: I believe you testified about this

6 at the hearing, but I want to ask you again so I can ask you

7 some other questions.

8 Are you aware of whether or not the entire

9 contents of what was in your drop file relating to this

10 matter was produced to the - investigation?

11 MR. SAMPSON: I don t know.

12 MR. BHARARA: And you don t know because you

13 don t recall what was in the file, or you don t know because

14 you haven t gone through the entire production? Or for some

15 other reason?

16 MR. SAMPSON: Well, both ~~is~~ are true. My counsel

17 went through the entire production and only ~~sought~~ brought some

18 documents for me to review. But I m not sure that there was

19 anything in the file, because in this final process I would

20 have had that chart and finalized it and drafted the U.S.

21 attorney replacement plan, and then probably thrown the

22 chart in the burn box. But I don t recall specifically.

23 MR. BHARARA: What was the day in which you

24 resigned from the Department?

25 MR. SAMPSON: The Attorney General accepted my

1 resignation on Monday -

2 MR. BHARARA: March 13th?

3 MR. SAMPSON: Or was it the 12th?

4 MR. BHARARA: The 12th? Okay. At what point did

5 you become aware that the department was going to be

6 providing documents and emails to the Congress in connection

7 with what I ll describe as the U.S. attorney firings?

8 MR. SAMPSON: On Friday, March 9th. Well, on

9 Thursday night, March 8th, the Attorney General returned to

10 the office after having come up and met with Senator Spector

11 and Senator Schumer and perhaps Senator Feinstein.

12 He had had a difficult meeting with them and had

13 agreed in that meeting to make five of his staff people

14 available for interviews. I believe that was the day of the

15 executive business ~~meeting that~~ Meeting, the day that the committee

16 authorized subpoenas perhaps. I don t remember

17 specifically.

18 But there was some discussion on Thursday night

19 about how we would proceed, and there was no real

20 resolution. I came into the office on Friday morning. One

21 of the things that I did was said we need to prepare a good,

22 comprehensive response. I said that because I believed, you

23 know, I was sort of a fact witness, as was McNulty, as was

24 Moschella, as were so many people in the DOJ leadership,

25 that someone outside that group ought to be involved in

1 doing that, and I recommended ~~to~~ Steve Bradbury, the
2 Assistant Attorney General for the Office of Legal Counsel
3 do that.
4 So I was aware that on Friday morning that an
5 effort for the first time was being made to collect all the
6 documents. I don t think that I was aware that the
7 department was determined to disclose them until after I had
8 left.
9 MR. BHARARA: So did you participate in the
10 collection of documents?
11 MR. SAMPSON: On Thursday morning, or Thursday
12 sometime before the executive business meeting, I sat down
13 at my computer and ~~saw~~ looked to see what I could find ~~an~~ and found a couple
14 of documents. Then the next morning, when I recommended
15 Steve Bradbury begin doing that, that began, and my
16 participation was to allow people from the Office of
17 Information Privacy, or ~~FOIA people~~ the FOIA people to come and search my
18 computer.
19 Then from time to time, Steve Bradbury would call
20 and ask me questions. This was just sort of on Friday and
21 Saturday I think. And then on Monday morning, the Attorney
22 General accepted my offer to resign.
23 MR. BHARARA: As far as you understood before you
24 resigned, were other officials at the Department of Justice
25 making similar efforts to find possibly relevant documents

there is a period of time for which the documents are preserved in the ordinary course?

MR. SAMPSON: I just don t know.

MR. BHARARA: Okay. I am going to move to a separate topic now and ask you about the origination of the plan to fire any United States attorneys at all in President Bush s second term, all right?

MR. SAMPSON: Uh-huh.

MR. BHARARA: You recall - let me ask you this. What is the earliest time you remember there to have been a discussion after President Bush was reelected about the firing or the request for resignations from all or a subset of United States attorneys?

MR. SAMPSON: I remember generally that after the President was reelected, there was sort of an administration wide assessment about all political appointees. ~~I think political appointees,~~ I m not 100 percent sure, but I think there was discussion, and there may even have been a request made that all political appointees administration wide offer to resign.

I think it was in that context that the question came up about United States ~~attorneys~~ Attorneys and whether they should be asked to resign at that time.

MR. BHARARA: And I think at some point you say or have said that you d be back or helped to beat back a

1 plan to fire all 93 United States attorneys, is that right?
2 MR. SAMPSON: I think I said that in an email to
3 Bill Mercer.
4 MR. BHARARA: Right. I mean, is that true? Did
5 you help to beat back that plan?
6 MR. SAMPSON: I think it s probably too much to
7 say beat back. My recollection is that there was some
8 discussion in December of 2004, early 2005 about whether all
9 United States attorneys should be asked to resign.
10 I remember that I didn t think that was a good
11 idea, and so I guess in that sense, I helped beat it back.
12 But I don t remember feeling a lot of pressure on that
13 either.
14 MR. BHARARA: And when in fact to your
15 recollection was the plan to fire all 93 U.S. attorneys
16 rejected?
17 MR. SAMPSON: Well, to the best of my
18 recollection, it would have been sometime after the Attorney
19 General was confirmed, which was in early February. Things
20 just were kind of held in limbo until after he was
21 confirmed. So it would have been sometime, you know,
22 February or March of 2005, to the best of my recollection.
23 MR. BHARARA: Okay.
24 MR. SAMPSON: And I guess I wouldn t want to
25 associate myself with the premise of your question that

1 there was a plan to seek the resignations of all of them.
2 It was an idea that was discussed.
3 MR. BHARARA: It was an idea. And do you have
4 any understanding as to who originated that idea?
5 MR. SAMPSON: To the best of my - my
6 recollection is that Harriet Miers raised it with me. In
7 reviewing the documents, I understand that Mr. Rove raised
8 it with Mr. Leach of the Counsel s Office at the time, but I
9 don t think I knew that at the time.
10 MR. BHARARA: Okay. After the proposal of the
11 idea of firing all 93 U.S. attorneys was rejected, could you
12 tell us the first time that you or anyone else began the
13 preparation of any kind of list that might form the basis
14 for asking for resignations of some subset of those 93 U.S.
15 attorneys?
16 MR. SAMPSON: Well, a couple of things. It was
17 my view that U.S. attorneys all had the expectation that
18 they would get to serve at least four years, and none of
19 them had served four years at that time.
20 The first expirations wouldn t even be coming up
21 until September or October of 2005. And so in my mind, you
22 know, there was 9 months or something before that would even
23 ripen into a possibility.
24 That said, in reviewing the documents, I had seen
25 that I sort of in a quick and dirty fashion, sent over one

1 of those charts to Harriet Miers that made some evaluation of
2 the U.S. attorneys in March I think of 2005. You know,
3 earlier.
4 MR. BHARARA: Isn t it the case that appointed
5 U.S. attorneys in fact had an expectation of serving not
6 just to the end of their four-year term, but until the end
7 of the term of the President who appointed them? Isn t that
8 in fact what the actual expectation given the history of all
9 U.S. attorneys is? Was?
10 MR. SAMPSON: Perhaps so. I think the way that I
11 thought of it in my mind was that they had an expectation
12 that they would get to serve at least four years, and the
13 practice in other two term presidencies, the most immediate
14 preceeding being President Clinton and President Reagan, the
15 practice had been that many of those U.S. attorneys had held
16 over for longer than four years.
17 I didn t know what the expectation of the U.S.
18 Attorneys was in an actual sense, but I knew that they would expect to servi
19 at least for the statutory four-year period.
20 MR. BHARARA: Okay. So who became in charge of
21 the process that you described that had various phases,
22 including a thinking phase, of determining which if any
23 United States attorneys, should be asked to resign?
24 MR. SAMPSON: I think it would be fair to say I
25 was the staff person that was asked to work on that.

1 MR. BHARARA: And you would say you were
2 principally responsible for that? You were the person
3 principally responsible for that?
4 MR. SAMPSON: At the staff level.
5 MR. BHARARA: And who understood you to be
6 responsible for that project?
7 MR. SAMPSON: I think the Attorney General and
8 the counsel to the President.
9 MR. BHARARA: Anyone else?
10 MR. SAMPSON: I am not sure. I mean, I remember
11 visiting with several members of the DOJ senior leadership
12 about this notion of identifying a subset of U.S. attorneys
13 who might be asked to resign after their four-year terms had
14 expired. I think, although I don t recall specifically
15 whether I laid out ~~those lists~~ that list of people at my hearing on
16 March 29th, but it included the Attorney General, the senior
17 counsel to the Attorney General and White House liaison, it
18 included the Deputy Attorney General, a couple of Associate Deputy
19 Attorney General s.
20 It included David Margolis, it included Bill
21 Mercer, and it included a couple of directors of EOUSA. That
22 was the core group of people that I consulted on this
23 question.
24 MR. BHARARA: Starting at what time period?
25 MR. SAMPSON: Well, beginning in 2005 in that

1 thinking phase.

2 MR. BHARARA: When in 2005?

3 MR. SAMPSON: I think as early as March.

4 MR. BHARARA: The people that you described in

5 that group, did they understand that they were part of a

6 group whose purpose was to deliberate over what subset of

7 United States attorneys might be asked to resign?

8 MR. SAMPSON: I remember speaking with Bill

9 Mercer extensively about this, that the White House had

10 raised the question of asking all 93 to ~~resign, and that the~~ resign and that, after

11 ~~process was, you know, and then after some discussion the~~ some discussion the

12 idea of settling on a smaller subset was the way we were

13 going to proceed.

14 I remember visiting with him about that and asking

15 for his views about who should be included in that smaller

16 subset, who of his fellow U.S. attorneys should be included

17 in that subset.

18 I remember having a similar conversation with Mary

19 Beth Buchanan who was the Director of EOUSA at the time. I

20 remember having a similar conversation with Jim Comey, who

21 was the Deputy Attorney General at the time. I remember

22 having a similar conversation with David Margolis, who was

23 the Associate Deputy Attorney General at the time, and I

24 remember speaking about it in general terms with the

25 Attorney General.

1 Then later as those people were replaced by
2 successors, I remember speaking with them generally about
3 their assessment of the U.S. attorneys. So later in time, I
4 spoke with Mike Battle who became the Director of EOUSA and
5 had formerly been a U.S. attorney. I remember speaking with
6 Mike Elston, the Deputy Attorney General s Chief of Staff
7 about identifying U.S. attorneys that might be added to this
8 list.
9 Monica Goodling, who became the White House
10 liaison and senior counsel to the Attorney General. So
11 that s the group of people that I spoke with about this and
12 gathered information from.
13 MR. BHARARA: Was it a formally constituted
14 group?
15 MR. SAMPSON: I don t think it would be. I don t
16 think it s accurate to characterize it as a formally
17 constituted group.
18 MR. BHARARA: Okay. And to go back to my
19 original question. Separate and apart from conversations
20 you may have had about the specific performance problems
21 about United States attorneys from time to time, did all the
22 members of this group that you have described understand
23 themselves to be part of a group whose purpose was to
24 determine what subset of United States attorneys should be
25 asked to resign?

1 another 5-minute break, and then we can talk a little bit
2 about the schedule?
3 MR. BHARARA: If you don t mind, why don t I just
4 keep pushing ahead and seeing how far I can get in the
5 next -
6 MR. BERENSON: Do you have a particular topic you
7 need to complete? Or do you just generally not want to take
8 a break?
9 MR. BHARARA: Off the record.
10 [Off the record at 4:20 p.m.]
11 [On the record at 4:35 p.m.]
12 MR. BHARARA: Back on the record.
13 I want to ask you questions about some of the U.S.
14 Attorneys who were asked to resign and the particulars of
15 what went into that process that you were not asked about at
16 great length at your hearing. I want to ask you about Dan
17 Bogden, who was the U.S. Attorney in Nevada.
18 Did you come to believe that he was in the bottom
19 tier of United States Attorneys?
20 MR. SAMPSON: Let me say this about the different
21 reasons that U.S. Attorneys were added to the list. I
22 remember some of the reasons that were conveyed to me as I
23 was aggregating information, and some of the things I don't
24 remember and some of the things I may not have known that
25 were in the minds of other folks involved in this process.

1 My recollection with regard to Mr. Bogden was that
2 he was a relatively close case. There ~~was not~~ were no particular
3 allegations or concerns that he was a bad manager or that he
4 had failed to do thus and such. My recollection is that
5 there was sort of a judgment that a change in that office
6 would be beneficial, that a stronger leader in that office
7 would be helpful.
8 In reviewing the documents, I remember that there
9 was concern that his office had not and that he himself had
10 not worked closely with Main Justice, with the Obscenity
11 Prosecution Task Force of the Criminal Division, in trying
12 to make some obscenity cases in Nevada. But I don't
13 remember if I had that on my mind at the time late in the
14 process.
15 MR. BHARARA: With whom did you consult and from
16 whom did you receive information about the performance of
17 Dan Bogden during the course of this project?
18 MR. SAMPSON: Well, in reviewing the documents, I
19 remember receiving some criticism of his office from Brent
20 Ward, who was the Chair of the Obscenity Prosecution Task
21 Force. At the end of the process, in its final stage, when
22 we were finalizing who would be on the list, I remember
23 speaking with the Deputy Attorney General, Paul McNulty; his
24 chief of staff, Mike Elston; Monica Goodling, the senior
25 counsel to the Attorney General; and I think Bill Mercer,

1 though I am not 100 percent sure.

2 MR. BHARARA: How did his name get on the list?

3 Who put his name on the list?

4 MR. SAMPSON: I don't remember specifically.

5 MR. BHARARA: Weren't you the maintainer of the

6 list? So you would have put the name on the list, correct?

7 MR. SAMPSON: Physically, I would have put the

8 name on the list. I don't remember who suggested that he be

9 added to the list.

10 MR. BHARARA: You don't recall what the triggering

11 event of putting him on the list was?

12 MR. SAMPSON: I just don't remember. It may have

13 been suggested to me by someone else of that group of people

14 I've talked about, but I don't have a specific recollection

15 of it.

16 MR. BHARARA: So other than the person who headed

17 the Obscenity Task Force--what was his name again?

18 MR. SAMPSON: Brent Ward.

19 MR. BHARARA: Right. Other than him, can you

20 remember anybody else at Justice--I am not talking about

21 people who ultimately approved his being kept on the list,

22 but anyone in the same vein as Brent Ward who lodged a

23 complaint or told you about a performance problem with

24 respect to Dan Bogden?

25 MR. SAMPSON: I just don't remember specifically.

1 whether or not Mr. Bogden was a good performer or not?
2 MR. SAMPSON: I don't remember.
3 MR. BHARARA: Do you recall ever consulting with
4 Mr. Margolis about Dan Bogden?
5 MR. SAMPSON: I don't remember.
6 MR. BHARARA: Would you have in the ordinary
7 course, given that he was a person you mentioned was in the
8 group of people who was involved in this project?
9 MR. SAMPSON: Yes, although as this process
10 finalized, I was really working more closely with the Deputy
11 Attorney General and his chief of staff, Michael Elston.
12 And I guess I assumed that they were consulting with Mr.
13 Margolis. He was the expert on U.S. Attorneys and how they
14 were performing.
15 MR. BHARARA: You assumed that those other
16 individuals were consulting with Mr. Margolis, but you don't
17 know for a fact that they were?
18 MR. SAMPSON: At the end of this process, in
19 October and November and early December of 2006, really most
20 of my consultations were with the Deputy Attorney General
21 and his chief of staff and Monica Goodling. And I had
22 previously gotten input from others, including Mr. Margolis.
23 But at the end of this process, my best recollection is that
24 those were the folks I was visiting with. And in addition
25 to those folks, I think Bill Mercer as well. Again, I am

1 decision to ask Mr. Iglesias to resign?

2 MR. SAMPSON: About the knowledge of the

3 President?

4 MR. BHARARA: Yes.

5 MR. SAMPSON: What I remember is in maybe the

6 week--or just a week before I left the Department in March,

7 I remember the Attorney General telling me that he had had a

8 meeting with the President in October sometime. And he

9 reminded me about this because it was a meeting that the

10 President was having with each of the Cabinet officials, and

11 the Attorney General thought it was silly that he was

12 meeting with the President because he had met with him the

13 week before on some matter and asked me to inquire of the

14 White House whether he really needed to come over for that

15 meeting. And I think it was, you know, just some short time

16 before the meeting was to occur, and so the word I got back

17 was, "Yeah, tell him to come over anyway."

18 And, again, just--I really didn't know much about

19 this meeting. I don't remember the Attorney General

20 reporting to me the substance of it in the fall after he had

21 had the meeting. But in the week or so before I left the

22 Department, when Mr. Iglesias, you know, made some

23 allegations and it became a public affair, the Attorney

24 General--I remember the Attorney General saying, "You know,

25 I remember the President in that meeting we had in October

1 refresh my recollection on that, but I don't have access to
2 those.
3 MR. BHARARA: Okay. Let me ask you about John
4 McKay, the former U.S. Attorney in Washington. Could you
5 tell me how he got on the list?
6 MR. SAMPSON: Again, to the best of my
7 recollection, the Deputy Attorney General's office expressed
8 concerns about policy conflicts that it had had with Mr.
9 McKay.
10 MR. BHARARA: Can you recite for us your
11 recollection of every conversation and communication you had
12 with anyone at the Justice Department about any negative
13 performance issues relating to Mr. McKay?
14 MR. SAMPSON: And I assume you mean performance-
15 related in the broad sense.
16 MR. BHARARA: In whatever sense you interpret that
17 word.
18 MR. SAMPSON: I remember having conversations with
19 Michael Elston about Mr. McKay's efforts to promote the
20 ~~Links~~ LINK Software, information-sharing software, and real
21 irritation that the Deputy Attorney General himself had over
22 the fact that Mr. McKay had gotten 20 or 25 U.S. Attorneys
23 to sign on to a letter that, in the Deputy Attorney
24 General's view, I think, you know, tried to sort of force
25 his hand and box the Department in on the decision about the

1 structure of Department-wide information sharing. So that's
2 one issue.
3 I remember having conversations with Bill Mercer
4 about his concerns about Mr. McKay's office's sentencing
5 practices, and I remember Mr. Mercer complaining that that
6 office never sought to appeal downward departures. So that
7 is a second thing.
8 I remember there was concern expressed about the
9 way Mr. McKay interacted with Main Justice with regard to an
10 AUSA ~~BOUSA~~ in his office had been murdered and they thought it
11 was case related. And it was in sort of an ongoing
12 investigation that was handled by another U.S. Attorney's
13 Office, but McKay on occasion--on at least a couple of
14 occasions, sort of demanded that the Deputy Attorney
15 General, or the Attorney General, I think, in one case, you
16 know, drop everything and fly to Seattle to participate in
17 an event related to ~~with~~ that. It was just the manner in which
18 McKay did that that raised issues and concerns.
19 I think one thing--and you asked me for everything
20 I remembered. The other thing I remember is ~~I remember is I remember~~
21 being told--I don't remember when precisely, but I remember
22 being told that Mr. McKay had held a press conference in
23 which he complained about the President's budget for U.S.
24 Attorneys, and instead of supporting the President's budget
25 request, he had complained about it.

1 So sitting here today, that's what I remember
2 about the concerns about John McKay.
3 MR. BHARARA: Was there an issue of personal
4 animosity between Mr. McKay and certain officials at Main
5 Justice?
6 MR. SAMPSON: Not beyond what I've said. Not that
7 I'm aware of. He had irritated some officials in the
8 Deputy's office, but I don't know if I would call it
9 animosity.
10 MR. BHARARA: Did he irritate Mr. McNulty?
11 MR. SAMPSON: I understand Mr. McNulty and his
12 chief of staff, Mr. Elston.
13 MR. BHARARA: Did he irritate anyone else in the
14 Deputy's office that you are aware of?
15 MR. SAMPSON: Not that I remember.
16 MR. BHARARA: Was it your understanding that the
17 issue with respect to the ~~Links~~ LInX system was irritation with
18 how Mr. McKay had handled it or a substantive problem with
19 what he was trying to promote through the ~~Links~~ LInX system?
20 MR. SAMPSON: I'm not sure, but I think it was the
21 former.
22 MR. BHARARA: The former?
23 MR. SAMPSON: I think so. But I'm not 100 percent
24 sure.
25 MR. BHARARA: With respect to any of these issues

1 where in the world Congress has any oversight jurisdiction
2 whatsoever over the way the President chooses to exercise
3 his hiring and firing authority among permissible reasons.
4 I mean, whether it would have been a better practice or a
5 worse practice to do this, that, or the other or have an
6 internal personnel system, that just--that's a core
7 presidential power, and I don't think the oversight
8 jurisdiction of Congress extends to it. If we can just
9 stick to questions that do relate to Congress' legitimate
10 investigative and oversight jurisdiction, we can probably
11 get through this a lot faster.
12 MR. BHARARA: Thank you for the speech.
13 MR. BERENSON: You are welcome.
14 MR. BHARARA: I am going to continue my
15 questioning. Off the record later I will explain to you the
16 various ways in which that question is relevant.
17 I am going to ask you about Mr. Charlton. How did
18 he end up on the list?
19 MR. SAMPSON: I understood that there were--again,
20 let me say that I remember some of the reasons folks were
21 added to the list, and I don't remember some of the other
22 reasons, and some I may not even have known about. So this
23 is what I remember.
24 I remember there was concern about Mr. Charlton--
25 MR. BHARARA: If I could just interrupt you.

1 MR. SAMPSON: Yes.

2 MR. BHARARA: Do you remember with any specificity

3 when exactly he got on the list, and separate and apart from

4 the various concerns that you might state, what the

5 triggering issue was for putting him on the list, if you

6 remember?

7 MR. SAMPSON: I think the documents show when he

8 first appeared on a list. I just don't remember, sitting

9 here right now. To the best of my recollection, it had to

10 do with policy conflicts over the death penalty and over the

11 videotaping of FBI interrogations, as I laid out in my

12 testimony in a colloquy with Senator Kyl.

13 MR. BHARARA: One of those issues was, am I

14 correct, Mr. Charlton's desire to engage in videotaping of

15 interrogations? Is that right?

16 MR. SAMPSON: Yes.

17 MR. BHARARA: And is it your understanding that--

18 withdrawn.

19 Are you aware of whether or not Mr. Charlton, over

20 the objection of the Department of Justice, actually engaged

21 in a program to videotape interrogations at any point?

22 MR. SAMPSON: I don't remember. I'm not sure.

23 MR. BHARARA: Did you review in connection with

24 Mr. Charlton his most recent EARS evaluation?

25 MR. SAMPSON: I did not.

1 MR. BHARARA: Do you know if anyone else did from
2 whom you were aggregating information about Mr. Charlton?
3 MR. SAMPSON: With regard to EARS evaluations, I
4 understood that David Margolis read every EARS evaluation.
5 MR. BHARARA: What did Mr. Margolis have to say
6 about Mr. Charlton?
7 MR. SAMPSON: I don't remember.
8 I don't remember speaking with Mr. Margolis about
9 Mr. Charlton. I don't remember having that conversation.
10 MR. BHARARA: Do you recall if there was any
11 dissent over the issue of whether or not Mr. Charlton should
12 be asked to resign within Justice?
13 MR. SAMPSON: I don't think there was any dissent,
14 to my recollection.
15 MR. BHARARA: Do you have any knowledge of anyone
16 outside of--I am sorry. First, if there were people at the
17 White House who advocated one way or the other with respect
18 to Mr. Charlton?
19 MR. SAMPSON: Not to my knowledge.
20 MR. BHARARA: Do you have any recollection of
21 whether or not there were people outside of the
22 administration altogether who advocated or in any way
23 weighed in either way with respect to Mr. Charlton?
24 MR. SAMPSON: Not to my knowledge, other than, you
25 know, the post-resignation--or post-request for resignation,

1 MR. MINER: Let s turn the paper over and
2 disregard Exhibit 19.
3 MR. SAMPSON: I apologize. I m not trying to be
4 difficult.
5 MR. MINER: That s fine. I m not either. Was
6 the Attorney General involved in deliberations regarding
7 whether a particular United States attorney should or should
8 not be asked to resign?
9 MR. SAMPSON: As I was aggregating information
10 from different people, I don t remember the Attorney General
11 being involved in that process. Some of the information
12 came in from him.
13 MR. MINER: Would you describe that as a
14 deliberative process? Was he considering whether folks
15 should be removed? Not be removed? Based upon that
16 exchange.
17 MR. SAMPSON: Was the Attorney General
18 considering that?
19 MR. MINER: Yes, sir. My question called for a
20 yes or no answer, and that s the reason why I m trying to
21 get an answer as to whether he was involved in
22 deliberations, discussions, considerations as to whether a
23 particular United States attorney should be asked to resign.
24 MR. SAMPSON: I think it would be fair to say
25 that at the end of the process, he was involved in those

1 deliberations

2 As the process developed, you know, in the

3 thinking phase and then later in the more serious, final

4 phase, he was not particularly involved in those

5 deliberations. I informed him about it. He asked me to

6 make sure that the Deputy Attorney General was involved, and

7 that it was coordinated with the White House.

8 Then he definitely to my recollection was involved

9 in the final deliberation about should we really go forward

10 with this concept and are we comfortable with these seven

11 being the ones that would be asked to resign.

12 MR. MINER: Let s look back to June of 2006. You

13 testified earlier today regarding a June 1st email

14 concerning the Attorney General having expressed an interest

15 in a plan to deal with the immigration issues in Southern

16 California, is that correct?

17 MR. SAMPSON: Yes.

18 MR. MINER: In that email as you described and as

19 you were asked questions, there was a discussion of a plan

20 that mentioned the possible removal of Carol Lam, correct?

21 MR. SAMPSON: Yes.

22 MR. MINER: With regard to the conversations that

23 preceded that email and your discussion with the Attorney

24 General regarding Carol Lam, were there deliberations

25 regarding her removal?

PART B

Excerpts of Interview of D. Kyle Sampson, April 18, 2007

U.S. SENATE
COMMITTEE ON THE JUDICIARY
Investigation

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In the Matter of:

PRESERVING PROSECUTORIAL INDEPENDENCE: IS THE DEPARTMENT OF JUSTICE POLITICIZING THE HIRING AND FIRING OF U.S. ATTORNEYS?

- - - - - - - - - - - - - - - - - - -x

Wednesday
April 18, 2007

The continued interview of D. KYLE SAMPSON, Former Chief of Staff to the Attorney General, Department of Justice, was convened, pursuant to notice, at 3:14 p.m. in Room 2138, Rayburn House Office Building.

APPEARANCES:

ELLIOTT M. MINCBERG, ESQ.
Counsel for the Majority
House of Representatives Committee on the Judiciary

DANIEL M. FLORES, ESQ.
Counsel for the Minority
House of Representatives Committee on the Judiciary

1 MR. MINCBERG: Now, as you have described quite
2 extensively in previous testimony, those statements are not
3 accurate, correct?
4 MR. SAMPSON: As I testified at my hearing in the
5 Senate, the final process began, I would say, in late
6 September and carried through October and November and
7 December. And, you know, the process before that, as I've
8 described in previous testimony, was episodic and sort of
9 more in the thinking process.
10 So that is just how I would describe the process.
11 MR. MINCBERG: But, in any event, there is no
12 question in your mind that the process of deciding which
13 prosecutors to terminate began much before October?
14 MR. SAMPSON: Well, I don't want to quibble with
15 your words. I mean, the process for deciding. The
16 decisions were made, you know, late in November--
17 MR. MINCBERG: Let me rephrase my question. The
18 process for identifying which prosecutors to terminate
19 certainly began before October.
20 MR. SAMPSON: I agree with that.
21 MR. MINCBERG: Okay. I take it you did not have
22 any discussions with the unidentified Justice Department
23 officials leading them to make those statements that you are
24 aware of?
25 MR. SAMPSON: Not that I remember. I don't know

1 MR. SAMPSON: And Ms. Buchanan. But I don't
2 remember specifically--
3 MR. MINCBERG: You have no memory of any of them
4 suggesting he be put on the list?
5 MR. SAMPSON: I don't remember--in answer to your
6 question, I don't remember specifically whether Mr. Comey or
7 Mr. Margolis or Ms. Buchanan at this time raised concerns
8 about Mr. McKay. I do remember that Deputy Attorney General
9 Larry Thompson had previously, during his time as Deputy
10 Attorney General, had concerns about McKay. And so that may
11 be a reason he appeared on the list at this time.
12 MR. MINCBERG: Again, I appreciate your
13 speculating, although obviously it is only that at this
14 point. But just in terms of the way that you operated,
15 would you have relied on what an earlier Deputy had said
16 without checking with the current one?
17 MR. SAMPSON: Well, my recollection is that I did
18 check with the current one.
19 MR. MINCBERG: Okay. So--
20 MR. SAMPSON: I just don't have any specific
21 recollection about whether then-Deputy Attorney General Jim
22 Comey--
23 MR. MINCBERG: Right.
24 MR. SAMPSON: --suggested that McKay be on the
25 list or we talked about it. I just don't have any

1 recollection.

2 MR. MINCBERG: But if he--again, I realize this is

3 somewhat hypothetical, but I am referring to your

4 speculation. If there were concerns that you recall from

5 Mr. Thompson and you had checked them with Mr. Comey, and

6 Mr. Comey had indicated, no, I don't think he should be on

7 the list, would you have done that anyway or would you have

8 deferred to Mr. Comey on that?

9 MR. SAMPSON: Again, it is hypothetical.

10 MR. MINCBERG: Right.

11 MR. SAMPSON: But the general process, as I recall

12 it, was that it worked by consensus. So if any one person

13 said, "I don't agree with that," you know, the person would

14 come off the list.

15 MR. MINCBERG: And, again, you would have checked

16 with the current Deputy in that situation.

17 MR. SAMPSON: That's my recollection.

18 MR. MINCBERG: Now, what is your recollection of

19 the substance of the concerns that had come at some point

20 from Mr. Thompson?

21 MR. SAMPSON: My recollection is that there had

22 been an AUSA who was killed in Seattle, and folks believed

23 it was in connection with that AUSA's work. I believe the

24 AUSA's name was Wales. Again, I wasn't a firsthand

25 participant in this, but my recollection is that Mr. McKay

1 had demanded that Mr. Thompson take some action, and there
2 had been some conflict between the two of them. That is
3 really the substance of my recollection.
4 MR. MINCBERG: Very helpful. Now, do you recall
5 any discussion at all at this time--or for that matter, any
6 time--about complaints about Mr. McKay from Republican
7 officials relating to his failure to take action about
8 alleged vote fraud in the November '04 election?
9 MR. SAMPSON: My recollection is I testified about
10 this at my hearing, and I don't think I have anything to
11 add. It's hard to know what I was aware of then and am
12 aware of now.
13 MR. MINCBERG: Right.
14 MR. SAMPSON: I don't have any recollection of
15 being aware of that in any official capacity. I think I
16 learned of that through press accounts and general knowledge
17 of it now. But I ~~just--I don't think, I don't--I just~~ don't
18 remember anything more than that.
19 MR. MINCBERG: Do you recall--or did you ever have
20 any discussions within any of those Republican Party
21 officials from the State of Washington?
22 MR. SAMPSON: Not to my recollection.
23 MR. MINCBERG: Or with anybody at the White House
24 about the concerns of those officials?
25 MR. SAMPSON: Not to my recollection.

1 MR. FLORES: Turn to the specific U.S. attorneys
2 review section. When you began this assignment of reviewing
3 U.S. attorneys and considering whether any of them might be
4 replaceable, did you think about what would be the grounds
5 for - U.S. attorneys?
6 MR. SAMPSON: Yes.
7 MR. FLORES: And what were those grounds?
8 MR. SAMPSON: Well, the foundation of that would
9 be that these are political appointees who could be asked to
10 resign for any reason or no reason. But having passed over
11 that decision early on when it was decided that it wouldn t
12 be wise to ask all of them to resign, the consideration in
13 my mind at least was that it had to be something more than
14 any reason or no reason. It had to be a reason. There had
15 to be a ~~reason~~ reasoned basis for asking someone to resign.
16 In my mind at least, it was a question of could
17 the production or management or work of the office be
18 improved with the change.
19 MR. FLORES: And did you keep those grounds in
20 mind throughout this process?
21 MR. SAMPSON: I did.
22 MR. FLORES: Let me ask you. I know you ve heard
23 many questions about each of the individual U.S. attorneys
24 and how they got on the list and whatnot.
25 If you could bear with me, I want to ask you some

1 questions in that vein. Some may have been asked before.
2 With regard to Carol Lam, Carol Lam first appeared
3 on the list of candidates for the request of resignations
4 after you had a discussion with or received information from
5 Paul McNulty?
6 MR. SAMPSON: My recollection is that Ms. Lam was
7 on a list very early on and consistently was on the list.
8 MR. FLORES: Do you recall from whom you received
9 the information that first put her on the list?
10 MR. SAMPSON: I don t think I have anything to
11 add to my prior testimony. There were concerns about her
12 office s production in gun cases, and then later her
13 office s production in immigration enforcement cases.
14 MR. FLORES: Was it the continuing flow of that
15 information that caused you to leave her on the list as time
16 went by?
17 MR. SAMPSON: I think that s fair. As I
18 testified earlier, too, it was a consensus process. If
19 anyone had said no, I think that person should be off the
20 list, she in all likelihood would have been off the list.
21 But no one was saying that.
22 MR. FLORES: Did everybody who participated in
23 this process with you understand that that was your
24 assumption and procedure?
25 MR. SAMPSON: I guess you d have to ask them. I

1 and Chief of Staff?

2 MR. SAMPSON: It was not different than what I

3 observed when I worked for General Ashcroft as counselor to

4 him, and there was another Chief of Staff.

5 I guess I really don t have much basis to compare

6 it to other agencies except to say I expect it is that way.

7 MR. FLORES: Okay. Just to wrap up with this

8 line of questioning. At the time that you completed this

9 review of the U.S. attorneys and decisions had been made,

10 did you feel like the fruits of your effort were going to

11 benefit the department?

12 MR. SAMPSON: I did at that time.

13 MR. FLORES: How much?

14 MR. SAMPSON: It is hard to say. I did have some

15 concern that at that time, we didn t know who the next U.S.

16 attorney was going to be. So theoretically, we could end up

17 with a U.S. attorney who presented even more issues and

18 concerns, but a judgment had been made that not knowing who

19 we are going to get as replacements, do we think we can do

20 better. That was the standard that was applied, and these

21 seven were the ones that were identified.

22 So certainly at that time I thought it would be

23 beneficial. That s why I was in favor of the

24 recommendation.

25 MR. FLORES: Sure. And in your view, it would

1 have been detrimental to the department to have left any of
2 these eight people in place?
3 MR. SAMPSON: Yes, I think that s fair. I mean,
4 one of the considerations, too, is we heard all the time
5 that a lot of U.S. attorneys who had served for four or five
6 years, we heard that they were sort of ~~our~~ out looking for their
7 next job. So these folks were all going to leave either in
8 early 2007 or they were going to leave in early 2009.
9 So it was ~~some view~~ the view of some that this was just an
10 opportunity to ~~get~~ not only mitigate some concerns with
11 specific U.S. attorneys and their performance, but also get
12 fresh blood into those offices.
13 MR. FLORES: Thanks. Now, I have a couple of
14 different sets of questions to go, and we have about 10
15 minutes left, so I ll try to read them quickly. If I could
16 ask you to try and be judicious with the length of your
17 answers, it would be helpful.
18 On hearing prep for the testimony by Mr. McNulty
19 and Mr. Moschella before the Congress this year, were you
20 concerned that the testimony that they would give would be
21 truthful, sound, and defensible?
22 MR. SAMPSON: I assumed it would be that.
23 MR. FLORES: Did you want the Senate and the
24 House truly to understand the grounds and appreciate the
25 merits for the decisions that had been made?

1 right?

2 MR. SAMPSON: With regard to Mr. Moschella,

3 although I was out of town for a large portion of that, I

4 think there was a lot of time committed to trying to - at

5 least looking back at the documents.

6 MR. FLORES: Do you feel like Mr. McNulty had

7 adequate prep time?

8 MR. SAMPSON: My recollection is that there was

9 just one ~~day of, just one~~ prep session with Mr. McNulty

10 before his testimony.

11 MR. FLORES: Okay. At any point in that process,

12 did you intend to cover anything up about the agency

13 decisions?

14 MR. SAMPSON: I did not.

15 MR. FLORES: Did you ever intend to mislead

16 Congress?

17 MR. SAMPSON: I did not.

18 MR. FLORES: Did you ever intend to withhold

19 needed information for the Congress?

20 MR. SAMPSON: I did not.

21 MR. FLORES: I had a number of questions I wanted

22 to ask you to clarify some things that came up on Sunday.

23 The first is with regard to Sampson Exhibits 1 and

24 2. We will need to work with the exhibits as we go through

25 this. I ll try and do it quickly.

PART C

Excerpts of Interview of D. Kyle Sampson, July 10, 2007

RPTS JOHNSON

DCMN MAGMER

EXECUTIVE SESSION

COMMITTEE ON THE JUDICIARY,

U.S. HOUSE OF REPRESENTATIVES,

WASHINGTON, D.C.

INTERVIEW OF: DENNIS KYLE SAMPSON

Tuesday, July 10, 2007

Washington, D.C.

The interview in the above matter was held in Room 213B, Rayburn House Office Building, commencing at 9:10 a.m.

reason that I want to raise it.

You recall that we were talking about the question of why Mr. McKay was on that early March '05 list, which was before some of the LInX and other issues that were testified about later. Do you recall that generally?

A Generally.

Q And, again, I can show you the part of the transcript if it will be helpful. But do you recall, as you were searching your memory for what might have been raised about Mr. McKay then, you had a vague memory about something that happened during Mr. Thompson's tenure as Deputy Attorney General concerning the Wales murder and a concern about whether Mr. McKay was being too insistent about that.

Do you remember that generally?

A I do.

Q Do you recall also indicating that you would have checked with the then-current Deputy Attorney General, which would have been Mr. Comey, before that could have been a factor in putting him on the list?

A Do I remember if I had checked with Mr. Comey --

Q No. Do you remember indicating in our interview that -- just by way of process, wouldn't have reached back into something that happened in Thompson's tenure, without checking with Mr. Comey, the current deputy, about it as a reason for putting it on the list?

A Let me say this about -- those early lists were essentially my notes. You know, they were -- they, I think in this process, have taken on too much significance. I was asked to make an assessment of, you know, if we were going to ask some U.S. attorneys to resign, who would it be? And I made some inquiries and generated some preliminary lists.

And then the process went dormant, and every once in a while someone would ask me, where are we on that? And I would, you know, generate a new list. So I don't recall specifically why Mr. McKay was on an '05 list.

In response to your questioning of me at my last deposition, I searched my memory and I recall some discontent with the manner in which Mr. McKay was pressing a point related to the Wales investigation. And so I shared that as possibly a reason back in '05 why he was on the list. I don't remember if I checked with the current Deputy Attorney General, Jim Comey, at that time. I don't think I necessarily would have, because that was really just a brainstorming preliminary list.

Of course, if it ever got to a near decision point, it certainly would have -- just as it did in late 2006 -- would have been something that was highly coordinated with the current Deputy Attorney General and so forth.

And if I could add one thing, I regret the way this kind of spun out about Wales. I think it's a tragedy that

an AUSA was killed, and I don't begrudge anybody wanting to get to the bottom of that. In response to questions, I just will share with you my recollection that there was some discontent in the Department for the way Mr. McKay interfaced with main Justice on ~~Links~~ Link and on other things. And maybe my memory is not right, but I remember that there was some discontent of the way he was demanding main Justice people take certain actions in that case. And he wasn't running the investigation of that case; a different office was. It was demanding sort of the Deputy Attorney General, the Attorney General, do certain things. And I think, as I testified, I don't have a strong recollection about it. That was my recollection about why he may possibly have been on an early, really, preliminary list.

Q I want you to understand that there is a good deal of concern by Members of Congress and others about that possibility. And my point is I think we can eliminate it, if we can just go down this road a little bit. So let me read to you a portion of what you said before. This is page 46 of the transcript. My question --

Mr. Kemerer. Which date?

Mr. Mincberg. April 18, 2007.

Mr. Kemerer. Thank you.

BY MR. MINCBERG:

Q My question there was:

to resign in December of 2006. My experience at the -- during all the administrations since 2001, was that several U.S. attorneys were asked to resign during that time, beginning in 2001, for reasons related generally to their misconduct. And that was usually handled by Mr. Margolis.

And later in the process, you know, after -- in 2007 after this controversy arose, my recollection was vague and I don't recall specifically. But I remember thinking in my mind that Graves is in that category, that it was a resignation that Margolis handled. Because I don't have any specific recollection of being very involved in it, and I know that it -- I know for sure it wasn't part of the process, you know, that -- that the final process that happened in the fall of 2006.

Q Well, I think we will need to put in the record, then, the documents that will indicate very clearly that he was in fact on the January '06 list. But let me move forward, and I will circle back to that in just a couple minutes.

But let me move forward with, in fact, an e-mail from you to Mr. Battle.

Mr. Berenson. Before you put a question there, Elliot, may I consult for one moment with Mr. Sampson?

Mr. Mincberg. Sure. Please do.

Mr. Berenson. Thank you.

at all about the reasons Mr. Graves was put on the list of possible people to be terminated, the reasons that he was asked to leave and the timing of that?

A That's right. I remember -- I'm -- I know that Mr. Graves was not part of the final process where U.S. attorneys were asked to resign in December of 2006.

Q Indeed, by then he had already left?

A Yeah, he was already gone. And I just don't remember the circumstances surrounding his resignation earlier in the year.

Q Now are you familiar with Brad Schlozman?

A I am.

Q Do you recall any conversations with Mr. Schlozman, or anybody else, about any concern about a lawsuit brought in Mr. Graves' district concerning whether the State of Missouri was adequately taking care of vote fraud and maintenance of voter lists?

A I don't remember having any conversation like that with Mr. Schlozman or anyone else.

Q Anyone else? You don't remember one way or the another?

A I don't remember.

Q Did you have any involvement in selecting Mr. Schlozman to be interim U.S. attorney in Kansas City?

A What I remember is after Mr. Graves resigned --

after there was a vacancy, I remember Mr. Schlozman expressed interest in being appointed as interim U.S. attorney. My recollection is that he had previously expressed interest in being appointed interim U.S. attorney anywhere in the country. If there was a need for that, he wanted to be on the list.

And I remember Mr. Schlozman, after Mr. Graves' resignation became public, expressing a real interest in going to that district because I think that's his home district. I think he's from Kansas City. So he wanted to go back and be the interim U.S. attorney, and I think he was interested in pursuing the Presidential appointment.

Q Uh-huh. And he was in fact appointed interim U.S. attorney?

A Yes.

Q And I want to get to a document or two about that in a minute.

But what then happened with respect to the permanent U.S. attorney post?

A What I remember is that Senator Bond, you know, put -- I don't remember specifically if Senator Bond has sort of a team back in the State that reviews applicants. I remember encouraging Schlozman to apply with Senator Bond and I remember that Senator Bond recommended some names, and I don't think he recommended Schlozman. I know that someone

A Well, the only -- the regular practice was that an interim U.S. attorney had to be a DOJ employee --

Q Right.

A -- who had current background. And so it didn't take long. It was usually just Ms. Goodling and Mr. Margolis and Mr. Battle would interview the first assistant and the criminal chief and somebody from Main Justice, and then they would make a recommendation on who they felt was the strongest.

Q And to whom would they make that recommendation?

A The Deputy Attorney General and then the Attorney General. Because it was the Attorney General who would be appointing the person who is the interim U.S. attorney.

Q Let me ask you to look at what again will be my last exhibit, which is Exhibit 47. And for the record it is OAG2183 to OAG2184. And again you will see that significant parts of this have been redacted, but this is the publicly available document that we have.

A Mm-hmm.

Q Have you had a chance to take a look at Exhibit 47?

A Yes.

Q Okay. I want to ask you to turn to page OAG2184, to the e-mail up top, which is an e-mail from you to a name that has been blacked out about Kansas City, where you say, "The Schloz" -- S-c-h-l-o-z -- "has expressed interest in

being appointed interim and is being interviewed today." I take it "The Schloz" is a nickname for Mr. Schlozman?

A I don't think it is -- I am not aware of him being called that by anybody. But that is who I was referring to when I said that.

Q So this is --

A It is accurate that I was referring to Brad Schlozman, but I don't know that that is his nickname.

Q Okay. And if you go up the chain, there is an e-mail then a little later that day, it looks like about 3 or 4 hours later, from Ms. Goodling to you, indicating that Brad interviewed well, a name that has been redacted bombed, that we cannot talk to another name that has been redacted, and I'd argue we shouldn't at this point. Do you see that?

A I do.

Q And, again, by "Brad" I assume we are referring to Mr. Schlozman?

A I think so.

Q And then you send an e-mail a few minutes later to Ms. Goodling saying, Brad it is. Can you explain that, what that means?

A Well, I think I was just very quickly saying, you know, let's tee up Brad to be recommended to the Deputy Attorney General and the Attorney General. And he was, and they approved, and he was appointed.

Q And how did that happen? How did that get handled?

A I don't remember specifically, but the regular process would be that EOUSA would prepare appointment paperwork, that Ms. Goodling would check with Mr. Margolis to make sure Mr. McNulty was fine with that, and then she would bring the paperwork up and make the recommendation to the Attorney General.

Q With respect to the appointment of Mr. Schlozman, do you recall any discussion -- and again you may not, because I know you weren't in the interview -- I am sorry, let me take that back. You were not, I take it, in the interview with Mr. Schlozman, is that correct?

A That is correct. I don't remember being there. And I wouldn't have in the regular practice, and I don't think I was.

Q Absolutely. So I realize that you may or may not remember or know about what I am about to ask you, but do you recall any discussion at all in the course of any of the deliberations about Mr. Schlozman about that case that he had brought against the State of Missouri involving voter rolls?

Mr. Berenson. The case that who had brought?

Mr. Mincberg. That he, Mr. Schlozman, had brought.

Mr. Hunt. He brought it when? What is the time frame you are speaking of?

has been the interests of the minority in our chamber be damned, and we have continually been short-shrifted in our time.

We have been gentlemanly in terms of accommodating the witness' time constraints in each occasion and the needs of the counsel from the Senate sides to ask their questions. I will proceed forthwith, consistent with that prior practice of my own today.

Mr. Mincberg. Needless to say --

Mr. Flores. I don't think the majority practice will change from this point forward.

Mr. Mincberg. Needless to say, we don't agree with any of that, but I won't take Mr. Sampson's time to have that dispute now.

EXAMINATION

BY MR. FLORES:

Q Mr. Sampson, as I mentioned, you have testified previously on your contacts with the White House in this matter. Let me just start by asking whether it is the case that, given Monica Goodling's testimony that although she was White House Liaison she did not engage in discussions with the White House on the review process of U.S. attorneys that you rode herd on, if you yourself were the principal White House contact in that process for the department?

A I think it would be fair to say I was the principal

contact, but I believe she had some contacts related to it.

Q Okay. In the context that you had with the White House, I believe that your prior testimony reflects that you had recalled in your earlier testimony that the White House had specifically asked you about only two U.S. attorney positions that were affected by the review. One was the position of the U.S. attorney for the Eastern District of Arkansas involving Mr. Cummins and Mr. Griffin. The other was an inquiry by Ms. Miers about the status of Ms. Yang in the Central District of California. And you had recalled no other specific inquiries by the White House about individuals in this process. Is that still your testimony today?

Mr. Mincberg. I will object to the characterization.

Mr. Sampson.

A With regard to the seven U.S. attorneys who were asked to resign in December of 2006, plus Mr. Cummins, who was asked to resign in January, with regard to that list, Mr. Cummins is the only one that I remember the White House making specific inquiries about. And I do remember that Ms. Miers asked specifically about Ms. Yang, whether she could be -- what her plans were, whether she would be someone who we might ask to resign. Sitting here right now, that is what I remember.

I also remember, as I testified previously, that I came

to learn that Mr. Rove had made inquiries about -- or had complained about U.S. attorneys in three jurisdictions: Philadelphia, Milwaukee, and Albuquerque; and the substance of his complaint was the lack of vigorous prosecution of voter fraud or the alleged lack of vigorous prosecution of voter fraud.

BY MR. FLORES;

Q And his complaint again had been made to whom?

A The Attorney General.

Q Thank you.

In your contacts with Ms. Miers about the Eastern District of Arkansas position and Ms. Yang in the Central District of California, was there any mention made by Ms. Miers of any desire on the part of the White House to seek the replacement of a U.S. attorney for reasons related to a desire to shut down any prosecution or investigation or start any prosecution or investigation that was or was not being conducted by the sitting U.S. attorney?

A To my knowledge, that was not the case. In both instances, I understood her inquiry to be related to a desire to clear the way for someone else to be appointed and have the opportunity to serve.

Q Did you ever hear such an attempt with regard to a U.S. attorney position? And by that I mean an attempt related to the shutting down or initiation of a case for

investigation being made by Karl Rove?

A I don't remember anything like that. To my knowledge, that was not the case.

Q Bill Kelley?

A Same answer.

Q Sara Taylor?

A Same answer.

Q Scott Jennings?

A Same answer.

Q Chris Oprison?

A Same answer.

Q Any other White House staffer with whom you had contact during the process of your review?

A Same answer. I don't remember any case-specific questions. That is, I don't remember any conversations with any of those White House people you listed that connected up asking a U.S. attorney to resign in order to interfere with or shut down a particular case.

Q Do you recall any attempt by any of those individuals, or others at the White House whom I named, to seek the removal of a U.S. attorney or U.S. attorneys generally for reasons other than performance-related reasons or the desire that simply another person be given an opportunity to serve?

A I don't remember anything like that.

Q Ever in your process?

A Not that I recall sitting here today.

Q You testified earlier, Mr. Sampson, that at one point in the process the process went dormant. By "the process" I mean your process of reviewing U.S. attorneys starting in late '04, early '05, and ending in December of '06. How many times did the process go dormant and for how long was it dormant collectively?

A I think one way to characterize it would be that it was dormant the entire time until about September of 2006. I remember there was, you know, those initial inquiries that I have testified about soon after the President was reelected; and from time to time I would be asked a question about where that stood. And so I would generate a list or respond by e-mail or what have you. But no action really was ever taken, and things really didn't come to a final action phase until the fall of 2006.

Q So is it fair then to say that during those periods at which the process went dormant, and in fact was dormant, the White House left you alone regarding the process?

A Yes. There was large periods of time where we didn't talk about it.

Q To your knowledge or in your opinion, based upon your experience and your tenure at the White House and your main dealings with the White House while at the Department

of Justice, is it at all consistent with the theory that the White House was involved in pursuing the dismissal of U.S. attorneys in order to shut down cases or investigations or prompt the initiation of cases or investigations by any individual U.S. attorney for the White House to have, as you have described, let the process be so dormant for so long and to have left you alone about that?

A Well, what I can say is I think it certainly was a process that was not agile, you know. It was not -- it just really didn't work like that. Oh, here is a specific case; let's ask the U.S. attorney for his resignation. It was, as I testified, a long thinking phase that bumped along and didn't really have any traction to it.

I remember feeling sometimes when -- I remember feeling one time -- I am not sure when in time it was -- Bill Kelley asking me about it, and I remember thinking, you know, do you really want -- is there really going to be administration action on this? You people raise it with me from time to time, but then nothing ever happens. And so I really didn't think it ever had legs until late in 2006.

Q If I could ask you to summarize very briefly then, is it your opinion, based upon your contacts and your observations of the process, your knowledge of it, that the White House behavior was in any way consistent with a desire by the White House to retaliate against U.S. attorneys for

complaints?

A I do understand that under the Constitution it is the President's responsibility to see that the laws are faithfully executed. My experience was that the priorities of the Department, which included terrorism and guns and meth and corporate fraud and civil rights, including voter access, as well as voter fraud, were priorities that the Attorney General established in consultation with the White House, absolutely, the President.

Q Thanks.

Let me refer you now to Sampson Exhibit 40, the materials provided earlier this morning, regarding communications from the Seattle area to the Attorney General about alleged irregularities during the 2004 general election in Washington; and I am looking at page OAG758.

I would refer you to that particular page, please; and I would ask particularly that if you could read the list -- numbered list of issues that starts on that page and continues over onto page OAG759.

A 1. Over 1,000 felons cast illegal votes.

2. At least 45 votes were cast in the name of deceased persons, at least 15 people voted twice, and at least 2 noncitizens voted.

3. More than 660 unverified provisional ballots were inserted into tabulating machines at the polls.

4. Some signatures collected by party workers to validate provisional ballots were apparently forged.

5. Almost 900 more absentee ballot were counted in King County than the number of registered voters who sent in absentee ballots.

6. King County reconciliation records from the year 2000 general election are missing.

7. Election officials illegally modified -- enhanced -- ballots.

8. Selected absentee ballots were set aside and not counted. Voters who were disenfranchised were not notified.

9. There was an apparent organized effort to register voters who had been judged mentally incompetent.

10. King County election officials have been unable to reconcile polling place results and are withholding election results to cover up error and possible fraud.

11. King County illegally registered individuals who gave the County Courthouse as their residence and mailing address.

And, 12, King County illegally registered individuals who gave invalid residence addresses.

Q Thank you. Based on your knowledge and experience and in your opinion, upon receipt of such information is it appropriate for the Department of Justice to look into whether there are valid bases for such allegations?

A Yeah. This refreshes my recollection. I remember that Senator Feinstein went on the floor and named seven U.S. attorneys. And I remember thinking how unfair that was to Charlton and McKay, for example, who had announced they were leaving to take partnerships or to go teach at a law school; and she had essentially outed them as being people who had been asked to resign.

And so then there was some, you know, discussion about how to deal with that; and I remember I was concerned because we were being asked essentially to prove a negative. You know, we could say, look, no one was asked to resign for the improper purpose of influencing a particular case for partisan advantage. No one was asked to resign because we had people pre-selected to go in there under an indefinite AG appointment. You know, we had to prove that negative.

And we knew internally that, look, we had asked these folks to resign because, you know, albeit a little bit of a loose process in evaluating things, we thought about people. It wasn't an improper process. It was a process that identified people for whom there were policy conflicts or what have you.

So my recollection is thinking, you know, we have a tough row to hoe here to try and explain this and to explain it and protect these U.S. attorneys who we didn't want to say negative things about.

on the California U.S. attorneys because that was Ms. Duck's primary concern.

Q Sure. In Mr. Cohen and Ms. Duck's statements or questions to you during that briefing, did they allege or question whether U.S. attorneys had been dismissed for partisan advantage by the administration?

A We talked about that. Because my recollection is that Senator Feinstein had made that allegation with regard to I think the Duke Cunningham case that Carol Lam's office handled. And so, you know, I gave them assurance the best I could that, you know, to my knowledge that was not the case, that Ms. Lam was on the list and was asked to resign because of immigration and gun prosecutions.

Q During that briefing did they accept that explanation by any signal to you, either verbal or otherwise?

A You would have to ask them. You know, I have a good relationship with Bruce. He just -- you know, we slapped backs, and that was the end of it.

Q Had they been former colleagues of yours on the Senate committee?

A Mr. Cohen. I did not previously know Ms. Duck.

Q Okay. So is it not the case that the response by Senator Feinstein to that briefing, which preceded her comments on the 16th, was to, for whatever reason, reject

witness referring specifically to interim U.S. attorneys or acting U.S. attorneys in that answer?

Mr. Sampson. In New Mexico, I understand that the first assistant became acting U.S. attorney. In Arizona, I understand that the managing AUSA became interim. In San Diego, I understand that the civil chief, Karen Hewitt, became interim. In San Francisco, I understand that Scott Schools was appointed interim. And in Seattle, I understand that the first assistant became acting. And I don't know or don't remember about the Western District of Michigan.

BY MR. FLORES;

Q Okay. In either case then is it not the fact that in at least the three districts which I will submit have been those most alleged to have been tampered with for partisan reasons via the removal of the U.S. attorneys, those being New Mexico, the Southern District of California, and the Western District of Washington, that a career official of the Department was the immediate successor to the dismissed U.S. attorney?

A That is correct.

I would add I forgot about Nevada. I understand that the first assistant, who was a career AUSA, became the acting U.S. attorney.

Q In any of those districts in which the course of action by the Department was to put in place or allow the

succession of a career person from within the office to lead immediately following the dismissed U.S. attorney, is that in your view at all consistent with the idea that the White House or the Department somehow desired to dismiss the U.S. attorney for reasons of gaining a partisan political advantage in the pursuit of a case or an investigation?

A To my knowledge, that wouldn't be consistent.

Q Would that have been entirely the opposite of what the Department or the White House would have sought had it desired such an advantage?

A I wouldn't know how to say. I guess that would all depend on the person who became the acting or the interim U.S. attorney.

Q But in no case of those districts was a political appointee placed as the acting or interim U.S. attorney. Is that correct?

A I think that is right. In every district it was a career person. Usually, in most cases, from inside the office; in the case of San Francisco, outside the office. I guess I would just add, with regard to Seattle, it is the best of my recollection that the first assistant became the acting. I am just not 100 percent sure.

Q To the best of your recollection, did the White House at all interfere with, second-guess, oppose in any way the Department's action in having a career person succeed a

dismissed U.S. attorney in any of those districts?

A To my knowledge, that was not the case; and that wasn't the regular practice. The White House -- an associate counsel to the President, that is, a White House staffer, and sometimes a person from the Office of Presidential Personnel at the White House would participate in the U.S. attorney selection panel with regard to Presidential appointees. But the regular practice was with regard to acting or interim U.S. attorneys, that would be handled by Mr. Margolis, Mr. Battle and Ms. Goodling, just entirely at the Department of Justice.

to the President and he'd approve the person for nomination to be U.S. attorney pending the completion of a background investigation.

Q Is that general approach to those proceedings, are those actions at all consistent with the theory that the White House, for political reasons, would have been tampering with the U.S. attorney selection process or dismissal process for partisan reasons to gain partisan advantages in cases, et cetera?

A I don't think so with regard to particular cases. U.S. attorneys are political appointees. Their names were received from home State senators who, for a variety of reasons, wanted to exert that sort of patronage authority they have and recommend candidates to the White House for consideration. So they're definitely political in that sense.

Q Just one last question. It pertains to the Schlozman-Graves scenario. I only ask because it pertains to White House involvement in that.

If I can clarify the record from earlier. If I am recalling correctly your statement and the record on this, after Todd Graves resigned, or at least around the time that he learned that Mr. Graves would be leaving or had left, Mr. Schlozman expressed an interest in response to a position as interim or acting U.S. attorney. He then

competitively interviewed for that position.

Mr. Margolis, the top career official at the Department, was involved in that interview process. Mr. Schlozman interviewed well. And Mr. Schlozman got the job. Is that correct?

Mr. Mincberg. I will object to the characterization.

BY MR FLORES:

Q Is that a fair characterization of the process?

A Yes. Yes. I think so.

Q Was the White House involved with that, do you know?

A To my knowledge that wasn't the case. It was an interim U.S. attorney appointment, so it was handled at the Department as far as I know.

Q Are you aware of allegations that had been made over the course of this investigation that Mr. Schlozman's replacement of Mr. Graves somehow was related to the administration's advantage in cases in the Western District of Missouri?

A I understand generally that that allegation is out there.

Q It's your testimony today that the White House was not involved in Mr. Schlozman's placement in that position in the Western District of Western Missouri; is that not correct?

A Not that I remember.

A Harriet Miers I recall asking about it from time to time, and I think the documents reflect that. And Bill Kelley I remember asking about it from time to time, and I think the documents reflect that. And that's it, I think.

Q Do you recall how often Harriet Miers and Bill Kelley asked about the project?

A I mean it was, you know, quarterly approximately. It was not weekly. It was not that frequent.

Q Did you recall anyone within the Department of Justice?

A There were many other intervening events that always superseded.

Q Do you recall anyone at the Department of Justice who, in the same way as Ms. Miers and Mr. Kelley, would ask about the project from time to time?

A I don't really remember. I mean, I think Ms. Goodling probably. But I don't remember.

Q Do you recall whether or not --

A Well, let me say, the Attorney General from time to time -- and usually that was in the context of Harriet or Bill; me reporting to him that Harriet or Bill had raised this, you know, and then we would talk about it.

Q Would it have been your practice to report to the Attorney General every time Ms. Miers or Mr. Kelley raised the issue with you?

PART D

Excerpts of Interview of Paul J. McNulty, April 27, 2007

RPTS CALHOUN

DCMN MAGMER

EXECUTIVE SESSION

COMMITTEE ON THE JUDICIARY,

U.S. HOUSE OF REPRESENTATIVES,

WASHINGTON, D.C.

INTERVIEW OF: PAUL J. McNULTY

Friday, April 27, 2007

Washington, D.C.

The interview in the above matter was held in Room 2138, Rayburn House Office Building, commencing at 9:32 a.m.

capacities?

A Well, I was the chairman of AGAC up until -- at the time I was called on to become the Acting Deputy Attorney General, I hadn't served as the chairman of AGAC all that long. I think I began to serve as Chair of AGAC in the summer of '05. So I had about roughly 6 months or so of chairmanship before that.

Q How long had you been vice chairman?

A Vice chairman, I had been that for at least 2 years or so. I went to AGAC in 2002 after several months of being U.S. Attorney, and I think I was vice chairman -- named vice chairman almost at the beginning of my time. So I served under Paul Warner who was chairman of AGAC, Bill Mercer, Mary Beth Buchanan. I may have it in reverse order, Mary Beth, then Bill Mercer.

Q In any event, the point is that prior to becoming enacting deputy you were pretty familiar both because of being Principal Associate Deputy Attorney General and then being the Vice Chair of the AGAC and for a short period the Chair with many of the U.S. Attorneys around the country.

A Absolutely.

Q When you became the Acting Deputy Attorney General, what did you understand the role of the Deputy was with respect to U.S. Attorneys?

A Well, pretty straightforward, that the Deputy

Attorney General oversees the work of all the components of the Department of Justice. There are some 40 components of DOJ, and all of those component heads report directly or indirectly to the Deputy Attorney General, and then the Deputy Attorney General also oversees the U.S. Attorneys. The Deputy Attorney General is the supervisor in a general sense of the U.S. Attorneys.

Q Is it fair to say that, as a supervisor, the Deputy Attorney General is responsible for the employment, the separation and the general administration of personnel, of all attorneys in the Department, including the U.S. Attorneys?

A Well, I wouldn't agree with that characterization. It is more complicated than that. Personnel, who actually is a U.S. Attorney and is not, is not something the Deputy Attorney General -- at least in my experience as Deputy Attorney General; I can't speak for every past administration -- but to the both best of my understanding of this administration, at least, the decisions about who is a U.S. Attorney are not --

Q I didn't mean the selection. I said separation. Leaving aside selection, I understand the Deputy is not responsible for the selection of the U.S. Attorneys.

A I am sorry. Would you repeat?

Q I was reading from the Web site again, and it says

the employment, but I assume that doesn't mean the original hiring but during the course of the employment. Separation in general of personnel, of all attorneys, including U.S. Attorneys in the Department, are under the supervision.

A I see your point, yes.

Q That's correct, isn't it?

A I think that is right. Certainly the Deputy Attorney General's Office is the office that has traditionally handled issues of discipline and problems that arise within the U.S. Attorney's Office dealing with a U.S. Attorney. That is what Dave Margolis in particular is responsible for in the office.

Q I want to focus on the period from November 1, 2005, when you became the Acting Deputy Attorney General, through the period of October 1, 2006, basically a year period when first you were acting and then you had been confirmed, up until October 1. During that period, did you terminate any U.S. Attorney?

A There may have been some attorneys that left in that period of time.

Q I am not asking about people who left voluntarily. I am asking if you terminated because you didn't think they were doing the proper job or were the right people for the job between those two dates.

A I get your question.

of October 1 of 2006 that he had received from any Member of Congress a complaint that any U.S. Attorney was not competent to do the job?

A I don't recall -- I don't have any clear recollection of that right now. I knew about the concerns expressed regarding Carol Lam, and I don't know if anybody ever put it that way to the Attorney General and that the Attorney General passed it on to me. I have no recollection of that. I just remember complaints about the immigration issue. But I don't have any recollection of anybody -- the Attorney General telling me that someone has put it to him that way.

Q As to Carol Lam, you are referring to some complaints by Members of Congress or a Senator about her enforcement of the immigration laws in San Diego, is that correct?

A That is right.

Q Are you aware of any Member of Congress who suggested to either you or the Attorney General prior to October 1 of '06 that she was not competent to be the U.S. Attorney?

A No, I don't remember anybody -- any expression in those terms.

Q Do you recall any -- with respect to any other U.S. Attorney, did you have any Member of Congress or of the

Senate express to you prior to October 1, '06, that any incumbent U.S. Attorney was not capable of handling the job?

A I don't recall that, no.

Q Now when was the first time that you learned that there was an effort within the Department to consider for termination a series of U.S. Attorneys, a number?

A To the very best of my recollection, the first time I learned about it was at the end of October. Somewhere in the time frame of late October, early November was when Kyle Sampson consulted me about the idea of seeking the resignation of a group of U.S. Attorneys.

My best recollection is that the first time I learned about it was through my chief of staff, Mike Elston, who had apparently received an inquiry from Kyle Sampson to run this by me, to ask me my thoughts on the subject. It was presented to me in an oral fashion, as I recall.

Q By Mr. Elston?

A By Mr. Elston, right. And it was presented to me as here is the idea and here are the names of individuals that are being identified for seeking the resignation.

Q And do you recall the names that he stated to you?

A Well, what I don't recall clearly are the actual names that were stated to me in a sense that I know the names that eventually were asked to resign. To the best of my memory, the people who were asked to resign were the

suggest any names for this list.

A Well, there gets to the question of Kevin Ryan. From what I have seen from this e-mail and from that one in November that I have subsequently seen -- the one in November was actually sent to me I believe November 7th. Kevin Ryan's name is not there. I am still a little confused as to how Kevin was not listed initially. Because of the matters that I was dealing with as Deputy, Kevin Ryan was an issue that I was very much involved in. Just to take a moment.

In late October, we had to send a team out to San Francisco to do what is called kind of a special evaluation of an office, and that is an unusual thing to do. I was working with the Executive Office of the U.S. Attorneys and Dave Margolis, and we were dealing with some very significant management problems that were occurring in the Northern District of California. So a team of a half dozen or so AUSAs were sent out there to do a 3-day evaluation and talk to a whole lot of AUSAs who were in the office and those who had left the office, and that was actually a significant thing itself.

That team had come back; and, as I recall, they put together a report, a brief report that was presented to the Department. I don't know if it was addressed to me or presented to the Department in late October. I probably

didn't actually see that report when it first came in, probably didn't come do me until sometime in November.

During this same period of time, I was dealing with the Executive Office of the U.S. Attorneys and David Margolis and looking at what this report said, the significance of it. The report was very critical. And so I can't quite understand, sitting here now, just exactly why Kevin wasn't on these lists, or on this November list, early November list in particular.

I know that Kyle said in his public hearing that I told him after that November 27th meeting in the Attorney General's office that I suggested Kevin Ryan. I don't have any personal memory of that, but that would be consistent with what I was dealing with at the time.

Q But at the time that you were presented with this list in late October, again, orally you were told, you didn't suggest any additional names at that time.

A Not at that time, no.

Q And you hadn't been consulted by anyone prior to the formation of that list about these terminations, had you?

A Would you repeat that again, please?

Q You had not been consulted by Mr. Sampson or Ms. Goodling or anyone else who was compiling this list for your views with respect to whether or not any individual U.S. Attorneys should be on this list.

A Not if you are referring to placing someone on a list or not. I am sure I had lots of conversations with Kyle especially over a period of time about U.S. Attorneys.

Q Did you recommend to Mr. Sampson or anyone at the Department prior to late October that anyone be placed on a list for termination?

A No.

Q And no one came to you and said we are compiling -- before Mr. Elston spoke with you, no one came to you and said we are compiling a list and we would like to get your views of the competence or the advisability of continuing in the office a particular U.S. Attorney.

Mr. Flores. Objection to the form of the question.

Mr. McNulty. I have no memory of being approached prior to that time that Mike brought me this.

BY MR. NATHAN:

Q That is in late October of '06.

A Correct. I have no memory of ever being informed that a list was being compiled for seeking the resignations of U.S. Attorneys. I probably had -- I am sure I had many conversations about the performance of U.S. Attorneys during the time that year I was the Acting and the Deputy.

Q In a previous answer you said that you were surprised but that the people who make these kinds of decisions apparently wanted to terminate eight or ten U.S.

A I didn't have any reason to assume that.

Q Did you assume it?

A I don't have any memory of assuming that, either.

Q What did you assume? Where did you assume this came from?

A I assume this list came from Kyle.

Mr. Flores. Objection. Can the witness be allowed to answer the question?

BY MR. NATHAN:

Q How would Kyle have a basis for making a determination of which U.S. Attorneys to retain and which to terminate?

A I think Kyle had a wide basis for making those determinations, and the reason is that Kyle had been with the Department basically throughout the entire administration. He was responsible for the selection of U.S. Attorneys for much of the time that he was in the Department and the White House, so he knew the U.S. Attorneys very well, and he was very much engaged in the leadership and the life of the Department.

So it didn't strike me as being unusual that Kyle would be able to identify or to compile a list of individuals where we had issues and concerns about their performance.

Q Kyle Sampson is a 32-year old assistant to the Attorney General, never prosecuted a case, never served in

the U.S. Attorney's Office, didn't supervise the U.S. Attorneys. Did you think that he personally had a basis for determining which U.S. Attorneys to keep and which to fire?

A Well, there is a difference between what a person's experience would allow them to know through experience and what a very intelligent person would know based upon countless conversations with both U.S. Attorneys and with the leadership of the Department of Justice. So it strikes me that -- take, for example, the situation with Carol, just as one example.

Q That is Carol Lam?

A I am sorry, Carol Lam. Kyle was certainly in a position to know of the concerns that existed with regard to her enforcement of gun laws and the Project Safe Neighborhood and enforcement of immigration laws. He was involved in lots of discussions about that and is a very intelligent professional and, again, someone in the middle of that. It doesn't strike me as being unusual that Kyle could say if we have individuals where there are issues, concerns about their performance, Carol Lam as one example, is one of those people, whether he had ever prosecuted a case or not.

Q I want to try to go back to your mindset in late October of '06. How did you believe this list had been assembled at that time?

A My assumption when I first learned of it was that Kyle had pulled together these names based upon the long process of dealing with the U.S. Attorneys and knowing where there were various issues and concerns that existed. That was my understanding at the time.

Q So you thought that he had compiled this list from his own observations and experience over the time he had been at the Department of Justice.

Mr. Flores. Objection to the form of the question.

Mr. Hunt. I don't believe that is an adequate characterization of what he said, if that is the suggestion of your question.

Mr. McNulty. I didn't say it that way. What I meant to say is that I believed it was Kyle's collection of information, from his experiences in talking to lots of different people and his experiences in dealing with the issues that came up.

To take another example, Paul Charlton. Kyle was well aware that Paul Charlton had done something very unusual, really unprecedented with regard to the death penalty case; and he was well aware even of the FBI videotape policy that Paul changed on his own.

Every morning we have an 8:30 meeting at the Attorney General's Office, involves the leadership of the Department, talk about things going on. So Kyle is in a position to

know a lot of different things, and he talks to a lot of people all the time.

BY MR. NATHAN:

Q But he hadn't talked to you about this issue.

A He had not talked to me about compiling a list of names and seeking their resignation.

Mr. Hunt. Are you finished answering?

BY MR. NATHAN:

Q After you received this list from Mr. Elston, an oral list from Mr. Elston which he told you had come from Mr. Sampson, did you contact Mr. Sampson to ask him how he had gone about compiling this list?

A After I received the information, I probably had maybe two or three conversations with Kyle about this whole effort or this plan. Following that, leading up to the sort of final plans going over for approval, whenever this was November 7th or November 15 this, I don't specifically recall discussing with him how he went about formulating the list. I maybe just assumed that process was one of, again, identifying the folks where there were issues and concerns. That is probably because it struck me that way from the moment I saw it, and therefore I continued to assume that is how Kyle did it.

Q And after you were advised of this list did you have any conversation with the Attorney General about the names

this was 9:00. It was scheduled for an hour, but it was much shorter than an hour.

My best memory of the meeting was that its purpose was for a kind of last opportunity to go over what was the plan, what were we going to be doing. Kyle was -- it was Kyle's meeting. He was sort of laying out what we were there for.

I don't have any memory of the dialog of the meeting. I just recall the meeting was for the purpose of saying, okay, we just need to go over this one more time, make sure that we are clear on what we are going to be doing.

Q When you say "go over one more time," you mean the plan for implementing these terminations, is that right?

A That is how I read it, yeah.

Q There was no discussion as to which names should be on the list or which shouldn't be on the list at this meeting, was there?

A I don't recall that. He says after the meeting I mentioned Kevin Ryan may have been at that meeting. I took note of the fact Kevin was not there. I know it is a bad thing to do, to speculate in a deposition what I was doing, but I just have heard that, and so I am assuming that there must have been --

Q I am focusing at the meeting itself. I understand your testimony to be that no one at the meeting laid out the reasons that any particular U.S. Attorney was on the list

now produced with respect to the period prior to October of '06?

A Even with all those e-mails that I have now come to understand and see, the extensive back and forth that existed between Kyle and the White House and so forth, I still understand the process at its final stage having -- requiring an initiative by the Department to identify who these individuals are and put them together in a list and then send them to the White House.

As I sit here today, my view is that if Kyle had decided not to do that or just never gotten around to it, we may have not done this. So that is why I still see it as being something the Department initiated when it went forward with putting together those names.

Q You testified before the Senate that you were involved in this process from beginning to end; and you identified that process as starting in October of '06 and terminating as of December 7th, isn't that correct?

A I don't know if that is exactly how I said it, but at the time I testified my understanding of the process was that it began in October.

Q Of '06?

A Of '06. And that was when I became involved in the process.

Q Right. And that it ended December 7th when the

Q And that is the impression you wanted to leave with them.

A I just wanted to give them as much truth as I knew.

Q Which is what you understood at that time.

Let me go back in time to early October of '06. Did you receive a phone call at that time from Senator Domenici?

A I recall getting a phone call on December -- on October 3rd. I returned it. He wasn't available. Then he called me back on the 4th and got through to me at that time.

Q So you spoke to him on the 4th.

A Yes.

Q Can you tell us what he said to you and what you said to him?

A I didn't say much to him. He called, and it was a very short conversation. He expressed his concerns about the abilities of David Iglesias, and he used general terms, things like he's not up for the job, over his head, not getting the job done, things to that effect, and I think he's just not the right guy for the job.

He didn't, as I have searched my memory, refer to any specific case. He just talked in generalities about his fitness for the job. He may have mentioned categories like public corruption and immigration. So I am a little vague on how -- how many categories, including in terms of kind of

work he is doing. What is clear in my memory is his statements of lack of support for his abilities.

Q Did he call for his termination?

A I don't recall him doing that. What I recall him doing is just saying that to me; and I said, thank you very much, Senator.

Q Is that the full extent of the conversation?

A That is the best I remember. It was very short and just to that point.

Q He just calls you up, says David Iglesias is not up to the task. Maybe he mentions categories of cases. You say, thank you. He hangs up, and that is the entire conversation. Why did he call? What did he say was the purpose, besides giving you his opinion on Mr. Iglesias?

A That was the purpose of the call I remember.

Q He didn't ask you to secure his termination. He didn't say you should terminate him.

A I have no memory of him saying something like that.

Q Did you make a memo of this conversation?

A No, I didn't.

Q Did you report it contemporaneously to anyone?

A Well, though I don't have a specific recollection of that, my best memory is that I -- a conversation like that I would have mentioned to the AG and/or Kyle at the next opportunity I had. When I receive a call from a Senator or

I realized that that was a mistake that needed to be corrected.

Q And you asked that it be corrected.

A Yes.

Q And they did.

A Yes.

Q So the fact is you didn't consult with Mr. Comey about any of these individuals on the list.

A But I had conversations with Jim Comey over a period of time -- not in the most recent time frame, that is not since I have been Deputy, but going back quite some time, Jim and I have been associated with each other through much of this administration -- about U.S. Attorneys. So I had many conversations about U.S. Attorneys with Jim but not in this time frame.

Q Is Mr. Comey a pretty good judge of prosecutors and of U.S. Attorneys?

A I am sure he is. But I will say that I don't know the basis for Jim's assessment of David. David is a very nice guy.

Q David Iglesias.

A David Iglesias. He is a very nice guy; and I have a good relationship with him, personal relationship with him in the sense that we talked to each other at the AGAC meetings and enjoy each other's company. But I don't know

what Jim's -- the basis for Jim's assessment would be.

Q I am trying to get the basis for your inaction in response to this call. You know that Mr. Iglesias had been a U.S. Attorney at the suggestion of Senator Domenici back in 2001, correct?

A He was, yes.

Q He would been the U.S. Attorney for 5 years by this time; and you had not seen anything in his evaluations that suggest that he was not doing his job, isn't that right?

A I was not familiar with his evaluations.

Q Were you aware that he had been considered for promotion to the U.S. Attorney in the Southern District of New York?

A No, I wasn't aware.

Q Are you aware of it now as you sit here?

A No.

Q Are you aware that he was being considered at one time for the U.S. Attorney position in the District of Columbia?

A No, I am not aware of that.

Q Do you know that he was considered for a high-level position at the Department of Justice in this period between 2001 and 2006?

A No.

Q You didn't know that. But you knew that he had been

selected for the AGAC and had been on it, correct? Was there anything about his activities that you were aware of prior to October 3rd or 4th of '06 that suggested that there was any credibility to the claim by Senator Domenici that he was not up to the job of being U.S. Attorney in New Mexico?

A Well, I had picked up just from time to time -- and during the time I was the Deputy I wasn't familiar with issues associated with him prior to my time as Deputy, but I had just picked up -- I can't be very specific about it -- concerns about the aggressiveness and the effectiveness of his office under his leadership.

So when Senator Domenici said that to me, it did not come completely out of the blue or a surprise that there had been any question about David Iglesias.

Q Did you discuss with the Attorney General his visit to New Mexico at the end of 2005 after you had already started as Acting Deputy Attorney General?

A No, I don't think I was familiar with that.

Q Are you familiar with the briefing materials that the Attorney General received before he went out there?

A No, I am not.

Q Are you familiar with the fact that the Attorney General told Mr. Iglesias when he visited him that he was doing a great job?

A No, I am not familiar with that.

Q Are you familiar with any letter that Mr. Battle sent to Mr. Iglesias after his most recent evaluation prior to the phone call that you got from Senator Domenici?

A Say that one more time, please.

Q Are you familiar with any letter Mr. Battle sent to Mr. Iglesias following the most recent evaluation that the EOUSA had done of the New Mexico's U.S. Attorney's Office prior to the Domenici call?

A Well, I am familiar with that now, because I think I have seen that in some form that has been identified, but at the time I did not.

Q At the time of the October 4th call --

A Right.

Q -- you did not know that.

A Right.

One other thing I think should be included in this is that I -- one of the reasons why that made an impression on me I guess when Senator Domenici made that call was that Senator Domenici had recommended him for that position initially, and these U.S. Attorneys are largely selected as a result of those kinds of home-State Senator support. So that just struck me as a significant thing, his home-State Senator. Plus Senator Domenici is a very distinguished Senator who has been there a long time. Maybe from working on the Hill for 12 years I have a certain instinct to be

deferential to Members and Senators.

Q You thought it was significant when you got this call.

A Right.

Q But you didn't take any action with respect to it.

Mr. Hunt. I don't think that is an adequate characterization.

BY MR. NATHAN:

Q Well, you didn't write any memo about it, right?

A I did not write a memo about that.

Q You did not ask for his evaluation.

A That is correct.

Q You did not call Mr. Iglesias to see what had triggered this sudden lack of confidence, correct?

A I wouldn't necessarily call it "sudden lack of confidence."

Q Well, the first time it was expressed to you.

A Expressed to me, but I didn't have --

Q Had he ever expressed that before?

A No, I didn't have any particular memory of him expressing that to anybody else before.

Q And did you examine the files of anything going on in New Mexico at that time to see what might have triggered this lack of confidence that was expressed to you by the Senator?

A Not particularly. But, I mean, I certainly have no reason to question her memory of that.

You know, the only thing that I can recall is that when I talked to the U.S. attorneys, I was mindful of the guidance, or the decision, that had been made that we were not going to go into the details. And yet, I'm sure I was mindful of wanting to be honest with the individuals, and so if her recollection of how I formulated that was to say, I didn't want to say anything that would lead her to believe something different -- you know, with Carol Lam, though I have tremendous respect for her as an attorney, I did have a lot of concerns about her performance.

And so, on my mind in that call would only have been the fact that there was a history of things that had come up, and that I had to decide whether to go into those things or not. So I was not doing -- and a failure to call back, or whatever, why, I can't explain that. But if she expected that, and I said that, I don't know why I didn't follow through with that.

Q When you say you had concerns with her, isn't what you mean, that you had concerns about the office and certain -- the statistics they had in prosecutions in certain areas like immigration and gun matters?

A That's correct.

Q So it was not personal?

A Oh, no, not personal.

Q It's not misconduct by her. It's the activities of the office in terms of the priorities of the Department; isn't that correct?

A Correct. It was the performance of the Southern District of California.

Q Well, let me ask you this. I am not a management expert but I am puzzled by this.

If, by the termination, you intended to effect the priorities of the office, but you didn't tell the U.S. attorney that she was in jeopardy and that she could change that, you didn't tell her what the reason was, and you didn't tell the successor what the reason was, how does this termination -- this unexplained termination help change the policies of the Department -- of the office in San Diego that the Department wants to change?

A Well, there are a couple things built into your question there. On the last part, what I hear you saying is, does this actually accomplish the good of trying to fix the office.

Q How would they learn that's what they should be doing, and that's what you wanted and you intended -- I'm trying to explain my question; that by the termination, you intended to effect these changes and the practices of the office, if you didn't explain it either to her, to her

successor, or to the public?

Mr. Hunt. Do you want an answer to that question now or to the three-part question you asked before?

Mr. Nathan. It's the same question. It's the same question.

Mr. McNulty. Well, let me see if I can do it this way. I think, of all the -- well, different kinds of reasons.

The shortcomings of the office in the area of gun prosecution and immigration was a very apparent thing for a wide audience of people, not just Main Justice, but these numbers are out there in lots of different ways.

The gun numbers themselves are just -- and I -- and I know that a lot of folks in the room here have a lot of problems with the Carol Lam situation. So forgive me with the harsh sound of this. I really view the gun prosecution numbers just shocking, that they were so low after Jim had brought it to her attention -- Jim Coleman, excuse me, former Deputy Attorney General -- and then they went down after she and Jim talked about what she was going to do to change it, as a real indifference to the number two priority of the Department of Justice.

And, therefore, getting to your question, I understand that what you're trying to get at is the notion of how that is good management. But the reality is that as a result of the change that's occurred in San Diego, there is a

recognition -- and ATF has seen this -- and immigration, unfortunately, folks have seen this -- that there is a different recognition of the importance of those cases.

So I'm not here to say -- I can't say today or agree with your premise that this effort has not accomplished a change; to my knowledge, it has accomplished some change already.

BY MR. NATHAN:

Q But is the change in the Southern District of --

A Is it a model study for management? I wouldn't hold it out that way.

Q You're suggesting there has been a change in the priorities and prosecutions in the Southern District of California since Ms. Lam left in January?

A My testimony is that, as I understand it -- from some information that's not very scientific or systematic, so the statistics might contradict me; so I want to make that clear in the record -- but from my understanding and talking to the interim U.S. attorney, Karen Hewitt, and some things I have heard from law enforcement agencies, they've actually increased their focus on gun prosecutions; and that priority is being addressed clearer.

Again, let it be clear in the record, I have not looked at the gun stats for the last 3 months to verify that.

Q Did you look at the gun stats at any time between

October 30 and December 7 of 2006?

A No, I didn't look during that period of time.

Q And did you ever check to see that, in fact, as Ms. Lam suggests, violent crime in San Diego was at a 25-year low at the time that she left the office?

A No. I can't say that I was aware of that, but I certainly was aware of the fact that violent crime is -- in that same State -- if I had known that statistic, it would not have jumped out at me, because violent crime has been down in many places around the country.

Q Would it jump out at you if the prosecutions of State and local gun matters and gun prosecutions in San Diego were very high?

A It would not surprise me. And I -- if you're getting to what I think you're driving at there is, I appreciate the fact that part of our Project Safe Neighborhoods strategy is to encourage State prosecution.

So I don't -- I don't devalue that as an accomplishment, but --

Q Looking at the numbers --

A Let me finish my thought here.

-- very frankly, we expect our U.S. attorneys' offices to -- and they have to increase substantially over the past 5, 6 years, their Federal prosecution of gun crimes; and San Diego is not the only place where there are good district

attorneys.

We have in the Eastern District of Virginia, we have excellent district attorneys. But we still had a responsibility to enforce Federal gun laws, and I look at the stats around the country during this span of time, and some very small districts, Southern District of California has -- on the top of my head about 110 AUSAs, and they're very busy people and they have a very heavy workload. And we can talk about that issue. But the fact is that districts with the same kind of workload, like the Western District of Texas, still has literally hundreds of more gun cases prosecuted every year. And I just see it as being a real resistance to something that was laid out for our U.S. attorneys by the President of the United States as the top domestic enforcement priority for this administration.

Q Let's go to your preparation for the Senate testimony.

A Okay.

Q What did you do to prepare for that testimony?

A Well, first of all, as a general matter, having been involved in the matter from late October until February 6, I felt that I was pretty well aware of the circumstances that have brought us to the point of having that Senate hearing.

I had a prep session, like we typically do before a hearing; it was held in my conference room, and I don't

up at the hearing, and various points that I believed were important to make.

Q And to the best of your recollection, this was something that you wrote after you'd had the prep session with the individuals who you described already?

A That's correct.

Q And the top line on the first page says Sending a Message, and the bottom of that page says, "Our intent was for this to send no message," underscore "no." Is that correct?

A Correct.

Q Did you think that firing eight U.S. attorneys without explanation would send no message to either the rest of the U.S. attorney community or to the public at large? Is that what this is suggesting?

A What this is suggesting is, I anticipate -- so I'll get to your question. Let me recollect my thoughts here.

I anticipated that the Senators would be concerned about what message these removals were sending. And one of the -- the title of the hearing was the politicization of our firing of U.S. attorneys or something like that, so I knew that was going to be an important issue.

So what I was doing was thinking through how I felt about that matter. And at first I felt that it was an important question, because we don't want to send the wrong

message to the U.S. attorneys, and so it's important for us to know what we think about it.

Secondly, I felt that if you looked at it on the totality of the circumstances, there would be a fair reason to conclude that there was -- there was no basis, that a message or a bad message was being sent to the other U.S. attorneys.

Why did I think that it wasn't sending a bad message to the U.S. attorneys? Because I believed that, first of all, we wouldn't want to do that. So if I thought it was true, we wouldn't want to do that.

Secondly, it wouldn't affect -- we wouldn't send a message about public corruption. You can see what I say in these notes about the way I look at how public corruption cases are a very high priority, and that we have a strong record in this area.

Thirdly, that I think U.S. attorneys have too much integrity to receive a message like that. That is, I think that -- and thank you for letting me go on here a little bit if you don't mind.

Q Sure.

A My experience at the Department of Justice is that prosecutors, especially prosecutors, both at Main Justice and also out in the field just don't think in terms of partisan politics when they do their job. They leave -- to

the extent they have any connectivity to that, they leave that at the front door, and when they are in the office and they're working on cases, it's a very nonpolitical, nonpartisan environment. That's the -- that's the lifeblood of the U.S. attorneys office. That's what makes them so particularly special, and I think it's true about the Department of Justice as a whole, the Main Justice.

So I have seen too many U.S. attorneys who just are committed to doing the right thing, and their AUSAs especially, that they're not going to receive any intimidation or message that there was even one that someone thought was being sent.

So that's my point there. U.S. attorneys have too much integrity to even receive a message. If they think they have a case to make intense a Republican or a Democrat, they're not going to be thinking about whether it's a Republican or Democrat; they're just going to be making their case.

And that's because the agents -- and that's number four; that's because the agents and the prosecutors who are involved, they don't slow down for a heartbeat. They don't take any of this stuff into consideration. They just keep plowing forward. That's the way the system is designed.

And. Therefore -- the last point I am making, the way we did it, looking back on it now, we can all agree it was

very seriously flawed. But at the time when we did it, we thought that by doing it quietly, people -- and again, as I said a moment ago, the way it kind of unfolded in December at first appeared to have some of that potential, that individuals would be expressing their intent on leaving, and that they would go off quietly, and people would not be reading a lot into it. And I think until mid-January or so, that's how it was working, that was the intent.

Thank you for letting me tell that.

Q Did you believe, as of February when this had already come out and you were testifying, that the actions of firing eight U.S. attorneys would send no message to the remainder of the U.S. attorney corps?

A I did not think at the time that the decision was being made -- what was the date you mentioned?

Q I'm now talking February 5, when you testified, right?

A When I testified. At the time I testified, it was still my view that the other U.S. attorneys were not being sent a message or being -- or perceiving that a message was being sent, yes.

Q And we have your testimony. We see what you said. And when you testified, you were of the belief that this process started in October of 2006 and that there was limited White House involvement; isn't that correct?

landlord," and if I -- and I defer to those who are actually briefed, because I just don't recall the words I chose; but that word does not mean for me or the language does not mean for me absence physically from an office. It just doesn't -- those two things are not connected in my mind.

We have U.S. attorneys who are out of their offices for a variety of reasons for all -- we have lots who are in the military service and they're out for those reasons, we have those who are dual-hatted and they have to -- they're in D.C. and not at their offices, because they're doing two different jobs.

So I don't personally connect physical location of a U.S. attorney with performance. That's not something that's in my mind.

What I think of -- so when I see the word "absentee landlord," I saw that term or understood that term at the time to mean more management style and approach rather than one's physical presence and so forth. Now there are things that U.S. attorneys do that -- where they travel a lot that are less justified.

And in the case of John McKay, I was concerned that in his promotion of the LinX program, he was traveling around the country a lot to do that, I did have some concerns about that. But this just did not register that same kind of thought in my mind.

as a result, the clear impression which was going to come up much more the next day, because of the U.S. attorneys themselves testifying, was that it was for other reasons that were not proper. And therefore, the concern was, make sure that you lay out what your justifications were.

And so that was the -- and we also discussed, as I recall, the position we would take on the legislation that was going to be discussed by the House.

Q Who instructed you at the White House to provide the reasons for the termination?

A There wasn't any one person who made that, alone, clear. There were a number of folks there, and it was sort of a consensus of the group that we needed to be clear on that point.

Q Was Mr. Rove present for this meeting?

A As I recall, he came in after the meeting started, didn't stay very long, and left early or --

Q And what do you recall him saying?

A I don't have any clear recollection of whether or not he spoke. I can picture where he was sitting, but I just can't recall whether he actually -- if I -- you know, pushing my memory at its limit, I think he said something, but I just can't remember what it was he said; and I just think it was lumped into the general point of, you all need to explain what it was that you did and why you did it.

A Yeah. I mean, that's generally right. I'm not sure if those are my -- I'm not sure.

Q Generally right, that you believed that at that time?

A Yeah. Until I saw the e-mails that Kyle, the documents that were produced on May -- on March 8, my understanding was that there was no -- I certainly don't -- I just have two words for you to remove.

To this day, I have no information to suggest that the White House played any role in identifying U.S. attorneys to be removed. I have no information to suggest that's not true.

And encourage the dismissals, that language -- you are asking me how I view that, then and now, is that until I saw the -- until I saw the documents that Kyle had on March 8, I did not appreciate that there was anything in the category of encouraging us to do what we did in October or November.

Q Right. So you believed it was true when you read the story -- first of all, when you talked to the reporter in advance of the story and when you read it in the story, you thought it was accurate at that time, correct?

A Yes. I would have -- again, I don't have any -- I can't say that I'm the official that's referred to there.

Q No. I wasn't asking you to attribute that.

A And as far as, do I believe it was true at the time.

Q Do you recognize Monica Goodling's handwriting?

A I don't think I would necessarily.

Q As of sometime between January 1 and January 9 of '06, do you have any basis for the knowledge of why Mr. Charlton or Mr. Bogden would be put on a list for termination?

A No, I don't.

Q Did anything happen with respect to the proposal to tape record conversations or confessions in Arizona? Did that occur by January of '06?

A I think it occurred after that because it occurred during my tenure as acting or deputy, and so it came up in the springtime of '06.

Q So that couldn't explain his being there.

What about this obscenity case? Did that come up during your tenure, too?

A As I recall, that was in the summer/fall time frame of '06.

Q Yes. So that couldn't have happened in January of '06 or have been known, could it?

A I am not aware of that being an issue at that time.

Q Right. Was there any other reason that had been attributed or any justification that had been suggested about Mr. Charlton besides the -- oh, the death penalty.

When did that occur that he asked for the death penalty

to be reconsidered?

A That was in the late spring and summer of '06. There is only one issue that I can think of that might -- that predates this.

Q What would that be?

A That is the resource issue down in his district. It is a little sensitive because it involves Senator Kyl, so we don't go around making a lot of noise about it, but it involved getting additional prosecutors to the district of Arizona, and I believe it occurred in the '05/'04 time frame.

Q Well, did Mr. Charlton oppose getting additional prosecutors?

A No. What happened was he worked -- as best I recall the story. I was not the deputy at the time. He worked with -- excuse me. The summary of it, as I understand it, is that he went around the process and dealt directly with Senator Kyl on getting additional prosecutors in Arizona. As a result -- and I believe this was during the late -- my memory is a little vague here. It might have occurred during the end of Ashcroft's time as Attorney General and maybe at the start of Gonzales', but as a result, we had to pull AUSAs out of larger districts like Southern New York and Northern Illinois and shift some slots down to Arizona. I think Jim Comey was the deputy at the time.

Q Was anybody assigned that event as a reason for Mr. Charlton's termination in December of '06?

A Yes, that has been referred to it.

Q Who said that?

A It might even be on that chart that we looked at a moment ago having to do with -- it might be stated in very vague terms such as "did not follow DOJ process for getting additional resources," but I do recall that that had kind of created frustration among the leadership for the spot it put the Department in.

Q With respect to Mr. Bogden, that issue dealing with the one obscenity case, had that occurred by January of '06?

A I believe that occurred after that date.

Q After that date. So that couldn't explain why someone, perhaps Monica Goodling, was suggesting the addition of Mr. Bogden as of January of '06 to the list to terminate?

A Well, I believe, at that time, that case was following that date.

Q Right.

A So, for the record, just -- I mean I appreciate what you've established, and I just want to make sure that it's clear for the record since I referred to the resource issue.

Q Sure.

A That resource matter did trouble the Department

leadership because it did kind of force us into having to do -- which is always a very difficult thing, and that is move AUSA positions from one place to another. We didn't have AUSA slots just to put in Arizona, and so I think it is important for the committees, in their search for reasons that were going on with Paul Charlton, just to appreciate the significance of that circumstance, and that circumstance may have been indicative of Paul's style, which was not to take "no" for an answer.

Mr. Nathan. Can we have this marked as Exhibit 16?

[McNulty Exhibit No. 16 was marked for identification.]

BY MR. NATHAN:

Q I'll show you Exhibit 16.

First, I want to -- let's see where this begins. So go to the end of the document, which, as you know, with an e-mail chain, that is the first one there.

September 13th, 2006 at 2:39 p.m. This is an e-mail from Harriet Miers, White House Counsel, to Kyle Sampson regarding U.S. attorneys. Do you see that?

A Harriet to Kyle, right.

Q It says, "Kyle, any current thinking on holdover U.S. attorneys? Any recent word on 'blank' intentions?" Someone's name has been deleted.

Do you see that this initiative is coming from

It is also true that it assumes that there is no other basis for the resignations of those U.S. attorneys, and I know you're working hard at trying to -- I don't say that negatively. I'm sorry -- distinguish between those reasons and these others, but I'll maintain with you that there are justifications, and just the -- you know, if you're a U.S. attorney right now and you're looking at this whole affair and you're looking at San Diego -- you and I will never know this for sure -- and if we could take a poll of every other U.S. attorney, I would be prepared to bet you more than a pint that the fact is that they would say that the reason for Carol Lam's departure is about the gun numbers, which most U.S. attorneys were really surprised to see how she was able to not do gun cases when they were being forced to do gun cases and those immigration numbers rather than say it is because she was following up on whatever the Cunningham case involves. I don't think you'll find the U.S. attorneys think that way.

Q Let me ask you about that.

First, you said, if an agent thought that this were having an effect, he should scream bloody murder.

A You're going to mention San Diego.

Q Didn't the FBI agent in San Diego scream bloody murder with respect to "it's politics"?

A I don't know if it was bloody murder or what he

A Yes, I assumed at the time I was being consulted; it would have been reasonable for me to assume at the time I was being consulted. I just can't specifically remember what I was thinking at that moment, but it would have been reasonable for me to assume that others had the same information or similar information or some of the information that I had concerning these individuals so that if they had been consulted they would have been able to provide the same kind of information.

Q Okay. Let me jump now to the individuals. I'll come back to this generally, perhaps, later, but I would like to ask you some questions about whether there is any other personal knowledge you had about -- or that would have supported concerns you had with the individuals who were asked to resign that did not come out in the earlier questioning.

The first of those people whom I'll mention is David Iglesias. Is there any further information or belief that you had concerning his performance as a U.S. attorney that affected your opinion of whether his resignation should be sought?

A Well, as I said before, I picked up through conversations over -- at the time that I was deputy for a year at that point, I had picked up some conversations about the sort of approach that was taken, the aggressiveness, the

ability, and things that were less than positive.

In other words, I had some information that had just come to me in the course of that year, through conversations and so forth, that was related to the style or approach that he took as a U.S. attorney that were similar to or not inconsistent with the things that Senator Domenici said to me in a phone conversation. So prior to that time that I saw the name that I was responding to, there were other, you know, miscellaneous things that I had picked up in conversations that were consistent with that criticism by Senator Domenici on October 4th.

Q Do you recall with any more specificity what those might have been?

A Well, I recall a comment made to me by a judge one time at a meeting I was at in the summertime.

Q Of what year?

A What's that?

Q Of what year?

A That's the summer of '06.

He is a judge who sits in the Southwest. I believe he is on the -- I was at a bar event or a judicial conference event. That's what it was, the Standing Rules Committee, I think it was, in the summertime, and he had made a negative comment about not, you know, being aggressive. I just didn't even respond to it. I think it was just a passing

comment, but that's the only specific thing I can recall.

I just remember that when Senator Domenici made those negative remarks, it didn't strike me as being out of the blue or totally inconsistent with other things that I had heard. There are some U.S. attorneys who, if someone called me and made a negative comment about them, I may not have any association at all with anything else. I just don't remember reacting that way with those criticisms.

Q Do you recall what kind of aggressiveness the judge might have been referring to? Was it aggressiveness in prosecution in the office or was it personal aggressiveness or something else?

A No. I think it had to do with being effectively running the office and dealing with the problems that were existing in New Mexico.

Q Is that the only more specific thing you can recall about Mr. Iglesias?

A That's the only thing I can recall right now, yes.

Q Okay. Next, I would ask about Mr. Bogden.

Is there any other information that affected your view of whether his resignation should be sought?

A No, I didn't really have any other information on Dan Bogden.

Q Have you learned of anything since that would confirm the wisdom of the decision to seek his resignation?

A Well, what I have heard since is basically consistent with what I understood to be the case at the time of a lacking of assertiveness and aggressiveness and a dynamic nature. I think, when people hear that, they may be confused or really puzzled by that, and I may need just a moment to explain that point a little better, because inside the Department and its leadership that probably means more to many of us than it does to those on the outside. There are a number of U.S. attorneys who, from the moment they arrive, have an aggressiveness that seems to really push the office to another level, and it's not only just seen in statistics; it is often seen in the kinds of cases that come up, and it's seen in the way in which they interact in the U.S. attorney community and with the leadership that they exercise, and when you see U.S. attorneys like that, you start to set the bar kind of high for what it can be like to see a person who really takes initiative, and I think that sometimes U.S. attorneys are judged against that kind of standard, and so when they're seen as lacking in some ways in terms of assertiveness or aggressiveness, that's what is meant. It's meant that they are not performing at that highest standard of energy and initiative that can be done, and if you lay that up against a district where it's a higher profile district, it might be accentuated more, and that's how I have come -- that's basically how I understood

it and it was explained to me and ultimately why I didn't object and how I've come to continue to understand the situation there.

Q So it would be fair then to say that a U.S. attorney who fell short of that bar that you just described would present a situation in which the Department, in reviewing the U.S. attorney corps, could decide reasonably, "in this district, we can do better"?

A Correct. That's how I think the Attorney General himself looks at it as to where we can make change and where we can do better.

Q I'd like to ask you about Mr. McKay, but let me first get back to a question about Mr. Iglesias.

As you may know from testimony in front of this committee back in March, Mr. Iglesias claimed he was contacted by Senator Domenici and Representative Wilson in the latter part of last year.

Do you believe that, whether or not he would have ended up on the final list and his resignation would have been sought, it might have been a different story if the Department leadership had known of those contacts, for example, because he had reported them to the Department consistent with procedures?

A It's a good question, and I know the Attorney General addressed it, to some extent, at his

hearing.

My way of saying it would be it would have been a very important consideration or factor, in our perspective, on how we viewed comments that had been made. Comments that have been made have been general in nature and not case specific. These appear to have been case specific issues, and so it doesn't necessarily mean that the general comments were not still valid, but it might have been an important factor in our perspective. Beyond that, I'm not going to speculate as to whether or not we would have come to a different decision, but it would have been very, I think, important information to have.

Q Do you think that the failure of a U.S. attorney to report that kind of contact to the Department, consistent with procedure, reflects what you would call an example of very poor judgment, poor judgment, moderately poor judgment?

A Well, I appreciate that. I'm going to refrain from speculating as to how it reflects in terms of judgment, but I will say that I am still puzzled as to why it wasn't given the significance of it in his mind, at least as he has described it, and I can't speculate beyond that as to why it wasn't reported.

Q Okay. With regard to Mr. McKay -- I know you spoke of a number of issues earlier.

A Right.

Q But with regard to the information that you knew about with respect to his performance --

A Right.

Q -- that led to your opinion about whether he should be on/remain on the list, is there any issue that you have not already discussed or is there any further detail about the issues you did discuss that you would like to offer?

A Well, I would appreciate your giving me the opportunity to say something about that --

Q Sure.

A -- because this is something that has been connected to me more because of the letter that was written by a group of U.S. attorneys to me about information sharing, and so I would like the record to at least include my own full understanding of the issue, and I don't think I told this to Mr. Nathan, so I hope I'm not repeating myself.

When I became the U.S. Attorney in Eastern Virginia, I was one of five pilot spots that the Navy Criminal Investigative Service had selected for a pilot project on information sharing using a particular brand of technology known as LInX -- capital L, capital I, small N, capital X. This is a technology that brings the data that exists in police department records together so that, at one spot, you can, like a Google search, enter information about any particular thing you know -- the vehicle number, the license

plate number, the name of a person -- and you can search the data of other law enforcement agencies quickly and get hits just like a Google type of search, and then you can go in and look at the text of those reports. It's a very attractive and exciting technology for what is really the cutting edge in law enforcement work, the sharing of information.

John McKay believes to his core that this is the way to go, and he and I actually developed a good working relationship because Seattle, Norfolk or Hampton Roads, Jacksonville and a few other places -- Hawaii -- were the core places the Navy invested in in doing this.

RPTS CALHOUN

DCMN HERZFELD

[3:40 p.m.]

A But -- and then secondly, when Jim Comey was Deputy Attorney General, he was faced with this question: How do we take Federal law enforcement records, FBI, DEA, DOJ law enforcement agency records, and how do we share those into the same process technically with the locals who are sharing information.

John's view, John McKay's view, was that those records have to be shared as fully and as openly as possible; that is, looking into the full record of the Federal law enforcement agency. The Federal law enforcement agency has had some real concerns about that and technically can raise all kinds of challenging things.

So Jim Comey decided to set up a pilot where Seattle was chosen for a test of bringing together all the Federal records called 1 DOJ as our name of the initiative and to share those with the Northwest Information Sharing Database.

John describes that decision to create a pilot as a decision by my predecessor to endorse LInX, a brand of LInX, as the way of sharing information. That is not correct. What Jim was doing was promoting information sharing, an important thing, and using that as a pilot.

But in San Diego they have a different technology; in

Texas, in New York, in St. Louis, different technologies for how to share information, and LInX is just one brand among other brands, other styles, other technical abilities. In San Diego, for example, it's what's called a structured data system, where you go in and enter information, and you get back a screen, and some law enforcement people prefer that approach than the full test for a variety of reasons.

So what John McKay and I finally discovered in early of 2006 now that I was Deputy Attorney General, and when I became Deputy Attorney General, I decided that this issue was of importance to me and I was going to invest time and effort in trying to promote it in a fair way. One of the things I learned quickly from the people that know this stuff quickly at the Department is we have to be brand neutral. We can't endorse LInX. It's a proprietary product. It's owned by a particular group of individuals. We can't promote LInX as the exclusive way to share information.

We have to make sure that we promote information sharing and encourage the other districts like San Diego and other places to use their technology. This is way more than anybody in this room wants to know, I'm sorry. I'm almost done.

So as a result, I established a more neutral approach. John believes that LInX is the only way to go. And so from

the springtime on, he set himself about going around the country promoting LInX and criticizing the Department, not necessarily me personally, but criticizing the Department for its failures toward law enforcement information sharing, which was a big blow or a bad message to local law enforcement. Police chiefs around the country think information sharing is a key thing to do, and the Navy was being told that the Department of Justice doesn't support it.

And I was working hard and I had two people on my staff working very hard to try to educate the country that we were for it, but for it in a brand-neutral way, and where people wanted to do LInX, fine, but it was the choice of local law enforcement, not the choice of DOJ.

And he wouldn't listen to that. He just continued to promote that until he led up to that letter where in that letter he calls on me and got his colleagues to sign an endorsement of the LInX approach as well as an endorsement of mandating, it says in the letter, mandating that all the Federal agencies share their data in a full way, which DEA and FBI have very serious concerns about doing.

And so that's why I responded back in that e-mail that I was disappointed that I was being in a sense cornered or being put in a public way. That letter was shared outside the Department to sort of capitulate to what John's agenda

was on law enforcement information sharing.

Mr. Nathan. Can you just state the date of that letter, please?

Mr. McNulty. I believe it's August 18th or thereabouts.

Mr. Nathan. August 30th, 2006?

Mr. McNulty. I will look it up real fast. It is right here. The letter is dated August 30th, 2006.

BY MR. FLORES:

Q The tour that Mr. McKay took around the country to promote LInX, that include statements critical of the Department's position to officials outside of the Department or strictly to officials in the Department?

A No, outside the Department. Now, I want to be careful; I don't have chapter and verse on those statements. My information was largely coming to me from two individuals on my deputy staff, one of whom was full time responsible for the promotion of the law enforcement information sharing effort, and another who was spending a lot of time on it. And those two would report to me on a regular basis. One of those two I met with every single morning because I have a national security meeting every morning with that team.

So I was getting from them constant reports of John just said this, or John was over there doing that, or John saying the Department doesn't care about information

sharing. And it was just a repeated process.

Q Okay. Thank you. Don't intend to jump around as much, but there are a few more questions about Mr. Iglesias, the concerns you had about Mr. Iglesias prior to late October '06. I forget if you mentioned earlier, but had you shared those concerns with others in the Department?

A I probably had some miscellaneous conversations, but nothing that comes to mind right now.

Q Do you recall with whom those might have been?

A I don't want to guess because I really don't have any specific recollections.

Q I appreciate it.

Do you recall from whom else within the Department within that period that you picked up any other concerns about?

A I don't have any specific recollections.

Q To turn to Exhibit 5, this is the report on the District of New Mexico from November of 2005, that evaluation. If I could draw your attention to the fourth paragraph on the first page, appears under the heading "United States Attorney and Management Team." Can I ask you to just review that quickly, please?

A Yes.

Q Could you please answer for me whether when you read the first sentence, The first assistant United States

attorney, parens AUSA, close parens, appropriately oversaw the day-to-day work of the senior management team, effectively addressed all management issues, and directed the resources to accomplish the Department's and United States attorney's priorities, close quote, that that statement could refer simply to whether the first assistant U.S. attorney was doing well those responsibilities that had been delegated to him by Mr. Iglesias, leaving totally aside the question of whether that delegation had been appropriate?

A That's correct. I read it that this is the evaluator's efforts, and their typical way to be as positive as possible to attribute to the first assistant the good work that first assistant was doing.

Q What is your opinion of the importance of that delegation to whether Mr. Iglesias was exercising sufficient leadership in his office or otherwise sufficiently performing as the U.S. attorney in that office, if you have one?

A Would you repeat the question?

Q I guess I could rephrase it. Do you think that making such a delegation of those categories of authority is consistent with the sufficiency of performance in the office that you would expect of a well-performing United States attorney?

A I don't think there's enough in that information to shed much light on the question of the adequacy of the performance of the U.S. attorney in and of itself. I think that could be interpreted in a variety of ways, and I would be cautious as to how I would interpret that as reflecting positively or reflecting less than positively on the U.S. attorney himself. It just states that this work is getting done by this first assistant, and I don't want to read more into it than appropriate.

Q I appreciate that. My question was not precisely that, it was more to if there had been just a delegation in the U.S. Attorney's Office, what would that mean in terms of whether the U.S. attorney was fully discharging his responsibilities and performing well? If you can offer an opinion.

A It's hard to say in the abstract. It could be a positive statement about someone who understands how to delegate, and could be a statement that raises questions about how engaged personally the U.S. attorney is. It just, again, could range. I don't want to try to read too much into that.

Q Okay. If I could turn your attention also to Exhibit 6. This is the letter from Michael Battle to Mr. Iglesias in January of 2006. Just a simple question. Based on your knowledge and experience, is the time between

January 2006 and the time on which David Iglesias appeared on the list of attorneys of his resignation to be sought sufficient for performance problems in U.S. attorneys' performance sufficient to seek his resignation to manifest themselves?

A There would be enough time between January and November for a person to have issues of concern arise. I am not saying specifically in relation to David Iglesias, I am just saying there is enough time in there because it wouldn't be in the category of priorities necessarily because that would be a very limited period of time to get that. But certainly there could be some policy issues that would arise.

I would say that, for example, John McKay's situation, more things came up to affect him. And Paul Charlton, for that matter, would be another example, in the January time -- excuse me, in the '06 time frame than may have existed at the start of '06. So generally speaking, issues could arise in that time period.

Q Turn to Mr. Ryan. The documentation in his case is rather robust relatively. Let me ask simply with regard to performance issues that informed your opinion of whether he should be on the list of those whose resignations were sought, is there anything else that you would like to mention or about which you would like to offer further

detail?

A No. I think that the Ryan situation really focuses on the performance evaluation that occurred in the spring, as best I recall -- I think I have used March in that interview, I think that's the date -- and then the subsequent special team that went out in October of '06. Those two documents, essentially that second document really summarized the significant issues there.

In the case of Northern District of California, interestingly it notes in, I believe, the second evaluation that with regard to priorities, that office was doing a good job. The issue there was all about morale and the performance of the management team.

Q Let's turn now to Mr. Charlton. You have mentioned a number of things that bore on consideration of him in this process. Is there anything else about his performance that you would like to add to what you earlier said that formed your opinion?

A Well, when I reacted to that name when I was consulted, I think two things were foremost in my mind. The death penalty matter -- without taking half as long as I took for LInX, the process we have at the Department of Justice for deciding to seek the death penalty or not is a very well-established process that involves multiple stages. The U.S. attorney is given a great deal of opportunity to

weigh in and express a view in regards to that U.S. attorney's preference to seek or not seek the death penalty.

It begins by coming to the Criminal Division of the Capital Case Unit and presenting a recommendation. The Capital Case Unit is made up of individuals, largely career individuals. I think they put together panels, and occasionally they may not have a noncareer person on the panel, but for the most part that is a very standardized process. They do a lot of capital case review, and their job is to make sure that we have a policy of uniformity in our decisionmaking.

They go over the evidence carefully. They meet quite frequently with the U.S. Attorney's Office, get all the input necessary. Then it comes to my office after the Assistant Attorney General Criminal Division signs off on what the Capital Case Unit has recommended. Comes to my office; I have a team within my office which reviews the recommendation again, and I have experienced prosecutors who look at the case, look at the Capital Case Unit's review, and thoroughly analyze it, bring it to me. And usually they bring it to me through my chief of staff or through my PADAG, depending on who's the most experienced person available to kind of look at the matter, and then it comes to me for final review.

If I see that the U.S. attorney disagrees with the

recommendation, I spend a lot of personal time going over it because I don't like to -- I give deference to the U.S. attorney. I prefer we go with the U.S. attorney's recommendation. So I want to know very carefully why the U.S. attorney's recommendations are not being accepted.

Then I make a recommendation to the Attorney General. In the Attorney General's Office, it goes through another review. By the time the letter is signed that says seek or not seek, that is the end of a process that has been lengthy and involved a full opportunity to voice interests or concerns.

To my knowledge, the only time that a letter to seek or not seek was not followed was this incident with Paul Charlton. What happens sometimes is that a change of circumstance occurs in the case. Evidence is lost, witnesses unavailable, a plea opportunity comes up. Then there is a standard process for submitting it again, having reconsideration based upon changed circumstances, same evaluation, back-up, and we take the death penalty off.

In this case, to the best of my memory, Paul was informed that he should seek the death penalty in late May. He turned around and informed the court that no decision had yet been made and got a time delay, and then I think the record shows that there was a conference call in August, I believe, where he and I spoke about his desire to appeal

this decision.

And when he initially did not accept the letter from the Attorney General to say you will seek, it struck a lot of people at the Department as a rather significant thing, because we had not had anyone just -- it's so well established that you have to follow the Attorney General's decision once that decision is made. It's an essentially an order from the Attorney General. It took folks involved in that aback, and we then proceeded to deal with his desire for us to change our way of thinking. And I had a personal conversation with him about that in August. So that case, by the time I saw his name on the list in late October, that case was pretty clear in my mind.

And then, quickly, the FBI videotaping matter was another very significant thing, because prior to this occurring, Paul, without talking to anyone else, established a process for requiring that any confession in Arizona be videotaped for purposes of evidence in a Federal criminal prosecution.

Well, Bob Mueller personally called me about that because the fact is if the FBI just as one agency is held to a standard like that in one Federal district, then defendants in other districts where their confession is being used in a prosecution will be able to argue that why should we rely on the testimony of the agent when in Arizona

they are videotaping, and we should have videotape in this district. And some judges may be persuaded by that, and it could have caused a real significant effect across the country.

I called Paul and said, Paul, you have made this change you never even talked to me about, and his response was basically, well, don't tell me I can't do it because I have already done it. So I had to figure out how we were going to sort of cope with that. So that was a very significant thing on my mind at the time I saw his name.

Mr. Nathan. May I, as a point of privilege here, because I think it is very important to put on the record, may I ask a few questions about this taping policy?

Mr. McNulty. The taping policy?

Mr. Nathan. Because isn't it a fact that Mr. Charlton told the Department he was going to start this policy, but he never did start the policy? He stopped it at your request. And you asked him to submit a proposal for a pilot program on this so it could be reviewed by all the agencies; isn't that true?

Mr. McNulty. The way I remembered it was. He announced it publicly that this was the new policy. I found out about it and contacted him, and fortunately it had not yet gone into effect. The FBI had not yet started to do that. And because he expressed real concern about the

effect it would have on him personally for having announced it and not being able to do it, I tried to find an accommodation and tried to work with him to see if we could do some kind of pilot in Arizona that would allow him some way forward.

Mr. Nathan. I would like to have this marked as an exhibit and put in the record here.

Mr. Flores. Why didn't you bring it up in your earlier questions?

Mr. Nathan. Because there is no insubordination by Mr. Charlton with respect to the taping. He obeyed you not to start it.

Mr. Flores. I am going to stop you right now. I need to finish my questioning. I would like to get to the Senate people.

Mr. Nathan. I am not trying to suppress. This is an exhibit. I would like to make this point --

Mr. Flores. No, I need to ask my questions, sir. I need to ask my questions. We have heard your questions. I am not trying to suppress any information. We have the document for the record. I need to ask my questions.

Mr. Nathan. If that document is in the record, it will be sufficient.

Mr. McNulty. I will say that I did not mean to suggest in this instance this was insubordination. My point was

that this was a policy or a judgment, put in the category of a judgment. This was an area of what I would consider to be an exercise of poor judgment, not disobeying a direct order.

Mr. Hunt. Do you want to explain any more about why you thought it was poor judgment?

Mr. McNulty. Thank you. My thought is that it was poor judgment to go forward with a significant policy that would have national implications without first getting approval from the Department of Justice, working with the law enforcement agencies, and then announcing it as a policy of the district.

BY MR. FLORES:

Q Let's turn now to Ms. Lam. I know you discussed her detail earlier. With regard to her, is there any other information that informed your opinion of whether her resignation should have been sought at the time that you were consulted that you would like to discuss in more detail?

A I think we have talked about the gun statistics and the immigration numbers.

Q Thank you.

One person we haven't discussed much is Margaret Chiara. Same question for her: Is there more in terms of issues you would like to identify that affected your opinion, or is there more detail you would like to offer

with respect to her?

A Well, we haven't talked about her, so I guess there is nothing that affected my view when I saw her name. I say Margaret Chiara would be someone who would -- on that spectrum of subjectivity and level of dissatisfaction would have been -- there would be less of a serious and established concern that would exist compared to some others. But what I understood and why I did not object is because I understood that there were management problems that had persisted in the office, and that there was a real fraction or division within the office that was holding it back from being able to do better, and so that is what I was thinking at the time when I saw that name.

Q Turn to Mr. Cummins, as some of the questions earlier touched on there was an issue about whether there are performance-related questions about him. As I recall it, you were asked about the Attorney General's reaction to your testimony on February 6th before the Senate. And you had offered your understanding that at least some of that be -- on his part was you understood him to have performance-related concerns about Mr. Cummins. When you state that that was your understanding of what was in his mind, is that based in whole or in part on speculation about what was in his mind, the Attorney General's mind?

A No, it's based on the explanation that I have heard

by -- I can't recall if I heard by the Attorney General directly. I think he mentioned this at his hearing in the Senate, but I don't have clear recollection of how he did that, but that at the time that came out, that e-mail, the Department of Justice, there was a Public Affairs Office explained that it was about that, and that's how I basically learned -- not that I read in the paper, but I learned it from individuals in the Department who had the information as to why he was upset.

Q But you didn't discuss with him precisely why.

A No, I never discussed that with him.

Q So you're not certain why he was upset.

A No, but I would say my certainty as I sit here would be stronger if I could recall more precisely what he said in the Senate, and I had this recollection that he said in the Senate just that, that he thought this was a performance issue associated with Cummins.

Q I understand.

One question that came up earlier concerned whether you had received documentation of all the reasons for which these several resignations were finally recommended to be sought, either at the time of the November 27th meeting or on December 7th, earlier or some other time. Were, to your understanding, the others in senior Justice management who were involved in this we'll call it an informal review of

U.S. attorney performance aware of the information you have just recounted that affected your opinion, and if so, to what degree?

A I have always assumed that the information that I had in mind was known to other people as well. These were not private matters which I was only involved. Knowledge of Kevin Ryan's evaluation or Paul Charlton's cases or Carol Lam's priorities, these were all known issues. Many people have been involved in them, discussed them in different ways.

I think the question is were those concerns that I had concerns that others had as well? I think the answer is yes. Every concern I can think of right now exists with other people.

Q In the minds of other people.

A In the minds of other people, sure.

Q If I recall correctly from Mr. Sampson's public testimony, he described this process at least in part as a consensus-based process. He aggregated information and tried to find a consensus about whose resignation might reasonably be sought, if that's a fair characterization. Do you think that consensus-based approach to gathering information that supported the recommendations might have had something to do with the fact that no document cataloging the reasons that supported the recommendation was

did know some or all of the performance-based concerns with regard to the reason the resignations were sought that we discussed today.

A Generally speaking, U.S. attorneys would not be very familiar with what their colleagues were doing. Most of the interaction is on a very positive and more superficial level, and there would have to be some specific reason why they might be aware of a colleague's concerns.

My own sense is that the U.S. attorneys were probably aware of Carol Lam's gun statistics because we put those out in a pretty open way and tracked pretty clearly. I know I looked at my district's performance in relation to other districts. I'm sure other U.S. attorneys did the same thing.

As you may know, the matter involving John McKay involved other U.S. attorneys who signed a letter and who expressed concern about what John told them when they agreed to sign the letter, so there would be some knowledge there about John's issue.

Kevin Ryan's situation might have been known to some people, what was going on in San Francisco, although I don't have specific information that comes to mind about that.

That's probably as much as I can recall right now as to what might be known by other U.S. attorneys concerning their colleagues.

I also want to say -- make sure it's clear in the record that this language always intended -- or it's my -- it's my wording and it may or may not have come from any one person, and it may reflect also the fact that as I looked at this total effort, it was my understanding that we were going to seek to put people in place through ordinary process and we were going to get nominations. So I may have connected that intention to Arkansas as well as the other districts.

Mr. Miner. In light of the fact that it is now 8 minutes to 6, and in light of the Deputy Attorney General had other commitments, I would ask to take over questioning. May I?

Mr. Bharara. I will pass the witness over for questions.

Mr. Miner. Do you have adequate time for me to ask a series of questions?

Mr. McNulty. I will stay until the last possible moment.

EXAMINATION

BY MR. MINER:

Q I appreciate that. Matt Miner for the Senate Judiciary Committee minority.

The Attorney General testified on April 19 that he, quote, soberly questioned his prior decisions and asked you

if he should stand by his decision to seek the removal of U.S. attorneys.

Do you recall him approaching you to ask if the Department could stand by the decision?

A I recall discussing that subject with him. And the fact that we talked about -- talked about whether or not it was appropriate or not, and talked about the fact the President has the authority to remove U.S. attorneys and that, notwithstanding all of the difficulty in the weaknesses of the process and the difficulty it has created, that nevertheless we should stand by the decisions because of the President's rights to be able to make changes.

Q Was that what you conveyed to the Attorney General when he asked you?

A That's the nature of our conversations. I generally remember it, and I think it represents, as best I can remember right now, what my thinking would have been.

Q Was that face to face or was that via phone?

A That would have been a conversation we had.

Q And did you go through the bases of the removals of the seven U.S. attorneys, or were you only looking at the President's power to remove?

A Well, we didn't have a thorough discussion about each case, because we were well aware of all those circumstances, and we were just having a discussion about

that this is a home State Senator's question to the U.S. attorney, is there anything inappropriate about what Paul Charlton did?

A No. I am glad you reminded about that. I had forgot about Senator Kyl saying he asked that, and that may be a very fair explanation. When I was answering Mr. Nathan's question, I was trying to recall if there was any issue that existed in that time frame, other than the two that I dealt with later. And the best I could come up with, on the spot there, was those resource issues.

Now, I will say this: that that explanation's very reasonable and -- but it may not have been what people at the Department of Justice understood at the time that it was occurring. So that information sheds more light on it. But it could be contemporaneous with the events that were occurring in the latter part of 05 or early 06, that you could have understood that more differently at that time, and not understood or appreciated Senator Kyl's initiative that would explain that.

Q Did you ever discuss or did anyone ever discuss with you -- were you ever present and overheard a discussion where a justice official or a White House official advocated for the removal of one of these U.S. attorneys to impede a political prosecution?

A Absolutely not.

Q What about to spur a political prosecution?

A Absolutely not.

Q Your testimony before the Senate Judiciary Committee has come into question based upon a number of facts that you have said you were unaware of; because documents later came out, but you were not aware of them at the time, correct?

A That's correct.

Q At the time you testified before the Senate Judiciary Committee, did you have any intent to mislead the committee?

A None at all. Just the opposite. I had every intention to tell the committee everything I knew, to the best of my ability.

Q Did you --

A I would just, by the way, refer to Senator Sessions' exchange with Kyle Sampson at his hearing as an important explanation by Kyle Sampson as to what I knew when I testified. Thank you.

Q Did you -- or were you present when anyone else did this -- suggest that the reasons for the terminations of these U.S. attorneys, that that should be documented before the decision was made?

A Was I part of any conversation where that was suggested?

Q Yeah. Before we fire these folks or seek their

PART E

Excerpts of Statement of Paul J. McNulty, February 6, 2007

Department of Justice

STATEMENT

OF

PAUL J. MCNULTY
DEPUTY ATTORNEY GENERAL
UNITED STATES DEPARTMENT OF JUSTICE

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

CONCERNING

"PRESERVING PROSECUTORIAL INDEPENDENCE:
IS THE DEPARTMENT OF JUSTICE
POLITICIZING THE HIRING AND FIRING
OF U.S. ATTORNEYS?"

PRESENTED ON

FEBRUARY 6, 2007

U.S. Attorneys are not only prosecutors; they are government officials charged with managing and implementing the policies and priorities of the Executive Branch. United States Attorneys serve at the pleasure of the President. Like any other high-ranking officials in the Executive Branch, they may be removed for any reason or no reason. The Department of Justice—including the office of United States Attorney—was created precisely so that the government's legal business could be effectively managed and carried out through a coherent program under the supervision of the Attorney General. And unlike judges, who are supposed to act independently of those who nominate them, U.S. Attorneys are accountable to the Attorney General, and through him, to the President—the head of the Executive Branch. For these reasons, the Department is committed to having the best person possible discharging the responsibilities of that office at all times and in every district.

The Attorney General and I are responsible for evaluating the performance of the United States Attorneys and ensuring that they are leading their offices effectively. It should come as no surprise to anyone that, in an organization as large as the Justice Department, U.S. Attorneys are removed or asked or encouraged to resign from time to time. However, in this Administration U.S. Attorneys are never—repeat, never—removed, or asked or encouraged to resign, in an effort to retaliate against them, or interfere with, or inappropriately influence a particular investigation, criminal prosecution, or civil case. Any suggestion to the contrary is unfounded, and it irresponsibly undermines the reputation for impartiality the Department has earned over many years and on which it depends.

Turnover in the position of U.S. Attorney is not uncommon. When a presidential election results in a change of administration, every U.S. Attorney leaves and the new President nominates a successor for

confirmation by the Senate. Moreover, U.S. Attorneys do not necessarily stay in place even during an administration. For example, approximately half of the U.S. Attorneys appointed at the beginning of the Bush Administration had left office by the end of 2006. Given this reality, career investigators and prosecutors exercise direct responsibility for nearly all investigations and cases handled by a U.S. Attorney's Office. While a new U.S. Attorney may articulate new priorities or emphasize different types of cases, the effect of a U.S. Attorney's departure on an existing investigation is, in fact, minimal, and that is as it should be. The career civil servants who prosecute federal criminal cases are dedicated professionals, and an effective U.S. Attorney relies on the professional judgment of those prosecutors.

The leadership of an office is more than the direction of individual cases. It involves managing limited resources, maintaining high morale in the office, and building relationships with federal, state and local law enforcement partners. When a U.S. Attorney submits his or her resignation, the Department must first determine who will serve temporarily as interim U.S. Attorney. The Department has an obligation to ensure that someone is able to carry out the important function of leading a U.S. Attorney's Office during the period when there is not a presidentially-appointed, Senate-confirmed United States Attorney. Often, the Department looks to the First Assistant U.S. Attorney or another senior manager in the office to serve as U.S. Attorney on an interim basis. When neither the First Assistant nor another senior manager in the office is able or willing to serve as interim U.S. Attorney, or when the appointment of either would not be appropriate in the circumstances, the Department has looked to other, qualified Department employees.

At no time, however, has the Administration sought to avoid the Senate confirmation process by appointing an interim U.S. Attorney and then refusing to move forward, in consultation with home-State Senators, on the selection, nomination, confirmation and appointment of a new U.S. Attorney. The appointment

of U.S. Attorneys by and with the advice and consent of the Senate is unquestionably the appointment method preferred by both the Senate and the Administration.

In every single case where a vacancy occurs, the Bush Administration is committed to having a United States Attorney who is confirmed by the Senate. And the Administration's actions bear this out. Every time a vacancy has arisen, the President has either made a nomination, or the Administration is working—in consultation with home-state Senators—to select candidates for nomination. Let me be perfectly clear—at no time has the Administration sought to avoid the Senate confirmation process by appointing an interim United States Attorney and then refusing to move forward, in consultation with home-State Senators, on the selection, nomination and confirmation of a new United States Attorney. Not once.

Since January 20, 2001, 125 new U.S. Attorneys have been nominated by the President and confirmed by the Senate. On March 9, 2006, the Congress amended the Attorney General's authority to appoint interim U.S. Attorneys, and 13 vacancies have occurred since that date. This amendment has not changed our commitment to nominating candidates for Senate confirmation. In fact, the Administration has nominated a total of 15 individuals for Senate consideration since the appointment authority was amended, with 12 of those nominees having been confirmed to date. Of the 13 vacancies that have occurred since the time that the law was amended, the Administration has nominated candidates to fill five of these positions, has interviewed candidates for nomination for seven more positions, and is waiting to receive names to set up interviews for the final position—all in consultation with home-state Senators.

However, while that nomination process continues, the Department must have a leader in place to carry out the important work of these offices. To ensure an effective and smooth transition during U.S. Attorney

PART F

Excerpts of Interview of Michael J. Elston, March 30, 2007

RPTS THOMAS

DCMN MAYER

EXECUTIVE SESSION

COMMITTEE ON THE JUDICIARY,

U.S. HOUSE OF REPRESENTATIVES,

WASHINGTON, D.C.

INTERVIEW OF: MICHAEL JAMES ELSTON

March 30, 2007

Washington, D.C.

The interview in the above matter was held at 2138 Rayburn House Office Building, commencing at 11:00 a.m.

18

A As Chief of Staff, I have two primary areas of responsibility. One is to manage the staff of the Office of the Deputy Attorney General, which consists of approximately 21 mostly lawyers and 10 support staff, so I think it is a total of 31. And that relates to everything from office space -- a lot of it is pretty mundane.

I sign time slips, lease slips, those kinds of things. I interview people who want to work in the Deputy Attorney General's Office. I deal with the personnel issues that come up in the Office of the Deputy Attorney General.

I also am responsible for the Deputy Attorney General's schedule, and I often accompany him to meetings and other things. As a matter of course, I am put on virtually every meeting that the Deputy Attorney General has. I don't attend all of them, but I oftentimes will accompany him to meetings, mainly as a communication link; if something is going on and someone needs to get hold of the Deputy Attorney General, there needs to be somebody who is around and, that is usually me.

And the schedule is a major part of my responsibilities, making sure that meetings, speaking engagements, all of those things are correctly calendared and not resulting in conflicts oftentimes, that are

19

overlapping meetings, making sure I know which meeting that the Attorney General wants to do. When he is invited to give a speech, we talk about whether he should do it, who should draft the speech, those kinds of things.

Those are -- those are the primary functions of my job as Chief of Staff.

Q And you also mentioned Counselor. I assume there are more substantive responsibilities that go with that.

A I don't --

Q You don't distinguish between?

A I don't distinguish.

Q Tell me a little bit about your substantive responsibilities.

A I think that as issues come up -- as issues come up, I do provide my advice. He sometimes will ask it. Sometimes I provide it without being asked on a wide variety of issues.

I will say, just to be clear, that my job responsibilities have changed over time.

In July, 2006, the Principal Associate Deputy Attorney General, or PADAG, Bill Mercer, left that position.

Q To become Associate Attorney General?

20

A He went back originally and did eventually come back, yes. So for a period of 3 months there was no PADAG, and I essentially did both jobs. And then when Will Moschella came, in October of 2006, I believe, I went back to largely being Chief of Staff, although I kept a number of other responsibilities at Paul's request, including managing the capital case processing within the Deputy Attorney General's Office and the Executive Office for U.S. Attorneys.

I also -- I also have a role in the pardon process within the office. And so maybe those things are more Counselor-like than Chief of Staff-like.

Q And your last answer actually got into my next question, which is, can you describe your responsibilities and the responsibilities of the Deputy Attorney General's Office with respect the U.S. Attorneys?

A The Deputy Attorney General is the direct supervisor of the 93 United States Attorneys. As a result -- as well as being the direct supervisor of the Director of the Executive Office for the United States Attorneys. As a result, there is a constant flow of information and communication between U.S. Attorneys Offices, DOUSA, and the Deputy Attorney General's Office.

21

Probably beginning in July, 2005, I became the point person for those communications and issues. I share that responsibility with David Margolis, who also has a role in U.S. Attorney issues in the office, and he always has.

Q And he is in the Deputy Office?

A Correct. I guess I said 2005. July of 2005, is that what I said?

I wasn't in the Deputy Attorney General's Office. I meant July of 2006.

Q Right.

A Because I was not there in -- until November. July of 2006 was when Mr. Mercer left, that these additional responsibilities came my way.

Q I am trying to get a little bit of an understanding of -- and this will be a little longer question than usual, so you understand where I am trying to come from -- of differences. And there may not be that many differences; it may be more collaborative between the functions that the DAG Office has and the functions that EOUSA has with respect to U.S. Attorneys, the Web site of EOUSA, their having responsibility for policy for U.S. Attorneys and evaluating performance and things like that.

Can you -- with that confusion in my mind, can you try to explain to us the relationship between the DAG

22

Office and EOUSA and their respective responsibilities with respect to U.S. Attorneys?

A I will try.

Obviously, there are large numbers of Assistant U.S. Attorneys that work in the field. And the Executive Office of U.S. Attorneys, I would say, has a very big role and responsibility with respect to the day-to-day management and work of the U.S. Attorneys Offices, making sure that the U.S. Attorney Offices are staying within their budgets, addressing employment issues with the respect to USADA that come up or support staff that come up; it is a -- it's more of the day-to-day assistance to the U.S. Attorneys Office.

It is complicated because United States Attorneys, of course, are appointed by the President and confirmed by the Senate. They are the chief law enforcement officer of their district.

Q Right.

A The Director of EOUSA is not a Presidential/Senate confirmed person. So while the Deputy Attorney General is the direct supervisor of the United States Attorneys, the Director of EOUSA is not their direct supervisor. And --

A My sense is that many -- I guess I would have to say "no."

Q Okay.

A Not that I can think of.

Q No. That makes perfect sense. And what about Immigration?

A In Immigration, we have two staff members, Dan Fridman and Lee Otis, who work on immigration issues.

Q And this is LeeAnn Hebramson Otis?

A Yes.

Q Okay. That is very helpful.

Let me move now for a little bit, and I think we can probably get through -- at least I hope -- the next line before we break for lunch. I want to move to at least a general discussion of the issue of the terminations that we are here to talk about.

Focusing on the period after Bush's reelection in November of 2004, when did you first learn about or begin participating in a plan, or an idea or a proposal, to consider terminating multiple U.S. Attorneys?

A The answer is, I believe the fall of 2006. I cannot date it with precision, but it was sometime in late September or early October to the best of my recollection.

Q And how did you become aware of that?

A Kyle Sampson approached me, indicated that the Department -- at least in my recollection it was the Department; he might have said "we," he might have said something else. Certainly as I have looked back on this conversation, I have tried to figure out precisely what he meant.

But there was a plan or an intention to ask weak performers, or U.S. Attorneys who are not supporting the administration's priorities, or otherwise, or where there were other issues, to resign. And he asked for my help in trying to identify, in particular, the weak performance performers. And at the time, I believe he asked me if I could put together a list for him.

I want to qualify all of this by saying that from the spring of 2006 on, there were running conversations about individual U.S. Attorneys and issues that were arising with those U.S. Attorneys; but I understood your question to be about a plan to ask a group of U.S. Attorneys to resign.

Q No. I think you interpreted it exactly right.

I mean, I assume that issues arise with individual attorneys all the time?

A Correct.

Q And I assume issues have arisen with some U.S. Attorneys that haven't been asked to resign?

30

I understand it, and gangs, fighting gangs, part of that priority.

So I guess if I had to put it out, I would say terrorism, violent crime, drugs, corporate fraud and public corruption being one, and immigration.

Was there something I missed in what I have already said? I think that is --

Q I think you got them all, but I confess, I wasn't taking notes as quickly as you were talking.

A I understand.

As I sit here right now, without the chart in front of me, those are the priorities.

Q I think that is fine. I think that is fine.

When Mr. Sampson had this conversation with you, did he indicate who else was involved in this? By "this," I mean the project of identifying U.S. Attorneys for possible termination.

A He did not.

Q Did you subsequently learn of other people that were involved in this, or was it just you and he that worked on this?

A Well, obviously I had a discussion with the Deputy Attorney General about it. So if you -- I guess I am not sure what you mean by "involved."

31

Q Well, I will get -- I do want to get back to the discussion about the Deputy in a minute, but by "involved" I guess what I am talking about is the process of compiling a list, if you will.

A I don't believe he told me who else was involved. I either assumed, or at some point became aware, that Monica Goodling was involved in a sense. She had EOUSA as part of her portfolio and was the White House liaison. I don't know if there were -- I got the sense that Kyle was consulting a number of people, but I don't know that.

Q Okay.

Now, you mentioned that you had a conversation with Mr. McNulty about this, I assume, early on, when Mr. Sampson first approached you.

A Yes. I would say that typically it is my responsibility to provide important information to the Deputy Attorney General. That is one of my functions, and as the direct supervisor of the United States Attorneys, it would certainly be something that I would tell him.

My recollection is that I did tell him. I can't tell you when, I can't tell you precisely what I told him. And I am as near certain as I can be that I did, because when I first went over the list with him in

33

A So I didn't take a piece of paper to him and say, Here is the list.

I just want to be perfectly clear about that.

Q No. I appreciate that. I think we will get into that e-mail a little bit later.

But with that correction, at least up until the point that you read him those names, was it -- did he have any involvement that you are aware of in putting together that list of names that you read him, up until that point?

A I am not aware of any involvement. That is not to say Kyle and the Deputy Attorney General had a conversation. I don't know about, but I am not aware of any.

Q Right.

What was his reaction to -- actually, let us wait on that. Wait until we get to the documents to ask about specifics of names.

Describe to us more generally, then, beginning with the time that Mr. Sampson first approached you until the -- until December 7th, the day that a number of them were called, how this process worked.

A December 7th. I am not sure that I can answer that question.

Q Well, just describe to us as best you can remember, everything you did, saw, learned between then and December 7th relating to the termination of the U.S. Attorneys.

A When Kyle asked me to give him his thoughts, give him a draft list, I said, Sure. I didn't actually do it. I was very busy. And I just -- it just didn't seem like a priority in terms of the other things that I was doing; and ultimately he sent me that e-mail. I remember thinking he might have been a little ticked that I hadn't gotten around to giving him sort of my list at that point.

And from that point on, I think there were -- I would say infrequent and intermittent discussions about particular people on the list between individual people. I don't recall a meeting between the October 17th -- I think it was October 17th -- e-mail and November 27th, when there was a meeting.

I don't recall any particular meeting. But I do recall discussions regarding -- it mainly centered on whether people should be added to the list or taken off of the original list that Kyle prepared.

Q And with whom were those discussions?

A I recall having discussions with the Deputy Attorney General about a couple of the names on the

list. I recall having discussions with him about adding one person to the list. I certainly communicated with Kyle regarding those discussions.

Q And anybody else that you participated in these discussions with during that period up until November 27th, which I think was a good place to -- a good time mark?

A As I sit here today, I don't recall anything other than perhaps David Margolis with respect to Kevin Ryan.

Q Um-hmm.

A There was a conversation -- there was a conversation that occurred in early November regarding Margaret Chiara, and I know --

Q For the record, that is spelled C-h-i-a-r-a.

A And that conversation would have involved Kyle, Monica Goodling, the Deputy Attorney General, me, and I believe, possibly, Will Moschella, although I am not clear on that.

And the purpose of that conversation was to discuss an offer that she had received to become the Interim Dean of the Michigan State Law School and how -- and what we should do in response to that.

I definitely had conversations with Dave Margolis, not one conversation, but -- not that conversation, but a

different conversation which was, what is the Department's policy on leaves of absence for Presidentially appointed and Senate confirmed individuals.

But I believe the conversation about what to do with respect to that was the -- the ones I am sure of were the Deputy Attorney General, Monica, Kyle, and me.

Q Is there anybody else you can think of during that period up until November 27th, that you were involved in discussions with on this topic?

A No. No. I mainly kept the Attorney General informed of what I knew. And I responded to inquiries from Kyle, and then had discussions about specific people about whether they should go on or off the list.

Q During that period up until November 27th, did you become aware directly or indirectly of discussions that other people were having either inside Justice, or outside, about this topic?

A I need to -- can I go back to your last question, first, as I am sort of thinking this through?

Q Sure.

A There was a point in time where I was asked to -- I was asked to check with others to see if there were individuals that we had missed or there were problems that we weren't aware of. So I did do that.

Q And who did you wind up consulting with?

A And by and large the conversations were not about, hey, we are going to fire a bunch of U.S. Attorneys; is there anyone you want added to the list.

These -- my question was -- my question was, are there any problems with any -- a particular U.S. Attorney or issues regarding a particular U.S. attorney. I just was doing more of a fact-finding mission as opposed to -- as opposed to checking to see if anyone wanted to add anybody to this list.

I didn't feel like -- my sense from Kyle was this was a fairly closely held process, and I didn't feel like it was something that I was supposed to discuss broadly.

I assumed, and I don't know why I assumed this, as I sit here right now; I can't recall a specific conversation, but I was under the impression that Kyle was consulting with other people in the Department regarding U.S. Attorneys.

Q What other people did you assume he was consulting with?

A Kyle has been at the Department for many, many years, 4 years or something like that. And I assume he consulted with a broad [range|rage] of people. I don't know who precisely he would have talked to.

PART G

Excerpts of Interview of William W. Mercer, April 11, 2007

U.S. SENATE
COMMITTEE ON THE JUDICIARY
Investigation

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In the Matter of: :
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PRESERVING PROSECUTORIAL :
INDEPENDENCE: IS THE DEPARTMENT :
OF JUSTICE POLITICIZING THE :
HIRING AND FIRING OF U.S. :
ATTORNEYS? :
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Wednesday
April 11, 2007

The interview of WILLIAM W. MERCER, Acting Associate Attorney General, Department of Justice, was convened, pursuant to notice, at 11:15 a.m. in Room SR-385, Russell Senate Office Building.

APPEARANCES:

PREET BHARARA, ESQ.
Chief Counsel for the Majority
Senate Committee on the Judiciary

MATTHEW S. MINER, ESQ.
Chief Counsel for the Minority
Senate Committee on the Judiciary

ERIC TAMARKIN, ESQ.
Counsel for the Majority
House of Representatives
Committee on the Judiciary

DANIEL FLORES, ESQ.
Chief Minority Counsel
House of Representatives
Committee on the Judiciary

1 MR. MERCER: Well, I certainly was--again, if we
2 are talking about that immediate time right in advance of
3 the hearing, I wasn't involved in any discussion like that.
4 I don't recall any discussion like that. If we are talking
5 about the performance of Carol Lam as the U.S. Attorney in
6 the Southern District of California, I participated in many
7 such discussions back in the spring of--
8 MR. BHARARA: No. That I am going to get into.
9 What I am talking about is preparation of the Attorney
10 General on the subject, because as I understand it, the
11 Attorney General--and I acknowledge it--was prepared to
12 answer questions about what was going on in the Southern
13 District of California and what was going on--because
14 Senator Feinstein raised the issue--and what was going on in
15 the Eastern District of Arkansas. My question is: In
16 connection with this preparation--and you were involved in
17 some of this preparation--were you present for any
18 discussions about those subjects?
19 MR. MERCER: I don't recall being--as I answered
20 earlier, I don't recall being involved in any prep sessions
21 in advance of his appearance before the Senate Judiciary
22 Committee where the question of replacements for those three
23 U.S. Attorneys came up or when we specifically talked about
24 performance-based issues in those districts in advance of
25 his--I do not recall participating in any such discussion.

1 those sessions. I think I was invited for probably two,
2 maybe three principal reasons.
3 The first reason is that there was an interest in
4 having me brief Mr. Moschella about the interactions that I
5 had had with U.S. Attorneys Charlton and Bogden beginning on
6 the 7th of December.
7 The second reason was that I had been PADAG and
8 had on a number of occasions raised concerns about the
9 operations of the U.S. Attorney's Office in the Southern
10 District of California, and that was well known within the
11 senior management offices, and I understood that to be
12 something that had been a significant consideration in the
13 ultimate decisions that were made. And I was probably the
14 person in the best position to recount all the various
15 things that I had observed and analyzed and reported at one
16 time or another. Mr. Moschella had become the PADAG about 3
17 months after I left the position, I think--certainly at
18 least a 2-month spell there where there wasn't a PADAG. And
19 so I was prepared to talk to him about the operations in the
20 Southern District of California.
21 The third issue was before I had become the
22 Chairman of the Attorney General's Advisory Committee, I had
23 been very involved in sentencing reform issues, and as you
24 all know, the system has been through a significant amount
25 of upheaval in that post-Blakely, post-Booker era where for

1 MR. BHARARA: Are you aware of whether or not
2 anyone at any point in the Department of Justice did believe
3 that there was a performance issue with Bud Cummins?
4 MR. MERCER: I am not aware of any, but that
5 doesn't mean that someone didn't have that concern.
6 MR. BHARARA: Okay. I am going to ask you some
7 questions about--we have had some conversations about
8 documents and whether or not they were produced. Let me
9 just ask you some general questions about documents, just so
10 the record is clear.
11 Prior to December 7th of 2006, are you aware of
12 any documents that were created at the Department of
13 Justice--and if so, please identify them--with respect to
14 the performance issues of any of the U.S. Attorneys that
15 were asked to resign?
16 MR. MERCER: I think there are a significant
17 number of documents as part of the ASG production that talk
18 about the production--excuse me, the productivity,
19 compliance with the Department's initiatives for the
20 Southern District of California. If you mean was there a
21 single document that was created per each district, other
22 than the document that I faxed to Ms. Lam on the 5th of July
23 in 2006, I am not aware of any compilation, but I am aware
24 of a lot of individual documents for the Southern District
25 of California. And if the question is am I aware of any

1 documents--is there a document that says here are the
2 performance issues in the Western District of Washington, I
3 personally am not aware of any document that could be
4 described as that.
5 MR. BHARARA: Let me come at this a different way.
6 Have you reviewed the production made by the Department of
7 Justice to the Congress?
8 MR. MERCER: Only segments of it. I have
9 certainly not reviewed it in its entirety.
10 MR. BHARARA: And why only segments?
11 MR. MERCER: Well, I think what is important is
12 what I had a basis to know about in the course of my
13 capacity as Acting Associate; and to the extent that I had
14 knowledge of something during my time as Principal Associate
15 Deputy Attorney General, I think that that is where I can be
16 helpful. But I am sure there are things that are not things
17 that I knew anything about.
18 MR. BHARARA: Are you familiar with the document
19 production process in response to a request from the
20 Congress in this matter?
21 MR. MERCER: In a general--I mean, in a general
22 sense I am.
23 MR. BHARARA: Was there someone who was heading up
24 the effort in particular to be responsive to the
25 congressional request for documents?

1 for resignation. I am not talking about that. What I am
2 asking is the first time you became aware there was anything
3 in the nature of a plan to ask for the resignations of
4 multiple U.S. Attorneys.
5 MR. MERCER: During my time as Chairman of the
6 Attorney General's Advisory Committee, after the election I
7 had fielded a number of calls from U.S. Attorneys about
8 whether there would be a request that all U.S. Attorneys
9 submit letters of resignation. And I passed that concern on
10 to Mr. Sampson, and in very short order, we had an e-mail
11 that indicated that, in fact, there wouldn't be any request
12 made for resignations. That e-mail, which I believe has
13 been produced as part of my production here, notes that U.S.
14 Attorneys serve at the pleasure of the President, but that
15 there wouldn't be any requests for resignations.
16 MR. BHARARA: Do you recall the date of that
17 e-mail?
18 MR. MERCER: I don't--well, it is early November.
19 I recall that.
20 MR. BHARARA: Early November of?
21 MR. MERCER: 2004. The next time that--and I
22 really hesitate to call this a "plan" because I don't have
23 any background knowledge. But Mr. Sampson advised me at
24 some point--and I cannot be precise about when I learned of
25 this, but at some point he mentioned to me--and this, I

1 believe, would have been either early in my tenure as PADAG
2 or late in my tenure as Chair of the AGAC--that the White
3 House counsel had proposed asking for the resignations of
4 all United States Attorneys, in fact, having a broad-based
5 plan that would have, across the board, asked all U.S.
6 Attorneys to resign. And Mr. Sampson advised me at the time
7 he told me of this plan that he had successfully argued
8 against it and that that idea had been abandoned.
9 Again, I hesitate to call it a "plan" because I
10 don't know anything about it. I was relying on the
11 information of one person who said that this had been
12 proposed and that he had worked to make sure that that did
13 not go forward. That was the first time that I had ever
14 heard anything about the potential to ask U.S. Attorneys to
15 leave their positions.
16 MR. BHARARA: You described two separate
17 communication incidents. I just want to go to the first one
18 for a moment.
19 MR. MERCER: Sure.
20 MR. BHARARA: To make sure I understand, you said
21 there was inquiry from someone in the U.S. Attorney's office
22 in the field wondering whether or not there was going to be
23 a request for everyone's resignation. Is that right?
24 MR. MERCER: That is right. As Chair of the
25 Attorney General's Advisory Committee, I was the logical

1 receiving this email on the 5th of December. To û-
2 MR. BHARARA: If I could interrupt. Prior to the
3 8th or 9th of July of æ06, did you have any knowledge of a
4 plan that would end up culminating in the request for
5 several resignations?
6 MR. MERCER: At some point in the fall of 2005,
7 Mr. Sampson and I had a conversation. Mr. Sampson and I had
8 on a number of occasions talked about U.S. attorney
9 personnel during the course of my time as Chairman of the
10 Attorney GeneralÆs Advisory Committee.
11 I had made recommendations about who would be good
12 members of the advisory committee. I had made
13 recommendations on who should chair subcommittees of the
14 advisory committee. I had made recommendations about who
15 might be viable candidates to serve as Director of EOUSA.
16 So in my capacity both as Chairman of the Attorney
17 GeneralÆs Advisory Committee and then once I got in the
18 Deputy Attorney GeneralÆs Office, he and I had multiple
19 conversations about people who could potentially serve well
20 in other capacities.
21 MR. BHARARA: Could I just interrupt you? This is
22 an example of a time where it would be helpful if you just
23 sort of answered the question I ask without û- if there is
24 additional context needed, IÆll ask for it, or someone else
25 can ask the follow-up question.

1 But my question was was there some time prior to
2 July of æ06 when you learned about a plan to actually people
3 to resign? Not a question about whether or not people
4 should serve or not serve in certain advisory capacities.
5 MR. MERCER: Okay. And I will try and do that.
6 MR. BHARARA: Okay. Great.
7 MR. MERCER: I just want to make sure that the
8 context is there, because certainly Mr. Sampson and I had
9 multiple conversations about U.S. attorneys in my capacity
10 as PADAG and as my capacity as Chair of the AGAC.
11 In the fall of 2005, we had a discussion in his
12 office where he asked me specific questions about my
13 perceptions having been PADAG for at that point, depending
14 on when the conversation was, probably 3 or 4 months, not to
15 mention my tenure as U.S. Attorney, my Chairmanship as AGAC,
16 whether I had views about the productivity of the offices of
17 certain individuals, and essentially whether in my view
18 there were problems in those offices, and whether the
19 strategic plan articulated by the Attorney General was being
20 accomplished in that subset of districts.
21 I canÆt recall if we talked about 10 U.S.
22 attorneys or 12 U.S. attorneys. It was certainly not the
23 entire list of U.S. attorneys, but it was also more than
24 just a handful. That conversation, again, I canÆt be
25 precise, but it was sometime, I was PADAG at the time, and

1 it was sometime in the fall of 2005.

2 And let me just û- you talked about a plan, and I

3 want to once again say IÆm not sure I would articulate this

4 as a plan. I would articulate this as a conversation about

5 the productivity of individual U.S. attorneys and my

6 perceptions about those particular U.S. attorneys.

7 MR. BHARARA: Let me ask you a series of questions

8 about that fall conversation.

9 MR. MERCER: Sure.

10 MR. BHARARA: First, can you place it in time with

11 any greater precision than you have?

12 MR. MERCER: I can try. I think that it happened

13 after Deputy Attorney General Coney had departed, and I

14 think it happened either contemporaneous with or a bit

15 before Deputy General Attorney arrived, Deputy Attorney

16 General McNulty arrived.

17 MR. BHARARA: Okay. Do you remember what months

18 those were?

19 MR. MERCER: Well, Jim left in the middle of

20 August, and Paul started in early November.

21 MR. BHARARA: And you recall this being an

22 in-person conversation?

23 MR. MERCER: Yes. I recall it being in Mr.

24 SampsonÆs office.

25 MR. BHARARA: Was anybody else present?

1 MR. MERCER: No.

2 MR. BHARARA: How long was the conversation?

3 MR. MERCER: I would think probably a half an

4 hour. Twenty minutes to half an hour.

5 MR. BHARARA: And it sticks out in your mind even

6 though it was 20 minutes long a year and a half ago?

7 MR. MERCER: I recall being asked my views about

8 individual U.S. attorneys based upon my service as PADAG and

9 any other perceptions I had, yes.

10 MR. BHARARA: Now, when you had these

11 conversations, this conversation with Mr. Sampson about the

12 performance of particular U.S. attorneys, did you understand

13 him to be asking whether or not one or more of these people

14 should be asked to resign, or something very different? Or

15 was he û- did you understand him simply to be asking were

16 they performing well or not performing well?

17 MR. MERCER: Well, I--

18 MR. BHARARA: Did you follow my û- do you

19 understand my distinction?

20 MR. MERCER: I think so. But IÆm not so sure this

21 is susceptible to that degree of precision. I think he was

22 asking preliminarily for my views about what I thought about

23 all those different categories. Productivity, the ability

24 to manage the strategic initiatives as articulated by the

25 Attorney General, and any other compliance problems that I

1 was observing, to the extent that those things had come to
2 the attention of the Deputy Attorney GeneralÆs Office.
3 That could be anything from a bad EARs evaluation
4 to something else that had come up in a particular case. He
5 was attempting to say weÆve got a responsibility as a
6 department to manage these resources in a way that we can
7 have optimal performances in U.S. attorneys offices. What
8 is your view on these particular individuals?
9 So I think it can most fairly be characterized as
10 just that. You are in a position to have knowledge about
11 the performance of individual U.S. attorneys. IÆm going to
12 ask you about this subset of them, and tell me what your
13 views are based upon your vantage point.
14 MR. BHARARA: From time to time, am I correct that
15 he and other people might have asked you, what do you think
16 of so and so performing in the District of Such and Such, am
17 I right? That would happen from time to time?
18 MR. MERCER: Oh, certainly. I mean, I think there
19 is û-
20 MR. BHARARA: The answer is yes, right?
21 MR. MERCER: The answer is yes.
22 MR. BHARARA: Okay. So what made this
23 conversation different from other occasions when somebody
24 might say, what do you think of the person performing the
25 job in the Northern District of California, or the Middle

1 District of Florida, which I think happens in every
2 workplace all the time.
3 People ask how people are doing and whether or not
4 people are doing their job, and whether or not they are good
5 or they are not good. Why was this conversation different
6 in quality from other conversations that it appears you must
7 have had throughout, during the course of your tenure?
8 MR. MERCER: Because we had a broader subset of
9 subjects. It wasnÆt a conversation about, you know, what is
10 your view in terms of how things are going in Southern
11 District California. We had a subset of individuals, and I
12 was given an opportunity to share any views I had about
13 those individuals, and that was different.
14 MR. BHARARA: Did he name individuals? Or did you
15 name individuals? Or did you both?
16 MR. MERCER: He was the one that was asking my
17 views on particular individuals. I cannot recall as I sit
18 here now whether if a particular individual wasnÆt on that
19 list, whether I would have said, and by the way, I have real
20 concerns about what IÆm seeing from the District of X.
21 MR. BHARARA: Okay.
22 MR. MERCER: So I want to be very clear about
23 this.
24 MR. BHARARA: Yes.
25 MR. MERCER: If in the fall of 2005 he had not

1 inquired about the Southern District of California, I would
2 have said I have real concerns about the Southern District
3 of California in September of 2005.
4 MR. BHARARA: Gotcha. You said list. Was he in
5 that conversation speaking off the top of his head? Or do
6 you recall that he was working off an actual list?
7 MR. MERCER: I donÆt recall if he was referring to
8 paper or if he was just naming specific districts or
9 specific U.S. attorneys.
10 MR. BHARARA: IÆm going to ask you in a moment to
11 see what particular U.S. attorneys you can remember. But
12 just another question about what might have led to that
13 conversation.
14 Did he suggest to you during that conversation
15 about U.S. attorneys whether or not anyone else had been
16 concerned whether or not he had been directed to engage in
17 this kind of inquiry of you and other people?
18 MR. MERCER: My sense was that I was not the only
19 person with whom he was consulting. It was my sense that he
20 was not limiting his conversation on the subject to me, that
21 he was talking to other people.
22 MR. BHARARA: Was it your understanding though
23 that he was making his inquiries and consulting with people
24 with the understanding and knowledge of the Attorney
25 General?

1 MR. MERCER: I did not have that understanding.
2 That might have been the case, but I did not have that as a
3 û-
4 MR. BHARARA: Did you understand whether or not he
5 was having these conversations with you and perhaps other
6 people with the knowledge and understanding of the Deputy
7 Attorney General?
8 MR. MERCER: I donÆt recall that being something
9 offered as foundation either. I just û- it was a
10 conversation, and it was my understanding that he was having
11 multiple conversations.
12 MR. BHARARA: Do you know who the other
13 conversations were with?
14 MR. MERCER: I do not.
15 MR. BHARARA: Okay. To the best of your
16 recollection, who did he mention in his conversation with
17 you in asking for û-
18 MR. MERCER: I donÆt have any recollection.
19 MR. BHARARA: You canÆt remember a single one of
20 them?
21 MR. MERCER: No.
22 MR. BHARARA: You donÆt know if he mentioned Carol
23 Lam?
24 MR. MERCER: Like I said, if he didnÆt mention
25 Carol Lam, I can affirmatively tell you I would have raised

1 Carol Lam in the conversation.
2 MR. BHARARA: Well, can you remember any of the
3 U.S. attorneys that were mentioned in the conversation,
4 whether or not he raised the specific or you raised the
5 specific person?
6 MR. MERCER: Carol Lam.
7 MR. BHARARA: Anyone else?
8 MR. MERCER: No.
9 MR. BHARARA: And it couldnÆt have been as many as
10 10?
11 MR. MERCER: I would say it was somewhere in the
12 neighborhood of 10. It could have been fewer, it could have
13 been a little bit more. But it was not 1/3 of the U.S.
14 attorneys.
15 MR. BHARARA: And IÆm just going to go through the
16 list, just to be clear. You donÆt remember if Dan Bogden
17 was mentioned?
18 MR. MERCER: I donÆt.
19 MR. BHARARA: You donÆt remember if David Iglesias
20 was mentioned?
21 MR. MERCER: I donÆt.
22 MR. BHARARA: You donÆt remember if John McKay was
23 mentioned?
24 MR. MERCER: No.
25 MR. BHARARA: You donÆt remember if Carol Lam was

1 mentioned? I mean, IÆm sorry. Paul Charlton, do you
2 remember?
3 MR. MERCER: No.
4 MR. BHARARA: Bud Cummins?
5 MR. MERCER: No.
6 MR. BHARARA: Margaret Chiara?
7 MR. MERCER: Not with specificity.
8 MR. BHARARA: Kevin Ryan?
9 MR. MERCER: Kevin Ryan is û- I canÆt be clear,
10 but it may have been at that point we had some sense that
11 there were problems in that office. But I donÆt want to say
12 that for sure, because that conversation happened in the
13 fall of 2005, and I just donÆt recall who the individuals
14 were.
15 MR. BHARARA: But you remember having the
16 conversation?
17 MR. MERCER: I do.
18 MR. BHARARA: And it sticks out in your mind
19 sufficiently that you remember having that conversation?
20 MR. MERCER: Yes.
21 MR. BHARARA: About approximately 10 United States
22 attorneys a year and a half later, but you donÆt remember a
23 single person for fact that was discussed?
24 MR. MERCER: Correct. Well, Carol Lam.
25 MR. BHARARA: Other than Carol Lam. Do you recall

1 whether or not when he mentioned the names, what your
2 reactions about them were, generally speaking?
3 MR. MERCER: Well, I think some were probably
4 positive, and some were negative.
5 MR. BHARARA: Do you have a specific recollection
6 of having a negative reaction to some of the people
7 mentioned?
8 MR. MERCER: Carol Lam.
9 MR. BHARARA: Okay. Other than Carol Lam.
10 MR. MERCER: No.
11 MR. BHARARA: Okay. Well, let me ask you this.
12 How many people in your mind at the time of the 93 would you
13 have had a negative feeling about?
14 MR. MERCER: Well, I think you first have to say I
15 donÆt know what names were raised. There are all kinds of
16 different perspectives that I would have had at that point.
17 I had an understanding of what was happening based
18 upon my knowledge of the sentencing commission. They û-
19 MR. BHARARA: Can I interrupt you again? IÆm
20 sorry.
21 MR. MERCER: Sure.
22 MR. BHARARA: Did you have in your head at that
23 time, based on all your experience, because you suggested
24 that you were being û- the inquiry was being made of you
25 because you had extensive experience about and knowledge of

1 the performance abilities of various U.S. attorneys.
2 Did you carry around with you in your head a sort
3 of general sense of who the bottom performing U.S. attorneys
4 were?
5 MR. MERCER: When youÆre in the Deputy Attorney
6 GeneralÆs Office, you get a subset of information. It may
7 be that you donÆt ever hear anything about the Northern
8 District of Iowa.
9 MR. BHARARA: Can we go back to my question?
10 MR. MERCER: Sure. IÆm sorry.
11 MR. BHARARA: Did you carry around in your head û-
12 MR. MERCER: IÆm having trouble with the question
13 because it isnÆt statistically viable. If I donÆt have a
14 reference point with respect to a particular U.S. attorney,
15 there isnÆt a way for me to have a particular observation.
16 The only place I can have an observation is if
17 weÆve had a conflict, if there has been a problem in a
18 particular case.
19 MR. BHARARA: Okay. IÆll ask a different
20 question.
21 At the time in the fall of 2005, whether or not
22 you had data on all 93, were there U.S. attorneys
23 specifically that you believed were not performing well?
24 MR. MERCER: Well, I have already said I had û-
25 MR. BHARARA: Other than Carol Lam.

1 MR. MERCER: û- Carol Lam.
2 MR. BHARARA: Yes, other than Carol Lam.
3 MR. MERCER: And I knew that there were other U.S.
4 attorneys who had had either evaluations or there were
5 particular things that were being explored in the District
6 based upon our information that suggested there were
7 problems.
8 MR. BHARARA: Okay. How many such people would
9 you say in your mind you thought had problems?
10 MR. MERCER: Oh, you know, I donÆt think I can be
11 precise in that. But again, at this point I had been in the
12 Deputy Attorney GeneralÆs Office for four months. So, you
13 know, when you have been in a place for four months and
14 youÆve had an opportunity to see a number of different
15 issues, one begins to collect a set of facts that leads one
16 to various conclusions.
17 MR. BHARARA: Wait.
18 MR. MERCER: And so I canÆt say if that was six or
19 two or seven.
20 MR. BHARARA: Well, can you remember any of those
21 people who you thought in your mind might have had
22 performance problems? The reason IÆm asking that is to try
23 to refresh your recollection as to who might have been the
24 people that Mr. Sampson was asking you about. Because you
25 suggested that with respect to some of the people that Mr.

1 recollection of who the individuals were at that time.
2 But, again, when you are in a position like the
3 PADAG position, youÆre going to learn things about
4 individual folks, and youÆre going to have opinions about
5 their performance that are going to be relevant to a
6 conversation about are we achieving the goals of the
7 department.
8 I had those views at the time. IÆm sure I offered
9 my complete assessment of what they were, but I canÆt
10 remember who the individuals were as I sit here 20 months
11 later.
12 MR. BHARARA: So you cannot remember either who
13 was discussed at the time, nor can you remember who in your
14 mind you thought was underperforming at that time?
15 MR. MERCER: ThatÆs correct. Carol Lam, I can be
16 very clear about that. But I cannot be clear with respect
17 to other individuals.
18 MR. BHARARA: If I named a few other people, might
19 that refresh your recollection?
20 MR. HUNT: Let me just clarify. ItÆs fine if
21 those people are among the eight. But if we go beyond the
22 eight, I think itÆs fine to ask if there were others. But
23 the scope of this is not to talk about other U.S. attorneys
24 beyond û-
25 MR. BHARARA: I understand, but IÆm going to ask

1 did you nevertheless recall making further inquiries out of
2 your own curiosity or because you thought it was part of
3 your duty with respect to any of these names after the
4 meeting?
5 MR. MERCER: No, because that wasnÆt the context
6 of the conversation. There obviously were, as you noted
7 earlier, as time went on in 2006, there were times where
8 events occurred that were specific to say a person like
9 Carol Lam, but those were single incidents that would have
10 inspired further conversation.
11 But again, whether the conversation was related to
12 somebody that was discussed in the fall of 2005, I donÆt
13 have any recollection of that.
14 MR. BHARARA: Just to be clear, in that meeting,
15 did Mr. Sampson ever use the words ôresignationö or
16 ôterminationö or ôdismissalö with respect to any of the
17 names, possible ôterminationö, ôresignationö, or ôdismissalö
18 with respect to the names that were mentioned?
19 MR. MERCER: I donÆt know if it would have been û-
20 but the clear intent of the conversation was to say we have
21 an obligation to make sure that we are doing as well as we
22 can on all 93 districts, and if we believe that we are not
23 doing very well, then letÆs have a conversation about what
24 places those are, and what the particular problems are.
25 MR. BHARARA: Okay. Did you û- when was the last

1 time you had a conversation, if at all, along those lines
2 with Mr. Sampson?
3 MR. MERCER: Well, there certainly wouldnÆt have
4 been anything comparable. I canÆt recall anything
5 comparable where there was another conversation about a
6 subset of U.S. attorneys.
7 As I mentioned, as we get into 2006, there are
8 times where we learned things about particular U.S.
9 attorneys, whether it was, you know, an EARs team going out
10 and doing an evaluation or learning about a particular
11 problem in an office, or in the case of Ms. Lam, seeing a
12 number of different accounts, both in terms of data
13 confirmation and press accounts, and frankly the contacts
14 from Congress about problems in the Southern District of
15 California.
16 So there were things like that that would pop up
17 in the course of 2006.
18 MR. BHARARA: Those were all individual cases?
19 MR. MERCER: Exactly.
20 MR. BHARARA: And so any other conversations you
21 had with Mr. Sampson were about individual cases, not
22 multiple United States attorneys being discussed at once?
23 MR. MERCER: ThatÆs the way I recollect. it
24 MR. BHARARA: Okay. Do you recall if there was
25 anyone else at the department with whom you had a discussion

1 prior to July 9th of 2006 about the performances of multiple
2 U.S. attorneys as opposed to a particular û-
3 MR. MERCER: Well, my colleague David Margolis and
4 I talked about performance issues and evaluation issues
5 throughout our time together at the Office of the Deputy
6 Attorney General.
7 I cannot say to you whether in a single setting we
8 would have said well, letÆs talk about two or three
9 individual U.S. attorneys offices, or whether in fact the
10 conversations were focused on a particular office.
11 It strikes me that probably it was the latter, but
12 we talked about performance issues on and off during my
13 time. Mr. Margolis received copies of all EARs reports, Mr.
14 Margolis is involved in disciplinary questions. Between
15 sort of my knowledge of what was happening on the operations
16 side and his knowledge as senior career official in the
17 department, we had conversations about performances of
18 individual U.S. attorneys.
19 MR. BHARARA: These conversations with Mr.
20 Margolis and Mr. Sampson about the performances of these
21 U.S. attorneys, were they with an eye towards figuring out
22 who needed to go? Or were they also with an eye towards
23 figuring out how we could improve them so that they wouldnÆt
24 have to go?
25 MR. MERCER: IÆm not so sure that thatÆs an easy

1 distinction for me to make. I think in each case where
2 youÆre talking about a person who had been in since 2001 or
3 2002, it is certainly fair to say that we knew a lot about
4 peopleÆs ability to manage based upon the record. Mr.
5 Margolis was in the DeputyÆs Office for that entire time.
6 So I think that the emails would reflect that
7 although there had been a significant amount of concern
8 about the Southern District of California, even in June of
9 2006, there wasnÆt a clear plan to say we must replace Carol
10 Lam.
11 One of the options was to give her additional time
12 in order to try to correct the situation in the Southern
13 District of California. So I canÆt really say that those
14 conversations with Mr. Margolis tended in one direction or
15 another. ~~He~~ I was just focused on do we have a problem, and
16 if we do, what are we going to do to address it?
17 MR. BHARARA: Was there any time that you
18 understood prior to December of 2006 that there was an
19 intent to fire or ask to resign a number of United States
20 attorneys? It was only a question of figuring out who they
21 would be rather than whether or not there should be anyone
22 asked to resign? Do you follow my question?
23 MR. MERCER: Could you restate it? I think I got
24 the part anytime before December 7th.
25 MR. BHARARA: Anytime before December 7th of 2006,

1 reduce violent crime. I want to be able to tackle drug
2 trafficking.
3 All those priorities. I could continue.
4 MR. BHARARA: I have the answer. Did you ever
5 talk to Attorney General Gonzales about the dismissal or the
6 request of resignations of any of the eight United States
7 attorneys who were asked to resign?
8 MR. MERCER: I donÆt recall any conversation with
9 Attorney General Gonzales on that topic.
10 MR. BHARARA: With respect to any of the eight.
11 MR. MERCER: With any of the eight. I mean, as I
12 have said to you before, I had a number of conversations,
13 and he would have been part of meetings in which I expressed
14 concern about the Southern District of California, and the
15 leadership in that office.
16 So he was aware of my views with respect to that
17 office.
18 MR. BHARARA: You had specific conversations with
19 the Attorney General about Carol Lam?
20 MR. MERCER: I think as part of this document
21 production, there is a notice of a meeting that was set for
22 the 4th of June specific to the Southern District of
23 California.
24 MR. BHARARA: The answer is yes?
25 MR. MERCER: The answer is that the Attorney

1 General had heard me say that I was very concerned about
2 what was happening.
3 MR. BHARARA: Did your concern in your
4 conversation with the Attorney General rise to the level of
5 your suggesting or acquiescing him a decision that Carol Lam
6 be asked to resign?
7 MR. MERCER: no. I think also those emails
8 suggested even in June of 2006 with the concerns we had, I
9 had gone back after that meeting with the Attorney General
10 to the Deputy Attorney General via an email because he was
11 out of the country to say there are significant concerns
12 with what is happening in the Southern District of
13 California. Here are the range of options.
14 So I cannot say that in June of 2006 I had
15 specifically recommended to the Attorney General that a
16 particular course be taken. But I had certainly articulated
17 my concerns with respect to that office.
18 MR. BHARARA: Were any of the other eight that you
19 recall having expressed concerns about directly the Attorney
20 General?
21 MR. MERCER: I do not recall relating concerns
22 about the other eight to the Attorney General.
23 MR. BHARARA: Okay. Anyone else that you related
24 concerns to that you knew went to the Attorney General?
25 MR. MERCER: I mean, I canÆt be sure. When I made

1 an observation to Mr. Sampson, I canÆt be sure that that was
2 then relayed to the Attorney General. But I certainly did
3 have views that I shared with Mr. Sampson, Mr. McNulty, Mr.
4 Elston, in 2006 about some of the other people on this list.
5 MR. BHARARA: Okay. IÆm going to go through all
6 those. Before I get to those, let me just ask you, did you
7 have any conversations with anyone at the White House about
8 any of these eight dismissed United States attorneys?
9 MR. MERCER: No.
10 MR. BHARARA: In any context at all?
11 MR. MERCER: No.
12 MR. BHARARA: Not with Harriet Miers?
13 MR. MERCER: No.
14 MR. BHARARA: Not with Bill Kelly?
15 MR. MERCER: No.
16 MR. BHARARA: Not with anyone else at the White
17 House CounselÆs Office?
18 MR. MERCER: No.
19 MR. BHARARA: Not with Carl Rove?
20 MR. MERCER: No.
21 MR. BHARARA: Not with Scott Jennings?
22 MR. MERCER: No.
23 MR. BHARARA: Not with Sara Taylor?
24 MR. MERCER: No.
25 MR. BHARARA: Have you had any conversations with

1 Carl Rove?

2 MR. MERCER: I met him when the President came to

3 Montana. I canÆt be really sure when that was. That is the

4 only time I met him in Montana. I was at Harriet MiersÆs

5 going away party, and I introduced myself. But I certainly

6 didnÆt talk about any of these eight U.S. attorneys in the

7 course of either of those conversations.

8 MR. BHARARA: Okay. We touched for a moment

9 before, I just asked two or three questions on the change in

10 the Patriot Act.

11 MR. MERCER: Yes.

12 MR. BHARARA: In the reauthorization.

13 MR. MERCER: Sure.

14 MR. BHARARA: Did you have any awareness that the

15 change was being requested for the authorization,

16 reauthorization?

17 MR. MERCER: Yes.

18 MR. BHARARA: When did you become aware of that?

19 MR. MERCER: I donÆt know. I read the conference

20 report. And youÆll recall how long the conference report

21 was hanging out there. So it may have been, in fact I think

22 itÆs highly probable that when the conference report was

23 filed, if thatÆs the right term, in the fall before the

24 recess, I think I would have been aware of that provision

25 then.

had not crossed before that. But we just did a number of different things together. Believe it or not, Montana and Arizona have some things in common. Indian country in particular. We did a lot of different things together during our tenure as U.S. attorneys.

MR. BHARARA: When did you learn that he was going to be asked to resign?

MR. MERCER: December 5th.

MR. BHARARA: Is that true of all of these folks?

MR. MERCER: When we get to Margaret Chiara, I will give you a different answer.

MR. BHARARA: Okay. Were you surprised when you saw that Mr. Bogden was on the list?

MR. MERCER: Mr. Charlton?

MR. BHARARA: IÆm sorry. Mr. Charlton was on the list.

MR. MERCER: I knew from my time near the end of my tenure in the DeputyÆs Office that there had been some policy concerns with the District of Arizona, specifically in the area of death penalty cases.

I had, after having left the DeputyÆs Office, I knew that there were people both in the Office of the Attorney General and the Office of Deputy Attorney General that they had been very frustrated with, the District of Arizona and Mr. Charlton in particular.

1 MR. BHARARA: Who were the people who were
2 frustrated?
3 MR. MERCER: Well, I think that the people in the
4 Office of the Attorney General, the person who did the death
5 penalty case work back then was Jeff Taylor. I canÆt recall
6 whether Jeff had expressed any particular p~~ref~~ique, but I know
7 that within the Office of the Deputy Attorney General, that
8 there was frustration on the part of the person who
9 coordinates that work there, Joan Myer, and that Mr. Elston
10 had been involved in this.
11 I think there had even been a meeting with the
12 Deputy Attorney General on this subject. I think that there
13 were people in the Capital Case Unit ~~application department~~ that believed that
14 the way that this had been handled was not appropriate.
15 So this was sort of, and again, I was gone from
16 the DeputyÆs Office when this sort of had its major
17 reverberation. So this is all just after the fact
18 information. But I think there were a number of people who
19 were concerned with that matter.
20 MR. BHARARA: And was it with respect to one death
21 penalty matter? Or multiple death penalty matters? To your
22 knowledge.
23 MR. MERCER: I think the reverberations occurred
24 with respect to this one case, although I think in the
25 course of the work up of this case, it became apparent that

1 the District of Arizona had, it appeared had never sought
2 authorization to seek the death penalty for all the
3 death-eligible cases during the course of this
4 administration.
5 Again, I was not in the office during the time
6 when this sort of came to a head. But I was aware I think
7 before I left about this historical note which I think in
8 some ways impaired the credibility of the office in terms of
9 dealing with this issue.
10 But again, I was not there in August when things
11 really came to a head.
12 MR. BHARARA: Do you know whether or not Mr.
13 Charlton was told that if he didnÆt fix these problems, with
14 respect to his pursuit of death penalty matters, that he was
15 being asked to resign?
16 MR. MERCER: I was not part of the office at that
17 time. I donÆt know what the --
18 MR. BHARARA: Do you have an opinion on whether or
19 not you should have been? Do you have an opinion on whether
20 or not you should have been told of the matters with respect
21 to this issue or any other issue that he might be asked to
22 resign?
23 MR. MERCER: As I understand it, you know, I guess
24 since I wasnÆt part of this conversation, it probably is not
25 great to ask me these questions.

1 change that. The reality is that you are asking a witness
2 who just doesnÆt have any information about what else went
3 into consideration with respect to Mr. Charlton.
4 MR. BHARARA: Can I ask you a broader question?
5 MR. MERCER: Yes.
6 MR. BHARARA: Are you aware whether any of these
7 eight were told at any point that various perceived
8 deficiencies that they had in their performance might result
9 in their being fired if they didnÆt improve?
10 MR. MERCER: I canÆt say that I know with clarity
11 that someone was told that they would be fired if they
12 didnÆt improve. I can say with clarity that the record
13 reflects that Carol Lam in 2004 had a conversation with the
14 Deputy Attorney General who had a one on one conversation
15 with her about the inadequacy of the Project Safe
16 Neighborhood initiative, and that there was a plan to
17 rehabilitate that initiative in the course of the next year,
18 and various representations and commitments were
19 memorialized as a result of that.
20 I can also say that by the end of 2005, her record
21 in terms of Safe Neighborhood was worse than it had been
22 leading up to the time that Mr. Comey talked to her. So
23 whether Mr. Comey said you improve or you get fired, I donÆt
24 know. But it was very clear that there was an expectation
25 that she needed to improve.

1 MR. MERCER: Yes.

2 MR. BHARARA: Were you surprised that he was on

3 the list?

4 MR. MERCER: No.

5 MR. BHARARA: Why is that?

6 MR. MERCER: Two primary issues with respect to

7 Mr. McKay. During my time in the DeputyÆs Office, John had

8 had a number of different interactions with the staff in

9 ODAG about the Law Enforcement Information Sharing Program

10 initiatives that the department was involved with with not

11 only DHS, but State and local partners.

12 John had been a leader in an effort in the

13 northwest, the northwest US based in Seattle called LINX.

14 He was viewed I think as a leader in the U.S. attorney

15 community on law enforcement information sharing. He

16 eventually took over a subcommittee to the AAGC.

17 As he went around the country advancing this

18 initiative, we would get reports back from the DeputyÆs

19 Office that both Federal agencies, in particular DEA and

20 FBI, were oftentimes very displeased with the

21 representations that he was making and the way he was going

22 about his business.

23 Eventually he had a meeting with the Deputy

24 Attorney General before I left as PADAG, and there were only

25 three of us in this meeting. The Deputy Attorney General,

1 Mr. McKay and I attended.

2 I would describe that meeting as a very intense

3 affair with a fair amount of aggressive behavior on Mr.

4 McKayÆs part. I think that the Deputy Attorney General left

5 that with great frustration given the responsibility that he

6 asked Mr. McKay to accept and the relationship and

7 communication that seemed to be following.

8 At some point after I left the DeputyÆs office, I

9 learned that there had been more deterioration in that

10 relationship, and it did not surprise me when I saw the name

11 on the list given what I really saw as a relationship that

12 was a troubled one.

13 I also alluded to this earlier, in the course of

14 our sentencing reform, I think the Western District of

15 Washington had been identified as one of the real problem

16 areas we had in an area where the downward departure rate

17 outside the guideline range without the benefit of a motion from

18 the government was

19 extraordinarily high.

20 The percentage of cases that fit in that box

21 within the guideline range was somewhere in the neighborhood

22 of 40 percent. It was one of the worst percentages in the

23 country, and yet they were not doing anything to advance

24 affirmative appeals by seeking authorization from the Solicitor General to

25 appeal.

1 That was a matter that had been brought to the
2 attention of both the Deputy Attorney General. I know the
3 Chief of Staff was aware of that, and I think that was also
4 something where you really had a District identified through
5 the Sentencing CommissionÆs data. I recall that being an
6 issue that came up during the latter part of my tenure in
7 the DeputyÆs Office.
8 MR. BHARARA: With respect to either of those two
9 issues, do you know if Mr. McKay was told if he didnÆt
10 improve or change his conduct with respect to those two
11 issues, he risked being removed?
12 MR. MERCER: IÆd have to say IÆm not aware of any
13 such conversation. I can say that probably in the course of
14 my briefings on sentencing reform, it is likely that I may
15 mention that with respect to the Western District of
16 Washington, that was one of only two places where I visited
17 as Chairman of the Attorney GeneralÆs Advisory Committee,
18 subcommittee on sentencing guidelines to meet with the USAs.
19 MR. BHARARA: The answer to my question is no,
20 right?
21 MR. MERCER: Yes. But youÆre talking once again
22 û-
23 MR. BHARARA: My question was was he ever told by
24 anyone û- if you could answer the question.
25 MR. MERCER: Sure.

1 MR. FLORES: My objection is it is after 4:00. At
2 this point we are using û- and we would like to ask our
3 questions as well.
4 MR. BHARARA: He hasnÆt answered that question.
5 MR. MERCER: I think IÆve answered it. Party
6 affiliation is not a legitimate consideration in career
7 civil service jobs.
8 MR. BHARARA: With respect to Carol Lam, let me
9 just ask a few questions about her.
10 When was the first time that you found out that
11 she was being asked to resign?
12 MR. MERCER: Also December 5th.
13 MR. BHARARA: Even though you had raised concerns
14 about her throughout the process?
15 MR. MERCER: Correct.
16 MR. BHARARA: Were you involved û- separate and
17 apart from your involvement in talking about concerns with
18 respect to her district, were you involved in the decision
19 making process of putting her on the list of U.S. attorneys
20 to be replaced?
21 MR. MERCER: Well, I wasnÆt, again, I wasnÆt
22 involved in the decision making process. It led up to û-
23 the last time I would have had anything to say relevant to
24 Carol Lam would have been early July of 2006.
25 But it is certainly fair to say that for probably

1 a 9-month period, there were a number of occasions in which
2 I expressed grave concern about that office. I have to
3 believe that that was of some significance in the ultimate
4 decision making process.
5 MR. BHARARA: Do you know who else might have been
6 involved in the decision for Carol Lam to be asked to
7 resign?
8 MR. MERCER: I donÆt. You know, I wasnÆt involved
9 in the ultimate process.
10 MR. BHARARA: Do you know if Dave Margolis had any
11 role in that?
12 MR. MERCER: I donÆt.
13 MR. BHARARA: You donÆt. Did you ever have any
14 conversations with David Margolis about Carol LamÆs
15 performance?
16 MR. MERCER: I certainly expressed to him my
17 concerns. Maybe I didnÆt express them every time I found
18 one, but he certainly knew my views.
19 MR. BHARARA: Did he share your concerns?
20 MR. MERCER: I canÆt say that he did right down
21 the line, but as IÆve said before, I think that in general,
22 Mr. Margolis is concerned about the performance of the U.S.
23 AttorneyÆs Office. We discussed those matters at length.
24 MR. BHARARA: Did he share your concerns with
25 respect to Carol Lam?

1 General?

2 MR. MERCER: Yes.

3 MR. BHARARA: Has the ODAG ever called Carol Lam

4 and woodshedded her re immigration enforcement? Has anyone?

5 What is your understanding of what that means?

6 MR. MERCER: Taking her to task. Call her and say

7 your performance is inadequate.

8 MR. BHARARA: And why was Mr. Sampson asking you

9 that question?

10 MR. MERCER: I think probably because in the

11 course of three things on immigration enforcement, I had

12 raised on multiple occasions the fact that the effort in the

13 Southern District of California was far inferior to that of

14 regional peers on the Southwest border.

15 MR. BHARARA: Okay. Let me ask you this question.

16 The next paragraph says, expresses a hypothetical thought.

17 If the AG ordered 20 more prosecutors to the

18 Southern District of California to do immigration

19 enforcement only, where would we get them from (remember the

20 premise: AG has ordered it).

21 Do you see that in any way as an acknowledgment of

22 an inability to do what was needed in that district with the

23 level of resources currently there? Or do you not believe

24 that to be so?

25 MR. MERCER: Well, before the afternoon is over, I

may just submit this for the record if we donÆt have time to do it, but IÆve got the full chronology of all the documents that IÆm aware of in my production that deal with the production of San Diego, including the resources.

This will show the budget in the southern District of California had gone up substantially in 2000 to 2006, and the FTEs have gone up substantially. My response here û-

MR. HUNT: Can you just clarify what an FTE is?

MR. MERCER: Full time equivalent employee. And my response, so your question is û-

MR. BHARARA: So the answer is no?

MR. MERCER: û- whether this is a suggestion that they were under resourced. The reason why I responded the way I did is I thought that the record, based upon what I had learned in ODAG is that they were ~~not û- in~~ in a lot better shape than others who were doing considerably more work in this area.

MR. BHARARA: Okay. If we could, if you could take a look at what weÆll ask the court reporter to mark as Mercer Exhibit 10.

[Mercer Exhibit No. 10 marked for identification.]

MR. BHARARA: ThatÆs a document that is bates numbered ASG257.

1 Do you have that in front of you?
2 MR. MERCER: No.
3 MR. BHARARA: IÆm sorry.
4 MR. MERCER: I can see in my chronology what it
5 is.
6 MR. BHARARA: I apologize. You see that thatÆs an
7 email between û- from Mr. Sampson to you with a cc to
8 Michael Elston. Do you see that?
9 MR. MERCER: Yes.
10 MR. BHARARA: This email with a high importance
11 level flag on it relates to what appears to be a plan of
12 action with respect to Ms. Lam, is that right?
13 MR. MERCER: Correct.
14 MR. BHARARA: The first sentence says Bill, this
15 relates certainly the AGÆs mind to the email I just sent to
16 Elston, cc to you.
17 Then later in that paragraph, it says the AG,
18 Attorney General, has given additional thought to the SD,
19 thatÆs San Diego, situation, and now believes we should
20 adopt a plan - something like the following.
21 Was it your understanding when you received this
22 email that the Attorney General had personally became
23 involved in the issue with respect to San Diego?
24 MR. MERCER: Yes. And then as I noted earlier, we
25 then had a meeting on San Diego three days later.

1 MR. BHARARA: With the Attorney General in
2 attendance?
3 MR. MERCER: Yes. Yes.
4 MR. BHARARA: So he was personally involved over
5 the course of time with the San Diego situation?
6 MR. MERCER: Yes.
7 MR. BHARARA: The first item, the first bullet
8 item in that email says as part of the plan, ôhave a heart
9 to heart with Lam about the urgent need to improve
10 immigration enforcement in San Diego.ö
11 Did that happen?
12 MR. MERCER: This û- quick context here. This
13 plan of action was forwarded to the Deputy Attorney General
14 who was out of the country, in terms of whether we wanted to
15 pursue this course.
16 So after this email, after the June 4th meeting,
17 there was an email to the Deputy Attorney General saying we
18 need to make a decision on this. That resulted in me after
19 the flood at Justice in late June of 2006, putting together
20 a compilation of all the relevant data with respect to San
21 Diego and all the border districts, which I faxed to Carol
22 and then called her and said we need to confirm the accuracy
23 of this data.
24 ItÆs from a û- Commission. It may actually
25 understate what youÆre doing. We determined, Deputy

1 Attorney General in particular determined that we needed to
2 make sure that the data set that we had summarizing what the
3 issues were in San Diego û-
4 So this generated a meeting which generated an
5 outreach to the DAG, her supervisor, who said I want to make
6 sure that we go to Carol and find out what it is that is
7 going on up there, and the best way to do that is to share
8 with her the data that . . . ~~will work~~.
9 MR. BHARARA: So the answer to my question is the
10 heart to heart did not happen?
11 MR. MERCER: Well, not when I was in the DeputyÆs
12 Office.
13 MR. BHARARA: To your knowledge, it did not
14 happen?
15 MR. MERCER: To my knowledge, we went to her and
16 said we need to understand exactly what youÆre doing.
17 During my time in the DeputyÆs Office, IÆm unaware of a
18 meeting with her.
19 MR. BHARARA: Okay. The second bullet says work
20 with her to develop a plan for addressing the problem, to
21 include alterations or prosecution thresholds, additional
22 DOJ prosecutors, additional DHS, what I assume is Special
23 Assistant U.S. Attorney Resources, et cetera.
24 Were those additional resources ever provided?
25 MR. MERCER: I think they were.

1 MR. BHARARA: Do you remember to the tune of how
2 many?
3 MR. MERCER: I donÆt. That happened after I left.
4 MR. BHARARA: The next bullet says put her on a
5 very short leash. What does that mean?
6 MR. MERCER: Well, I think that means that any
7 sort of response with respect to the first two bullets
8 should be met with improvements. If not, then different
9 action should be taken.
10 MR. BHARARA: Well, that brings us to the next
11 bullet. If she balks on any of the foregoing or otherwise
12 does not perform in a measurable way by July 15th, my date,
13 remove her.
14 Were you on board with that plan?
15 MR. MERCER: Again, to the best of my knowledge,
16 this didnÆt happen.
17 MR. BHARARA: Okay.
18 MR. MERCER: Resources were provided. I donÆt
19 believe that there was any sort of contract entered into
20 with her. At least not while I was in the Deputy Attorney
21 GeneralÆs Office.
22 MR. BHARARA: And the final bullet is the Attorney
23 General then appoints a new U.S. attorney from outside the
24 office.
25 Can you understand why part of the plan would be

1 to appoint a U.S. attorney from outside the office?
2 MR. MERCER: No, other than sometimes I think you
3 affect a culture by bringing in someone that has not been
4 part of the same office culture.
5 Again, I talked in other terms about her
6 performance. It was clear based upon the Project Safe
7 Neighborhood that sit downs were not necessarily going to
8 generate the sort of outcomes that we were interested in.
9 But to begin, this is not something that as I
10 understand, took place in its entirety. I emailed the
11 Deputy Attorney General, he came back from Ireland, we had a
12 flood. I reached out to get an assessment of what data was
13 accurate, and I left.
14 So my knowledge of what happened with respect to
15 this plan is not as good as maybe others might be.
16 MR. BHARARA: Do you know whether or not Ms. LamÆs
17 numbers improved in any way after June 1 of 2006?
18 MR. MERCER: I am familiar with the sentencing
19 commission data set for 2006 which indicates the numbers
20 were as bad in æ06 as they were in æ05.
21 MR. BHARARA: Well, I guess the question is did
22 they improve after June 1 of æ06?
23 MR. MERCER: I donÆt know.
24 MR. BHARARA: You donÆt know?
25 MR. MERCER: I donÆt know. IÆm not in the Deputy

1 YouÆve identified some of the concerns that you
2 had regarding Carol Lam and her performance as a U.S.
3 attorney for the southern District of California in San
4 Diego, correct?
5 MR. MERCER: Correct.
6 MR. MINER: One of those concerns was immigration
7 enforcement, correct?
8 MR. MERCER: Correct.
9 MR. MINER: And you became the principle associate
10 deputy Attorney General or PADAG in 2005, correct?
11 MR. MERCER: June, 2005, correct.
12 MR. MINER: Prior to your becoming the PADAG, I
13 believe you testified there was a separate concerning a law
14 enforcement priority in the Southern District of California,
15 is that correct?
16 MR. MERCER: ThatÆs correct.
17 MR. MINER: And what was that?
18 MR. MERCER: Our Project Safe Neighborhood
19 initiative.
20 MR. MINER: And what is that?
21 MR. MERCER: That was, other than the
22 anti-terrorism war, the second highest priority for Attorney
23 General Ashcroft. The program launched in 2001 to use the
24 Federal crime laws to go after the most dangerous
25 recidivists in communities around the country.

1 MR. MINER: And I realized youÆve testified
2 regarding the lack of a heart to heart with Ms. Lam
3 regarding immigration enforcement, or your lack of knowledge
4 of such a heart to heart conversation.
5 Was there a conversation at a high level between a
6 Justice official and Ms. Lam regarding any perceived
7 deficiencies regarding Project Safe Neighborhoods with
8 firearm prosecutions?
9 MR. MERCER: Yes. In July, 2004, the Deputy
10 Attorney General Comey met with her and Spence Pryor, who
11 was the PSN coordinator for the department at that time, was
12 involved in those conversations.
13 After Mr. Comey left the department, I met with
14 Mr. Pryor, who is no longer in the DeputyÆs Office, no
15 longer coordinat~~ed~~ing PSN to get his sense of not only what
16 happened in those meetings, but what sort of response he had
17 seen from other districts around the country that had been
18 identified in those meetings.
19 He reported to me that the meeting had suggested
20 that San Diego had significant problems, and had come up
21 with some ideas on how they were going to deal with the
22 problems. Yet when we looked at the data that had been
23 generated in the period leading up to this meeting I had
24 with him in August of 2005, the numbers generated through
25 Project Safe Neighborhood were actually worse in San Diego

1 than they had been.

2 MR. MINER: So the meeting with the DAG did not

3 produce a favorable result in the following year?

4 MR. MERCER: Not in Mr. PryorÆs view, and I

5 certainly not in my view given the data that I analyzed.

6 MR. MINER: In terms of the lack of a heart to

7 heart, or your lack of knowledge of a heart to heart, were

8 the concerns relating to immigration enforcement

9 communicated to Ms. Lam?

10 MR. MERCER: Yes. Well, I mean, as I said

11 earlier, and I can give you the Bates numbers on this

12 because I donÆt think this has been introduced into the

13 record.

14 We faxed, I personally faxed and called her on the

15 5th of July, and this document is ASG 14 through 16,

16 indicating what we showed to be the prosecutionÆs own

17 firearms immigration, drugs, and fraud. Almost without

18 exception, you will see if you look at that document that

19 the cases resulting in sentences in the Southern District in

20 California were far below other û- southwest corridor.

21 I called her to say weÆve got to determine whether

22 in fact these data are accurate. That led to a response

23 from her after I left the DeputyÆs Office in July.

24 MR. MINER: Okay. So you communicated through a

25 letter to her your concerns and you cited deficiencies or

1 perceived deficiencies in terms of her numbers. Was it just
2 immigration, or was it immigration and firearms cases?
3 MR. MERCER: Firearms, fraud, drugs, immigration.
4 MR. MINER: And then you left the main Justice to
5 go back to be the U.S. attorney full time in Montana,
6 correct?
7 MR. MERCER: ThatÆs right.
8 MR. MINER: No characterizations there. With
9 regard to you leaving other folks in the office of the
10 Deputy Attorney General aware of these concerns û- in other
11 words, when you communicated this to her and then you left,
12 was this something that was just between William Mercer and
13 Carol Lam? Or did other folks know about it?
14 MR. MERCER: No. I had been, in fact I guess with
15 your indulgence, IÆd like to be able to make this part of
16 the record. This is a chronology that sets forth just a
17 simple time frame on all of the documents in the ASG
18 production and a couple of extras that I think are relevant
19 to what we learned about the efforts in the Southern
20 District of California.
21 MR. MINER: Before making it part of the record,
22 IÆve got to find out a few foundational facts about this
23 document.
24 Is this something that you prepared?
25 MR. MERCER: Yes.

1 MR. MINER: And did you prepare it in view of your
2 testimony today?
3 MR. MERCER: I prepared it earlier than that
4 because I wanted to try to figure out sort of this
5 chronology. But I did make a few edits today to make sure
6 that it was complete and it read properly.
7 MR. MINER: And you compiled this, did you compile
8 this based upon your review of the documents?
9 MR. MERCER: I looked at the ASG documents and two
10 other documents that were not ASG documents but were shared
11 with me.
12 Again, I think itÆs important for the record.
13 This is just really for the ease of your review. With the
14 exception of û-
15 MR. MINER: Before we make reference to it, IÆll
16 let you go through it. YouÆve reviewed the documents, and
17 based on your knowledge of the documents, you feel this is
18 an accurate summary?
19 MR. MERCER: Yes. I mean, the documents speak for
20 themselves. This is just an attempt to set forth in the
21 chronology with bates stamp numbers what I believe those
22 documents say.
23 MR. MINER: Okay.
24 MR. MERCER: Obviously the documents speak for
25 themselves.

1 MR. MINER: LetÆs label this then as Mercer 13 and
2 go forward.
3 [Mercer Exhibit No. 13 marked
4 for identification.]
5 MR. MINER: Go ahead, now. I just had to make
6 sure that it was official.
7 MR. MERCER: I know that the time is short, and I
8 donÆt want to read the whole thing. It truly is just
9 designed for the committee to understand what I believe are
10 set forth in the documents.
11 If I can just sort of give you a quick overview.
12 I think youÆll see here that during my time in the Deputy
13 Attorney GeneralÆs office, there were three sets of data
14 that I reviewed that gave me real concern about the Southern
15 District of California.
16 Firearms prosecutions, immigration prosecutions,
17 and child exploitation prosecutions. Those are all areas
18 where either we had an AG initiative, or we were very
19 worried about meeting our core responsibilities on a
20 national issue.
21 In each case, the data, take a look at the data
22 set forth in these documents, you will I think conclude that
23 the Southern District of California was really far beyond
24 its peer districts, and in some cases both by child
25 exploitation and guns, was far beyond, was far inferior in

1 terms of its emphasis to even districts that werenÆt peer
2 districts, that were much smaller.
3 It was, again, the Federal firearms numbers, if
4 you look at the November 7 entry, the average û- 18 cases
5 per year. Then if you go down and take a look at somewhere
6 later in here, you will see that ATF actually referred 152
7 cases for prosecution.
8 So we had concerns in these three core areas, ATF
9 had concerns because their cases werenÆt being prosecuted.
10 We had congressional inquiries from Senator Feinstein,
11 Congressman Issa, and other members of the California
12 delegation, and testimony questioning at an AG hearing by
13 Representative Keller. All things that we were worried
14 about given the oversight role being played by the Congress
15 and the concern being voiced.
16 Then youÆve got budget data in here which will
17 suggest that both the November 11th entry of 2005 and I
18 think there is another entry, itÆs the April 27th report
19 talking about increases in FTEs, but at the same time
20 immigration cases have gone down by 39 percent between 2000
21 and 2005. They came down even more between 2004 and 2005.
22 Just in general, there were a number of different
23 concerns that it seemed like every time I worked on an
24 initiative, whether it was part of the Project Safe
25 Neighborhood or immigration enforcement, that the Southern

1 District of CaliforniaÆs data suggested that there were
2 serious problems in that district, and that there were many
3 people within the Department including Mr. Sampson and Mr.
4 Elston, Mr. McNulty, and as I mentioned, even the Attorney
5 General had been advised on the brief û-
6 I know that he was aware of my concerns dealing
7 with the caseload in the Southern District of California. I
8 really just did this for ease of your review.
9 MR. MINER: Okay. IÆm going to show you another
10 document along the same lines of whether things were
11 communicated within the department regarding Ms. Lam. This
12 is, IÆm sorry. This is a document Bates labeled DAG465.
13 It is, as you will see, an email between, or
14 labeled Bill Mercer to Michael Elston, subject re Carol Lam.
15 MR. MERCER: Yes.
16 MR. MINER: And IÆd like for this to be marked as
17 an exhibit, Mercer 14.
18 [Mercer Exhibit No. 14 marked
19 for identification.]
20 MR. MINER: Taking a look at the date on this,
21 this is July 8, 2006, is that correct?
22 MR. MERCER: Yes.
23 MR. MINER: In terms of the exchange, at the very
24 bottom there is an email, Saturday, July 8th from you to
25 Carol Lam, is that correct?

1 MR. MERCER: Yes. The very bottom entry is my
2 assistant got a phone call from Carol Lam. I had asked that
3 this information, all I was asking for as is reflected in
4 the text in another document, I simply asked for a
5 verification of whether the data set forth in my fax, that
6 they were accurate, because I was trying to then take that
7 compilation and report to the Deputy Attorney General what
8 my conclusions were about this work. But I needed it before
9 I was returning to Montana.
10 MR. MINER: Okay.
11 MR. MERCER: My assistant got a call from Carol at
12 5:45 on Friday afternoon asking whether I was waiting for a
13 response. So I then wrote to her on Saturday and said that
14 she needed to communicate with Mike Elston because I was no
15 longer the PADAG.
16 MR. MINER: Okay. And then you follow up by
17 saying my time as PADAG has come to a close. I gather that
18 you will be emailing something on Monday. Will you direct
19 it to the Deputy COS, I presume that is Chief of Staff?
20 MR. MERCER: Correct.
21 MR. MINER: Mike Elston.
22 MR. MERCER: Yes.
23 MR. MINER: With regard to her emailing something,
24 what are you referring to there?
25 MR. MERCER: Well, again, I was just looking for

1 some sort of a response in terms of whether the data that I
2 had faxed to her were accurate. That should be an exercise
3 that any U.S. AttorneyÆs Office can go to its own internal
4 data set and figure out well, how many sentencings did we
5 have in fraud cases? Is 141 right, or whatever the number
6 it was?
7 How many firearms ~~firing~~ sentencings did we have? I really
8 expected that this would be a pretty quick exercise. But I
9 didnÆt get anything then, and I think on the 10th of July if
10 the dates are right, she forwarded a memo to both Chief of
11 Staff Elston and to me with essentially an agreement that
12 the data were correct, and then sort of an analysis of her
13 views of what those data suggested.
14 MR. MINER: Okay. With regard to the exchange
15 between you and Mike Elston, he response I guess to you
16 following the email between yourself and Carol Lam. This is
17 so sad, I am not adjusting well to this change. Is that
18 correct?
19 MR. MERCER: Yes.
20 MR. MINER: All right. And then you have a
21 response back to him. Would you read the first paragraph?
22 MR. MERCER: What, that Carol Lam canÆt meet a
23 deadline, or that youÆll need to interact with her in the
24 coming weeks or that she just wonÆt say, ôO.K., you got me,
25 youÆre right. IÆve ignored national priorities and obvious

1 local needs. Shoot, my production is more hideous than I
2 realized.ö
3 MR. MINER: Was the perception as you were leaving
4 the DAGÆs Office on July 8th or July 9th the following day
5 that Carol Lam was ignoring national priorities?
6 MR. MERCER: Yes.
7 MR. MINER: Was it that she was ignoring obvious
8 local needs?
9 MR. MERCER: Yes.
10 MR. MINER: And you characterize her production as
11 hideous.
12 MR. MERCER: That was my ~~piece~~ view.
13 MR. MINER: Okay. Because this is written in sort
14 of a jocular tone.
15 MR. MERCER: Well, yes.
16 MR. MINER: But were those your views at the time
17 you were leaving?
18 MR. MERCER: Yes.
19 MR. MINER: You have been asked a number of
20 questions about whether you participated in the actual
21 decision making regarding folks being added to the list that
22 you received on December 5th, 2007, is that correct?
23 MR. MERCER: Yes.
24 MR. MINER: And I think universally you said you
25 didnÆt participate in the decision making as to how folks

1 got on the list, correct?

2 MR. MERCER: Yes.

3 MR. MINER: Okay. I'm going to ask you just in

4 terms of whether you were present during any conversation or

5 whether you personally discussed removing Carol Lam based

6 upon her prosecution of any political figure.

7 MR. MERCER: I was never involved in such a

8 conversation. I never heard anyone suggest anything like

9 that.

10 MR. MINER: And that is not just with respect to

11 December of 2006. Does that cover your tenure?

12 MR. MERCER: It covers my entire time in the

13 Office of the Deputy Attorney General and the Office of the

14 Associate Attorney General.

15 MR. MINER: Looking to Mr. Iglesias, are you

16 familiar with media accounts and allegations regarding him?

17 MR. MERCER: Yes.

18 MR. MINER: Were you present during any

19 conversation, or did you personally discuss at any time

20 removal of David Iglesias to stop a prosecution, to start a

21 prosecution of any political figure?

22 MR. MERCER: I was never part of such a

23 conversation. I certainly never suggested such a thing, and

24 I never heard anyone else ever suggest such a thing about

25 Mr. Iglesias.

1 MR. MINER: With regard to the six other U.S.
2 attorneys who are listed as having been asked to resign,
3 same exact question.
4 MR. MERCER: And same exact answer.
5 MR. MINER: There have been some questions
6 regarding, well, absentee landlords, letÆs just put it that
7 way. You have acknowledged you served in two roles over
8 time. Since 2005, either as the PADAG or in your current
9 role as acting Associate Attorney General. Is that correct?
10 MR. MERCER: Yes.
11 MR. MINER: How have you managed those two jobs?
12 MR. MERCER: Good. You know, I go back and forth
13 between the districts. I have daily contact with my first
14 assistant, fairly regular contact with my criminal chief and
15 my civil chief, and through emails, faxes, video
16 conferencing, phone, I have steady contact on cases and on
17 developments and investigations.
18 Again, if people want to compare the record of the
19 District of Montana, IÆm happy to have people take a look at
20 the sentencing commissionÆs data set and look at the Montana
21 specific information.
22 I think it is always an interesting question about
23 different people have different views on productivity. My
24 own personal view is that if you look at case numbers
25 without looking at complexity, you can miss a ~~rock~~ lot.

1 evaluate that data over the last five months. I just wasnÆt
2 one of those people.
3 MR. MINER: Well, I donÆt want to retread any
4 tires here. I believe that you said that as to Bogden, the
5 û- didnÆt have any basis, and I believe you testified that
6 you would as to Lam, and you had reason to conclude as to
7 Chiara and Ryan, is that correct?
8 MR. MERCER: Correct.
9 MR. MINER: Cummins, I think you also testified
10 you didnÆt have a basis for putting him in any category.
11 MR. MERCER: Right, thatÆs true.
12 MR. MINER: That leaves John McKay. Did you have
13 a basis for concluding where he belonged in terms of lower
14 tier, belonging on the list for termination, any reason to
15 believe he was underperforming?
16 MR. MERCER: Well, I was aware of the sentencing
17 data, and I had a chance. I didnÆt finish that answer, but
18 I had a chance to sort of note that answer. But other than
19 that, I hadnÆt undertaken any sort of broader review with
20 respect to Mr. McKay.
21 MR. MINER: And I think you testified as to Paul
22 Charlton and the death penalty issue.
23 MR. MERCER: Correct.
24 MR. MINER: And with respect to the recording
25 issue, you didnÆt view that as a matter, a problem. You

PART H

Excerpts of Interview of David Margolis, May 1, 2007

U.S. SENATE
COMMITTEE ON THE JUDICIARY
Investigation

- - - - - - - - - - - - - - - - - -x
In the Matter of: :
: :
PRESERVING PROSECUTORIAL :
INDEPENDENCE: IS THE DEPARTMENT :
OF JUSTICE POLITICIZING THE :
HIRING AND FIRING OF U.S. :
ATTORNEYS? :
- - - - - - - - - - - - - - - - - -x

Tuesday
May 1, 2007

The interview of DAVID MARGOLIS, Associate Deputy Attorney General, was convened, pursuant to notice, at 10:10 a.m. in Room SH-212, Hart Senate Office Building.

APPEARANCES:

PREET BHARARA, ESQ.
Counsel for the Majority
Senate Committee on the Judiciary

HANNIBAL KEMMERER, ESQ.
Counsel with Senator Specter
Senate Committee on the Judiciary

DANIEL M. FLORES, ESQ.
Counsel for the Minority
House of Representatives Committee on the Judiciary

SAM BRODERICK-SOKOL, ESQ.
Oversight Counsel
House of Representatives Committee on the Judiciary

1 when the--during the interview process that one mark, one
2 measure of your success will be if you never have to deal
3 with me again, because if they screw up, I am the one who
4 has to handle it. That's usually in terms of conduct
5 rather than performance, though, unless the performance
6 is notorious, openly notorious.
7 MR. BHARARA: Let me ask you some questions
8 about the dismissal of several U.S. Attorneys in 2006 by
9 the Justice Department.
10 MR. MARGOLIS: Sure. I should have added I
11 also--when you talked about performance, I am one of the
12 people who looks at the EARS evaluations of U.S.
13 Attorneys' Offices.
14 MR. BHARARA: Are you aware of the fact that Mr.
15 Sampson, Kyle Sampson, described you as someone who knows
16 more about United States Attorneys than anyone alive?
17 MR. MARGOLIS: I heard him say that.
18 MR. BHARARA: Is that a fair statement?
19 MR. MARGOLIS: He flatters me. He's overly
20 modest and he flatters me.
21 MR. BHARARA: Is it fair to say that of the
22 people at the Justice Department, you know a lot about
23 United States Attorneys?
24 MR. MARGOLIS: Yes, but I think it is more
25 accurate because of my perspective over the years that

1 distinguishes me. There are a lot of people who know
2 what the U.S. Attorneys are doing on a day-to-day basis,
3 including the Executive Office for U.S. Attorneys.
4 But because of the way I entered the Department,
5 you know, I have an acute awareness of the difference
6 between career people and political people, having been
7 there in both situations, and having various jobs.
8 So I think my perspective is unique, and I tend
9 to think that's what Kyle had more in mind, and plus I
10 participated in the selection--I'm the one person that
11 participated in the selection of all U.S. Attorneys in
12 this administration.
13 MR. BHARARA: Did you participate in the
14 selection of all of the United States Attorneys including
15 the eight who were asked to resign last year?
16 MR. MARGOLIS: Yes.
17 MR. BHARARA: Aside from yourself, who are the
18 other people at a high level at the Justice Department
19 who would have a great deal of knowledge about U.S.
20 Attorneys, their performance and their conduct?
21 MR. MARGOLIS: The last two Deputies--Paul and
22 Jim Comey--were both United States Attorneys themselves
23 in this administration, and Paul was the Chairman of the
24 Advisory Committee, as I recall, so those two would have
25 a great deal of experience.

1 Bill Mercer, who is the Acting Associate
2 Attorney General and was the PADAG and was the U.S.
3 Attorney in Montana, was also the Chairman of the
4 Advisory Committee. So he would also have a very good
5 handle on the day-to-day operations.
6 MR. BHARARA: What about whoever the chief of
7 the Criminal Division is, the Assistant--
8 MR. MARGOLIS: Alice Fisher.
9 MR. BHARARA: --Attorney General for the
10 Criminal Division. What is your understanding of how
11 much knowledge that person would have about the
12 performance and conduct of various U.S. Attorneys around
13 the country?
14 MR. MARGOLIS: I think the AAG for Criminal
15 would have a lot of context with U.S. Attorneys' Offices
16 in individual cases, and maybe individual initiatives,
17 too. So whether she does it through herself or her
18 Deputies, you know, would depend on the case, I guess.
19 MR. BHARARA: You said you participated in the
20 selection of United States Attorneys. Did you mean the
21 selection of United States Attorneys who have been
22 nominated for Senate confirmation? Or did you also mean
23 to include Interim U.S. Attorneys or Acting U.S.
24 Attorneys?
25 MR. MARGOLIS: Both--all three. Not people who

1 MR. BHARARA: So the record is clear, when you
2 mentioned performance versus misconduct or an ethical
3 violation, could you describe what you mean by each of
4 those terms?
5 MR. MARGOLIS: Yes. Underachieving, you know,
6 roiling the office, destroying morale. You could have
7 somebody who never shows up for work, screws up cases.
8 Whereas, misconduct would be things like stealing money
9 from petty cash or cheating on their travel vouchers or
10 having an affair with a subordinate officer in the
11 office, things like that. Lying.
12 MR. BHARARA: Okay. When did you first learn,
13 Mr. Margolis, that there was a plan in which Kyle Sampson
14 was involved to ask for the resignations of all or a
15 subset of the 93 U.S. Attorneys who were serving in the
16 Bush administration?
17 MR. MARGOLIS: Either shortly after the 2004
18 election or maybe during the beginning of the second
19 term, Kyle told me that Harriet Miers had asked him about
20 the feasibility of removing and replacing all United
21 States Attorneys. And he either--one of two things
22 happened.
23 My memory gets squishy on all this stuff because
24 of what I read in the newspaper and confusing it with
25 what I know and also not having the opportunity to have

1 talked to my colleagues about it because of our
2 instructions, so I am just going to be able on this stuff
3 to give you my best recollection.
4 He either told me that he had killed that idea
5 and asked me whether I agreed, or he asked me--or he told
6 me he thought it was a bad idea and asked me my opinion,
7 which I certainly endorsed either way, either he had done
8 the right thing or he should do the right thing.
9 I gave him my reasons for--and he either said,
10 "Good," you know, "I'm glad you agree," or he said,
11 "Okay. I'll see what I can do." I don't remember which
12 of the two. But we were in agreement.
13 And then he said, either that day--if, in fact,
14 he had killed the idea and he was just telling me about
15 it, or a short time later after he killed it, he said to
16 me, you know, "This does give us the opportunity, though,
17 to look at individual United States Attorneys who should
18 be replaced, and then we can"--you know, "We obviously
19 have opened the door, so we ought to do that and make the
20 U.S. Attorneys' Offices stronger for the second term."
21 And I wholeheartedly endorsed that as a novel
22 approach that I had never seen before and that I
23 encouraged, because in the past--and I'm not talking
24 about any specific administration--any administration, it
25 seemed to me that U.S. Attorneys were removed during an

1 administration either for misconduct or performance that
2 had burst out into the public scene, but not performance
3 that, you know, was mediocre and hadn't publicly
4 humiliated us.
5 So I thought that was a good idea.
6 MR. BHARARA: Let me go back--
7 MR. MARGOLIS: The concept was a good idea.
8 Obviously, our execution left something to be desired.
9 MR. BHARARA: I want to go to each of those
10 things separately. When Mr. Sampson mentioned to you
11 that Harriet Miers had suggested the possibility of
12 seeking the resignations of all 93 U.S. Attorneys, what
13 was your reaction to that idea?
14 MR. MARGOLIS: The same as his, which was, I
15 think, what he said, he rolled his eyes. And my reaction
16 was the same, that that was not a good idea. And we
17 discussed the reasons why it wasn't a good idea.
18 MR. BHARARA: And what were those reasons?
19 MR. MARGOLIS: That it would, you know,
20 needlessly cause discombobulation in the various offices;
21 it would get rid of--these were my--this is me talking
22 now to him. It would get rid of--it would throw out the
23 baby with the bath water.
24 You'd have maybe a few people that should go,
25 and you'd be throwing out great people. And not only is

1 that a bad idea and not good government, but it opens up
2 the claim, as we've seen in the past, that all these
3 people were fired just to cover for the real reason,
4 which was to fire one person to stop them from doing
5 something, you know, and the conspiracy theorists have
6 said that and said that at the beginning of the Clinton
7 administration. So that was another reason why it was a
8 bad idea.
9 And then as Tip O'Neill said, "All politics is
10 local." As I pointed out to Kyle, that would mean we
11 would have to go through 93 districts, probably three
12 interviews a district, so almost 300 new interviews, and
13 I was not up for that at all.
14 So am I correct that part of the discussion
15 about why a decision to fire all 93 U.S. Attorneys was a
16 bad one was the appearance issue.
17 MR. MARGOLIS: Yes. That was part of it.
18 MR. BHARARA: Did Mr. Sampson tell you or did
19 you ever come to learn who other than Harriet Miers, if
20 anyone, was promoting the idea of asking for the
21 resignations of all the U.S. Attorneys?
22 MR. MARGOLIS: I think it was--I mean, from what
23 he told me, I believe it was--he's the only--she is the
24 only name he mentioned.
25 MR. BHARARA: Do you recall if he or anyone else

1 MR. BHARARA: Okay. After the time when Mr.
2 Sampson mentioned to you the opportunity to ask for
3 resignations from some subset of U.S. Attorneys, did you
4 and he have any further discussions about how that might
5 be accomplished?
6 MR. MARGOLIS: Was this all U.S. Attorneys or
7 some U.S. Attorneys?
8 MR. BHARARA: Subset.
9 MR. MARGOLIS: Oh, subset. Yes, I think on that
10 occasion--I think on that occasion he pulled out the list
11 of all United States Attorneys and asked me who I thought
12 should be looked at for termination, and not--you know,
13 "I'm not asking you to say, `Fire this person.' I want
14 to know, you know, that we should consider it."
15 The impression I got was that he would talk to a
16 bunch of people about it, but he wanted candidates, I
17 guess is the word. And some I felt strongly about and
18 said, you know, "I'm prepared to say now that this person
19 should go." Others, I said, "You ought to take a look
20 at."
21 MR. BHARARA: To the best of your recollection,
22 did you look at the list with him at about the same time
23 that he first presented you the idea of asking for the
24 resignations of some subset of U.S. Attorneys?
25 MR. MARGOLIS: I can't say it was the same day,

1 but I don't think it was too far--I don't think it was
2 too far down the road.
3 MR. BHARARA: And you believe this was late '04
4 or early '05?
5 MR. MARGOLIS: I think it was--by this time it
6 was '05.
7 MR. BHARARA: When Mr. Sampson showed you that
8 list, do you recall whether or not that list was already
9 ordered in some way based on performance or rank? Or was
10 it a random list of U.S. Attorneys?
11 MR. MARGOLIS: I think it was an alphabetical
12 district list or an alphabetical name list, one of the
13 two.
14 MR. BHARARA: And to the best of your
15 recollection, at that time did you mention to him
16 specific U.S. Attorneys who should be considered for
17 possible termination?
18 MR. MARGOLIS: Yes. I had two categories, as I
19 recall: one was I really feel strongly about this one
20 going; and the other was run this fact, check this out,
21 these people ought to be looked at for a variety of
22 reasons.
23 MR. BHARARA: Do you recall how many people in
24 that first conversation might have fallen into either of
25 those two categories?

1 MR. MARGOLIS: I would say it was less than ten.
2 MR. BHARARA: In both categories combined?
3 MR. MARGOLIS: Both categories combined.
4 MR. BHARARA: And what was the basis, generally
5 speaking, of your identifying particular U.S. Attorneys
6 in either of those categories?
7 MR. MARGOLIS: The two that I was very firm
8 about going were performance, and then some others, I had
9 questions about their performance or there were questions
10 about some of their conduct.
11 MR. BHARARA: Would you say that one more time?
12 MR. MARGOLIS: Yes. The two that I felt
13 strongly should go were based on performance. And then
14 the others were based on either-and/or performance and
15 conduct.
16 MR. BHARARA: And, again, could you tell us how
17 you distinguished between performance and conduct?
18 MR. MARGOLIS: Yeah. On some of these, I think
19 at the time there were outstanding either OPR or OIG
20 investigations of them, so I thought, you know, we ought
21 to take a look at them, but we ought to see what the
22 results of the investigations are. You know, they may be
23 exonerated.
24 And it could be having an affairs with a
25 subordinate and treating that subordinate more favorably

1 than other people, creating problems in the office. It
2 could be lying, things like that.
3 MR. BHARARA: Okay. But in the pure performance
4 category, at that time--
5 MR. MARGOLIS: It could be misconduct in
6 connection with litigation.
7 MR. BHARARA: But in the pure performance
8 management category, at that time you only could identify
9 two United States Attorneys who should be considered for
10 possible termination?
11 MR. MARGOLIS: Yeah. There was--there were two
12 that I said should go. There were others--there was one
13 that almost made List 1, who later made List 1, but I
14 wasn't sure at the time.
15 MR. BHARARA: Okay.
16 MR. MARGOLIS: That was a performance one.
17 MR. BHARARA: I'm going to try to ask some
18 questions before I draw an objection. Were any of the
19 people on the first list, the performance list, later
20 asked to resign? Pure performance list.
21 MR. MARGOLIS: Do you mean as part of the--
22 MR. BHARARA: As part of the eight.
23 MR. MARGOLIS: Okay, because, you know, there
24 were--people leave for--you mean--
25 MR. BHARARA: Why don't I rephrase the question.

1 You have said there were two people that you identified
2 who for performance reasons should go. Were either of
3 those two people ultimately asked to resign?
4 MR. MARGOLIS: Yes.
5 MR. BHARARA: And who were those people?
6 MR. HUNT: As part of this--
7 MR. BHARARA: As part of the eight that we are
8 all talking about.
9 MR. MARGOLIS: One was asked. One of the two.
10 MR. BHARARA: Okay. And who was that?
11 MR. MARGOLIS: Kevin Ryan.
12 [Pause.]
13 MR. MARGOLIS: I think Mr. DiBiagio was gone by
14 that time. I think he--or at least had announced his
15 resignation by then. He wouldn't have been on my list.
16 When does it say he left?
17 MR. BHARARA: Let me just ask you to look back
18 at Exhibit 2 and see if that refreshes your recollection
19 as to when--
20 MR. MARGOLIS: It does. It says I asked him to
21 leave in 2004, so that was before this list.
22 MR. BHARARA: Okay. So you have Mr. Ryan and
23 then another person you haven't identified yet who were
24 on your initial list of performance-based people who
25 should go.

1 MR. MARGOLIS: Correct.
2 MR. BHARARA: And then you said thereafter there
3 was another person that you would put in that category?
4 MR. MARGOLIS: Yeah--no. It was at the same
5 time. It's just that I put that person in the category
6 that said let's take a very close look, talk to other
7 people about that person. But I have questions.
8 MR. BHARARA: About that person's performance?
9 MR. MARGOLIS: Yes.
10 MR. BHARARA: So that would be a third person
11 you would put in the performance category?
12 MR. MARGOLIS: Yes.
13 MR. BHARARA: Okay. And in what time frame did
14 that third person in your mind warrant being in the
15 performance category of people who should leave?
16 MR. MARGOLIS: As time went on.
17 MR. BHARARA: Was it weeks or months?
18 MR. MARGOLIS: Months.
19 MR. BHARARA: Okay.
20 MR. MARGOLIS: It was a continual process.
21 MR. BHARARA: Was that third person you have
22 just been describing among the eight people who were
23 ultimately asked to resign last year?
24 MR. MARGOLIS: Yes.
25 MR. BHARARA: And who was that?

1 MR. MARGOLIS: Margaret Chiara.

2 MR. BHARARA: So Kevin Ryan was on your initial

3 list of performance problems. At some point Margaret

4 Chiara you identified in a similar fashion. Those are

5 those people who were asked to resign. The third person

6 that you have not identified, just so we are absolutely

7 clear, that person was not asked to resign as part of the

8 eight.

9 MR. MARGOLIS: That's correct.

10 MR. BHARARA: Do you know if that third person

11 still serves as United States Attorney?

12 MR. MARGOLIS: I do know.

13 MR. BHARARA: And does that person?

14 MR. MARGOLIS: Yes.

15 MR. BHARARA: And you won't identify that

16 person?

17 MR. HUNT: No. Correct.

18 MR. MARGOLIS: The Department objects.

19 MR. BHARARA: Okay.

20 MR. MARGOLIS: I personally would love to out

21 that person.

22 [Laughter.]

23 MR. MARGOLIS: Of all the people.

24 MR. BHARARA: If I said a word that it rhymes

25 with, would you--

1 people who you believed should go?

2 MR. MARGOLIS: I don't believe so. I don't

3 recollect adding any others.

4 MR. BHARARA: Okay. So the only--

5 MR. MARGOLIS: I think there were--in the

6 interim people came up who I terminated, but without a

7 list or anything like that. They were just handled

8 individually, always for conduct. They weren't part of

9 this Justice Eight.

10 MR. BHARARA: Do you believe--withdrawn.

11 After your initial conversation in late '04 and

12 early '05 with Mr. Sampson, could you describe your

13 involvement in discussions about who should stay and who

14 should go from that point until December 7th of 2006?

15 MR. MARGOLIS: I think--and I am pretty certain

16 of this--that the only person that I ever talked to

17 between the first conversation with Kyle and toward the

18 very end was Kyle, about this list or anything to do with

19 the list. And the only reason I'm hesitating is at some

20 point in the fall, Kyle told me what the final list was

21 at that time--

22 MR. BHARARA: Is this fall of '06?

23 MR. MARGOLIS: Fall of '06. And said--and I

24 think it was November. I think it was November. And he

25 said, "We're about to execute this" and gave me the

1 chance to weigh in on any, and I noticed two names
2 missing. And I've mentioned--I'm not sure how I phrased
3 it, but they happened to be the two names that were at
4 the top of my list.
5 MR. BHARARA: Those names would be Kevin Ryan
6 and Margaret Chiara?
7 MR. MARGOLIS: No.
8 MR. BHARARA: Or different names?
9 MR. MARGOLIS: One name--one name was Kevin
10 Ryan. The other--remember I said I had a top two. The
11 other was--the second of the top two or the first of the
12 top two.
13 MR. BHARARA: Can I just go through that so that
14 I am clear? You had a top two and later you had a third,
15 and those were Kevin Ryan--
16 MR. MARGOLIS: It was not that important to me,
17 but I had a recommendation.
18 MR. BHARARA: Okay. You had a recommendation as
19 to three people who should be gone based on performance,
20 correct?
21 MR. MARGOLIS: Yes.
22 MR. BHARARA: Kevin Ryan, Margaret Chiara, and
23 the third person that you haven't identified.
24 MR. MARGOLIS: That's correct.
25 MR. BHARARA: And then fast forward to November

1 November of 2006, going back to the end of '04 and
2 beginning of '05, can you describe how frequently you
3 talked with Mr. Sampson about this whole plan or process?
4 MR. MARGOLIS: I don't think I had more than
5 one, at the most, conversation with him--it was not a
6 running thing--in between that time. I say no more than
7 one because I remember one. But I can't discount the
8 possibility.
9 I mean, I got to tell you that I didn't think
10 that--I didn't have great optimism that this would ever
11 happen because, you know, I didn't fall off a Christmas
12 tree. I know how difficult getting rid of a political
13 appointee can be without really hard evidence. And there
14 were long periods of time when I didn't hear anything.
15 MR. BHARARA: So to the best of your
16 recollection, from the first time that Mr. Sampson
17 mentioned to you this possibility of terminating a subset
18 of United States Attorneys through the very end of the
19 process in November of 2006, how many conversations in
20 total do you believe you had with Mr. Sampson about this
21 whole process?
22 MR. MARGOLIS: No more than three that I can
23 really say.
24 MR. BHARARA: And by those three, are you
25 including the first conversation?

1 MR. MARGOLIS: Actually, maybe four. If it was
2 separate conversation, one would be killing the "firing
3 of everybody" discussion, conversation; two, let's go
4 through the U.S. Attorneys and give me your views on who
5 should be considered; a third, maybe a third that I'm
6 very fuzzy on; and then near the end, maybe November,
7 saying here's the list, here's what we're going to go
8 with. And that didn't happen, by the way, but that--in
9 other words, nothing happened right away.
10 MR. BHARARA: How far apart were those
11 intervening conversations, to the best of your knowledge?
12 MR. MARGOLIS: Well, the early '05 to late '06,
13 and maybe one somewhere in the middle of that. But I
14 don't have a good specific recollection of the one in the
15 middle.
16 MR. BHARARA: Did you have any understanding of
17 who else Mr. Sampson was consulting with on this project?
18 MR. MARGOLIS: He never mentioned--as far as I
19 can recall, he never mentioned having that information,
20 but, you know, I would have guessed who he thought that--
21 MR. BHARARA: Who would you have guessed?
22 MR. MARGOLIS: I would have thought the
23 Directors of EOUSA, maybe the Chairman of the Advisory
24 Committee; the Deputies, the Deputy Attorneys General;
25 some Assistant Attorneys General, especially Criminal, I

1 guess.

2 MR. BHARARA: And why would you have assumed he

3 would be talking to those folks?

4 MR. MARGOLIS: To get their input. They would

5 know U.S. Attorneys. Like I said, you have got two

6 Deputy Attorneys General who actually were U.S.

7 Attorneys, one of whom was Chairman of the Advisory

8 Committee, so would be in a good position to meet those

9 people.

10 MR. BHARARA: Did he ask you your opinion about

11 who he should be consulting with in addition to you?

12 MR. MARGOLIS: I don't think so. I don't think

13 so. But if he did, if I'm wrong and if he did, it would

14 have been the names--the positions I just gave you.

15 That's what I would have said.

16 MR. BHARARA: Just once again, did you have any

17 conversations that you can recall about this process with

18 anyone other than Kyle during the 2-year period or so

19 ending in November of 2006?

20 MR. MARGOLIS: Not that I recall. I mean, I

21 recall in the summer of 2006 talking to--listening to

22 Bill Mercer talking about some issues with--you know,

23 that had come out with Carol Lam. But it wasn't in

24 connection with this list or anything. It was just

25 issues. I've seen some of the e-mails between him and

1 Elston that have been published, and I've read them.
2 MR. BHARARA: Did you have any understanding of
3 the involvement, if any, of Monica Goodling in this
4 process?
5 MR. MARGOLIS: Certainly after it blew up.
6 MR. BHARARA: Prior to December 7th of 2006.
7 MR. MARGOLIS: I don't recall--that's a good
8 question. I don't recall that.
9 MR. BHARARA: Did you ever have conversations--
10 MR. MARGOLIS: I'm surprised, if I don't recall
11 it.
12 MR. BHARARA: In your capacity, in your job at
13 the Deputy Attorney General's Office, did you have any
14 occasion to interact with Ms. Goodling?
15 MR. MARGOLIS: Oh, yes.
16 MR. BHARARA: In connection with what?
17 MR. MARGOLIS: Primarily in connection with U.S.
18 Attorney and U.S. Marshal selection. I played the same
19 role with the Marshal selections, primarily in those
20 contexts, both presidentially appointed U.S. Attorney,
21 Acting, and Interim U.S. Attorneys. That would be my
22 primary contact.
23 MR. BHARARA: Now, I just want to fast forward
24 to November of '06 when you were asked by Mr. Sampson
25 about a number of people that he identified to you.

1 specific goals or criteria for deciding whether or not
2 someone was above the threshold for being terminated
3 versus--
4 MR. MARGOLIS: I don't recall that--I mean, I do
5 recall when I would make a pitch for somebody to be on
6 the list, I would give my reasons. You know, so that
7 would be a standard there.
8 MR. BHARARA: Prior to December 7th of 2006,
9 were you consulted on whether U.S. Attorneys should be
10 given the opportunity to correct any performance problems
11 that may have been discussed before they were actually
12 terminated?
13 MR. MARGOLIS: No, but I should say that I am a
14 bit exasperated by my role here because I'm the only one
15 of all the people involved who knows how to fire a United
16 States Attorney or a Marshal based on experience. And I
17 was not aggressive enough or vigilant enough, and I
18 should have done a number of things, I should have
19 inserted myself.
20 I was too passive, and I'd like to, I think--and
21 I hold myself accountable for this--that if I had stepped
22 in and said something, that maybe this would have been--
23 we would have handled this better, because I'm used to--
24 the irony is when people have been found to have engaged
25 in misconduct by an OPR investigation or an OIG

1 investigation, historically when they were political
2 appointees as opposed to career people with protections,
3 historically maybe just bounced because they had no
4 rights. And, you know, we had this independent finding.
5 When I came on board 14 years ago, it didn't
6 take me long to change that, and I got some resistance
7 from especially career people, saying, "You're setting a
8 dangerous precedent by giving some kind of rights to
9 these people who were political appointees."
10 But I would give them a copy of the report. I'd
11 give them a chance to respond in writing. I'd give them
12 and their attorney--and I'm talking about U.S. Attorneys
13 now specifically--a chance to respond through counsel
14 personally.
15 And then I'd make my decision, and so--but I
16 didn't insist that happen in this case, and I understand
17 there was a bit of difference. A finding of misconduct,
18 if it's allowed to stand, you know, follows a lawyer
19 forever.
20 It will stop them from becoming a judge or other
21 positions of public trust; whereas, this shouldn't have
22 the same result. So I do make that distinction. But I
23 still wish that I had said, look, let's here what these
24 people have to say.
25 Now, Kevin Ryan I gave more due process to than

1 I give a career person. I gave him an unlimited budget,
2 and he exceeded it. But the others, you know, I didn't--
3 and I would say as to Margaret, too, that she had pretty
4 good due process. But I did not insert myself as to the
5 others and say, look, what do you got? What do they say?
6 What is their response?
7 MR. BHARARA: With respect to--
8 MR. MARGOLIS: And I'd like to think that I know
9 how far a career guy should go and when he should defer
10 to the political appointees. But in this case,
11 ironically, I think my tentativeness and lack of
12 aggressiveness--which I'm not known for lack of
13 aggressiveness. I think it did my masters a disservice,
14 and I accept that. That does not mean that I'm excluding
15 everybody else from their own responsibility. That's a
16 different issue.
17 MR. BHARARA: I'm coming to those people.
18 MR. MARGOLIS: Okay.
19 MR. BHARARA: It's later in the hour.
20 MR. MARGOLIS: I'll be here.
21 MR. BHARARA: Prior to December 7, 2006, were
22 you consulted at any point on the relative merits of any
23 complaints relating to lack of aggressiveness in pursuing
24 voter fraud cases on the part of one or more of the
25 dismissed U.S. Attorneys?

1 MR. MARGOLIS: No. My pretty firm recollection
2 is that I didn't hear about that issue and others, but
3 that issue specifically, until after the dismissals and
4 things started to become public.
5 MR. BHARARA: Prior to December 7th of 2006,
6 were you ever asked to create or prepare any
7 documentation that would support the decision to dismiss
8 these eight U.S. Attorneys?
9 MR. MARGOLIS: As to Kevin -- put Kevin Ryan
10 aside, because we got the EARS evaluation, so I put him
11 in a special category. But aside from him, no.
12 MR. BHARARA: More generally, prior to December
13 7th of 2006, were you ever consulted on what, if any, due
14 diligence should be done on particular complaints raised
15 about the U.S. Attorneys who were ultimately dismissed,
16 apart from Ken Ryan?
17 MR. MARGOLIS: I think -- I think, in the
18 context -- not in the context of these removals, but in
19 the context of Deputy U.S. Attorney General's Office
20 business, Mercer discussed -- excuse me -- discussed with
21 me the performance of Carol Lam in his efforts to make it
22 better. To make her better. His failed effort.
23 MR. BHARARA: Prior to December 7 of 2006, were
24 you ever consulted about whether or not a number of U.S.
25 Attorneys should be fired on the same day or whether it

1 Prior to December 7th, 2006, did you have any
2 communications with anyone at the White House about the
3 performance of any of these eight, or to dismiss any of
4 these eight?
5 MR. MARGOLIS: No.
6 MR. BHARARA: And specifically, I just want to
7 run through a few names. Do you recall whether or not
8 you had any communications at all with Harriet Meirs on
9 this?
10 MR. MARGOLIS: I never had any communication
11 with Harriet Meirs on any subject. Never met her.
12 MR. BHARARA: You ever meet Bill Kelley?
13 MR. MARGOLIS: I know the name. I don't believe
14 -- I know I've never met him. I don't believe I've ever
15 talked to him. I certainly didn't discuss this with him.
16 MR. BHARARA: Did you discuss it with anyone
17 else at the White House counsel's office, to your
18 recollection?
19 MR. MARGOLIS: Now, people from the White House
20 counsel's office, not the ones you mentioned, participate
21 in our U.S. Attorney selection interviews, but I don't
22 believe any of -- that I talked to any of these people
23 about them.
24 MR. BHARARA: Same answer for Karl Rove?
25 MR. MARGOLIS: Never met Karl Rove. Never

1 talked to Karl Rove. Only contact with him is through
2 Fitzy's investigation that everybody --
3 MR. BHARARA: Pat Fitzgerald.
4 The same answer for Scott Jennings and Sarah
5 Taylor?
6 MR. MARGOLIS: Who? Say again?
7 MR. BHARARA: Scott Jennings and Sarah Taylor.
8 MR. MARGOLIS: I've only seen their names in
9 some of these public e-mails.
10 MR. BHARARA: Separate and apart from any
11 communications you had with the folks that I've
12 mentioned, are you aware of any involvement by anyone at
13 the White House in connection with the decisions to ask
14 for the resignations of these eight U.S. Attorneys?
15 MR. MARGOLIS: Say that again.
16 MR. BHARARA: Separate and apart from whether or
17 not you personally had conversations with folks at the
18 White House, are you aware, as you sit here now, of any
19 degree of involvement on the part of people at the White
20 House in the decision to ask for these eight folks'
21 resignation?
22 MR. MARGOLIS: I only -- from the materials I
23 read publicly, you know, that have been posted on the
24 Internet that were turned over to you guys, but that --
25 you know, I see from that that there was involvement and

1 discussions, but that's all.

2 MR. BHARARA: You have no understanding of White

3 House involvement from post-December '06 conversations

4 with Kyle Sampson, or Monica Goodling, or the Attorney

5 General, or anyone else?

6 MR. MARGOLIS: I -- I have never, to this day,

7 discussed the specific -- the specifics of this U.S.

8 Attorney dismissals -- of U.S. Attorney dismissals with

9 the Attorney General. There've been vague allusions on

10 occasion when we've chatted, but nothing specific.

11 And Kyle and Monica, I -- I don't believe so.

12 You know, if something -- the only occasion would have

13 been -- oh, wait a minute. Wait a minute. Wait a

14 minute. I'm wrong. I missed an obvious point.

15 On a Thursday afternoon or early evening, the

16 Thursday before all hell broke loose -- the Thursday

17 before the Monday when all hell broke loose with our

18 disclosures that became public, I was coming back to my

19 office from somewhere and Kyle was standing outside my

20 office waiting for me and he asked me to step into my

21 office and he had some binder with him or something.

22 In any event, he sat there and read me materials

23 that, as I said, were later disclosed two or three days

24 later about White House involvement.

25 MR. BHARARA: Do you recall what time of day

1 that was on that Thursday?

2 MR. MARGOLIS: In the afternoon. Late

3 afternoon. Because I think after we left my office I saw

4 him doing the same thing in the Deputy's office, or the

5 Deputy -- with the Deputy in the conference room.

6 MR. BHARARA: Do you recall that this was two

7 days after the U.S. Attorneys testified in the House and

8 the Senate and that Mr. Moschella testified in the House?

9 MR. MARGOLIS: No. I mean, the way -- the

10 timing of it, the way I set the timing is that it was the

11 Thursday before the Monday disclosures.

12 MR. BHARARA: And the Monday disclosures

13 happened around the same time that Mr. Sampson resigned?

14 MR. MARGOLIS: Yes. Maybe even --

15 MR. BHARARA: So Mr. Sampson resigned on Monday

16 the 12th, so this was Thursday the 8th.

17 MR. MARGOLIS: This would have been Thursday the

18 --

19 MR. BHARARA: March 8th.

20 MR. MARGOLIS: -- 8th.

21 MR. BHARARA: Okay.

22 MR. MARGOLIS: So that was the first inkling.

23 And then later that night--and I mean like 8:00 or so--

24 Monica came down to see me.

25 MR. BHARARA: Can we go back to Mr. Sampson's

1 visit to you earlier that evening? What time,
2 approximately, was that again?
3 MR. MARGOLIS: Late afternoon.
4 MR. BHARARA: So before 5:00?
5 MR. MARGOLIS: No. Yeah, maybe before 5:00.
6 MR. BHARARA: And the two of you met alone in
7 your office?
8 MR. MARGOLIS: Yes.
9 MR. BHARARA: How long a meeting was that?
10 MR. MARGOLIS: It seemed longer than it probably
11 was. Maybe 15, 20 minutes.
12 MR. BHARARA: Can you tell us, to the best of
13 your recollection, what you said to him, what he said to
14 you?
15 MR. MARGOLIS: All I can remember of him is him
16 reading -- "I'm going to read you some e-mail traffic so
17 you know what's going on." And he read me some of these
18 e-mails that later -- that, you know, on Monday I read
19 publicly disclosed. I don't think I said anything to him
20 other than "oh".
21 MR. BHARARA: Can you describe what his demeanor
22 was when he was telling you this?
23 MR. MARGOLIS: Somber. Somber.
24 MR. BHARARA: Did he apologize in any way?
25 MR. MARGOLIS: I got -- I don't think he said he

1 outside the district who, if I had been thinking, I would
2 have -- he was a protégé of mine and I had no problem
3 with him, and I thought it was fine.
4 MR. BHARARA: With respect to the eight U.S.
5 Attorneys who were asked to resign last year, the eight
6 we've been talking about, other than Ms. Chiara and Mr.
7 Ryan, did you -- were you the cause of any of those other
8 six names being put on the list of people to be asked to
9 resign?
10 MR. MARGOLIS: Kevin Ryan. Kevin Ryan, I think
11 I put on the list. Margaret Chiara I either put on the
12 list, or endorsed being on the list.
13 MR. BHARARA: Okay.
14 MR. MARGOLIS: The other people who I either put
15 on the list or endorsed are not among those six
16 remaining.
17 MR. BHARARA: I want to turn to some of the
18 particular U.S. Attorneys among those six and ask you
19 about Mr. Bogden.
20 Do you know Mr. Bogden from -- from your time in
21 the Deputy's office?
22 MR. MARGOLIS: I interviewed him and -- so I
23 participated in that, and then the only matter -- the
24 only case that I was involved with him, ironically, was a
25 bit of a disagreement between him and Carol Lam over --

1 December 6th of 2006 -- December 7th of 2006, understand
2 that any elected officials, including Senator Domenici or
3 Heather Wilson, had expressed concerns of any sort about
4 Mr. Iglesias?
5 MR. MARGOLIS: No. I learned that subsequently.
6 I would be remiss if I didn't point out that I am furious
7 at Mr. Iglesias for not reporting that. And I don't
8 think I'd be sitting here answering questions if he had
9 reported that, because the way we react at the department
10 when something like that comes up is, we run the other
11 way to make sure that nobody thinks we're fixing the
12 case.
13 So that's unforgivable, and his explanation was
14 unforgivable. His explanation was, oh, this guy was my
15 mentor. That's what -- we hold out an independent U.S.
16 Attorney to the public. To say, oh, well, I'm not going
17 to follow the rules if I like this guy or something like
18 that, I am furious about that. Now, that doesn't mean
19 I'm not furious at the other party to the conversation
20 either, but I don't expect as much from him.
21 MR. BHARARA: Are you aware of whether or not
22 there was any dissent within the department about whether
23 or not Mr. Iglesias should be asked to resign prior to
24 December 6th -- December 7th of 2006?
25 MR. MARGOLIS: No. No. Because I take -- as I

1 MR. BHARARA: Did you form an impression of him
2 and his performance and conduct?
3 MR. MARGOLIS: My recollection was, he was very
4 articulate and had -- didn't have prosecutorial
5 experience. But that's not always a prerequisite for the
6 job. Some of the best trial lawyers are lousy U.S.
7 Attorneys, and some of the best U.S. Attorneys are not
8 much as trial lawyers.
9 MR. BHARARA: Am I correct, you were not
10 involved in any way with Mr. McKay also in putting him on
11 the list?
12 MR. MARGOLIS: No. But I did hear -- now, I did
13 -- on him I heard the reason -- or one of the reasons,
14 anyway. I believe before -- before the prep -- boy.
15 After -- after he was put on the list and before this
16 blew up, I think it was -- I asked -- I used to talk--I
17 still talk to Bill Mercer--all the time and asked him,
18 what was McKay's problem?
19 And he said something about, he had tried to
20 pull a -- now, "bully" is my word. He didn't use that
21 word. I used it. He tried to pin the deputy into a
22 corner with other U.S. Attorneys unfairly on some
23 information sharing thing and my reaction was, "that
24 sounds like a bully to me", or something.
25 MR. BHARARA: Do you recall when that

1 conversation with Mr. Mercer was?

2 MR. MARGOLIS: Do I recall when it was? I'm

3 having trouble. I know it was before -- before the prep

4 session, before this blew up, but I'm not sure that it

5 was before he was fired. I just can't be sure.

6 MR. BHARARA: Do you have any understanding as

7 to how Mr. McKay's name ended up on a list of people

8 whose resignation you sought?

9 MR. MARGOLIS: Well, I would say, based on what

10 Bill told me -- Bill Mercer told me, I would put him on

11 the list.

12 MR. BHARARA: Were you ever asked --

13 MR. MARGOLIS: If Paul had come to me and said,

14 "Here's what happened," and described it the way I heard

15 it from Bill, and now have read it, you know, in the --

16 in the explanations, I would have put him on the list.

17 MR. BHARARA: Now, were you asked --

18 MR. MARGOLIS: I might have asked him, you know,

19 "what's your excuse for this?"

20 MR. BHARARA: Do you know if Mr. McKay was ever

21 given an opportunity to provide his explanation for the

22 letter that you're describing for Mr. McNulty and/or ever

23 given an opportunity to correct any problem that he might

24 have had with respect to supervision?

25 MR. MARGOLIS: I don't know as to either. As to

1 the second, if he didn't have a -- if he didn't have an
2 adequate explanation to me, if I'm making the calls, then
3 I don't -- I am not certain I would give him a second
4 chance. This isn't, you know, Douglas factors for a
5 career government employee. That kind of
6 insubordination, if true, might be a capital offense to
7 me. It might very well be a capital offense.
8 MR. BHARARA: Do you know if Mr. McKay was on
9 that initial list in late '04, early '05 when Mr. Sampson
10 talked to you about people who asked to resign?
11 MR. MARGOLIS: I don't think so, but I wouldn't
12 swear to it.
13 MR. BHARARA: Are you aware of whether or not
14 the issue of the letter that you're talking about that
15 upset Mr. McNulty occurred after March of 2005?
16 MR. MARGOLIS: I think so. I mean, the letter
17 will have the date, but I think so. I don't think I ever
18 saw -- I know I never saw the letter, I just heard about
19 it.
20 MR. BHARARA: My question is this. Are you
21 aware of any other basis for Mr. McKay's being asked to
22 resign, other than the issue of this letter --
23 MR. MARGOLIS: I thought that was the big thing.
24 Since that time I've read--and I can't tell you where.
25 Not that I wouldn't, but I just can't remember--read

1 Do you have any understanding as to who, inside
2 or outside the Justice Department, inside or outside the
3 White House, suggested or advocated that Mr. McKay be put
4 on the list of people to be fired?
5 MR. MARGOLIS: No.
6 MR. BHARARA: I'm going to ask you about Paul
7 Charlton.
8 MR. MARGOLIS: Yes
9 MR. BHARARA: Do you know Paul Charlton?
10 MR. MARGOLIS: Interviewed him. I don't think I
11 knew him when he was an AUSA, and he wasn't an AUSA
12 before he was U.S. Attorney.
13 MR. BHARARA: Did you form an impression of the
14 quality of his performance and conduct as a U.S.
15 Attorney?
16 MR. MARGOLIS: Not personally, except for one
17 item which I'll get to in a minute. But I was told--and
18 once again, I think it might have been by Mercer or
19 Elston--that he had tried to -- he had tried to enforce
20 recording requirements on statements taken by the Bureau,
21 which on the merits I don't quarrel with particularly at
22 all, but I don't want -- I don't support the concept of
23 one U.S. Attorney making national policy like that. I
24 had also heard that he was weak on immigration, some of
25 this I know firsthand.

1 General was upset about Mr. McNulty's testimony with
2 respect to the reasons for Bud Cummins being asked to
3 resign. Are you familiar with that?
4 MR. MARGOLIS: I read that e-mail.
5 MR. BHARARA: Do you have any understanding as
6 to what the Attorney General was upset about?
7 MR. MARGOLIS: No. I know nothing about that
8 one, except the four corners of the e-mail, which I read
9 as a member of the public.
10 MR. BHARARA: Do you recall whether or not Mr.
11 Cummins was on any earlier list that Mr. Sampson may have
12 discussed with you?
13 MR. MARGOLIS: I don't believe he was.
14 MR. BHARARA: And do you have any understanding
15 about who, inside or outside the Justice Department or
16 the White House, may have advocated that Mr. Cummins be
17 asked to resign?
18 MR. MARGOLIS: No. I mean, I know firsthand
19 that Monica was a strong supporter of -- of Griffin. So
20 if the plan was to get Bud out and give Tim Griffin the
21 opportunity, then it wouldn't surprise me if Monica was a
22 strong advocate for removing Bud. Not for Bud, but in
23 favor of Griffin.
24 MR. BHARARA: And do you have any understanding
25 of whether or not anybody at the White House was also an

1 advocate of Mr. Griffin?

2 MR. MARGOLIS: Well, I think now that e-mails

3 have come out that I've read since this all exploded

4 would indicate that -- at least Kyle's e-mails indicate

5 that people in the White House were interested. I think

6 he said something, "I know this is important to Karl."

7 MR. BHARARA: Did Mr. Sampson ever discuss with

8 you any perceptions that he had about Mr. Cummins'

9 performance or conduct as U.S. Attorney?

10 MR. MARGOLIS: I don't think so. I don't think

11 so. If he did, I certainly don't remember.

12 MR. BHARARA: Let me turn to Ms. Lam. When is

13 it you learned that she would be asked to resign?

14 MR. MARGOLIS: I think I first heard her name in

15 November. October or November. That was reported to me

16 to be, remember, to put it back in context, the final

17 list.

18 MR. BHARARA: Were you involved in any way in

19 the decision to put Ms. Lam on the list?

20 MR. MARGOLIS: No. That's when I did -- I mean,

21 that's a problem I was aware -- made aware of before I

22 knew anything about her being on the list, so it didn't

23 surprise me in that sense because when Mercer was PADAG

24 he used to tell me about problems he was having with her

25 vis-a-vis immigration and -- immigration and guns, I

1 believe. But my dealings with her -- my dealings with
2 her were always on individual cases, usually of the high-
3 level magnitude type cases, like Duke Cunningham.
4 MR. BHARARA: And based on your interaction with
5 her on those high-level cases, did you form an impression
6 of Ms. Lam's performance?
7 MR. MARGOLIS: Based upon my interaction with
8 her and what other people, including Mercer, said, both
9 then and now, in reading, my--and I love Carol like a
10 sister--an outstanding investigative lawyer, an
11 outstanding trial lawyer, tough as nails, honest as the
12 day is long, but had her own ideas about what the
13 priorities of the department would be, and was probably
14 insubordinate on those things.
15 MR. BHARARA: Do you know who --
16 MR. MARGOLIS: And I don't think that she would
17 -- if she heard what I just said I'm not too sure she
18 would quarrel with what I just said, and she might even
19 like it.
20 MR. BHARARA: Have you talked to her since
21 December 7th of 2006?
22 MR. MARGOLIS: Yes, I have.
23 MR. BHARARA: On how many occasions?
24 MR. MARGOLIS: Once.
25 MR. BHARARA: When was that?

1 MR. MARGOLIS: Maybe even December 7th, if not
2 December 8th or 9th. She called me primarily to tell me
3 that -- I think she said, "I think I just got fired by --
4 by Mike Battle."
5 And I believe, as I think about it, that that's
6 how I learned that the plan actually went forward,
7 because I remember it was supposed to go forward before
8 that and it didn't.
9 I was beginning to wonder whether it really was
10 going to go forward, but that made it sure to me that it
11 was going forward. I wasn't sure what the exact final
12 list was, and of course she didn't know.
13 So she had two questions of me: "Am I -- was I
14 the subject" -- was she the subject of an OPR or OIG
15 investigation that would cause this, and I said,
16 "Absolutely not. I would know that. That's absolutely
17 false. Don't worry about that." And then jokingly she
18 sort of said, you know, "Am I the only one?" And I
19 deflected that, disingenuously, probably.
20 Then she said nobody -- that Mike wouldn't tell
21 her the reason. Couldn't tell her the reason or wouldn't
22 tell her the reason, but that she had a few -- she was
23 going to call Paul and see if she could get the reason.
24 And then she speculated to me that it was over
25 immigration and guns. It was a very pleasant

1 MR. HUNT: You know, it's pretty clear he's just
2 speculating about what this document is.
3 MR. BHARARA: You said, Mr. Margolis, earlier
4 that you deserved some responsibility for how the firing
5 of the U.S. Attorneys has played out.
6 MR. MARGOLIS: That's right.
7 MR. BHARARA: Is that right?
8 MR. MARGOLIS: That's right.
9 MR. BHARARA: And you made reference to the fact
10 that there are other folks who also deserve some
11 responsibility.
12 MR. MARGOLIS: Yeah.
13 MR. BHARARA: Who are they, and why do you think
14 so?
15 MR. MARGOLIS: I have in mind one particular
16 person, and that was Mr. Iglesias, for his failure to
17 follow the rules and tell us about the contact from
18 Senator Domenici.
19 MR. BHARARA: Is there anyone else at the
20 Department of Justice?
21 MR. MARGOLIS: I think Kyle could have handled
22 it better and, to the extent that Monica reports to him,
23 she could have handled it better. But if Iglesias had
24 done his job or if I had done my job, things could have
25 been a lot different.

1 MR. KEMMERER: You would have endorsed that as
2 well?
3 MR. MARGOLIS: That's correct.
4 MR. KEMMERER: Okay.
5 Now, turning to Ms. Lam for the moment, would
6 you have endorsed putting Ms. Lam on the list based upon,
7 I believe it's the gun prosecutions and immigration
8 prosecutions?
9 MR. MARGOLIS: Reluctantly, yes. And I say
10 reluctantly because I know her to be a fine prosecutor
11 and I liked her. But reluctantly.
12 MR. KEMMERER: Now, with respect to Mr. Bogden,
13 I don't believe anybody asked, and I don't believe you
14 testified whether you would have endorsed putting him on
15 the list based upon all that you've known, sort of, since
16 December 7, 2006. Would you now, given everything you
17 know, have supported putting Mr. Bogden on the list?
18 MR. MARGOLIS: I would have -- I would have, and
19 should have, pressed for more facts before a decision was
20 made.
21 MR. KEMMERER: Well, with the benefit of
22 hindsight and the knowledge of everything that you've
23 read as a citizen online, have you ever read any
24 justification for removing Mr. Bogden that you felt was
25 appropriate and that you would endorse?

1 MR. MARGOLIS: I'm torn on the obscenity
2 prosecution issue, because if it was -- if, indeed, that
3 was a primary ground, then on the one hand, while those
4 aren't my favorite prosecutions, you know, I recognize
5 the Attorney General, whoever she might be at a given
6 time, has the right to set their priorities and have them
7 followed. But I would have also wanted, on a situation
8 like that, to make sure Bogs got the chance to explain
9 his side of the story and correct his action.
10 So, I don't think there was any legal reason not
11 to remove him for those grounds, but I think we should
12 have confronted him with whatever facts we had, heard his
13 answer, and then maybe, depending on the answer, given
14 him a chance to comport his conduct.
15 MR. KEMMERER: And with respect to obscenity
16 prosecutions in Mr. Bogden's U.S. Attorney's district,
17 you really were only aware of one instance where he was
18 alleged not to have brought a strong case.
19 MR. MARGOLIS: That's correct.
20 MR. KEMMERER: And if that's the case, if it was
21 really just one obscenity prosecution that Mr. Bogden let
22 slip through the cracks, it's all the more obvious once
23 you confront him and give him an opportunity to explain,
24 isn't it?
25 MR. MARGOLIS: It is. It is. The wild card

1 Preet asked you whether Mr. Sampson was incorrect in
2 suggesting that you had told him something, you know,
3 negative about Mr. Iglesias' performance.
4 MR. MARGOLIS: I think he said, if I've got the
5 right quote, in his testimony he said that, "I had told
6 him that Iglesias was an absentee landlord." Is that
7 what you're referring to?
8 MR. KEMMERER: Yes, things to that effect, and
9 that he delegated a lot to his First Assistant.
10 MR. MARGOLIS: And that, what I'm saying is I
11 said that I believe what Kyle's referring to is what I
12 said at the prep session after the firings had long since
13 taken place, because it was something I learned from the
14 First Assistant when we interviewed him to replace
15 Iglesias. So I don't think I knew that before the
16 firing. I certainly didn't hear it from the First
17 Assistant until after the firing.
18 MR. KEMMERER: Okay.
19 MR. MARGOLIS: So I think his timing is wrong.
20 MR. KEMMERER: Okay. Actually, he was fairly
21 careful. He says he doesn't know when you said that to
22 him.
23 MR. MARGOLIS: Oh, I didn't even remember that.
24 MR. KEMMERER: All right. So at any point did
25 you ever hear anyone suggest that the terminations of

1 these eight U.S. Attorneys--or the request for their
2 resignations--I think you made that distinction in your
3 testimony.
4 MR. MARGOLIS: Right.
5 MR. KEMMERER: The request for their
6 resignations were to influence a political corruption
7 case?
8 MR. MARGOLIS: Well, I've read newspaper
9 articles after the fact, and I've read Iglesias' public
10 statements after the fact and some statements from John
11 McKay. But you don't mean that. You mean anybody in a
12 position of authority. Absolutely not, and they would
13 get my sharp stick in the eye if they suggested that.
14 MR. KEMMERER: Okay. And did you ever hear from
15 anyone in the administration, either at the Department of
16 Justice or the White House, that they were terminating
17 these--or asking for the resignations of these eight U.S.
18 Attorneys in order to chill or jump-start a particular
19 case?
20 MR. MARGOLIS: No.
21 MR. KEMMERER: And what would that type of
22 statement in your presence by someone in authority have
23 elicited from you?
24 MR. MARGOLIS: Well, you know, I'd like to be
25 very simple, but I think to instruct the situation and

1 MR. KEMMERER: Yeah.

2 MR. MARGOLIS: Well, I think Mercer shared with
3 me his thoughts about Carol in the summer, so I knew back
4 then, and I would reluctantly have to agree. As to McKay
5 and Charlton, I can't be sure just when I heard stuff
6 about them. But as I testified earlier, that would have
7 caused me to endorse their being put on the list whenever
8 I found out about it.

9 There was somebody else who I think I put on the
10 list early on, and the reason I can't be sure is that--
11 like I think put them on in early '04, and in May or June
12 of '04 I forced them out of the Department, so it never
13 got any further. I put them on for performance and
14 forced them out for conduct.

15 MR. KEMMERER: And they are not a part of this,
16 obviously.

17 MR. MARGOLIS: No.

18 MR. KEMMERER: Let me just consult with my
19 colleagues here and see if I have any more questions.

20 MR. MARGOLIS: Feel free.

21 [Pause.]

22 MR. KEMMERER: Okay. I think I'm done.

23 MR. MARGOLIS: I encourage you to read the
24 Metcalf exchange and make up your own mind.

25 MR. KEMMERER: I will.

1 knocked that down or there might have been one quick
2 following--he might have been seeking your counsel and
3 you--
4 MR. MARGOLIS: Correct.
5 MR. BRODERICK-SOKOL: --might have agreed that
6 that is what he should do.
7 MR. MARGOLIS: Correct.
8 MR. BRODERICK-SOKOL: And then you testified
9 that he said something to the effect of, "But this does
10 open the door to a more responsible"--and you used that
11 word--"to a focused process to identify weak performers
12 and make some changes, and you thought that was a good
13 idea.
14 MR. MARGOLIS: I thought it was a great idea,
15 long overdue.
16 MR. BRODERICK-SOKOL: Did he say to you that
17 that was his idea, that the door had been opened and he
18 would--it gave him this idea that the opportunity could
19 be used?
20 MR. MARGOLIS: I don't recall if he actually
21 said that, but that's the conclusion I drew from what he
22 said.
23 MR. BRODERICK-SOKOL: You did not--and he didn't
24 say--did he say that he had discussed that more targeted
25 plan with the White House?

1 MR. MARGOLIS: I don't recall him saying that.
2 I have seen, you know, e-mails. That's not your point.
3 MR. BRODERICK-SOKOL: No, no. I am just trying
4 to understand. At the time your understanding was that
5 this was an idea that Kyle was working at that point.
6 MR. MARGOLIS: That's the impression I had,
7 yeah.
8 MR. BRODERICK-SOKOL: Okay.
9 MR. MARGOLIS: I think he said, "But I'm pretty
10 confident we can sell it."
11 MR. BRODERICK-SOKOL: Sell it to who?
12 MR. MARGOLIS: The White House.
13 MR. BRODERICK-SOKOL: And when you say the White
14 House, who would you understand would need to be
15 convinced for a plan like that?
16 MR. MARGOLIS: I would think the counsel.
17 MR. BRODERICK-SOKOL: Do you think the counsel
18 could make that decision without consulting the
19 President?
20 MR. MARGOLIS: Oh, no. The counsel would have
21 to be on board and then go to the President.
22 MR. BRODERICK-SOKOL: Could a United States
23 Attorney be dismissed without the approval of the
24 President himself?
25 MR. MARGOLIS: Not to my legal opinion. Not in

1 MR. MARGOLIS: Yes.

2 MR. BRODERICK-SOKOL: Did he voice that as a

3 complaint about Mr. Iglesias, or--

4 MR. MARGOLIS: I thought it was--he voiced it

5 not as a complaint about David Iglesias but, rather, a

6 kudo to himself; in other words, "I have been running the

7 office."

8 MR. BRODERICK-SOKOL: That was the other side of

9 my "or," a statement of his own ability to continue

10 running the office--

11 MR. MARGOLIS: Correct.

12 MR. BRODERICK-SOKOL: --if he would get such an

13 appointment.

14 And then I think you stated that sometime later

15 during one of the two prep sessions for Paul McNulty,

16 that subject of the delegation to the First Assistant

17 came up.

18 MR. MARGOLIS: I raised it.

19 MR. BRODERICK-SOKOL: I think you testified

20 before that someone else raised the issue.

21 MR. MARGOLIS: No. I raised--I was the one who

22 raised his statement, the delegation. Somebody else had

23 raised the absentee management issue.

24 MR. BRODERICK-SOKOL: Do you know if that

25 someone else was Monica Goodling?

1 MR. MARGOLIS: I don't think so. I may be
2 wrong, but I don't think so.
3 MR. BRODERICK-SOKOL: Do you have any further
4 memory of who it might have been?
5 MR. MARGOLIS: No, because I turned--when that
6 was said by whoever said it, I turned to Monica and said,
7 "Monica, remember when we interviewed" the First
8 Assistant, whose name is escaping me now. "He told us
9 that he had been delegated to day-to-day operations."
10 MR. BRODERICK-SOKOL: Why did you raise that at
11 that prep session?
12 MR. MARGOLIS: Because I think it, A, was a
13 relevant factor and, B, it corroborated what was said,
14 you know, the absentee management thing.
15 Now, it also, I would say, wasn't known to the
16 deciders at the time they decided because it didn't
17 happen, by definition, until after the firing.
18 MR. BRODERICK-SOKOL: And the purpose of this
19 preparation was to prepare Paul McNulty to brief Senators
20 and testify before the Senate on the--
21 MR. MARGOLIS: I think it was the testimony.
22 MR. BRODERICK-SOKOL: This is just for the
23 testimony?
24 MR. MARGOLIS: Right. I think so. The briefing
25 came later. I don't know how much later.

1 MR. BRODERICK-SOKOL: You wouldn't want to know.
2 MR. MARGOLIS: It's the kind of thing, "Don't
3 you tell me to fire one of my people. I'll fire them on
4 my own. But you can't tell me to."
5 MR. BRODERICK-SOKOL: It was reported in the New
6 Mexico press, that story.
7 Let me ask you about John McKay. I think you
8 discussed--what is your understanding of the reason John
9 McKay was forced to resign as United States Attorney?
10 MR. MARGOLIS: As I think I've testified before,
11 he put the Deputy in a bad light by sending him a letter
12 signed by a whole bunch of United States Attorneys who
13 were led to believe that the Deputy would welcome such a
14 letter when really he didn't and it would paint him in a
15 corner. That's not the way we do business. And then,
16 secondarily, something to do with sentencing.
17 MR. BRODERICK-SOKOL: And I think you testified
18 that that issue on the communications system and, more
19 precisely, the interactions between McKay and the Deputy
20 and the letter occurred sometime in the summer of 2006.
21 MR. MARGOLIS: I didn't say that, but it might
22 very well have.
23 MR. BRODERICK-SOKOL: I can represent that that
24 meeting with--that the letter was--
25 MR. MARGOLIS: That's good enough for me.

1 that's -- you know, that's to get new leadership and
2 aggressiveness and, you know, new ideas and energy.
3 But you could also justify it that, you know,
4 people -- these are four-year appointments. They're not
5 eight-year appointments. It's well within the legitimate
6 discretion to give somebody else a chance, and it's
7 happened before, you know, with no basis.
8 MR. FLORES: Uh-huh.
9 Is it not the case that each of these eight
10 individuals had completed their full four-year term?
11 MR. MARGOLIS: Every one of them has.
12 MR. FLORES: Uh-huh.
13 To move to another thing you mentioned during
14 your testimony earlier in the day, I believe that you had
15 indicated that you thought it was good of the department
16 to embark on an exercise like this.
17 MR. MARGOLIS: Absolutely. And I -- I should
18 add one of my sadnesses -- I have a lot of sadnesses
19 about this, but it was a great idea. Our execution
20 wasn't particularly good, but we didn't have much
21 experience with it. But one of my great sadnesses is, I
22 fear that down the road people will shy away from doing
23 this again because of the burning here.
24 And so when a U.S. Attorney called me a couple
25 of weeks ago to run an idea past me, he said, I want to

1 take some action but I want to run it past you and take
2 your temperature because I don't want to get fired, I
3 said to him, "Buddy, you could urinate on the President's
4 leg right now and it wouldn't work."
5 [Laughter.]
6 MS. BURTON: We have to have that on the record.
7 MR. MARGOLIS: That's on the record.
8 MR. FLORES: Could you please describe for me,
9 if you can, what kinds of benefits, going through a
10 process like this and executing it well, would produce
11 for the department or could produce for the department?
12 MR. MARGOLIS: We would -- because, as much as
13 we try to get the right choices the first time around, we
14 don't always succeed. And in the past, as I think I
15 indicated, the only way a U.S. Attorney left was to die
16 or decide, you know, they're going to get another job, or
17 engage in misconduct and have us remove them, or have a
18 performance problem that boiled out into the open so that
19 we had to face it.
20 But that's not good for the department to have
21 some under-performers there who we just let slug along.
22 And maybe we do it because we got a First Assistant who
23 can take over and run the office, if the United States
24 Attorney is smart enough to let the First Assistant run
25 it. You know, the kind of U.S. Attorney that is a poor

1 performer may not be smart enough to get out of the way
2 and let the First Assistant do the job.
3 I remember, in the Carter administration,
4 hearing about a U.S. Attorney who was appointed who the
5 White House had to send a letter telling him what the
6 working hours were, you know, the 9:00 to 5:00 or 9:00 to
7 5:30 to make sure he understood that and was willing to
8 hang around during those hours. You know, we can do
9 better. And if we make a mistake the first time around
10 we ought to be able to correct it without -- without a
11 big mess.
12 Part of the problem here was execution, part of
13 it was, maybe we did too many at the same time and that
14 meant it was going to get it. If it didn't get out,
15 nobody would have been embarrassed and there wouldn't
16 have been a problem.
17 MR. FLORES: So would you like the department to
18 have another opportunity to do something like this and do
19 it right?
20 MR. MARGOLIS: Yeah. But I -- I'd like it, but
21 I think, once burned, twice shy. It's going to be hard.
22 MR. FLORES: Do you have a sense of -- and if
23 it's hard to quantify this, just let me know. Do you
24 have a sense of what the magnitude of the improvement in
25 the department's performance overall would be from

1 MR. FLORES: Uh-huh.

2 MR. MARGOLIS: I have concern. I mean, that's -
3 - that's not my only concern. I'm very saddened by -- by
4 the fact that I'd like to see the department in the
5 newspaper every day for locking up the bad guys, and
6 we're getting in the paper every day now in a negative
7 light and that saddens me greatly.

8 Really, I think if this had happened at the
9 beginning of my career I don't think I would have stayed.
10 I would have said, boy, this is a place I want to -- I
11 don't want to hang my hat forever. But fortunately when
12 I started, this was before -- long before Watergate, and
13 press was uncritically supportive of us. Uncritically
14 supportive of us. And that's not good either, but, hell,
15 it was a lot more fun.

16 MR. FLORES: Earlier in your testimony you also
17 took a substantial amount of responsibility for what's
18 happened in this case.

19 MR. MARGOLIS: I'm bleeding over that.

20 MR. FLORES: Have you -- have you reflected
21 substantially over what you would do differently? Could
22 you walk me through sort of what kinds of things you
23 would do differently, different steps in this kind of
24 process?

25 MR. MARGOLIS: Yeah. I mean, I think -- I think

1 -- now, remember, Mr. Iglesias doesn't escape my ire over
2 this.
3 MR. FLORES: Right.
4 MR. MARGOLIS: But I would have, right from the
5 beginning, wanted to be very vigorous--rigorous?
6 Rigorous and vigorous--in establishing the grounds for
7 why we were getting rid of people, not because there's
8 any legal necessity, and only partially out of a sense of
9 fairness. Much more important than the sense of
10 fairness, because these are -- if John -- if Senator
11 Kerry were elected after the 2004 election, these people
12 would all be out on the street anyway, so it's not like
13 we're, you know, taking the jobs out from under them.
14 But partially out of a sense of fairness, but
15 also to protect the department's image and reputation so
16 that -- you know, like if we had -- while it was Mr.
17 Iglesias' responsibility to tell us about this call from
18 the Senator, if we had said to him, you know, we've got
19 problems with you, A, B, and C, maybe even tell him who
20 was complaining, he could say, whoa, wait, let me tell
21 you what this guy did. At least we'd know that and we
22 could say, well, we're going to do this in spite of it,
23 or maybe more likely, I hope we're going to step back
24 from this.
25 MR. FLORES: Uh-huh.

1 MR. MARGOLIS: So then I suppose, you know -- I
2 think maybe there's some resentment over the fact that we
3 didn't explain to them what the reasons were in these
4 cases. And it could have been just, you didn't follow
5 priorities. I think it was important to let them know it
6 wasn't misconduct.
7 MR. FLORES: What about, in terms of the end
8 game of the process where recommendations would have been
9 finally vetted, assembled, and moved on to the three
10 general -- what would you have done differently in that
11 phase of this kind of exercise?
12 MR. MARGOLIS: I think I would have wanted to
13 play a more central -- should play -- would have wanted
14 to play a more central role so that nobody -- people
15 could be retained over my objection, like this guy that I
16 brought in. I can understand, okay, he's retained, but
17 that nobody could be removed without my signing off.
18 MR. FLORES: Uh-huh.
19 Do you think if you had advocated for that kind
20 of authority in this process this time that that would
21 have been respected and agreed to?
22 MR. MARGOLIS: Yes. Yes.
23 MR. FLORES: On what --
24 MR. MARGOLIS: Because -- because, you know,
25 everybody was learning.

1 MR. FLORES: Do you think there's been any
2 damage to the department's image as far as the process
3 that you would regard as unfair?
4 MR. MARGOLIS: I think short-term. I think
5 we'll get over it, though.
6 MR. FLORES: Uh-huh.
7 MR. MARGOLIS: And I think -- and I think--I may
8 be smoking something here--I don't think the public
9 follows what goes on around here as much as we do, I
10 really don't.
11 MR. FLORES: Let me ask you, why do you think
12 the light didn't go on in your mind as you were going
13 through this process this time, telling you that you
14 should be doing more to test the system that was being
15 used or make it more robust?
16 MR. MARGOLIS: I think, two things. One, is I
17 was so pleased that it was actually happening, and
18 second, I gave too much deference to -- you know, I
19 mentioned earlier, I know the difference in a career
20 guy's role and the political role, and I gave too much
21 deference to the political role here, saying, you know,
22 these guys--and woman -- women--serve at the pleasure of
23 the President, and so that's -- you know, that solves
24 that. I didn't think about the other, more subtle
25 aspects.

1 MR. FLORES: Uh-huh.

2 MR. MARGOLIS: I do now.

3 MR. FLORES: Do you think those in the process
4 gave too much reliance to that factor as well, that these
5 were political appointees that served at the pleasure of
6 the President?

7 MR. MARGOLIS: I don't know. My great nightmare
8 is they gave too much deference to the fact that I didn't
9 balk. That was my worst nightmare. Margolis didn't come
10 in and hit us over the head.

11 MR. FLORES: Yeah. Yeah.

12 One of the things that you spoke to earlier with
13 regard to Mr. Sampson was that you and he had been
14 through a lot of wars together --

15 MR. MARGOLIS: Right.

16 MR. FLORES: -- at the department and you had
17 taken away from that experience, in least in part, the
18 sense that in a number of cases that Mr. Sampson had
19 taken the high road on an issue.

20 MR. MARGOLIS: Yes.

21 MR. FLORES: If I'm correct, it was about ethics
22 or conduct.

23 MR. MARGOLIS: Yes. In dealings with the
24 politicians. Yeah.

25 MR. FLORES: Yeah.

1 And if I'm recalling correctly, you had said
2 that he had done that even when it might be difficult for
3 him to do so.
4 MR. MARGOLIS: Yes. When it cost -- was
5 costly. Yeah.
6 MR. FLORES: When it was costly to him in
7 political terms, you mean?
8 MR. MARGOLIS: Personally. You know, he had to
9 take an unpopular -- he had to stand up for what he
10 thought was right.
11 MR. FLORES: Yeah.
12 I'd like to understand that a little bit more.
13 Could you recount for us a few key examples of those
14 kinds of instances?
15 MR. MARGOLIS: I'll make them very general.
16 Like the one -- the most recent one just before all this
17 blew up was, there was a judicial candidate and a
18 question arose whether the White House could ask him
19 questions about a decision he had made as a prosecutor on
20 a -- on a case, to test him.
21 And Kyle came to me on it and he says, I -- I
22 really want to tell them that that's way out of bounds
23 and he shouldn't do it. What do you think? I support --
24 I'll support you on that. That's the most recent
25 example.

1 Once we were looking at a candidate who -- you
2 know, you'd think because he was an enemy, he was
3 perceived -- this is a bit of an overstatement, but
4 because he was perceived as an enemy of the -- the
5 administration's enemy, he would be perceived as a friend
6 of the administration. But Kyle's attitude was, look, if
7 somebody stabs my enemy in the back, that doesn't make
8 him my friend.
9 MR. FLORES: Uh-huh.
10 Are there any other instances that really stand
11 out in your mind at this point?
12 MR. MARGOLIS: Say again?
13 MR. FLORES: Are there any instances that really
14 stand out in your mind at this point?
15 MR. MARGOLIS: Not that -- not that I feel
16 comfortable talking about. But it was just -- no, we
17 would -- well, I'll tell you, he was -- one day we were
18 interviewing a candidate for -- not a U.S. Attorney's
19 job, some job -- a political job, though, and they came -
20 - you know, he said to me, okay, what -- how do you come
21 down on this guy?
22 MR. FLORES: Uh-huh.
23 MR. MARGOLIS: And I said, you know, if you're
24 looking for a token Democrat in the administration, in
25 the department, this is your guy. And I thought he had a

1 great answer. He said, "Hey, we only have room for one
2 token Democrat in the department, and so far that's been
3 you."
4 [Laughter.]
5 MR. MARGOLIS: I said, well, the hell with this
6 guy, you know, and walked out. I mean, he was just -- he
7 was good that way.
8 MR. FLORES: Yeah.
9 In your estimation, was there a common thread in
10 his character or approach to his job that you've
11 identified in these instances?
12 MR. MARGOLIS: I think he was professional. He
13 -- he was -- he was partisan but, you know, most people
14 are at that level. But I think he cared about the
15 department.
16 MR. FLORES: Uh-huh.
17 MR. MARGOLIS: He cared about the job we do.
18 MR. FLORES: Do you think that animated his
19 desire to perform this exercise to begin with?
20 MR. MARGOLIS: Yeah, it sure -- it sure wasn't a
21 good career developer. I mean, just -- even if it had
22 worked. I'm not -- this time I'm not being facetious.
23 Even if it had worked smoothly, you're going to have
24 eight enemies who have some degree of political
25 connection, and those eight, plus maybe some of the

1 Senators who -- who endorsed them.

2 MR. FLORES: Uh-huh.

3 MR. MARGOLIS: So it certainly wasn't a career

4 enhancer, and he's shrewd enough to have known that right

5 at the beginning.

6 MR. FLORES: Uh-huh.

7 Could you please give me your relative

8 assessment of the importance to the performance of an

9 individual U.S. Attorney of each of the categories of --

10 I'll call it under-performance. The eight individuals

11 that have been identified.

12 MR. MARGOLIS: I'm not sure I understand.

13 MR. FLORES: As we've talked today, the issues

14 we've discussed that you know of that concern their

15 performance that you know directly or you've seen in the

16 documentation or the information so far, relatively

17 speaking, where does performance on those issues, things

18 like following priorities, bringing energetic leadership,

19 et cetera, fall in a U.S. Attorney optimally performing?

20 MR. MARGOLIS: Well, I think the most important

21 thing is, to both -- both perception and the reality of -

22 - and I tell them when they come in, when I -- when I

23 finish with my political questions, I say, okay, now,

24 switching gears, politics got your foot in the door, but

25 politics stops at the door.

PART I

Excerpts of Interview of Mary Beth Buchanan, June 15, 2007

RPTS MERCHANT

DCMN ROSEN

EXECUTIVE SESSION

COMMITTEE ON THE JUDICIARY

U.S. HOUSE OF REPRESENTATIVES,

WASHINGTON, D.C.

INTERVIEW OF: MARY BETH BUCHANAN

Friday, June 15, 2007

Washington, D.C.

Q And I want to show you what's been marked as Exhibit 1. Is this the statement that you prepared for today's proceedings?

A Yes, it is.

Q And are all the statements in there true and accurate to the best of your knowledge?

A Yes, they are.

Q In addition to serving as the U.S. attorney in Pittsburgh --

Let me establish the record, I think it is in your statement, but were you appointed the U.S. attorney in Pittsburgh?

A I was appointed as the United States attorney for the Western District of Pennsylvania on September 5, 2001.

Q And since that time, in addition to the position you described with respect to the Violence Against Women, Office of the Department, have you held other positions for the Department of Justice since you were appointed U.S. attorney for the Western District of Pennsylvania?

A Yes. From May of 2004 until June of 2005, I served as the director of the Executive Office for United States Attorneys. I have also served in other capacities throughout the Department on a number of subcommittees of the Attorney General's Advisory Committee, I served as Chair of the Attorney General's Advisory Committee, and I have

also served on the United States sentencing commission's ad hoc advisory committee on the organizational guidelines.

Q When did you serve as Chair of the Attorney General's Advisory Committee?

A I was chair of the Attorney General's Advisory Committee from April 2003 through May 2004.

Q And were you the department's representative to this ad hoc committee on the sentencing commission?

A Yes, I was.

Q And during what period?

A I served on the sentencing commission's ad hoc advisory committee from February 2002 through August 2003.

Q How would you describe the responsibilities of the EOUSA?

A As the director of the Executive Office for United States Attorneys, I was responsible for providing support to the 93 United States attorneys throughout the country and to their more than 10,000 employees throughout the United States. I also served as a liaison between the Attorney General and the Deputy Attorney General and other components of the Department and to the United States attorneys. I handled personnel matters, budget and financial issues, public affairs matters, policy development and the coordination of priority projects.

Q And was it the responsibility of EOUSA to evaluate

the performances of the offices of U.S. Attorneys?

A The Executive Office for United States Attorneys implemented a program for peer evaluation of United States Attorneys. This was a program that was operated through the Executive Office for U.S. Attorneys. We put together teams from throughout the country to evaluate U.S. Attorneys to assist them in the management of their offices.

Q So is that a yes, that it is part of the job of the Executive Office for U.S. Attorneys to evaluate the performance of the U.S. Attorneys?

A It is part of the role of the Executive Office for U.S. Attorneys to evaluate the offices of the United States attorney for purposes of assisting them in the management of their offices.

Q And is it also appropriate to make reports and to propose corrective action when necessary?

A Evaluation reports were prepared and shared with the U.S. attorney and with the management of each office. The United States attorney and their senior management could also provide input into the report. But, yes, the purpose of the report was to aid the United States attorney in evaluating the effectiveness of his or her office and to make changes where appropriate.

Q And then I want to conclude that the EOUSA would take the corrective actions where necessary?

we received the resignation letters, we disseminated them to the White House and to the Attorney General and then we prepared to assist the United States attorney in his or her transition from the Department.

Q I don't recollect if anyone, any U.S. attorney, called you about the resignation who did not resign in the first month or so after 2005?

A I don't recall.

Q Now, on page 2 of your statement, which is Exhibit 1, you say that Mr. Sampson indicated that a review of the United States attorneys would be conducted and that while most United States attorneys would serve, some would be replaced. When did you have that conversation with Mr. Sampson?

A This conversation occurred in either January or February of 2005.

Q So, again, it was after the letter went out to the U.S. attorneys with the forms about resignation?

A Yes. As I have previously --

Q Is it the same conversation?

A As I have previously stated, these conversations were totally unconnected.

Q Okay. But was it the same conversation in which Mr. Sampson told you that the U.S. attorneys did not have to be renominated and their resignations wouldn't be sought, in

which he told you there would be this review process?

A I am not certain. I had regular communications with Mr. Sampson. The reason that I asked Mr. Sampson what the procedure would be for United States attorneys who wanted to continue to serve was because I was receiving telephone calls from U.S. attorneys who wanted to know whether they would ~~they~~ be renominated or would ~~they~~ have to go through the nomination process. In response to that inquiry, Mr. Sampson advised me that those -- that most U.S. attorneys who wanted to continue to serve could continue to serve and they wouldn't be renominated, but that there would be some United States attorneys who may be asked to resign.

Q And you say in your statement that he said that he would most likely seek your input in the process. I assume the process was reviewing U.S. attorneys to see which ones should stay and which ones should be suggested for leaving, is that correct?

A That's correct.

Q And then you say that request never came?

A That's correct.

Q So you never had a follow-up conversation with Mr. Sampson about which U.S. attorneys to retain and which to ask to leave?

A That's correct.

Q Did you ever recommend to Mr. Sampson any particular

U.S. attorney who should be asked to resign?

A No.

Q Did he ever consult with you with respect to whether you believed a particular U.S. attorney should be asked to resign?

A No.

Q After he told you that he would likely seek your input in the process, did you do anything to prepare for such a role?

A No. But, at this point, I think it is important for you to understand the position that I held within the Department and my knowledge of the United States attorneys. I had been serving with most of these United States attorneys since September of 2001. I worked with many of them through various subcommittees of the Attorney General's Advisory Committee and worked with many of them in my role as Chair of the Advisory Committee. I also worked with United States attorneys on a regular basis in my role as the Director of the Executive Office for United States Attorneys. So I was a person who had extensive knowledge about the United States attorneys and their performance.

So I was certainly a likely person who Mr. Sampson would have consulted. However, Mr. Sampson never showed me a list of United States attorneys who were considered for replacement. He never asked me to comment specifically on

Department.

Q Well, I am asking you now, what is it that you can recollect, realizing that Ms. Lam is one of nine U.S. attorneys that was asked to resign as a result of this process by Mr. Sampson, about the fact that an EARS evaluation was underway that you can recall now with Mr. Sampson?

A I recall that I had the conversation with Mr. Sampson because the evaluation was underway, and I was telling him that the evaluation was underway.

Q And the evaluation was conducted between February 7 and February 11, 2005. Is that the period of time at which you had this discussion with Mr. Sampson?

A Yes.

Q And then I believe you testified a little while ago that following the evaluation and the preparation of the report, you had a further conversation with Mr. Sampson about issues that were raised in the report, is that correct?

A That's correct.

Q What do you recall of that conversation?

A The issues that I recall that we discussed included the challenges that the Southern District of California faced in dealing with a large number of border and immigration cases. I also recall that we discussed the

relatively low number of cases that were prosecuted involving Project Safe Neighborhoods ~~and Violence~~ Prosecutions. I also recall that we discussed the unusually large number of contract employees that were on staff at the Southern District of California and the amount that each contractor was paid as compared to the salary of government employees.

Q And when, approximately, was this conversation with Mr. Sampson?

A It would have been some time after the evaluation was conducted.

Q Well, the evaluation was conducted, as it says on its face, ending on February 11.

Approximately, how long after an evaluation of the field work is done is the written report prepared and circulated?

A You know, it really depends. Because the evaluation is completed and then the report is provided to the United States attorney, and the United States attorney is given the opportunity to provide a response. And then a final report is prepared by the Executive Office based upon all of this input.

So depending upon how quickly the evaluation report could be prepared and how quickly the United States attorney could respond, that would vary when the final report would

A Some time after they were asked to resign, so probably in December or January of -- either December of '06 or January of '07.

Q And what did she say about those who had been asked to resign?

A We didn't talk specifically about each of the United States attorneys who were asked to resign, but there were two United States attorneys that we discussed.

Q Which are the two?

A We briefly discussed Carol Lam and Margaret Chiara. And I don't recall that we had conversations about any of the other United States attorneys, although we may have, because she did mention the names of the United States attorneys who had been asked to resign.

Q Did she mention Mr. Graves to you?

A No.

Q And with respect to Ms. Lam, what do you recall Monica said to you?

A I recall that we talked about the communications that I had with Carol Lam in December of '04 that related to the performance of the southwest border districts in the handling of immigration cases.

Q What was the conversation that you had? I'm focusing now with Ms. Goodling. What was the -- what did she say to you and what did you say to her about Ms. Lam and

your earlier conversation?

A We talked about the fact that there were a number of Members of Congress who were concerned about the prosecution of immigration cases on the border and that Carol Lam was asked to look at her prosecutions and determine whether improvements could be made or best practices could be adopted and that there weren't significant improvements that were made after that request.

Q Did --

A We also talked about Project Safe Neighborhoods cases.

Q About Carol -- what about the Southern District of California?

A That's correct.

Q What did she say about that?

Mr. Howard. "She" being Monica?

Mr. Nathan. Yes.

Ms. Buchanan. We talked about the low number of Project Safe Neighborhoods cases that were prosecuted by Carol Lam's district.

BY MR. NATHAN:

Q And exactly why was she having this conversation with you about Ms. Lam? Sometime -- I take it this is like in December of '06 or January of '07?

A I think because she was telling me that I might be

A No.

Q Did you do anything to prepare for such an inquiry?

A No, other than reviewing the documents that were produced after the letter was sent requesting that I meet you for an interview.

Q I meant immediately after the conversation with Ms. Goodling, did you do anything to prepare for the possibility of you being asked about your earlier conversations with Ms. Lam?

A No.

Q When did you have this conversations with Ms. Lam?

A Well, I had a lot of conversation with Ms. Lam.

Q Presumably the witness Ms. Goodling was referring to in the 2007 conversation?

A The first conversations that I had with Carol Lam, among other things, dealt with the prosecution of firearms cases. Carol and I had a discussion about her district's prosecution numbers. She indicated that this was a program that she really didn't think her district could handle, that they had lots of cases dealing with immigration, and they couldn't handle prosecuting firearms cases. And I recall thinking that this is a priority of the Department and somehow she's got to find a way to prosecute firearms cases.

I also recall having a discussion with her when I began my tenure at EOUSA. Because Carol had to come in and meet

with Jim Comey, who was then the Deputy Attorney General, to discuss her low prosecution numbers in the area of firearms cases.

I also talked with Carol Lam in December, 2004, in response to Congressman Issa's letter to the Department asking us to take a look at the prosecution of immigration cases along the southwest border.

During these conversations with Carol Lam, I advised her that the Department was looking at her performance in the area of immigration and that they had also been looking at her district in connection with her performance in the prosecution of firearms cases. And I wanted her to know that because as her friend, as her colleague and as a Director of the Executive Office for U.S. Attorneys, I wanted her to know that she should pay attention to these areas and she should improve her performance.

Q Were you present for the conversation with Mr. Comey and Ms. Lam?

A No.

Q Did Mr. Comey have a similar conversation with you?

A We had a telephone conversation.

Q Did he discuss your low numbers in this area of gun violence?

A At the time we had a discussion, my numbers weren't low.

Q You don't recollect?

A I'd have to take a look at the letter.

Q No, I'm asking what your recollection is.

A And I'm telling you that I'm not going to try to recall something that happened in 2004 without looking at the letter. And you have a letter, so --

Q You've been telling us about --

Mr. Flores. Objection, let the witness answer the question.

BY MR. NATHAN:

Q I want to make it clear, you said in your statement you will answer any questions of the staff?

You're telling us about conversations with Ms. Lam that you recall in 2004. I'm asking you your recollection of your drafting a letter about her in the same time period, and I'm asking you if you think there is anything critical in that letter about her practices with respect to immigration matters in the very same time frame that you've just been testifying about.

A I've drafted the response to Congressman Issa. There were a number of drafts that were prepared. I don't recall if there was anything in any of the drafts that was critical of Carol Lam.

Q Thank you.

A However, during the preparation of this letter, I

attempted to give Carol Lam the opportunity to take an active role in being a part of the solution to the problem. I asked Carol Lam to coordinate with the other United States attorneys on the southwest border and to determine if, through information sharing between these districts, they could identify best practices that were effective in certain districts and whether these best practices could be shared between the districts.

She ultimately talked to the other United States attorneys, ~~and~~ but she did that somewhat reluctantly.

Q She talked to them reluctantly?

A She was reluctant to talk to the other United States attorneys because she really didn't feel that there was anything more than anybody could do. And I felt that, regardless of how well you are doing in any given area, that you can always improve and that clearly in this area there were a number of Members of Congress who were concerned. And when a number of Members of Congress are concerned, we have an obligation as the Department of Justice to look at the problem, and we also have an obligation to see whether we can do anything to improve. And I had hoped that she would be -- she would more readily respond to do that. So she did it, but she was reluctant.

Q And I want to call your attention to page two of your statement in the last paragraph on that, which says,

for the selection of judges involved the congressional delegations and the White House and the Department of Justice, and if the Department of Justice fires you one day, it's going to be connected to the judicial process.

And I don't recall whether we specifically connected each of the dots, but we both knew what he was referring to when he said that he thought the two were connected.

Q Do you believe that the White House was involved in the termination of Mr. McKay?

A I have no idea what was involved in the termination of John McKay.

Q Did you ask Monica Goodling when you talked to her how come John McKay was on this list?

A No.

Q Did you ask her why any of the others, apart from Ms. Lam and Ms. Chiara, were on the list?

A I never asked her why any of the people were on the list.

Q Did she tell you why?

A At the time we had our first conversation about the United States Attorneys being asked to resign, she told me who the United States Attorneys were. Subsequent to that conversation, we had other conversations about Carol Lam and Margaret Chiara. Those are the only conversations that we had subsequent to the termination of these United States

attorneys.

However, during the time period that I worked with Monica, both in the executive office and after, there were a few conversations that we had about some of the United States attorneys on the list.

Q What were those discussions?

A One of the discussions that I recall about David Iglesias had something to do with his handling of a public corruption investigation and a very unorthodox process of utilizing a bipartisan commission to investigate the case. This would not be something that a United States attorney would do in the due course of conducting a criminal investigation. I recall her telling me about that, about David Iglesias.

Q Is that all you remember about David Iglesias -- about Monica's conversation with you about David Iglesias post the termination?

A Yes, that's correct.

Q Did you ask what was this bipartisan commission?

A I recall that she told me about it in a conversation that we were having in connection with an unrelated matter, and she had to get off the telephone because she had to deal with some issue that came up as a result of this issue, and that's how I recall that she told me about it.

Q Did she tell you who put Mr. Iglesias on the list to

time that you left as Executive Director of the OUSA in June of '05 and December 7th of '06?

A I just answered your question. I had lots of conversations with Monica Goodling from the time I left the executive office to December 7th. I never had any conversations with her before December 7th about the termination of these United States Attorneys.

Q Did you have any conversations with her about the performances of these eight U.S. attorneys between June of '05 and December, '06?

A The conversation that we had about David Iglesias' use of a bipartisan commission to investigate a public corruption case occurred at some point between June, 2005, and December, 2007.

Q What was the context of that conversation?

A That was the conversation that I just related to you earlier wherein Monica indicated that she had to address an issue that was related to David Iglesias and his use of a bipartisan commission. And it was such an odd concept that I remember it.

Mr. Flores. I believe you said that conversation took place between June, '05 and December, '07. Did you mean '06?

Ms. Buchanan. I'm sorry, yes. Thank you.

BY MR. NATHAN:

they had the best person in place, did Mr. Sampson suggest to you where he would find replacements?

A No.

Q Did he suggest to you that the replacements would have to be located before the terminations so that you would know that the replacement would be better than the person replaced?

A We didn't have any of those discussions.

Q Well, do you think that would be required in order to put the best person in?

A I'm not going to speculate on that.

Q Were you asked to provide any names for U.S. attorney positions which, as of the time of your request, were filled with a presidentially appointed U.S. attorney?

A I'm not sure I understand your question.

Q Did anyone from the U.S. attorneys office or White House ask you to suggest people who might replace sitting U.S. attorneys?

A No.

Q Did you ever look for such candidates?

A No.

Q With respect to Mr. Charlton in Arizona, what was his reputation as a U.S. attorney?

A I think that he generally had a good reputation. He focused a lot of his efforts on narcotics prosecution,

border prosecutions, and specifically narcotics involving methamphetamine.

Q Did you hear any criticism of his work while you were in the Executive Office of the U.S. Attorneys?

A I heard some criticisms of Paul Charlton. Some of them occurred when I was the Director of the Executive Office and then some of them I heard about later.

The first that I became aware of, Paul Charlton managed to obtain additional positions within his office to handle border and immigration issues, and these positions came from other offices, and there was some criticism about the manner in which he did this.

One of the things that we as a Department were always instructed to do is to think about the overall operation of the Department and not to have individual United States attorneys making efforts to gain additional resources for their own individual offices, and there was some criticism that Paul Charlton had engaged in some effort to do that.

Q When did you hear that? Were you the Executive Director of the EOUSA at the time?

A Yes.

Q Was he successful in getting his additional spots?

A He was. And I had to go to other districts and take them. So they weren't additional spots.

Q How did he accomplish this task? I'm sure there are

other U.S. attorneys who would like to know.

A It was believed that he had gone to his Senators and expressed a need for additional positions in his office.

Q And did you confirm that that was the case?

A I don't know how he obtained the positions. This is what I heard. My role of the Director of the Executive Office was to find them, and I had to find them by calling individual districts and borrowing positions from other U.S. attorneys who weren't -- who hadn't filled them at the time so that he could get 10 new positions for border and immigration cases.

Q Who told you that he had secured these by contacting his home State Senators?

A I believe that I heard this from the Deputy's office or the Attorney General's office.

Q And did they tell you that you were required to fill those additional spots?

A Yes.

Q Who told you that?

A I don't recall who specifically told me, but that was my -- one of the responsibilities I had as the Director of the Executive Office, was to manage the resources. A commitment had been made to give Paul Charlton 10 positions, and I had to find them.

Q And did you find 10?

A I did.

Q And did you have any discussions with Mr. Charlton about this?

A No, I did not.

Q So --

A Wait a second. I told him that -- I told him how I got the positions because I wanted him to know that these were not extra positions that were sitting around not being used. These were positions that came from his colleagues. And so he should be aware that he probably would have a number of angry colleagues who knew that he was suspected of circumventing the process that we had in place and obtaining additional resources at the expense of his colleagues.

Q And what did he say?

A I don't think he cared.

Q Did he confirm that that's how he got the extra spots?

A I only recall that he didn't care.

Q He didn't care about what his colleagues thought, you mean?

A That's correct.

Q And did you report this to someone?

A I'm sure I did.

Q Did you complain and suggest that Mr. Charlton should be fired?

A Absolutely not. But I think that this is one example of Paul Charlton's selfishness, and it's only one. He also had a history of badgering the Executive Office for U.S. Attorneys for additional awards for his district. And, again, this is a similar concept, that there are only a certain number of awards that can be given; and if Paul Charlton's district gets extra awards, that means someone else's district doesn't get them.

And I had been told every year Paul Charlton came into the Executive Office and badgered who was in the director spot to give his district additional awards. So it was known in the Department that Paul Charlton didn't have a lot of consideration for others in making sure that the resources were given to his office.

Mr. Nathan. Can we take a short break, a few minutes, off the record?

[Discussion off the record.]

RPTS MERCHANT

DCMN ROSEN

Q You said that you heard about Mr. Charlton making these requests. From whom did you hear this?

A I don't remember who I specifically heard it from. But I recall being told that Charlton was getting ten additional positions because his ~~senders~~ Senators had requested this based on information that Charlton gave them about his district. And I knew that this was very extraordinary.

Q Did you discuss this with Ms. Goodling?

A I don't recall.

Q Did Ms. Goodling ever tell you that she had recommended Charlton to be terminated?

A No.

Q Do you know whether she did?

A I don't know. And just to be clear on Paul Charlton, now, I knew that Paul -- there were certainly some things that Paul did that were very good as a United States attorney. And I am trying to help identify any concerns that I heard.

Q I understand.

A Whether it was during my tenure at the executive office or things that I heard after the fact. And that is why I identified these things that I had heard people discuss. I also know that during the time that I was the

director of the Executive Office, we held a United States attorneys conference in Paul Charlton's district. And the United States attorney who hosts the conference is generally extremely cooperative in helping run the conference. And I do recall Mr. Charlton was not very cooperative. So individuals who would have dealt with had him would have been aware of that. And those people that would have dealt with him would have been in the Deputy's office or in the AG's office.

Q Again, I assume that you are not suggesting that either the effort to get extra U.S. attorneys or what you were describing as a lack of congeniality in connection with the conference were firing offenses?

A I am not making any suggestions with respect to any of the United States attorneys on the list. I am simply making you aware of issues that I heard of about these United States attorneys.

Q Did you also hear an issue about his investigation of a Congressman in Arizona, Mr. Renzi?

A No.

Q Have you heard of that investigation?

A No. I also heard that there were two other issues that Paul Charlton had that may have caused concern. One of the issues dealt with --

Q Before you tell us the issue, when did you hear the

Ms. Burton. I object to this question.

Mr. Flores. Objection.

Mr. Hunt. I agree, this not an appropriate line of questioning. I don't think it is appropriate for her to be put in a position where she's asked to divulge non-public information about a pending matter.

BY MR. NATHAN:

Q Can you answer that question?

Ms. Burton. The Department objects to this kind of inquiry.

Mr. Flores. As do we.

Mr. Howard. She won't answer it. Go ahead and ask your next appropriate question.

BY MR. NATHAN:

Q When you were director of EOUSA, did you have conversations with people at the White House?

Mr. Howard. I think that's been asked. I'm going to make a suggestion, you said about another 30 minutes, why don't you ask questions you haven't asked?

BY MR. NATHAN:

Q Can you answer that question?

A About what?

Q Well, did you have conversations with people at the White House? If you say about what, that suggests that you did.

Mr. Hunt. It doesn't suggest anything.

The Witness. The only conversations I had with people at the White House were either in relation to presentations that I made at the White House or for meetings that I had with individuals involving my own consideration for different positions.

BY MR. NATHAN:

Q I'm not asking about the positions, your own positions. What presentations did you make to the White House?

A I gave a presentation for -- about the PATRIOT Act to a group, I believe it was called Jensa, that involved citizens who came in for a roundtable discussion about the PATRIOT Act, and I did a presentation about that.

Q And you also wrote an op ed paper about the PATRIOT Act?

A I've written a number of op ed pieces.

Q About the PATRIOT Act?

A Yes.

Q I'd like to have marked and this will be our last exhibit this article that appeared in an op ed piece that appeared in the Pittsburgh Post Gazette in March of '07 written by Thomas Farrell.

[Buchanan Exhibit No. 12
was marked for identification.]

performance issues that you had previously discussed about a U.S. attorney?

A Not that I recall.

Q You testified earlier you mentioned in your statement that there were two U.S. attorneys to whom you spoke about performance issues and their pursuit of policy priorities, I believe those were Ms. Lam and Mr. Ryan, if I am correct?

A That's correct.

Q I notice you provided a fair amount of testimony already about the nature of those conversations, but is there anything else relevant and material about those conversations that you would like to get on the record?

A Well, for example, my statement was directed to the eight United States attorneys who were on the list. So I was referring to any communications that could have been characterized of performance or not pursuing department priorities. And I wanted to make sure that it was distinguished that there were some issues dealing with management concerns involving the Northern District of California, and there were also concerns about the pursuit of the priorities in the Department involving the Southern District of California, which would have included Project Safe Neighborhoods and the prosecution of immigration cases.

It was very unique that a United States attorney would

directly, you know, admit that they weren't even going to try to comply with the priority. And that's sort of what Carol Lam did in terms of the Project Safe Neighborhoods.

In fact, many districts received additional resources to handle those cases and her office received additional resources. And instead of using those resources to handle those cases, you know, she didn't. And so that clearly shows a lack of support of that particular effort that the President and Attorney General thought were important.

But I don't know what the reasons were that she was on the list. These are just issues that I'm aware of that I know that others were aware of that could have been taken into consideration.

Q Is there anything more?

[Witness conferred with counsel.]

The Witness. And I had -- I also had several conversations with Kyle Sampson regarding the concerns over the prosecution of border and immigration cases along the southwest border, so I know that Kyle and I had many conversations about that issue.

BY MR. FLORES:

Q Mm-hmm.

A So I mentioned these two United States attorneys, because I recall that I had conversations with Mr. Sampson about these two attorneys involving issues that could be

know how thorough it was, but it does appear that the process may have been inconsistent. So I can't really comment about it in all respects, because I don't know what the process was.

Q You are still a sitting U.S. attorney in the Western District of Pennsylvania.

A That's correct.

Q So the extent that -- the reason you were included in Mr. Elston's list, the one you mentioned earlier, was the speculation perhaps someone in the Eastern District of Virginia was interested in your job, and that person did not obtain your job.

A That's correct.

Q How much time has passed since that? That would be a good amount of time since then.

Not too much more here. Quickly review my notes.

I don't recall if you mentioned earlier, when you had your discussions with Ms. Lam while you were director, this was in December, 2004, and you stated you would let her know the Department was looking at her with regard to immigration and gun prosecutions, to the extent you already haven't conveyed what her response was, is there anything you would like to add?

A I knew that the Department was concerned about her, Carol Lam's performance in the area of Project Safe

Neighborhoods, and I knew there were concerns about her effectiveness of handling border and immigration issues. I thought it was important to let her know that people were concerned. She didn't appear to have suggestions for how she might change that performance or even indicate that there were things she could do to improve.

Q Thereafter, did she ever indicate a perception there was a problem or a willingness to take steps to improve?

A I never had any discussions with her after that time, but I don't think that her performance improved. When I say "her performance," I mean in those two areas.

Q My last question would be with regard to the testimony that you gave, which was limited, and the questions that you received about prosecutions or investigations of Republican and Democrat candidates or office holders in Pennsylvania during your tenure. Is there anything further you would like to add about any of those?

A Nobody ever suggested to me who should be considered for investigation or prosecution within the Western District of Pennsylvania. I am not aware of any United States attorney in any district who the Department has made suggestions with regard to who should or should not be investigated. Never in my career in the Department of Justice have I ever heard politics of a defendant to ever be taken into consideration in whether an individual should be

investigated. It is offensive for anyone to suggest otherwise.

Mr. Flores. I have no further questions.

Ms. Espinel. I will try to be very brief. Good afternoon.

Ms. Buchanan. Hello.

Ms. Espinel. My name is Zulima Espinel, I am representing Senate majority.

BY MS. ESPINEL:

Q Why did you leave the directorship of the EOUSA?

A I was asked to serve as the Director of the Executive Office for the United States Attorneys in May of 2004. At that time, I agreed to serve in that role until a successor could be identified. So I never intended to stay for an extended period. In fact, when I was asked to serve, I was told ~~take~~ that my service would be about 5 or 6 months, and it ended up being 13 months.

After the election occurred, I was asked if I was interested in remaining in the position as the Director for the Executive Office for U.S. Attorneys, which would have required that I resign from the position of United States attorney for the Western District of Pennsylvania; and between the two positions I was much more interested in remaining in the Western District of Pennsylvania, and so I helped to identify Michael Battle as my successor.

it also a friendship?

A I would say it's friendship. We had lunch, dinner together.

Q Did Ms. Goodling ever discuss her personal opinion of any U.S. attorneys with you?

A I wouldn't characterize it as her discussing her personal opinion, but it would also be unfair to say that she never commented on any U.S. attorney. We had a lot of dealings with U.S. attorneys who would call the office requesting various types of assistance or resources, and some U.S. attorneys were a lot easier to deal with than others.

Q Do you recall her ever commenting, giving her personal opinion about Paul Charlton, for example?

A I know that Monica Goodling would have worked with Paul Charlton on the United States Attorneys Conference that was held in Phoenix; and, as a result of Paul Charlton's lack of cooperation, Monica Goodling had to do a lot of additional work for the conference because Paul would not assist nor would he provide resources from his office to assist.

Now -- and Robin Ashton, by the way, had prior dealings with Paul Charlton with the badgering of EOUSA to give his district additional awards at the annual award selection.

Q Okay. So not just Monica Goodling but also Robin

Q Is that correct?

A That's correct. There was some discussion about it being good to give someone else an opportunity to serve in that district.

Q So she never mentioned a performance-related reason to you.

A No, she did not.

Q So are you aware that when Monica Goodling testified in front of Congress she said that Mr. Graves did have a performance-related problem as U.S. attorney?

A I believe I heard that, yes.

Q But she never mentioned anything like that to you.

A Not that I recall.

Q Now just taking you back to Robin Ashton for a minute, do you know what her reputation was in the field with the U.S. attorneys?

A I think she had a very good reputation in the field with the United States attorneys, and I think that she went out of her way to develop that reputation, and in fact I think she did it at the detriment of the Director of the Executive Office for U.S. attorneys.

Q You mean she was trying to overshadow the Director? Is that what you're trying to say?

A That's correct.

Q So do you think that she did a good job in the

PART J

Excerpts of Interview of Michael A. Battle, April 12, 2007

RPTS McKENZIE

DCMN HERZFELD

EXECUTIVE SESSION

COMMITTEE ON THE JUDICIARY,

U.S. HOUSE OF REPRESENTATIVES,

WASHINGTON, D.C.

INTERVIEW OF: MICHAEL ADRIAN BATTLE

April 12, 2007

Washington, D.C.

The interview in the above matter was held at 2138 Rayburn House Office Building, commencing at 1:47 p.m.

Department would be deferential to the U.S. attorney, needs to be responsive to the local needs and the local interests, and give the U.S. attorneys some room to perhaps prioritize those things, and maybe on a national level not necessarily ignore other things, but maybe not give them as much priority, because we had districts that at least didn't think at the time they had much counterterrorism, so to speak, activity, but they might have more of a focus or a need for a focus on guns and drugs. The Department would give them room to put their resources there. So it was a healthy balance on a case-by-case basis.

Q Okay. So just hypothetically speaking, if there was a certain Congressman in your jurisdiction who might be engaging in fraud or bribery or whatever the case may be, and that particular national priority for that matter was immigration or whatever the case may be, certainly to the degree to which facts came to light and you were aware of the fact that this was ongoing, wouldn't that office, the U.S. Attorney's Office, have an obligation to at least that particular type of case even despite the fact that it may not have been a national priority?

A Yes. U.S. attorneys were given a lot of leeway to respond to their local needs and the criminal activity they identify occurring in their district.

Q Okay. With regard to your role as Director of the

EOUSA, what generally were your responsibilities in that position?

A I guess the short description is to act as a liaison between the Department of Justice and the 94 offices and the 93 U.S. attorneys. One of the things I learned was that my role was a lot more administrative than I thought it was going to be, which was a good thing because I had learned a lot about budget, management and personnel and those issues which I find really is very much part of the meat and potatoes of the office, because the U.S. attorney's responsibility is managing people, and learning how to do that and do it well is something that is very important.

So I had, I think, I had a lot of different roles, but my role was really to make sure that the U.S. attorney's offices had the resources to do what they needed; to make sure that their budgets were in shape and in order; to give them opportunities to hire, to deal with personnel issues, to deal with EEO issues; to make sure they had facilities that were appropriate to do the work, and a whole lot of stuff in between.

Q I will pass to you what we can mark as Battle Exhibit Number 4. Take a moment to look at that if you could.

[Exhibit No. 4 was marked for identification.]

PART K

Excerpts of Interview of Matthew W. Friedrich, May 4, 2007

RPTS MERCHANT

DCMN BURRELL

EXECUTIVE SESSION

COMMITTEE ON THE JUDICIARY,

U.S. HOUSE OF REPRESENTATIVES,

WASHINGTON, D.C.

INTERVIEW OF: MATTHEW WILHELM FRIEDRICH

Friday, May 4, 2007

Washington, D.C.

The interview in the above matter was held in Room 2138, commencing at 10:30 a.m.

Task Force?

A No.

Q So you wouldn't know one way or the other whether he was given an opportunity by the Deputy Attorney General or others to explain his resource constraints and the level to which he attempted to cooperate?

A I don't think so.

Q Let me now bring you forward in time to the period that you have started to work with Mr. Sampson and Goodling in the Office of the Attorney General. Do you recall Mr. Sampson or others raising with you a subject of voter fraud some time in October of '06?

A I do.

Q Tell us what you remember.

A I remember sort of two discrete things. The first of which was, as I said, before I joined the Attorney General's Office in October of 2006, and I know there may be counterentries or such that reflect this, but as I sit here without them in front of me, some time after I joined the office but before the election, Kyle Sampson came to me at one point and said, essentially, that there had been concerns raised by the White House about either rampant voter fraud or lax enforcement in three districts, or in three locations, and essentially asked me to sort of check out what we were hearing about this and get back to him,

folks.

Q Terrific. Is this the calendar entry that you were referring to that might help refresh your recollection about the specifics of this?

A Yes.

Q So let me ask you if this document refreshes your recollection about the three jurisdictions you were asked to look at?

A Yes. The three jurisdictions I have here are Philly, Milwaukee and ALB, meaning Albuquerque. So those three jurisdictions.

Q And then next to that you have the word election fraud, is that right?

A Yes.

Q And is this, to the best of your memory, the date that you had this conversation with Mr. Sampson?

A That is hard to say. I can't say that I followed a regular practice in terms of putting down the exact date when things came in. Probably. But that is the best I can say.

Q And by "this" we mean October 12, 2006?

A Yes.

Q Did Mr. Sampson elaborate on how he had learned about the White House concerns about voter fraud?

A Not that I recall.

Q Did he tell you from whom he had learned about these concerns?

A Not that I recall. I simply -- it's certainly possible that he did learn. I remember him saying at that time was the White House, and that is all I remember. I mean, obviously, there's been testimony and so forth since then where people have referred to this.

Q Right.

A But in terms of my memory now as to what I remembered at the time, I remember White House.

Q So tell us then what you did in response to Mr. Sampson's inquiry?

A I called Ben Campbell, who was the Chief of Staff of the Criminal Division, and essentially relayed the request and said, you know, what are you guys hearing about -- have you heard anything about lax enforcement or sort of rampant fraud in these three jurisdictions?

Q And tell us what he told you.

A There again, I would like to lean on my notes, if I can. There's another document that I know you probably have seen that represents his pass back to me.

Q Let's do that.

We'll have marked as the next exhibit, this is No. 4, a series of pages bearing the Bates stamps OAG820 to 851.

[Friedrich Exhibit No. 4

your report to him?

A I don't recall any substantive response that would indicate anything, for example, what he might do with it or that type of thing. I don't recall anything like that. I think it was just thanks. Let me say, it is possible that I communicated this to the AG, but I just can't be sure about that. I know I communicated it to Kyle. I can't rule out that I would have communicated this to the AG.

Q What would lead you to raise that possibility?

A I just can't rule it out.

Q Had you heard or learned that this was an issue that the AG was interested in?

A I don't think I knew that at that time.

Q Let's take a look at -- I'm sorry, one other question about the conversation with Mr. Sampson. Do you recall when that was?

A I don't. It would have been certainly in '06, certainly in '06, and certainly prior to. I just don't know. Certainly in '06. I don't remember that it was that long an amount of time. Obviously I just started. I didn't want the task to go unanswered for months on end. I just don't have a clear recollection.

Q Let's go back to the beginning or the first page of Exhibit 4, which is OAG820.

A Yes.

Q And I think this has been identified before as the cover page of an envelope addressed to Mr. Sampson with a Post-It Note to you, to Matt, 10-17-06.

A Yes.

Q Can you identify this part of the exhibit?

A Yes.

Q Tell us what it is.

A This is a document which I produced from my files.

Q And when and from whom did you get it?

A Okay. As to the when, I recall it being after the inquiry we just discussed a moment ago with respect to the three jurisdictions. It was some time after that. I see a date on here of 10-17-06. This looks like 8 characters long. I think this is my handwriting. But since the characters are so short, I can't be 100 percent sure, but I think that is my handwriting. So I was given this document by Kyle Sampson.

Q And what did he say when he gave it to you?

A What I recall was that Kyle came into my office at some point with this document in his hand and that the two of us went in my office. I recall him saying that he had been given this packet, he either said by Karl Rove or by Rove's shop. I don't remember which of those two, but it was one of those two things.

And he said essentially that this was something that

they wanted to pass along to us to take a look at. And I said to Kyle -- I think at that point I may have opened it, opened the packet and looked at it, perhaps looked at the first page and said something like, you know, what does that mean? And he said, well, you know, they just want us to take a look at it. There was sort of a pause and I just sort of looked at Kyle and he said, to the best of my memory his exact words were, do with it what you will.

Q And what did you do with it?

A Not a darn thing. I did not disseminate it, I did not copy it, I did not communicate it down the chain of command in substance or in form.

Q Did you look at it?

A Yes, I looked at it. I jump ahead of myself. Kyle left and I reviewed this document briefly. And I did not need to review it for a lengthy period of time to know what I was going to do with it.

Q And explain to us what you mean by that.

A I noticed a number of things about the document. First, that this appeared to be, you know, a bunch of -- I couldn't tell if it was related information or unrelated information. It's really the first part of the packet that I focused on. I noticed that it had been prepared by -- looking at just the top, RPW, it looked like it had been prepared by some Republican organization.

Q You're referring now to page OAG821?

A I am. That it had been prepared by some type of Republican organization. I noticed that. I noticed that these were -- these appeared to be. I mean, they look like clippings, I mean, clippings from a newspaper or summary clippings from a newspaper. And that these related to events that had occurred that would be within an applicable statute of limitations and that they were specific events. And among somewhere -- I guess, you know, the thought in my mind at the time was, you know, you either pass this down the chain of command or not. And the chain of command at which I am a part is sort of the criminal enforcement chain of command. And among the other concerns I remember thinking about at the time -- this was, again, somewhat short before the election. And I recalled from my days as a member of the Campaign Finance Task Force that there was a policy manual known as the Red Manual that governs the Federal prosecution of election crimes. There is a policy within that manual that basically speaks towards the initiation of new enforcement actions or other enforcement actions or, more particularly, investigations right before an election. And while I'm paraphrasing the policy it basically means be sensitive about big new investigations right before an election because you don't want just the fact of an investigation to influence an election itself.

And, again, that was sort of third down my list, but it was something that I was sensitive to.

So based on all of those concerns I did not believe that this was an appropriate document to forward down the criminal enforcement chain of command and I set it aside where it basically stayed set aside until I was asked to search for documents responsive to the inquiry that brings us here today.

Q Let me ask you to turn in particular to a page towards the end of the document, OAG850. Do you recall looking at this page of the document?

A I don't. That doesn't mean I didn't at the time, but I don't. I frankly did not -- once I had made sort of a determination about this, I did not continue to review the document.

Q Do you recall noticing the notation in the upper left-hand corner, discuss with Harriet?

A I see that notation. I don't have reason to disagree with you that that's what it says. I don't know whose handwriting that is, and I don't know anything about it.

Q Were there any further conversations with Mr. Sampson or anyone else in the October or November, December '06 time frame relating to election fraud or voter fraud that you recall?

A In the October, November, December time frame relating to a voter fraud, not that I recall.

Q Did you ever have any conversations with anybody at the White House about this subject?

A No.

Q Other than your conversation with Mr. Campbell, do you recall getting any other information about the issue of voter or election fraud in any of the jurisdictions that you discussed, including Wisconsin, New Mexico and Philadelphia?

A Can you state that question again?

Q Other than your conversation with Mr. Campbell that you've described --

A Right.

Q -- do you recall getting any other information or having any other discussions relating to voter or election fraud in Pennsylvania, Wisconsin or New Mexico?

A I do. I do. I recall being at my desk in June of 2006. And I recall receiving -- it was late in the day. And I recall receiving a phone call from Monica Goodling. And what I remember her saying was that there were a couple of lawyers in her office from New Mexico, one of whom was a member of a presidential board, that they had concerns about voter fraud in New Mexico. I believe she mentioned that they had been over at the White House earlier in the day, that they were there essentially for that day only, and that

she wanted to bring them down to see me to talk about voter fraud, which she did.

Q And tell us what you remember about that conversation.

A I remember that they came down. She brought them down not long after she called me, that there were two gentlemen, one of whose name was Mickey Barnett, the other whose name I think was Pat Rogers. I will tell you there's a document that has been produced, I believe by Ms. Goodling, that references these two gentlemen. I believe that relates to this. I believe that these are the folks who she brought down.

So they came down and I met with them in my office. I remember it was late in the day. I remember trying to find someone to sit in on the meeting with me. At some point Noel Hillman joined the meeting. Noel was a career employee at DOJ who had shortly there before been the head of Public Integrity who had moved up to the front office in a counselor position. And so Noel came in and joined this meeting. But I can't tell you at what point in the meeting he walked in, but Noel came in.

I remember a few things being discussed. They were both from New Mexico. I have a family member from New Mexico. We exchanged some pleasantries about the State. I remember that they said that they had concerns about voter

fraud in their State. I talked to them about a voter fraud initiative that had been undertaken, as I understand it that predated my time, but by the Criminal Division, that these cases were regarded as serious cases. Whether they occurred for the benefit of Republicans or occurred for the benefit of Democrats, that they were regarded as serious cases and should be prosecuted.

I also recall that they had some voter fraud cases, or at least one voter fraud case in their State that they didn't feel was moving. That sufficient attention was not being paid to it, that they had brought this to the attention of the FBI and the U.S. Attorney in New Mexico, Dave Iglesias. And I don't think I had heard the name Dave Iglesias before that meeting. I knew we had a U.S. attorney in New Mexico. I just didn't know his name. And they complained about that. They complained that this case wasn't moving, to which I believe I responded essentially that the Criminal Division, as I had said before, is sort of on the same line as U.S. attorneys offices, but they don't report to us. And in terms of complaints with the U.S. attorneys offices, you know, that is something to raise with the Deputy's Office, or EOUSA. So sort of referred them there.

But they were not happy with Dave Iglesias. I certainly remember that. They had concern about, or

articulated concern about a particular case. I don't remember the name of the individual subject, but I do remember the name ACORN, which I understand to be some type of voter registration organization. They had a concern about ACORN.

And my reply to that was basically this. You know, again, U.S. attorneys offices were not over U.S. attorneys offices. We do have an interest in voter fraud, and that the organization that works in voter fraud in terms of the Criminal Division's responsibility was the Public Integrity Section. And that, you know, they, as anyone, were free to relay concerns to them, but that that was a conversation that they needed to have with the career officials in the Public Integrity Section. So to the extent you're interested in doing it, I'm not saying that you should, those are the people to talk to.

And it was not -- as I say, it was not a lengthy meeting. They basically said if you ever get out here, give us a buzz, and that was it, in terms of that meeting.

Q Was there anything subsequent to that meeting that you recall relating to that subject?

A I remember after that talking to people in the Public Integrity Section. And I remember, if you'll give me a little latitude, I remember having the following concern in my head --

Q Sure.

A -- which was that the people that I met did not seem to have -- I don't mean to insult them, but they didn't seem to have a high degree of sophistication in terms of DOJ or how it worked. What I didn't want to have happen is to have them call Public Integrity and say Matt Friedrich just told us that we should open a case. I didn't know them. I didn't know what they would do or not do.

So I called Public Integrity. At that time they were in a transition period that I remember. The head of the Public Integrity would either have been Andy Lourie, L-O-U-R-I-E, or his deputy Brenda Morris. Andy was coming in in an acting capacity. I don't remember who was there at the time. I worked with Public Integrity a lot. I interacted a lot with those folks. And I remember having a very brief conversation with one of them where I essentially said, listen, some folks came in to see me about a voter fraud matter -- I may have passed on the name of ACORN -- and you may hear about this from them. If you hear about this from them, they may mention my name. The fact that they mention my name shouldn't be read by you as some type of endorsement that either a case should be opened or not. If they call you, handle it as you do anything else, and what you guys choose to do with this is up to you.

I will say that I later read a New York Times article

conversations with your wife, if any, about this subject?

A I don't think so.

Mr. Mincberg. Mr. Friedrich, I'm very happy to tell you that I have no further questions for you, and I'll turn the questioning over to my colleague from the House.

Mr. Flores. We can go off the record.

[Recess.]

EXAMINATION

BY MR. FLORES

Q Mr. Friedrich, just a few questions that I have for you. You referred earlier to a packet labeled "Exhibit 4" in this interview --

A Yes.

Q -- and its having been passed to you by Kyle Sampson and your having received it; isn't that correct?

A Yes.

Q You had testified that you did nothing with it after that other than briefly reviewing it; is that correct?

A Correct.

Q Did Mr. Sampson ever cycle back around to you to follow up on this issue?

A No.

Q Thank you.

You also testified earlier that, in June of 2006, you received a call from Monica Goodling about the presence of a

couple of New Mexico lawyers in her office, and in the end, they had come down to your office to talk to you about issues in New Mexico; is that not correct?

A That's right.

Q After that meeting, did Monica Goodling ever follow up on that with you?

A I don't think she did. If she followed up, it was simply to say thanks for taking the time.

Q You also spoke earlier as to, following your encounter with individuals in New Mexico at a breakfast in November of 2006 at which those individuals discussed with you some matters relating to Mr. Iglesias, Mr. David Iglesias, that you might have talked to Kyle Sampson and Monica Goodling about that conversation; isn't that correct?

A I do not remember that.

Q Okay.

A I do not remember that.

Q Do you have any recollection of discussing that matter with them?

A I recall at one time relaying a general description of the June meeting and follow-up lunch to Kyle and to the A.G.

Q And what might you have said in that?

A I basically gave an abbreviated description of what I talked about here today.

PART L

Excerpts of Interview of Larry Gomez, June 8, 2007

RPTS CALHOUN

DCMN ROSEN

EXECUTIVE SESSION

COMMITTEE ON THE JUDICIARY

U.S. HOUSE OF REPRESENTATIVES,

WASHINGTON, D.C.

TELEPHONE INTERVIEW OF: LARRY GOMEZ

Friday, June 8, 2007

Washington, D.C.

The interview in the above matter was held at 2148, Rayburn House Office Building, commencing at 11:02 a.m.

Q So you are serving as acting U.S. Attorney pursuant to that statute.

A Yes, sir. I believe that term is for 210 days.

Q And you're located where in New Mexico, sir?

A Albuquerque.

Q Can you give us your business address?

A It is suite 900, 3rd Street, Albuquerque, New Mexico, 87103.

Q And can you tell us how long you have served in your current position as acting U.S. Attorney?

A Since I believe February the 28th of this year.

Q And that was the date that Mr. Iglesias resigned as U.S. Attorney, is that correct?

A Yes, sir.

Q Now prior to that time, what position were you serving in?

A I was serving as the first assistant and as the criminal chief.

Q And can you tell us how long you have been serving in those positions?

A Since I believe the fall of 2001.

Q And can you trace for us your legal career prior to getting that position in the fall of 2001?

A I was, prior to being a Federal prosecutor, I was a State prosecutor for a couple of years. I started in the

Q I take it your entire legal career, at least as a Federal prosecutor, has been in New Mexico.

A It has been.

Q Now I want to start out if I could by talking a little bit about the operation of the office during Mr. Iglesias' tenure, and I am going to start with the final EARS, EARS evaluation report that was done in late 2005. Do you recall that generally?

A I do.

Q I am going to read to you for the record the kind of concluding or penultimate paragraph right at the beginning of the report under the heading, "United States Attorney and management team."

"The United States attorney was experienced in legal, management and community relations work and was respected by the Judiciary agencies and staff. The first Assistant U.S. Attorney, (AUSA), appropriately oversaw the day-to-day work of the senior management team, effectively addressed all management issues, and directed the resources to accomplish the Department's and the United States attorneys' priorities. The USAO had a well-conceived strategic plan that complied with Department priorities and reflected the needs of the district.

Do you agree with that conclusion, Mr. Gomez?

A I do.

PART M

Excerpts of Hearings before the House Judiciary Committee and the Senate Judiciary Committee

HEARING OF THE SENATE JUDICIARY COMMITTEE SUBJECT: PRESERVING PROSECUTORIAL INDEPENDENCE: IS THE DEPARTMENT OF JUSTICE POLITICIZING THE HIRING AND FIRING OF U.S. ATTORNEYS? CHAIRED BY: SENATOR CHARLES SCHUMER (D-NY) WITNESSES: SENATOR MARK PRYOR (D-AR); DEPUTY ATTORNEY GENERAL PAUL J. MCNULTY; MARY JO WHITE, ATTORNEY; LAURIE L. LEVENSON, PROFESSOR OF LAW, LOYOLA LAW SCHOOL, LOS ANGELES, CA; STUART M. GERSON, ATTORNEY LOCATION: ROOM 226 DIRKSEN SENATE OFFICE BUILDING, WASHINGTON, D.C. TIME: 9:30 A.M. EST DATE: TUESDAY, FEBRUARY 6, 2007

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* * *

MR. MCNULTY: Thank you, Mr. Chairman, and thank you for your kindness.

I appreciate the opportunity to be here this morning and attempt to clear up the misunderstandings and misperceptions about the recent resignations of some U.S. attorneys, and to testify in strong opposition to S. 214, a bill which would strip the Attorney General of the authority to make interim appointments to fill vacant U.S. attorney positions.

As you know and as you've said, Mr. Chairman, I had the privilege of serving as United States Attorney for four and a half years. It was the best job I ever had. That's something you hear a lot from former United States attorneys -- "best job I ever had." In my case, Mr. Chairman, it was even better than serving as counsel under your leadership with the Subcommittee on Crime. Now why is it -- being U.S. Attorney -- the best job? Why is it such a great job? There are a variety of reasons, but I think it boils down to this. The United States attorneys are the president's chief legal representatives in the 94 federal judicial districts. In my former district of Eastern Virginia, Supreme Court Chief Justice John Marshall was the first United States attorney. Being the president's chief legal representative means you are the face of the Department of Justice in your district. Every police chief you support, every victim you comfort, every citizen you inspire or encourage, and yes, every criminal who is prosecuted in your name communicates to all of these people something significant about the priorities and values of both the president and the Attorney General.

At his inauguration, the president raises his right hand and solemnly swears to faithfully execute the office of the president of the United States. He fulfills this promise in no small measure through the men and women he appoints as United States attorneys. If

the president and the attorney general want to crack down on gun crimes -- if they want to go after child pornographers and pedophiles as this president and attorney general have ordered federal prosecutors to do, it's the United States attorneys who have the privilege of making such priorities a reality. That's why it's the best job a lawyer can ever have. It's an incredible honor.

And this is why, Mr. Chairman, judges should not appoint United States attorneys as S. 214 proposes. What could be clearer executive branch responsibilities than the attorney general's authority to temporarily appoint, and the president's opportunity to nominate for Senate confirmation, those who will execute the president's duties of office? S. 214 doesn't even allow the attorney general to make any interim appointments, contrary to the law prior to the most recent amendment.

The indisputable fact is that United States attorneys serve at the pleasure of the president. They come and they go for lots of reasons. Of the United States attorneys in my class at the beginning of this administration, more than half are now gone. Turnover is not unusual, and it rarely causes a problem because even though the job of United States attorney is extremely important, the greatest assets of any successful United States attorney are the career men and women who serve as assistant United States attorneys. Victim witness coordinators, paralegals, legal assistants, and administrative personnel -- their experience and professionalism ensures smooth continuity as the job of U.S. attorney transitions from one person to another.

Mr. Chairman, I conclude with these three promises to this committee and the American people on behalf of the attorney general and myself. First, we have -- we never have and never will seek to remove a United States attorney to interfere with an ongoing investigation or prosecution or in retaliation for prosecution. Such as act is contrary to the most basic values of our system of justice, the proud legacy of the Department of Justice and our integrity as public servants.

Second, in every single case where a United States attorney position is vacant, the administration is committed to fulfilling -- to filling that position with a United States attorney who is confirmed by the Senate. The attorney general's appointment authority has not and will not be used to circumvent the confirmation process. All accusations in this regard are contrary to the clear factual record. The statistics are laid out in my written statement. And third, through temporary appointments and nominations for Senate confirmation, the administration will continue to fill U.S. attorney vacancies with men and women who are well qualified to assume the important duties of this office. Mr. Chairman, if I thought the concerns you outlined in your opening statement were true, I would be disturbed too. But these concerns are not based on facts. And the selection process we will discuss today I think will shed a great deal of light on that.

Finally, I have a lot of respect for you, Mr. Chairman, as you know. And when I hear you talk about the politicizing of the Department of Justice, it's like a knife in my heart. The AG and I love the department, and it's an honor to serve, and we love its mission. And your perspective is completely contrary to my daily

experience, and I would love the opportunity -- not just today but in the weeks and months ahead -- to dispel you of the opinion that you hold.

I appreciate your friendship and courtesy, and I am happy to respond to the committee's questions.

* * *

SEN. SPECTER: . . . Mr. McNulty, what about Carol Lam? I think we ought to get specific with the accusations that are made. Why was she terminated?

MR. MCNULTY: Senator, I came here today to be as forthcoming as I possibly can, and I will continue to work with the committee to provide information. But one thing that I do not want to do is, in a public setting, as the attorney general declined to do, to discuss specific issues regarding people. I think that it's -- it is unfair to individuals to have a discussion like that in this setting, in a public way, and I just have to respectfully decline going into specific reasons about any individual.

SEN. SPECTER: Well, Mr. McNulty, I can understand your reluctance to do so, but when we have confirmation hearings, which is the converse of inquiries into termination, we go into very difficult matters. Now, maybe somebody who's up for confirmation has more of an expectation of having critical comments made than someone who is terminated, and I'm not going to press you as to a public matter. But I think the committee needs to know why she was terminated, and if we can both find that out and have sufficient public assurance that the termination was justified, I'm delighted -- I'm willing to do it that way.

I'm not sure that these attorneys who were terminated wouldn't prefer to have it in a public setting, but we have the same thing as to Mr. Cummins and we have the same thing as to going into the qualifications of the people you've appointed. But to find out whether or not what Senator Schumer has had to say is right or wrong, we need to be specific.

MR. MCNULTY: Can I make two comments on -- first on the question of confirmation process. If you want to talk about me, and I'm here to have an opportunity to respond to everything I've ever done, that's one thing. I just am reluctant to talk about somebody

who's not here and has the right to respond. And I don't -- I just don't want to unfairly prejudice any --

SEN. SPECTER: But Mr. McNulty, we are talking about you when we ask the question about why did you fire X or why did you fire Y. We're talking about what you did.

MR. MCNULTY: And I will have to be -- try to work with the committee to give them as much information as possible, but I also want to say something else.

Essentially, we're here to stipulate to the fact that if the committee is seeking information, our position basically is that -- that there is going to be a range of reasons and we don't believe that we have an obligation to set forth a certain standard or reason or a cause when it comes to removal.

SEN. SPECTER: Are you saying that aside from not wanting to have comments about these individuals in a public setting which, again, I say I'm not pressing, that the Department of Justice is taking the position that you will not tell the committee in our oversight capacity why you terminated these people?

MR. MCNULTY: No. No, I'm not saying that. I'm saying something a little more complicated than that. What I'm saying is that in searching through any document you might seek from the Department, such as an -- every three years we do an evaluation of an office. Those are called "EARs" reports. You may or may not see an EAR report what would be of concern to the leadership of a department, because that's just one way of measuring someone's performance. And much of this is subjective, and won't be apparent in the form of some report that was done two or three years ago by a group of individuals that looked at an office.

SEN. SPECTER: Well, my time is up, but we're going to go beyond reports. We're going to go to what the reasons were.

MR. MCNULTY: Sure.

SEN. SPECTER: -- subjective reasons are understandable.

MR. MCNULTY: I understand -- (cross talk) --

SEN. SPECTER: I like -- I like to observe that red signal, but you don't have to. You're the witness. Go ahead.

MR. MCNULTY: No, I just -- the senator opened, the chairman opened with a reference to documentation, and I just wanted to make it clear that there really may or may not be documentation as you think of it, because there aren't objective standards necessary in these matters when it comes to managing the department and thinking through what is best for the future of the department in terms of leadership of offices. In some places we may have some information that you can read; in others, we'll have to just explain our thinking.

SEN. SPECTER: Well, we can understand oral testimony and subjective evaluations.

MR. MCNULTY: Thank you, Senator.

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SEN. SHELDON WHITEHOUSE (D-RI): . . . Mr. McNulty, welcome. You're clearly a very wonderful and impressive man. But it strikes me that your suggestion that there is a clear factual record about what happened and that this was just turnover are both just plain wrong.

I start on the clear factual record part with the suggestion that has been made to The Washington Post, that the attorney general also made to us, and I'm quoting from the Post article on Sunday: "Each of the recently dismissed prosecutors had performance problems," which does not jibe with the statement of Mr. Cummins from Arkansas that he was told there was nothing wrong with his performance, but that officials in Washington wanted to give the job to another GOP loyalist. So right from the very get-go we start with something that is clearly not a clear factual record of what took place; in fact, there's -- on the very basic question of what the motivation was for these, we're getting two very distinct and irreconcilable stories.

MR. MCNULTY: Senator --

SEN. WHITEHOUSE: And I don't think that, if it's true, that as The Washington Post reported, six of the prosecutors received calls notifying them of their firings on a single day. The suggestion that this is just ordinary turnover doesn't seem to pass the last test, really. Could you respond to those two observations?

MR. MCNULTY: Yes, sir. Thank you.

Senator, first of all, with regard to Arkansas and what happened there and any other efforts to seek the resignation of U.S. attorneys, these have been lumped together, but they really ought not to be. And we'll talk about the Arkansas situation, as Senator Pryor has laid it out.

And the fact is that there was a change made there that was not connected to, as was said, the performance of the incumbent, but more related to the opportunity to provide a fresh start with a new person in that position.

With regard to the other positions, however --

SEN. WHITEHOUSE: But why would you need a fresh start if the first person was doing a perfectly good job?

MR. MCNULTY: Well, again, in the discretion of the department, individuals in the position of U.S. attorneys serve at the pleasure of the president. And because turnover -- and that's the only way of going to your second question I was referring to turnover -- because turnover is a common thing is U.S. attorneys offices --

SEN. WHITEHOUSE: I know. I turned over myself as a U.S. attorney.

MR. MCNULTY: -- bringing in someone does not create a disruption that is going to be hazardous to the office. And it does, again, provide some benefits.

In the case of Arkansas, which this is really what we're talking about, the individual who was brought in had a significant prosecution experience -- he actually had more experience than Mr. Cummins did when he started the job -- and so there was every reason to believe that he could be a good interim until his nomination or someone else's nomination for that position went forward and there was a confirmed person in the job.

SEN. WHITEHOUSE: Mr. McNulty, what value does it bring to the U.S. attorneys office in Arkansas to have the incoming U.S. attorney have served as an aide to Karl Rove and to have served on the Republican National Committee?

MR. MCNULTY: With all --

SEN. WHITEHOUSE: Do you find anything useful there to be an U.S. attorney?

MR. MCNULTY: Well, I don't know. All I know is that a lot of U.S. attorneys have political backgrounds. Mr. Cummins ran for Congress as a Republican candidate. Mr. Cummins served in the Bush-Cheney campaign. I don't know if those experiences were useful for him to be a successful U.S. attorney, because he was.

I think a lot of U.S. attorneys bring political experience to the job. It might help them in some intangible way. But in the case of Mr. Griffin, he actually was in that district for a period of time serving as an assistant United States attorney, started their gun enforcement program, did many cases as a JAG prosecutor, went to Iraq, served his country there and came back. So there are a lot of things about him that make him a credible and well-qualified person to be a U.S. attorney.

SEN. WHITEHOUSE: Having run public corruption cases, and having firsthand experience of how difficult it is to get people to be willing to testify and come forward, it is not an easy thing to do. You put your career, you put your relations, everything on the line to come in and be a witness. If somebody in Arkansas were a witness to Republican political corruption, do you think it would have any affect on their willingness to come forward to have the new U.S. attorney be somebody who assisted Karl Rove and worked for the Republican National Committee? Do you think it would give any reasonable hesitation or cause for concern on their part that maybe they should keep this one to themselves until the air cleared?

MR. MCNULTY: Well, again, U.S. attorneys over a period of long history have had political backgrounds, and yet they've still been successful in doing public corruption cases. I think it says a lot about what U.S. attorneys do when they get into office.

One thing, Senator, as you know as well as I do, public corruption cases are handled by career agents and career assistant United States attorneys. U.S. attorneys play an important role, but there is a team that's involved in these cases. And that's a nice check on one person's opportunity to perhaps do something that might not be in the best interest of the case.

So my experience is that the political backgrounds of people create unpredictable situations. We've had plenty of Republicans prosecute Republicans in this administration, and we've had Democrats prosecute Democrats. Because once you put that hat on to be the chief prosecutor in the district, it transforms the way you look at the world. It certainly --

SEN. WHITEHOUSE: We hope.

MR. MCNULTY: -- yes.

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SEN. HATCH: . . . Are these really called "firings" down at the Department of Justice?

MR. MCNULTY: No.

SEN. HATCH: Were the people removed?

MR. MCNULTY: The terminology that's been assigned to these -- firings, purges and so forth -- it's, I think, unfair.

Certainly the effort was made to encourage and --

SEN. HATCH: Well, basically, my point is, they're not being fired. You're replacing them with other people who may have the opportunity as well.

MR. MCNULTY: Correct. And Senator, one other thing I wanted to say to Senator Whitehouse --

SEN. HATCH: And that's been done by both -- by Democrats and Republican administrations, right?

MR. MCNULTY: Absolutely.

SEN. HATCH: Is this the only administration that has replaced close to 50 percent of the U.S. attorneys in its six years in office?

MR. MCNULTY: I haven't done an analysis of the --

SEN. HATCH: But others have as well, haven't they?

MR. MCNULTY: Well, it's a routine thing to see U.S. attorneys come and go, as I said. And --

SEN. HATCH: Well, I pointed out at the beginning of this that President Clinton came in and requested the resignation of all 93 U.S. attorneys. Are you aware of that? MR. MCNULTY: Yes, I am. I was, in fact --

SEN. HATCH: I didn't find any fault with that. That was his right.

MR. MCNULTY: Right.

SEN. HATCH: Because they serve at the pleasure of the president, right?

MR. MCNULTY: Right.

SEN. HATCH: Well, does the president always -- or does the department always have to have a reason for replacing a U.S. attorney?

MR. MCNULTY: They don't have to have cause. I think in responding to Senator Schumer's question earlier --

SEN. HATCH: They don't even have to have a reason. If they want to replace them, they have a right to do so. Is that right or is that wrong?

MR. MCNULTY: They do not have to have one, no.

SEN. HATCH: Well, that's my point. In other words, to try and imply that there's something wrong here because certain U.S. attorneys have been replaced is wrong, unless you can show that there's been some real impropriety. If there's real impropriety, I'd be the first to want to correct it.

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SEN. DIANNE FEINSTEIN (D-CA): . . . I'd like to ask this question. Did you or any Justice staff make a series of phone calls in December to at least six United States attorneys telling them they were to resign in January?

MR. MCNULTY: I think I can say yes to that because I don't want to be -- talk about specific numbers. But phone calls were made in December asking U.S. attorneys to resign. That's correct.

SEN. FEINSTEIN: And how many U.S. attorneys were asked to resign?

MR. MCNULTY: Because of the privacy of individuals, I'll say less than 10.

SEN. FEINSTEIN: Okay, less than 10. And who were they?

MR. MCNULTY: Senator, I would, following the Attorney General's response to this question at his committee, in a public setting, I don't want to mention the names of individuals -- not all names have necessarily been stated, or if they have, they've not been confirmed by the department of Justice. And information like that can be provided to the committee in a private setting. But in the public setting, I wish to not mention specific names.

SEN. FEINSTEIN: And in a private session, you would be willing to give us the names of the people that were called in December?

MR. MCNULTY: Yes.

SEN. FEINSTEIN: Thank you very much.

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SEN. JEFF SESSIONS (R-AL): . . . We had a situation in Alabama that wasn't going very well, and Department of Justice recently made a change in the office and was reported as being for performance

reasons. You filled the interim appointment with now Assistant United -- U.S. Attorney Debra Rhodes, a professional from San Diego -- professional prosecutor who'd been in the Department of Justice. She was sent in to bring the office together -- did a good job of it. Senator Shelby and I recommended she be made -- be a permanent United States attorney and we did that.

My personal view is that the Department of Justice is far too reticent in removing United States attorneys that do not perform. United States attorneys are part of the executive branch. They have very important responsibilities. I recall seeing an article recently about wonderful Secretary of Labor Elaine Chao -- she's the last member of the Cabinet standing was part of the article. I mean, Cabinet members turn over. They're appointed and confirmed by the Senate at the pleasure of the president, and I think the Department of Justice has a responsibility of your 92 United States attorneys to see that they perform to high standards, and if they do not so perform, to move them.

I don't see anything wrong with taking -- giving an opportunity to somebody who's got a lot of drive and energy and ability, and letting them be a United States attorney and seeing how they perform. But they ought to have certain basic skills in my view that indicate they're going to be successful at it, and otherwise you as the president gets judged on ineffectual appointments and failing to be effective in law enforcement and related issues. I just wanted to say that.

Seven out of 92 to be asked to step down is not that big a deal to me. I knew when I took the job that I was subject to being removed at any time without cause, just like a secretary of State who doesn't have the confidence of the president, or the secretary of Transportation. If somebody had called and said, "Jeff, we'd like you gone," you say, "Yes, sir," and move on I think than be whining about it. You took the job with full knowledge of what it's all about.

With regard to one of -- I know you don't want to comment about these individual United States attorneys and what complaints or performance problems or personal problems or morale problems within the office may have existed. I would just note that one has been fairly public, and Carol Lamb has been subject to quite a number of complaints. Have you received complaints from members of Congress about the performance of United States Attorney Carol Lamb in San Diego on the California border?

MR. MCNULTY: Well, we've received letters from members of Congress. I don't want to go into the substance of them although the members can speak for them. But I -- again, I want to be very careful about what I say concerning any particular person.

SEN. SESSIONS: Well, on July 30th, 14 House members expressed concerns with the Department of Justice current policy of not prosecuting alien smugglers -- I don't mean people that come across the border -- I mean those who smuggle groups of them across the border -- specifically mentioning that Lamb's office to -- had declined to prosecute one key smuggler. Are you familiar with that -- June 30th, 2004?

MR. MCNULTY: I'm familiar with the letter.

SEN. SESSIONS: On September 30th -- 23rd, 2004, 19 House members described the need for the prosecution of illegal alien smugglers -- these are coyotes -- in the border U.S. Attorney offices, and they specifically mentioned the United States attorney in San Diego. Quote -- this is what they said -- quote, "Illustrating the problem, the United States Attorney's office in San Diego stated that it is forced to limit prosecution to only the worst coyote offenders, leaving countless bad actors to go free," closed quote. Isn't that a letter you received that said that?

MR. MCNULTY: I'm familiar with the letter.

SEN. SESSIONS: On October 13th of 2005, Congressman Darryl Issa wrote to U.S. Attorney Lamb complaining about her, saying this: "Your office has established an appalling record of refusal to prosecute even the worst criminal alien offenders," closed quote. And then on October 20th, '05, 19 House members wrote, quote -- to the Attorney General Gonzalez, to express their frustration, saying, quote, "The U.S. attorney in San Diego has stated that the office will not prosecute a criminal alien unless they have previously been convicted of two felonies in the District -- two felonies in the District," closed quote, before they would even prosecute, and do you see a concern there? Is that something that the attorney general and the president has to consider when they decide who their U.S. attorneys are?

MR. MCNULTY: Well, anytime the members of Congress, senators, House members, write letters to us we take them seriously and would give them the consideration that's appropriate.

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SEN. SCHUMER: . . . I want to go back to Bud Cummins. First, Bud Cummings has said that he was told he had done nothing wrong and he was simply being asked to resign to let someone else have the job. Does he have it right?

MR. MCNULTY: I accept that as being accurate as best I know the facts.

SEN. SCHUMER: Okay. So in other words, Bud Cummins was fired for no reason. There was no cause --

MR. MCNULTY: No cause provided in his case as I'm aware of.

SEN. SCHUMER: None at all. And was there anything materially negative in his evaluations? In his EARs reports or anything like that? From the reports that everyone has received, he had done an outstanding job -- had gotten good evaluations. Do you believe that to be true?

MR. MCNULTY: I don't know of anything that's negative, and I haven't seen his reports or one that -- probably only one that was done during his tenure but I haven't seen it. But I'm not aware of anything that --

SEN. SCHUMER: Would you be willing to submit those reports to us even if we wouldn't make them public?

MR. MCNULTY: Right. Well, other than -- I just want to fall short of making a firm promise right now, but we know that you're interested in them and we want to work with you to see how we can accommodate your needs.

SEN. SCHUMER: So your inclination is to do it but you don't want to give a commitment right here?

MR. MCNULTY: Correct.

SEN. SCHUMER: Okay. I will -- as I said in my opening statement, if we can't get them I will certainly discuss with the chairman my view that we should subpoena them if we can't get them. This is serious matter. I don't think they should be subpoenaed. I think we should get them -- certainly a report like this which is a positive evaluation. Your reasoning there, at least as far as Cummings is concerned -- obviously you can make imputations if others are not released -- wouldn't hurt his reputation in any way.

MR. MCNULTY: I'd just say, Mr. Chairman, if you get a report, see a report, and it doesn't show something that you believe is cause, to me that's not an a-ha moment, because as I say right up front, those reports are written by peers --

SEN. SCHUMER: Understood. MR. MCNULTY: -- and they may or may not contain (cross talk) --

SEN. SCHUMER: But you did say earlier -- and this is the first we've heard of this -- that he was not fired for a particular reason -- that when he said he was being fired simply to let someone else have a shot at the job, that's accurate as best you can tell.

MR. MCNULTY: I'm not disputing that characterization.

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SEN. SCHUMER: All right, now let me ask you this. You admitted, and I'm glad you did, that Bud Cummins was fired for no reason. Were any of the other six U.S. attorneys who were asked to step down fired for no reason as well?

MR. MCNULTY: As the attorney general said at the - his oversight hearing last month, the phone calls that were made back in December were performance-related.

SEN. SCHUMER: Mm-hm. All the others?

MR. MCNULTY: Yes.

SEN. SCHUMER: But Bud Cummins was not one of those calls, because he had been notified earlier.

MR. MCNULTY: Right. He was notified in June of -

SEN. SCHUMER: Okay, so there was a reason to remove all the other six?

MR. MCNULTY: Correct.

SEN. SCHUMER: Okay. Let me ask you this. I want to go back to Bud Cummins here. So here we have the attorney general adamant; here's his quote, "We would never, ever make a change in the U.S. attorney position for political reasons." Then we have now -- for the first time, we learn that Bud Cummins was asked to leave for no reason and we're putting in someone who has all kinds of political connections -- not disqualifiers, obviously, certainly not legally -- and I'm sure it's been done by other administrations as well. But do you believe that firing a well-performing U.S. attorney to make way for a political operative is not a political reason?

MR. MCNULTY: Yes, I believe that's it's not a political reason.

SEN. SCHUMER: Okay, could you try to explain yourself there?

MR. MCNULTY: I'll do my best. I think that the fact that he had political activities in his background does not speak to the question of his qualifications for being the United States attorney in that district. I think an honest look at his resume shows that while it may not be the thickest when it comes to prosecution experience, it's not insignificant either. He had been assistant United States attorney in that district to set up their Project Safe Neighborhoods program --

SEN. SCHUMER: For how long had he been there?

MR. MCNULTY: I think that was about a year or so.

SEN. SCHUMER: Yeah, I think it was less than that, a little less than that.

MR. MCNULTY: And he -- but he did a number of gun cases in that period of time. He's also done a lot of trials as a JAG attorney. He'd gone and served his country over in Iraq. He came back from Iraq and he was looking for a new opportunity. Again, he had qualifications that exceed what Mr. Cummins had when he started, what Ms. Casey had, who was the Clinton U.S. attorney in that district before she became U.S. attorney. So he started off with a strong enough resume, and the fact that he was given an opportunity to step in -- and there's one more piece of this that's a little tricky, because you don't want to get into this business of what did Mr. Cummins say here or there, because I think we should talk to him. But he may have already been thinking about leaving at some point anyway.

There are some press reports where he says that. Now, I don't know, and I don't want to put words in his mouth; I don't know what the facts are there completely. What I've been told, that there was some indication that he was thinking about this as a time for his leaving the office or in some window of time. And all those things came together to say in this case, this unique situation, we can make a change and this would still be good for the office.

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SEN. SCHUMER: . . . But let's go onto these questions. Did the president specifically approve of these firings?

MR. MCNULTY: I'm not aware of the president being consulted. I don't know the answer to that question.

SEN. SCHUMER: Okay. Can we find out an answer to that?

MR. MCNULTY: We'll take it back.

SEN. SCHUMER: Yeah. Was the White House involved in anyway?

MR. MCNULTY: These are presidential appointments --

SEN. SCHUMER: Exactly.

MR. MCNULTY: -- so the White House personnel, I'm sure, was consulted prior to making the phone calls.

SEN. SCHUMER: Mm-hmm. Okay, but we don't know if the resident himself was involved, but the White House probably was.

When did the president become aware that certain U.S. attorneys might be asked to resign?

MR. MCNULTY: I don't know.

SEN. SCHUMER: Okay. Again, I would ask that you get back to us on that.

And fourth question, which I'm sure you cannot answer right now, was there any dissent over these firings? Do you know if there was any in the Justice Department -- did some people say, well, we shouldn't really do this?

MR. MCNULTY: I'm not aware of that. To the contrary, actually, you know Dave Margolis. He's -

SEN. SCHUMER: I do.

MR. MCNULTY: -- been involved in all of the interviews for every interim who's been put in in this administration. He's been involved in every interview for every U.S. attorney that's been nominated in this administration. We have a set group of people and a set procedure that involves career people. Dave actually takes the lead role for us in that. And Dave was well aware of this situation.

And -- so apart from objections, I know of folks who believed that we had the authority and the responsibility to oversee the U.S. Attorneys Office the way we thought was appropriate. .

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SEN. SCHUMER: . . . I'd now like to go on to Carol Lam. We talked a little bit about this. Senator Sessions mentioned all the Congresspeople who had written letters. I'd just ask Senator Sessions when -- was that -- were -- was that -- were those bipartisan letters? Do you know? I don't know who the 13 or 18 --

SEN. SESSIONS: (Off mike.)

SEN. SCHUMER: Okay. Well, if you could submit those letters to the record, we could answer that question.

SEN. SESSION: I would be glad to.

SEN. SCHUMER: Great. Without objection.

Now given the velocity -- the heat of the investigations that have gone on in southern California, did the Justice Department consider the chilling effect on those -- the potential chilling effect on those prosecutions when Carol Lamb was fired? I mean, wasn't it -- should it have been a factor as -- in --

MR. MCNULTY: Certainly.

SEN. SCHUMER: To be weighted? Do you know if that did?

MR. MCNULTY: Yes. It -- we are -- I have to careful here because, again, I'm trying to avoid speaking on specifics. But we would be categorically opposed to removing anybody if we thought it was going to have either a negative effect in fact, or a reasonable appearance. Now we can be accused of anything. We can't always account for that. But as far as the -- a reasonable perception and the factual, that would be a very significant consideration. I mean, we wouldn't do it if we thought it would, in fact, interfere with a case.

SEN. SCHUMER: So you thought it would -- so there were discussions about this specific case, and people dismissed any --

MR. MCNULTY: Any time we ask for someone to resign --

SEN. SCHUMER: Chilling effect, or even as Senator Whitehouse mentioned, the break in the continuity of important ongoing prosecutions. Was that considered in this specific instance?

MR. MCNULTY: Any time we do this, we would consider that. And may I say one more thing about it? What happened in the prosecution of Congressman Cunningham was a very good thing for the American people, and for the department of Justice to accomplish. We are proud of that accomplishment, and any investigation that follows from that has to run its full course. Public corruption is a top priority for this department, and we would only want to encourage all public corruption investigations, and in no way want to discourage them. And our record, I think, speaks for itself on that.

SEN. SCHUMER: Were you involved in the dismissal -- in the decision to dismiss Carol Lamb?

MR. MCNULTY: I was involved in all of this, not just any one person. But I was consulted in the whole decision process.

SEN. SCHUMER: Okay. And did you satisfy yourself that -- I mean, it would be hard to satisfy yourself without an appearance problem --

MR. MCNULTY: Right.

SEN. SCHUMER: -- because there obviously was going to be an appearance problem. On the other hand, certain factors, at least in the Justice Department, must have outweighed that. It would be hard to

believe that Carol Lamb was dismissed without cause in your mind. You must have had some cause.

MR. MCNULTY: All of the changes that we made were performance- related.

SEN. SCHUMER: Mm-hmm. Okay. And we'll discuss that privately towards the end of the week. So I'm not going to try to put you on the spot here.

But I do want to ask you this. Did anyone outside the Justice Department, aside from the letters we have seen that Senator Sessions mentioned, urge that Carol Lamb be dismissed?

MR. MCNULTY: I don't -- I don't know.

SEN. SCHUMER: Could you get an answer to that?

MR. MCNULTY: You mean anyone said -- because those letters --

SEN. SCHUMER: Those are public letters.

MR. MCNULTY: -- may not be the only letters we've received. We may have received --

SEN. SCHUMER: I know, but phone calls, any other -- I'd like you to figure out for us and get us answers on whether there were other people, other than the people who signed -- I don't know who they were -- who signed the letters that Senator Sessions mentioned outside the Justice Department who said -- obviously, given the sensitivity of this this is an important question -- who said that Carol Lamb should be dismissed. Can you get back to us on that?

MR. MCNULTY: Yes.

SEN. SCHUMER: Thank you.

MR. MCNULTY: I'm only not giving you a definitive answer now because I'm trying to avoid talking about any one district --

SEN. SCHUMER: Okay.

MR. MCNULTY: -- but I -- but the suggestion of your question would be whether there might have been some -- let's just say on a general matter, not referring to any one district, any undue influence on us from some unnamed --

SEN. SCHUMER: Oh, no. I didn't ask that.

MR. MCNULTY: (Cross talk.)

SEN. SCHUMER: I didn't ask whether it was undue.

MR. MCNULTY: Generically, I can say that with any change we made, they weren't subject to some influence from the outside.

SEN. SCHUMER: All right. I would just ask that when you meet with us, we get an answer to that question. Who from the outside urged, whether appropriately or inappropriately -- it might be appropriate. It's certainly your job, if you think a U.S. attorney isn't doing a good job, to let that be known, that she be dismissed.

Okay, let me just ask you this. We're going to hear from a fine U.S. attorney from the southern district former, and she says in her testimony -- she quotes Robert Jackson as Attorney General, and he gave a noted speech to U.S. attorneys. He said this, "Your responsible in your several districts for law enforcement and for its methods cannot wholly be surrendered to Washington and ought not to be assumed by a centralized Department of Justice." Do you agree with that?

MR. MCNULTY: I'm not sure if I can say that I appreciate -- I agree with everything being said in that. You know, what's tricky about this is that -- Senator, you or any other senator in this committee might call us on another day and say to us, "I want to see more health care fraud cases done. You people have turned your back on that problem." And we would get back to you and say, "Absolutely, Senator. We'll take that seriously." But how could we do that if we didn't have some confidence that if we turned around and said to our U.S. attorneys, "We need you to prioritize health care fraud. It's a growing problem in our country and you need to work on it?" Now that's a centralized Washington responsibility going out to the field. So I believe in a Department of Justice that does act with some control over its priorities and its -- use of its resources. I don't believe, however, that that should go to the question of the integrity or the judgment --

SEN. SCHUMER: And he uses the words -- in all fairness, he uses the world "wholly." He doesn't say Washington should have no influence. He says "cannot be wholly surrendered to Washington.

MR. MCNULTY: Well then, I would agree with that. . .

* * *

SEN. WHITEHOUSE: Mr. McNulty, you said that the firings were performance-related and that there was a set procedure that involved career people that led to this action. To go back to The Washington Post, one administration official, says the Post, who spoke on the condition of anonymity in discussing personnel issues, said the spate of firings was the result of, and here's the quote from the administration official, "pressure from people who make personnel decisions outside of Justice" -- capital J, the department -- "who wanted to make some things happen in these places."

MR. MCNULTY: Whoever said that was wrong. That's -- I don't know where they'd be coming from in making a comment like that, because in my involvement with this whole process, that's not a factor in deciding whether or not to make changes or not. So I just don't know --

SEN. WHITEHOUSE: What is not a factor?

MR. MCNULTY: Well, that quote suggests agendas, political or otherwise, outside of the Department. And in looking at how to -- or who should be called or encouraged to resign or changes made they are based upon reasons -- they weren't based upon cause, but they were based upon reasons that were Department-related and performance-related, as we said. And so I don't ascribe any credibility to that quote in a newspaper.

SEN. WHITEHOUSE: Okay. Would you agree with me that when you're in the process of selecting a United States attorney for a vacancy, it makes sense to cast your net broadly, make sure you have a lot of candidates, choose among the best and solicit input from people who are sort of outside of the law enforcement universe? Would you agree with me that it's different when you have a sitting United States attorney who is presently exercising law enforcement responsibilities in a district, how and whether you make the determination to replace that individual?

MR. MCNULTY: I think that's a fair concern, and one distinction that's important to keep in mind.

SEN. WHITEHOUSE: You wouldn't want to apply the same process to the removal of a sitting U.S. attorney that you do when you're casting about for potential candidates for a vacancy?

MR. MCNULTY: I'm not sure I fully appreciate the point you're making here. Could I ask you to restate it so I make sure if I'm agreeing with you that I know exactly what you're trying to say?

SEN. WHITEHOUSE: Yeah. I think what I'm trying to say is that when there's an open seat and you're looking for people to fill it --

MR. MCNULTY: Yes.

SEN. WHITEHOUSE: -- you can cast your net pretty broadly, and it's fair to take input from all sorts of folks. It's fair to take input from people in this building --

MR. MCNULTY: Oh, I see what you're saying.

SEN. WHITEHOUSE: -- it's fair to take input from people, you know, in law enforcement. It's fair to take input from people at the White House. It's fair to take input from a whole variety of sources. But it's different once somebody is exercising the power of the United States government and is standing up in court saying, "I represent the United States of America." And if you're taking that power away from them, that's no longer an appropriate process, in my view, and I wanted to see if that view was shared by you.

MR. MCNULTY: I think I appreciate what you're saying there, and I think that when it -- you know, there's two points. The first is that we believe a U.S. attorney can be removed --

SEN. WHITEHOUSE: Of course.

MR. MCNULTY: -- for a reason or for no reason, because they serve at the pleasure of the president. But there's still a prudential consideration. There's got to be good judgment exercised here. And when that judgment is being exercised, there have to be limitations on what would be considered; I think that's what you're suggesting. And there's going to be some variety of factors that may or may not come out in an EARs report or some other kind of well- documented thing. But it comes down to a variety of factors that have to do with the performance of the job, meaning --

SEN. WHITEHOUSE: But they're truly performance-related, you don't just move around, because, you know, somebody in the White House or somebody in this building thinks, "You know what? I'd kind of like to appoint a U.S. attorney in Arkansas. Why don't we just clear out the guy who's there so that I can get my way." That person might very well, with respect to a vacancy, say, "I want my person there," and that's a legitimate conversation to have, whether you choose it or not. But it's less legitimate when there's somebody in that position, isn't it?

MR. MCNULTY: Yeah, I hear the distinction you're trying to make there. I'm not sure I -- I agree with it. The change that is

occurring by bringing a new person in versus the change that's occurring by bringing a person in to replace an interim, I'm not sure if I appreciate the dramatic distinction between them. If the new person is qualified and if you're satisfied that it's not going to interfere with an ongoing case or prosecution, it's not going to have some general disruptive effect that not good for the office --

SEN. WHITEHOUSE: Well, there's always some disruptive effect --

MR. MCNULTY: There is always some, right. The question is is it undue or is it substantial beyond the kind of normal turnover things that occur? I think that there needs to be flexibility there to make the changes that need to be made.

* * *

SEN. SESSIONS: Thank you. It's a most interesting discussion. I do have very, very high ideals for United States attorneys. I think that's a critically important part of our American justice system. I think sometimes that the Department of Justice has not given enough serious thought to those appointments -- has not always given the best effort to selecting the best person.

President Reagan, when he was elected and crime was a big problem, he promised experienced prosecutors, and I think that was helpful. I'd been an assistant for two years and -- two-and-a-half years and that's how I got selected. And I did know something about prosecuting cases. I'd tried a lot of cases, and I was -- I knew something about the criminal system. So I think Giuliani is correct -- you need to have somebody to contribute to the discussion -- that knows something about the business. With regard to Arkansas, I just took a quick look. I don't think that Mr. Cummins had any prior prosecutorial experience before he became U.S. attorney, did he?

MR. MCNULTY: That's correct. He did not.

SEN. SESSIONS: But Mr. Griffin had at least been a JAG prosecutor in the military and been to Iraq and he tried people there, had he not?

MR. MCNULTY: Tim Griffin had actually prosecuted more cases than a lot of U.S. attorneys who go into office. A lot of people come from civil backgrounds or policy backgrounds, and he actually had been in court, whether it's as a JAG here in Ft. Campbell, where he tried a very high profile case, or over in Iraq or as a special assistant in that office. And I don't think we should look lightly upon his experience as a prosecutor.

SEN. SESSIONS: And he spent a good bit of time with General Petraeus, I guess -- well, the 101st in Mosul, Iraq with the -- as an

Army JAG officer. So anyway, he had some skills and experience beyond politics. But I just -- I want to join with Senator Schumer and my other colleagues in saying I think we need to look at these appointments maybe in the future more carefully. It's a tough job. You have to make tough decisions. I remember -- I guess I took it as a compliment -- people said that Sessions would prosecute his mother if he -- she violated the law. I guess that was a compliment; I took it as -- tried to take it as that. So I wanted to say that.

* * *

END.

HOUSE JUDICIARY COMMITTEE, SUBCOMMITTEE ON COMMERCIAL AND ADMINISTRATIVE LAW HOLDS A HEARING ON THE DISMISSAL OF U.S. ATTORNEYS

MARCH 6, 2007

SPEAKERS:

REP. LINDA T. SANCHEZ, D-CALIF. CHAIRWOMAN

REP. JOHN CONYERS JR., D-MICH.

REP. HANK JOHNSON, D-GA.

REP. ZOE LOFGREN, D-CALIF.

REP. BILL DELAHUNT, D-MASS.

REP. MELVIN WATT, D-N.C.

REP. CHRIS CANNON, R-UTAH RANKING MEMBER

REP. JIM JORDAN, R-OHIO

REP. RIC KELLER, R-FLA.

REP. TOM FEENEY, R-FLA.

REP. TRENT FRANKS, R-ARIZ.

REP. LAMAR SMITH, R-TEXAS EX OFFICIO

WITNESSES:

WILLIAM MOSCHELLA,

PRINCIPAL ASSOCIATE DEPUTY ATTORNEY GENERAL,

DEPARTMENT OF JUSTICE

CAROL LAM,

FORMER U.S. ATTORNEY

DAVID IGLESIAS,

FORMER U.S. ATTORNEY

BUD CUMMINS,

FORMER U.S. ATTORNEY

JOHN MCKAY,

FORMER U.S. ATTORNEY

DANIEL BOGDEN,

FORMER U.S. ATTORNEY

PAUL CHARLTON,

FORMER U.S. ATTORNEY

JOHN SMIETANKA,

FORMER U.S. ATTORNEY

REP. DARRELL ISSA, R-CALIF.

FORMER REP. ASA HUTCHINSON

FORMER DEPUTY ATTORNEY GENERAL GEORGE TERWILLIGER

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MOSCHELLA: Madame Chairman, Mr. Cannon, members of the subcommittee, I appreciate the opportunity to testify today.

Let me begin by stating clearly that the Department of Justice appreciates the public service that was rendered by the seven United States attorneys who were asked to resign last December. Each is a talented lawyer who served as U.S. attorney for more than four years and we have no doubt they will achieve success in their future endeavors, just like the 40 or so U.S. attorneys who have resigned for various reasons over the last six years.

Let me also stress that one of the attorney general's most important responsibilities is to manage the Department of Justice. Part of managing the department is ensuring that the administration's priorities and policies are carried out consistently and uniformly. Individuals who have the high privilege of serving as presidential appointees have an obligation to carry out the administration's priorities and policies.

United States attorneys in the field as well as assistant attorneys general here in Washington are duty-bound not to make prosecutorial decisions but also to implement and further the administration and department's priority and policy decisions. In carrying out these responsibilities, they serve at the pleasure of the president and report to the attorney general. If a judgment is made that they are not executing their responsibilities in a manner that furthers the management and policy goals of departmental leadership, then it is appropriate that they be asked to resign so that they can be replaced by other individuals who will.

To be clear, it was for reasons related to policy, priorities and management, what has been referred to broadly as performance-related reasons, that these United States attorneys were asked to resign.

I want to emphasize that the department, out of respect for the United States attorneys at issue, would have preferred not to talk about those reasons, but disclosures in the press and requests for information from Congress altered those best laid plans. In hindsight, perhaps this situation could have been handled better. These U.S. attorneys could have been informed at the time they were asked to resign about the reasons for the decisions.

Unfortunately, our failure to provide reasons to these individual United States attorneys has only served to fuel wild and inaccurate speculation about our motives. And that is unfortunate, because faith and competence in our justice system is more important than any one individual. That said, the department stands by the decisions. It is clear that after closed-door briefings with House and Senate members and staff, some agree with the reasons that form the basis for our decisions and some disagree. Such is the nature of subjective judgments.

Just because you might disagree with a decision does not mean it was made for improper political reasons. There were appropriate reasons for each decision.

One troubling allegation is that certain of these United States attorneys were asked to resign because of actions they took or didn't take relating to public corruption cases. These charges are dangerous, baseless and irresponsible. This administration has never removed a United States attorney to retaliate against them or interfere with or inappropriately influence a public corruption case. Not once.

The attorney general and the director of the FBI have made public corruption a high priority. Integrity in government and trust in our public officials and institutions is paramount. Without question, the department's record is one of great accomplishment that is unmatched in recent memory. The department has not pulled any punches or shown any political favoritism. Public corruption investigations are neither rushed nor delayed for improper purposes. Some, particularly in the other body, claim that the department's reasons for asking these United States attorneys to resign was to make way for pre- selected Republican lawyers to be appointed and circumvent Senate confirmation. The facts, however, prove otherwise.

After the seven United States attorneys were asked to resign last December, the administration immediately began consulting with home state Senators and other home state political leaders about possible candidates for nomination. Indeed, the facts are that since March 9, 2006, the date the attorney general's new appointment authority went into effect, the administration has nominated 16 individuals to serve as United States attorney and 12 have been confirmed.

Furthermore, 18 vacancies have arisen since March 9, 2006. Of those 18 vacancies, the administration: (1) has nominated candidates for six of them, and of those six, the Senate has confirmed three; (2) has interviewed candidates for eight of them; (3) is working to identify candidates for the remaining four.

SANCHEZ: Mr. Moschella, your time has expired. If you could just briefly conclude.

MOSCHELLA: Let me repeat what has been said many times before and what the record reflects. The administration is committed to having a Senate-confirmed United States attorney in every single federal district.

In conclusion, let me make three points. First, although the department stands by the decision to ask these United States attorneys to resign, it would have been much better to have addressed the relevant issues up front with each of them. Second, the department has not asked anyone to resign to influence any public corruption case and would never do so. Third, the administration at no time intended to circumvent the confirmation process.

I'd be happy to take your questions.

SANCHEZ: Thank you for your testimony.

I would now like to recognize myself for the first round of questioning.

Mr. Moschella, we've had now two briefings regarding the purported reasons for the requested resignations of the six U.S. attorneys that are behind you.

Could you please summarize for the subcommittee the particular reasons with respect to each individual, Ms. Lam, Mr. McKay, Mr. Cummins, Mr. Bogden, Mr. Iglesias and Mr. Charlton, why they were asked to resign?

MOSCHELLA: I will, and I will try to do so quickly.

SANCHEZ: You have about four minutes to do so.

MOSCHELLA: I notice that two individuals are not here, and those individuals would have been in the management category...

SANCHEZ: We're interested solely in the individuals sitting behind you.

MOSCHELLA: ... just so the record is clear.

With regard to Carol Lam, a distinguished prosecutor and someone who did fulfill more than her four-year term, there were two basic issues. It has been a priority of the Department of Justice and this administration, both in violent crime and in immigration. In violent crime, Project Safe Neighborhoods, which is our landmark anti-gun program, has been talked about by the president, by the attorney general, in conferences, at U.S. attorneys meetings. And quite frankly, her gun prosecution numbers are at the bottom of the list. She only beat out Guam and the Virgin Islands in that area.

On immigration, it's been reported in the press after our briefings with the Senate Judiciary Committee that her numbers for a border district just didn't stack up. The president of the United States, this administration, has made immigration reform a priority and those on the border, in these border districts, have a responsibility there and to the rest of the country to vigorously enforce those laws.

SANCHEZ: Mr. McKay?

MOSCHELLA: With regard to Mr. McKay, the department really had policy differences and were concerned with the manner in which he went about advocating particular policies and we'll get into the details of information sharing, but he spent quite a considerable amount of time advocating for a particular system, basically advocating that the Justice Department give our good housekeeping seal of approval for this particular system, but we decided, because various jurisdictions around the country have different systems, that we would plug our pipe -- one DOJ pipe in which we share with state and local governments -- to those systems.

SANCHEZ: Mr. Cummins?

MOSCHELLA: I think Mr. Cummins' situation has been well- documented. His was not for performance-based reasons. I'll just refer to, in the interest of time, the deputy attorney general's testimony a couple of weeks ago in the Senate.

SANCHEZ: We'd like to get the information on the record here, if you don't mind.

MOSCHELLA: It may take a little bit longer than the minute and 35 seconds that I have, but Mr. Cummins was -- the administration asked Mr. Cummins to move on only after we knew that -- you know, he had indicated he was not going to serve out the remainder of his term -- a qualified individual who had served both as a prosecutor at main Justice and in his district, was coming back from Iraq after serving his country for a year in Mosul, not in the green zone, and prosecuting over 40 JAG-related cases there, was interested in a U.S. attorney position.

Mr. Griffin was considered for the other district in Arkansas earlier in his tenure, was interviewed. He had gone all the way through the process and likely would have been the candidate. He would have but for the fact that he took another position, he probably

would have been the U.S. attorney in that other district. So it was clear that he was interested in a position and given the knowledge that Mr. Cummins was not likely to serve out the remainder of his term, because there had been at least one press report that I'm aware of where that was indicated.

SANCHEZ: OK. Mr. Bogden? I'm sorry to hurry you along, but we have limited time here. If you could please get through the final three as briefly as you can. Mr. Bogden?

MOSCHELLA: Sure.

The general sense in the department about Mr. Bogden is that given the importance of the district in Las Vegas, there was no particular deficiency. There was an interest in seeing new energy and renewed vigor in that office, really taking it to the next level.

It's important to note that the reason why this process was undertaken was really to ensure that in the last two years of this administration we were fielding the best team possible, and that's what the attorney general was doing when we -- as we reviewed these.

SANCHEZ: OK. Mr. Iglesias?

CANNON: Pardon me, Madame Chairman. We're going to have a large number of witnesses and many people here who want to participate. I don't mean to be a skunk to the party, but if we do the five-minute rule, we're probably going to get through more quickly.

SANCHEZ: OK.

WATT: Madame Chair, I'd be delighted to yield the gentlelady my time for questioning and pass, because I think we need this information in the record.

SANCHEZ: I appreciate that, Mr. Watt. I understand that.

WATT: I yield the gentlelady my five minutes.

SANCHEZ: OK. Thank you, Mr. Watt.

Mr. Moschella, please, as briefly as you can, Mr. Iglesias?

MOSCHELLA: Sure. And it is difficult to do it in such a short time frame. As you know, our briefing took about 40 or 50 minutes.

SANCHEZ: Right. I think you can distill that, though, to the heart of the matter fairly quickly.

MOSCHELLA: I will.

SANCHEZ: It's usually a one or two sentence reason.

MOSCHELLA: There was a general sense with regard to this district, again, Mr. Iglesias had served, as they all did, the entire four-year term, that the district was in need of greater leadership. We have had a discussion about the EARS Report, and the EARS Report does pick up some management issues and Mr. Iglesias had delegated to his first assistant the overall running of the office. And, quite frankly, U.S. attorneys are hired to run the office, not their first assistants.

SANCHEZ: OK. And Mr. Charlton?

CHARLTON: I would put Mr. Charlton more in the policy category. Mr. Charlton had undertaken in his district a policy with regard to the taping of FBI interviews and set a policy in place there that had national ramifications. It did not go through the whole policy process. It has implications for prosecutions, for law enforcement agencies, the bureau's sister agencies at ATF, DEA, Marshals, ICE, CBP and the like, and that was just completely contrary to the way policy development occurs in the Department of Justice.

Furthermore, on the death penalty, we have a process in the Department of Justice. It is the one area that is non-delegable by the attorney general. And Mr. Charlton, in a particular case, was told and was authorized to seek in a particular case. He chose instead to continue to litigate after that long and exhaustive process, going from his career people to him to the criminal division, the Capital Case Unit, which comes to the recommendation of the deputy attorney general's office, and then the attorney general.

SANCHEZ: Thank you, Mr. Moschella.

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CANNON: . . . Thank you, Mr. Moschella, for being here.

I am one of your great admirers. I appreciated working with you here on the committee where you served as parliamentarian and legal counsel to the committee for several years. In fact, how long did you serve on this committee?

MOSCHELLA: Since '98 to 2003.

CANNON: Thank you.

Great service. We appreciate it on the committee. And we appreciate your being back here. And I want to thank you for your very thoughtful statement in a difficult environment and give you a chance, first of all, to add anything that you'd like in particular.

I know that you were a little bit rushed, but you did mention Lam's prosecution or low-end number of prosecutions on the firearms issues. Can you elaborate on that a little bit, please?

MOSCHELLA: Well, when the president ran for election, one of the cornerstone priorities that he had was preventing violent crime. We do so through our Project Safe Neighborhoods Program. Congress has appropriated millions and millions of dollars for this program over the last several years.

Our firearms prosecutions have gone up I believe over 70 percent over the time of this administration and we expect the U.S. attorneys to follow in those priorities. The U.S. attorneys hear about those priorities at conferences, PSN conferences, at U.S. attorneys conferences, through memos and other forums. Indeed, at one of the PSN conferences, President Bush gave a videotaped presentation about the importance of prosecuting violent criminals.

CANNON: And how did Ms. Lam's district rank in terms of number of prosecutions during the relevant period?

MOSCHELLA: I don't have the numbers committed to memory, but she was 91st out of 93 districts.

CANNON: And the other districts were -- do you recall what 92 and 93 were?

MOSCHELLA: Guam and the Virgin Islands.

CANNON: Places that don't have the kind of significant crime that we have in Southern California.

MOSCHELLA: And certainly don't have the significant resources of the Southern District of California.

Let me say, I think every U.S. attorney will say, "I have resource problems." And it's true. Congress in the past several years has not funded the president's request and we actually got a pretty good appropriation out of the joint resolution. So there are strains, and we have set specific priorities.

That said, these are high administration priorities and we expect that those priorities be fulfilled.

CANNON: What happened to prosecutions of people smuggling people or drugs across the border in Ms. Lam's district?

MOSCHELLA: Well, at about the 2004, 2005 time frame, just at the time, coincidentally, that the administration is really gearing up to make its case on the Hill for comprehensive immigration reform, the numbers in that district dropped precipitously, and it was

because of a policy instituted to focus on, and I know Ms. Lam will say, on higher priority prosecutions.

The truth is, on the border we need to prosecute these cases before they become interior problems. And I understand prioritizing, but we have made this a priority for the border, and to have both components of comprehensive immigration reform work, the guest worker program and enforcement, you need them both, and the Congress has put a lot of resources towards this effort. We've put more resources on the border. We can always use more, but the other border districts did substantially more.

CANNON: Since time is limited, let me just clarify. You are speaking in terms of Ms. Lam's priorities and what she thought was higher priority, and then you went on to talk about what we needed. When you talk about what we needed, you're talking about what the president has directed, what the attorney general has directed and what the Department of Justice was telling Ms. Lam to do. Is that not correct?

MOSCHELLA: That's right. And quite frankly, members of Congress, some from the House, some from -- at least one in the Senate, Senator Feinstein, wrote specifically about this issue, the concern that the San Diego area, which is an extremely important sector and port of entry, that it not become kind of a magnet for these coyotes and other smugglers.

CANNON: And did it become a magnet?

I see my time has expired.

WATT (?): Madame Chair, I ask unanimous consent to yield the gentleman one minute of my time.

CANNON: And I'll just let the witness answer the question.

SANCHEZ: Will you please restate the question, Mr. Canno?

MOSCHELLA: Did it become a magnet?

CANNON: In other words, was there change in the patterns at the border?

MOSCHELLA: Well, I know that the border patrol and others in that area were very concerned about the numbers of apprehensions made and the number of prosecutions that were declined. So I don't have a specific figure for you. But when you lower the prosecutions, the deterrence level certainly will go down.

* * *

CONYERS: Well, was anyone at the White House consulted or did they offer any input in compiling the list of U.S. attorneys to be terminated, to the best of your knowledge?

MOSCHELLA: The list was complied at the Department of Justice.

CONYERS: Was the White House consulted?

MOSCHELLA: Well, eventually, because these are political appointees...

CONYERS: Sure.

MOSCHELLA: ... which is unremarkable, send a list to the White House, let them know...

CONYERS: I understand.

MOSCHELLA: ... our proposal and whether they agreed with it.

CONYERS: The answer is yes. Your answer is yes?

MOSCHELLA: Yes.

CONYERS: All right. I believe that's ordinary process.

Now, who did it go to in the White House?

MOSCHELLA: Our contact is the counsel's office.

CONYERS: Who is that?

MOSCHELLA: Specifically who in the counsel's office?

CONYERS: Well, is it true that it was the White House that asked that you find a position for Mr. Rove's former deputy, Mr. Timothy Griffin?

MOSCHELLA: If you mean you as in me, personally...

CONYERS: You, as in Mr. Moschella.

MOSCHELLA: No.

CONYERS: But what about the department?

MOSCHELLA: There was a point in time when, before Mr. Griffin had come back from Iraq, and knowing that he would be returning from his service in Iraq, that the counsel to the president communicated and asked is there...

CONYERS: So your answer is yes...

(CROSSTALK)

SANCHEZ: The time of the chairman has expired.

Were you finished with the answer to that question, Mr. Moschella?

MOSCHELLA: I don't know if we got it all. There was a communication about whether or not there was a place for Mr. Griffin and, obviously, he had already been considered for the other district in Arkansas, so there is an interest in allowing him to continue to serve his country in that capacity.

* * *

JORDAN: Thank you, Madame Chair.

Thank you, Mr. Moschella, for joining us today.

Before or after the department determined to dismiss this group of attorneys, did the department ever interfere with one of their districts' public corruptions cases?

MOSCHELLA: Absolutely not.

JORDAN: Never asked to speed any up? Never asked to dismiss a case?

MOSCHELLA: No.

JORDAN: Before or after the department determined to dismiss this group of attorneys, did the department support the attorneys' investigations and prosecutions of public corruption cases, whether against Republicans or Democrats or whomever?

MOSCHELLA: Absolutely. I mean, the attorney general, as I said, the attorney general and the director of the FBI have made this area a priority. Who else other than the FBI and the Justice Department can root out the kind of corruption that we want to see rooted out? And I think that the record -- and Mr. **Conyers** mentioned Ms. Lam. I didn't say that Ms. Lam's performance in the things that she was doing was poor. The Cunningham case is something, as I said, we applaud, we herald, and if public officials are engaged in that kind of activity, they need to be brought to justice.

All I pointed out with regard to that district is that in the other priority areas, they were not being as vigorously pursued as we would have liked.

JORDAN: You had mentioned in your earlier testimony and you just referenced it right there, about Ms. Lam, that she was 91st out of 93 or 92nd out of 94 districts. For the other five attorneys, can you give me a summary of where they may have ranked in specific areas of prosecution cases relative to that, you know, to the 94 districts across the country?

MOSCHELLA: Well, in the other districts, we didn't have this same sort of difference on prosecution. We certainly had these other policy differences. For example, as I mentioned for Mr. Charlton, on death penalty or FBI taping and the like.

We certainly were aware, those who are considering these things, we certainly were aware that in Mr. McKay's district, that the sentencing -- within -- he had one of the -- maybe one other district was lower, but one of the lowest within guidelines sentencing ranges, and we had -- Deputy Attorney General Comey had sent out a memo I believe in 2004 to all U.S. attorneys indicating that we, the Justice Department, need to do our part to ensure that we get the maximum number of within guideline sentences.

So that was a consideration, certainly, in that district.

JORDAN: You also mentioned in your testimony relative to Mr. McKay, since you just brought him up there, that there were policy differences. Can you elaborate a little bit more on those policy differences?

MOSCHELLA: He was a vigorous and strong proponent of a particular information sharing system called LInX. He did a lot to promote it around the country and within the department, but we had a difference, and the manner in which we...

JORDAN: And it was fair to say that you communicated the difference that the leadership in the Department of Justice had with him, and yet he continued to promote that?

MOSCHELLA: Yes. He was always in contact, particularly on this issue, because the deputy attorney general's office is really driving information sharing policy. So he clearly knew the position of the department in this regard.

JORDAN: Appreciate it.

* * *

KELLER: Thank you, Madame Chairman.

Mr. Moschella, do U.S. attorneys serve at the pleasure of the president?

MOSCHELLA: Yes, sir.

KELLER: Because I only have five minutes, I'm going to limit my questions to Ms. Lam's situation. That's been brought up quite a bit.

Did the Department of Justice headquarters ever discourage Ms. Lam from bringing the case against Duke Cunningham?

MOSCHELLA: No. In fact, I know that there was discussion about which district to send it to, and her district was favored over another district.

KELLER: Did the Department of Justice actually assist Ms. Lam in trying to help her obtain documents from Congress relating to the Duke Cunningham case?

MOSCHELLA: Yes, assistance has been provided in that regard.

KELLER: Let me be crystal clear. Did Ms. Lam's role in prosecuting Duke Cunningham have anything whatsoever with her being asked to resign?

MOSCHELLA: No, sir.

KELLER: Now, it's my understanding from your earlier testimony, the concerns that the attorney general had with her related to the prosecution of gun crimes and immigration enforcement. Is that correct?

MOSCHELLA: Yes, sir.

KELLER: OK. And those concerns, in fact, actually predated the Duke Cunningham scandal coming to light. Isn't that correct?

MOSCHELLA: Yes. Well, I don't know exactly when Duke Cunningham...

KELLER: I'll refresh your recollection. This is the story that broke the Duke Cunningham story wide open, published by "San Diego Union Tribune" June 12, 2005. "Lawmakers' home questioned." This was the beginning of the end, appropriately, for Mr. Cunningham.

I have letters here, letter after letter, over a year before that. February 2, 2004, Congressman Darrell Issa writing to Ms. Lam, complaining that she is not prosecuting alien smugglers. March 15, 2004, Ms. Lam responds to Congressman Issa. May 24, 2004, Will Moschella, on behalf of DOJ, responding to Mr. Issa, raising concerns about an illegal alien smuggler, Antonio Imparo Lopez (ph) not being prosecuted.

Does that refresh your recollection?

MOSCHELLA: It does.

KELLER: So, in fact, the concerns that were being raised, which ultimately led to her dismissal, were raised before we even knew about the Duke Cunningham scandal. Is that right?

MOSCHELLA: Well, I don't want to get...

KELLER: Before the public knew about it.

MOSCHELLA: Yes, those concerns existed. As I testified in the 2004-2005 time frame, when she specifically changed policy in the department, there was a precipitous drop in the number of immigration cases.

KELLER: Let me cut you off, because I've got to go with some more questions.

Did the Department of Justice ever share its concerns before asking her to resign, about the problem with gun violence prosecution and immigration enforcement prosecution?

MOSCHELLA: On the gun side, yes. I believe she had a conversation about it with Deputy Attorney General Comey. On the immigration side, I don't know specifically what was communicated. I know there was back and forth with regard to what was going on in her district.

But, that said, again, United States attorneys know what the priorities are and should be executing on those priorities.

KELLER: Let me again refresh your recollection. On April 6, 2006, Attorney General Gonzales testified before the full House Judiciary Committee, and I relayed to him some concerns I heard from border patrol agents, having spent a week with the border patrol in San Diego, about their complaints about there not being any prosecution of people who are smuggling aliens unless they commit a violent act against someone or bring 12 people with them.

And this specifically was my question to Attorney General Gonzales: "What if anything will you do to see that the U.S. attorney in San Diego prosecutes those alien smugglers, at least those who have been repeatedly arrested by border patrol agents?"

Answer, by Gonzales: "I'm aware of what you're talking about with respect to the San Diego situation, and we are looking into it. We're asking all U.S. attorneys, particularly those on our southern borders, to do more, quite frankly. We need to be doing more, and we are looking at the situation in San Diego, and we are directing that our U.S. attorneys do more, because you're right, if people are coming across the border repeatedly, particularly those who are coyotes and they're smugglers, whether criminals or felons, they ought to be prosecuted."

Now, that little dialogue between myself and the attorney general took place on national TV, on CSPAN.

MOSCHELLA: I was sitting behind him.

KELLER: You were sitting behind him. After that, did the attorney general or anyone from DOJ share with Ms. Lam the concerns that he had raised at the hearing relating to the prosecution of alien smugglers?

MOSCHELLA: I can't tell you if a transcript or something like that was sent to her. I don't know.

KELLER: You don't know? OK.

Thank you. I will yield back the balance of my time.

* * *

FEENEY: Thank you, Madame Chairman.

Mr. Moschella, thanks for being back with us.

There is one statement in your testimony that probably isn't technically correct. You say, like other high-ranking officials in the executive branch, you're referring to U.S. state attorneys, in quotes, "They may be removed for any reason or no reason at all," end of quote. That probably isn't exactly accurate, that you couldn't fire somebody because, for example, of their race or ethnicity. You couldn't fire somebody to obstruct justice. Would it be correct that you can't fire even high-level officials for any reason whatsoever?

MOSCHELLA: As we said, everyone -- there was a reason, whether folks agree or disagree with these, there was a reason.

FEENEY: I was just pointing out that, theoretically, there are certain...

MOSCHELLA: I have not done the Article 2 analysis about whether or not there is any limitation on the president. I don't believe so, but there are all reasons in this case. It wouldn't be the right thing to do in the examples that you said.

FEENEY: I think what you really intended or ought to have said there is that these are not lifetime appointments, they serve at the pleasure of the president. And within reason, he's got the ability to, just as he does to hire them, to fire them for anything that would be a legal reason.

MOSCHELLA: They're like the folks sitting behind you today. They're at-will employees. I sat there for almost 13 years.

FEENEY: Aside from the performance issues on some specific benchmarks that you mentioned in the Southern California case, you also point out that these are not just prosecutors, that they have managerial and policy responsibilities. And so that, for example, you point out that the attorney general, at U.S. attorney conferences and through memos, even the president of the United States through a video, announces his priority policies and what can you do to state attorneys who are simply ignoring the attorney general and the president of the United States when it comes to management responsibilities and policy priorities? Other than firing, do you have any other discipline mechanisms?

MOSCHELLA: No, there isn't a way that you can garnish their -- I don't believe you can garnish their wages, or something like that. I mean, they are the presidential-appointed, Senate-confirmed leader of that office, and I don't know how else we would communicate to them those priorities, other than the manner in which you state, the memos, conferences and the like.

FEENEY: I remember a great deal of criticism of the former secretary of defense and criticism of the president for not asking him to step down earlier. There was even criticism after he did step down. Recently, we've had people with the U.S. Army resign because of a situation at Walter Reed.

It seems as if the administration is damned if they do and damned if they don't when it comes to replacing people that are not putting priorities on their policies. I can tell you, I for one have been strongly critical, not just of independent state of attorneys for lack of enforcement, for illegal immigration issues and violent crime, but of the administration itself, and I'm delighted to hear that no matter how successful in one area a state attorney is, that if they're not prosecuting illegal immigration offenses, and especially firearm offenses with respect to violence, that I personally am delighted that there is a signal sent to all state attorneys that these are priorities of the administration and, personally, I want to congratulate you.

By the way, one thing that we haven't put formally in the record, Congressman Keller talked about his correspondence and Congressman Issa's, but it wasn't just Republicans complaining about lack of enforcement in Southern California. Senator Feinstein's letter on June 15, 2006 made very clear that the U.S. attorney's office for the Southern District of California may have some of the most restrictive prosecutorial guidelines nationwide for immigration cases, such that many border patrol agents end up not referring their cases.

I also want to stress the importance of vigorously prosecuting these types of cases. And she goes on to say that she's concerned that lacks prosecution can endanger the lives of border patrol agents.

So Republicans and Democrats in Congress are urging the administration to do a better job in Southern California. And as you said, you can't garnish wages. You really only have one remedy available to you, and I personally applaud you for using it. I hope everybody else along the border gets the message.

* * *

CANNON: Thank you, Madame Chair.

Ms. Lam, I'd like to let you know I watched your testimony in the Senate. I think you're very bright and very tough. I asked a number of questions to Mr. Moschella about your work, largely just to point out the differences between you. I don't think there's any

question but that there are differences. How those sort of sort themselves out on a national level is something else.

But I just wanted to let you know that those are not questions to hurt your character or your reputation, which I think you've much enhanced in this process, although I did find it interesting that you pointed out in your testimony here that you decline to speculate as to the reason you -- and the other U.S. attorneys declined to speculate as to the reasons for dismissal. And yet it seems to me that we've just heard Mr. Iglesias speculate, pardon me, ad nauseam, about what he guesses are the reasons for his dismissal.

Let me read to all of you a statement from the U.S. attorney's manual. All of this comes out of Section 1 8.010. "All congressional staff or member contacts with the USAO's, including letters, phone calls or visits of any other means, must be reported promptly to the United States attorney.

Ms. Lam, did you report the letters that you received from Representative Issa and Senator Feinstein?

LAM: Well, in fact I think those letters actually were not directed to me in particular, but actually to the attorney general. And Senator Feinstein, I may have received a copy of one. But there may have been one letter early on that came to me and I did convey that to the department.

CANNON: And Mr. McKay, did you report on your conversations with Mr. Hastings' staff?

MCKAY: Yes, I will. I received a telephone call from.

CANNON: No, no, no. Did you report that conversation with Congressman Hastings's staff? Did you report that to the U.S. attorney general's office?

MCKAY: To the main Justice? No, I did not.

CANNON: Why not? Not important?

MCKAY: No, it was important, but I called in my first assistant and criminal chief and reviewed the telephone call from Congressman Hastings's chief of staff to me following the 2004 governor's election. And we all three concluded that I had stopped the caller from crossing the line into lobbying or attempting to influence me.

CANNON: So in other words, you mean you kept him from going across the boundary which would have made it important enough to report?

MCKAY: That was our conclusion, yes.

CANNON: Mr. Iglesias, did you report the contacts from Ms. Wilson or Mr. Domenici?

IGLESIAS: No, sir.

CANNON: Why not? Were they also unimportant, like Mr. McKay has just pointed out?

IGLESIAS: They were very important. They were very important to my career. Mr. Domenici was a mentor and a friend. Heather Wilson was a friend. I campaigned with her in 1998. I felt terribly conflicted about having to report it. I eventually did.

CANNON: When?

IGLESIAS: In late February I reported it. Not to the Justice Department, but I made -- I started talking to the media about being contacted by two members of Congress.

CANNON: Oh, wait a minute. No, no. You started talking to the media and you call that reporting?

IGLESIAS: No, sir. That's what you just said.

CANNON: What did you say? You said that you reported it later. When did you report it?

IGLESIAS: I did not report it to the Justice Department.

CANNON: But you said earlier that you reported it...

IGLESIAS: To the media.

CANNON: You mean you reported it to the media, meaning you used that as your mechanism for communicating with the Department of Justice?

IGLESIAS: That's correct.

CANNON: Is that appropriate?

IGLESIAS: I think that's your job, sir.

CANNON: No, no, no. You were a U.S. attorney. Was that an appropriate action?

IGLESIAS: Not anymore.

CANNON: You're not a U.S. attorney anymore.

IGLESIAS: I'm a private citizen, sir.

CANNON: Were you a U.S. attorney when you announced that? When you went to the press?

IGLESIAS: No, sir. I said two members of Congress. I did not identify them until, in public, today.

CANNON: Were you a U.S. attorney when you said you had been contacted?

IGLESIAS: Yes, sir. I was.

CANNON: Did you in that press conference talk about upcoming or public corruption actions that would be coming soon?

IGLESIAS: My last press conference was my last day on the job as a United States attorney and there were questions about pending corruption matters. I indicated that I expected there to be a public comment sometime soon.

CANNON: Indicating that the public corruption case would be handed down?

IGLESIAS: I can't speculate as to what the local media thought about the comments.

CANNON: Well, it got reported. The local media said, "As the investigation of the kickback scheme reportedly involving construction of Albuquerque's Metro Court and several other buildings, a corruption case rumored to dwarf the Vigil and Montoya cases, Iglesias said he expected indictments to come up," quotation marks, "very soon," end of quotation marks. "But as he prepared for a news conference today in which he is expected to focus on a defense of his tenure, Iglesias said those indictments would not come under his watch."

Did you make those two comments?

* * *

CANNON: . . . did you say those things that I have quoted to you to the press.

IGLESIAS: I don't recall using the word indictment. I did say that there would be some public announcements as to the questions involving the alleged corruption matters.

* * *

KELLER: Thank you, Madame Chairwoman.

And, Ms. Lam, let me ask you a few questions. You're a Bush appointee?

LAM: Yes, sir.

KELLER: And did you serve out your full four-year term of your appointment as U.S. attorney?

LAM: Yes, sir, the first four-year term, yes.

KELLER: And you serve at the pleasure of the president, and you can be removed for any reason or no reason at all, is that correct?

LAM: Yes, sir.

KELLER: OK. Do you have any evidence whatsoever that your role in prosecuting Duke Cunningham is the reason you were asked to resign?

LAM: I was not looking for evidence; I don't have any indication one way or the other.

KELLER: I know you weren't look for it, but do you have any evidence, that you have at all, that you were asked to resign...

LAM: No, sir.

KELLER: OK.

Well, let me just say a few things, and I want to be fair to you. And your office is to be commended for successfully prosecuting that case. And you and the career prosecutors deserve a lot of credit for your work. If you never did anything the rest of your life, you will go down in the books as having a monumental achievement.

Did the Department of Justice headquarters ever discourage you from bringing the case against Congressman Cunningham?

LAM: No.

KELLER: In fact, didn't the Department of Justice assist your office in trying to attain documents from Congress in the Cunningham case?

LAM: In the Cunningham case? I'm not sure if that was true in the Cunningham case. It could be; I'm not sure.

* * *

CANNON: I thank the gentleman.

Ms. Lam, just one little detail I'd like to follow up on. Is your office, the office you've left, competent to handle the prosecution of these two other indictments that were recently filed? Do you have any concerns about the competency?

LAM: Under the current leadership, I have no concerns.

* * *

CANNON: . . . I see the time is about over, and I would certainly look forward to a second round.

LAM: I'm sure I'm breaking some rule somewhere, but I did want to add something...

CANNON: It's my time. You're not breaking a rule.

LAM: Very good. You asked whether my office could competently handle the continuing prosecutions, and I do believe they can. However, I do think it's important to emphasize that, in sensitive prosecutions, high-profile prosecutions, it's very helpful to have a confirmed United States attorney, because of the many interactions with the Department of Justice and the many sensitive issues involved.

* * *

WATT: . . . Mr. McKay, let me just clarify one thing. Did the gentleman who called you from Representative Hastings' office indicate where he was calling at the direction or on behalf of the Congressman, or did he indicate either way?

MCKAY: He did not. I believe when I responded to him, I told him that I was certain that neither he nor the Congressman was in the process of lobbying me.

* * *

SANCHEZ: . . . Now, it's my pleasure to ask my colleague, Congressman Issa, to proceed with his testimony.

ISSA: Thank you, Madam Chair and ranking member.

I'll place my formal statement in the record and, hopefully, since I have such a group of knowledgeable people on the U.S. attorney's office, I'll limit my testimony to one U.S. attorney, the U.S. attorney for the southern district of California.

As you've already heard here today, many, many members of Congress, but, to a certain extent, led by my efforts, because I was one of the members, I was the member of the Judiciary closest to the border and in the district that she oversaw, had deep concerns for a very long time about enforcement against human smugglers at the border.

We voiced that in the appropriate ways that I believe this committee needs to do it and this body, the U.S. House of Representatives needs to do it.

We are, after all, the oversight over the administration of the laws we pass and the money that we appropriate.

The president and the vice president were the only two members of the administration elected. They asked for and had confirmed a number of individuals, thousands of them, and they set policy and they ran for reelection on that policy.

And there were two hallmarks of the policy. One was that, in fact, they said they would secure the border, before 9/11 and especially after 9/11.

Secondly, President Bush has lobbied long and hard this body and particularly this committee for a comprehensive guest worker program. In the period 2004-2005-2006, I and my colleagues sent numerous different letters and this committee held hearings in which our concerns bout the enforcement in the San Diego region was voiced.

And I would ask unanimous consent that my records of those letters be included in the record.

CONYERS: Without objection, it will be included.

ISSA: Thank you, Mr. Chairman.

This was not something that was done in the dark of night. This was not done by whispers or political activities. This was done on a bipartisan basis.

And already submitted to the record is Senator Feinstein's request to get to the bottom of the questions of low enforcement, of one category, that of human traffickers, not the 180,000 who try to cross the border every year, but those who, in fact, profit from the trafficking of human beings, those who are known to leave human beings in the desert to die or in the back of trucks to die.

My investigation and activity began when a 21-time offender, Mr. Lopez, who has been repeatedly mentioned here, was not prosecuted, 20 times caught with illegals, 20 times sent home, 20 times not prosecuted. On the 21st time, it was brought to my attention by the Border Patrol.

And I would also include in the record just a little picture, this is what we call the "wall of shame" that the Border Patrol keeps along the border and they do so because these are people who they caught who were released and they were caught as traffickers, repeat offender traffickers.

It's demoralizing to the Border Patrol and it flies in the face of what this Congress has spent billions of dollars trying to do, which is make America safe and selectively prosecute the worst of the worst, and people who traffic in human beings are the worst of the worst.

Now, before September 11, we didn't have the other component, which is if we can't prosecute those who would traffic a human being, who might be from Mexico or New Zealand or Afghanistan or Iraq or Syria, then how do we separate those who simply, as

was said earlier, are nannies coming back from a weekend home from those who, in fact, would do us harm?

That's the reason that, in a very straightforward fashion, I lobbied to change the behavior of U.S. Attorney Carol Lam and I was disappointed repeatedly not to be able to do so.

I would also include for the record the statement by -- she's already left and I apologize for that -- Ms. Lofgren, who, in fact, last summer, on July 5, the day after Independence Day, in fact, particularly wanted to know why this policy was in effect and how outrageous it was that we didn't have, and I'll paraphrase it, "a zero tolerance policy at the border."

She did so while we were overseeing the border with the border chief and a day on which Mr. Sensenbrenner and I had met with the U.S. attorney and she was concerned.

Now, that was before the election. It is now after the election, but nothing has changed.

This committee has a lot of things to look at. The story of Carol Lam is, in fact, that this is an incredibly talented U.S. attorney, a gifted prosecutor, who ran an office that did a lot of big things well.

But I would ask this committee to put into perspective, not all seven people who were terminated, but Carol Lam, she had a border region. She was repeatedly asked by this committee and by our Senator to do better on the prosecutions of those who traffic in human beings.

She didn't do so and my only question for this committee is not why was she let go, but why did she last that long?

* * *

JOHNSON: Thank you, Mr. Chairman.

Congressman, you've focused a lot on this alleged smuggler, Mr. Antonio Amparo-Lopez, who you say had been arrested and deported 20 times without ever having been prosecuted.

When did those arrests and deportations occur?

ISSA: They occurred over, I believe, a seven-year period prior to the first complaint, which was in '04.

Although whether or not he committed other crimes, there's no question that he was not eligible to be where he was and he was deported 20 times before that.

JOHNSON: When you say deported, do you mean that there were actually some deportation proceedings begun by the INS?

ISSA: No. We have a procedure when you're not entitled to be in the U.S., when you're an illegal, and the gentlemen to my left can do a much better job of answering the details.

You can voluntarily, you can waive the claim of various rights.

JOHNSON: So in short, there was no prosecution of the gentleman because he was deported administratively, is that correct?

ISSA: That's correct. Twenty times he was in the U.S. illegally and was let go back to his home country.

JOHNSON: And that was administrative, not a decision that was made by the U.S. attorney's office, isn't that correct?

ISSA: It was correct that -- no, no, I take that back. No, he had been put up for prosecution. Prosecution had been refused previously and he was let go.

The Border Patrol doesn't make a decision on prosecution.

JOHNSON: And how many times had the U.S. attorney's office in the San Diego district refused to prosecute Mr. Lopez.

ISSA: I don't have that figure today. I have to be quite candid, the 21st time was when the Border Patrol had him on the top of the wall of shame and asked me if we could do something before he left the country again.

JOHNSON: So pretty much after 20 times of being administratively deported, a complaint was made that the U.S. attorney's office should commence criminal prosecution against this gentleman.

ISSA: That's correct.

JOHNSON: All right, thank you.

SANCHEZ: Mr. Keller is recognized.

KELLER: Thank you.

Mr. Issa, you were here today. I want to start with the alleged Duke Cunningham connection.

You saw that I asked Will Moschella from DOJ a question and he testified under oath that Ms. Lam's dismissal had absolutely nothing to do with her pursuing Duke Cunningham.

When I asked Ms. Lam, under oath, if she had any evidence whatsoever that her dismissal was really in her prosecution of Duke Cunningham, she said, under oath, "No."

I just want to point out a timeline, based on letters that you sent that totally confirms that. The Duke Cunningham scandal was broken by your local paper, "San Diego Union Tribune," on June 12, 2005, and yet we have a series of letters from you 14 months before that date, calling the attention of the problem to Ms. Lam that she was not prosecuting certain alien smugglers who had been arrested repeatedly.

In fact, your first letter is February 2, 2004. Is that correct?

ISSA: That's correct.

KELLER: And it makes common sense, but you obviously had no idea on February 2, 2004 that your colleague, who had just been reelected over and over again, 14 months from now, was going to be involved in some big scandal. Is that correct?

ISSA: I'm quite certain none of us here or on the dais had any idea.

KELLER: And you aren't the only one to raise those concerns. There were 19 Republicans that signed a letter, but there were also a couple of Democrats who raised the same concerns you did.

Would you talk about that for a little bit?

ISSA: Senator Feinstein has been an excellent Senator for California and she's shown an interest in an immigration reform policy, but at the same time, an assurance that we should make our borders secure, and she had written a letter that almost mimicked the exact same concerns I had and perhaps even generated by the other part of the enforcement process, the Border Patrol, being frustrated.

KELLER: Let me just say, in closing, that I thought Ms. Lam today was very professional and handled herself well. She deserves a lot of credit for the Duke Cunningham prosecution and will go down in the books for that outstanding prosecution.

But you, too, deserve a lot of credit, Darrell. I went to San Diego myself and spent a week in January of '06, riding around with Border Patrol agents, and they reported to me the same frustrations that you had first been calling to the attention of everyone for two years, that they had arrested the same exact people 20 different times, that these people were bringing over about 10 illegal aliens per shot at 1,500 bucks a pop, making 15 grand a week, bring them in 10 times a year.

Next thing you know, that's 150 grand and they were not being prosecuted at all and they were so frustrated because they were risking their lives to arrest folks and they may be shot and then they would turn them over and not be prosecuted.

So I just want to commend you. You were ahead of the curve on that and I can just say, from having been there firsthand, you knew what you were talking about.

ISSA: Thank you, Mr. Keller. And I think you point out the one great flaw that we tried to get changed in the southern district and that was that the U.S. attorney's policy of less than dozen, no prosecution, had become known.

So it created a guaranteed get-out-of-jail free or never go to jail and that, of course, enhanced a particular type of smuggling.

I want to say one other thing, which is that I happen to believe that Carol Lam is a terrific prosecutor and when it came to big cases, she did extremely well.

It really is a question of balance. Our office felt that we needed to have a little more balance on human smuggling and we endeavored to do so and we really regret that we didn't get that during the period of time in which it might have helped in federal policy, including a guest worker program and a national reform which this president lobbied for.

KELLER: I thank you for your leadership.

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SANCHEZ: . . . Mr. Hutchinson, would you please proceed with your testimony?

HUTCHINSON: Thank you, Madam Chairman, Ranking Member Cannon, Mr. Chairman of the full committee, Chairman **Conyers**, colleagues, former colleagues, I should say.

It's good to be back in the home of the Judiciary Committee, where I served 1997 to 2001. I have enormous respect for this committee, the work of the members of this committee and for its history, as well.

I am here today testifying as a former United States attorney and I have served in that capacity in the '80s under former President Ronald Reagan, but I've also worked with the United States attorneys both as administrator of the Drug Enforcement Administration, including the current batch of U.S. attorneys, as well as in homeland security, looking at drug enforcement, working with them on immigration enforcement and customs enforcement, as well.

And the purpose of my testimony is, obviously, to answer any questions, but also to talk about the importance of the U.S. attorney and serving at the pleasure of the president in terms of carrying out the president's mission and I certainly support that totally.

The U.S. attorneys who have previously testified, I worked with most of those while I was head of the DEA and at Homeland Security and I have the greatest respect for them.

But I also understand the issue here today is not necessarily the performance as simply the question that they serve at the pleasure of the president of the United States and whenever you serve in that discretionary role, the president can ask for a U.S. attorney's resignation, as has happened many times during the course of history.

But I would just make a couple points before I turn the microphone back.

First, except for the U.S. attorney, except for the U.S. attorney, the federal prosecutors are career attorneys who are not necessarily committed to the priorities of the administration. And without the full support of the U.S. attorney, the president, through the attorney general, would have little impact on the strategic priorities of the federal justice system.

Any new administration could choose from a laundry list of priorities that range from environmental enforcement to federal gun laws to fighting terrorism and the priorities change with the necessity of the time and with the goals of the administration.

With limited resources, the U.S. attorney sets the prosecutorial guidelines, among a long list of federal agencies, and they invariably change with different presidents, but they cannot change without the commitment of the presidentially-appointed United States attorney.

So it's essentially that the U.S. attorneys serve at the pleasure of the president and any U.S. attorney enjoys being able to say, as a mark of his or her authority, "I serve at the pleasure of the president of the United States." And as a necessary part of that power and authority goes with the logical inference that the president can request that individual's resignation.

And it would be unacceptable for a U.S. attorney to refuse to enforce federal immigration laws, drug laws, or to seek the death penalty merely because of disagreement with the administration's views.

If you disagree with that statement, then it would appear to me that the president prerogative should be preserved and protected.

With regard to the issue of the appointment of interim United States attorneys, it is my view that the attorney general should have the authority to name interim U.S. attorneys until the presidentially- appointed successor is named, confirmed and takes office.

And while this is not perfect, it is consistent with the objective of the president having the ability to influence federal enforcement priorities through the attorney general and the United States attorneys.

The role of the U.S. attorney has always been critical to effective enforcement of our federal criminal laws, but it has been substantially increased since the terrorist attacks of 9/11.

The U.S. attorney not only sets enforcement priorities within the district, but also serves as a unique coordinator of the federal law enforcement.

In fighting terrorism, it is essential that the U.S. attorney be in synch with the attorney general and properly coordinate with the Department of Justice.

* * *

SANCHEZ: Now, is it Terwilliger?

TERWILLIGER: Yes, ma'am, that's exactly right.

SANCHEZ: Excellent, I'm a quick study.

You are recognized for your testimony.

TERWILLIGER: Thank you very much, Madam Chair and Ranking Member Cannon and Mr. **Conyers**.

Thank you for inviting me to appear today, despite the lateness of the hour.

The United States attorney in each district plays a vital role in promoting the safety and wellbeing of all Americans. The process for filling United States attorney positions, whether initially or through a vacancy in an administration, therefore, deserves the thoughtful and careful consideration that they are usually accorded.

I had the privilege of serving as an assistant United States attorney for eight years, as a United States attorney for five years, and to supervise the nation's 93 United States attorneys as deputy attorney general for a period of over two years.

I was involved in decisions to hire United States attorneys, to review their performance and to remove them as necessary.

As a general proposition, in dealing with United States attorneys today, I find that they are their assistants are among the most honorable and dedicated of professionals that one can encounter.

I am here before this committee today because I believe strongly that protecting the integrity of the office of the United States attorney is essential to our system of justice.

It's also my privilege to know personally much of today's leadership of the Justice Department, including Attorney General Gonzales and Deputy Attorney General McNulty.

In addition, I am fortunate to enjoy the friendship of many of their staff members, as well as many long-serving career Department of Justice lawyers, men and women for whom I have sincere personal and professional admiration.

I have every reason to believe that the department's leaders share my views about the importance of maintaining the integrity of and respect for the office of United States attorney.

In my experience, particularly as deputy attorney general, there are advisors variety of reasons why a change in leadership at a United States attorney's office may be appropriate or even necessary. There is no entitlement to the job.

During my own tenure as United States attorney, I believe it would be fair to say that there were those who praised my performance and there were those who found it wonting.

I received my fair share of criticism for both policy and operational decisions. Such criticism comes with the territory. If one does not want to suffer such criticism, one should not assume the office.

I considered the proper execution of my duties as United States attorney to require both a recognition that I serve as a subordinate of the attorney general and the leadership of the Justice Department and an awareness of my responsibility for forwarding within my district the goals and objectives of each administration in which I served.

When I hear Mr. Wampler talk about the independence of the United States attorney's offices, I assume he means the discretion and the respect for the discretion in deciding how to prosecute cases that has traditionally been afforded United States attorneys and their assistants.

But I don't think independence is the right word and I would ask -- independence of whom or of what?

It is decidedly not within the United States attorney's responsibility for him or her to execute his duties in a manner that is politically driven.

Where I or the attorney general believed that a United States attorney's performance in regard to their core responsibilities was wonting, we acted on that belief.

Because the United States attorney serves as a subordinate to the president, I think it is most appropriate that the authority to appoint interim United States attorneys be delegated to the attorney general, as it is under current law.

There responsibility for the supervision and management of United States attorneys' offices has been vested by Congress in the attorney general and the Department of Justice.

It seems to me, as both a practical and a legal matter, therefore, that such responsibility should carry with it the authority to appoint the persons necessary to carry it out.

I certainly recognize that the advice and consent process is critical to the balance of power between the Congress and the executive branch and I would hope that both branches of government would act in a responsible manner to see that the nomination and appointment process necessary to fill a vacancy in the United States attorney's office would move with dispatch.

In conclusion, I regret the circumstances greatly which have led to this hearing. I would respectfully urge all parties to recall simply that United States attorneys, as has been mentioned so many times today, do serve at the pleasure of the president and may be removed for any reason.

I would most respectfully urge Congress and, respectfully, this committee to accord deference to that fundamental aspect of the office and urge restraint in exploring any particular or individual decision regarding a particular office.

* * *

CANNON: Mr. Terwilliger, let me ask you a question about our prior panel. I know you heard that.

Using quotes here, based on the press conference that Mr. Iglesias called, the paper referred to that as "as he prepared to leave his office."

So he was still in office and he said, "We put corruption cases back on the front burner. As for the investigation of a kickback scheme reportedly involving construction of Albuquerque's metro court and several other buildings, a corruption case rumored to dwarf the Vigil and Montoya cases."

"Iglesias said he expected indictments to come very soon. But as he prepared for a news conference today, in which he expected to focus on a defense of his tenure," putting his tenure above, I think, his -- "Iglesias said those indictments would not come under his watch. 'I wish I would have that honor,' he said, 'but it will have to wait for my successor.'"

In your view, is that an inappropriate thing for a retiring U.S. attorney to do?

TERWILLIGER: With respect, Mr. Cannon, I don't want to judge based on newspaper reports alone, which I'm sure have been accurately reported, what a particular individual has done, particularly in a matter as serious as that.

I will say this, though, that I understand perfectly, having been a United States attorney, how difficult it is to involuntarily give up your job and I understand that there may be some residual bitterness about that.

But whatever the circumstances may be, whether it's viewed as a good reason or a bad reason, it cannot possibly justify someone -- and I'm not saying this is what Mr. Iglesias did, because I don't know, but it cannot justify the very, very serious transgression not just of department policy, but of the law, of reporting about an indictment that hasn't been returned, that's prospective.

Members of the political establishment are vexed constantly by leaks out of the executive branch, whether they're politically- motivated or somebody trying to feather their nest, talking about what's happening in investigations and potential charges and so forth.

We investigated leaks when I was at the Justice Department. We took complaints from members at the department about leaks, very vociferous complaints, as I'm sure some members of this committee that were around then remember, and it continues up to the present day.

It is a very serious transgression when it occurs.

* * *

END

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U.S. SENATE JUDICIARY COMMITTEE HOLDS A HEARING ON U.S. ATTORNEY FIRINGS

MARCH 29, 2007

SPEAKERS:

SEN. PATRICK J. LEAHY, D-VT. CHAIRMAN

SEN. EDWARD M. KENNEDY, D-MASS.

SEN. JOSEPH R. BIDEN JR., D-DEL.

SEN. HERB KOHL, D-WIS.

SEN. DIANNE FEINSTEIN, D-CALIF.

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SEN. ARLEN SPECTER, R-PA. RANKING MEMBER

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SEN. LINDSEY GRAHAM, R-S.C.

SEN. JOHN CORNYN, R-TEXAS

SEN. SAM BROWNBACK, R-KAN.

SEN. TOM COBURN, R-OKLA.

WITNESSES:

KYLE SAMPSON,

FORMER CHIEF OF STAFF

TO ATTORNEY GENERAL GONZALES

BRADFORD BERENSON,

ATTORNEY FOR KYLE SAMPSON

[*]

* * *

SAMPSON: . . . As you know, I've come here voluntarily to answer your questions.

I've been a public servant for the past eight years. During the past several years, I've served Attorney General Gonzales in a staff position culminating in my service to him as his chief of staff.

In that role, I was responsible for organizing and managing the process by which certain U.S. attorneys were asked to resign. From that vantage point, I believe I was well-positioned to observe and understand what happened in this matter.

I can't pretend to know or remember every fact that may be of relevance, but I am pleased to share with the committee today those that I do know and those that I do remember.

After the 2004 election, the White House inquired about the prospect of replacing all 93 U.S. attorneys with new appointees. I believed, as did others, that less sweeping changes were more appropriate. The Department of Justice then began to look at replacing a limited number of U.S. attorneys in districts where, for a variety of reasons, the department thought change would be beneficial.

Reasonable and honest people can differ, and, in fact, did in various stages in the process, on whether particular individuals should be asked to resign. But the decision to ask them to do so was the result of an internal process that aggregated the considered collective judgment of a number of senior Justice Department officials.

I would be the first to concede that this process was not scientific, nor was it extensively documented. That is the nature of presidential personnel decisions.

But neither was the process random or arbitrary. Instead, it was a consensus-based process based on input from Justice Department officials who were in the best position to develop informed decisions about U.S. attorney performance.

SAMPSON: When I speak about U.S. attorney performance it is critical to understand the performance for a Senate-confirmed presidential appointee is very different than -- it's a very different thing than performance for a civil servant or a private sector employee.

Presidential appointees are judged not only on their professional skills, but also their management abilities, their relationships with law enforcement and other governmental leaders, and their support for the priorities of the president and the attorney general.

A United States attorney may be a highly skilled lawyer and a wonderful person, as I believe all of the individuals who were asked to resign are, but if he or she is judged to be lacking in any of these respects, then he or she may be considered for replacement.

The distinction between political- and performance-related reasons for removing a U.S. attorney is, in my view, largely artificial. A U.S. attorney who is unsuccessful from a political perspective, either because he or she has alienated the leadership of the department in Washington or cannot work constructively with law enforcement or other governmental constituencies in the district, is unsuccessful.

With these standards for evaluating U.S. attorneys in mind, I coordinated the process of identifying U.S. attorneys that might be considered for replacement. I received input from a number of officials at the Department of Justice who were in a position to form considered judgments about the U.S. attorneys.

These included not only senior political appointees, such as the deputy attorney general, but also senior career lawyers, such as David Margolis, a man who served justice for more than 40 years under presidents of both parties and who probably knows more about United States attorneys than any person alive.

I developed and maintained a list that reflected the aggregation of views of these department officials over a period of almost two years. I provided that information to the White House when requested and reviewed it with and circulated it to others at the Department of Justice for comment.

By and large, the process operated by consensus. When any official I consulted felt that an individual name should be removed from the list, it generally was.

Although consideration of possible changes had begun in early 2005, the process of actually finalizing a list of U.S. attorneys who might be asked to resign and acting on that list did not begin until last fall.

In the end, eight total U.S. attorneys were selected for replacement: Bud Cummins in mid-2006 and the other seven in a group in early December of 2006.

With the exception of Bud Cummins, none of the U.S. attorneys was asked to resign in favor of a particular individual who had already been identified to take the vacant spot. Nor, to my knowledge, was any U.S. attorney asked to resign for an improper

reason. U.S. attorneys serve at the pleasure of the president and may be asked to resign for almost any reason with no public or private explanation.

The limited category of improper reasons includes an effort to interfere with or influence the investigation or prosecution of a particular case for political or partisan advantage. To my knowledge, nothing of the sort occurred here.

Instead, based on everything I've seen and heard, I believe that each replaced U.S. attorney was selected for legitimate reasons falling well within the president's broad discretion and relating to his or her performance in office, at least as performance is properly understood in the context of Senate-confirmed political appointees.

SAMPSON: Nonetheless, when members of Congress began to raise questions about these removals, I believe the department's response was badly mishandled. It was mishandled through an unfortunate combination of poor judgments, poor word choices and poor communication in preparation for the department's testimony before Congress.

For my part in allowing this to happen, I want to apologize to my former DOJ colleagues, especially the U.S. attorneys who were asked to resign.

What started as a good-faith attempt to carry out the department's management responsibilities and exercise the president's appointment authority has unfortunately resulted in confusion, misunderstanding and embarrassment.

This should not have happened.

The U.S. attorneys who were replaced are good people. Each served our country honorably, and I was privileged to serve at the Justice Department with them.

As the attorney general's chief of staff, I could have and should have helped to prevent this. In failing to do so, I let the attorney general and the department down.

For that reason, I offered the attorney general my resignation. I was not asked to resign. I simply felt honor-bound to accept my share of blame for this problem and to hold myself accountable.

Contrary to some suggestions I've seen in the press, I was not motivated to resign by any belief on my part that I withheld information from department witnesses or intentionally misled either those witnesses or the Congress.

The mistakes I made here were made honestly and in good faith. I failed to organize a more effective response to questions about the replacement process. But I never sought to conceal or withhold any material fact about this matter from anyone. I always carried out my responsibilities in an open and collaborative manner.

Others in the department knew what I knew about the origins and timing of this enterprise. None of us spoke up on those subjects during the process of preparing Mr. McNulty and Mr. Moschella to testify, not because there was some effort to hide this history, but because the focus of our preparation sessions was on other subjects; principally, why each of the U.S. attorneys had been replaced, whether there has been improper case-related motivations for those replacements and whether the administration planned to use the attorney general's interim appointment authority to evade the Senate confirmation process.

SAMPSON: As I see it, the truth of this affair is this: The decisions to seek the resignation of a handful of U.S. attorneys were properly made, but poorly explained. This is a benign, rather than sinister, story. And I know that some may be disposed not to accept it, but it's the truth as I observed it and experienced it.

And, Mr. Chairman, if I may just add, eight years ago I moved my wife and children here to Washington because I was interested in public service. And I came to work here for this committee first, for then-Chairman Hatch. And it was an honor for me to do that. And really, through serendipity I've had opportunities for other public service in the government.

And I believe in public service, and in all of my work in public service I've made every effort to operate openly and forthrightly and with integrity.

LEAHY: Mr. Sampson, I don't mean to cut you off, and we have given you extra time, as you know.

We have now what I believe is a final vote. Then I am going to turn the gavel over to Senator Kohl, while I go and vote. I will come back.

If you wish to add to the part that is cut out, certainly I'll give you the time. Thank you.

SAMPSON: Thank you, Mr. Chairman.

KOHL: Mr. Sampson, finish your statement.

SAMPSON: Mr. Chairman -- thank you, Mr. Chairman.

All I had to say -- all I wanted to conclude in saying is that I've come up here to testify voluntarily today because I believe in public service, and because I believe in the goodness of our political process.

I appreciated Senator Schumer saying this was not a gotcha. And I came here today because this episode has been personally devastating to me and my family.

SAMPSON: And it's my hope that I can come up here today, share with you the information that this committee and that the Congress wants and, frankly, put this behind me and my family.

And with that, I'm happy to answer any questions any senator may have.

* * *

LEAHY: Now, since the 2004 election, did you speak with the president about replacing U.S. attorneys?

SAMPSON: I don't ever remember speaking to the president after the 2004 election.

LEAHY: So your answer would be no?

SAMPSON: Yes, no. I haven't spoken with the president since I worked in the White House.

LEAHY: Did you attend any meeting, then, with the president, since the 2004 election, where the replacement of U.S. attorneys was discussed?

SAMPSON: I did not.

LEAHY: Are you aware of any presidential decision document since the 2004 election in which President Bush decided to go ahead with the replacement plans for U.S. attorneys?

SAMPSON: I'm not aware of any.

LEAHY: Now, I'm going to give you a copy, or will provide you with a copy of a document. I'm actually going to go through a number of documents. And they're all -- they're OAG and then a whole series of zeros, and then a number. Just to make it easier, I'll just refer to them as OAG and the file number.

This is OAG-45. It's a copy of a December 4, 2006, e-mail exchange between you and Deputy White House Counsel William Kelley, copied to White House Counsel Harriet Miers. Is that correct?

SAMPSON: Yes, sir.

LEAHY: Now, Mr. Kelley's e-mail states, "We are go for the U.S. attorney plan. White House leg, political and communications signed off, acknowledged we have to be committed to follow through once the pressure comes." Is that correct?

SAMPSON: Yes.

LEAHY: Who headed the White House political operation at the time?

SAMPSON: Sara Taylor was the director of the Office of Political Affairs.

LEAHY: And was Ms. Taylor the overall head of the political operation?

SAMPSON: I understood that Ms. Taylor was the director of the Office of Political Affairs, and she -- that office, reported to Karl Rove, that ultimately reported to the president.

LEAHY: Who headed the White House communications operation at the time?

SAMPSON: I don't remember. I'm not sure if it was Dana Perino or -- I don't know, Senator.

LEAHY: Who headed the White House legal operation at the time?

SAMPSON: I think that the e-mail refers to White House leg, which is short for legislative affairs, and that was Candy Wolf, I believe.

LEAHY: Now, let me give you a copy of a document that's numbered OAG-40-43.

You notice the first page is a copy of a November 15, 2006, e- mail you sent to White House Counsel Harriet Miers. Her deputy, William Kelley, has copied the deputy attorney general, Paul McNulty. Is that what you were just handed?

SAMPSON: Yes.

LEAHY: The subject of the e-mail is, "USA Replacement Plan." The "USA" is referring to U.S. attorneys, is that right?

SAMPSON: Yes.

LEAHY: Attached there was a plan for the removal of a set of U.S. attorneys, including Paul Charlton, Carol Lam, Margaret Chiara, Dan Bogden, John McKay and David Iglesias, is that correct?

SAMPSON: Yes.

LEAHY: Now, in this e-mail, dated November 15, 2006, shortly after last fall's elections, you told Ms. Miers and Mr. Kelley that you had not informed anyone in Karl's shop which you considered a, quote, "pre-execution necessity," close quote. By "Karl," are you referring to Karl Rove?

SAMPSON: Yes.

LEAHY: In the e-mail, you asked Ms. Miers and Mr. Kelley to circulate the plan to "Karl's shop," is that right? Is that what you asked?

SAMPSON: Yes.

LEAHY: Do you know whether that was done?

SAMPSON: I believe that the previous e-mail that you provided me a copy of, OAG-45, indicates from Mr. Kelley that White House leg, political and communications have signed off. And the reference in the e-mail I drafted that's OAG-40 to Karl's shop was to the Office of Political Affairs at the White House.

LEAHY: But do you know whether then it was circulated to Karl's shop? I mean, your answer is it was, is that correct?

SAMPSON: I believe it was, yes.

LEAHY: OK.

And in the e-mail you write, "We'll stand by for a green light from you," is that correct?

SAMPSON: Yes, sir.

LEAHY: Now, you state in your e-mail that, quote, "You've consulted with the DAG" -- D-A-G -- close quote. That's the deputy attorney general, Mr. McNulty, correct?

SAMPSON: Yes.

LEAHY: Had you, by the time of your November 15 e-mail, discussed the replacement plan with the attorney general?

SAMPSON: I believe so.

LEAHY: You believe you had?

SAMPSON: Yes.

LEAHY: OK, let me give you a copy of a document number DAG-14. Now, this document contains Ms. Miers' response on November 15 to your e-mail that day, and your reply to her. You asked, quote, "Who will determine whether this requires the president's attention?" is that correct?

SAMPSON: Yes.

LEAHY: Did you get an answer to that question?

SAMPSON: No.

LEAHY: Who decided?

SAMPSON: I don't know.

LEAHY: Did the president reveal this plan for the removal and replacement of U.S. attorneys?

SAMPSON: I personally don't know.

LEAHY: You don't know either way? You've never heard either way.

SAMPSON: I don't know. That's correct.

LEAHY: And do you know today either way?

SAMPSON: I don't know.

LEAHY: Between this November 15 e-mail exchange and the December 4 e-mail from Mr. Kelley which informed you of White House leg and political and communications had signed off on the plan, did you have further communications with the White House regarding the plan to regard and replace several U.S. attorneys?

SAMPSON: I don't remember specifically. There was a Thanksgiving holiday in between there, and I just don't remember.

LEAHY: So you don't know whether you did or not?

SAMPSON: I don't remember if I did or not.

LEAHY: Let me give you a copy of the document numbered OAG-231.

LEAHY: That's a December 7, 2006, e-mail exchange between you and Mr. Kelley of the White House Counsel's Office, copying Scott Jennings, special assistant to the president, deputy director of political affairs, is that correct?

SAMPSON: I'm sorry, Senator. I was looking at the document.

LEAHY: Is this a copy of a December 7, 2006, e-mail exchange between you, Mr. Kelley of the White House Counsel's Office, copying Scott Jennings, special assistant to the president, deputy director of political affairs?

SAMPSON: Yes.

LEAHY: You received this e-mail from Mr. Kelley on the day seven of the U.S. attorneys were told to resign, asking you to talk to Scott Jennings about the particulars of Kevin Ryan's situation. He's one of the U.S. attorneys told that day to resign.

And did Mr. Kelley write, quote, "Karl would like to know some particulars as he fields these calls," close quote?

SAMPSON: Senator, I didn't remember this until looking at this document right now. But what I remember is that after Mr. Ryan was called and asked to resign, that some -- that the White House Office of Political Affairs had received some calls; that Mr. Ryan had called in some political chits, as it says there.

LEAHY: But my question was, does it say, "Karl would like to know some particulars as he fields these calls"? Is that in the e- mail?

SAMPSON: It is.

LEAHY: And that's Karl Rove?

SAMPSON: I assume so.

LEAHY: Do you have many other Karls spelled with "K"?

(CROSSTALK)

SAMPSON: I'm sorry, Mr. Chairman. I think it must have been.

LEAHY: OK.

And you responded by copying Mr. Jennings, asked him to call you, and then sent another e-mail to Kelley yourself, asking Kelley to forward something to Mr. Jennings.

What were you asking Mr. Kelley to forward to Mr. Rove's deputy?

SAMPSON: I don't remember, Mr. Chairman. It looks like I replied to both Mr. Kelley and to Mr. Jennings, and then again forwarded it to Mr. Kelley and asked him to forward it to Mr. Jennings. I don't remember why.

LEAHY: Well, I wish you did remember. It'd be awfully helpful.

My time is up. We're going to come back to this. And I would hope that you would search your memory as we go along.

Senator Specter?

SPECTER: Thank you, Mr. Chairman.

Mr. Sampson, first of all, thank you for coming in. It is not easy to be in your position. And to appear voluntarily is commendable. So thank you for doing that.

In the time I have on the first round, I want to take up two questions with you.

One is, was any United States attorney asked to resign because either that United States attorney was pursuing hot leads on corruption which somebody wanted stopped or whether any U.S. attorney was asked to resign because the U.S. attorney refused to prosecute cases which should not have been prosecuted?

And then I want to get to the question as to whether Attorney General Gonzales has been candid in his responses.

Starting off with U.S. Attorney Carol Lam, it has been reported that on the day that Ms. Lam was the subject of an e-mail from you raising an issue about asking her to resign, that she broadened the investigation to include the chairman of the House Appropriations Committee, and that the day before she had initiated search-and- seizure warrants.

SPECTER: And my question is: Was there any connection between those two events, the issuance of the search-and-seizure warrants, the broadening of the investigation to include a member of the House, chairman of the Appropriations Committee, and the e-mail which you sent saying, "We ought to be looking to replace Ms. Lam"?

SAMPSON: There was never any connection in my mind between asking Carol Lam to resign and the public corruption case that her office was working on.

SPECTER: Is it just a...

SAMPSON: I don't remember...

SPECTER: ... just a coincidence that you sent that e-mail saying, quote, "The real problem we now have with Carol Lam, that leads me to conclude that we should have someone ready to be nominated on 11/18, the day her four-year term expires"?

Now, admittedly, that's some time in the future. But if neither of those incidents was connected, what was the problem with Ms. Lam to ask her to resign?

SAMPSON: The real problem at that time was her office's prosecution of immigration cases. In the months...

SPECTER: And that's the sole reason she was asked to resign?

SAMPSON: No, sir. But at that time of that e-mail, that's what was in my mind when I said: "The real problem with Carol Lam that leads me to believe that she should be asked to resign when her four- year term expires."

SPECTER: Let me move on. Let me...

SAMPSON: In my mind, that was immigration enforcement.

SPECTER: Let me move on, then, to a situation with the U.S. attorney in New Mexico.

Your e-mails show that the name of David Iglesias was not added until November 7th, 2006, which -- he had not been on a list of anyone to be asked to resign.

SPECTER: But it was added on that day, which was the day of the election and after the calls had been placed to Mr. Iglesias.

Was there any consideration at all of asking Mr. Iglesias to resign because he refused to carry out a prosecution which you thought should have been carried out?

SAMPSON: Not to my knowledge.

In mid-October, as this process was being finalized, I went back and looked at a list -- at the list of U.S. attorneys whose four-year terms had expired to see if anyone else should be added to the list. And I did that in consultation with others at the Department of Justice, including Mike Elston, who is the deputy attorney general's chief of staff, the deputy attorney general and others.

And there were four U.S. attorneys who were added to the list sometime there in mid-October, and appeared on the list on November 7, or -- or during that period of time. And they were close cases. They were U.S. attorneys who, for a variety of reasons...

SPECTER: Mr. Sampson, I have your answer. And I need to move on because of the limitation of time.

SAMPSON: Very good.

SPECTER: Are you prepared to swear under oath that no U.S. attorney was asked to resign because the U.S. attorney was pursuing an investigation which you thought was too hot, or was failing to undertake a prosecution which you thought should have been made?

SAMPSON: To my knowledge, that was the case.

SPECTER: OK.

Well, let me turn to the issue as to the candor or truthfulness of the attorney general.

In his press conference on March the 13th, Attorney General Gonzales said that he was not involved in any discussions relating to the issue. But the e-mails show that on November 27th, there was a meeting which Attorney General Gonzales attended which took up the issues or, apparently, discussions on the U.S. attorney appointments.

Was your e-mail correct that Attorney General Gonzales was present at a meeting on November 21st, at which there were discussions about U.S. attorneys?

SAMPSON: I don't think the attorney general's statement that he was not involved in any discussions about U.S. attorney removals is accurate. And...

SPECTER: Is what? Is accurate?

SAMPSON: I don't think it's accurate. I think he's recently clarified it.

But I remember discussing with him this process of asking certain U.S. attorneys to resign. And I believe that he was present at the meeting on November 27th.

SPECTER: So he was involved in discussions, contrary to the statement he made at his news conference on March 13th?

SAMPSON: I believe yes, sir.

SPECTER: In the limited time I have remaining, I want to come to one final issue from this round. And that is the question of whether there was a calculation by the Department of Justice to use this new provision in the Patriot Act to avoid Senate confirmation or Senate scrutiny on replacement U.S. attorneys.

Without going into it now, because I have no time left but want to finish the question, isn't it true, as these e-mails suggest, that there was a calculation on your part and the part of others in the Department of Justice to utilize this new provision to avoid confirmation by the Senate and to avoid scrutiny by the Senate and to avoid having senators participate in the selection of replacement U.S. attorneys?

SAMPSON: Senator, that was a bad idea by staff that was not adopted by the principals.

I did advocate that at different times. But it was never adopted by Judge Gonzales or by Ms. Miers or any of the...

SPECTER: But it was adopted. It was your idea -- at least your idea, according to the e-mails.

SAMPSON: I recommended that at one point.

SPECTER: But you're saying that others didn't adopt it?

SAMPSON: I was the chief of staff, and I made recommendations of different options that the decision-makers might pursue. And I did recommend that at one point. But it was never adopted by the attorney general.

SPECTER: Was it ever rejected by the attorney general or Ms. Miers?

SAMPSON: It was rejected by the attorney general. He thought it was a bad idea and he was right.

SPECTER: Do you have an e-mail or any confirmation of that rejection?

SAMPSON: I didn't communicate with the attorney general by e- mail, so I don't.

SPECTER: Well, I'll pick this up in the next round. I think there's a lot more to it from the e-mails, which I'll get into in detail.

* * *

SCHUMER: . . . I asked you about the documents. You said you're not sure he's read a document. He received documents that mentioned this.

SAMPSON: I don't know that he did. I don't think the attorney general saw every iteration of the list.

SCHUMER: Let me ask you...

SAMPSON: And I'm not sure that he saw the replacement plan that I drafted.

SAMPSON: I don't remember if he did or not.

SCHUMER: The November 27th meeting that Senator Specter alluded to; he was there, right?

SAMPSON: Yes, I think so.

SCHUMER: OK.

And the purpose of that, according to the e-mails, was to discuss U.S. attorneys with you and other senior Justice officials, right?

SAMPSON: Yes.

SCHUMER: Was a document handed out at that meeting? Was there any paper?

SAMPSON: I don't think so. I had circulated the replacement plan to the deputy attorney general and others who were discussing this matter. And -- and we may have had it at that meeting, but I don't remember.

SCHUMER: Was there a discussion at the meeting?

SAMPSON: Yes.

SCHUMER: Did the attorney general participate in the discussion?

SAMPSON: I think so. I don't -- I don't remember the meeting clearly, Senator.

SCHUMER: OK. But your recollection is, he did speak at the meeting?

SAMPSON: Yes.

* * *

SCHUMER: . . . And when did he sign off on the final list?

SAMPSON: I don't remember specifically. It was during this period in time when we had an ongoing discussion.

I remember that he asked me to make sure that I was consulting with the deputy attorney general, and that he agreed with the list of U.S. attorneys who should -- who we might consider asking to resign. And he also asked that I be sure to coordinate with the White House.

SCHUMER: Right.

Did the attorney general add or remove any names from the list at any time?

SAMPSON: I don't remember him ever doing that.

SCHUMER: OK.

Did you discuss with the attorney general the reasons or method for selecting individuals to put on that list?

SAMPSON: I don't remember specifically doing that.

You know, we had talked over the course of a couple of years about the strengths and weaknesses of U.S. attorneys, and he was more interested in making sure that senior department leaders agreed that that was the right list.

SCHUMER: But at some point in time you mentioned the names to him, right?

SAMPSON: Yes, I think so.

* * *

CORNYN: Mr. Sampson, for me, these next two questions are the most important part of this inquiry. I'm talking about for me personally.

In your prepared statement you explain that to your knowledge no United States attorney was asked to resign for an improper reason. You say that the limited category of improper reasons include an effort to interfere or influence the investigation or prosecution of a particular case for political or partisan advantage.

At any time were you approached by anyone with the administration with a complaint about a U.S. attorney that you would consider taken alone to be an improper reason to remove the individual?

SAMPSON: No, Senator, I don't remember anything like that.

CORNYN: I believe Director Mueller of the FBI testified a couple of days ago and was asked whether any of this -- these removals -- to his knowledge had provoked a response from an FBI agent to the effect that it had interfered with an ongoing investigation or prosecution, and his testimony was consistent with yours.

Am I correct that the Public Integrity Section of the Criminal Division oversees the department's efforts to combat public corruption through the prosecution of elected and appointed public officials at all levels of government?

SAMPSON: Yes.

CORNYN: At any point during the process that you were evaluating U.S. attorneys, did you have any direct contact with attorneys or other employees of the Public Integrity Section or supervisors in the Criminal Division in relation to the work of a particular United States attorney or a particular district?

SAMPSON: I don't remember that.

I spoke with Alice Fisher from time to time about various issues, but I don't remember speaking with her ever about the idea of identifying a set of United States attorneys who might be asked to resign. And I certainly didn't speak with her with the idea of identifying U.S. attorneys who might be asked to resign so as to influence a case for political reasons.

CORNYN: Mr. Sampson, the United States attorneys, are they the ones -- the ones that are appointed by the president, confirmed by the Senate, are those the ones who typically handle the day-to-day investigation and prosecution of public corruption cases or other serious crimes?

SAMPSON: It's my understanding that those sorts of cases are usually handled by career investigators and prosecutors.

CORNYN: Is there any -- is there any reason, to your knowledge, to believe that the -- that the replacement of a United States attorney with another individual appointed by the president, and confirmed by the United States Senate, would by -- in and of itself, tend to interfere or impede with any investigation into any criminal -- serious criminal matter that a U.S. attorney's office was investigating or prosecuting?

SAMPSON: Not to my knowledge.

My observation was that U.S. attorneys -- political appointees -- came and went. We had -- I had participated in the selection of all of the U.S. attorneys from the beginning of the administration and about half of them had already left office. There was much turnover in the U.S. attorney ranks.

And it had -- it never was my belief that a U.S. attorney changeover would have much influence at all on a particular case.

CORNYN: Mr. Sampson, why have you chosen to voluntarily appear before the committee today rather than invoke your rights under the United States Constitution, under the Fifth Amendment?

SAMPSON: Well, because I wanted to come up to the Senate and explain the facts as I understood them. I considered what the appropriate thing to do was, and for me, it was to come and testify here today.

* * *

CORNYN: Well, Mr. Sampson, I -- I appreciate your testimony. And basically, there -- from everything that this committee has heard so far, at least what I've heard, there is no evidence that any of this replacement of U.S. attorneys was designed to or actually did impede a criminal investigation or prosecution.

If there was any evidence, I'd be the first one to be jumping down your throat. But I've heard no evidence of that.

I regret, if in fact at the end of this investigation there is -- continues to be no evidence of that, I regret the fact that dedicated public servants get caught up in politically motivated attacks against the administration or other individuals and find it necessary to have to hire lawyers and to invoke their rights under the Constitution not to testify, rather than risk perhaps prosecution for perjury or some other related criminal matter.

CORNYN: I think it's unfortunate. I really do. And I appreciate your testimony here today.

* * *

KOHL: . . . I ask you, Mr. Sampson, what confidence can citizens have in the fairness of our system and the unbiased nature of decisions to prosecute, after reviewing what happened with the dismissal of these U.S. attorneys?

Isn't there tremendous damage done to the Justice Department and our entire system of justice when the appearance of partisan politics seems to trump the administration of justice?

SAMPSON: Senator Kohl, thank you.

I understand the concern that animates your question. Let me just say that, in my e-mails, by referring to loyal Bushies or loyalty to the president and the attorney general, what I meant was loyalty to their policies and to the priorities that they had laid out for the U.S. attorneys.

The president, at the beginning of the administration, launched a domestic policy initiative called Project Safe Neighborhoods, to increase federal gun prosecutions. If that's the example -- that's an example of what I was referring to.

I agree wholeheartedly that, with regard to particular matters and investigating cases, that United States attorneys and federal law enforcement officers have to take the facts as they find them and prosecute cases based on the facts and the law.

I understand -- my observation is that United States attorneys also have another role, which is, as political appointees, to promote the president's priorities and initiatives in the area of law enforcement.

SAMPSON: So I hope that my answer has given you that assurance that I shared that view as well.

* * *

KOHL: We have heard the attorney general compare his management style to that of a CEO. He seems to have said in recent days that he was not involved in determining which U.S. attorneys would be fired or for what reason. And yet he did acknowledge that he signed off on the final list of terminations that you compiled.

In essence, he is saying that he permitted his deputies to fire almost 10 percent of the U.S. attorneys with almost no input from him at all.

Now, this is hard to believe.

Either the attorney general is simply absent as manager of the Justice Department, or he's not been candid with the American people about his participation in this firings. Which one is it or is there some other explanation?

SAMPSON: Well, as I said in a previous answer, the attorney general was aware of this process from the beginning in early 2005. He and I had discussions about it during the thinking phase of the process.

Then after the, sort of, more final phase of the process in the 2006 began, we discussed it. He asked me to make sure that the process was appropriate, that I was consulting with the deputy attorney general and others in developing the list.

And then ultimately he approved both the list and the notion of going forward and asking for these resignations.

KOHL: Mr. Sampson, the fact that you and your colleagues at the top echelons of Justice decided to fire these eight U.S. attorneys, individuals that you have referred to in your written statement to the committee as, quote, "good people," who, quote, "each served our country honorably," makes us wonder what exactly do the other 85 U.S. attorneys do to keep their jobs?

Were there any political discussions regarding any U.S. attorneys who were not fired that led them to pursue cases that they were not otherwise working on, or not to pursue cases that they were working on?

But again, you fired these who were otherwise good people, honorable people, doing nice jobs. You didn't fire any of the other 85. What is it about the other 85 that caused them not to be fired?

SAMPSON: Senator, to my knowledge there was no -- no U.S. attorney asked to resign for the purpose of influencing a particular case for a political reason.

My view was that these were political appointees, and that under the statute they serve four-year terms and then can hold over. And so with regard to all 93 U.S. attorneys, we didn't even consider U.S. attorneys who were in the midst of their four-year term.

So we only considered, in a collaborative manner among senior Justice Department officials, United States attorneys who had served more than four years, who had completed their term. And of that group, we identified a group of U.S. attorneys who, it was the considered judgment of folks, could be thanked for their service and that it would be beneficial to have a new U.S. attorney appointed.

* * *

HATCH: Well, thank you, Mr. Chairman.

One indication that the process was thorough and deliberative was that in your January 2005 e-mail, "rough guess" -- you used the language -- the rough guess was that you were going to retire about 15 to 20 percent, and in the end less than 10 percent were asked to resign.

So this process, as I understand it, took almost two years, is that correct?

SAMPSON: Senator, the issue was raised, you know, in early 2005 about whether all the United States attorneys should be removed and replaced.

HATCH: I remember that.

SAMPSON: It was my view, along with others, that that would not be appropriate and that we might consider as a management effort to identify a smaller subset of folks who

might be asked to resign after their four-year terms had expired. And the process after that took a while.

None of the United States -- in January of 2005, none of the first class of Bush-appointed United States attorneys had served their four-year term. The first expirations didn't begin until the fall of 2005.

So during 2005, it was really a thinking phase in the process where we were just identifying U.S. attorneys where there were issues or concerns with them.

HATCH: I'm grateful that you agreed voluntarily to come here today. And I'm glad you're here primarily because you were in charge of this process of evaluating U.S. attorneys and recommending some for replacement.

One thing the administration's consistently said is that seven of the eight U.S. attorneys were asked to resign for performance-related reasons. Now, the only way properly to evaluate the administration's decisions is on the administration's terms. So it is very important, it seems to me, to understand how the administration defined that key word "performance" in this process.

You were in charge of the evaluation process and in making the recommendations. In that January 9th, 2005, e-mail you spoke of a desire to remove U.S. attorneys who you described as, quote, "underperformers," unquote. Now, how did the administration view this category of performance?

SAMPSON: Senator, as I said in my opening statement, it was not a scientific or quantitative analysis for identifying U.S. attorneys who might be considered underperforming.

HATCH: But it was more than looking at just statistics, right?

SAMPSON: Frankly, Senator, it wasn't -- it was looking at statistics in a few of the cases, but in other cases it was a process of asking leaders in the department, folks who would have a reason to have an informed judgment, who were U.S. attorneys that presented issues and concerns.

HATCH: Well, I want to be crystal clear on this.

Our Democratic colleagues here in the Senate and in the House claim that there were no performance problems by using a very narrow definition of that term. They say the only legitimate performance problem is one that shows up on the statistical evaluation conducted every three years.

So let me ask you again, just to be clear: When you evaluated the performance of U.S. attorneys, did you look only at statistical categories and written evaluations, or was your idea of performance much broader than that?

SAMPSON: To me and to others in the process, performance-related was much broader. It included production in the office, management abilities, extracurricular U.S. attorney work on the attorney general's advisory committee or other work in developing policies of the administration. It included not engaging in policy conflicts with main Justice.

It was a general process where I talked to senior leaders in the department and asked them, "If we were going to ask a handful of U.S. attorneys to resign so that others might serve, who would you have on your list?"

And so performance-related is a plastic term that included a lot of things to a lot of people in the front (ph).

HATCH: A lot of additional things than what you've just said here today, right?

SAMPSON: Yes, sir.

HATCH: Well, based on the broader definition of performance you actually used, do you believe that there was or that there were legitimate performance-related bases for asking several of these U.S. attorneys to resign?

SAMPSON: Yes, I believe that all eight were asked to resign for reasons related to their performance.

HATCH: You were in charge of this project. It was assigned to you. We have hundreds, even thousands, of pages of documents showing that you worked very hard on this project for approximately two years. I want to ask you to respond to some of the many claims and charges swirling around, most coming from the other side of the aisle.

HATCH: One of my Democratic colleagues said that the only -- that the only U.S. attorneys the administration fired are those who, quote, "are investigating Republicans or not investigating Democrats when somebody wanted them to," unquote. Is that true?

SAMPSON: To my knowledge, that was not a consideration in adding a U.S. attorney to the list.

HATCH: One of my Democratic colleagues said that when you were the attorney general's chief of staff, you actually admitted that U.S. attorneys were fired for political reasons.

Have you ever admitted such a thing? Or were any of them asked to resign for political reasons? Or should I say improper political reasons, because the president -- they serve at the president's pleasure?

SAMPSON: U.S. attorneys are political appointees. And, as I said in my opening statement, I think the distinction between performance-related and political is artificial.

I'm not aware of any of the United States attorneys being asked to resign for the improper political purpose of influencing a case for political benefit.

But I'm aware that some were asked to resign because they weren't carrying out the president and the attorney general's priorities. And in some sense, that may be described as political by some people.

HATCH: But that's also described as a performance situation.

SAMPSON: That's right.

HATCH: Some of my colleagues focus on one of these U.S. attorneys more than any other, claiming that Carol Lam was asked to resign as U.S. attorney for the Southern District of California because she was investigating and prosecuting the corruption case involving former Representative Duke Cunningham.

They say it flat out, so let me ask you flat out: Did you conclude that Carol Lam should be replaced because she was pursuing the Cunningham case?

SAMPSON: I did not.

HATCH: Here's one of the things that confuses me about this claim that Carol Lam was removed because of the Cunningham case, or any other case, for that matter. Any other cases?

SAMPSON: Not to my knowledge, sir.

HATCH: As I read the documents provided by the Department of Justice, you listed Carol Lam as a recommended replacement on a chart dated February 24th, 2005. Now that was several months before the Cunningham scandal even broke in the media, which was before federal investigators and prosecutors, as far as I can see, got involved.

And I see correspondence and other evidence that complains about her performance are coming in even earlier, in 2004, from House members.

HATCH: And Southern California newspapers reported in 2003 about the frustration of Border Patrol agents that Carol Lam's office was bringing so few prosecutions of smugglers of immigrants.

And complaints about her performance in 2003 and 2004 led to a February 2005 recommendation that she be asked to resign for performance-related reasons. It seems pretty reasonable, if those are true.

I guess I'm baffled how a case that did not even exist could somehow have been responsible for her removal. And that is the tale being spun by some that I've heard, who -- and I confess, I just don't understand it.

And reading the record correctly, when did concerns and complaints about Carol Lam's performance arise and what were they?

SAMPSON: Carol Lam is a good person and a very skilled lawyer.

HATCH: I agree with that.

SAMPSON: But she consistently appeared on the list that I aggregated, based on input from other senior Department of Justice officials, from the beginning of this process.

My recollection is that, in the beginning, it was due to her office's failure to embrace the president's anti-gun violence initiative, Project Safe Neighborhoods. The district in San Diego simply did not devote any resources to that initiative. And it was the subject of consternation in former Deputy Attorney General Jim Comey's office and early on through the process.

Later, in 2005 and 2006, the concerns about Carol Lam related to her office's immigration enforcement, in the context of the debate that was going on about comprehensive immigration reform.

* * *

FEINSTEIN: Now, if I might go on, who, Mr. Sampson, was Dusty Foggo or is Dusty Foggo?

SAMPSON: I understand from news reports, Senator, and from general knowledge, that he was an employee at the CIA.

FEINSTEIN: And who is Mr. Wilkes?

SAMPSON: I don't know. I understand, again from news reports, that he's affiliated somehow with Mr. Foggo.

FEINSTEIN: And are you aware that on May 10th Carol Lam sent a notice to the Department of Justice saying she would be seeking a search warrant of the CIA investigation into Dusty Foggo and Brent Wilkes?

SAMPSON: I don't remember ever seeing such a notice.

FEINSTEIN: But the next day you wrote the e-mail which says, "The real problem we have right now -- right now -- with Carol Lam that leads me to conclude we should have someone ready to be nominated on 11/18, the day after her four-year term expires," that that relates to her immigration record.

SAMPSON: The real problem that I was referring to in that e-mail was her office's failure to being sufficient immigration cases.

FEINSTEIN: OK.

SAMPSON: The attorney general in the month before had been subject to criticism at his -- at a hearing in the House Judiciary Committee. And thereafter at the Department of Justice, in our senior management meeting with the deputy attorney general and others, there had been a robust discussion about how to address that issue.

The department was being criticized for not doing enough to enforce the border, largely by House Republicans. And the attorney general was concerned about it. And he asked the deputy attorney general to take some action to address that issue.

I recall also that the deputy attorney general was scheduled to meet with the California House Republicans, who were critical of Carol Lam, on May 11th.

FEINSTEIN: Let me just move on.

On January 13th, Dan Dzwilewski, the head of the FBI office in San Diego, said that he thought Carol Lam's continued employment was crucial to the success of multiple ongoing investigations.

FEINSTEIN: Did you call FBI headquarters and complain about those comments?

SAMPSON: I did. I called Lisa Monaco (ph), who serves as a special assistant to the director of the FBI, and asked her why an FBI employee was commenting on that issue.

FEINSTEIN: And why would you think that the special agent in charge in the area should not comment on whether her termination was going to affect cases?

SAMPSON: I understood that Carol Lam was a political appointee, and that a decision had been made in the executive branch to ask her to resign so that others could serve.

FEINSTEIN: OK.

I'd like to just go over a series of cases quickly, in the time I have remaining. I'll finish it on the next round if I don't have a chance.

Were you aware that Bud Cummins was looking at an investigation into Missouri Republican Governor Roy Blunt? I'm just asking if you were aware of that.

SAMPSON: I don't remember being aware of that.

FEINSTEIN: OK.

To the best of your knowledge, was the attorney general?

SAMPSON: I don't know.

FEINSTEIN: Were there any discussions that you heard that discussed this?

SAMPSON: No, I don't -- I don't remember being aware of that.

FEINSTEIN: OK.

Were you aware that Dan Bogden had opened a probe relating to Nevada Republican Governor Jim Gibbons?

SAMPSON: I don't remember being aware of that.

FEINSTEIN: You were not.

Were you aware that John McKay declined to intervene in a contentious governor's race in Seattle?

SAMPSON: I remember hearing about that back in 2005, I believe. But I don't really have any specific recollection about that. I may just have heard of that through news accounts.

FEINSTEIN: Were you aware that Paul Charlton had opened preliminary probes into Republican Congressmen Jim Kolbe and Rick Renzi before the November election?

SAMPSON: I think that I was aware of that through news accounts.

FEINSTEIN: And of what were you aware?

SAMPSON: That he had -- that there was some preliminary investigation of those two congressmen.

FEINSTEIN: OK.

And were you aware that David Iglesias had been overseeing an investigation of state Democrats?

FEINSTEIN: And let me just put a period -- question mark there.

SAMPSON: I don't remember being aware of that until, you know, the last month or so.

FEINSTEIN: Were you aware that calls were made to Mr. Iglesias?

SAMPSON: I was not aware of that.

FEINSTEIN: Were you aware that there were concerns with that case?

SAMPSON: I was not aware of any concerns with any particular case in New Mexico.

* * *

SESSIONS: United States attorneys have got to be strong people. They are given difficult challenges. They're not shrinking violets. Somebody criticized them, they're not likely to wither and run and hide. I think that's important to note. And I think every day, most of them go forward, almost universally, making tough calls that they believe are just and fair and take the consequences no matter what people say.

I just hate anything that suggests here that there are some serious problem with United States attorneys not doing what they think is right because I think daily they do.

This idea to remove a number of United State attorneys, did the attorney general object? Did he call to the White House and say, "This is not a good idea"?

You expressed some concern. Your initial numbers were three, maybe four to be terminated. Did he object to removing a United States attorney for -- to give someone else a chance?

SAMPSON: No.

SESSIONS: You know, attorney generals are lawyers for the president in one sense -- no this personal lawyer, but they're the country's lawyer. And I think sometimes they just have to say no. And I think a lot of attorney generals have, and maybe we would have been better off if there had been some explanation of the difficulties that you've raised here with this process had been conveyed further up in a firm way.

Why didn't they -- you did say earlier in 2005, which was the appropriate time to tell people they would be leaving -- they'd completely nearly four years at that time; most had. Why didn't you tell them, "By the time your four years is up, maybe September, October, later in the year, that we want to replace you and you need to be looking for something else"? Why didn't that happen?

SAMPSON: Well, Senator, to my recollection is the very first U.S. attorneys had not completed their four-year terms until September.

SAMPSON: And then for the next year, sort of September '05 to September '06, is when that first class' four-year terms expired.

* * *

SESSIONS: . . . With regard to Carol -- I guess my time is up.

I would just say this: With regard to the FBI supervisor's comment that her presence as United States attorney was crucial to the success of corruption cases, he should have probably been disciplined for that, because it's not so.

She probably -- I would be amazed if she personally was trying those cases. United States attorneys turn -- turn over all the time. And I don't believe that that's an accurate statement. If it is, I'd like to see him make proof of that.

But I -- and if it comes up in this committee that what occurred had some tendency to block a legitimate prosecution, then people are going to be in big trouble with me and, I think, this Congress. But I assume and hope and pray that that was just an overreaction by him, to make a statement that was over the top...

LEAHY: Thank you, Senator Sessions.

SESSIONS: ... and I think it was not correct for him to do so.

* * *

CARDIN: . . . In your prepared statement, you indicate that one reason for dismissal would be the loss of trust or confidence of important local constituencies in law enforcement or government. And I want to ask you whether that played a role in the eight U.S. attorneys that were dismissed. But I'm particularly interested, quite frankly, in New Mexico and California. And I would appreciate if you could answer that somewhat briefly.

SAMPSON: Senator, the reason that eight U.S. attorneys were put on the list is -- was related to their performance. Related...

CARDIN: My question is, related to the concerns of the local political establishment?

SAMPSON: I understand.

What -- I understand that the eight were put on the list because of concerns related to their performance. I also understand that -- I know that at the time, the department knew that Congressman Issa and others were very critical of Ms. Lam.

I also have been reminded that the attorney general received three calls from Senator Domenici complaining about Mr. Iglesias, and that the deputy attorney general received a call from Senator Domenici complaining about Mr. Iglesias.

I'm not sure those things were on my mind when those names were added to the list. But they certainly may have been influential. I know that the department cares about the views of Congress...

CARDIN: But who would be the principal person that you -- advised you on who should go on the list? Who would be responsible for weighing the local political issues?

SAMPSON: Well, that wasn't a -- I don't believe that was specifically a consideration. I guess I just wanted to share with you that -- that looking back on this, as I sit here today,

the department as a whole was aware of those complaints from those members of Congress. No one in the senior DOJ leadership who I was getting input from would be responsible for assessing the views of Congress specifically.

* * *

CARDIN: How did you arrive at eight as the number? Could it have nine, could it have been seven, could it have been 15? Was there a specific number you were looking for?

SAMPSON: There really wasn't.

In fact, in mid-October, after presenting the list to different DOJ officials, I remember asking, "Let's go back and look at all the remaining United States attorneys whose four-year terms have expired," which was another 30 maybe, "and see if there are any folks there that ought to be added to the list."

And I remember that four U.S. attorneys were added to the list at that time, relatively close cases, but ones that we could consider whether it would be beneficial or not to ask them to resign.

* * *

CARDIN: I want to get to perception here. Because I tell you, we all worry about perception. Perception and public confidence go hand in hand.

You acknowledge here that an inappropriate way to discharge a U.S. attorney would be for interference or influence the investigation or prosecution of a political case for political or partisan advantages.

You've also acknowledged that you were aware of what was happening in California at the time that the decision was made to ask for the resignation of the U.S. attorney.

You also acknowledge you were aware in New Mexico of the contacts that were made in regard to a sensitive decision on whether to prosecute or not.

CARDIN: Do you see a perception problem here?

SAMPSON: Senator, at the time, in my mind, I did not associate at all the idea of asking a U.S. attorney to resign and the idea that it would be done to improperly influence a case for...

CARDIN: Do you see a perception problem here, of the timing relative to the investigations and the U.S. attorneys that were selected?

SAMPSON: Senator, in retrospect, I do. And that -- I believe that it was a failure on my part. And I want to take accountability and responsibility...

* * *

KYL: . . . Mr. Sampson, I'm going to ask you a few questions first about the former U.S. attorney in Arizona, Paul Charlton.

Did you know Paul Charlton?

SAMPSON: I know Paul Charlton, Senator. And I think him to be a fine man and a very good lawyer.

KYL: That was the other question I was going to ask. He has a reputation of being a topnotch attorney and performed very well as Arizona's U.S. attorney.

The reason why he was -- do you know the reason why or the primary reason he was asked to resign?

SAMPSON: I do.

KYL: And did that have to do with policy differences with the department?

SAMPSON: It did.

KYL: Primarily two particular policy matters?

SAMPSON: Yes.

I think, as Mr. Moschella testified in the House a couple of weeks ago, the concerns and issues that were raised with Mr. Charlton related to the death penalty, and also the interrogation -- the recording of interrogation, the department-wide policy about that.

KYL: Right.

In some cases there were differences of opinion about when to seek the death penalty, is that right?

SAMPSON: Yes.

KYL: And Paul Charlton had pretty much a running dispute with the department, wanting to use recorded confessions by the FBI. And the FBI did not want to record confessions in most cases.

And that policy dispute actually went on for some time and represented several different meetings and communications between Mr. Charlton and the department, is that right?

SAMPSON: That's my understanding.

KYL: Right.

But this -- but clearly, this is a policy dispute. Let me ask one more question.

Did you also believe that the Department of Justice felt that perhaps Mr. Charlton had pursued his point of view after -- after the attorney general had made his decisions final, that Mr. Charlton continued to press his point of view?

SAMPSON: Yes. Yes, sir. That was the substance of the concern.

KYL: So it was that rather than some kind of underperformance in his duties as U.S. attorney that occasioned his request for removal, is that correct?

SAMPSON: Again, I think the term "underperformance" has led to a lot of confusion here. But I think that's a fair characterization.

KYL: Well, I -- it may have led to some confusion, but I think you would also acknowledge that there's a difference between indicating that someone had a policy difference with the administration, and as a result the administration has the perfect right to ask them to pursue something else; on the other hand, when you suggest that it is a matter of performance or underperformance, would you not agree it's almost a challenge for any good lawyer to come forward and defend his reputation or her reputation?

SAMPSON: I would agree with that, Senator. I think that largely was the mishandling and bungling that the Department of Justice did in the wake of this.

KYL: So even though I can appreciate how you could consider that, under the overall general rubric of performance, policy differences would be subsumed in that, in retrospect, would it not have been better to characterize situations like Mr. Charlton's as predominantly depending on policy differences rather than an underperformance of his duties?

SAMPSON: Yes.

KYL: Thank you.

Did the Department of Justice or the White House, to your knowledge, have a replacement in mind for Mr. Charlton when they asked him to step down in January?

SAMPSON: To my knowledge, there was no replacement ready to replace Mr. Charlton.

KYL: And, to your knowledge, is there any yet?

I mean, Senator McCain and I have recommended someone, and I'm not asking you to prejudge that. But there's nobody by the White -- the White House doesn't have its own candidate, to your knowledge?

SAMPSON: Correct.

KYL: Was there any suggestion that anyone, to your knowledge, ever considered investigations, either in the U.S. attorney's office in Arizona or the FBI in Arizona -- was there any suggestion that Mr. Charlton be removed because of a pending or potential political corruption case?

SAMPSON: To my knowledge, that was not the case.

KYL: Could you say that you probably would have had knowledge, given all of the discussions that were occurring back and forth, that anyone sought to remove him because of his involvement and/or lack of involvement in a political corruption case in which they might have had a different point of view?

SAMPSON: I believe so. I was the aggregator of input that was coming in from sources. And based on everything I observed and heard, that was not a factor.

KYL: So you would have probably known, although I know you can't say for sure.

SAMPSON: I can only...

KYL: You would have probably known if anybody had ever talked about that?

SAMPSON: I can only speak for myself, and I was not aware of any of that, to the best of my knowledge.

KYL: But you were the aggregator of information that didn't see anybody else speaking to it, either, is that correct?

SAMPSON: That's correct.

* * *

KENNEDY: . . . Did you have any communication on the replacement of U.S. attorneys with anyone in the Republican National Committee?

SAMPSON: Not to my knowledge.

KENNEDY: And did you attend any meetings in the White House where the issues of replacing U.S. attorneys was discussed?

SAMPSON: Yes. On a handful of occasions I met with Harriet Miers.

KENNEDY: Can you tell us how -- can you tell us who was there at those meetings?

SAMPSON: I remember speaking with Harriet Miers and Bill Kelley about that. Sometimes this subject would come up after a Judicial Selection Committee meeting, which was a once-a-week meeting that happened in the Roosevelt Room.

KENNEDY: Let me just ask you, because my time is running out, Chris Oberson (ph) -- was he attended? Or did Karl Rove attend? William Kelley?

SAMPSON: Attend what, Senator?

KENNEDY: Those meetings in the White House on the issue of replacing U.S. attorneys.

SAMPSON: The issue of replacing U.S. attorneys most frequently came up as sort of a pull-aside after a Judicial Selection meeting.

KENNEDY: How many meetings, approximately?

SAMPSON: Well, Judicial Selection Committee meetings happen regularly, approximately once a week; maybe something less than that. It would be canceled from time to time.

And the issue of U.S. attorney replacements was quite episodic, you know, in the thinking phase of this through 2005 and 2006. And it would just come up occasionally after a Judicial Selection meeting, usually between myself and Harriet Miers and Bill Kelley.

* * *

LEAHY: . . . Now, on March 5th Mr. Iglesias testified before this committee under oath that Senator Domenici and Congresswoman Heather Wilson called him prior to the 2006 election to ask him about a pending high- profile investigation in New Mexico.

Then, according to news accounts, New Mexican -- New Mexico Republican Party Chairman Allen Weh complained in 2005 about Mr. Iglesias to someone in the White House. Mr. Weh later asked Mr. Rove about Mr. Iglesias at a December 14, 2006, White House holiday party, and he was told by Mr. Rove that he's gone -- meaning Iglesias.

The White House has said that President Bush complained to the attorney general in October 2006 about certain U.S. attorneys, although the attorney general has told us he doesn't recall that conversation with the president.

What do you recall hearing in the way of complaints about the way Mr. Iglesias handled corruption investigation and voter fraud cases in New Mexico?

SAMPSON: I don't remember hearing any complaints or anything about Mr. Iglesias's handling of corruption cases in New Mexico.

SAMPSON: I do remember learning -- I believe, from the attorney general -- that he had received a complaint from Karl Rove about U.S. attorneys in three jurisdictions, including New Mexico.

And the substance of the complaint was that those U.S. attorneys weren't pursuing voter fraud cases aggressively enough.

LEAHY: And where did those complaints come from?

SAMPSON: I believe, to the best of my recollection, I learned of them from the attorney general.

LEAHY: Where did the attorney general get them?

SAMPSON: To the best of my recollection, I think that he told me that he got them from Karl Rove.

LEAHY: And where did Karl Rove get them?

SAMPSON: I don't remember ever knowing that. I don't know.

LEAHY: Did you receive any comments from any official in the White House, complaining that David Iglesias was not aggressive enough in prosecuting voter fraud cases or corruption cases?

SAMPSON: I don't remember anything other than what I just shared with you.

LEAHY: And are you aware of anybody in the FBI getting a complaint that he wasn't being aggressive enough?

SAMPSON: I don't remember hearing that at all.

LEAHY: Do you recall hearing about the president -- firsthand knowledge of the president complaining to the attorney general about U.S. attorneys not being aggressive enough?

SAMPSON: I don't remember hearing anything like that.

* * *

HATCH: . . . This claim that Carol Lam was removed because of her prosecution of Republicans has been repeated so many times that it seems to have taken on a life of its own.

I ran into it just yesterday when I was on a panel with a member of the House in front of 400 editors in this country. And since there has never been any evidence for this claim,

maybe those making it think that repetition rather than proof will just make it so. Now, thank goodness prosecutors cannot get away with just telling stories without any real evidence.

Because that claim has been repeated so often, let me just ask you one more time, yes or no: Did the Cunningham public corruption case, or any other member of Congress who might have been accused, have anything whatever to do with recommending Carol Lam's removal?

SAMPSON: To my knowledge it did not.

HATCH: Another one of the former U.S. attorneys, David Iglesias, of New Mexico, has done a lot of media interviews since this flap has occurred and made some very public and specific claims.

Now, since you were head of this project and know more than anyone why he and others were asked to resign, I would like a response to the following: He told Tim Russert that he absolutely believes he was removed for what he called political reasons. He was on Chris Wallace's program and said, quote, "Performance has nothing to do this. This is a political hit," unquote.

He wrote an op-ed in the New York Times in which he said he was fired for, quote, "not being political," unquote, and that this group of U.S. attorneys, quote, "had apparently been singled out for political reasons," unquote.

Now, accusations and rhetoric like this are precisely why I think it's so important to clarify the standards the administration used in making their decisions in these matters. You were in charge of this project. You know better than anyone else the reasons why these U.S. attorneys were recommended for removal.

So let me just ask you directly. Was the decision regarding Mr. Iglesias, was it a political hit?

SAMPSON: Not to my knowledge, Senator. I was not -- I aggregated information from other people, and I was not aware of Mr. Iglesias -- I don't remember anyone -- to my knowledge, it was nothing of the sort.

HATCH: Was Mr. Iglesias removed because he refused to be political?

SAMPSON: Senator, as I said in my opening statement, political and performance related is sort of an artificial distinction in my mind based on the criteria that we used to look at candidates who -- U.S. attorneys who might be considered for replacement.

HATCH: Were these U.S. attorneys singled out for political reasons?

SAMPSON: To my knowledge, they were singled out because they -- because issues and concerns had been raised about them.

Some of those things might be considered political, such as a failure to carry out the president's priorities, but I'm not aware, and I wasn't aware, and I don't remember ever hearing that a factor for David Iglesias or any of the other U.S. attorneys was that there needed to be an effort to influence a particular case for political reasons.

HATCH: Was he asked to resign because of performance?

SAMPSON: Yes.

HATCH: OK. As you know, the documents we received, including e- mails -- and by performance, you mean the broad definition of performance, not the narrow one that some of our friends on the other side would like...

(CROSSTALK)

SAMPSON: Yes. Thank you for that...

HATCH: And by political, you mean the narrow reasons from political, which our friends on the other side broaden greatly, the narrow reasons of interfering with an ongoing investigation or an ongoing criminal trial.

Is that a fair statement?

SAMPSON: I think so. To my knowledge, based on everything I observed and heard, Mr. Iglesias was not added to the list and asked to resign in an effort to influence a case...

(CROSSTALK)

HATCH: Well, let me make that even more clear. As you know, the documents we received included e-mails which are conversations, which Mr. Iglesias asked if both Attorney General Gonzales and Deputy Attorney General McNulty would be reference for future employment. They both agreed they would be references for him, even after this, right?

SAMPSON: They did.

HATCH: Yes or no?

SAMPSON: Yes.

HATCH: Mr. Iglesias has now said in numerous media interviews this was actually not an honest, straightforward request, but a little test. He says that there's simply no way they would agree to be a reference if he had actually been asked to resign for

performance- related reasons. The fact that they did agree to be references proves, as he put it in one interview, quote, "that the true nature was political, not performance," unquote.

Now, you've already said that this category of performance was very broad and included more than competence or statistical measures, but such things as priorities, management, policy, et cetera.

Now, you were the attorney general's chief of staff. Does the fact that he agreed to be a reference for Mr. Iglesias in any way prove that this was all about politics and not about performance?

SAMPSON: Senator, if I could say two things to that. The first is that I think David Iglesias is a fine man and a skilled lawyer. And when he asked if the attorney general would serve as a reference for him, I remember asking the attorney general if he had any problem with that. And he didn't and I didn't. And so I communicated back to Mr. Iglesias that the attorney general would agree to do that.

With regard to your earlier question about politics and politics being involved, what I remember is that Mr. Iglesias was added to the list late in the process after folks at the department went back and looked and asked the question: Are there any others that should be added?

And four close cases were added, including Mr. Iglesias.

Ultimately, three of those came off the list. And I recall in conversation, as we were finalizing the list, I remember asking what folks thought about keeping Mr. Iglesias on the list. I remember the deputy attorney general mentioning that that wouldn't create any problems with the home state senators because he knew that Senator Domenici was not pleased with Mr. Iglesias' performance.

So there was that -- you know, that was considered in keeping Mr. Iglesias on the list.

HATCH: . . . Now, I'd like to read a portion of the editorial titled, "Political Spectacle," from The Washington Post of March 22nd, and ask if you think this is a reasonable or accurate description of the situation.

Mr. Chairman, I do ask consent to place this editorial, titled "Political Spectacle," in the record.

SCHUMER: Without objection.

HATCH: Mr. Sampson, do you think that this is a reasonable or accurate description of the situation? That the president has the authority to remove U.S. attorneys to make room for others to serve or because they were not pursuing the right priorities with sufficient

vigor; that there's no evidence of anything nefarious in the dismissal process, and no evidence that the administration was trying to short- circuit prosecutions?

That is the conclusion of The Washington Post, and I'm wondering if you think, in your perspective, they got it right.

SAMPSON: Well in my opinion, based on the information that I know and remember, I think that's fair.

* * *

HATCH: . . . Our committee's ranking Republican, Senator Specter, was on Chris Wallace's show on the Fox News Channel about 10 days ago and he said, in his practical, common-sense way, that the question is not whether the president had the authority to remove U.S. attorneys, but whether he did it for a, quote, "Bad reason," unquote.

Senator Specter gave us an example, removing a U.S. attorney for not responding to pressure to prosecute or pressure to not prosecute.

Now once again, you were in charge of this project. You were in charge of the evaluation and recommendation process. Were any of these U.S. attorneys asked to resign for such a bad reason, that they would not give in to pressure to prosecute or not prosecute a particular case?

SAMPSON: Based on what I observed and heard, that was not the case.

* * *

FEINSTEIN: . . . Mr. Sampson, who decided on who would be added to the termination list?

SAMPSON: I was the keeper of the list and so...

(CROSSTALK)

FEINSTEIN: I know that. That's not my question. Who made the decision who would be added to that list?

SAMPSON: It was based on an aggregation of input that came into me, and then I added people to the list.

(CROSSTALK)

FEINSTEIN: So you made the decision of who would go on the list?

SAMPSON: Before the final decision was made by the attorney general, I was the person who kept the list, and as information came in I added people to the list based on the input of others.

FEINSTEIN: You made a list, you aggregated a list, and you took it to the attorney general.

FEINSTEIN: Is that correct?

SAMPSON: Ultimately, in the fall of 2006, he approved the final list.

FEINSTEIN: And when did he -- when exactly?

Was that at the meeting 10 days before December 7?

SAMPSON: I don't remember, specifically. I think it was before that.

FEINSTEIN: How did it go to the attorney general -- in what form?

SAMPSON: I believe it was, you know, done on an oral basis. But I don't recall specifically.

FEINSTEIN: You told him who was on the list?

SAMPSON: I don't remember, specifically. I might have shown him the list. I might have told him. I remember him directing me to make sure that there was a good process, that I had consulted with the deputy attorney general and others who would have reason to make an informed judgment about the U.S. attorneys.

And I assured him that I did and would.

FEINSTEIN: All right. Now, on November 21, you sent an e-mail entitled "Meeting for Next Monday," regarding U.S. attorney appointments: "A.G., me -- meaning you, Monica, Deputy Attorney General Moschella, Elston, Battle; one hour; A.G.'s conference room."

Do you recall that e-mail?

SAMPSON: I reviewed that e-mail in preparation for this hearing, and so I remember it now.

FEINSTEIN: And you were present at that meeting that took place on the 27th?

SAMPSON: Yes.

FEINSTEIN: And what took place at that meeting?

SAMPSON: I believe, to the best of my recollection, we discussed where things stood. I reported that I had been -- had coordinated with the White House and that they were -- that I'd asked them to make sure they touched all the bases.

FEINSTEIN: Had they signed off on the list of attorneys?

SAMPSON: I just don't remember the timeline, exactly.

FEINSTEIN: Well, either the White House signed off on it, at that point, or did not.

SAMPSON: I recollect...

FEINSTEIN: Did the White House sign off on the list before that meeting on the 27th?

SAMPSON: What I remember is that the White House really didn't -- I don't remember receiving input, during this time period, from the White House, on who should be on the list and who should be off. I remember...

FEINSTEIN: Well, that's not my question.

You told me you had aggregated a list, that you had selected, you had put together, and you took that list to the attorney general and the attorney general approved the list.

I then asked you, in what form?

And you said, "Oh, by conversation."

And so then I went to the meeting on the 27th, and who was present at the meeting. And you said, I believe -- I could ask that the transcript be re-read -- that the White House had approved the list.

SAMPSON: I don't remember -- I don't remember when the attorney general specifically signed off on the list or on the idea of proceeding and moving forward.

And I don't remember, specifically, whether he made those approvals based entirely on an oral presentation or on seeing the list. I do remember that he was concerned about process.

He directed me to make sure that the senior leaders in the department all agreed that these were the people that should be on the list. And that list...

FEINSTEIN: Well, wait one second. Someone takes responsibility for this. This was not the usual order of business. In the last 25 years, only two U.S. attorneys have been fired. And they have never been fired in bulk, to the tune of seven on one day; that's for sure.

So this was unusual. You, yourself, in e-mails to others, said that it was unusual. And you, yourself, pointed out the hazards. Someone approved that list.

FEINSTEIN: And what I thought you told me was the attorney general approved the list. Is that not correct?

SAMPSON: The attorney general approved the list, Senator. I just don't remember specifically in this time period when he did that.

FEINSTEIN: All right. But at the meeting on the 27th, what business was conducted for one hour on these appointments?

SAMPSON: I remember that I did have some concern about making sure everyone understood what was -- what we were talking about doing here, what the recommendation was and what the decision would be. And I remember calling the meeting to make sure that the deputy attorney general and the attorney general and the other people that you listed all were in agreement about the list and about going forward.

FEINSTEIN: Was there dissent in the room?

SAMPSON: I don't remember any dissent.

FEINSTEIN: So everyone was agreed to proceed? Was the date that the calls would be made mentioned?

SAMPSON: I don't remember specifically if that was discussed at the November 27th meeting, but I do remember having conversations about that.

If I may, Senator, one other thing that I remember about the November 27th meeting, I think, to the best of my recollection, is that after the meeting, after the attorney general left, I remember the deputy attorney general calling me back. And I believe that it's then that he suggested that Kevin Ryan needed to be added to the list.

FEINSTEIN: All right. So you had a list. Leaving that meeting you had a list.

SAMPSON: Yes.

* * *

SESSIONS: Now, Carol -- on the question of Carol Lam. I want to be clear about this. She seems to be a very impressive United States attorney, and very capable lawyer. But it does appear to me her priorities were not the priorities of the Department of Justice.

And my impression when I was a United States attorney was, there was always quite a few out there that thought they knew better than everybody else what they wanted to do

in their district. Sometimes they were right. Sometimes they weren't right. I've often thought they were given too much reign.

I mean, these people are given money from the taxpayers of America to execute policies, and they're not accountable to anybody, really, but the president. And they have to be held to account to utilize that money consistent with legitimate policies that the president has promised in his campaign or the -- or the people want.

Her prosecutions in 2004 over immigration cases -- and these were serious immigration cases, not just border crossings. These were people who were involved in smuggling and things of that nature -- fell from 2,054 to 1,453. And that's more than a quarter, more than 25 percent.

Her prosecutions for firearms offenses -- they're just stunning to me. 2002: 24. 2003: 17. 2004: 18. 2005: 12. 2006: 17. The Southern District of Texas was averaging at that time, let's see, about 200 a year. The Southern District of New Mexico, over 100 a year. The Southern District of Arizona, almost 200 a year.

So it seems to me that Operation Safe Neighborhoods, which emphasized from the president on down -- it was a clear priority of Department of Justice -- was not being effectively carried out in the Southern District of California, which I'm not surprised that the senator wrote a letter.

Senator Feinstein wrote a letter asking about some of these things, an inquiry. Other congressmen wrote letters about this. Not that she wasn't a good person or an honorable person, but her priorities weren't what other people thought they should be. Why did you all write a letter to defend her?

SAMPSON: I don't remember. I remember concern being expressed about that office along the lines of what you set forth with regard to gun prosecutions and border enforcement. And I don't remember specifically that letter in response. I believe that there was some incoming letters from members of Congress, and a response was prepared that did its best to defend the work of the department.

SESSIONS: Well, I think that's a typical reaction of the Department of Justice, to defend itself against criticism when perhaps you should examine the validity of the criticism. It sounds to me like it was fairly legitimate.

* * *

CARDIN: . . . Who added David Iglesias to the list?

SAMPSON: I'm sorry, Senator?

CARDIN: Who was responsible for your consideration of David Iglesias to be added to the list?

SAMPSON: What I remember is that some time after October 17, the -- an effort was made to go back and look at the list of U.S. attorneys whose four-year terms had expired...

CARDIN: Effort made by whom?

SAMPSON: An effort made by myself, the deputy attorney general, his chief of staff, Monica Goodling, perhaps others who were...

CARDIN: Four additional names came forward.

SAMPSON: Including Iglesias.

CARDIN: And one went beyond that.

Who suggested that David Iglesias remain on the list that would be ultimately recommended...

SAMPSON: I don't...

CARDIN: For termination?

SAMPSON: What I remember, Senator, is that the discussion was, should each of these four stay on the list? And for various reasons the other three came off.

And in discussing Iglesias, all I remember is the deputy attorney general saying, "Senator Domenici won't mind if he stays on the list. Senator Domenici's dissatisfied with him."

CARDIN: And the four that were selected -- how did you come up with those four? Did you just go to your -- your master list that was in your drawer and circle four names?

How did you come up with these four being the next to be considered?

SAMPSON: I think they were all close cases. They were sort of...

CARDIN: Close cases because of performance?

SAMPSON: Because there weren't specific policy conflicts or significant management challenges. They were close cases because they were four U.S. attorneys where the aggregation of information coming in was, we -- we -- we can do better here. A change would be beneficial.

CARDIN: And Mr. Iglesias remained on the list because you felt that the senator would not object?

SAMPSON: He remained on the list because nobody suggested that he come off.

CARDIN: Who suggested that -- what -- who was there really promoting that he remain on the list, in your -- among your group?

SAMPSON: I don't remember anyone promoting that he remain on the list. The default was sort of the opposite, that he was a close case along with the other four. And that's how he came on the list. And then the question was, who of these should stay on the list?

(CROSSTALK)

SAMPSON: ... winnow the list to the smallest amount where everyone in a consensus fashion agreed.

CARDIN: You've indicated that, when the recommendations were made to the attorney general, that there was an additional name that was added after the meeting. How many of the recommendations you made were turned down by the attorney general?

SAMPSON: I don't remember any of them being turned down.

CARDIN: Were there additional names that you wanted included on the list that did not get suggested by the attorney general?

SAMPSON: I don't remember the attorney general suggesting names to go on or to come off.

CARDIN: No, did you -- did you want additional U.S. attorneys asked to resign that were not ultimately asked to resign?

SAMPSON: The way the process worked is that if any one of those people involved in developing the list -- the deputy attorney general...

CARDIN: Were you responsible for the list going to the attorney general?

SAMPSON: Yes, I believe I was.

CARDIN: Was there any names that you wanted on that list that didn't get on? That -- were there any names that were on that -- that you wanted on that list that didn't get on that list?

SAMPSON: It just wasn't like that. It wasn't that I wanted names on the list. I was the aggregator of information that came in from a variety of sources.

CARDIN: And other than...

SAMPSON: I don't remember any one specific U.S. attorney being on the list because I personally thought they should be on the list.

* * *

CARDIN: . . . And were there discussions among the senior advisers, when you were discussing this, as to whether there was any impact on a pending investigation? Did that come up in your discussion? Was there discussion about what was going on in California or New Mexico?

SAMPSON: I don't remember any such discussion. To my knowledge, that was never considered.

CARDIN: But you did consider the local political issues in those jurisdictions?

SAMPSON: To my knowledge, Senator, I personally didn't consider that but I...

CARDIN: I thought you told me earlier, to answer a question, that you did; that that was one of the considerations you had gotten. When I asked you about the local support with government, you said: Yes, we had gotten calls from senators and we had gotten calls that people were upset. I thought you said you have that information.

SAMPSON: The department had that information. Let me...

CARDIN: The department means you. You were the person who got all of the information together.

SAMPSON: Others in the department had that information. And I think I may have generally been aware of that information. I don't remember whether, at the time, I considered that information. And as I said before, I don't remember ever hearing or observing anything that connected the notion of asking a U.S. attorney to resign with influencing a particular case for political reasons.

* * *

WHITEHOUSE: . . . And to follow up on your conversation with Senator Feinstein, and the immigration issue. And the real problem we have right now with Carol Lam. It strikes me that when the chief of staff to the deputy attorney general of the United States has a real problem -- that's a matter of pretty significant weight. And when he says he has a problem "right now," that temporal element is also pretty significant.

And I ask you, with respect to the immigration prosecutions undertaken by her district, what was the problem "right now" that fits into that temporal urgency that is -- that is described in your e- mail? What "right now" made something different about the immigration thing?

SAMPSON: What I remember was going on at that time was there was a robust debate going on in the Congress about comprehensive immigration reform, and a robust debate

going on within the administration about how the administration could show that we were doing everything we could with regard to securing the border. I remember...

WHITEHOUSE: So the problem was not so much a change in her conduct, as with outside atmospherics that affected your view of the importance of the immigration issue?

SAMPSON: I remember the attorney general felt some exposure because the department was being criticized soundly for not doing enough to enforce the border. And there was a debate going on in the administration about how to show that the administration was doing more to enforce the border. And at that very time there was discussion between the department and the White House about the notion of militarizing the border. And in fact, on May 15 the president announced that he was going to send National Guard troops to the border.

I remember also that -- I believe at around that time, I think even on May 11 there was a meeting that had been scheduled to meet with House Republicans who had expressed concern about border enforcement, with either the attorney general or the deputy attorney general.

SAMPSON: I don't know that that meeting ever happened. But I remember, at the time, there was real discussion, in the senior management offices of the Department of Justice, about how we could fix that problem, how we could get some immigration deliverables.

And I remember, at our senior management meeting, some time in the weeks before that, there was a specific discussion about the U.S. attorney's office in San Diego.

And Bill Mercer, who, I think, at the time, was the principal associate deputy attorney general, came to the meeting and had pulled a bunch of statistics from the sentencing commission, comparing the offices along the Southwest border, and was adamant about Carol Lam and that office's failure to understand what was going on politically and reorient resources to bring more border enforcement, notwithstanding the fact that she had been the recipient of a lot of criticism from members of Congress.

And there was a view expressed, at the time, that Ms. Lam just had her own independent views about what kind of cases she wanted that office to work on, and had not pushed her office to follow the attorney general's priorities with regard to immigration. And also, in the background of that, was with gun cases.

* * *

SCHUMER: . . . Did you or did you not have in mind specific replacements for the dismissed U.S. attorneys before they were asked to resign on December 7th, 2006?

SAMPSON: I personally did not. On December 7th, I did not have in mind any replacements for any of the seven who were asked to resign.

SCHUMER: Did anyone around you, that you were aware of?

SAMPSON: I don't remember anyone having anyone in mind.

SCHUMER: Really? You're sure?

SAMPSON: Yes. In fact I remember, Senator, as we were finalizing the list, I remember saying: Not knowing who will be the replacement, do we still want to go forward with asking these seven to resign?

* * *

SCHUMER: . . . For any of these people who might have been replaced or weren't, were there any people being groomed for those jobs?

SAMPSON: To the best of my recollection, no. If I'm correct about the ones I'm thinking about, the answer is no.

* * *

FEINSTEIN: . . . And I must go back to the problem we have with Carol Lam right now. The day before you wrote that e-mail, she noticed the department that two search warrants were issued. When a U.S. attorney notices the department, how does she do that, or how does he do that?

SAMPSON: Senator, as I testified before, I don't remember receiving any notice of that myself. There is a system where United States attorneys may submit an urgent report. I believe it goes to the executive office of the U.S. attorney.

FEINSTEIN: And I believe that's what she did. She submitted an urgent report. And you're saying you knew nothing about it and no one told you about it.

SAMPSON: I don't remember ever hearing about those searches at that time. I received...

FEINSTEIN: You're under oath. No one told you about those searches?

SAMPSON: Senator, I don't remember ever hearing about those searches, and I certainly didn't associate in my mind the idea of asking Carol Lam to resign with the fact that she was -- her office was doing an investigation of Mr. Foggo and Mr. Wilkes.

SAMPSON: Her -- that office's investigation and prosecution of Duke Cunningham was a good thing. And any investigations that carried on from that conviction were viewed in the department as a good thing. No one at the department had a brief to carry for Duke Cunningham. When I said in that e-mail -- I referenced a problem that we have with Carol Lam -- I was referencing immigration enforcement.

FEINSTEIN: You were. And yet you didn't ever, as the chief of staff to the attorney general of the United States, pick up the phone and call her and say, "We have a problem with your record," nor did anyone else in the department?

SAMPSON: Senator, I recall that I suggested that that be done. That -- I recall that in the spring, around that time, the attorney general had asked the deputy attorney general's office -- the deputy attorney general and his office -- to work on the -- improving the immigration numbers and getting some immigration enforcement deliverables out of that office.

And I remember that he specifically tasked the deputy attorney general to do that. And I remember asking, "Has anyone called Carol Lam?" And I think that my words were "woodshedded Carol Lam" about immigration enforcement.

* * *

FEINSTEIN: Was any consideration given to the cases that she had brought, or was in the process of bringing, of which the Arellano- Felix cartel was at the top of the list in terms of major cases? Or the Foggo -- Mr. Foggo was number three at the CIA. This is a big deal when a search warrant goes out.

SAMPSON: Senator, all I can tell you is what I know.

SAMPSON: I was the aggregator of information that came in. And it came in from the deputy attorney general, who was a former U.S. attorney and had served with Carol Lam. It came in from the principal associate deputy attorney general, Bill Mercer, who was a U.S. attorney and had served with Carol Lam. It came in from David Margolis...

FEINSTEIN: I'm sorry, what came in?

SAMPSON: Information about concerns about U.S. attorneys, including Carol Lam. I trusted the information that came in.

FEINSTEIN: I would appreciate it if you would provide the committee with that information. You said it came in. I trust it came in, in writing. We would like to have that information.

SAMPSON: Senator, let me be clear. As I said in my opening statement, the process was not scientific and it wasn't well documented.

I compiled a list, based on information that came in from folks in the department who would have reason to make an informed judgment about the performance of U.S. attorneys, including former U.S. attorneys who were then serving as the deputy attorney general and the acting associate attorney general, including the career -- senior career official in the department, David Margolis, including the director of EOUSA.

And this information that came into me, I aggregated into a list and compiled in a list. But it was not scientific and it was not well-documented.

* * *

FEINSTEIN: . . . who did decide?

Give us the deciders' names.

SAMPSON: The attorney general is the one that decided. He's the one that made the final decision that we would proceed and go ahead and do this, and that these were the U.S. attorneys who would be asked to resign.

He's the attorney general. I was a staff person.

* * *

HATCH: . . . Now, we're supposedly trying to get the truth here. That means going with the evidence. There is substantial evidence dating back to at least 2003 about Carol Lam's performance. Now, I happen to think she's fine lawyer, just like you have said here. I happened to think she did a pretty good job in many respects.

But I have to tell you, there is no evidence regarding interfering with any case -- not one shred of evidence. You know, that's the evidence here today. There is no evidence of interfering with any particular case.

Now, it may not be enough for certain senators but that's the evidence for the decision that was the administration's to make. You know, if you look at it, I can see why the administration might want to have somebody else. She's had the opportunity. She's an excellent person. She's going to be able to do well in the private sector, no question, or public sector if she wants to go into state government.

But the fact of the matter is that there were performance problems that this particular administration wanted to clear up and take care of. And you can't ignore the facts here. You know, from the Sentencing Commission data, only 20 defendants have been sentences for firearms offenses in the southern district of California in the past two years. This is a big issue to this administration.

It's always accused of supporting gun rights and so forth. Well, one of the reasons we believed we've brought crime down is because we have gone after the misuse of guns. Well, there were 29 defendants who have been sentenced for firearms offenses in the past two years. Only 88 have been sentences for firearms offenses in the last five years.

HATCH: That's under 18 USC Sections 922 and 924.

Now, let me just give you a contrast, for the same period, between 2000 and 2006. The Southern District of Texas, in retrospect, got 946 --just one district; the Western District, 894; the District of Arizona, 897; the District of New Mexico, 437.

You know, I just don't think he should be pilloried because the administration decided it was time to make a change there.

Now, I think the administration mishandled it. They should have just said, flat-out, you served well; we appreciate you; but now we want to give somebody else a chance.

Had they done that, it would have been a lot better for everybody concerned; the same thing with Mr. Iglesias.

You know, I don't think anybody here wants to run the guy down, from a standpoint of being a good lawyer or a decent U.S. attorney. But to be honest with you, there were reasons, performance reasons, that were legitimate reasons.

On immigration cases -- look, I looked at, and contrasted her with some of the people in Texas. She had, maybe, a thousand immigration cases, to 4,000.

That may not be totally accurate, but it was at least 2-1, in Texas. These were important issues. Immigration smuggling was one of the administration's major, major concerns -- and especially in the Southern District of California, especially there.

Well, now, let me ask you this. Did Carol Lam have a legal right to hold onto this position -- you know, if the president exercised his right to remove her, for any reason other than the two bad reasons that we've all admitted the president should not do, or neither should you or anybody else in the Justice Department?

SAMPSON: My understanding is U.S. attorneys are political appointees. And so they don't have tenure protections.

HATCH: But she had no right to hold onto the job. Now, she might have wanted to. As you've heard, senators on this committee have been U.S. attorneys, who say it's the best job they've ever had, including the Senate.

And frankly, I don't blame anybody for wanting to hold onto it. But I also don't blame the president for wanting to give some other people an opportunity, especially if some of the performance wasn't up to what they really wanted them to do.

She was doing a lot of other good things. There's no question about it. She's an excellent lawyer. She did an excellent job. She did a lot of good things.

But I saw the letters from -- I think there were, like, 20 members of Congress who were concerned about the lack of prosecution in these areas.

And of course, I saw Senator Feinstein's letter. Now, she's saying, well, she corrected that. Well, I don't think that's necessarily the evidence, either.

Now, these positions serve at the pleasure of the president.

How important were gun prosecutions to this administration?

SAMPSON: Project Safe Neighborhoods was the president's signature domestic policy initiative, at least in the law enforcement area, during the first term.

And I recall that -- I recall General Ashcroft frequently touting the successes that the department had had in that area.

SAMPSON: The department, to my recollection, had increased gun prosecutions by 70 percent as of, you know, 2004, 2005. And so they were very important.

HATCH: Well, how important were immigration smuggling cases, and especially in southern California district?

SAMPSON: They were very important, Senator, especially as the administration was trying to persuade the Congress to enact comprehensive immigration reform.

And one of the criticisms was that it should be enforcement only, that the focus should be on sealing the border before considering the question of the 6 million or 8 million or 10 million illegal immigrants that were in the country.

And so border enforcement was very important as a way to assist the administration in promoting comprehensive immigration reform.

HATCH: So if you look through the president's eyes, these are matters of great concern to the president and to this administration.

SAMPSON: Yes. In the spring of 2006, when the immigration bill was being debated, I remember a robust discussion in the executive branch about the things that could be done to help get that legislation through, the things that could be done to more effectively prosecute illegal immigration on the southwest border.

HATCH: Well, and you did a very good job of explaining why performance is of broader significance than our friends who are criticizing have allowed here and that the political side of it was interpreted more narrowly, just to the cases where there was an ongoing investigation or a case (inaudible). And, you know, I don't know how anybody can really disagree with that.

* * *

Now, let me ask you another question. When the Washington Post article appeared I called the attorney general and said, "What about this?" And he said, "Yes, I had a general knowledge about what was going on, but I didn't have the specific knowledge because I hadn't concentrated on that." And he relied on you and others. And there were plenty of others working on this at the Department of Justice.

Is that a fair appraisal of the way he feels? Well, at least to the knowledge that you have of it.

SAMPSON: Yes, I can only speak to what I know. And I feel like I kept him generally aware of the process.

HATCH: Generally aware.

SAMPSON: I briefed -- I spoke with him every day. I talked to him about the things that I was doing and the conversations I was having.

I don't remember sharing any paper with him on it, but I remember that we generally talked about it.

HATCH: He admits that. But do you understand why he feels like he didn't know all the specifics about this?

SAMPSON: I think he -- well, look, I don't want to speculate to what he thinks. I can only tell you what I think, which is that I believe I kept him generally aware. And then, as the process came to a decision point, that he approved the idea of going forward and asking...

HATCH: In the end, he did. But did he understand all these nuances that you've been questioned about today?

SAMPSON: To the best of my knowledge, he understood some of them, and others he didn't have as much understanding on.

HATCH: Well, that's my point. So for us to hang the man in the press and everywhere else for not understanding every aspect of this that it's taken you all day long to explain seems to me is wrong. Would you agree with that?

SAMPSON: I wouldn't want to do -- I don't know...

HATCH: Giving you a chance here.

(CROSSTALK)

HATCH: You don't have to -- you don't have to answer that question. I understand.

SAMPSON: I only -- I want to come and testify what I know.

SAMPSON: And I think the attorney general's a good man who's doing his level best to -- to do his best.

HATCH: Did he have any intention, to your knowledge, or did he indicate any intention of doing wrong -- wrongful acts here?

SAMPSON: Not to my knowledge.

HATCH: Or of hurting anybody?

SAMPSON: No, not that I recall.

HATCH: Or of smearing any of these eight U.S. attorneys?

SAMPSON: To the contrary, he was concerned about that. He felt that the department's position should be to not talk about the reasons they were asked to resign that related to their -- to their -- to the way they were doing their jobs.

* * *

SCHUMER: . . . I want to talk a little bit about David Iglesias.

First, just a specific question, and then we'll get into more detail. You mentioned earlier, I believe, that the attorney general talked to you about Karl Rove relaying complaints about Mr. Iglesias, correct?

SAMPSON: I remember him doing that. But I don't remember when.

SCHUMER: That was my question, when.

Do you have some idea? Can we get a year?

SAMPSON: I think it was in the fall of 2006, in the run-up to the midterm elections.

SCHUMER: Right.

Because I believe that he was -- Karl Rove was called a few times on it. Or the attorney general himself was called on it as well, right?

SAMPSON: I remember learning from the attorney general that Mr. Rove had complained to the attorney general about U.S. attorneys in three districts. And the substance of the complaint was that they weren't aggressively pursuing voter fraud cases.

SCHUMER: And you think, with Mr. Iglesias, it's likely to be the fall of '06?

SAMPSON: I think so.

* * *

SCHUMER: . . . can you tell us on what date Mr. Iglesias was added to the list of names of U.S. attorneys to be fired?

SAMPSON: I don't remember the specific date.

SCHUMER: Approximate time.

SAMPSON: I remember sometime before November 7 I had discussions with others at the Department of Justice about U.S. attorneys who we might consider adding to the list. And those resulted in four additional names being added, including Iglesias'.

I remember speaking to -- at some point prior to this, I remember in my mind, in the best of my memory, knowing that Bill Mercer, who had previously served as the principle associate deputy attorney general was a fellow U.S. attorney of Mr. Iglesias, had expressed negative views about Mr. Iglesias.

He had served with Mr. Iglesias on the attorney general's advisory committee and recommended that he not be reappointed, recommending that he be replaced as chair of the Border Committee.

SCHUMER: When was that?

SAMPSON: That would have been in 2005.

SCHUMER: 2005, and you had a recollection of that...

SAMPSON: I did, and I knew generally...

SCHUMER: ... but it didn't stop your from or didn't cause you to put him on the list in October or September of 2006, correct?

SAMPSON: That's right.

SCHUMER: And yet he ended up on -- so it must have been something that happened between October 17 and November 15 of 2006 that made Mr. Iglesias be added to the list. I'm not saying something you did, but something must have happened that made this change, right?

SAMPSON: If I may share just two points...

SCHUMER: Please.

SAMPSON: ... I also remember that at some point, Mr. David Margolis, the associate deputy attorney general, had indicated to me that his -- some negative views about Mr. Iglesias, that he wasn't a strong manager, that he delegated a lot to his first assistant.

And so I knew, in my mind, those two criticisms from Mr. Mercer and Mr. Margolis.

SCHUMER: Any just approximate idea of when Mr. Margolis made those suggestions to you?

SAMPSON: I don't remember.

SCHUMER: Were they before October 17 of 2006?

SAMPSON: I think so to the best of my memory. I...

SCHUMER: Before, so...

SAMPSON: Yes, I think.

SCHUMER: ... it didn't cause you to add him to the list that you gave to -- I guess it was Mr. Elston. Was it before September 13 of 2006?

SAMPSON: I don't remember specifically when I heard those criticism from Mr. Margolis. I think that what happened is that after...

SCHUMER: But wait. I just want to -- I'm sorry to interrupt you. I just want to get a date set here or a time. Was it in 2006? Was it fairly recent? I mean, that's not hard to answer.

SAMPSON: I don't remember. I don't think it was that recent.

SCHUMER: No, so it could have been a while back.

SAMPSON: Yes.

SCHUMER: So the question remains, why those comments by Mr. Margolis, by all reports a respected member of the Justice Department, didn't trigger Mr. Iglesias' name on the list of September and October 2006 but did put him on the list of November?

There must have been something else. Is there anything else you can recall that happened in the interim that -- not that you did but that somebody told you, somebody mentioned?

SAMPSON: As best as I can remember, sitting here today -- and I've thought back about this -- sometime in late October, those in the senior management of the department, the deputy attorney general, his chief of staff, myself, Monica Goodling, went back and looked at the list to see if there anyone else who should be added. And four U.S.

attorneys were added including Mr. Iglesias. And three ultimately came off. We've talked about that.

SCHUMER: Who were the people at this discussion? You said Monica Goodling?

SAMPSON: I don't remember it being one discussion. It was general.

SCHUMER: Who were the people involved in the general discussions?

SAMPSON: The deputy attorney general, his chief of staff, Monica Goodling.

SCHUMER: Yourself.

SAMPSON: Myself.

SCHUMER: Anyone else?

SAMPSON: I don't remember if Bill Mercer was involved in that time or previously.

SCHUMER: Got it.

SAMPSON: I don't remember specifically if David Margolis was involved that time or previously. They had been folks who had been consulted previously on the issue.

SCHUMER: I'm going to ask you a few more questions. Did you have any communication with any member of Congress or Republican Party official in New Mexico -- or any Republican Party official -- in October of 2006 about Mr. Iglesias?

SAMPSON: I didn't.

SCHUMER: To you knowledge, did Attorney General Gonzales have any communication with any of those groups in October of 2006.

SAMPSON: Not to my knowledge.

SCHUMER: Not to your knowledge. OK.

To your knowledge, did Karl Rove have any communication with any member of Congress or Republican Party official in October 2006 about Iglesias?

SAMPSON: I don't know.

SCHUMER: And you wouldn't know -- you would have no recollection if any of those people, members of Congress, Republican Party officials, Attorney General Gonzales, Karl Rove had any discussions with any other members of the group? You didn't hear anything to that effect?

SAMPSON: Not that I remember.

SCHUMER: OK.

SAMPSON: And, Senator, in reviewing the documents, I understand that Monica Goodling met with some New Mexico Republican, but I don't remember anything more than that.

SCHUMER: And it was at about that time?

SAMPSON: I don't remember.

SCHUMER: OK, well, we'll check the documents.

SAMPSON: I think it's in the documents. I did not remember that until reviewing that document.

SCHUMER: OK, so do you have any reason to disbelieve the view -- because if you look at all the facts, it's kind of logical that the only reason Mr. Iglesias was put on the list and removed was called from members of Congress in 2006 of October. Do you have any reason to doubt that?

SAMPSON: I'm sorry. Can you say it again?

SCHUMER: Any reason to doubt that the reason Mr. Iglesias was put on the list and removed -- and then eventually removed were calls from members of Congress in October 2006. Do you have reasons to doubt that?

SAMPSON: I just don't know. I don't remember. As I testified before, I remember after he was on the list having a conversation with the deputy attorney general, and the deputy attorney general suggested that Senator Domenici wouldn't have any concern about us asking David Iglesias to resign because he was dissatisfied with him.

SCHUMER: Right. In fact, you write to Ms. Goodling that the "White House wants" -- and you have a name redacted -- "for New Mexico U.S. attorney, but Domenici is not so sure.

SCHUMER: "Domenici is going to send over some names tomorrow." No, that was a little bit later, right?

SAMPSON: I don't remember. It'll be helpful if I could see that document.

SCHUMER: It's OAG 125. I'll keep -- I'm not going to stop the clock. I'm going to keep asking questions while you look at that document, and then we'll come back to it.

OK. Let's go through some of these so-called performance problems Mr. Iglesias allegedly had.

One of the complaints made against him was lack of aggressiveness in indicting election fraud cases. In fact, even the president passed along complaints of this nature. We know that. That's in the record. President said so.

Dan Bartlett, counselor to the president, said, according to The Washington Post, that President Bush told Attorney General Gonzales about such complaints and specifically cited New Mexico as one of the three states where the complaints had arisen.

You were aware of such complaints about Mr. Iglesias, were you not?

SAMPSON: I don't remember the attorney general telling me about...

SCHUMER: I didn't ask that. I just asked if you were aware of complaints about Mr. Iglesias on voter fraud -- on voter fraud cases.

SAMPSON: Yes. At the time I was aware that the attorney general -- the attorney general informed me that he had received a complaint from Karl Rove about U.S. attorneys in three districts, as I've testified already.

SCHUMER: On voter fraud?

SAMPSON: And the substance of his complaint was voter fraud...

SCHUMER: Right. Not doing enough.

SAMPSON: ... and their failure to aggressively...

SCHUMER: Right.

SAMPSON: ... pursue it.

* * *

SCHUMER: When you heard complaints about these U.S. attorneys, the ones who were fired, Iglesias included, did you ever check?

SCHUMER: Did you ever ask them?

According to them, in most cases, not, although I believe, early on, Ms. Lam was talked to about immigration cases.

Did you ever do independent research?

SAMPSON: I don't remember ever doing any. I didn't do any.

SCHUMER: OK, so these folks were fired without any independent checking -- just, sort of, complaints out of nowhere?

We don't know who they came from. You've not been able to identify the people. We don't have a file. And they are fired. Isn't that -- doesn't that trouble you?

SAMPSON: Senator, the process, as I described it, was -- my role was aggregating information that came in from senior leaders in the department. And I just relied on that information. It came in from David Margolis and Paul McNulty and Bill Mercer...

SCHUMER: Name me a senior leader who made a specific complaint about a U.S. attorney, and then what you did when you got it.

SAMPSON: I remember the deputy attorney general asking me to add Kevin Ryan to the list.

SCHUMER: Right.

SAMPSON: I remember concerns being...

SCHUMER: And did you go check and see if the -- what the deputy attorney general had heard about Kevin Ryan might be true?

SAMPSON: I did not. I relied on the deputy attorney general.

SCHUMER: So, in other words, someone brought up a name, brought up a complaint, and they were just put on the list?

SAMPSON: They were put on a list that was then circulated among the senior leadership of the department and approved, and ultimately brought to the attorney general and approved.

SCHUMER: And "approved" meant no one said, "Take the name off"?

SAMPSON: Essentially.

SCHUMER: OK. So there was very little research that went behind this, after somebody in the department put the name on a list?

SAMPSON: The "somebody" in the department were the senior leaders of the department, who oversaw the work of the United States attorneys, the deputy attorney general, the deputy...

SCHUMER: I understand who the somebodies were.

SAMPSON: And I relied on that information.

* * *

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Gonzales Testifies Before Senate Panel

CQ Transcripts Wire
Thursday, April 19, 2007; 6:31 PM

* * *

GONZALES: Finally, let me be clear about this: While the process that led to the resignations was flawed, I firmly believe that nothing improper occurred. U.S. attorneys serve at the pleasure of the president. There is nothing improper in making a change for poor management, policy differences or questionable judgment, or simply to have another qualified individual serve. I think we agree on that.

I think we also agree on what would be improper. It would be improper to remove a U.S. attorney to interfere with or influence a particular prosecution for partisan political gain. I did not do that. I would never do that.

Nor do I believe that anyone else in the department advocated the removal of a U.S. attorney for such a purpose.

Recognizing my limited involvement in the process, a mistake I freely acknowledge, I have soberly questioned my prior decisions. I have reviewed the documents available to the Congress. And I have asked the deputy attorney general and others in the department if I should reconsider.

What I have concluded is that although the process was nowhere near as rigorous or structured as it should have been, and while reasonable people might decide things differently, my decision to ask for the resignations of these U.S. attorneys is justified and should stand.

* * *

LEAHY: Thank you, Attorney General.

Your former chief of staff testified under oath about a conversation in which Karl Rove told you about complaints that former New Mexico U.S. Attorney David Iglesias and two other U.S. attorneys were not being aggressive enough against so-called voter fraud.

When did such a conversation between you and Karl Rove take place?

GONZALES: What I recall, Senator, is that there was a conversation where Mr. Rove mentioned to me concerns that he had heard about pursuing voter fraud, election fraud in three jurisdictions: New Mexico, Milwaukee, Wisconsin, and Philadelphia, Pennsylvania, as I recall.

LEAHY: How many -- going back to New Mexico, how many conversations about New Mexico with Mr. Rove?

GONZALES: Senator, I can only recall of that one conversation.

LEAHY: Do you recall when that was?

GONZALES: Senator, my recollection was that it was in the fall of 2006?

LEAHY: Do you remember where?

GONZALES: No, sir, I don't remember where that conversation took place.

(CROSSTALK)

GONZALES: And, Senator, I don't recall either whether or not it was a phone conversation or was an in-person conversation, but I do have a recollection of that conversation.

* * *

LEAHY: So when was David Iglesias added to the list of U.S. attorneys to be replaced?

GONZALES: Of course, Senator, when I accepted the recommendation, I did not know when Mr. Iglesias was, in fact, added to the recommended list. As I've gone back and reviewed the record, it appears that Mr. Iglesias was added sometime between, I believe, October 17th and December 15th.

But I was not responsible for compiling that list.

LEAHY: He was added either before or after the elections, but you don't know when? Is that what you're saying.

GONZALES: Senator, I just responded as to when I believe -- as I've gone back and looked at the documents, it appears he was added sometime between October 17th and November 15th.

LEAHY: I understand. But you don't know when?

GONZALES: Senator, I have no recollection of knowing when that occurred.

LEAHY: Do you know why he was added?

GONZALES: Again, Senator, I was not responsible for compiling that information. The recommendation was made to me.

I was not surprised that Mr. Iglesias was recommended to me, because I had heard about concerns about the performance of Mr. Iglesias.

LEAHY: From?

GONZALES: Certainly, I'd heard concerns from Senator Domenici.

LEAHY: And who else?

GONZALES: Well, Senator, certainly...

LEAHY: And Karl Rove?

GONZALES: What I know -- I heard concerns raised by Mr. Rove. And what I know today, while I don't recall the specific mention of this conversation, I recall the meeting.

It was that there was a meeting in October, with the president, in which the president, as I understand it, relayed to me similar concerns about pursuing election fraud...

LEAHY: When was that?

GONZALES: ... in three jurisdictions.

Senator, I've gone back and looked at my schedule. And it appears that that meeting occurred on October 11th.

* * *

LEAHY: Now, Mr. Iglesias has been described by your former chief of staff as a "diverse up-and-comer."

He was reportedly offered the job as the head of the Executive Office of the United States Attorneys for you here in Washington.

He was selected by the Department of Justice to instruct other U.S. attorneys on investigating and prosecuting voter fraud.

This past weekend, the Albuquerque Journal reported that when Senator Domenici told -- this is a quote -- "When Senator Domenici told Gonzales he wanted Iglesias out in the spring of 2006," you refused -- I'm quoting now from the article -- and told Senator Domenici you'd fire Iglesias only on orders from the president.

In your testimony that you provide, you characterize Mr. Iglesias as "a fine lawyer; dedicated, professional; gave many years of service to the department."

But in your March 7th column in USA Today, you wrote that he was asked to leave because he simply lost your confidence.

When and why did he lose your confidence?

GONZALES: Senator, Mr. Iglesias, like these other United States attorneys -- I recognize their service; I recognize their courage to serve the American people.

Mr. Iglesias lost the confidence of Senator Domenici, as I recall, in the fall of 2005, when he called me and said something to the effect that Mr. Iglesias was in over his head and that he was concerned that Mr. Iglesias did not have the appropriate personnel focused on cases like public corruption cases.

GONZALES: He didn't mention specific cases, he simply said "public corruption cases."

I don't recall Mr. -- Senator Domenici ever requesting that Mr. Iglesias be removed. He simply complained about the -- whether or not Mr. Iglesias was capable of continuing in that position.

LEAHY: With all due respect, Mr. Attorney General, my question wasn't when he may have lost confidence of Senator Domenici. My question is when and why did he lose your confidence?

GONZALES: Senator, what I -- what I instructed Mr. Sampson to do was consult with people in the department...

LEAHY: When and why did he lose your confidence?

GONZALES: Based upon the recommendation -- what I understood to be the consensus recommendation of the senior leadership in the department that in fact these individuals -- there were issues and concerns about the performance of these individuals, that's when I made the decision to accept the recommendation that, in fact, it would be appropriate to make a change in this particular district.

Now, the fact that Mr. Iglesias appeared on the list, again, was not surprising to me, because I already had heard concerns about Mr. Iglesias' performance.

* * *

SPECTER: How much more could you have been involved than to be concerned about the replacement of Cummings and to evaluate Lam and to be involved in Iglesias? Now, we haven't gone over the others, but is that limited in your professional judgment?

GONZALES: Based on what I thought that I understood was going on, yes, Senator.

I thought Mr. Sampson -- I directed Mr. Sampson to consult with senior officials in the department who had information about the performance of United States attorneys. I believed that that was ongoing and that he would bring back to me a consensus recommendation.

The discussion about Ms. Lam never, in my mind, was about this review process. And I indicated so in my conversation with Pete Williams, I believe on March 26th, is that we were doing this process.

Of course there were other discussions outside of the review process about the performance of United States attorneys.

GONZALES: I can't simply stop doing my supervisory responsibilities over United States attorneys because this review process is going.

* * *

SPECTER: Did you tell Mercer to take a look at Lam's record with a view to having her removed as a U.S. attorney?

GONZALES: Senator, what I...

SPECTER: Or is he wrong?

GONZALES: I don't recall -- here's what -- Senator, what I recall is, of course, we had received -- the department had received numerous complaints about Carol Lam's performance with respect to gun prosecutions and immigration prosecutions. I directed that we take a look at those numbers because I wanted to know. And I don't recall whether it was Mr. Mercer who presented me the numbers, but I recall being very concerned.

SPECTER: But you were involved in evaluating U.S. Attorney Lam's record, weren't you?

GONZALES: Senator, I did not view that, and I -- this was my -- I did not view that as part of Mr. Sampson's project of trying to analyze and understand the performance of United States attorneys for possible removal.

* * *

SPECTER: Weren't you involved in the decisions with respect to U.S. Attorney Iglesias in New Mexico, as you've already testified in response to the chairman's questions?

GONZALES: Senator, I do recall having the conversation with Mr. Rove. I now understand that there was a conversation between myself and the president. And, at some

point, Mr. Sampson brought me what I understood to be the consensus recommendation of the senior leadership that we ought to make a change in that district.

* * *

GONZALES: Senator, you're talking about a series of events that occurred over approximately 700 days. I probably had thousands of conversations during that time.

And so putting it in context, Senator, I would say that my involvement was limited. I think that is an accurate statement. It was limited involvement.

And with respect to certain communications such as the communication with the president, such as the discussion about Carol Lam, I did not view it at the time as part of this review process. I simply considered those as doing part of my job.

We'd heard complaints about the performance of Ms. Lam. I directed the department to try to ascertain whether or not those complaints were legitimate. And if not, we ought to look at perhaps doing something about it.

* * *

SEN. EDWARD M. KENNEDY, D-MASS.: Thank you, thank you, Mr. Chairman.

And we appreciate, General, your sentiments about this horrific tragedy. I think all of us here on the committee, all Americans, know that that is certainly something that's hanging over all of our hearts at this very important and sad time.

Just to come back to some themes that have been talked about a little bit here, earlier, during the course of this hearing. In your opening statement you indicated, as Senator Specter mentioned, that you had a limited involvement and that the process was not vigorous. The question is -- and then you say, "My decision is justified and should stand."

Well, since you apparently knew very little about the performance of the replaced U.S. attorneys, how can you testify that the judgment ought to stand? What's the basis for that?

GONZALES: I think that's a fair question, Senator.

Obviously, when this began, I did not -- I was not the person in the department who had the most information about the performance and qualification of U.S. attorneys.

GONZALES: There were many other people, particularly the deputy attorney general.

And I charged Mr. Sampson, my chief of staff -- then my deputy chief of staff -- to engage in a review. I think it was perfectly appropriate to see where we could make changes to benefit the performance of the Department of Justice.

And what I understood and what I expected is he would talk to people like the deputy attorney general to ascertain how U.S. attorneys were performing.

And, of course, when the recommendation was presented to me, I understood it recommended the consensus view of the senior leadership of the department.

GONZALES: I think that I'm justified in relying upon what I understood to be the recommendation -- the consensus recommendation of the senior leadership.

And I think, as we look through the documents; as you glean through the documents, nothing improper occurred here.

You have more information about the testimony of witnesses than I do. I'm not aware that anyone based their recommendation on improper reasons. But just to be sure, I've asked the Office of Professional Responsibility to work with the Office of the Inspector General at the Department of Justice, to ensure that nothing improper happened here.

* * *

KENNEDY: Well, getting back to the time that you made the judgment and decision, you didn't really know the actual weapons when you approved the removal, did you...

GONZALES: Senator...

KENNEDY: ... at the time?

GONZALES: Senator, I have in my mind a recollection as to knowing as to some of these United States attorneys. There are two that I do not recall knowing in my mind what I understood to be the reasons for the removal.

But as to the others, I recall knowing the reasons why independently I was not surprised to see their names recommended to me because through my performance as attorney general I had become aware of specific related to performance.

* * *

KENNEDY: Well, my time is just going to be just about wrapped up. Did you speak with others in the department of the performance of any of these U.S. -- individually, did you -- did the attorney general -- did you speak to anyone else in the Department of Justice about any of these U.S. attorneys, about their performance, prior to the time that they were fired, other than the Mr. Sampson?

GONZALES: Yes, sir.

KENNEDY: Who?

GONZALES: Senator, I don't recall in connection with this review process Mr. Sampson was engaged in. But obviously issues came up with respect to Ms. Lam and her performance.

And I recall a meeting at the department. I don't recall everyone who was there. But I do recall a discussion about the numbers.

And again, Ms. Lam is a wonderful prosecutor, and I acknowledge her service. But I had genuine concerns about her efforts in pursuing gun prosecutions and particularly her effort with respect to immigration prosecution. This is a very important border district. And given the current debate about immigration reform, I felt that we should do better -- much better -- in this discussion.

And yes, there was some discussion with others about Ms. Lam.

* * *

SEN. SAM BROWNBACK, R-KAN.: Good. Thank you very much Mr. Chairman.

Welcome, Attorney General.

I'd like to get just a series of facts and the factual information out on the table on why this list of U.S. attorneys out of the 93 were terminated.

You've talked already some about David Iglesias and Carol Lam. You just addressed some of the reasons there.

And I recognize, as you state, that these are people that serve at the will and at the pleasure of the president. So you can terminate the for cause, without cause, whatever there might be.

But it appears you've come today prepared to discuss the reasons for the termination of these various U.S. attorneys. And I think it's important that we find out what those reasons are, given the allegation that a number of them were fired for inappropriate reasons.

So I want to go -- just go down the list with you, if I could.

Daniel Bogden of Nevada: Why was he terminated?

GONZALES: Senator, this is probably that one that to me, in hindsight, was the closest call.

I do not recall what I knew about Mr. Bogden on December 7th.

GONZALES: That's not to say that I wasn't given a reason; I just don't recall the reason. I didn't have an independent basis or recollection of knowing about Mr. Bogden's performance.

Since then, going back and looking at the documents, it appears that there was concerns about the level of energy, generally, in a fast-growing district, concerns about his commitment to pursuing obscenity -- which is important for the department; it is a law, we have an obligation to pursue it -- and just generally getting a sense of new energy in that office.

Now, in hindsight -- and I had a discussion with the deputy attorney general on the evening of Mr. Sampson's testimony, because I went to the deputy attorney general and I asked him, "OK, do we stand behind these decisions?"

And if you look at some of the documents, you can see that the deputy attorney general agonized over this one. And I think that's good. That's a good thing that we're thinking about what is the effect of making this kind of decision on people.

But at the end of the day, we felt it was the right decision.

* * *

BROWNBACK: Paul Charlton in Arizona -- and if you could be as concise as possible, I'd appreciate that.

BROWNBACK: But I want to give you a chance to say why.

GONZALES: What I recall about Mr. Charlton, when the recommendation was made to me, as I recall knowing, of his poor judgment in pushing forward a recommendation on a death penalty case.

These kinds of decisions, of course, are very, very important. And I take them very seriously. But we have a process in place to carefully evaluate death penalty decisions of the department around the nation.

Obviously, the views of the local prosecutor are very, very important. I made a decision around, I believe, May 15th -- somewhere around there -- about a particular case. And he came back to me two months later, first going through the deputy attorney general's office and then back to me to have me reconsider the case.

And I'm not aware of any new facts here. But the deputy attorney general, the capital unit review committee had already made a recommendation to me about this particular case. I'd already made a decision on this particular case.

Since the decision on December 7th, I've also learned that he exercised poor judgment in the way he pushed forward a policy with respect to interviewing of targets. He wanted to

record those interviews. He implemented that policy on his own, without consideration how it would affect other offices around the country, without consideration of how the other units like the FBI would feel about it.

In hindsight, there may be good reasons to pursue such a policy. But to implement it unilaterally on his own, in my judgment, was poor judgment. But that's something that I became more familiar about as I studied the documents.

* * *

BROWNBACK: Kevin Ryan, Northern District of California?

GONZALES: I was not surprised to see Mr. Ryan on the list.

And again, it's difficult for me to talk critically about these individuals who served our country. But you're asking me these questions.

I was aware as a general matter about poor management in that office. There was disruption; that Mr. Ryan had lost confidence in some career prosecutors. We had to send out a second EARS team out to that office to try to get an understanding of the sources of complaints that we were hearing.

So, in essence I would say it's a question of poor management.

* * *

BROWNBACK: Margaret Chiara, the Western District of Michigan?

GONZALES: Same issue. She's the other person, quite candidly, Senator, that I don't recall remembering -- I don't recall the reason why that I accepted the decision on December 7th.

But I've since learned that it was a question of similar kinds of issues: poor management issues, loss of confidence by career individuals.

GONZALES: We had to send someone out from main Justice to help mediate some kind of personnel dispute.

So it was a question simply of someone not having total control of the office.

* * *

BROWNBACK: H.E. "Bud" Cummins of Arkansas?

GONZALES: Mr. Cummins obviously is someone who was on a different track . . . Mr. Cummins was asked to resign because there was another well- qualified individual that

the White House wanted to put in place there, that we supported, because he was well-qualified.

I also understand -- this is after the fact -- that, in fact, Mr. Cummins had expressed a desire -- and I don't want to put words in his mouth, because I think he may have testified maybe not -- he's testified about this -- but there was a newspaper article that appeared in the Arkansas Times indicating that because of having four kids -- having four kids to have to put through college, don't be shocked if he didn't serve the rest of his term.

So it was a question of seeing that there may be a vacancy coming up and having a well-qualified candidate to go in that office.

* * *

BROWNBACK: And John McKay, Western District of Washington?

GONZALES: Mr. McKay, when I accepted the recommendation on December 7th, generally I recall there being serious concerns about his judgment. That's what I recall when I accepted the recommendations.

And what I've since learned, of course, is that it related to an information-sharing project. It's not the way that he -- it's not that he pursued this. We expected him to. He was doing a good job -- he was doing a good job with respect to that.

It's the way he pursued it, in exercising poor judgment that involved some of his colleagues and a letter that he sent to the deputy attorney general, that his colleagues would not have signed on the letter if they had known that the deputy attorney general would not welcome the letter.

And he nonetheless asked them for their signature, and the deputy attorney general was surprised by the letter. It angered his colleagues, it angered the attorney -- the deputy attorney general, and it was an indication of poor judgment.

There was also an instance where he gave an interview in Washington where he basically told our state and local partners, "Don't come to me for any more help in terms of partnerships because I just don't have the resources to do it." That was inappropriate.

If, in fact, there are concerns about resources, he should come to us, try to let us help him with it. But to go out and give an interview and tell state and local partners, "Don't come to us because we can't help you anymore" -- and I'm paraphrasing here, I want to be fair to Mr. McKay -- that also demonstrated poor judgment.

* * *

SEN. HERB KOHL, D-WIS.:

* * *

Mr. Gonzales, there have been allegations that voter fraud and public corruption cases have been influenced by partisan political considerations in my state of Wisconsin . . . So, Mr. Attorney General, was Mr. Steve Biskupic, U.S. attorney in the Eastern District of Wisconsin, ever on the list of U.S. attorneys who were to be dismissed?

* * *

GONZALES: Senator, I was never aware that Mr. Biskupic was on a list, obviously, when I made my decision. I'm aware that he may have appeared in a category which would indicate that there were concerns about his Mr. Biskupic.

GONZALES: But I think he's already issued a press release saying he never knew about that, and that it never would have influenced, and did not influence any decisions that he made with respect to cases in Wisconsin.

* * *

KOHL: So then my question is, why was he then taken off the list?

GONZALES: . . . I don't recall being aware of discussions about Mr. Biskupic.

Mr. Biskupic is a career prosecutor. He was appointed a United States attorney through a bipartisan panel.

With respect to the case, I think everyone is focused on, he made charging decisions after consulting with the then-Democratic state attorney general and consulting with the Democratic local prosecutor. And he believed it was the best -- his best judgment to charge that case, based on the evidence.

* * *

KOHL: Mr. Attorney General, once appointed by the president, confirmed by the Senate as attorney general, we all understand that you're expected to cast aside all partisan politics and serve only the interest of justice and of the American people.

The Justice Department is expected to investigate and prosecute those who violate our laws completely blind to their partisan political affiliation . . . .

GONZALES: Let me first direct the question about taint of politics. And let me just start with an example, Senator.

Six weeks before the election, this department took a plea from Congressman Bob Ney -- six weeks before the election. We could have taken the -- we could have taken the plea after the election. And I'm sure when we took that plea, there were some Republicans

around the country probably scratching their heads, wondering, "What in the world are they doing?"

Well, what we're doing is doing what's best for the case. That's what we did. We don't let politics play a role -- partisan politics play a role in the decisions we make in cases.

And we've prosecuted members of Congress, we've prosecuted governors, Republicans. And so, this notion that somehow we're playing politics with the cases we bring is just not true.

And the American people need to understand that. Because, when you attack the department for being partisan, you're really attacking the career professionals. They're the ones, the investigators, the prosecutors, the assistant U.S. attorneys, they're the ones doing the work.

And so, when someone says that we politicized a case, what you're doing is criticizing the career folks. And that's not right.

* * *

SEN. ORRIN G. HATCH, R-UTAH:

* * *

HATCH: I know you have to -- you've stated this before, but let me ask you just once more for the record, because this is important: Were any of these eight U.S. attorneys asked to resign in retaliation for or to interfere with any case that they brought or refused to bring?

GONZALES: That's not the reason I asked for the resignations, Senator. And from everything that I've seen and heard...

HATCH: Then the answer is no.

HATCH: Now, many of our fellow citizens may not have an accurate picture of what federal prosecutors do, or their relationship with the Justice Department here in Washington, what we call main Justice.

Now, I think many people probably see U.S. attorneys as something like independent contractors, able to call their own shots, set their own priorities, follow their own policies. And there might also be another kind of misunderstanding, in the other direction, when people here had said that U.S. attorneys are political appointees.

That makes understanding all of this much harder for our fellow citizens who have been characterized here today.

Now, I'd like to help -- I'd like you to help dispel these myths a little, by describing what the roles and the relationships should be between the U.S. attorneys around the country and the Justice Department, which ultimately means you and the president, here in Washington.

GONZALES: Senator, United States attorneys are accountable to the president, through me. We are accountable to the American people. And there has to be real accountability.

Obviously, with respect to decisions relating to prosecution, U.S. attorneys should have and do enjoy independence in exercising their judgment as to what cases to move forward with or not.

GONZALES: But with respect to policy, a president and the attorney general -- we are accountable to the American people. The president is elected based upon a set of -- his policies, his priorities. I mean, the only way to get those implemented is through the U.S. attorney. And it's important that the United States attorney support the policies and priorities of the president of the United States.

And obviously, within each specific district, there are going to be specific needs and priorities that are local. And the U.S. attorney has to find a way to accommodate those local needs and priorities, as well as the national needs and priorities. Because those are important to the president of the United States, and the U.S. attorney, as a member of a president's team, is subordinate and is accountable to the president. And the president is accountable to the American people for his policies and for his priorities.

* * *

SEN. DIANNE FEINSTEIN, D-CALIF.: . . . Who was the decider?

GONZALES: Senator, I accepted the recommendations made by the staff. I'm the attorney general. I make the decision.

* * *

Mr. Sampson periodically updated me on the review. As I recall, his updates were brief, relatively few in number, and focused primarily on the review process itself.

During those updates, to my knowledge, I did not make decisions about who should or should not be asked to resign. So in connection with this review process, as Mr. Sampson gave me updates, I don't recall ever saying -- even though they were still in the deliberative process, ever saying, "No, take that person off," of, "Add this person." I don't recall ever doing that.

Now, certainly after the work had been completed, Mr. Sampson brought me recommendations. I accepted those recommendations. Those were my decisions. I accept full responsibility for those decisions.

FEINSTEIN: . . . You said today, "We could do much better with regard to Carol Lam."

GONZALES: Senator, she is a distinguished prosecutor, and I commend her service as a prosecutor and as a judge, and she's a wonderful person.

She was acutely aware of the concerns that existed with respect to her policies. She received letters directly from Congress. She met with members of Congress. There were communications back and forth with the Department of Justice about her numbers. I think that she was aware of the fact that we had concerns.

* * *

Ms. Lam served with distinction in a lot of other areas. And, of course, she's going to have a lot of fans, and as do these other United States attorneys that were asked to resign, because there are good things that they did.

But this was a very important border district, and it was appropriate for the president of the United States and the attorney general to expect that we would make improvements with respect to both gun prosecutions and immigration prosecutions.

That is the reason why I asked for Ms. Lam's resignation. She had served for four years, and we felt that it was the appropriate time to make a decision to try to improve performance with respect to -- certainly with respect to immigration prosecutions.

* * *

SEN. RUSS FEINGOLD, D-WIS.: . . . Let me then go back to the subject that Senator Kohl brought up that's of particular interest to us in Wisconsin, on the question of the case of Georgia Thompson. This was the highly publicized public corruption case which got a lot of attention in Wisconsin during much of 2006, especially since it happened during the reelection campaign of the governor of the Wisconsin.

On April 5th, right after oral argument in the case, the Court of Appeals for the 7th Circuit ordered that Ms. Thompson be immediately released from prison and her conviction was summarily reversed. I thought the report was wrong, because it's so unusual for an appeals court to simply release somebody at that level.

The appellate judges suggested that the evidence in the case was extremely weak and said essentially the case should have never been brought.

Can you understand why many citizens of my state, as they see this U.S. attorney scandal widen, are now questioning whether the U.S. attorney in Milwaukee could have possibly brought the Thompson case for political reasons?

GONZALES: Senator, . . . look at the facts here. Again, this was a career prosecutor. The charging decision was made in consultation with a then-Democratic state attorney general and a Democratic local prosecutor.

When you allege or anyone alleges -- I'm sorry, when anyone alleges that in fact there may have been politics involved in this case, what does that say to that attorney general, to that local prosecutor, to the career investigators and career prosecutors?

* * *

FEINGOLD: . . . Kyle Sampson has testified that he kept you generally informed about the process of identifying U.S. attorneys who might be asked to step down. Did you ever ask him for specific information about who he was speaking to in connection with this process, or what he was doing to follow up and check out the information he received?

GONZALES: Senator, what I recall is telling Mr. Sampson, "Make sure the White House is appropriately advised, because these are political appointees," and telling him that I expected him to consult with the senior leadership at the department, people who would know best the qualifications, the performance of United States attorneys.

* * *

SEN. DURBIN: . . . Did you ever have a conversation with Karl Rove about the removal of David Iglesias?

GONZALES: Senator, I recall a conversation with Mr. Rove, but it wasn't a recommendation or a discussion about removal of Mr. Iglesias. But there was a discussion that I recall Mr. Rove had with me about voter fraud cases in three district, including New Mexico, which, of course, Mr. Iglesias is the United States attorney.

DURBIN: And what did Karl Rove say to you?

GONZALES: Senator, my recollection of the conversation was basically, "I've heard complaints about voter fraud prosecutions or lack of prosecutions." And again, I could be -- I'm paraphrasing. I don't recall precisely what he said, but it was general about voter fraud prosecutions, voter fraud cases in three districts including New Mexico.

DURBIN: And there was no conclusion to that conversation about the fate of Mr. Iglesias?

GONZALES: Senator, I believe that I communicated this information to Mr. Sampson, but I don't remember or recall what happened after that.

DURBIN: How about the fate of Mr. Iglesias himself? I mean, was that something that you were party to, the decision for his removal?

GONZALES: It was my decision.

DURBIN: And now that you reflect on that decision, having looked at his performance and considered the calls that were made by members of Congress, do you still think that was the right decision?

GONZALES: Senator, I think that is a very fair question. Obviously -- and by the way, this is a matter being investigated by the Congress so I'm not conceded that, in fact, what Mr. Iglesias said was true. There is -- Senator Domenici and Congresswoman Wilson will have their opportunity to present their story.

But if a member of Congress contacts a U.S. attorney to put pressure on them on a specific case, that is a very, very serious issue. And if, in fact, we had known -- if the deputy attorney general, I believe, had known about these calls, which Mr. Iglesias admitted that he did not contact us, would it have made a difference? It probably would have made a difference.

But now we're looking in hindsight, and so what we also know is that Mr. Iglesias did not report these conversations. That was a serious transgression. He intentionally violated a policy meant to protect him.

And so as we weigh these additional facts, my conclusion is is that I stand by the decision that Mr. Iglesias should not longer serve as a United States attorney.

DURBIN: In the situation with Carol Lam, did you have any conversations with Karl Rove about her fate?

GONZALES: Senator, I don't recall having any conversations with Mr. Rove about Ms. Lam in connection with this process.

* * *

SEN. CHARLES E. GRASSLEY, R-IOWA: . . . Who did you discuss the review with at the White House? Did you question any of the recommendations? Were you comfortable with the process and methodology for the final recommendations? And what was your personal input in that process?

GONZALES: Senator, as to whether or not I had a specific conversation with individuals about the review process is not something that I can recall having, that kind of conversation.

I had understood that there was a process in place where Mr. Sampson would consult with the senior leadership in the department, people that knew the most information about U.S. attorneys, and then he would bring back to me a consensus recommendation of the senior leadership of where there were districts in terms of issues and concerns about the performance of United States attorneys.

Still today, I think that was an appropriate thing for a manager to do, is to try to identify where there were areas of improvement. Clearly, there were mistakes made in the implementation of this plan and in the review of this plan, and I accept responsibility for those mistakes.

* * *

GRASSLEY: Who came up with the plan to evaluate U.S. attorneys?

GONZALES: Senator, I think that was my plan. I believed it was appropriate to look to see whether or not the United States attorneys were doing a good job. Were they doing their job? I felt that was a good management decision, to simply look to see whether or not the United States attorneys were doing their jobs. I think the American people want to know that public servants are serving them.

* * *

SEN. BENJAMIN L. CARDIN, D-MD.: . . . You've said a couple times that you had confidence in the process that had been set up. How did you know that wrong political considerations weren't being used in the advice that was being given to you on the firing of these U.S. attorneys?

GONZALES: Senator, I think that's a fair question.

I certainly know the reasons on which I made my decision. And I, quite frankly, relied upon people that I trusted to make a recommendation to me. I think I'm justified in relying upon the chief of staff to bring forward to me a consensus recommendation of the senior leadership of the department.

I'm not aware of anything in the documentation or anything with respect to testimony that would support the allegation that it was anything that was improper that happened here.

But, again, as I've said before, just to reassure myself, I did ask the Office of Professional Responsibility, and they're working with the Office of the Inspector General to ensure that nothing improper happened here.

* * *

SENATOR CARDIN . . . And yet you've said in your testimony, "I also have no basis that anyone involved in the process sought the removal of U.S. attorneys for improper reasons."

How do you know that?

GONZALES: Senator, based on what I know -- and again -- and it wasn't just the chief of staff. I was relying upon what I understood to be the consensus recommendation of the

department, in particular the deputy attorney general. This was -- U.S. attorneys report to the deputy attorney general. He is their former colleague.

I don't believe that he would make a recommendation based upon improper reasons that a former colleague, a United States attorney, should be removed.

* * *

SEN. JON KYL, R-ARIZ.: . . . In addition to being wrong if you affected a particular corruption case, would it not also be an improper firing if it was for the purpose of generally affecting or influencing political corruption cases?

GONZALES: That would trouble me, Senator, because...

KYL: Wouldn't it more than trouble you?

GONZALES: Yes, I think that would be wrong.

* * *

We don't want -- we do not want to send the message that prosecutors should not follow the evidence and prosecute people. We want them to do that, absolutely. We don't want them to be discouraged.

And I don't want them to be discouraged from coming forward and being candid with their views about issues or about cases.

KYL: Let me ask you, as far as you know, since this has all occurred, has there been any difference in the way that any of the political corruption cases has been handled by the career prosecutors in any of the offices?

GONZALES: Senator, not to my knowledge.

* * *

LEAHY: . . . Did the president ever tell you specifically to fire a U.S. attorney?

GONZALES: I don't recall the president ever telling me specifically to fire a United States attorney, sir.

* * *

FEINSTEIN: . . . From documents and interview, we know the following: The White House was involved in the removal of Bud Cummins. Karl Rove called you and asked about three districts: Milwaukee, Philadelphia and Albuquerque.

GONZALES: Senator, I don't recall whether he called or if there was a visit. It may have been a call.

FEINSTEIN: OK.

You got a call from the president about New Mexico in the fall of '06.

GONZALES: Senator, I think that was a conversation. I don't think it was a phone call.

FEINSTEIN: OK -- conversation, thank you.

And Harriet Miers discussed whether to remove Deborah Yang from Los Angeles. Now, she resigned so she was not part of this.

But given all these inquiries that we know about, how could you say just three weeks ago that the White House did not play a role in adding or taking off names?

GONZALES: Well, Senator, the fact that there may have been a conversation with the president indicating a concern about election fraud in a particular issue, in my mind I never would have equated that with the process, this review process that was ongoing with respect to -- that Mr. Sampson was coordinating.

* * *

HATCH: . . . With regard to public prosecutions, do the named U.S. attorneys always try those cases?

GONZALES: No, sir.

HATCH: Very seldom.

GONZALES: In fact, in most cases they're tried by the career professional with experience.

HATCH: By professional staff, right?

GONZALES: That is correct, sir.

HATCH: They're tried by professional staff. So if a U.S. attorney leaves, that case continues on, right?

GONZALES: The institution is built to withstand change in the leadership positions. That's the way it should be...

(CROSSTALK)

HATCH: Am I right, if the U.S. attorney leaves that case continues and it's well handled?

GONZALES: That's true.

HATCH: And that's without interference by the Department of Justice. Is that correct?

GONZALES: We have every expectation that the case will continue and move forward.

* * *

CARDIN: I want to go to the issue of voter intimidation, voter fraud . . . . Now, you have indicated that the lack of energy on voter fraud was involved in evaluation of a couple U.S. attorneys. I didn't see any evaluations at all about U.S. attorneys being aggressive in dealing with voter intimidation.

CARDIN: And I'm just wondering where the priority of the office will be.

GONZALES: Senator, I think you've raised a very, very good point.

First of all, with respect to voter fraud, generally, as someone who grew up in a poor neighborhood, the one day we were equal to everyone else was on Election Day. And so, I really appreciate how important the right to vote is.

Voter fraud to me means you're stealing somebody's vote. And so, I take this very, very seriously.

Having said that, in enforcing or prosecuting voter fraud, we need to be careful that we don't discourage people or intimidate people from participating on Election Day.

And I think it's important to send a strong signal that if you're going to do an investigation, be sensitive to the fact that you don't want to create -- have a chilling effect or create some kind of cloud and discourage people from participating.

And so, that, to me, is very, very important.

We have guidance about that, doing those kind of investigations near an election. Because it's important to enforce the law; it's important to pursue voter fraud, but let's be sensitive about the effect it has on, particularly, minority participation.

Hearing on Oversight of the Department of Justice, May 10, 2007

CQ Transcripts Wire
Thursday, May [__], 2007

May 10, 2007

SPEAKERS:

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REP. RICK BOUCHER, D-VA.

REP. JERROLD NADLER, D-N.Y.

REP. ROBERT C. SCOTT, D-VA.

REP. MELVIN WATT, D-N.C.

REP. ZOE LOFGREN, D-CALIF.

REP. SHEILA JACKSON-LEE, D-TEXAS

REP. MAXINE WATERS, D-CALIF.

REP. MARTIN T. MEEHAN, D-MASS.

REP. BILL DELAHUNT, D-MASS.

REP. ROBERT WEXLER, D-FLA.

REP. LINDA T. SANCHEZ, D-CALIF.

REP. STEPHEN I. COHEN, D-TENN.

REP. HANK JOHNSON, D-GA.

REP. LUIS V. GUTIERREZ, D-ILL.

REP. BRAD SHERMAN, D-CALIF.

REP. ANTHONY WEINER, D-N.Y.

REP. ADAM B. SCHIFF, D-CALIF.

REP. ARTUR DAVIS, D-ALA.

REP. DEBBIE WASSERMAN-SCHULTZ, D-FLA.

REP. KEITH ELLISON, D-MINN.

REP. LAMAR SMITH, R-TEXAS RANKING MEMBER

REP. F. JAMES SENSENBRENNER JR., R-WIS.

REP. HOWARD COBLE, R-N.C.

REP. ELTON GALLEGLY, R-CALIF.

REP. ROBERT W. GOODLATTE, R-VA.

REP. STEVE CHABOT, R-OHIO

REP. DAN LUNGREN, R-CALIF.

REP. CHRIS CANNON, R-UTAH

REP. RIC KELLER, R-FLA.

REP. DARRELL ISSA, R-CALIF.

REP. MIKE PENCE, R-IND.

REP. J. RANDY FORBES, R-VA.

REP. STEVE KING, R-IOWA

REP. TOM FEENEY, R-FLA.

REP. TRENT FRANKS, R-ARIZ.

REP. LOUIE GOHMERT, R-TEXAS

REP. JIM JORDAN, R-OHIO

WITNESSES:

ALBERTO GONZALES,

ATTORNEY GENERAL,

DEPARTMENT OF JUSTICE

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GONZALES: . . . I have soberly questioned my prior decisions. I have reviewed the documents available to the Congress . . . I have also asked the deputy attorney general if I should reconsider my decisions.

What I have concluded is that although the process was not as rigorous or as structured as it should have been, and while reasonable people might decide things differently, my decision to ask for the resignations of these U.S. attorneys was not based on improper reasons, and, therefore, the decisions should stand.

I think we agree on what would be improper. It would be improper to remove a U.S. attorney to interfere with or influence a particular prosecution for partisan political gain. I did not do that. I would never do that.

* * *

REP. JOHN CONYERS JR., D-MICH. CHAIRMAN: . . . Look, let me ask you a specific example. Mr. Iglesias . . .

* * *

. . . in New Mexico, who was not put on the termination list until October or November of 2006, we learned in last Friday's interview with your counsel, Matthew Friedgen (ph), at the request of the White House and Monica Goodling, he met with two prominent New Mexico lawyers who complained about Mr. Iglesias' handling of a vote fraud case.

CONYERS: He met them again in November. And they told him they didn't want him -- Mr. Iglesias -- to be the U.S. attorney. And then they said they were working toward that, and they had communicated about that directly with Senator Domenici and Karl Rove.

Aware of that, are you?

* * *

GONZALES: You mean, at the time that I made my decision?

CONYERS: Yes.

GONZALES: At the time I accepted the recommendation -- Mr. Chairman, I don't recall whether or not I was aware of that.

But I will tell you this: I was certainly aware of the fact that the senior senator had lost confidence in Mr. Iglesias beginning in the fall of 2005, and that we had had several phone conversations where he had expressed serious concerns or reservations about the performance of the person that he recommended for that position.

CONYERS: Yes. And they had communicated directly with Karl Rove and Senator Domenici.

You were aware of that?

* * *

GONZALES: At the time I made my decision, I was aware of the fact, of course, that Senator Domenici, of course, had called me several times. Mr. Rove, in a conversation that he had with me, raised concerns about voter fraud prosecutions in three jurisdictions in the country, including New Mexico. My recollection is that occurred sometime in the fall of 2006.

I don't have any specific recollection that when I made my decision I was aware of the specific conversations that Mr. Friedrick (ph), I believe, may have testified to.

* * *

REP. LAMAR SMITH, R-TEXAS RANKING MEMBER: . . . Mr. Attorney General, let me go to what I consider to be the heart of the matter and ask you a series of questions.

The first is this: Did you seek the resignation of any U.S. attorney to retaliate for, interfere with, or gain a partisan advantage in any case or investigation, whether about public corruption or any other type of offense?

GONZALES: I wouldn't do that, Congressman Smith. I would not retaliate for partisan political reasons. That's not something that I believe is acceptable, and would not tolerate.

SMITH: Did the White House ever ask you to seek the resignation of any U.S. attorney in order to retaliate for, interfere with, or gain a partisan advantage in any case or investigation, whether about public corruption or any other offense?

GONZALES: Not that I recall, Congressman. I don't believe that the White House ever did.

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REP. ZOE LOFGREN, D-CALIF.: . . . I would like to inquire about the situation of U.S. Attorney Todd Graves.

Here we have been pursuing -- I'm on the subcommittee of jurisdiction -- we thought there was an eight attorney general situation. And now, according to press reports, there's a ninth U.S. attorney situation.

LOFGREN: And I'd like to know, the news media is reporting that Mr. Graves had been targeted for removal on Mr. Samson's list as early as January of 2006. And one reason suggested in the press is that in November of 2005 the U.S. attorney, Mr. Graves, refused to sign onto a lawsuit that was proposed by main Justice accusing the state of Missouri of improper conduct regarding its voter rolls.

Would you have recommended Mr. Graves for removal based on that exercise of his prosecutorial judgment?

GONZALES: I have no basis to believe that, in fact, Mr. Graves -- that that particular case has anything to do with Mr. Graves' departure. I've spoken with the head of the Civil Rights Division this morning about this; obviously just became aware of Mr. Graves' statements in today paper.

I spoke with him -- Wan Kim, head of the Civil Rights Division. He signed the complaint. He stands behind that particular case. He's not aware of any concerns that existed in that office.

Now, we haven't spoken to everyone in that office, but we're not aware of any concerns that existed in that office with respect to this particular case. The assistant U.S. attorney signed on the complaint as well. Mr. Graves' name is on the complaint.

The case involved whether or not the voter lists were accurate in Missouri, and the Democratic secretary of state issued a statement saying...

LOFGREN: Mr. Attorney General, are you aware that just last month this litigation was dismissed for lack of evidence?

LOFGREN: Doesn't that suggest that the judgment not to file might have been the right one?

GONZALES: Well, again, we are evaluating whether to appeal. But it's my understanding that the judge decided that the department should not have sued the secretary of state but should have sued the local jurisdictions. So that's the basis for the dismissal -- the primary basis for the dismissal as I understand it.

And, again, the Democratic secretary of state issued a statement saying basically, "You got us. Our roles are incomplete and inaccurate." And I think it's legitimate for the

American people to expect that voting lists be reasonably accurate. That's what Congress required in its laws.

LOFGREN: I understand -- and this is really based on press reports so I don't have any firsthand knowledge -- that Mr. Schlozman had vote fraud experience but little prosecutorial experience, and that when Mr. Graves was left, that Mr. Schlozman was almost immediately appointed by you as his replacement.

It seemed to me -- I mean, just looking it at, doesn't it look like there was some plan in place to replace this Mr. Graves with Mr. Schlozman related to this prosecution? And isn't it true that the department's own criteria for bringing lawsuits would tend to indicate that lawsuits would not be brought just before an election?

GONZALES: The substance and timing of the -- well, let me just say again that I spoke with the head of the Civil Rights Division this morning and he stands behind this litigation. He believes it was an appropriate use of the department's resources . . . .

* * *

REP. DAN LUNGREN, R-CALIF.: . . . In terms of U.S. attorneys, do you expect that they should reflect the emphases of the president of the United States?

And what I mean by that is, we have presidential elections every four years. A president comes in and says, "I want to make crime- fighting the number one priority; I want to give assistance to the states with their drug-fighting; I want to assist the states in going after gangs."

Do you expect that your U.S. attorneys ought to at least pay some attention to the priorities of a president of the United States, that is, his administration's policies?

GONZALES: Yes. In fact, we have a conversation with him when they come on board and we make it clear that the president's accountable to the American people for the policies and priorities which he campaigned on. And those can only be carried out by the attorney general...

LUNGREN: But isn't that political?

GONZALES: Well, I think, with respect to policies and priorities, one could say it's political, but that would be OK. That would be OK to do...

LUNGREN: I think so, but some people find that shocking.

* * *

LUNGREN: . . . Now, let me ask you this about voter fraud: Do you believe that we ought to investigate voter fraud that might take place as the result of people who are dead still being on the rolls?

GONZALES: Congressman, it is the law. We have an obligation to investigate and prosecute voter fraud.

Where this notion that somehow voter fraud is a dirty word, I don't understand it. Because you're talking about people stealing votes, canceling out legitimate votes. And so we have an obligation -- as a minority, to me it's extremely important to make sure that votes count. And I think we have an obligation at the department to pursue voter fraud.

LUNGREN: I've been a little confused by some of the statements that have come out of the Justice Department and from you, quite frankly, Mr. Attorney General, about the propriety of reviewing the performance of U.S. attorneys who might be performing well as attorneys, but not be bringing forward the emphases or the priorities of the administration.

Do you think that's an appropriate thing to bring up in terms of a review, as opposed to whether or not they're good attorneys and they prosecute cases well; that is, the array of their resources with respect to the priorities of the administration?

GONZALES: I do.

LUNGREN: And would that, could that be the grounds for making a determination as to whether a U.S. attorney stays?

GONZALES: It could be.

* * *

LUNGREN: Under the statute, does a U.S. attorney have a prescribed term?

GONZALES: The statute says four years. But, of course, the statute also says that they may be removed by the president.

* * *

GONZALES: What I would say is that we all serve -- this is a privilege. I have the privilege of serving as the attorney general.

If the president comes to me today and says, "I no longer have pleasure in you continuing to serve," that's the way it works.

* * *

LUNGREN: Did the president of the United States or anybody from the White House tell you to investigate or remove any U.S. attorney because they were launching a particular investigation against a Democrat or Republican for partisan reasons, or to back off of any such prosecution?

GONZALES: They never said it to me.

LUNGREN: Did you ever say that to anybody?

GONZALES: No.

LUNGREN: Anybody in your department say that that you know of?

GONZALES: Not that I'm aware of.

LUNGREN: Thank you, Mr. Attorney General.

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REP. CHRIS CANNON, R-UTAH: . . . You're familiar with Mr. Margolis at the Department of Justice, are you not?

GONZALES: Yes.

CANNON: And my understand is he's the senior career employee at the department. Is that right?

GONZALES: I think he may not be the senior, but he's certainly one of the most senior.

CANNON: Probably one of the most outspoken. And he was actually interviewed, and I'd like to read some of the comments that he made.

He was asked by Mr. Broderick Socal (ph), "And then you testified that you said something to the effect of, but this does open the door to a more responsible -- and you used that word, that is, 'more responsible' -- to a focused process to identify weak performers and make some changes. And you thought that was a good idea."

And Mr. Margolis said -- responded, "I thought it was a great idea, long overdue."

Now, I believe it was Mr. Scott who was talking about the CRS report on firings at the Department of Justice, which is retrospective, of course. And here you've got a senior member -- or senior person at the Department of Justice pointing out that he thought what you were doing here was a great idea.

A little more here: "To move onto another thing, you mentioned during your testimony earlier in the day, I believe, that you had indicated that you thought it was good of the department to embark on an exercise like this; that is, reviewing U.S. attorneys."

Mr. Margolis; "Absolutely. And I -- I should add, one of my sadnesses" -- his word -- "I have a lot of sadness about this, but it was a great idea. Our execution wasn't particularly good, but we didn't have much experience with it."

So this is a new idea, a new process here.

"But one of my great sadnesses is I fear that, down the road, people will shy away from doing this again because of the burning here."

In other words, he's condemning the politicization of this process.

"And so, when a U.S. attorney called me a couple of weeks ago to run an idea past me," he said, 'I want to take some action, but I want to run it past you and take your temperature, because I don't want to get fired.'"

CANNON: "I said to him, 'Buddy, you could urinate on the president's leg now, and it wouldn't work,'" suggesting that the department has, in fact, been affected. And, again, Mr. Margolis is one of the very senior career guys who happens -- I think you would agree he loves the department...

GONZALES: No question about that.

CANNON: ... cares about the institution...

GONZALES: Yes.

CANNON: ... cares about the integrity of the institution...

GONZALES: Yes.

CANNON: And was called on to testify because they thought he would do what he suggested could not be -- or could be done without fear of being fired, I suppose. "Were you involved in any way," he was asked, "about the decision to put Ms. Lam on the list?" He says, "So it didn't surprise me in that sense because when Mercer (ph) was PDAG, he used to tell me about problems he was having with here, vis-a-vis immigration and immigration and guns, I believe." Then he goes on and he says, "Based upon my interaction with her and what other people, including Ms. Mercer (ph), said, both then and now, and reading my -- and I love Carol like a sister; an outstanding investigative lawyer, an outstanding trial lawyer, tough as nails, honest as the day is long, but had her own ideas about what the priorities of the department would be and was probably insubordinate on those things." That's -- nobody is claiming Mr. Margolis is political or politicizing this process. He's saying this is a process that was good, and he wants it to

happen or continue. Later he says, "She called me primarily to tell me that. I think she said, "I think I just got fired by Mike Battle.'" But later he says, "And then she speculated to me that is was over immigration and guns." She then told what the problem was. By the way, I think he said it was a very pleasant conversation. So this is not about competency, nobody's saying Ms. Lam wasn't competent, but she wasn't doing -- and she understood she wasn't doing -- what the president wanted.

* * *

CANNON: . . . I just want to put one more in. This is Mr. Margolis again. "I was asked about David Iglesias. Given everything I know today, he would have been number one on my list to go." "That's because he didn't call and report the phone calls?" "That's right." And he goes on to talk about that. So we did have some problems with some of these guys in the sense that they weren't exactly paradigms of competence, were they?

* * *

REP. MELVIN WATT, D-N.C.: . . . In the prior hearings, Mr. Attorney General, I've been devoting some time to trying to figure out what happened with the firing of John McKay. And on April 19 you told the Senate that you had accepted the recommendation to fire Mr. McKay because he had shown bad judgment in pushing an information-sharing system and in speaking to the press about the department -- about department resources.

WATT: You remember that testimony?

GONZALES: Yes. I hope, though, that I said the concern was not that it was pushing for the information-sharing system, but the manner in which he pushed it.

WATT: OK. Well, that really doesn't have much relevance to the next set of things I want to ask you about. Whatever he was pushing or not pushing occurred in the summer of 2006. The letter on the information system you discussed in the Senate was dated August 30, 2006, it turns out. And Mr. McKay's comments to the press were reflected in an e-mail on September 22, 2006. And, unfortunately, we now have evidence that -- documentation, in fact -- that Mr. McKay was already targeted for removal by Mr. Sampson in March of 2005, because the documents show that he was already on the list. So are you aware of any legitimate reason that John McKay should have been forced out as a U.S. attorney in March of 2005, as opposed to the things you had talked about that occurred in 2006?

GONZALES: I would have to go back and look at that, Congressman. Again, what I recall is that when I accepted the recommendations, I was not surprised to see Mr. McKay included, because I was aware of concerns in the way that he pushed this information-sharing project. Again -- and I applaud his efforts. He was doing his job.

WATT: OK, Mr. Attorney General, I understand what you're saying. You've got to go back and look. But there's been some suggestion, unfortunately -- our investigators asked Kyle Sampson his -- and he said that he remembered department officials being upset that Mr. McKay had pushed for action regarding the department's investigation of the murder of Thomas Wales.

WATT: And there was some concern that he was not being -- that he was being overly aggressive in pursuing the people who had murdered Thomas Wales. And so a lot of people are viewing this as being admirable, not something that somebody should be fired for. Would you agree with that?

GONZALES: That is -- certainly, it wasn't in my mind a reason why I accepting the recommendation. And I was not aware of these specific concerns within the department until very, very recently. So I don't know why -- if that was a reason why he was included as part of the recommended group, that's something you'd have to ask others involved in this process because I have not had the opportunity to do that.

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WATT: . . . Mr. McKay also failed to aggressively, or as aggressively, prosecute, as some people thought he ought to prosecute, and pursue some voting fraud cases that were taking place after an election took place.

WATT: And it might have had some impact on a Democrat versus a Republican being elected. So if that concern that the public is concerned about, Mr. Attorney General -- if that's at the bottom of this, that would be an improper motivation for a termination, and would be illegal. Wouldn't you agree?

GONZALES: I agree that if in fact there was pressure put on Mr. McKay to investigate a case which didn't warrant an investigation -- but obviously, there may be circumstances where an investigation may have been warranted. And so we'd have to look at the circumstances of a particular case. I don't recall that when I made my -- when I accepted the recommendation, Congressman, that that was a reason for it, is his efforts with respect to voter fraud. But clearly, I do -- going back and looking at the documents and the correspondences, there was a great deal of concern about his efforts with respect to voter fraud. Because I received a number of letters from groups and outside parties . . .

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REP. MAXINE WATERS, D-CALIF.: . . . Did you meet with the president about this issue?

GONZALES: Which issue is this, ma'am?

WATERS: Did you and the president meet to discuss the accusations of the politically motivated firing of these eight U.S. attorneys?

GONZALES: Ma'am, I wouldn't -- I disagree with your characterization as politically motivated.

WATERS: I'm not characterizing. I'm asking you, have you met with the president of the United States to discuss what has been accused of politically motivated firing?

GONZALES: Again, I would not characterize it as politically motivated.

* * *

REP. STEVE KING, R-IOWA: . . . I would reflect back on some issues that were raised, particularly by the gentlelady from California, with regard to . . . the behaviors and the activities of the attorney generals -- U.S. attorney's office, in that area. Then the issue is raised by the gentleman from Wisconsin, Mr. Sensenbrenner, about the investigation of a member of Congress and how that might affect the activities on the part of your office. And so I can't help but reflect upon a 500-page report that was delivered to the Department of Justice regarding another member of Congress. And that investigation has been going on since December of 2005. And that issue is still pending any kind of resolution. And I believe that the Ethics Committee in this Congress is awaiting the results of the investigation. But the question I would ask to you is, if the chairman of the Justice Appropriations Committee happened to have had been under that kind of scrutiny, could that affect the kind of prosecution that takes place out of your Justice Department with regard to that particular member of Congress?

GONZALES: I would like to say no, quite frankly, I think, because you have to understand that prosecutions, by and large, are handled, and the investigations and prosecutions are handled, by career officials. They go forward no matter what happens. We want them to do that. I've told every United States attorney to, "Tell your people, I don't want anything affected, whatsoever, by anything going on Washington. I don't care who the target is, Republican, Democrat, member of -- someone on the Hill, someone at the White House. You follow the evidence; you do your job. That's what the American people expect, and that's what I expect and demand."

KING: And, Mr. Attorney General, you know, aside from the president of the United States, what could be more intimidating to the Department of Justice than to be involved in an investigation of the chairman of an Appropriations Committee that had control directly of your budget?

KING: What could be more intimidating than that with regard to an investigation?

GONZALES: We have to put that aside. Again, if the evidence is there, we have an obligation to pursue it. And if it's not there, then we stop the investigation. But, clearly, this comes with being a prosecutor. Sometimes it's going to put you in a very awkward, difficult situation. But the American people expect you to do your job, and that's what I expect of the prosecutors in the Department of Justice.

KING: Let me say then, Mr. Attorney General, that if that kind of circumstance -- if the person that's in control of your budget has his activities being reviewed by your department -- it's very well- published across this country and not well-known in this Hill -- if that does not affect your investigation and your integrity has risen about that kind of intimidation, then how in the world can any of these other allegations be intimidating the investigation of the Justice Department?

GONZALES: Well, again, without commenting on a particular investigation, we have a job to do that the American people expect we're going to do it.

KING: And I would submit to this committee that what I've stated here is entirely true: that there is nothing more intimidating than the scenario that I've laid out here, and this scenario happens to be fact. All the rest of these things that unfold are minor in comparison to this looming issue that's here. And if this Justice Department can be considered to be conducting themselves above reproach with this investigation -- and I don't have any reason to believe they're not and I want to put that on the record -- then the rest of these allegations are essentially baseless. And I would also submit that in my experience into the 11th year of the legislation process that I've been involved in, there has been nothing that has seen more opposition from a partisan political standpoint than trying to provide integrity into the electoral process.

And those investigations that were going on in the southwestern part of this United States which were part of a decision, I believe, that was made by your department to dismiss an attorney general down -- or excuse me, dismiss a U.S. attorney down in that area, I think were met with political opposition on the other side. And if we're going to investigate this, then I'd be looking at some of the FBI officers that were doing the investigations in those kind of cases.

KING: And I'd ask if you'd care to comment on that, Mr. Attorney General.

GONZALES: No, sir.

KING: I didn't think you would.

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REP. DARRELL ISSA, R-CALIF: . . . General Gonzales, it goes without saying, and I'm sure you're well aware of it at this point, that I've been a critic of the former U.S. attorney in San Diego, Carol Lam, who was terminated.

And I was a critic not because she wasn't a fine prosecutor, as a matter of fact, not because she didn't take on big cases; she did that, but because of the exclusion of any reasonable prosecution of coyotes, people who traffick illegally in human beings, people who, very well, would bring terrorists into our country. And, in addition to that, I'm very aware that she failed to prosecute -- willfully failed to prosecute gun crimes in any number similar to the rest of the country or the rest of California.

Having said that -- and I'm going to ask you an off-the-cuff question -- are you aware of who Antonio Lopez was in that district?

GONZALES: Is that his full name, Congressman?

ISSA: He's got a middle name. I apologize.

GONZALES: Well, I mean, I don't...

(CROSSTALK)

ISSA: He trafficked 20 times and was arrested and not prosecuted by Carol Lam. On the 21st time, we sent to your predecessor a letter, signed by 19 members of Congress...

GONZALES: I'm now aware -- I recall him, yes.

ISSA: And we did so as a form of political pressure to say, "We want this type of prosecution. We believe the president stands for this. And Attorney General Ashcroft failed to take action. Carol Lam failed to take action."

ISSA: So, it's not without some special interest in this that I believe that the policies of this president were, in some cases, poorly executed by U.S. attorneys.

And I'm here today not to support your management capabilities or how much you delegated -- I think you've already apologized for not having a better management system in place. I think you've already apologized for the fact that U.S. attorneys may have, in many cases, not been through the normal process of review -- "You're not doing this; you have to do better." I think we've all read e-mails that indicate that that may not have been done very well. But I'm going to ask you the basis question, which is, if you continue to serve for 20 more months at the pleasure of the president, which I believe you will, will you, in fact, not be gun shy as a result of what happens here today? And if you have a U.S. attorney who is not implementing the stated public policies of this president, will you take any and all measures necessary to make sure they are aware and they are supportive of the stated policies of this present administration?

GONZALES: Contrary to being gun shy, this process is somewhat liberating in terms of going forward. No, believe me, I think it's clear to the American people what I expect of U.S. attorneys. We -- the president is accountable to the American people, and his priorities and policies can only be implemented through people like myself and the United States attorneys. What I need to do a better job of is making sure that I communicate with U.S. attorneys where I think that they're falling short. And if I have concerns about their performance or any thing else about what's going on in their district, we need to do a better job communicating those concerns to the United States attorneys.

ISSA: General Gonzales, I would ask that you follow up for the record with some of the steps you're going to take to provide better guidance to 93 U.S. attorneys. And I look

forward to seeing those. Let me follow up with, I think, the fair balance for some of the things I've heard here today. You weren't here at the beginning of this administration as the attorney general, but you're aware of the termination of the previous U.S. attorneys at the beginning of this administration. Do you recall the number that were terminated?

GONZALES: Well, eventually all of the United States attorneys were terminated. And what was unusual about that is that normally they're staggered over a period of time. And as I recall, in connection with the previous administration, they were actually more compressed.

GONZALES: And so, the concern there is it's much more disruptive -- it's a shock -- a greater shock to the system when you do it all together at one time. But having people removed over a staggered period of time is something that has occurred before.

ISSA: So under this administration, 93 U.S. attorneys were replaced. Some quit on day one; some were asked to leave shortly thereafter; some were kept on for transition purposes. And that was done in order to do the best job you could in spite of the fact every one of them was a Democrat political appointee.

GONZALES: That is correct. And quite frankly, you know, at the beginning of an administration, we weren't prepared to immediately nominate 93 new individuals. And so, it would take a period of time. I think it's a matter of good management and judgment. It would take some time before we were prepared to do that.

ISSA: And I applaud this administration for doing it. I might note that under President Clinton, 92 out of 93 were terminated immediately. And just in the remaining time, how do you think that earlier administration's immediate termination of 92 out of 93 affected morale and capability of doing the job versus the technique that this administration employed?

GONZALES: Well, I don't want to comment on that, other than to say that we -- I think it's a better system to do it on a staggered term, quite frankly, again, because it's less of a shock to the system . . . .

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CONYERS: Now, you've already indicated that you talked to Mr. Karl Rove about the voter fraud matter in New Mexico in October of 2006.

GONZALES: Mr. Chairman, I'm not sure that I said it was in October. I think it was in the fall of 2006.

CONYERS: All right. Do you have information on whether Karl Rove or any other White House staff member helped get Mr. Iglesias on the termination list, either through Ms. Goodling, who was liaison to the White House, or anyone else that might be White House-like liaison?

GONZALES: I have no personal knowledge, Mr. Chairman. I don't recall now, thinking back, whether or not there's anything in the documents. I'm not sure that I have any personal knowledge outside the documents.

* * *

CONYERS: . . . Now, we have already learned that Karl Rove has been contacted by prominent New Mexico Republicans to try to remove Mr. Iglesias as the U.S. attorney because of concerns about the voter fraud matter.

Mr. Rove talks to you about the voter fraud matter in New Mexico in the fall. Right?

GONZALES: That is my recollection -- not just New Mexico, but also, as I recall, Philadelphia as well.

CONYERS: A couple other places. All right. And Mr. Iglesias appears on the termination list in October or November...

GONZALES: I believe it was Election Day, November.

CONYERS: It was November. Thank you. Well, now, if we start following these bread crumbs, it suggests that there could have been some connection between the discussions between yourself and Mr. Rove and Mr. Iglesias hitting the door, as an ex-employee.

GONZALES: Mr. Chairman, you have more bread crumbs than I do, quite frankly, because you've had the opportunity to speak directly to other fact witnesses at the Department of Justice. I was not surprised to see Mr. Iglesias recommended to me, based upon previous conversations that I'd had with Senator Domenici.

CONYERS: Well, you may have yet more bread crumbs than I, sir, because you were the one that talked to Karl Rove. That's a pretty big bread crumb.

GONZALES: I have a lot of conversations with Mr. Rove, Mr. Chairman. I have no recollection that Mr. Rove ever recommended that Mr. Iglesias be terminated. Again, what he was conveying to me were concerns that had been raised with him with respect to voter fraud prosecutions in these three jurisdictions.

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REP. J. RANDY FORBES, R-VA.: . . . one of the things that we had recently, we had a hearing in New Orleans about some of the crime activity that was down there. We found out a staggering statistic: that the state attorney down there, that there was apparently only 7 percent of the individuals that were arrested ended up going to jail.

And if we found that statistic and we found that we had had a president who was elected to go after crime and anybody on this committee contacted you and said, "We just think

that 7 percent of the individuals arrested would not be satisfactory," would that be an appropriate thing for us to raise to you?

GONZALES: Oh, no question about it.

FORBES: And if you had such an attorney like that, would it be an appropriate thing for you to tell him if that didn't change, that he may be removed, even if he was a good attorney and a competent attorney?

GONZALES: Of course.

FORBES: And what we did also find out in that same hearing that we had down in New Orleans was that the people under charge, the U.S. attorney down there was actually having between 93.5 and 99 percent conviction rates.

FORBES: So they had done a good job.

But if you hadn't have taken those steps, we'd have you before us and we'd be asking you those questions why. So we want to compliment you for that job.

The other thing is, some of us are concerned about what we see with gangs across the country, and the rise in gangs. And if you sat down and made policy decisions that you wanted to have U.S. attorneys go after networks of gangs, as opposed to just waiting until individual gang crimes took place, would that be a fair thing for any member of this committee to raise to you and say, we think your U.S. attorneys need to be doing that?

GONZALES: I'd be very interested in hearing your views about gangs. It's a serious issue in our country. And I think we ought to be -- and we are focused on it.

FORBES: And you are. And if your U.S. attorneys were not, would that be appropriate thing for you -- even if they were competent attorneys and good attorneys. But if they weren't going after gangs in the direction that you felt appropriate, from an administrative point of view, would that be reason to make a change in that U.S. attorney's office?

GONZALES: If the U.S. attorney -- now, of course, we would endeavor to find out, OK, what are the reasons why? We ought to have a conversation with that U.S. attorney. And the reasons aren't legitimate, of course it would be appropriate.

FORBES: And if you didn't, we'd bring you back for a hearing and we would be criticizing you for that. One of the other big things that many of us have been concerned about is pornography and child pornography, and especially pornography on that Internet. If you had U.S. attorneys that weren't going after that in the manner that you felt appropriate -- that some of us felt appropriate -- and that wasn't getting prosecuted, would it be appropriate for us to raise those issues with you?

GONZALES: Well, I'd be interested in hearing your views about that.

FORBES: And if we did, and you felt those U.S. attorneys -- even if they were competent -- were not prosecuting those obscenity cases in the manner that you felt they needed to be prosecuted, would that be reason for you to be able to remove those U.S. attorneys?

GONZALES: It would be. I'd give the same answer. You know, in hindsight looking back, I'd like to try to find out the reasons why. And the reasons -- if there aren't good reasons, then I think...

FORBES: Even if they were a competent attorney, if they weren't moving in that direction. The other big thing -- and you've testified before us, correctly so -- that our number one espionage problem in this country was with China. And if we had U.S. attorneys that weren't prosecuting that in what we felt was an appropriate manner, would that be appropriate for us to raise that kind of issue with you?

GONZALES: I'd be -- always be interested in hearing about the concerns and views of Congress.

FORBES: And if they didn't modify that and they weren't going after those espionage cases, would that be a reason for you then to make a change with the U.S. attorney's office?

GONZALES: Yes.

* * *

SANCHEZ: . . . in his written responses to questions from the Subcommittee on Commercial and Administrative Law, Mr. Bogden noted that Mr. McNulty told him that he had, quote, "limited input," end quote, in the final decision process to terminate the U.S. attorneys. Did you understand that the deputy attorney general had only, quote/unquote, "limited input"? Is that your understanding?

GONZALES: It was my understanding or belief that Mr. Sampson was consulting with the senior leadership, including and in particular, the deputy attorney general, because the deputy attorney general is the direct report for these U.S. attorneys, including Mr. Bogden.

GONZALES: But at the end of the day, no matter the level of consultation, what I know is that Mr. McNulty, the deputy attorney general, signed off on these names. And, in fact, on the day of Mr. Sampson's testimony, I went to the deputy attorney general, I said, "Do you still stand behind these recommendations?" And he told me, "Yes," and that, to me, is the most important thing.

* * *

REP. ROBERT WEXLER, D-CAL.: . . . Did the president select Mr. Iglesias to be put on the termination list?

GONZALES: No...

WEXLER: No, the president didn't select him.

Did the vice president select him to put him, Mr. Iglesias, on the termination list?

GONZALES: No.

* * *

WEXLER: So you don't know who put it on the list, Mr. Iglesias . . . ?

GONZALES: Well, again, I wasn't surprised to see Mr. Iglesias' name recommended to me based upon conversations that I had had with the senior senator from New Mexico. He had lost confidence in Mr. Iglesias.

* * *

REP. STEVE COHEN, D-TENN.: . . . I want to follow up a little bit on Congressman Wexler's questions. You said you don't know who put Mr. Iglesias on the list. Is that correct?

GONZALES: That is correct.

COHEN: But you said you knew the president and the vice president didn't. How do you know they didn't?

GONZALES: Well, I just know that they would not do that.

COHEN: Do you think Mr. Nulty or Mr. Sampson would have done it? Obviously, you think they could have done it.

GONZALES: Of course. Look, I didn't envision the president of the United States and the vice president being involved in this process. What I...

COHEN: But you don't know for a fact that they weren't involved in the process through Ms. Miers or through Mr. Rove. You don't know that.

GONZALES: I have no -- that is correct. That is correct.

(CROSSTALK)

GONZALES: But I had no reason to believe that the White House -- in fact, I know the White House has said publicly they were not involved in adding or deleting people from the list. That's what the White House has said publicly.

* * *

REP. RIC KELLER, R-FLA.: . . . Mr. Attorney General, when I'm asked at town hall meetings about what's going on with this U.S. attorney situation and you, I tell folks back home that it can all be summarized, the microcosm of this whole -- what the media calls a scandal -- in one case. And that's the case of Carol Lam. Carol Lam was a talented lady, U.S. attorney from San Diego, who had successfully prosecuted Duke Cunningham. She also is a lady who had some concerns with your department. I think she was 91 out of 93 in firearms. And I learned, from going to San Diego and talking to folks that she had failed to prosecute alien smugglers, even those who had been arrested 20 times. Now, you let her go, or told her she was going to leave in December of 2006. And immediately we heard the allegation from some in the media and some members of Congress that Carol Lam must have been fired because she prosecuted a public corruption case against Republican Duke Cunningham. Now, I went through and reviewed the documents, talked to people, including Carol Lam. And the timeline is crystal clear. The documents regarding her failure to prosecute alien smugglers, including those who had been arrested 20 times, began in Congress with -- in February of 2004 -- with Darrell Issa, which is literally 16 months before the local San Diego Union-Tribune broke the very first story about the Duke Cunningham scandal, which shows me that it is literally impossible that that was an improper motive on your part or anyone else. So, let me ask you directly, did you ask Carol Lam or any of the other U.S. attorneys to resign because they were prosecuting or investigating public corruption cases against Republicans.

GONZALES: No. In fact, I'm very, very proud of the work of the department in prosecuting public corruption cases. I don't care whether or not we're talking about Republican or Democrat. We're doing our job.

KELLER: Did anyone at the White House -- including, but not limited to the president, Karl Rove, Harriet Miers or Josh Bolten -- ever come to you and say, "We want you to fire Carol Lam" -- or any other U.S. attorney -- "because they're going after a Republican congressman"?

GONZALES: They didn't say it to me, and I'm not aware of any such direction.

* * *

CANNON: . . . Going back to Mr. Margolis -- who, again, is a very senior career employee -- and his view about the Griffin appointment, I should say directly or indirectly. I also, to be fair to Griffin, his resume at the time I interviewed him looked better for the job than Cummins's did when I interviewed him. Here was a guy who's not political, who's saying that Griffin was well qualified. Remember, Griffin went -- was in Iraq. He was in DOJ. He was a judge advocate general. And so we have lots of views on these issues that haven't been out here yet, which indicate that at least in the case of Cummins we have some pretty good information about why he was supplanted. I thank you, Mr. Chairman. I cede...

GONZALES: Mr. Chairman, could I make one comment? It bothers me to have to disparage individuals and to be critical openly about people who worked for the department. And I just want to make a general observation that these are all very, very fine people. And they should be proud of their service. We should all be proud of the fact that they had the courage to engage in public service. And I don't want anyone to think that I don't otherwise appreciate the fine work that they did on behalf of the department.

* * *

REP. TRENT FRANKS, R-ARIZ.: . . . Have you ever fired anyone or caused anyone to be fired or influenced anyone to be fired on the basis of trying to affect a particular criminal case or investigation, or to thwart justice in any way?

GONZALES: No.

FRANKS: Do you know of anyone in the administration or your department that has done either of those things?

GONZALES: No.

* * *

FRANKS: See, I think, Mr. Chairman, that is indeed the job of this committee, is to ask those very direct questions.

And, of course, time and justice has a way of prevailing. And the truth of those answers -- of which I have to say to you I've seen no evidence that either of those things have occurred, before this committee or otherwise -- but time will probably bear that out one way or the other.

But I just wanted to make sure that we understood what we're all about here. And your job is protecting this country. And while we're interviewing you like this, it cannot possibly help but detract from what you're trying to do to protect this country and to pursue those three priorities that you mentioned earlier.

So I guess one of the things I'd like to do, Judge Gonzales, is to ask you, what do you think is the public's greatest misperception of the Department of Justice at this time, given all the circumstances that have occurred here?

GONZALES: Well, given some of the statements that have been made, the notion that the department has been politicized.

As I indicated in response to an earlier question, there are only hundreds -- there a few hundred political appointees. There are tens of thousands of career individuals.

The department is great because of the career individuals. They deserve all the credit for the success of the department.

And it would be pretty darn difficult, if not impossible, to make a decision for political reasons and expect to get away with it. If in fact someone -- if a career investigator or prosecutors felt that we were making decisions for political reasons to interfere with a case, you'd probably hear about it. We'd probably read about it in the papers. Because they take this stuff very seriously, as they should. We expect them to.

And, again, I just want to emphasize to the American public that the work of the department continues, irrespective of who the attorney general is, United States attorney is. It continues because of the great career people in the department.

* * *

REP. BRAD SHERMAN, D-CALIF.: . . . You've now spent more time looking at these eight U.S. attorneys then you might have expected to. Are there any of them that you think it was a mistake to fire and that it would have been in the interest of the administration of justice to have left at their posts?

GONZALES: You know, I've gone back and thought a lot about this. You're right. And, in fact, I spoke with the deputy attorney general after Mr. Sampson's public testimony and asked him, "OK, do you still stand by the recommendation?" And the answer was yes. I think the one that's probably the closest call for me is Mr. Bogden in Nevada, and I talked about this in my Senate testimony. It is for that reason that I have reached out to Mr. Bogden and have offered my assistance in trying to help him, move him forward with an employment. But again, the standard is, was anything improper here...

SHERMAN: I'm not asking improper; we all make mistakes.

GONZALES: I stand by the decisions. I stand by the decisions.

SHERMAN: So if you had it to do all over again, these eight would be toast.

GONZALES: No, because, again, we would have used a different process and I don't know whether or not using this different process the same recommendations would have come to me. I relied upon the recommendations.

SHERMAN: Well, I'm asking you whether you made a mistake, not whether you liked your process. Did the conclusion to fire these eight...

GONZALES: I think...

SHERMAN: ... is that -- was that the right, best thing to do for the administration of justice?

GONZALES: I think I stand by the decision. In hindsight, I'm not happy with the process. I know that, to me, the process is important too, and I think using a different process, we may have come out with different recommendations to me which would have made a different, perhaps.

* * *

SHERMAN: Well, it's -- let me move on. You've said that it would -- you know, U.S. attorneys deal with political sensitive investigations. It would be wrong to fire one in order to thwart an ongoing investigation. Would it be wrong to fire a U.S. attorney because he failed to announce indictments before an election date?

GONZALES: Well, of course, with respect to making public an indictment, that's something -- particularly if you're talking about an announcement on or around election, you may get criticized if you do it before the election; you may get criticized if you do it after the election. What I tell people is try to be sensitive and do what's best for the case.

SHERMAN: Let me move on. Would it be wrong -- let's say an investigation had been completed and it was politically painful to your party how it went, somebody got indicted or convicted. Would it be wrong for you to fire a U.S. attorney after the investigation, not for the purpose of thwarting the investigation, which had already been completed, but for the purpose of rebuking that attorney for having chosen to investigate those associated with your political party.

GONZALES: I'm not sure I'm comfortable with answering that question. I will say this...

SHERMAN: Do you think it might be OK to fire somebody because they successfully completed an investigation?

GONZALES: Let me just give an example of the way we deal with these cases: Representative Bob Ney. We accepted a plea from Representative Ney six weeks before the election.

GONZALES: We didn't have to do that before the election. I'm sure there's some Republicans around the country who felt -- sort of scratched heads when we in fact took that plea right before the election. Why did we do that? We did it because we don't -- we aren't motivated by politics. We do what's best for the case.

* * *

REP. TAMMY BALDWIN, R-OHIO: . . . So, let me ask you again, are you aware that Mr. Biskupic was on the first known version of the list compiled by your chief of staff, Mr. Sampson, dated March 2, 2005, recommending names of U.S. attorneys to be fired?

GONZALES: Yes, my understanding is, Congresswoman, is that, actually, the list included all the United States attorneys. And the documentation reflected, sort of, Mr.

Sampson's -- I presume -- then current view of their performance. But with respect to Mr. Biskupic, let me just remind everyone, this was a career prosecutor who made the charging decision on the Georgia Thompson case in consultation with the then-Democratic state attorney general and the Democratic local prosecutor. They all agreed this was the right thing to do...

BALDWIN: Let me...

GONZALES: ... no question that the decision by the circuit was quite different, quite surprising. But the notion that Mr. Biskupic would in any way -- this was a career prosecutor, again -- charging decisions made in consultation with Democratic officials, I just think is ludicrous.

BALDWIN: A career prosecutor who was on the list, and then was...

GONZALES: And he didn't know that. He's already publicly...

(CROSSTALK)

GONZALES: He's publicly said he didn't know he was on the list.

* * *

REP. LOUIE GOHMERT, R-TEXAS: . . . I would ask you, General, if there was no intent there by the Clinton administration to impede any investigation or affect an investigation. And all 93 U.S. attorneys were fired within 12 days of Attorney General Reno taking office, simply for political reasons. Is that a crime?

GONZALES: No.

GOHMERT: No, it's not a crime?

GONZALES: No.

GOHMERT: So they can do that, strictly for political reasons.

GONZALES: The U.S. attorneys serve at the pleasure of the president of the United States.

GOHMERT: Well, if it turned out that this was a joint decision by the attorney general and the White House in 1993, and others within the Justice Department, to have all 93 resigned at the same time, is that a crime in and of itself?

GONZALES: No.

GOHMERT: Now, we've also heard across the aisle reference to a U.S. attorney named McKay.

GOHMERT: And I would reference a article from the Weekly Standard, March 14, 2007, which indicated that U.S. Attorney John McKay from Washington state -- in 2004, the governor's race was decided in favor of Democrat Christine Gregoire by 129 votes on the third recount. As the Seattle Post-Intelligencer and other media outlets reported, some of the voters were deceased. Others were registered in storage rental facilities. And still others were convicted felons. More than 100 ballots were discovered in a Seattle warehouse. None of this constitutes proof that the election was stolen. But it should have been enough to prompt Mr. McKay, a Democrat, to investigate -- something he declined to do, apparently on grounds he had better things to do. Now, if you or the president -- particularly the president, since you've said they serve at the pleasure of the president. If somebody were fired because they would not investigate what appeared to be problematic and potentially a crime, is that a legitimate basis for a firing or resignation?

GONZALES: Of course. It could be depending on the circumstances. Obviously, if a crime has been committed -- potentially committed -- I mean, there's an obligation upon the Department of Justice to investigate and to prosecute. There obviously is prosecutory discretion...

* * *

REP. ADAM SCHIFF, D-CALIF.: . . . Mr. Gonzales, I wanted to go over some of your testimony in the Senate. You testified in September of 2005, Senator Domenici called you to complain that Mr. Iglesias was in over his head and lacked the resources to prosecute corruption cases. Is that correct?

GONZALES: I don't know if I said in connection with that particular call that he lacked the resources. I think what I may have -- I think what I testified to was the fact that he was concerned that Mr. Iglesias did not have the top talent working on public corruption cases generally. And I think in subsequent conversations that occurred in '06, I think there were concerns raised by Senator Domenici about whether or not there were sufficient resources available to handle other kinds of cases.

SCHIFF: Well, you testified in the Senate that he told you in these conversations that he lacked the resources to handle corruption cases. Are you saying that's not correct today?

GONZALES: What I'm saying is, is that -- I recall him saying with respect to some of the conversations.

GONZALES: I don't recall sitting here today that he said that with respect to the first case. The first conversation that I had -- what I recall in the first conversation was Senator Domenici indicated -- he questioned whether or not, does Mr. Iglesias have his best people working on these kinds of very difficult cases?

SCHIFF: On corruption cases?

GONZALES: That is my recollection, yes.

SCHIFF: So in September '05, he talked to you about corruption cases. In January of '06, you spoke with him again. Again, he complained about Mr. Iglesias and his handling or lack of resources with respect to corruption cases, correct?

GONZALES: My recollection, Congressman, is that the subsequent -- I have a recollection that in one of the conversations, which I believe occurred in '06 -- one of the two conversations that I had -- he mentioned generally voter fraud cases. That's the extent of my recollection.

* * *

SCHIFF: Well, your testimony was that you had three conversations.

GONZALES: Yes.

SCHIFF: And there two points that Senator Domenici made. First, that he was in over his head...

GONZALES: I didn't mean...

SCHIFF: Second, that he lacked resources to prosecute corruption cases...

GONZALES: I didn't mean to imply that those were the only points or things said in those conversations.

SCHIFF: So now you recall that he also talked about voter fraud cases?

GONZALES: Yes. In fact -- it's not a recollection that I have just sitting here today. But, yes, I have a recollection that the issue of voter fraud cases generally -- not specific cases, but generally -- was raised in one of those two conversations in '06.

SCHIFF: And you also said, in the Senate, that as a result of your conversations with the senator, you lost confidence in Mr. Iglesias. Is that correct?

GONZALES: Obviously, I was not surprised to see Mr. Iglesias's name recommended to me. The fact that the senior senator...

SCHIFF: That's not my question. You testified in the Senate you lost confidence in him as a result of this. Is that correct?

GONZALES: Not having the confidence of the senior senator and the senior leadership in the department was enough for me to lose confidence in Mr. Iglesias to recommend...

* * *

CANNON: . . . I would like to point out for the record -- in fact, it's been an interesting hearing, Mr. Chairman. We started out talking about bread crumbs, and, of course, with the $250,000 that your side is spending on attorneys, we would hope that that would be more like caviar. But in any event, at some point we have to get to the gist of what's -- what the problem is here. And if the problem is whether or not Mr. Iglesias was competent or should be fired, let me just remind the panel that Mr. Margolis, who is not a political hack -- he is a career guy, well-respected -- said, "Given everything I know today, he" -- referring to Mr. Iglesias, "would have been number one on my list to go." He later said that he was absolutely furious about the way Mr. Iglesias handled these kind of things. To challenge the attorney general the way I think he's been challenged here, just seems to me to be highly inappropriate.

* * *

REP. ARTUR DAVIS, D-ALA.: . . . Is there significant justification, Mr. Gonzales, for a significant disparity in the number of Democrats prosecuted versus the number of Republicans prosecuted, with respect to local elected officials?

Was there any reason for that disparity?

GONZALES: I wouldn't know if such a disparity existed. It's not something that we look at.

DAVIS: Would it concern you?

GONZALES: It's not something we keep track of.

* * *

GONZALES: . . . We don't keep that kind of numbers. And quite frankly, for us to do, that would be more alarming.

DAVIS: Well, General Gonzales, let me ask you the question: Would it concern you if you did your own research and you discovered that there was a significant disparity?

GONZALES: We're not going to do that kind of research...

DAVIS: Would it concern you if it were reported...

GONZALES: ... because I think it would be dangerous to do that kind of research.

DAVIS: Would it concern you?

GONZALES: Listen, it would concern me if we're not making cases based on the evidence.

* * *

REP. ELLISON, D-MINN.: . . .

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Senate Hearing on U.S. Attorney Firings

Part 1

CQ Transcripts Wire
Tuesday, May 15, 2007; 1:33 PM

* * *

FEINSTEIN: . . . Can you ever remember any discussion where an individual U.S. attorney's loyalty or political instincts were questioned?

[FORMER DEPUTY ATTORNEY GENERAL JAMES B.] COMEY: I don't remember ever discussing or having it discussed in my presence the loyalty or political instincts of a U.S. attorney, no.

* * *

FEINSTEIN: . . . You had two meetings with Carol Lam, I believe -- one about the Project Neighborhood program, the other about gun cases. Were you satisfied with her responses to your questions?

COMEY: Yes.

I think I had one meeting that was about Project Safe Neighborhoods, which was the name given to our gun program. And I think it was on the telephone. I spoke to -- I think by telephone -- to each of the 10 U.S. attorneys whose districts on a per capita basis were at the bottom end of our gun prosecutions.

And I thought she understood. And, again, I wasn't telling her to do cases for the sake of doing cases. I was saying, "This is important. I think this saves lives. If there's a difference you can make that the local prosecutors are not making in your jurisdiction, look for an opportunity to make it."

And she said she got it. And that was the end of it.

* * *

KOHL: . . . Mr. Comey, when you testified in the House a few weeks ago, you were asked about the U.S. attorney for the Eastern District of Wisconsin, Steve Biskupic . . . . At that time, you said that Mr. Biskupic was, quote, "an absolutely straight guy," unquote.

When you were asked whether you knew that Mr. Biskupic was on a list for weak performers and potentially slated for dismissal, you said -- and I quote -- "No, and I think very highly of him."

Having had time to reflect on your testimony, do you have anything to add to what you said at that time? Do you know why he was put on a list of weak performers, and why he came off the list?

Did it have anything to do with the prosecution of voter fraud cases that he was taken off the list, or the prosecution of Georgia Thompson, an employee of the Democratic governor's administration at that time?

COMEY: I don't know from firsthand knowledge that he was on a list. I can't imagine why he would be put on a list (inaudible).

I think very highly of him, as you quoted. I think he is what you want in a U.S. attorney. And I'm not saying that because he's tall and skinny...

(LAUGHTER)

... but he is a very solid person, who is as honest as the day is long, cares passionately about the independence of the Department of Justice. I know this from talking to him.

So I can't imagine -- I know he's gotten beat on because a case he prosecuted was reversed in the 7th Circuit Court of Appeals. I tried to explain to somebody who asked me about that -- not in a hearing, but a private citizen.

I said, "It happens. And it's not an indictment of the good faith of the prosecutor, of the district judge who denied a motion for a directed verdict or the jury that convicted. Sometimes appeals courts disagree about the inferences to be drawn from the evidence and reverse a conviction. That doesn't tell you that the prosecutor is a bad guy. In fact, I know this one, and this is a good guy."

* * *

KOHL: Mr. Comey, yesterday's Washington Post reported that White House and Republican Party concerns regarding voter fraud prosecutions were the cause of many of the U.S. attorney dismissals. Can you confirm this?

During the time you served as deputy attorney general were you aware of concerns from the White House that U.S. attorneys were not active enough in prosecuting voter fraud cases? Did the White House exert any effort to encourage the Justice Department to remove U.S. attorneys whom it believed were not prosecuting voter fraud cases vigorously enough?

COMEY: I'm not aware of any issue that came to my attention regarding voter fraud when I was deputy attorney general, complaints or otherwise.

KOHL: While you served at the Justice Department, were you aware of any pressure from the White House to bring voter fraud cases?

COMEY: No, sir.

* * *

WHITEHOUSE: . . . How would you phrase where the standard for what is improper should be in terms of where and when the department should allow political influence to enter into its deliberations or its conduct?

COMEY: I think that you have to talk about it in two pieces. One is main Justice and the other is the U.S. attorneys.

And although both of those parts of the institution are led by political appointees, I think they are -- have to be different in terms of what political means.

I think it is the job of the Department of Justice to be responsive to the policy priorities of the president, who's elected and who has appointed the folks to run the department.

COMEY: But I think it is main Justice's job to see to it that U.S. attorneys can operate in an environment where there is a little or no politics -- big P or little p -- at all entering into their considerations.

I think once they walk through the door and become the U.S. attorney, although they're politically appointed, they've got to call, as someone said, balls and strikes without regard to whether the person in the dock is a Democrat or a Republican or a Green or a who cares? They have to make the judgment the judgment on the facts.

I think the job of the department is, to the extent that there are complaints or their political issues, to receive those and figure out what to do about them without polluting the work of the U.S. attorney. And that's why I think they're different.

* * *

END

Hearing on [insert], May 23, 2007

CQ Transcripts Wire
Thursday, May [__], 2007

May 23, 2007

SPEAKERS:

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REP. RICK BOUCHER, D-VA.

REP. JERROLD NADLER, D-N.Y.

REP. ROBERT C. SCOTT, D-VA.

REP. MELVIN WATT, D-N.C.

REP. ZOE LOFGREN, D-CALIF.

REP. SHEILA JACKSON-LEE, D-TEXAS

REP. MAXINE WATERS, D-CALIF.

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REP. TRENT FRANKS, R-ARIZ.

REP. LOUIE GOHMERT, R-TEXAS

REP. JIM JORDAN, R-OHIO

WITNESSES:

MONICA GOODLING

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GOODLING: . . . I wish to clarify my role as White House liaison.

Despite that title, I did not hold the keys to the kingdom, as some have suggested. I was not the primary White House contact for purposes of the development or approval of the U.S. attorney replacement plan.

I have never attended a meeting of the White House Judicial Selection Committee. The attorney general and Kyle Sampson attended those meetings.

To the best of my recollection, I've never had a conversation with Karl Rove or Harriet Miers while I served at the Department of Justice. And I'm certain that I never spoke to either of them about the hiring or firing of any U.S. attorney.

Although I did have discussions with certain members of their staffs regarding specific aspects of the replacement plan, I never recommended to them that a specific U.S. attorney be added to or removed from Mr. Sampson's list. And I do not recall that they ever communicated any such recommendation to me.

. . . I wish to address my role in selecting U.S. attorneys for replacement.

I first learned that others more senior to me were discussing the possibility of replacing some U.S. attorneys at some point in mid- 2005.And I believe I first saw a list of candidates for replacement in January 2006, when Mr. Sampson showed me a draft memorandum he was preparing for Harriet Miers.

GOODLING:At that time, I recommended that two of the U.S. attorneys Mr. Sampson had listed be retained in office and that certain other U.S. attorneys be considered for replacement.

Paul Charlton and Daniel Bodgen were two of the U.S. attorneys that I recommended considering for replacement. However, it appears from the documents produced to Congress by the department that Mr. Sampson did not initially accept that recommendation. Mr. Bogden and Mr. Charlton did not appear on iterations of the list sent to the White House in January, April or May, and first appeared on the list in September 2006, presumably for reasons unrelated to my initial recommendation.

Although I'm prepared to tell the committee what I know about the eight replaced U.S. attorneys, the truth is that I do not know why Kevin Ryan, John McKay, Carol Lam, Paul Charlton, Daniel Bogden, David Iglesias and Margaret Chiara were asked to resign in December of 2006.

I can describe what I and others discussed as the reasons for their removal, but I just can't guarantee that these reasons are the same as those contemplated by the final decision-makers who requested these resignations.

However, I'm not aware of anybody within the department ever suggesting the replacement of these U.S. attorneys to interfere with a particular case or in retaliation for prosecuting or refusing to prosecute any particular case for political advantage.

CONYERS: . . . Could you tell the committee who made the recommendations to place on the list of U.S. attorneys to be fired each of the nine U.S. attorneys who were in fact terminated last year?

GOODLING: . . . I'm happy to tell you what I remember about Mr. Graves, but in my mind, I have slightly conflicting memories of what happened there. So, for purposes of the testimony, I'd prefer to reference the eight.

In terms of those eight, I know that Mr. Sampson compiled the list.And I know that he told me that, at different times, he talked to different people about it.He never told me exactly who recommended which name and at what time they did that.And that's...

CONYERS: So, from your point of view, your answer to the question would be Kyle Sampson.

GOODLING:I mean, Mr. Sampson compiled the list. I know that he did speak to the deputy attorney general about it.And I know that he presented it to the attorney general.

CONYERS: And the attorney general being Mr. Alberto Gonzales?

GOODLING: Yes, sir.

CONYERS: Now, let's just take one example, the one that is so paramount here, David Iglesias, who was not put on the list to be fired until November 2006, according to our records.

CONYERS: Who put his name on the list, ma'am?

GOODLING: I don't know.

CONYERS: Well, who would you recommend a committee, just seeking the facts in the matter -- who would you recommend to answer that question?

GOODLING: I think Mr. Sampson's the only person who can tell you at what point he put that name on the list.

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CONYERS: Now, what did Mr. Kyle Sampson tell you about the origins of the process and how he came up with the names that were on the list? And I know you had a number of discussions with him, but just pulling them all together, as you can best recall.

GOODLING: To the best of my recollection, the first time he mentioned it to me was in January, when he stopped by my office with a draft copy of the memorandum and asked me to take a look at that. I don't believe he gave me any context at that time.

I had heard that he was engaged in an effort in mid-2005, because I was working in the Executive Office for U.S. Attorneys, and I know that he had spoken with both Mary Beth Buchanan and Mike Battle at various points.

GOODLING: And they had mentioned it to me.

So I knew that he had been engaged in some effort to evaluate U.S. attorneys before I spoke to him in January about it.But that's the first time I recall.

And I don't remember him telling me -- giving me any background at that point other than just handing me the memo and asking me to take a look at it.

Later in the year, he sent me a memo in September -- an e-mail in September. And, again, because he sent me the e-mail I don't remember that he gave me any context, of course, other than what was in the e- mail.

I think...

CONYERS: That was last year, in 206 -- 2006.

GOODLING: Yes, I'm sorry.September of 2006.

When we had the November 27th meeting, I feel like he did discuss a little bit of the context of this as something that he'd been working on for awhile. But, you know, I don't recall that we had any specific conversation where he sat down and laid out to me the origins of the entire thing.

There was some point that I remember him mentioning to me that he had consulted with different people throughout time.

But, you know, he was my boss. And he didn't necessarily explain everything that he was doing or why to me. He just sometimes asked for my help and I tried to provide it.

I mean, I'm sure that there were other conversations. But if your question is asking, you know, did he ever sit down and lay out for me exactly what this was all about, I don't recall that there was ever any point that he did that.

GOODLING:It was just, kind of, from time to time he would -- he would show me something and ask for my thoughts. Then, you know, I would gather some context from it.

That's the best I can do.

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SMITH: . . . Once again, did you ever have any contact with, say, Harriet Miers about the replacement of any of these U.S. attorneys?

GOODLING: No.

SMITH: Did you ever have any contact with Karl Rove about the replacement of any of these U.S. attorneys?

GOODLING: No conversation with him before the decision was made.

There was one meeting at the White House after the decision had been implemented and he attended a meeting that I was also at. But that was the only time I've been in a room with him when this topic was discussed.

SMITH: And did you talk to anybody at the White House about the need to replace U.S. attorneys?

GOODLING: About the need to replace U.S. attorneys?

I don't believe I recall any conversations. But to be complete I should inform the committee that there was, I believe, in 2005, I had a social call at some point with Tim Griffin, who indicated to me -- and he was working at the White House at the time -- that he may have the opportunity to go back to Arkansas because some U.S. attorneys may be replaced and if Mr. Cummins was one of them he might get a chance to go home.

GOODLING: And, of course, I did exchange e-mails with Scott Jennings about meeting with some lawyers from New Mexico. But I don't remember that Scott Jennings even told me what the subject of that meeting was supposed to be.

SMITH: OK. Good.

Now, you testified a few minutes ago about your role. How would you describe your role in the decision to replace U.S. attorneys? Would you describe it as direct or indirect, or significant or minor? How would you describe your role?

GOODLING: You know, I'm not sure that I'm comfortable characterizing it. I'll let others make that assessment.

I mean, certainly I saw a draft memo in January. I had forgotten it, frankly, for a long time, but I did. And I saw an e-mail in September. And I was involved in the November 27th meeting.

The way I probably would characterize my role, without giving it a qualifier, is to say that I was responsible more for what happened after the plan was implemented than

maybe what -- the plan itself. My role was really to help ensure that once we had a vacancy, that we were carrying out the process of interviewing candidates and doing the paperwork that's necessary to make sure that we have a nomination eventually.

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SMITH: And a last question for you.

To the best of your knowledge, do you know if the department or the White House requested the resignation of any of the eight U.S. attorneys to retaliate for, interfere with or gain a partisan advantage in any case or investigation, whether about public corruption or any other type of offense?

GOODLING:I have no knowledge along that line.

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SENSENBRENNER: . . . Were all of the U.S. attorneys who were replaced -- had their terms of four years expired?

GOODLING: The eight, yes.

SENSENBRENNER: Yes.

With respect to Carol Lam, who was the U.S. attorney in the Southern District of California -- which is in San Diego -- were you aware that on June 15th of 2006, Senator Feinstein wrote Attorney General Gonzales, expressing concern about the fact that Ms. Lam had not been vigorous in prosecuting criminal alien smugglers within that district?

GOODLING:Yes.

SENSENBRENNER: And were you aware that the attorney general did respond to Senator Feinstein in a letter that contained a lot of statistics?

GOODLING: Yes, although I don't think I saw it until sometime this year.

SENSENBRENNER:Well, this being the case, that all of the U.S. attorneys whose terms had expired, you know, were subject to replacement, what's so unusual about replacing somebody whose fixed term had expired and consequently would either have to be reappointed or would have to be replaced with somebody else?

GOODLING:I don't know that there is anything.

I don't know that this is a road that I would have decided to go down if it had been up to me. But I certainly supported the effort because I believe the president does have the right

to be served by the best people that he can find and people that he'd like to have serve him. So I believe he has the right to make changes if he'd like to.

SENSENBRENNER: Isn't this an exercise of legitimate executive power which practically every president up to, including the current one, exercises all the time with officials within the executive branch subject to his appointment?

GOODLING:I believe it is.

SENSENBRENNER: Now, let me say that this committee has spent $250,000 of the taxpayers' money basically investigating the replacement of U.S. attorneys whose terms had expired.

I was the chairman of this committee for six years during the Bush administration and the chairman of the Science Committee for four years during the Clinton administration. I never signed a subpoena, because I didn't have to. And I never asked my committee to request the Justice Department to obtain a grant of immunity to anybody.

It seems to me that with this fishing expedition, there ain't no fish in the water. And we've spent an awful lot of time and an awful lot of money finding that out.

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COBLE: . . . Ms. Goodling, if you will, explain your role -- I think most of us are familiar with it, but explain your role in serving as the White House liaison to the Justice Department.

What were your responsibilities in the White House and in the Justice Department? And what was your principal mission in serving at the White House as the White House liaison to the Justice Department?

GOODLING:I didn't actually serve at the White House at all. I worked at the Justice Department as a department employee.

My basic job responsibilities fell into three categories.

The first was hiring of political appointees. I spent a lot of time doing interviews for what we call Schedule C, for noncareer senior executive service candidates.

And I wasn't the only one that would do those. Obviously, the component head that would be ultimately hiring the person would also interview. They would have interviews at the White House, and in some cases with Mr. Sampson as well.

So I was one of maybe three or four people evaluating everybody coming in, or considering coming into the department. And so that personnel work took a lot of time.

I also served a basic liaison function that related to information. You know, for example, The president's going to be on travel here, or we would pass over, The attorney general's going to be on travel here -- just information requests that would go back and forth relating to what the White House had going on or what we had going on -- report-type things along those lines.

And then the third thing -- which took a fair amount of time, actually -- was a lot of what we would call morale-boosting for employees, and, kind of, internal communications.

Oftentimes, the White House would have bill signings, or Marine One would be landing or taking off or there would be an opportunity to see the champions of the Stanley Cup come to the White House.And so I would spend -- I mean, several times a week send an e-mail to appointees and say, Hey, who would like to go to the White House and see X, Y and Z?And we would gather their names and Social Security numbers and dates of birth and transmit that down to the White House so that appointees could have the opportunity to do those sorts of things.

GOODLING: So it was as combination of things.And there were others that I'm sure I haven't mentioned, but those are the three general categories of things.

COBLE: I thank you.

Finally, Ms. Goodling, did you ever see the initial list or the final list of the United States attorneys who were recommended for replacement?

GOODLING: If the initial list is the one in 2005, I don't have any memory of having seen that.

The final list, being the November 27th plan, yes, I was in the room with the attorney general when that plan was presented, although, actually, I'm not sure if Kevin Ryan was on the list at that point or not.It may have only been six on that day.

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SCOTT: In reference to the U.S. attorneys, were the investigations and indictments of Republican officials or the failure to investigate or indict Democratic officials a factor in the removal of any U.S. attorneys?

GOODLING: Not as far as I know.

SCOTT: Not at all?

GOODLING: Not as far as I know.

SCOTT: Are you aware that Senator Domenici had called one of the U.S. attorneys that was asked to leave?

GOODLING: I've seen the press accounts, yes.

SCOTT: You've seen the press accounts?

GOODLING: Yes.

SCOTT: You know that he had a problem with one of the U.S. attorneys?

GOODLING: I was aware that he had concerns with Mr. Iglesias' performance.

SCOTT:OK.

In the back of Tab 26, you have a note that says, quote, Domenici says he doesn't move cases.

GOODLING: Yes, that was a comment that was made by someone else in one of the meetings that we had in the deputy attorney general's room.

SCOTT:Do you know what cases he was talking about?

GOODLING:I don't remember that the person who made the comment specified.

SCOTT:Do you know what case he was talking about?

Are you aware of a case of Manny Aragon, a Democratic office- holder?

GOODLING:I think I've seen press accounts.

SCOTT: Was that one of the cases that he could have been talking about?

GOODLING: I don't know.

SCOTT: Did -- now, the deputy attorney general's testimony did not include Domenici says he doesn't move cases as one of the reasons he was on the list.

GOODLING: It does not.

(CROSSTALK)

GOODLING: The reason it did not -- when we were meeting in his room, somebody made the comment that that was one of the reasons. The deputy attorney general said that he did not think that that was something that he wanted to brief to the Senate because he didn't think it was his place to raise one member's concerns with other members, and that it would be better if Senator Domenici wanted to raise the concerns with his colleagues.

SCOTT: Other than Domenici's problems that he doesn't move cases, how could Mr. Iglesias' name get on the list of fired attorneys?

SCOTT:W hat else could he have possibly done wrong to get him on the list?

GOODLING: The other reasons that I heard discussed was that it was a very important border district, that people just didn't think that he was doing as good of a job as we might have wanted to expect.

I know at one point I heard someone say that he had been kind -- and this is a quote -- kind of a dud on the AGAC -- that's the Attorney General's Advisory Committee.

And there were -- there was at some point a reference to him being an absentee landlord that somebody had made. Mr. Sampson had indicated that he heard Mr. Mercer express concerns about the amount of time he spent in the office. But I also heard somebody else express the concern that he delegated a lot to his first assistant.

So there were different...

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GOODLING:I mean, different people did make different comments at different times. And there were other -- there were other comments that people made, based on things that they felt or believed. And I wrote those down.

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REP. ELTON GALLEGLY, R-CALIF.: . . . Ms. Goodling, almost everyone -- including the attorney general -- agrees this matter was mishandled and that if he had to do it all over again, he would have done several things differently.

Do you agree with the assessment that things could have been handled much differently? And, if so, how would you say that that, in your opinion, should have taken place?

GOODLING:I do agree that things should have been handled differently.

I think it would have been better to try to document some things.

GOODLING: It certainly would have been good to have made sure that the reasons that -- you know, when we looked at the list and when we had the meeting to discuss what we thought the reasons were, I think somebody would say a comment and somebody else would think, That's what I thought, too.

So I think when people looked at the list, people generally had the same thoughts in their mind about people, as far as I could tell from that meeting, because somebody would say one thing and other people would nod and I would write it down.

But it would have been better to document it. And it would have been better, frankly, to have given some of those U.S. attorneys a chance to understand where the problems were and a chance to address them.

And, you know, at the November 27th meeting there was a discussion about whether or not the U.S. attorneys should be told in person. And someone made the comment that, because they were presidential appointees and served at the president's pleasure, there wasn't a need to litigate the reasons with them. And I think there was some concern that if you sat down with the folks, it would get into a back-and-forth on the reasons.

And I think people felt like they wanted the U.S. attorneys to be able to leave quietly and do good things with their lives.

But I think there was a sense that they didn't want to make the departures more painful for people, I guess.

But looking back on it, I think it would have been the right thing to do to have met with people individually and notify them in person, and given them an opportunity to ask questions at that time.

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GALLEGLY: My understanding is you had -- well, just a few minutes ago, you did make reference to Mr. Iglesias. I assume this is something that you learned subsequent to first seeing the list, as, maybe, one of the reasons that his name did appear on the list. Is that correct?

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Were there other members -- or other judges on that list that you recall any specific reasons why their name would have been placed on the list?

GOODLING:Yes.

At the November 27th meeting, there was a discussion about Daniel Bogden specifically. I think somebody made the comment, like, I know why it's this group, or, I think I know why these are the people on the list.

And the DAG said, The one person I have a question about is Mr. Bogden.Did he do something wrong, or is it just a general sense that we could do better?

And Mr. Sampson said in that meeting something about, you know, I think it's a general sense that, you know -- it was a general, kind of, sense that we could do better, or something along that line.

And then I said that I was aware of one case involving use of the Patriot Act that had gotten a little messy a few years ago.But that was all I was aware of.

And at that point we, kind of, looked at each other and at the attorney general and said, you know, What do you want to do?And he -- I think he nodded and said, OK.

And so we had that one discussion in that November 27th meeting, which was just a brief reference. But that's the only one where I remember that the group as a whole discussed the reason...

GALLEGLY: But that clearly wasn't a statement saying it was political reasons, or implied that.

GOODLING: Oh, for political reasons, no, no.

And I didn't mean to imply that I thought it was for political reasons in Mr. Iglesias's case, if that was the question. I'm sorry.

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LUNGREN: . . . Let me ask you:Is it 93 U.S. attorneys that there are?

GOODLING: Yes.

LUNGREN: Do you believe that there are more than 93 qualified people in the United States who are attorneys to be U.S. attorneys?

GOODLING: Yes.

LUNGREN: Do you believe that a president has the right to refresh an office and to say, You've had your four years, I'd like to give someone else a chance?

GOODLING: Yes.

LUNGREN: Do you think that that is violative of the Constitution?

GOODLING: No.

LUNGREN: Does that in any way interfere with the prosecution of the laws?

GOODLING: No.

LUNGREN: Can you have two people -- one who's in charge of an office, and then another one who comes in -- both equally committed to prosecuting the laws of the United States?

GOODLING:Yes.

LUNGREN: And you said in your written statement, However, I'm not aware of anyone within the department ever suggesting the replacement of these U.S. attorneys to interfere with a particular case or in retaliation for prosecuting or refusing to prosecute a particular case or political advantage.

Now, after you've had all the questioning from the panelists thus far about that, do you still stand by that statement?

GOODLING:I do.

I mean, certainly I knew that Senator Domenici had told the attorney general he had some concerns with public corruption...

LUNGREN: And Dianne Feinstein had complained about the lack of prosecution of coyote cases in San Diego?

GOODLING: Yes.

But I didn't understand those to be the complaints -- I didn't -- my memory is not that it was of any specific case, that it was more of a focus or emphasis.

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LOFGREN: . . . Do you think it was true that one of the factors in removing Mr. Graves so quickly and installing his replacement with Mr. Schlozman so promptly was to push forward with the vote fraud case that Mr. Schlozman was promoting and Mr. Graves was resisting in Missouri, just before that election?

GOODLING: You know, I don't remember anything like that. My memory of the reason why I was thinking that Mr. Graves had been asked to leave related more to the fact that he was under investigation by the inspector general and that there were some issues that were being looked at there.

And like I said, I had conflicting memories on it, but I thought that that was -- that was my memory of what was going on during that period of time.

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REP. ROBERT W. GOODLATTE, R-VA.: . . . Some have alleged that the department requested the resignations of the U.S. attorneys for partisan purposes, such as to exact retribution against U.S. attorneys who prosecuted Republicans or failed to prosecute Democrats in public corruption cases.

If that were true, would it have made any sense for the department to have named career first assistant U.S. attorneys as interim U.S. attorneys to replace these individuals, as occurred in the district of New Mexico and the district of Nevada?

GOODLING: Some would say that might seem odd.

GOODLATTE: Can you elaborate on that at all?

What was your experience in terms of who were the replacements for these U.S. attorneys?

GOODLING: There actually was a lot of debate about those topics, just because we wanted to ensure that we put good people into those spots. And we were making those decisions in a time that there was a lot of scrutiny on what was happening.

But we interviewed several people for all the spots. And ultimately we chose the people that we thought could best lead, given the circumstances and the situation that we were under.

GOODLATTE: And are you satisfied that that was the result of those who were put in those positions, that they were indeed fulfilling the responsibilities that we expect of U.S. attorneys to conduct these offices in a professional and non-partisan fashion?

GOODLING: I certainly think that they will do a good job.

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REP. SHEILA JACKSON-LEE, D-TEXAS: . . . I understand that you've made a point that you say, To the best of my recollection, I had no meetings with Mr. Rove or Harriet Miers. Did you receive e-mail?

GOODLING:I don't remember receiving an e-mail from Mr. Rove. I did receive e-mail from Harriet Miers . . .

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JACKSON-LEE: Can you tell us anything about what Karl Rove knew about the plan to fire the nine U.S. attorneys, or what he did to create the situation leading to those firings?

GOODLING:I know that Mr. Rove was consulted after the plan -- or I believe that he was consulted. I guess I may not know for sure. When the plan went to the White House for approval, it was transmitted to the White House Counsel's office, and there was an e-mail that Mr. Sampson forwarded to me, I think, on December 4, if I'm remembering correctly, that said that it had been circulated to different offices within the White House and that they had all signed off.

So I assume that that -- that he was one of the individuals that signed off as part of that process but I don't know for sure. I think the e-mail just referenced the offices. Certain...

JACKSON-LEE: But he was certainly in an office in the White House.

GOODLING: He was in an office in the White House. I think it said that White House political had signed off. Political is actually headed by Sara Taylor but does report to Mr. Rove, so I don't know for sure.

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JACKSON-LEE: . . . You testified in response to Mr. Scott that someone at DOJ made a comment in a meeting that Senator Domenici says that Mr. Iglesias doesn't move cases in connection with Mr. Iglesias being on the list of fired U.S. attorneys.

When did that meeting take place? Who made the comment about Senator Domenici? And who else was at the meeting?

GOODLING: The DAG, Kyle Sampson, Mike Elston, and there may have been another person and myself were in the meeting. It was after his Senate testimony, but before his private briefing, so it was the week before Valentine's Day. I don't remember the exact date.

JACKSON-LEE: And the year?

GOODLING:2007. It would have been, I guess, before February 12th or around that period at some point.

I don't remember who in the meeting made the comment. But I wrote it down . . .

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REP. RIC KELLER, R-FLA.: . . . I understand from your testimony that Kyle Sampson is the one who compiled the list of attorneys to be replaced?

GOODLING: Yes.

KELLER: And you didn't see that list of potential U.S. attorneys to be replaced, to the best of your recollection, until January of '06?Is that right?

GOODLING: Right.

KELLER: I'm going to focus most of my questions on Carol Lam- related issues, since that seems to be the most controversial.

Did you ever speak to anyone within the Department of Justice regarding Carol Lam?

GOODLING: Yes. She was a topic of frequent conversation.

KELLER: Tell me what your communications were and when they took place.

GOODLING: There were a lot. I'm not sure I'm going to remember them all.

There were a lot of conversations about her work in the gun crime area, which was an area that I worked in. And so the people that I worked on in relation to Project Safe Neighborhoods would frequently name her district as one that they felt was underperforming, that she just didn't seem to be doing as much as they thought she should be.

KELLER: When do you first remember those conversations about the lack of sufficient gun crime prosecutions taking place?

GOODLING: I believe it was while I was in the Office of Public Affairs...

KELLER: What would be the timeframe for that?

GOODLING: Maybe 2003 or 2004 time period.

KELLER:OK.

Were there any other topics of concern that you heard, other than gun crimes?

GOODLING: Immigration was the one that's been most frequently discussed in the past year and half or two years.

KELLER: And so when did you first start hearing about the concern about immigration prosecutions?

GOODLING: I believe while I was maybe in the Executive Office for U.S. Attorneys.I'm a little tentative on this, but I think that there may have been some letters from Congress that came in, I think, during that time period.Those were...

KELLER: Would that be around the 2004 time period?

GOODLING: No. I was in the Executive Office in 2005.

KELLER: 2005 time period. So, to the best of your recollection, the first concerns you heard about gun crimes and Carol Lam were 2003, 2004 and about immigration enforcement about 2004? Is that fair to say?

GOODLING: I think 2005 probably.

KELLER: 2005?

GOODLING: In relation to immigration...

KELLER: OK, so 2003, 2004 for gun crimes 2005 for immigration crimes.

GOODLING: To the best of my recollection.

KELLER: Did anyone at DOJ ever say to you, or did you hear or read an e-mail, that she should be fired for prosecuting Duke Cunningham or any other Republican-related official?

GOODLING: No, I don't remember anything like that.

KELLER: Did you ever have any communications with anyone at the White House wherein they suggested that Carol Lam should be fired for prosecuting Duke Cunningham or any other Republican official?

GOODLING: No, I don't remember anything like that.

KELLER:OK. The reason I bring this up is because one of the most controversial things -- and you just hear it in the L.A. Times this week, and I'm looking at an article May 18, 2007.

And I'll just read you what it says: Speaking at Loyola Law School in Los Angeles on Thursday, John McKay, who was the fired U.S. attorney in Washington state, said he suspected that U.S. attorney Carol Lam was removed in San Diego to derail the expanding probe of then-Rep. Randall 'Duke' Cunningham.

You hear that allegation over and over, and yet I have the documents here, the first of 20 members of Congress to complain about Carol Lam not prosecuting illegal immigration was February 2, 2004, from Darrell Issa, which was circulated to Department of Justice, the White House and Carol Lam.

I hear from you that you had heard complaints about not enforcing gun control gun crimes in 2003, 2004, and you had heard complaints about not enforcing immigration-related prosecutions in 2005.

And yet, the San Diego Tribune did not even break the initial story of Duke Cunningham until June 12, 2005, which is a full 14 months after Congressman Issa wrote the first of many letters complaining about her not enforcing alien immigration laws, which makes it literally impossible that she was fired as a pretext for Duke Cunningham because all the problems were occurring, as we hear from the documents and your testimony and others, before the story even broke about Duke Cunningham.

And, in fact, when I had Carol Lam right here, I asked her, Do you have any evidence whatsoever that you were fired because of Duke Cunningham?

KELLER: She said no.

When I had the U.S. attorney here, Did you fire her because of Duke Cunningham?: No.

I've looked at 10,000 documents, e-mails, many witness interviews, testimony, not a shred of evidence. But I still see (inaudible) that we saw in the L.A. Times this week saying that our attorney general's a criminal because he let Ms. Lam go because she prosecuted Duke Cunningham.

I'm happy that we were able to set the record straight with your testimony that the problems that she incurred dealing with illegal immigration and gun crimes far predated the breaking of the Duke Cunningham story.

* * *

REP. DARRELL ISSA, R-CALIF.: . . . June 15th, 2006, the letter -- the scathing letter about Carol Lam that was written by Senator Dianne Feinstein, one of the key appointers and confirmer of Carol Lam -- wasn't that relevant to her firing?

GOODLING:I think that the concerns about her immigration work certainly were relevant to her firing. And I know that the fact that membess of Congress had concerns with her on those issues was something that we definitively talked about.

ISSA: So for three years there had been a constant drip, drip of Carol Lam not supporting the president's stated policy of enforcing the federal gun laws and doing it throughout the country.

This wasn't something he was asking for in southern California, he was asking for and getting it everywhere, including other parts of California. The president was seeking and is still seeking a comprehensive guest worker program that requires that there be a belief that there would be valid enforcement.

And yet Carol Lam was not going after coyotes. Just the opposite, she set standards so hard to reach that basically the Border Patrol complained to people like myself and other congressmen that they couldn't do their job because they couldn't meet the litmus test. Even after somebody was arrested 20 times, on the 21st time she still wouldn't prosecute.

Isn't that a factor in the firing of Carol Lam?

GOODLING: I believe it was.

ISSA: Now, Carol Lam has, to her credit, some high-profile cases, but isn't it true that U.S. attorneys have to implement the policy uniformly around the country if they're to be effective that if, in fact, you can get away with certain types of crime in a certain area crime will morph to those areas? Isn't that true?

GOODLING: Uniformity is certainly important.

* * *

ISSA: Now, Carol Lam, among other things, also chose to prosecute not once, but twice, her own cases, spending weeks in front of jury trials. Isn't that a little unusual, a little bit of grandstanding when you're talking about somebody who has to oversee so many other assistant U.S. attorneys?

GOODLING: It was fairly unusual in extra-large offices where you had hundreds of staff members to supervise, for a U.S. attorney to do so much trial work. And that's...

ISSA: So isn't that also a factor in the firing of Carol Lam?

GOODLING: It was something I heard discussed, yes.

ISSA: OK. Well, let's talk about Carol Lam, because Mr. Keller mentioned that members had made these complaints. Well, I'm the member. I'm the member who saw somebody who would not enforce stated national policy and brought this to the attention of Attorney General Ashcroft and then the Attorney General Gonzales. And, quite honestly, I spoke to the president directly on my concerns, and I'm not ashamed of it.

But let's go through Carol Lam. Carol Lam was not a Republican, isn't that correct?

GOODLING:I actually don't know. Someone told me she was an Independent but I never checked her voter registration.

ISSA: Right. Well, I have. It's public in California. So let's go through this. She was a career professional assistant U.S. attorney, right?

GOODLING: Yes.

ISSA: So this administration, even though it has the absolute right to make political appointments based on party registration and party loyalty and loyalty to the president appointed a career professional in San Diego.

GOODLING: Yes, actually. We did that in a lot of districts.

GOODLING: And I supported that. In many cases, career professionals have the best backgrounds for the job.

ISSA:OK.

So you were looking for people who had an obligation to deal with a policy for which the American people had chosen. But you looked to career professionals.

Isn't it also true that when people turned in their resignations or left for any reason, you also looked very often to the existing career professionals inside the U.S. attorney's office?

GOODLING: Yes.

ISSA: So here we have an absolute right to make political appointments based on party registration, party loyalty and support of the president. And yet you chose to be non-partisan very often. And yet that's not being heard here today.

GOODLING: I'm afraid I don't have a comment on that.

ISSA:Well, I think my comment will stand on that.

Last but not least, is there any reason that this group of Republicans and Democrats -- there's not an independent sitting here -- should be surprised that the Clinton administration appointed Democrats and disproportionately made lifetime appointments for federal judges by people who were Democrats. I run into them all the time.

Isn't it, in fact, absolutely the right of a president elected by the American people to choose people who will support his policies and that in fact when you did that you were doing what was your right, and when you chose not to, was actually the exception that should be noted here today?

GOODLING:I think presidents of both parties have the right to pick the people to serve them.

ISSA: Thank you.

And, hopefully, the chairman will respect the fact that, perhaps today, we have concentrated on whether or not the president has a right to choose people in his own party when, in fact, that's not the debate here today and shouldn't be.

* * *

REP. MIKE PENCE, R-IND.: . . . Candidly, Ms. Goodling, I still haven't heard any facts or seen any facts that show anything illegal about the U.S. attorney firings themselves.

PENCE: And I'm trying to focus, as I did when the attorney general was here, on the issue of wrongdoing and of illegality.

When the attorney general came before this committee, he was very candid about mismanagement and administrative errors that were made. And I understand people's harsh criticism of those things. We expected better. We didn't get better. But that's different, it seems to me, from wrongdoing.

And I'm listening very intently.I 'm studying this case. And I want to explore this issue of illegal behavior with you. Because it seems to me so much of this -- and even something of what we've heard today in this otherwise cordial hearing -- is about the criminalization of politics. In a very real sense, it seems to be about the attempted criminalization of things that are vital to our constitutional system of government, namely the taking into consideration of politics in the appointment of political officials within the government.

And I want to speak to you about that.S o let me see if I can -- since you got a lot better grades, it seems to me, in law school than I did, let me see if I can (inaudible) you here.

Is there anything illegal about the president being served at his pleasure by the people he believes would be best?

GOODLING: No.

PENCE: Is there anything illegal about the president being able to dismiss any of his political appointees for any reason, or for no reason at all?

GOODLING: No.

PENCE: Is there anything illegal under our system about the president taking political considerations into account in determining who his political officials will be?

GOODLING: No.

PENCE: Is there anything illegal about taking those considerations into account since they're vital to the president being held accountable to the people, and especially to the people who elected him?

GOODLING: No.

PENCE: And, lastly: Is there anything illegal about taking those considerations into account since they're just as vital to the president's ability to assure that his officials are accountable to him?

GOODLING: No.

PENCE: Well, with that, I appreciate those straightforward answers.

I -- again, I just would say to my colleagues on both sides of the aisle in this committee, I'm troubled about the fact that we seem to be moving ever further down the road of the criminalization of politics.

And I appreciate the testimony that politics can be practiced in political appointments within an administration.

And I yield back the balance of my time.

* * *

REP. STEPHEN I. COHEN, D-TENN.: . . . You mentioned in your opening statement Mr. Charlton was a problem district, based on complaints you'd heard about unauthorized discussion with members of Congress.

Who told you about the violation of that departmental policy?

GOODLING: I think I was aware of it in part because I was in the executive office and complaints would come to me. I don't remember specifically who.But it was something I believe that had happened more than once, and I heard about it from different people at different times.

COHEN: And what are unauthorized discussions with members of Congress?

GOODLING: Almost any. We would encourage U.S. attorneys if they knew a member of Congress personally and they got invited to a birthday party or something like that, of course we didn't necessarily care if they went to the birthday party.

But if there was going to be a discussion about the Department of Justice, the policy was that they would talk to the department before they had those conversations and certainly before they asked or made any requests or stated any position.

* * *

REP. ROBERT WEXLER, D-FLA.: . . . You spoke about a meeting that you attended in the White House where Karl Rove was also in attendance.

Was that the meeting at the White House on March 5th that you refer to?

GOODLING: Yes.

WEXLER: And could you tell us who else was at the meeting? I assume you were there Mr. Rove was there. Who else was at that meeting?

GOODLING: It was a meeting called by the White House Counsel's Office. Fred Fielding was there. Bill Kelley was there. There were some people from White House communications, Dana Perino, I'm not sure of the other, some people from White House political, I believe, but I'm not sure who.It might have been Scott Jennings, but I am not 100 percent.

From the department -- well, you mean the people from the department from the calendar entries.

The other White House people...

WEXLER: Who from the department was there?

GOODLING: Kyle Sampson and myself, the deputy, Mike Elston, Will Moschella, Brian Roehrkasse from our Public Affairs Office.

GOODLING: I'm not positive of the others. I think there were others and they were on a calendar invite that's been released by the department.

Mr. Rove came in late and then left early, but he was there.

WEXLER: Do you recall Mr. Rove, at that meeting, saying that the Department of Justice needed to provide specific reasons why the prosecutors were terminated?

GOODLING: I remember he said something, but I don't remember exactly what the comment was. I remember somebody else from the White House, I believe it was, made some comment and then he emphasized it or re-emphasized it. At least, that's what I remember. But I don't remember the substance of it.

But that's certainly something that did come up, so that might have been the occasion. I just can't remember.

WEXLER: How long was Mr. Rove in the meeting?

GOODLING:You know, I don't remember. Because I don't remember how long the meeting was. I'd guess, maybe, he was there half the time that the rest of us were there. But I didn't fix it in time.

WEXLER: What happened -- what occurred at the meeting?

Could you tell us?

GOODLING: There was a discussion about Will Moschella's testimony and particularly the position the department should take on the legislation. It was very clear -- the White House folks made clear that they did not think that the legislation should be held up, that they just wanted it to pass.

And they made clear that we weren't to take a position against the legislation in the hearing the next day.

WEXLER: Was there any discussion about the termination of the prosecutors?

GOODLING:I remember, at one point, there was a reference to when Tim Griffin's name was submitted to the president for approval. And I checked my book and said that it was June.

GOODLING:I think that's the only comment I made in the meeting. And I think that's the only reference to a specific individual I remember in the meeting.

Mr. Sampson had suggested that maybe the way to conduct the meeting would be for people to read through Mr. Moschella's prepared remarks and then comment on them. So part of the meeting was people reading the remarks and then talking about them.

There was a comment about the department needing to explain its reasons, but I don't remember who made it. But it was made.

WEXLER: There was a comment about the department needing to explain its reasons for...

GOODLING: I believe there was a reference to, the department needs to explain the reasons for the dismissals. Or maybe -- it might have been a comment made by the communications folks that they just wanted people to be clear in the testimony. I can't give you a specific. And I don't know who said it.

WEXLER: Did you go to many meetings at the White House at that time?

GOODLING: No, not that many.

WEXLER:Was that your first, second, third, fourth?

GOODLING: No.I hesitate to guess, maybe 10 or 15.

WEXLER: OK.

So the bottom line here is, to the best of your recollection, somebody said, The Department of Justice needs to come up with its reasons why the prosecutors were terminated. It may have been Karl Rove. Or he may have just re-emphasized what someone else said, correct?

GOODLING: There was a comment about people needing to clear about what we did, something along that line. It may have been by the communication people. I just -- I can't tell you any more than I...

WEXLER: Did Karl Rove say anything else in the meeting? Or was that the entire purpose why he came?

GOODLING: I only remember that I feel like he said one thing. But that's all that I have in my memory.

WEXLER: So to the best of your recollection, the reason why Karl Rove spent his valuable time was one. And that was to tell the Department of Justice to come up with reasons why it fired eight or nine prosecutors.

GOODLING:I don't believe anyone said come up with. I believe it was more a matter of, Explain what you've done, but, again, I don't know if that was his comment. I just can't -- I can't recall. I remember that I felt like he interjected one thing into the conversation.

* * *

REP. TOM FEENEY, R-FLA.: . . .

FEENEY: Did you have any understanding of how the previous Justice Department worked under President Clinton? Was political considerations ever considered in either political or perhaps career positions, to your knowledge?

GOODLING:I don't know.

FEENEY: You weren't there at the time.

Well, you know, I just want to say that under very difficult circumstances you've conducted yourself with a lot of class and a lot of dignity. Ninety-nine percent of the cameras that were here first thing in the morning are gone.

And I ought to tell you, you've been a huge disappointment to a lot of people that were expecting to find some grand conspiracy of the Justice Department to deny justice to the American people.

FEENEY: So in that sense you've been a huge disappointment. But in another sense you have not been. You said that of the perhaps millions of people watching us at one point during the day, only a few knew you personally. Described yourself as a fairly quiet girl, tries to do the right thing, tries to treat people kindly along the way.I always knew I wanted to grow up and do something to serve or help other people.

And I would say that millions of Americans now know a lot more about you, and they're proud to have somebody like you serving in government, and they understand that this is a huge sacrifice.

And I want to tell you that, you know, when we have such big issues in front of us, it's a shame that we have spent so much time and money and resources on lawyers and investigators for a bottom-line question, and that is, was politics ever considered in the political appointment process or the replacement process of political appointees?

I supported, by the way, issuing a subpoena to you because I thought maybe you had the golden answer and could tell this committee that some huge crime had occurred in order to punish somebody because of an ongoing investigation or try to remove somebody in order to interfere with an investigation.

But in all the time I've spent listening to witnesses and reading materials, I haven't seen one shred of evidence to justify the time that we've taken on this.

The president announced yesterday that there are ongoing terrorist plots to attack us here in the United States. This committee has a lot of work to do fighting terror and crime and a number of other issues. And I just hope that Congress and this committee can get on with the real work and stop the circus.

* * *

REP. BRAD SHERMAN, D-CALIF.: . . . There's been a discussion of Carol Lam's supposed failings. And I know that there was a letter from Senator Feinstein that's in the file of documents given to us where the Justice Department responds and says, She's doing a great job. She's getting -- we're on target to be 40 percent higher on the alien smuggling prosecutions.

SHERMAN: Why would the Justice Department tell Senator Feinstein that these criticisms of Carol Lam were inaccurate and that she was doing a great job, and then go off and fire her, supposedly for not doing a good job?

GOODLING: I think the department tried to address the concerns by saying what good things it could. You know, if you do two cases and then you change it to four, that's 100 percent increase. But four cases in a particular category may not actually be all that great.

I think, you know, the department tried to provide information to assure the senator that there was some good work being done in this area, but maybe not as much good work as the department wanted to have done.

SHERMAN: But it's an extremely convincing letter that Justice sent noting that half the assistant U.S. attorneys in this district prosecute criminal immigration cases.Was there some reason you found this letter unpersuasive?

GOODLING: You know, I'm not sure that I really had any involvement in drafting it. I did hear a lot of discussions about Carol Lam's immigration record, and I remember hearing people feeling like it was difficult to respond to those letters because they wanted to be able...

CONYERS:Gentleman's time has expired.

GOODLING:... we were doing more.

CONYERS:You can finish.

GOODLING:I think the department would have been happier to be able to have an even more positive response, but provided the best response that it could.

* * *

REP. LOUIE GOHMERT, R-TEXAS: I do think it's noteworthy in all the complaints about inquiries -- complaints about U.S. attorneys, for example, when an election is won by less than 200 votes and they're concerned that despite all the reports of potential voter fraud, that the U.S. attorney doesn't pursue it, that that somehow is offensive to inquire about that.

Yet, when Senator Dianne Feinstein writes a letter concerned about the lack of prosecutions over the immigration issue, not one person on the other side of the aisle has raised any issue about the impropriety of Senator Feinstein sending that letter.

Why? Because it's a good inquiry. Why wouldn't it also be a good inquiry when someone is not pursuing human smuggling that sometimes results in death, pursuing voter fraud?

Now, I realize that our majority is trying to make it easier to vote so nobody's checked and we can't find out about voter fraud -- that seems to be the direction we're headed. But it shouldn't be anything wrong when people are wanting that pursued.

Now, as far as politics playing a role in the appointments, I hate to be the bearer of this news, but politics has always played a role in appointments.I've known of Democrats who were seeking to get Republican appointments, and they would call known Republicans and say, Would you please put in a good word for me, because I know this will be an issue.

And, gee, I appreciate your testimony today. And you seem to believe that you may have done something wrong by saying, Gee, this person may be a liberal Democrat.

Do you have any idea how many people would have wanted your head and contacted the White House if someone like you were put into position and you thought it was a great idea to hire liberal Democrats, the same way that if Bill Clinton had put in a right-wing conservative Republican in a position like yours? His supporters would have had his head.

GOHMERT: Politics is at play. Now, I would also like to point my colleagues to the fact that I had two good friends from law school who were appointed as federal judges in 1992, early in that year. They got a letter from Chairman Biden saying he wouldn't allow politics to keep them from having a hearing and confirmation within three or four months.

Several months later, because of politics, he let those qualified judges down the vine. They were later reappointed and confirmed, showing how they were good qualified.

When President Clinton fired 93 attorneys on the same day, 12 days after Janet Reno was hired, there was no investigation. There was no quarter of a million dollars.

* * *

BALDWIN: . . . Do you have any knowledge about who suggested that Mr. Biskupic be placed on this list to be terminated in the first place?

GOODLING: I don't. He wasn't on the January list or the September list...

BALDWIN: I'm aware of that.

GOODLING:... that I saw. And those were the only two I can remember seeing. And those were the only two I can remember seeing. And obviously, he wasn't on the final list. I don't remember hearing anything else about it.

BALDWIN: Do you have any knowledge about why he was placed on that earlier list?

GOODLING: No.

BALDWIN: Did you ever hear of any concerns of any kind about Mr. Biskupic, whether from someone inside the Department of Justice or anywhere else?

GOODLING:I feel like I would read the press clipping every day, and I feel like I did occasionally see stories that involved his office. But I can't remember any, specifically, and I don't remember any discussions about them.

BALDWIN:OK. Did you ever hear of or participate in any discussion of whether Mr. Biskupic was loyal to the president or the administration?

GOODLING: I don't remember any.

BALDWIN: OK. Did you ever hear of or participate in any discussion on whether Mr. Biskupic was sufficiently active in prosecuting alleged vote fraud in Wisconsin?

GOODLING:I just don't remember being a part of any discussion about him at all.

BALDWIN: No discussions at all about Mr. Biskupic.

GOODLING: I don't recall any. Like I said, I may have at some point, but I just don't remember any.

BALDWIN: Mr. Sampson testified that after you joined the attorney general's office, which was before Mr. Biskupic was taken off the list, that he likely would have spoken to you about Mr. Biskupic.

Did you ever have any conversation with Kyle Sampson about Mr. Biskupic?

GOODLING: As I sit here today, I don't remember any. But, you know, I can't rule it out. Sometimes what happened with Mr. Sampson is that we would talk about U.S. attorneys in the context of other jobs that were opening up, like, for example, when the associate

attorney general position opened, when the ATF position opened, when the Office on Violence Against Women position opened.

Sometimes, he would say, you know, let's take a look at the U.S. attorneys and see if you see any there we should consider. And so, sometimes I would say, well, what about this one or what about this one or I don't really know much about this one.

And sometimes he would say, Oh, I like that person, you know, or he would have comments. It may have been in a context like that, but I just don't remember -- I just don't remember any conversations about him at all.

* * *

REP. TRENT FRANKS, R-ARIZ.: . . . And the real issue, if there is one here -- and I have to think that Mr. Sensenbrenner is correct I don't see any fish in the pond here.

But the real question is, did you, at any time, at your stay at the Justice Department, ever seek to prevent or interfere with or affect or influence any particular case or any effort to change the outcome of justice, that is the predicate for your agency, by hiring or firing of threatening to do so any person or any of these U.S. attorneys that are under discussion?

GOODLING:I certainly did not.

FRANKS: Do you know of anyone in your department or the administration that did.

GOODLING: I don't recall anybody ever saying anything like that. I just don't. I can't say that -- I can't testify to what other people were thinking, and I can't testify to what people may have been thinking that they didn't say.

But when we -- we didn't talk about what the reasons were other than Mr. Bogden, at least in conversations I was in, until after it was in progress. And I never heard anybody say anything like that.

FRANKS: Well, I think, again, the reason I mention the questions in such direct terms is because that's really the only question that should be before this committee, even though you've received every other kind imaginable.

And I certainly have seen no evidence of any kind before this committee that says that any of these attorneys were fired because of some effort to change the outcome of a case or to influence a case or to influence or thwart justice.

* * *

REP. ADAM B. SCHIFF, D-CALIF.: . . . I think you testified with respect to Mr. Iglesias that there was a discussion about the rationale for his being on the list. Someone

mentioned he was an absentee landlord. Someone else mentioned that there was an improper delegation of authority.

I think the documents reveal that those justifications were not learned until after he was placed on the list. But I'll cover that later.

Let me assume for the moment that that's a legitimate consideration. If a U.S. attorney delegated too much of his authority to the first assistant U.S. attorney, that might be a reason to place him on a list to be fired.Is that right?

GOODLING: It could be.

* * *

SCHIFF: The U.S. attorney sets the tone in the office. If the U.S. attorney's mismanagement of his office results in low morale, and that morale affects the quality of the work done by the office and the reputation of the office, that might be a legitimate reason to put him on a list to be fired, right?

GOODLING: In some cases, morale can be improved. In some cases, you do need to make a change.

But, again, it's going to be the totality of the circumstances.

SCHIFF: If -- in the case of Mr. Iglesias or any other U.S. attorney -- the senators from that state, even senators of the same party, expressed a loss of confidence, as the attorney general testified, that might be a reason to place them on the list to be fired.

GOODLING:I think that that could be a factor you would consider in some cases.

* * *

KELLER: . . . Ms. Goodling, I have been here and listened to you carefully all day. And I believe the gist of all your testimony can be summarized as follows: You had no major role in assembling the list or firing the U.S. attorneys you wish there were some questions you hadn't asked of Civil Service employees on a political level and, while you agree with Mr. McNulty that the firings by the attorney general were not for an illegal or improper purpose, you have some disagreement with other aspects of his testimony.

Is that a fair summary?

GOODLING: I wouldn't want to say I didn't have a major role because certainly I was a part of the circle of people who reviewed the list and made recommendations and was a part of that. So I wouldn't -- I wouldn't want to say that I wasn't a major part.I certainly was part of the core.

I think I would summarize just by saying that as far as I know, the dismissals were made for appropriate reasons...

KELLER: OK.

GOODLING:... but that the handling of it and the explanation of it was poorly managed and not always as accurate as it could have been.

KELLER: So you agree with two of my three summaries, but you wouldn't say you wouldn't have a major role.

Let's turn to, if you would, your packet of documents there, number five, which is tabbed.

And that is an e-mail at the top of this. And this is, for those following, this is tab number five, Office of Attorney General, number 22 (inaudible).

That is an e-mail dated May 11, 2006, from Kyle Sampson to William Kelley. Do you see that?

GOODLING: Yes, I do.

KELLER: And you were in fact the senior counsel and White House liaison at that time, right?

GOODLING: Yes, I was.

KELLER: Were you even aware of this e-mail at the time?

GOODLING: I don't remember learning about it at the time, no.

KELLER: And the reason I say that is because I think your testimony to me earlier was you weren't even aware of a particular list until January of 2006.

And here is a list from May 11, 2006, from Kyle Sampson. So that's how I get the point that you really weren't a major player in all this. Because here you were liaison at the time, and you weren't even aware that this list was starting to be compiled.

GOODLING: The list that I saw, I believe, was January of 2006, so it would have predated this e-mail.

KELLER:OK. This e-mail here is what the other side, and some have called the smoking gun.As you see, it says, among other things, The real problem we have right now with Carol Lam leads me to conclude that we should have somebody ready to be nominated on November 18, the day after her four-year term expires.

Now, according to comments made by John McKay and the Los Angeles Times, on May 18, 2007, that is powerful circumstantial evidence of a crime.I believe we will see a criminal investigation, he says, because the day before, May 10, Carol Lam supposedly sent some notice to the Justice Department that she was going to be seeking certain search warrants related to the Duke Cunningham investigation.

And this must be what triggered it, this particular document. This is their smoking gun, that memo dated May 11.

So I'd like you to look at the bottom of this same memo. And is it in fact true that there is also a memo on the same page, dated April 14, 2006, from Kyle Sampson, saying a month before, that one of the people DOJ recommends terminating is Carol Lam. Is that correct?

GOODLING: Yes, and I believe she was on the January memo as well.

KELLER: That's right. And one final point, just in case anyone is not clear about where the attorney general stood on this issue, he testified before this committee, on April 6. And I specifically brought up the situation to Carol Lam with him.

And the attorney general said to me -- and I was looking for his testimony -- that he was aware of the problem in San Diego and that they were taking steps to do something about it.

KELLER: And I don't have his testimony right in front of me, but the gist of it is he knew then that there was a problem, in April of 2006, and I believe your testimony earlier today is that you had heard conversations back in 2003, 2004, that there were concerns within the Justice Department relating to Carol Lam's failure to prosecute certain gun crimes, and as early as 2005, regarding concern about certain immigration crimes' prosecution.

Is that true?

GOODLING: Yes, that's true.

* * *

LUNGREN: . . . Ms. Goodling, you mentioned in your testimony that you were concerned about statements that might come out that might hurt the U.S. attorneys that were to be relieved, correct?

GOODLING: Yes.

LUNGREN: And, as I understand it, your feeling was that even though there were justifiable reasons for letting these people go, they were otherwise honorable folks who had done good jobs in some areas of the law and there was no reason to hurt their reputation as they went off to pursue another job. Is that correct?

GOODLING: That's correct. They had served, you know, more than there four-year terms in most cases. And although the decision was made that maybe a change would be appropriate, I didn't think that we needed to do anything to damage their reputations.

* * *

LUNGREN: . . . I'm personally aware of at least one occasion in which that occurred somewhere in California while I was attorney general. But every effort was made not to penalize the person who was leaving, not to articulate the reasons why the individual was gone, not to make a big deal about it, but to make that change.

And I guess my question is to you: Was that part of how you viewed it in the situation that you were a part of in this particular matter? That is, with the eight who were being relieved of their positions...

GOODLING: I thought it was within the president's authority to make those personnel changes if he wanted to do so.

* * *

CANNON: . . . Mr. Davis raised questions about Senate referrals of legal matters in connection to an investigation. It goes too far to say that members shouldn't or can't communicate with federal prosecutors to refer matters for prosecution.

Rule 19 of the Senate Subcommittee on Investigations explicitly states a referral methodology. And Senators Feinstein and Representative Issa both encouraged Carol Lam to engage in certain activities with regard to immigration in particular in those referrals.

So, as you said numerous times, referrals themselves or discussions are not inappropriate with federal prosecutors, but it really is the responsibility of the U.S. attorney to communicate that communication to the department, is it not?

GOODLING: Yes. As I mentioned, it was department policy that contacts with members should be reported to the department for appropriate handling, for everyone's protection.

CANNON: Exactly. Are you familiar, then, with Mr. Iglesias' failure to communicate with the department about the contacts that had been made to his office?

GOODLING:I understand he's confirmed that he didn't report the contacts.

CANNON: Actually, no, he told this committee that he did report the contact, using not the telephone or e-mail, but through the medium of the press. I don't know if you're aware of that or not, but I -- personally I think the reasons for his replacement are self-manifest and probably don't need to be gone into much more.

But we've discussed the president's power involved in appointing these really at-will employees. I'd like to read into the record a description of the job security for U.S. attorneys by Mr. David Margolis. I love this line: If Senator Kerry were elected after the 2004 election, these people would be out on the street, anyway. So it's not like we're, you know, taking the jobs out from under them.

Do you think that's a fair representation of the expectations of tenure by U.S. attorneys?

GOODLING: It's certainly an accurate statement.

CANNON: Thank you.

Now, there's been some question about the importance of your role in all of these activities, Ms. Goodling. I, referring back again to Mr. Iglesias who said to Mr. Matthews on Hardball, I think Monica Goodling holds the keys to the kingdom.

CANNON:I think, if they get her to testify under oath with a transcript and have her describe the process between the information flow between the White House counsel, the White House, and the Justice Department, I believe the picture becomes a lot clearer.

Now, we have a transcript being developed today. You've been here with us quite awhile and answered many questions and only a few more, we would hope. I want you to know that in this particular and very narrow case, I agree with Mr. Iglesias that it couldn't be clearer.

You don't have much to show, or you're not a link to what -- someone called it the political corruption -- the partisan, political corruption that is going on that just does not seem to be here. At least, I haven't seen any evidence of that.

And I suspect that at the end of the hearing, the only thing we're going to hear more about is where all the momentum from this investigation dissipated to, using none other than our hero, Mr. Iglesias, to guide us through that.

* * *

GOHMERT: . . . We heard our friend from California mention about other U.S. attorneys who may have departed, perhaps not completely voluntarily, but it's my understanding from people who have worked the system and have seen U.S. attorneys come and go, that before this attorney general's office, this was normally handled by letting people know it might be a good idea to find other employment. We'll give you time, but we want to replace you.

As you've indicated, you said, I thought it was the president's power to make such changes.Isn't it true it is the president's power to make such changes, correct?

GOODLING: Yes.

GOHMERT:It is, and you can do it for political purposes.

GOHMERT: Well, hello, that is why Bill Clinton changed his. That's why...

CANNON: Would the gentleman yield back?

GOHMERT: Yes, I will.

CANNON: Because I'd like to just make a point in the last few seconds, that while Bill Clinton -- President Clinton -- did dismiss 93 U.S. attorneys, one of them was investigating the Clintons at the time. And there is certainly the odor of corruption in that circumstance.

Now, Ms. Goodling, we're done on our side pretty much. We appreciate your testimony and your being here. Mr. Schiff, I think, is going to take the time from here.You've got 15 more grueling minutes. And we'll see if he can come up with something worthy of the hours and hours that we've spent on this subject up until now -- and the money, and the $250,000, et cetera.

Thank you, Mr. Chairman. I yield back.

* * *

SCHIFF: You testified about a meeting in which Mr. Rove was present where someone said, We need to have a reason why all these people were fired, or something to that effect.Correct?

GOODLING:I believe someone made a comment more along the lines of you need to be clear in explaining your decisions or what you did or something. It was more a matter of being clear and explaining, not necessarily.

SCHIFF: And then someone at that meeting said, Yes, that's right, and -- well, you said that Karl Rove at some point emphasized the point someone earlier had made. Is the best of your recollection what he was emphasizing was the point that they needed to have a good explanation for why people are fired?

GOODLING:I can't remember what it was that he said. To the best of my recollection, he only spoke one time. And that's my memory, and I don't even know if it's right.But my memory is that he spoke one time, and it was kind of a follow-on comment to someone else. But I don't remember what the originating comment or his was.

SCHIFF: But someone emphasized that there needed to be a clear explanation for why these people got fired.

GOODLING:To the best of my recollection, yes, that was...

* * *

And this hearing is adjourned.

END

June 5, 2007

Senate Judiciary Committee Holds Hearing on the U.S. Attorney Firings

LEAHY: . . . Our first witness today is Bradley Schlozman, the first interim U.S. attorney appointed by Attorney General Gonzales pursuant to the authority granted in the Patriot Act reauthorization . . .

* * *

SCHLOZMAN:

Thank you very much, Chairman Leahy.

Chairman Leahy, distinguished members of the committee, thank you for the opportunity to testify today.

My service in the United States Attorney's Office for the Western District of Missouri was the highlight of my professional career. Although my 13 months in office was relatively brief, I believe that the outstanding assistant U.S. attorneys and staff in that district accomplished an extraordinary amount in that time.

During my time there, for example, the district was ranked first in the country in the Justice Department's Project Safe Neighborhood program, charging more felon defendants with unlawfully possessing a firearm than any other district in the entire country.

The district also maintained its position as one of the top offices in the country in prosecuting child exploitation cases. Indeed, many components of our Project Safe Childhood initiative that we launched in the district have served as models for other districts throughout the entire country.

In a related vein, I introduced a human trafficking task force shortly after my arrival, which in less than a year led to the indictments of numerous individuals and multiple prosecutions.

All of these successes were due to the incredible team of prosecutors and staff in the Western District of Missouri. And I continue to be grateful for the honor of having served with them.

I'm also very proud of my approximately three years in the Civil Rights Division, where I was privileged to work with many brilliant and dedicated attorneys who cared passionately about ensuring equal justice.

SCHLOZMAN:

I served as a deputy assistant attorney general from May of '03 until June of '05, and then as the principal deputy from June of '05 until March of '06. And during a brief five-month period during there, I was also the acting assistant A.G.

During this slightly less than three-year period, the division was able to achieve unprecedented results.

The accomplishments of the Voting Section, for example, were legion. In the slightly less than three years I spent supervising that section, for example, the division filed 10 objections on behalf of African-American voters, 13 minority-language cases under Section 203 -- which was nearly half of all cases that had been filed in the history of that provision of the Voting Rights Act -- a voter- assistance case under Section 208, the first case ever to protect Filipino voters, the first case ever to protect Vietnamese voters, the first case under the intimidation provision of the Voting Rights Act since 1992, four cases under the Uniformed and Overseas Citizen Absentee Voting Act, three cases under the national Voter Registration Act and four cases under the Help America Vote Act.

In fact, during just my five months as acting assistant attorney general, we filed six Voting Rights Act cases, which is an average of more than one per month. And to put that number in perspective, consider that the division's 31-year average is just six Voting Rights Act cases per year. We did that in just five months.

The work of the division's Special Litigation Section, which I also supervised, was similarly impressive. From 2001 through 2005, the Special Litigation Section increased the number of investigations pursuant to the Civil Rights for Institutionalized Persons Act by more than 28 percent. By the time I left, we had CRIPA matters involving over 175 facilities in 34 states and territories.

And those investigations ensure that all-too-vulnerable residents of state mental-health facilities, geriatric centers, juvenile facilities and correctional institutions are afforded the federal constitutional and statutory rights to which they're due.

Meanwhile, in the Employment Litigation Section, I either authorized, reviewed or oversaw the initiation of investigations, the filing of complaints or the course of litigation in some of the division's most important employment discrimination cases in a decade.

Among the more prominent examples is a pattern-of-practice suit that was -- the investigation that I'd authorized was recently filed against the New York Fire Department following a lengthy investigation.

Following -- and finally, the division's efforts to combat trafficking in persons, which was really one of my prides and joys, has been one of the department's great success stories.

Addressing an evil that really is nothing less than modern-day slavery, the Civil Rights Division launched a major initiative to educate law enforcement, victim advocates and the overall community about human trafficking and how best to eradicate it.

Task forces were formed around the country, and the results have been spectacular.

In fiscal years 2001 through '06, the Civil Rights Division and U.S. attorneys' offices prosecuted 360 defendants; a more than 300 percent increase from the prior six-year period.

SCHLOZMAN:

In addition, the number of convictions and guilty pleas during that time period increased by 250 percent when compared to the prior six-year period. And nearly 1,200 trafficking victims from 75 countries were assisted by the division and other law enforcement personnel for refugee-type benefits under the Trafficking Victims Protection Act.

Few accomplishments have brought greater pride to my heart.

Ultimately, none of these incredible successes of the division over the last five years would have been possible without the tireless efforts of so many fine attorneys and staff in the division. I congratulate them and reiterate what a genuine pleasure it was to work with them.

Thank you very much, Senator.

LEAHY: . . . When you were the attorney general's interim appointment as U.S. attorney for the Western District of Missouri, and as a high-ranking official in the department's Civil Rights Division, you did pursue voter fraud, as you said.

You're aware that the Justice Department's guidebook on federal prosecution of election offenses, the so-called red book, aren't you?

SCHLOZMAN:

I am somewhat familiar with it. In fact, the department, today, announced that they're issuing a new book that will be...

* * *

LEAHY: . . . On the eve of last year's closely contested midterm election in Missouri, you brought four indictments against individuals who filed some false voter registration applications.

Now, when I read this book -- and I wasn't a U.S. attorney, but I read this book, and they talk about the long tradition -- they actually use those words -- against criminal investigations on the eve of elections, the general policy against criminal pursuit of individuals accused of election misconduct in favor of going after larger conspiracies.

Wasn't the timing of your action, on the eve of it, filing criminal charges not against a large conspiracy but against a few individuals -- wouldn't that be contrary to the policies that are right here in the book?

SCHLOZMAN:

No, Senator, they would not be. The...

* * *

LEAHY:

Well, then -- did you go to anybody in the Justice Department to approve what you were doing insofar as this apparently goes against what is in the prosecutor's handbook?

SCHLOZMAN:

Yes, Senator.

I -- at my direction, the prosecutor, the assistant U.S. attorney assigned to this case, who's a 27-year veteran of the department, contacted the head of the Election Crimes Branch, which is a unit within the Public Integrity Section...

LEAHY:
Who'd you contact?

SCHLOZMAN:
The head of the Election Crimes Branch.

LEAHY:
Who?

SCHLOZMAN:
Craig Donsanto.

LEAHY:
Is he still there?

SCHLOZMAN:
Yes, he is.

LEAHY:
And you contacted him, or the assistant...

SCHLOZMAN:
My assistant U.S. attorney contacted him.

LEAHY:
At your direction?

SCHLOZMAN:
At my direction, yes.

LEAHY:
And what was the response?

SCHLOZMAN:
The response was, when we explained the nature of the investigation and the indictments, we specifically asked whether we should be able to go forward or he wanted us to delay.

And his response was, "Go ahead if you've got the investigation ready to go. Go ahead and indict. There's no need to wait until after the election."

* * *

SCHLOZMAN:

The director's explanation was is that this case did not implicate any of the DOJ informal policies. Because, as he said, there was no need to actually interview any voters in this case.

And because of that, there was -- the purpose of that policy is designed to ensure that no investigation ensues where a voter might actually have to be interviewed prior to the election, which could chill potential electoral activity.

And because that wasn't necessary here, he said, "Feel free to go forward. No policy is implicated."

LEAHY:

In your testimony, you said, "There was nothing unusual, irregular or improper about the substance or timing of these indictments."

Is that your position today?

SCHLOZMAN:

It is. And that is based on the expressed direction and guidance that I received from the Election Crimes Branch of the Public Integrity Section.

LEAHY:

But you -- but why did you even seek -- why didn't you just wait a couple weeks more? I mean, wasn't this obvious to you that just simply bringing the charges -- especially when there was nothing that you had to bring to stop somebody before the election -- just the bringing of the charges could have an effect on the election?

Did that thought ever occur to you?

SCHLOZMAN:

Well, a couple of points, sir.

Number one, I didn't -- the reason I contacted the Public Integrity Section is, is that that is explicitly required under the U.S. attorneys' manual.

In terms of -- I mean, I didn't think that this was going to have any impact on any election. I mean, these were individuals who were filling out false voter-registration cards. So...

* * *

SCHLOZMAN:

Well, there was no individual who was possibly going to be disenfranchised, or who was...

LEAHY: . . . Did you really think that bringing -- having the Department of Justice bring a charge like that that close to the election would have no effect on the election -- I'm not talking about an individual being stopped from voting -- would have no effect on the election?

SCHLOZMAN:

I did not think it was going to have any effect on the election in this case, no, Senator.

* * *

LEAHY:
OK.
Have you ever made a remark suggesting to anybody that helping a particular candidate or political party played a role in your decision about filing this lawsuit, as interim U.S. attorney?

SCHLOZMAN:

I can't imagine having made any comments like that.

* * *

LEAHY:
What about a role in the timing of the filing or prosecution of any lawsuit? Did you ever talk to anybody that this may affect an election one way or the other?

SCHLOZMAN:
I don't recall making any comment.

And, again, I did what I did at the direction of the Public Integrity Section.

* * *

FEINSTEIN:
In late 2005, you overruled the recommendation of then-U.S. attorney Todd Graves and authorized a lawsuit to be filed against the Missouri secretary of state. The chairman referred to it.
And the suit alleged that Missouri was not making the reasonable effort to remove ineligible voters from its voter rolls.
In early '06, Mr. Graves was told to resign and you became the interim U.S. attorney.
Why was Mr. Graves told to resign?

SCHLOZMAN:
Senator, I have no idea. In fact, I did not know that he had resigned until I read about it in the Kansas City Star.

FEINSTEIN:
So you had no involvement in the decision?

SCHLOZMAN:
None whatsoever.

FEINSTEIN:
Do you know who made that decision?

SCHLOZMAN:
I do not.
I mean, all I know is just what I've read in the newspaper, which is that he was apparently advised to the decision by the director of Executive Office for U.S. Attorneys. But I know no information on it at all.

FEINSTEIN:
Did you not talk to anybody about who made the decision?

SCHLOZMAN:
Not only did I not talk to anyone about it, but I didn't know that he -- about the resignation. I mean, I didn't know about the latest revelations until I read about it in The Washington Post, so...

FEINSTEIN:
OK.
I wanted to ask a few follow-up question on the ACORN indictments. Senator Leahy asked you about them.
As you know, the four workers voluntarily turned over evidence to investigators and they were cooperating fully with the investigation. And yet you went ahead and shortly before that election, you brought these indictments.

FEINSTEIN:
And on page 61 of this book, it is rather clear that that is effectively a no-no.
Why did you do that?

SCHLOZMAN:
Senator, I acted at the direction of the director of the Election Crimes Branch in the Public Integrity Section.
We asked whether he wanted us to go forward or delay until after the election, and he said, "Go forward," in e-mail traffic.

FEINSTEIN:
And who was that that ordered you to go forward?

SCHLOZMAN:
Craig Donsanto, the head of the Elections Crime Branch.

FEINSTEIN:
This is -- this is puzzling, why this volume -- that you admitted U.S. attorneys must be familiar with -- states very clearly, "Thus most, if not all, investigation of an alleged election crime must await the end of the election to which the allegation relates."

This involved four people who were cooperating with the local district attorney. The matter was being taken care of locally. And yet the U.S. attorney then files a case right before the election.

I have a hard time understanding that, if it isn't for political reasons.

SCHLOZMAN:

Senator, first of all, the cooperation was not by the four individuals. The cooperation was by the ACORN organization. That's the first point.

The second, although ACORN wrote to the local country prosecutor on, I believe it was October 11th, the next day we got a letter from the bipartisan election commission in Kansas City, urging -- and that was sent to the U.S. attorney's office and the FBI, urging us to investigate.

And at that point -- again, we completed our investigation very quickly because ACORN was so cooperative in that matter. And when we asked the Public Integrity Section if they wanted us to go forward or wait until after the election, they said, "Go ahead and go forward."

* * *

FEINGOLD:

Thank you.

Let's go to some of the issues being raised about ACORN, again, and the four indictments you served up.

You did confirm, already, in answer to Senator Feinstein, that ACORN itself provided officials with the names of the three or four people you indicted, correct?

SCHLOZMAN:

Yes.

FEINGOLD:

And so, it's true that these indictments were not the result of an ongoing national investigation, but, rather, of ACORN's self-reporting, right?

SCHLOZMAN:

Senator, the national investigation is not something that I'm able to talk about.

I can tell you that any statements in that regard were made at the direction of the Public Integrity Section at the Department of Justice. And I can't go into any more detail on that.

FEINGOLD:

But you've indicated how this ACORN thing happened and that it was a self-reporting act.

FEINGOLD:

It was not a result of a national investigation. Isn't that right?

SCHLOZMAN:
Senator, I mean, in terms of any broader investigation, I simply can't talk about that.

FEINGOLD:
I don't think it's necessary.
You indicated that in this case it came because ACORN self- reported.

SCHLOZMAN:
On those four cases, that's correct.

FEINGOLD:
So how can it be part of a national investigation if they simply self-reported?

SCHLOZMAN:
Senator, I just -- I can't talk about any broader part of -- again, the statement that I made in the media was made at the direction of the Public Integrity Section.

FEINGOLD:
Did you find any evidence of a conspiracy by ACORN to commit voter fraud in Missouri or elsewhere in the country?

SCHLOZMAN:
My office did not, no.

FEINGOLD:
Your office apparently named the wrong person in one of the indictments, suggesting that at least one and possibly all of the defendants were no interviewed pre-indictment. Is that true?

SCHLOZMAN:
Senator, I'm not sure that I'm able to talk about that kind of information. That may be Rule 6(e) material, grand jury, in terms of the nature of our investigation.

I can tell you that the individual who we amended to -- you know, one individual was dismissed. And we then ended up charging a fourth individual. And I can tell you that that individual was also charged with identity theft.

* * *

LEAHY: . . . Now, according to the recent press report, Tom Heffelfinger, who, I'm told is a widely respected U.S. attorney -- former U.S. attorney in Minnesota wanted to investigate possible voting rights discrimination against Native Americans in his district.
Now, at that time, you were serving in the Civil Rights Division. You may have played a role in quashing this voter protection investigation. But then, when you were interim U.S. attorney -- and I want to give you plenty of time to tell me if you disagree with any

of this -- when you were interim U.S. attorney, you filed the ACORN suit against four individuals on the eve of an election.

You explain what you did, even though it seems to go contrary to what's in the election offenses guidebook.

LEAHY:

But despite the expressed priority in the guidebook for protecting the voting rights of minorities, you prevented the U.S. attorney in Minnesota from taking action. And according to the May 31st Los Angeles Times, you effectively quashed the investigation into possible voter discrimination against Native Americans.

Joe Rich, who was the career head of the DOJ's Voting Rights Section, had recommended such an investigation.

What was your motivation in not pursuing that recommendation?

SCHLOZMAN:

Senator, Mr. Rich's report is completely inaccurate.

We were getting in the October 2004 time period, I mean, literally dozens of complaints every day. In fact, we were getting so many that we had assigned...

LEAHY:

Have you read that article in the Los Angeles Times?

SCHLOZMAN:

I have, Senator, Yes.

LEAHY:

And you disagree with it?

SCHLOZMAN:

Yes, I do.

LEAHY:

Tell me.

SCHLOZMAN:

We were getting so many complaints that we were literally assigning extra staff and attorneys to handle the complaints. And because we were getting so many complaints, we wanted to be able to properly triage how we were going to handle each of these matters.

LEAHY:

Well, let's go into that.

SCHLOZMAN:

Yes.

LEAHY:
The Los Angeles Times reported that you told Mr. Rich not to do anything on the Minnesota Native American issue without your approval because of the special sensitivity of this matter. Is that correct?

SCHLOZMAN:
That was, I believe, what he was instructed to do on all investigations. So, yes.

LEAHY:
What was special sensitivity about this?

SCHLOZMAN:

Well, any time we're dealing in a pre-election period and any time the Civil Rights Division is going to be going in and making inquiries on phone calls it immediately alerts the -- I mean, those things make the newspaper, it gets the attention. And we wanted to make sure that we were not going off half-cocked in any jurisdiction. So...

* * *

LEAHY: . . . What -- did you restrict the Minnesota officials whom Rich could speak in conducting his investigation? Did you tell him there were certain Minnesota officials he couldn't speak with?

SCHLOZMAN:
I instructed my voting counsel to -- once I got the allegation in, that this was something that we should be looking into.
The secretary of state is a state's chief election official. And so the allegation, as I understand it, was that she had come up with some kind of interpretation that was going to be potentially discriminatory with regards to Native Americans using tribal ID. And so the natural first person to go to would be the secretary of state to figure out what the interpretation is.
Nobody killed any investigation.

LEAHY:
What Justice Department employees were involved in the decision not to go forward at that point?

SCHLOZMAN:
I don't know who would have been responsible for not going forward, because I certainly did not give any kind of instruction to not pursue the investigation. The instruction that came from my voting counsel was to go ahead and contact the chief election official, which is the secretary of the state. If there was information there that proved valuable, then any investigation could be followed up.

So there was -- I mean, I've been perplexed at the suggestion that somehow the direction to contact the secretary of state killed the investigation. I don't know why that would be. I mean, that was the first step.

LEAHY:
Did you ever discuss anything about former U.S. attorney Heffelfinger with Monica Goodling?

SCHLOZMAN:
No, Senator.

LEAHY:
Flat no.

SCHLOZMAN:
Flat no.

LEAHY:
Kyle Sampson?

SCHLOZMAN:
No.

LEAHY:
No, you did not.

SCHLOZMAN:
I can cut this off by saying I didn't talk about Mr. Heffelfinger with anyone.

LEAHY:
Nobody at the Justice Department or the White House?

SCHLOZMAN:
That's correct.

LEAHY:
And you didn't discuss with anybody there about his investigation?

SCHLOZMAN:
No.

LEAHY:
Or his role in it?

SCHLOZMAN:

No.

* * *

FEINSTEIN . . . :
Thank you very much, Mr. Chairman.
I wanted to ask you about Arizona, if I might.

In April of '05, Justice informed Arizona that the Help America Vote Act allowed the state to require photo IDs when issuing provisional ballots to voters.

* * *

FEINSTEIN: . . . The Elections Assistance Commission disagreed with DOJ. And in September of '05, you signed a letter to Arizona stating that the act does not allow the state to require IDs when voters cast provisional ballots.
Were you involved in the drafting of the initial letter in April of '05?

SCHLOZMAN:
I don't believe that I was involved in that. I think that that was -- I mean, it was signed by my superior and I don't believe that I was involved in the drafting.
I may have looked at it. But I don't...

FEINSTEIN:
Do you know who was involved in that letter?

SCHLOZMAN:
It would have been probably -- I mean, the voting counsel in the front office.

FEINSTEIN:
Was anyone from the White House involved in drafting that initial letter?

SCHLOZMAN:
No.

FEINSTEIN:
Did Hans von Spakovsky object to the interpretation that was spelled out in the second letter?

SCHLOZMAN:
I don't recall him objecting. I mean, we were going over the facts of the HAVA statute. And I clarified what I thought my interpretation was. And I think he concurred in that.

FEINSTEIN:
All right.

Let me go, as others have, to Mr. Heffelfinger.

What role, if any, did Tom Heffelfinger's efforts to protect the voting rights of Minnesota's Native American communities have to do with placing him on the department's termination list?

SCHLOZMAN:

Senator, I have no idea.

FEINSTEIN:

Did you ever talk to Kyle Sampson or Monica Goodling about him?

SCHLOZMAN:

No.

FEINSTEIN:

Did you talk to anyone in the attorney general or deputy attorney general's office about his performance?

SCHLOZMAN:

No.

FEINSTEIN:

Did you ever talk to anyone in the attorney general or the office about his request that DOJ look into possible election- related discrimination against Native Americans in Minnesota?

SCHLOZMAN:

Did I speak with anyone in the A.G.'s office or the DAG's office, is that your question?

FEINSTEIN:

Yes.

SCHLOZMAN:

No. The answer's no.

FEINSTEIN:

Did you speak with anybody about it?

SCHLOZMAN:

I mean, presumably my voting counsel. But, I mean -- and, you know, the chief of the Voting Section, but...

FEINSTEIN:

Well, is it true that Mr. Heffelfinger made a request?

SCHLOZMAN:
I mean, I -- these requests were coming, usually, directly into the Voting Section. And based on that article from the Los Angeles Times, it sounds like that's the same thing that happened in that case.

FEINSTEIN:
No, but when you have a U.S. attorney in an area who says, "Whoa, I think we have a problem here; we should look into it," don't you look at that?

SCHLOZMAN:
Well, and Senator, it sounds like we did look into it. And we directed the Voting Section chief to contact the secretary of state to launch an investigation and contact the secretary of state.

FEINSTEIN:
But DOJ didn't launch an investigation.

SCHLOZMAN:
I don't know what happened...

FEINSTEIN:
I just find it a little -- you know, you have ACORN in one state where it's being solved by the locals. And yet, boom, you move in and you put forward indictments, one of which was wrong.
And here you have Native Americans who are going to be denied their right to vote, quite possibly, because of a certain ID, and you say, "Well, it's up to the secretary of state."

SCHLOZMAN:
Senator, the investigation to figure out what this alleged interpretation was, that was going to potentially disenfranchise Native American voters, is what the allegation was.
And my voting counsel instructed the chief of the Voting Section to contact the secretary of state, who apparently was responsible for this interpretation, and figure out what was going on.
I mean, I think that was the commencement of an investigation.

FEINSTEIN:
Well, I took that as your answer. I just find it strange.
Now, Monica Goodling testified last month before the House that there were issues with Tom Heffelfinger's performance because, at least in her view, he was spending an excessive amount of time on Native American issues.
How would she know that?

SCHLOZMAN:
I have no idea.

FEINSTEIN:
You have no idea?
And yet this was your department and you had Heffelfinger calling you. And you say you never talked to Monica Goodling about it?

SCHLOZMAN:
Number one, Mr. Heffelfinger did not call me at any point.

FEINSTEIN:
Well, who did he call?

SCHLOZMAN:
According to the Los Angeles Times, he apparently called the Voting Section.

FEINSTEIN:
I'm asking you, according to your knowledge?

SCHLOZMAN:
I mean, I don't know. You know, I did not remember this incident at all, and still actually don't remember all the specifics. I'm basing my statements on the article from the Los Angeles Times.

FEINSTEIN:
So you're saying, essentially, you knew nothing about that?

SCHLOZMAN:
That the -- I'm saying that today -- I mean, do I recall this conversation that I apparently had with Mr. Rich? No, I mean, I can't tell you that I recall that conversation.
I have no reason to doubt it. But, I mean, I can't recall a conversation that occurred almost three years ago, when, you know, it was one of probably a thousand complaints that we got from the division -- into the division in October of 2004.

FEINSTEIN:
How did you make a decision -- I'm very puzzled by this indictment of the four workers, just boom, just moving when the state was already into it and taking care of it, and yet other instances, the department didn't.

SCHLOZMAN:
I'm not sure where the suggestion that the state...

FEINSTEIN:
Of course, you can understand how some of us might feel that it's politically directed.

SCHLOZMAN:

Senator, I'm not aware that the state was ever -- I mean, these are violations of a federal statute, the anti-fraud provision of the National Voter Registration Act. So I'm not aware that the county prosecutor's office was ever even looking at this.

ACORN certainly did send a letter to the county prosecutor. And then the next day, the Kansas City Board of Elections commissioner sent a letter to the FBI, to the U.S. attorney's office and I think also to the county prosecutor.

But I'm not aware that the county was ever even looking at this.

FEINSTEIN:

So you're saying, then, the only decision you made was the decision to file an indictment prior to the election?

SCHLOZMAN:

At the direction of the Public Integrity Section, yes.

* * *

LEAHY: . . . Mr. Schlozman, during the Missouri case there were all kinds of leaks that came out to the press from Department of Justice talking about -- or at least the press treated them as being leaks from your office and others.

And as a result, people were calling in and saying, "Am I going to be prosecuted if I go to vote? There's going to be mass arrests."

Do you know anything -- are you aware of any -- any -- even a scintilla of information leaked from the U.S. attorney's office or the Department of Justice to the press in regards to the Missouri case?

* * *

SCHLOZMAN:

I am not aware of any leak, Senator, at all.

LEAHY:

None whatsoever?

SCHLOZMAN:

None.

LEAHY:

Are you aware of the press indicating that some of those leaks were coming either from the U.S. attorney's office or the Department of Justice?

SCHLOZMAN:

Candidly, Senator, today is the first time I'm ever hearing about any press report of leaks.

LEAHY:
Thank you.
Were you aware of press reports suggesting that a number of people were going to be indicted beyond the ones we've discussed?

SCHLOZMAN:

I'm not aware of any of those reports, and certainly my office had no intentions of expanding that investigation.

* * *

SCHUMER: . . . You had no involvement in the Graves situation.

SCHLOZMAN:
That is absolutely correct.

SCHUMER:
Next: Did Monica Goodling play any role in your becoming interim U.S. attorney?

SCHLOZMAN:
I believe she did, yes.

SCHUMER:
Can you described it?

SCHLOZMAN:
Yes. When I read about the opening for the U.S. position, which I read about the day after Mr. Graves resigned, I went to the three individuals who I thought were responsible for the appointment of interim U.S. attorneys.

SCHLOZMAN:
And that would be Monica Goodling, Kyle Sampson and David Margolis.
And I expressed my interest in the position. And this would, again, be about two weeks before I was selected because, at the time, there was no even first assistant to assume the acting U.S. attorney role.

SCHUMER:
And at the time you went to these three people, how many cases had you tried?

SCHLOZMAN:
Zero.

SCHUMER:

Zero?
No criminal cases?

SCHLOZMAN:
I had helped supervise the...

SCHUMER:
So you hadn't tried a case?

SCHLOZMAN:
That is correct, Senator.

SCHUMER:
And no civil cases?

SCHLOZMAN:
Right. I mean, I'd been involved in civil litigation, but I had not been in trial.

SCHUMER:
OK.
And you think you deserved to be, with so little experience, and you were chosen so quickly? Do you want to explain that to people?

SCHLOZMAN:
Well, the initial matter, in terms of the timing -- I mean, they had to have someone on board within two weeks because there was not even a first assistant to assume the acting U.S. attorney role. So that explains the prompt timing.
But in terms of my selection experience, I mean, I think it's not uncommon that the U.S. attorney doesn't have a lot of litigation experience. I mean, my job...

SCHUMER:
How old were you at that time?

SCHLOZMAN:
I'm sorry?

SCHUMER:
How old were you at that time?

SCHLOZMAN:
Thirty-five.

SCHUMER:
OK.
Let me ask you, in general, what's your relationship with Ms. Goodling? Is it just...

SCHLOZMAN:
I mean, she's a colleague and, you know...

SCHUMER:
How often did you speak to her while you were in your position in the Justice Department?

SCHLOZMAN:
I'd see her in the hallway and she and I were both on the fifth floor, so I'd, you know, occasionally even stop in to say hello.

SCHUMER:
OK.
But it was nothing -- you didn't deal with her all the time on different issues?

SCHLOZMAN:
No, no.

SCHUMER:
OK, got it.
All right.
Now, in written testimony, you say something that makes no sense to me. As had already been mentioned, you made the decision to indict a number of individuals within a week of 2006, even though DOJ policy seems to counsel against taking such action.

SCHUMER:
Quote, "While the ACORN matter arose in October, department policy did not require a delay of this investigation and the subsequent indictments because they pertained to voter- registration fraud, which examined conduct during voter registration, not fraud during an ongoing or contested election."
Consequently, the department's informal policy was not implicated in this matter. Quote -- and this is yours -- "In sum, there was nothing unusual, irregular or improper about the substance or timing of these indictments."
Now, here's what I don't understand.
Matt Friedrich, counselor to the attorney general, has testified during a committee interview that he understood the policy very well.
He testified that in 2006 October, Kyle Sampson gave him a document from Karl Rove -- it's right here. Karl Rove gave Sampson this document that suggested there was voter-registration fraud going on in Wisconsin in October.
Here's how he reacted when asked what he did with that document. This is Mr. Friedrich.
He said, quote, "Not a darn thing. I didn't disseminate it. I didn't copy it. I didn't communicate it down the chain of command in substance or in form. I did not need to review it for a lengthy period of time to know what I was going to do with it."

When asked to explain why, Mr. Friedrich said it was his clear understanding that because this was shortly before an election, and the red manual -- again, I'll read it again just to refresh your recollection -- says on page 61, right here, "Thus most, if not all, investigation of an alleged election crime must await the end of the election to which the allegation relates." And, as Senator Leahy pointed out, that is underlined.

So let me ask you, was Mr. Friedrich -- who is very well- respected -- completely off base?

SCHLOZMAN:

Senator, again...

SCHLOZMAN:

I don't know what the specific facts of the Wisconsin case are. All I can tell you is that in Missouri, our case...

SCHUMER:

Wait a minute.

He didn't even read the document. All he had to do was see that this was a few weeks before the election, and you don't do it.

Those of us -- I'm not a U.S. attorney. But those of us who are around elections and the system of justice know that those are the rules.

And no one before I heard has come up with the tortured explanation that you did to Senator Leahy that this isn't going to deter a voter from voting. That's not the point of this. The point of it is it might influence an election. Isn't that right?

SCHLOZMAN:

Senator, I did not think it was going to influence the election at all. And I contacted...

SCHUMER:

But that's not your judgment. You used your own judgment, being 35 years of age, not having a wide range of experience here, and you overruled something that is very explicit in the book, in the manual. Right? Isn't that what you did?

SCHLOZMAN:

I got my -- I got my direction from the Public Integrity Section of the Department of Justice.

SCHUMER:

I know, but, you know, you have to make some of your own decisions here, too.

Did you know of this sentence in the book?

SCHLOZMAN:

I believe I was probably aware of it, yes.

SCHUMER:

And did you -- you believe I was...

SCHLOZMAN:
Well, I mean, Senator, I suppose that I was responsible for being aware of the election crimes manual.
Again, I checked with the Public Integrity Section, which I was required to do under the U.S. attorneys manual, and sought direction on whether I was to wait. And we had a grand jury...

SCHUMER:
And Mr. -- what was his name? -- Donsanto...

SCHLOZMAN:
Donsanto, yes.

SCHUMER:
He will state, if we ask him, explicitly, with no reservation, he ordered you to do it, or told you it was OK to go ahead and do it?

SCHLOZMAN:
That is correct.

SCHUMER:
OK.
Let me ask you this: Why do you think Mr. Friedrich recoiled from even reading a document about a voter registration fraud while you rushed to indict just before an election? Is the law and the rules of the department that vague?

SCHLOZMAN:
Well, I do know that we had a grand jury session that I believe was meeting on October 31st to November 1st. And that's the grand jury to whom we'd been -- we were going to be presenting the information. It would have been, I believe, in the return of information. So you can't use...

SCHUMER:
But you don't think it would have affected the case to wait a week or two?

SCHLOZMAN:
Well, it would have been basically eight weeks to...

SCHUMER:
But would it have affected the case?

SCHLOZMAN:
I don't think it would have affected the case, no.

SCHUMER:
No. Of course not.
Let me say this. You say that ACORN indictments were not unusual or irregular. How many cases that are similar can you identify that have been brought within a week of an election over the last 10 years?

SCHLOZMAN:
Senator, I'm not able to give you any specifics like that.

SCHUMER:
Well, then, how you can say they weren't unusual or irregular?

SCHLOZMAN:
I was referring -- attempting to refer to the policy, and perhaps I stated it in a -- did not state it very well.

SCHUMER:
Well, wait a minute. Wait a minute.

SCHLOZMAN:
Yes.

SCHUMER:
Here you are. You're overruling a pretty clear rule in this manual. And you say that's because they're not unusual or irregular. And yet when asked, you have no evidence that they were or were not unusual or irregular.
Isn't that right? Don't you think a conscientious lawyer, conscientious public servant would have gone and checked?
Did you check? Did you check and see if there were other cases that were brought in a similar amount of time before an election?

SCHLOZMAN:
Senator, I was told that there was no policy implicated here. And that was why I went forward.

SCHUMER:
I'm asking you, did you go check and see if there were any other cases?

SCHLOZMAN:
That had been filed in that time period?

SCHUMER:
No, election cases...

SCHLOZMAN:

No. The answer is no.

SCHUMER:
You did not check.

SCHLOZMAN:

I did not check.

* * *

SCHUMER: . . . The policy was written, right?

SCHLOZMAN:
It has been described to me on the timing issue as an informal policy. And that's the phrase that the Public Integrity Section uses.

SCHUMER:
So this is -- this book is a book of informal policies?
Let me see here. I don't see that on the cover here.

SCHLOZMAN:
Senator...

SCHUMER:
It doesn't say, quote, "Informal policies of the Justice Department: Choose to follow them or not, as you wish." I don't see that written here.

SCHLOZMAN:
Senator, it has been described by the Public Integrity Section as an informal policy.

SCHUMER:
To you verbally?

SCHLOZMAN:
Yes.

SCHUMER:
Is there any indication in writing that they regarded this as informal?

SCHLOZMAN:
I mean, there may be. I don't know.

SCHUMER:
OK.

So can you tell me what the difference is between a formal policy and an informal policy?

SCHLOZMAN:
My understanding of it is that the department -- again, this has been described to me as that the department does not time indictments to an election.
So a formal policy has been described to me as, if they said there will absolutely be no indictments prior to the election, that would be something more formalistic.

SCHUMER:
Right, OK.
All right, let me ask you this -- and I appreciate my colleague. I just asked him if I might go on, since I'm over my time.
Who approved the ACORN indictments? Name names.

SCHLOZMAN:
Craig Donsanto in the Public Integrity Section.

SCHUMER:
And you? No one else?

SCHLOZMAN:
Well, there's a department review process, but I don't know what -- I mean, if there...

SCHUMER:
Who did you talk to about the indictments, other than Mr. Donsanto?

SCHLOZMAN:
I spoke with individuals in the deputy attorney general's office, who advised -- who asked me to...

SCHUMER:
Give me some names there, please.

SCHLOZMAN:
Mike Ellston would be the only person with whom I spoke, which is the deputy attorney general's chief of staff.

SCHUMER:
What did he tell you?

SCHLOZMAN:
He said, "Wait til you hear from us."

SCHUMER:
And did you?

SCHLOZMAN:
Yes.

SCHUMER:
And they told you, go ahead?

SCHLOZMAN:
Yes.

SCHUMER:
OK.
Who else?

SCHLOZMAN:
That was it.

SCHUMER:
That was the only other person you spoke to?

SCHLOZMAN:
That is correct.

SCHUMER:
And did anyone call you about these particular indictments and urge you to move forward or not move forward, from either inside or outside the Justice Department -- any other person?

SCHLOZMAN:
No.

SCHUMER:
Not a one?

SCHLOZMAN:
Not a one.

SCHUMER:
OK.
So, in other words, there was no communication between you and the White House in any way on this issue...

SCHLOZMAN:
That is absolutely correct.

SCHUMER:

... or with any Justice Department official in the White House, as far as you know?

SCHLOZMAN:

As far as I know.

* * *

SCHUMER:
You don't know, or you...

SCHLOZMAN:
I don't know.

SCHUMER:
OK.
How about Republican Party officials from Georgia or anywhere else? Any -- did you speak to anyone of that, who would meet that description?

SCHLOZMAN:
I don't have -- no.

SCHUMER:
No. OK.
Do you know of anyone who did in the Justice Department?

SCHLOZMAN:
I do not.

SCHUMER:
OK.
How about elected officials in Georgia or anywhere else?

SCHLOZMAN:
On the ACORN indictments? No.

SCHUMER:
I'm sorry. I'm saying Georgia here. I should be saying Missouri.
Sorry. So let me ask them again.
Any Republican Party officials from Missouri or anywhere else?

SCHLOZMAN:
No.

SCHUMER:

OK.
And elected officials in Missouri or anywhere else?

SCHLOZMAN:
No.

SCHUMER:
OK.
Any advocacy groups?

SCHLOZMAN:
No.

SCHUMER:
So you spoke to no one, no one, no one.

SCHLOZMAN:

Outside of my office and the individuals I identified in the Public Integrity Section and the deputy attorney general's office.

* * *

WHITEHOUSE: . . . Just in terms of the volume that Senator Schumer's been looking at, the preface says that the book is "intended to assist federal prosecutors and investigators in performing this important part of their mission," i.e. successful investigation and prosecution of corruption in the election process.

It says that it is "intended as a reference tool for personnel employed by the Department of Justice, including United States attorneys' offices and the Federal Bureau of Investigation."

It says that "the discussion in this book represents the views and the policies of the Criminal Division."

It says that it "addresses how the department handles all forms of federal election offenses."

It says that it "summarizes the department's policies, as well as key legal and investigative considerations related to the investigation and prosecution of election crime."

Did anybody in the course of this discussion ever stick up for the clearly articulated policy not to indict immediately pre-election an election offense? Did anybody stick up for it? Clearly, you didn't.

Let me ask you this: Were you even aware of that at the time of the indictment?

SCHLOZMAN:
I mean, I was aware of the general policy that the department refrains from indicting certain election-related crimes before an election, which is why...

WHITEHOUSE:
Were you aware of this section of this...

SCHLOZMAN:
I mean, I don't remember -- I don't recall specifically looking at that pages -- at those pages. But I did contact the Election Crimes Branch within the Public Integrity Section and I used...

WHITEHOUSE:
You're advised to do that by the U.S. attorneys manual, aren't you?

SCHLOZMAN:
That's correct, yes.

WHITEHOUSE:
And you indicated that the -- I forget the name of the gentleman you spoke to, Desanto?

SCHLOZMAN:
Donsanto, yes.

WHITEHOUSE:
Donsanto -- that you then went ahead to announce the indictment at his direction, was the word you used twice.

SCHLOZMAN:
Yes, I mean, when I -- we asked him if we should go forward or if we should refrain from bringing the case until afterwards, and he said, "If you've got an indictable case, bring it."

WHITEHOUSE:
The U.S. attorneys manual doesn't give him a directive role on this, does it? Doesn't it say that the U.S. attorney is obliged to consult?

SCHLOZMAN:
I think, yes, it does say that we are required to consult, yes.

WHITEHOUSE:
To consult. OK.
Did anybody in the process, anywhere -- clearly, he didn't stick up for this guideline. He gave you a green light to go ahead. You didn't stick up for the guideline. Did anybody on your staff have any reservations about the timing of this?

SCHLOZMAN:

Senator, no, as a matter of fact. And we contacted the Public Integrity Section. And they're the ones who handle the department's policy on this issue.

WHITEHOUSE:
So up and down, throughout the entire Department of Justice, not one person stuck up for this rule in the federal prosecution of election offenses manual?

SCHLOZMAN:
My understanding -- the Public Integrity Section, we consulted with them, and they're the ones who are the experts on this issue. They said no policy was even implicated. And so, we went forward.

WHITEHOUSE:
No policy was even implicated.

SCHLOZMAN:
That's what Public Integrity Section said. They're the experts on this issue.

WHITEHOUSE:
But you said that you were aware that there was a policy in the department against these immediate pre-election indictments, yet they said no policy was even implicated. Did you remind them that there was actually this policy out there, or...

SCHLOZMAN:
Senator, let me clarify.
What they said was is the policy is that you do not do an investigation that would require the interviewing of individual voters. And because our case did not involve any specific election, it involved false voter registration forms, and didn't require any individual voters to be interviewed, that there was no policy implicated.

SCHLOZMAN:
Now, that was their interpretation and they're responsible for administering the election crimes manual.

WHITEHOUSE:
You also indicated to the media at the time, pre- election -- you had press conferences about this pre-election, didn't you?

SCHLOZMAN:
No, we did not.

WHITEHOUSE:
Did you have a press statement?

SCHLOZMAN:

Yes.

WHITEHOUSE:
OK.
And you indicated that in the press statement that this was a national investigation?

SCHLOZMAN:
Yes, we did, at the direction of the Public Integrity Section.

WHITEHOUSE:
What was national about it?

SCHLOZMAN:
Senator, I'm not able to talk about any part of that investigation.

WHITEHOUSE:
What do you mean you're not able to talk about it? This was your investigation, wasn't it?

SCHLOZMAN:
Senator, I'm just not able to talk about any other parts of that criminal matter like that. I mean, that's prosecutorial -- I mean, that's privileged information and I'm just not able to go into any other parts of an ongoing department investigation.

WHITEHOUSE:
OK.
But your testimony is that when you said that it was a national investigation -- you're the one who brought that up, not me -- that the reason for that is because there are ongoing other investigative matters that are confidential.

SCHLOZMAN:
I'm saying that I made that statement at the direction of Public Integrity Section.

WHITEHOUSE:
At the direction -- the Public Integrity Section is directing what you say in your press releases as a United States attorney?

SCHLOZMAN:
Senator, they strongly suggested that I make that statement in response to any press inquiries, and I followed their guidance.

WHITEHOUSE:
OK.
And you have no idea why they would want you to mention that it was a national investigation. When I ask you how it's a national investigation and you say, "Oh, no, no,

that's confidential," why would they want to raise that confidential aspect of the investigation to the press immediately before an election?

SCHLOZMAN:
Senator, I'll let them speak for themselves.
And to the extent that I have certain knowledge of other parts of the investigation, I just can't talk about that.

WHITEHOUSE:
What is ACORN?

SCHLOZMAN:
I forget the exact word that it...

WHITEHOUSE:
Not what it stands for, what is it? It's an organization.

SCHLOZMAN:
It's an organization that among, I think, other things it seeks to register individuals to vote. It may have other functions. But that's certainly...

WHITEHOUSE:
But one of their primary functions is to seek to register individuals to vote, correct?

SCHLOZMAN:
Correct. Correct.

WHITEHOUSE:
Do you have an opinion as to the political affiliation or bent of the organization or the people that they seek to organize to vote?

SCHLOZMAN:
No.

WHITEHOUSE:
You don't consider them to be, say, an organization that will be more likely to register Democratic voters?

SCHLOZMAN:
Senator, my understanding is that they do employ many individuals who are not wealthy. I mean, they're poor individuals.
But in terms of registration, I'm not sure that -- I certainly don't have any knowledge that they're targeting individual or not targeting other individuals. I mean, they're registering individuals to vote.

WHITEHOUSE:
You don't associate them as a Democratic-leaning organization?

SCHLOZMAN:
I mean, Senator, I -- no.
I mean, they probably do have more Democrats than Republicans. And maybe they are. I mean, I'm -- but I don't certainly discriminate in who I target for a prosecution.

And they were very cooperative in this case. I mean, they were -- they were actually the victims in this case.

* * *

WHITEHOUSE: . . .

Our second witness today is Todd Graves, the former United States attorney for the Western District of Missouri, currently a lawyer in private practice with Graves, Bartle and Marcus, LLC.

* * *

GRAVES:
Mr. Chairman, thank you for the opportunity to address this body. I don't know if you remember, but we served together on the executive working group when you were the attorney general of the state -- I believe it was Delaware.
From 2001 to March 2006, I had the honor of serving as the United States attorney for the Western District of Missouri.
From January 1995 to September of 2001, I was the elected state prosecuting attorney for the 6th Judicial Circuit, Platte County, in Missouri.
In total, I served nearly 12 years as a public prosecutor. It was a privilege, and I loved every minute of it.
As United States attorney, I served at the pleasure of the president. I will always be grateful for the opportunity President Bush and my senior senator, Kit Bond, gave me to serve.
I believed in the goals of this administration.
The number one criminal enforcement priority was the prosecution of felons in possession of firearms. And my district rapidly climbed to be number one in the country in those cases.
And in fact, it was just a few years ago that I sat before this committee and testified about the success of that program in our district. And that is largely due to an assistant United States attorney named Paul Becker.

GRAVES:

From the first day -- from my first day in office, long before it was even a national priority, aggressively prosecuting those who exploit children over the Internet was my top local priority. From then til now, the Western District continues to be a national leader in prosecuting Internet predators.

Fair and sure enforcement of the death penalty was a priority of this administration, and we enforced the death penalty. During my tenure, 10 percent of all those on federal death row had been sent there from my district. I personally tried one of our death penalty cases, and I was preparing to try another when I left.

We doubled the number of felony cases filed per year from 500 to 1,000. We prosecuted corrupt officials and judges, major drug traffickers, corporate thieves, cold-blooded killers, and a pharmacist who in the name of greed watered down chemotherapy drugs for thousands of cancer patients.

The Western District of Missouri is staffed by many prosecutors who would rather try tough cases than sleep. We had -- and they continue to have -- an exemplary record.

When I received a call from Mike Battle in January of 2006 telling me that I had served honorably and that I had performed well, but that the decision had been made at the highest levels of government that it was time to give another person a chance to serve in my district, I accepted that without complaint.

In fact, I had previously made no secret among my U.S. attorney colleagues that I planned to leave office in 2006 and open my own law practice. I always assumed that the administration knew that, and wanted me to leave in time to replace me before the 2006 elections and a possible change in the Senate majority and the majority of this committee.

To this day, I bear no rancor or bitterness over that phone call. I had long planned to go, and it was the president's prerogative.

The private legal practice I started with my partners in Kansas City has succeeded far beyond my hopes. And I am thankful -- especially in light of current events -- that I left the Department of Justice over a year ago. And I would have been very happy to have stayed out of this situation altogether.

The public prosecutor in our system of justice bears a tremendous responsibility. We delegate to the prosecutor vast discretion in making decisions that can, with the full weight and authority of the government, take a person's liberty, property, reputation and, in some cases, their life. Those decisions are not Democrat or Republican decisions.

Decisions of prosecutorial discretion -- and I know that the chairman has been a prosecutor -- are extremely difficult, and they cause good prosecutors to lie awake at night grappling for the right answer.

But once a decision is made, the prosecutor owns it. He or she bears the responsibility for that decision.

Both as a state and federal prosecutor, I acted as a professional.

GRAVES:

If a decision came before me and there was clear guidance, I followed it.

On the other hand, if prosecutorial discretion was required, I exercised my independent judgment. No apologies and no excuses: I was responsible for my decisions.

That is our system. Yet the system only works so long as the people believe in the institution of public prosecutor.

The Department of Justice is a special place, with many talented and motivated people. But each attorney who represents a government bears a nearly sacred responsibility to uphold the reputation and honor of that institution.

As I have heard former Deputy Attorney General Jim Comey say, when an attorney appears in federal court and announces that he or she represents the United States of America, the judge or jury accepts as true and believes the next thing that attorney says; not because of who they are, but because of who they represent.

Although the reputation and honor of the Department of Justice has been accumulated across many generations and many fine prosecutors, it is easily lost.

My hope and request from this body, as an American citizen who no longer represents the government, is that the politics of this situation can be set aside, and that all the parties in this process can work together to quickly enhance and maintain the reputation and honor of the Department of Justice to the benefit of our great country.

WHITEHOUSE: . . . Let me go back to the call from Michael Battle. Did he, when he indicated that they would be asking you to resign, suggest there was any performance-related reason?

GRAVES:

He made it very clear that there wasn't. That's the first thing he said, "There are no performance issues, you have" -- I quoted from what he said, "You've served honorably and you've performed well. But the decision's been made at the highest levels of government to give another person a chance."

WHITEHOUSE:

And so no reference to misconduct, either?

GRAVES:

None whatsoever.

WHITEHOUSE:

So do you have any idea what Ms. Goodling was getting at last month when she testified before the House Judiciary Committee that the decision to remove you as U.S. attorney may have been related to an investigation by the department's Office of the Inspector General?

GRAVES:

Yes, that -- I know exactly what she was talking about.

I was immediately angry over that comment.

GRAVES:

I think it is another example of those who have a bright spotlight cast on them for their conduct attempt to shift those things to the people that were asked to leave.

I immediately contacted the Office of Inspector General. I got a copy of that report. I released it to the press.

What that was, was in the context of an employment matter we had someone raise an allegation against me. And as you know, when you're dealing with employment matter, whistleblower is something you have to deal with.

So we called the bluff of the person. And I turned that into the Department of Justice, I initiated that investigation.

The investigation was conducted. It was about standing in a picture line for a picture with the vice president of the United States. The investigation found that I did nothing wrong.

Interestingly enough, another United States attorney from another district was standing next to me in the picture line. And so it was -- I think, it was really a nonevent.

I think the way that she offered that and left that, sort of, laying out there without more meat on the bones was -- I think, it was a slur against my reputation. I took it very personally. That's why I immediately released the document, the Office of Inspector General confirmed that they've never opened any other investigation against me. And I'd be happy to have that investigation made a part of this record for inclusion so that anybody can see it.

WHITEHOUSE:

It will be done.

Were you at the time preparing to try a death penalty case?

GRAVES:

We had a case -- a particular care that has still not been tried of a woman.

I was a state prosecutor before I was a federal prosecutor and my expertise, if I ever developed one, was, sort of, in the mental defense. And we had a case where a woman was murdered, the government alleged -- it hasn't been tried yet -- and her baby was cut from her womb before she died.

That case took place less than 20 miles from where I was born in a rural part of the state. That was a very important case to me. That was literally the only reason why I hadn't left the department before, because I had young kids and other things that I wanted to do. But I wanted to stay around and try that case.

And we tried to get it go the previous fall. They postponed it. It was supposed to go last year. And that is something that was left undone.

WHITEHOUSE:

Did you ask to stay on to pursue that case at the time?

GRAVES:

Yes.

I had very little contact with the department other than Mr. Battle's call. I had some -- a little bit of back and forth from him, but I did contact my senior senator's office and I said, "I would like to stay to complete this case."

WHITEHOUSE:

And what signal did you get back from the department in respect to that?

GRAVES:

And as I said to them, "I'm perfectly willing -- I mean, I understand the objective and I'm perfectly willing to move on. It's something that, you know, doesn't cause me a lot of concern but that I'd like to try this case."

And the answer I got back is, "We considered it, and we want you to go ahead and go on."

WHITEHOUSE:

And in terms of the decision, you were informed that it came from the very highest levels of government. Have you generated or become aware of any other information more specifically where that decision came from?

GRAVES:

No, I haven't.

Frankly, it was something -- again, it did not -- I just moved on. I accepted that. I didn't probe. I did, sort of, you know, ask around if anyone had heard anything just in general. And nothing came back, without even mentioning my situation. And I don't know any more than that.

WHITEHOUSE:

Did they ever tell you why?

GRAVES:

They specifically told me -- well, yes. They told me that it was because they wanted to give another person a chance to serve. That's what they told me.

WHITEHOUSE:

In 2005, when you were still the U.S. attorney, Mr. Schlozman -- who's just testified here -- was then the acting assistant attorney general in charge of the Civil Rights Division.

He authorized a National Voter Registration Act suit against the state of Missouri and Democratic Missouri Secretary of State Robin Carnahan. The department then filed this suit, accusing Missouri and Ms. Carnahan of failing to eliminate ineligible people from lists of registered voters.

According to press accounts, the department did so over your reservations that the case lacked merit.

What were your reservations about the case? And did you express reservations to the department? And how were they expressed?

GRAVES:

Well, I had -- I had had a run-in with the department that was very significant in 2003, over a cross-burning case. It was a case that had been mediated in front of a federal magistrate. And there had been someone from the Civil Rights Division at main Justice in the room when it had been mediated and had authority.

And, as you know, federal magistrates don't do mediations unless everybody in the room has authority to bind their parties because they don't want to waste their time.

It had been a very difficult mediation. It had been settled. And as -- it was a civil mediation of a civil rights case. And it had followed a criminal prosecution for these individuals that had burned these crosses -- or burned a cross in a person's yard.

And the department came back. Then the acting director -- and I honestly don't even remember that person's name -- called me and said, "We're not going to go forward with this settlement."

And the way the department works, Civil Rights has authority to act without U.S. attorneys in civil rights matters. But U.S. attorneys do not have authority to act without Civil Rights.

And our discussion got very heated. And I ended up hanging up the phone, telling him that I would not participate in what they wanted to do.

Later, I got an e-mail and I drafted an e-mail back. They wanted to remove some provisions from the settlement, some punitive provisions against the defendant. And I...

WHITEHOUSE:

Against the defendant who had burned the cross?

GRAVES:

Had burned the cross.

GRAVES:

And he happened to be from a rural part of the very county where I'd been the elected prosecuting attorney. I knew this person. I knew that when he got out, that there was a high likelihood that the same sort of behavior would continue.

WHITEHOUSE:

But they wanted to remove punitive provisions that you had already negotiated from the agreed civil remedies for somebody who had burned a cross in somebody's yard?

GRAVES:

Right.

Because the criminal remedies -- because he'd been sentenced to prison. Once he got out, that's over. The only way to have sanctions controlling his behavior in the future was to have a civil settlement.

And there was a provision that he could not drink alcohol. And I can't remember what the other ones were. And someone at the department didn't think that was in accord with the theory of prosecution, or the theory of what civil rights settlements should be.

And I was a lunch-pail prosecutor. I was just a guy out in Kansas City who was trying to do my job.

And because -- I had two concerns about that.

One is, my reputation was on the line with the federal magistrate. Because we had committed to that.

Two is, I wasn't going to back up on this guy because I knew that, you know, when he got in trouble again I would have to own that decision and take responsibility for it. And I didn't think it was the right decision.

So I sent a strongly worded e-mail. I no longer have that e- mail, because I'm not in the department. But I went back through my computer and the language -- sometimes because the computer system at the department is, sort of, at the office -- I typed it up the night before. And the language of that e-mail I have. And I also have submitted that, and would be happy to have that included in the record.

And the person that I was told was going to contact me to mediate this after I -- mediate it with the department after I'd thrown down the gauntlet -- they told me that Brad Schlozman was going to be the guy, the peacemaker in the matter.

And so I talked to him maybe the next week. And as it turned out, I wouldn't back up. I wouldn't change my position. My reputation in the legal community in Kansas City was more important to me than my reputation in the halls and the many offices of, you know, staff level at main Justice.

And they ended up doing what we wanted.

WHITEHOUSE:

I'd stop you right there on that point...

GRAVES:

OK.

WHITEHOUSE:

... to make the point to you that I think that one of the reasons that we have locally appointed United States attorneys is so that they will make exactly that kind of call. And it's one of the concerns that I have about the -- for want of a better word -- infiltration of the U.S. attorney corps by people who have limited contact with the home district, but are sent out as emissaries of the operatives in main Justice.

In that context, how did you greet the arrival of Mr. Schlozman as the next U.S. attorney?

GRAVES:

Well, I mean, I was, sort of, indifferent. I had made my plans.

As you -- I've left other public offices before. And the most important thing, I think, is to, sort of, let the next person do whatever...

WHITEHOUSE:

Was he known in the Missouri legal community at the time?

GRAVES:

He was not known in the Missouri legal community. I knew him because of this previous civil rights case. And against that backdrop, he was also involved in the voting rights case.

And so I knew that he had mentioned to me that he was a Kansas City guy. And I knew that he had contacts in the community, certainly at the high school level.

But as far as I knew, I mean, I'd never heard of him before I talked to him on the phone.

WHITEHOUSE:

And you presumably know your way around the Missouri bar and prosecutive world pretty well?

GRAVES:

I've been -- you know, it hasn't been that long, but I've been there for awhile.

WHITEHOUSE:

Yes.

What was his role -- what was your experience on him in the cases in which you were directly engaged?

GRAVES:

OK.

The first one was the civil rights case. And I did not deal with him -- the first one was the cross-burning civil rights case. I did not really deal with him after that. My assistant did.

The department -- after, you know, some fairly strongly worded things to me -- eventually agreed with our position and they entered into that settlement.

Then fast-forward a few years, and it came to my attention that there was a letter that they wanted to send -- I believe it was the secretary of state, the attorney general and some others -- on a voting rights lawsuit.

And I read through it and thought about it, and I had some concerns about it. If you've been a United States attorney, you understand that sometimes components of main Justice want to do something and it's not a good idea. But it's not really for you; they have independent jurisdictional authority over you.

GRAVES:

And I remember -- what I remember -- and again, this is several years ago -- is I was dragging my feet on signing the letter. I don't remember if a request was ever specifically asked that we sign the letter, but I was avoiding signing the letter.

I believe Mr. Schlozman signed that letter.

I thought, at the time, that this was a bad idea. I thought there was, sort of, a main Justice rush on this. And what I would describe is we started, kind of, slow-walking it in the district.

I did not have any negative conversations with the assistant handling this for the local district because I didn't think it was appropriate for me -- I mean, you know, we were going to do what we were going to do. I didn't think it was appropriate for me to start poisoning the well. Because I knew that they were going forward with this.

And I didn't think it was a Rule 11 violation. Again, it's about -- it's just knowing where it's going to end up and the responsibility for it. And I wasn't being asked, you know, whether I thought they should proceed.

So how I would describe what I did was we slow-walked it. It was inevitable. And I just, sort of, stepped aside and absented myself from the situation.

I wasn't involved in the discussion of the case. I got periodic e-mail updates from the AUSA, who was acting as local counsel. But I don't really even remember responding to them.

And I was not part of -- in the Department of Justice, sort of, the currency of the realm is the press release. And I was not part of the press release when they filed that case.

So I don't see -- first of all, I have no idea if that has anything to do with me getting a phone call from Mike Battle. And I want to be clear about that.

But I don't see how anyone could claim that no one noticed, with my prior experience with civil rights, that I was not front and center on that case.

WHITEHOUSE:

That's a pretty bright red flag, actually, if the U.S. attorney won't sign the letter and doesn't participate in the press release. As you said, that's the coin of the realm.

GRAVES:

Yes, usually, you're fighting over who's on the press release and who's first and who gets a quote and you understand how that works.

WHITEHOUSE:

Yes.

In terms of the filing of these charges in the literally days before an election, at the time that you were the U.S. attorney, were you aware of the much-discussed policy that we've been talking about here that suggests that election-related charges should not be brought in the immediate run-up to an election?

GRAVES:

Yes. I had had some training. I had that book. I had some training on it.

But of course, all the department policies are -- there's, sort of, a field there. I think election-related that would influence the election would be the key.

GRAVES:

For instance, I once filed a case fairly close to an election with the U.S. attorney in Kansas, where voters had been voting on both sides of the line. It had been investigated from a previous election. And we filed that. But that -- there was no way that that would influence, you know -- I don't know whether those were Democrat voters or Republican voters, and the public would have no way of influencing that.

But something that clearly was an investigation about that election and about something that would impact that election -- meaning that it was an identifiable group of one candidate or the other -- it would have been my understanding that you would not do that.

WHITEHOUSE:
In your judgment, if a organizing group were actively registering voters the way ACORN does -- in my view, primarily for Democratic voters -- and presumably they had registered a considerable number of voters if they were being at all effective at what their intended task was, and then the government at the last minute brought charges that case into question the legality of registrations that had been brought by that organization, would you think that that might have any kind of chilling effect on voters who had been registered, other than the immediate subjects of the charges?

GRAVES:
Yes, I'm somewhat hesitant to speculate on that. Because I know there were good career prosecutors involved in this in Missouri. And I hate to without -- as someone who's prosecuted cases, I know that it's very contextual.
But I...

WHITEHOUSE:
The testimony is that they didn't make the call as to when the indictment would be announced.

GRAVES:
Right.

WHITEHOUSE:
The testimony today was that that was made by the head of Public Integrity Section.
And so as far as I'm concerned, if I were the U.S. attorney my -- the line assistants wouldn't really have a horse in that race.

GRAVES:
Right.

WHITEHOUSE:
They would have done their job. And it would be my job to see to it that policy guidelines were met and that I wasn't making announcements immediately before an election.

GRAVES:
I was out -- I had been out of the U.S. attorney's office for a long period of time when that happened.
When I read about it in the paper, knowing -- I still have a copy of that red -- I don't know if that violates the policy, that I still have a copy. But it surprised me.

GRAVES:
It surprised me that they'd been filed that close to an election.

WHITEHOUSE:
After you left the U.S. attorney's office, you stated that, "When I first interviewed with the department I was asked to give the panel one attribute that describes me. I said, 'independence.' Apparently, that was the wrong attitude."
Could you explain why you now think that that was the wrong attitude?

GRAVES:
Well, that was in response to so much of what I've seen since I left there.
That did happen. There was an interview, and I don't remember who was there. I remember David Margolis was there. And, you know, I thought of that question as sort of the, you know, the old question, if you were a box of cereal, what kind of cereal would you be and why? And they wanted that one question -- or that one attribute, and that's the one I gave them. And I was surprised at the reaction that I got because it was sort of like a lead balloon.
And I had come up as a state prosecutor, and I had colleagues that were Republicans, I had colleagues that were Democrats, and that was sort of the ideal that we all aspired to, was -- I was elected as a Republican. To this day, I mean, I'm a committed Republican conservative. And when I put...

WHITEHOUSE:
But a lot of prosecutors are prosecutors first...

GRAVES:
When you put the suit on, you really leave it at the door.
My first assistant while I was at the state level and I was at the federal level was a Democrat, and I didn't even know that until years after we started working together. It's just not something that -- you really try to set that aside, because, as I said in my opening statement, I mean, these are not Republican or Democrat decisions.

WHITEHOUSE:
Would it be fair to describe you in, sort of, the Bud Cummins category then?

GRAVES:
I don't think anyone's in Bud Cummins' category.

WHITEHOUSE:
I know. He's a special guy.
(LAUGHTER)
But in terms of being non-performance-related and being told that they'd like your seat vacated so they could put somebody else in and it being the department's call that this took place.

GRAVES:
That was what was clearly communicated to me.

And, you know, like I say, that was -- and it sounded like Mr. Battle was, sort of, reading from a script, although it wasn't that. But, you know, he made it clear that he was to tell me, you know, by who he wouldn't tell me, but that he was to tell me that there were no performance issues, they wanted to give another guy a chance to serve.

GRAVES:
We as U.S. attorneys are not, you know, promised two terms. That's not part of the deal.

And I agree with -- you know, actually I agree with all that. It is -- we're not -- you know, public office is a privilege, it's not a right. And so I accepted that.

* * *

LEAHY: . . .

And thank you very, very much. We stand in recess.

CQ Transcriptions, June 5, 2007

List of Panel Members and Witnesses

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SEN. JOHN CORNYN, R-TEXAS
SEN. SAM BROWNBACK, R-KAN.
SEN. TOM COBURN, R-OKLA.
WITNESSES:
BRADLEY SCHLOZMAN, ASSOCIATE COUNSEL, DIRECTOR OF THE EXECUTIVE OFFICE FOR U.S. ATTORNEYS

779

TODD GRAVES, FORMER U.S. ATTORNEY, WESTERN DISTRICT OF MISSOURI

House Judiciary Committee Subcommittee on Commercial and Administrative Law

CQ Transcripts Wire
Thursday, June 26, 2007

JUNE 21, 2007

SPEAKERS:

REP. LINDA T. SANCHEZ, D-CALIF. CHAIRWOMAN

REP. JOHN CONYERS JR., D-MICH.

REP. HANK JOHNSON, D-GA.

REP. ZOE LOFGREN, D-CALIF.

REP. BILL DELAHUNT, D-MASS.

REP. MELVIN WATT, D-N.C.

REP. CHRIS CANNON, R-UTAH RANKING MEMBER

REP. JIM JORDAN, R-OHIO

REP. RIC KELLER, R-FLA.

REP. TOM FEENEY, R-FLA.

REP. TRENT FRANKS, R-ARIZ.

REP. LAMAR SMITH, R-TEXAS EX OFFICIO

WITNESSES:

PAUL MCNULTY,

DEPUTY ATTORNEY GENERAL,

DEPARTMENT OF JUSTICE

[*]

MCNULTY: Madam Chair and Chairman Conyers, members of the subcommittee, thank you for the opportunity to allow me to come here today and speak to you. And as I leave

the Department of Justice, I've been thinking a lot about my 22 years of public service. And many significant events and great memories during that time occurred in this room. I spent eight years with the House Judiciary Committee, and I'm thankful for the experience I had here and the many lessons I learned here. One of the lessons that I learned here during my time was that character matters. And at my confirmation hearing for the job of deputy attorney general, I was asked how I would handle a potential conflict between the values of integrity and loyalty. Senator Schumer asked me that question. And I responded by saying that in my view the values of integrity and loyalty never conflicted. Integrity always trumps loyalty. And so, I have sought, by God's grace, to act with integrity in all that I have been called to do. And, yes, that includes the many, many times that I have testified before Congress. So when I testified in February before the Senate Judiciary Committee, I testified truthfully, based on the facts that I knew at the time. In the months since then, we have all had a chance to review thousands of documents from within the department and Congress has heard dozens of hours of testimony and interviews from me and others at the department. I was interviewed for a full day. We have learned that my knowledge at the time I testified about the replacement of the United States attorneys was, in some respects, incomplete. But I want to be clear today that at all times I have sought to provide Congress with the truth as I knew it.

And I also want to be clear that I do not believe and have never believed that anyone in the Department of Justice set out to intentionally mislead me so that I might provide Congress with inaccurate information about this matter. To the contrary, I believe that thousands of documents that have been produced demonstrate only that in the weeks before my testimony many in the department struggled with the question of how to best provide Congress with accurate information about the removals of the United States attorneys in a way that was consistent with our efforts to protect the reputations of the United States attorneys involved. And I appreciate today have the opportunity to discuss these matters with the committee. And I look forward to your questions. One final point: I've served in the department under two administrations and in many leadership positions.

MCNULTY: I've been the deputy attorney general. I've been the principal associate deputy attorney general. I've been the director of policy and communications. And for four and a half years I was United States attorney in the Eastern District of Virginia. I'm very familiar with how the Department of Justice works. And the public needs to know that when it comes to enforcing the law, Justice Department employees are blind to partisan politics. It plays no role in the department's actions. The law enforcement professionals, lawyers and staff at DOJ check their politics at the door and investigate and prosecute cases based strictly on the facts and the law. That's what I have consistently observed over a period of nine years at the Department of Justice.

* * *

SANCHEZ: . . . Ms. Goodling, in her testimony before the full committee, stated that, "As the plan was approved and updated the deputy was involved and kept updated and also that the deputy certainly knew that Mr. Sampson had been working with several offices in the White House for some period of time, and certainly understood that they

had signed off and were involved in the decision." I'm curious in getting your response to Ms. Goodling's statement that your Senate testimony was knowingly incomplete.

MCNULTY: Well, that involves going into four areas that Ms. Goodling identified where she believed or she characterized my testimony as being less than candid. So I know you're going to be pressed with your time, so we'll have to try work through the four. You've raised the first of the four -- it has to do with knowledge of the White House -- so let's take that one on. Senator Schumer askcd me at my hearing about what I knew about the White House involvement. And I said, quote, "These are presidential appointments. So White House personnel, I am sure, was consulted prior to making the phone calls," unquote. And that's exactly consistent with what I knew at the time, and that's a true statement.

SANCHEZ: So you dispute, then, the statement by Monica Goodling that you had been updated and involved and kept updated and knew that Mr. Sampson had been working with several offices in the White House for some period of time. Your statement before the Senate committee is a very general statement, will you agree to that? To say, "Well, you know, these are political appointees and so I'm sure the White House was involved." It's a little bit more specific to say -- to know that they've been updated or that communications are going back and forth between the White House and the DOJ. And you don't think that that was not an accurate reflection of your knowledge at the time?

MCNULTY: No, my statement at the committee hearing was very accurate and truthful. And what Ms. Goodling said to you in your exchange at this hearing does not contradict the truthfulness of my statement. What she was describing was what my role was in this process. When I first learned of this, first consulted, it was in October, not before that, and so I had no knowledge of any plan to remove U.S. attorneys prior to October of 2006, and therefore no knowledge of any White House contacts or White House involvement. After I was consulted, which has been described by the attorney general and by Mr. Sampson I was consulted in October/November, that information or that list of names was sent to the White House. The White House sent back its concurrence. And that's the awareness I had of the White House involvement...

* * *

MCNULTY: So Senator Schumer said, "Was the president involved?" That was his first question. And I said, "I don't know."

And then he said, "How about the White House? And my response to when he asked about the White House was, "These are presidential appointments, so White House personnel, I am sure, was consulted prior to making the phone calls."

MCNULTY: And that's exactly what I knew: that the White House had been consulted prior to our making those phone calls on December 7th. So I answered the question to the best of my ability.

* * *

CANNON: . . . During your interview, you stated as follows on page 165: "I believe that information that has come to light as a result of this process is information that the Senate would very much have wanted at the time they were gathering information from me, particularly. But I haven't reached a conclusion that any one person misled me in that process." Today, do you stand by that statement that you haven't concluded that any one person -- for example, Ms. Goodling -- misled you?

MCNULTY: That's right. I stand by that statement. I made that in my interview and I have believed that all through the process, that no one in particular misled me when I was trying to get ready for my hearing.

CANNON: And nothing from that time until the present has helped -- led you to a conclusion that someone did mislead you?

MCNULTY: No, I have not made that accusation.

CANNON: Have you any reason to believe that someone did, whether you made the accusation or not?

MCNULTY: No, I do not have that reason to believe.

* * *

CANNON: There's been much concern about the possibility that some of the U.S. attorneys were dismissed while their offices were in the middle of sensitive cases with political ramifications. As deputy attorney general, and as a former U.S. attorney, what's your reaction to this suggestion that the department shouldn't dismiss U.S. attorneys while their offices are in the middle of such cases?

MCNULTY: Well, my problem with this view that dismissing a U.S. attorney or a U.S. attorney leaving in the middle of an investigation doesn't fit with the reality of how investigations work. The fact is that all investigations, whether it's public corruption or other types, are conducted by career agents, worked on by career assistant United States attorneys, and they go on for long periods of time potentially.

MCNULTY: And if it was the case that the removal of a U.S. attorney or the resignation for any reason whatever disrupted a case, we could never change U.S. attorneys. We would have U.S. attorneys serve just from administration to the next, there could never be a possibility of a switch, because you would have this problem of disruption. That's why the system is designed the way it is -- to have career people doing the investigations, career prosecutors working the cases -- so that a change of U.S. attorneys does not disrupt it and that the work continues to go on just fine. When I left the Eastern District of Virginia, I might have like to think that I was critical to everything that was occurring there, but the truth is that the office continued along just fine, and my departure did not

affect the ongoing work of that office. And I think that's something being lost in a lot of this discussion about U.S. attorneys coming and going. More than half the U.S. attorneys who served with me at the start of this administration have left the position of U.S. attorney by now. And, again, in the 94 federal districts, the work continues to go on.

CANNON: So a U.S. attorney has a responsible (sic) to be responsive to the president's priorities and at the same time is dispensable. So he or she can organize the office's priorities, like Ms. Lam testified that she was not important to the investigation of Mr. Cunningham, for instance, because the system would hold that. And on the other hand, that's not inconsistent to say she was great at what she did, but she didn't do what the administration expected of her and was very clear in setting its priorities for her.

MCNULTY: Right. Setting the priorities is one of many tasks that the U.S. attorney is in a unique position to do. And that sends the right message to the agents and to the prosecutors as to the kinds of cases that we want to try to accomplish in this district, and then they go about doing that work on the specific cases. So, again, it's a difference of responsibilities. Priority- setting is definitely an important responsibility for a U.S. attorney.

* * *

CONYERS: OK. Now, we had testimony from the liaison to the White House that she was told not to attend your briefing for the senators on the United States attorney firings because if someone recognized her as the White House liaison, there would be a greater likelihood that there would be questions asked about the White House. Remember?

MCNULTY: I remember what she said to the committee, yes.

* * *

MCNULTY: What happened there was, as best I can remember, as we went up into that Senate briefing, my focus was on providing the information that we had promised concerning the reasons for seeking the removal, the resignations, of the seven U.S. attorneys. And my sense was at that time -- again, this is before documents have come to light -- that this was something the Department of Justice had done on its initiative, to look at individuals based on issues and concerns and so forth. And so, my own view was that that was not a political thing; that that was a very substantive thing. And I was concerned about any appearance of it being political. And that...

CONYERS: That's why you told...

MCNULTY: That's my best memory as to why I would have been concerned at that point and made that judgment.

* * *

KELLER: . . . You're appearing here today without a subpoena. Is that correct?

MCNULTY: That's correct.

KELLER: You're here voluntarily?

MCNULTY: Yes, sir.

KELLER: You haven't invoked the Fifth Amendment?

MCNULTY: No, I have not.

KELLER: You haven't gone to court and sought immunity?

MCNULTY: No, I haven't.

KELLER: Not everyone before us has appeared under the same circumstances. It's hard for a member of Congress, when we have five minutes to question Monica Goodling and five minutes to question you, to make an accurate assessment as to what person is courageously telling the truth and what person is full of baloney. It's just hard to tell in a five-minute instance. I can tell you, though, that I got a very long phone call yesterday from the attorney general of Florida, Mr. Bill McCollum, who served in Congress for 20 years as my predecessor. And he told me that he worked very closely with you for eight years on the Crime Subcommittee when you were his chief counsel, and told me that he can't think of a single person in his lifetime that has more integrity, more honesty or more ethics than you do.

And I think that speaks volume, as someone who's known you for a little bit longer than five minutes. I want to begin with some of the areas of agreement that I saw between you and Monica Goodling, for example. I reviewed your prior testimony in the Senate and I reviewed her testimony before us, and both of you have testified that you're not aware of any evidence whatsoever that any U.S. attorney was fired because of their pursuit of public corruption cases against congressmen. Is that still your testimony?

MCNULTY: That's correct.

KELLER: OK. There's been some confusion about can you fire someone for political reasons. Just let me simplify this, give you analogy. If I was the president and down in Orlando, Florida, my home town, I had the world's best U.S. attorney, he was ranked number one out of 93, 100 percent conviction rate, the staff loved him, and one day, in a very big, important mass murder case he says, "You know, I'm not going to seek the death penalty; just politically I don't believe in it, and I think life imprisonment's enough," and I'm the president, says, "I think you are going to seek it, and if you don't

enforce the law on the books you're fired," is that within my constitutional right to fire him just because I have a political difference of opinion on that issue?

MCNULTY: Well, I believe that a president has, again, a right to remove U.S. attorneys for any reason that's not an improper reason. And enforcement of the law is certainly in the area of proper reason.

KELLER: In your testimony before the Senate in 2007, February, you did not intentionally mislead anyone. Is that correct?

MCNULTY: That's correct.

* * *

JOHNSON: Did you have any discussions with Mike Elston about him calling the U.S. attorneys, urging them to remain silent about the circumstances of their firing?

MCNULTY: Well, I am familiar with that issue. There's two things we're talking about here. There were some January phone calls; three calls.

JOHNSON: Did he discuss the calls before he made them?

MCNULTY: The January phone calls I was aware of. The March phone call I was not aware of.

JOHNSON: March phone call...

MCNULTY: To Mr. Cummins, which was the subject of some discussion at the Senate hearing and perhaps this hearing as well.

JOHNSON: What was the purpose?

SANCHEZ: The time of the gentleman has...

CANNON: Madam Chair, this is an important issue, and I would ask unanimous consent that the gentleman be given an extra minute so that we get this clear on the record.

SANCHEZ: Without objection, so ordered. You may continue, Mr. Johnson.

JOHNSON: Thank you, sir. What would the purpose of the phone calls prior to the testimony of the fired U.S. attorneys before this body -- what were the purpose of the phone calls?

MCNULTY: The phone call that was made in March was the one that occurred prior to testimony of the U.S. attorneys. And that was a phone call that Mr. Elston had made to Mr. Cummins. And he wrote a little to -- Mr. Elston wrote a letter to the Senate Judiciary

Committee after the testimony of Mr. Cummins about that. He did the best he could to explain his reasoning. Senator Specter asked a lot of questions to Mr. Cummins. You have Mr. Cummins doing an inference of what he thought Mr. Elston meant, and then you have three other U.S. attorneys and their friends.

JOHNSON: What was the purpose of the phone call?

MCNULTY: Mr. Elston would say that the purpose was to encourage Mr. Cummins to understand that there was no effort to try to release information about individuals; that, in fact, Mr. Elston explains that he was simply trying to assure folks that the -- or assure Mr. Cummins that there was no personal information or information about this specific individuals that was being released by the department. He had read a newspaper article...

JOHNSON: And the earlier phone calls -- the earlier...

MCNULTY: Now, the January phone calls -- so those occurred prior to the attorney general's testimony before the Senate Judiciary Committee, long before there was any notion that any U.S. attorney would be testifying on Capitol Hill.

MCNULTY: At that time, Mr. Elston, at my encouragement, called two -- I think only left a message or didn't get through to a third -- but called two U.S. attorneys to assure them that the attorney general's testimony the next day was not going to get into any information about particular individuals and it wasn't going to -- some of the folks' names had never even come out in the public yet, and there was growing press interest or there were articles starting to show up and there was a concern that their confidentiality might be -- that there may be information about them. And he was trying to assure them that that was not going to occur in the attorney general's testimony; he was not going to speak about any particular people. We were trying to, again, stick with the original thinking of keeping the matter quiet for purposes of the privacy and the confidentiality of the individuals involved.

* * *

DELAHUNT: . . . November 27th . . . on a key decision in terms of the functioning of the Department of Justice. He went on to say -- this is the attorney general -- he signed off on the names and he would know better than anyone else, anyone in this room, any, anyone -- again, the deputy attorney general would know best about the qualifications and experiences of the United States attorney committee and he signed off on the names. I dare say, understanding the realities of what occurs here in Washington, you were the caboose, you were given the list, and maybe it was never articulated, but the suggestion was, "Sign off, we're moving."

MCNULTY: Well, to be fair, I was given an opportunity to voice any objections I had, and I voiced some objections. And...

DELAHUNT: Were your objections respected?

MCNULTY: Yes. At least one name was taken off a list on my objection. I raised some questions about another and did not at the end of the day voice that objection so that it wasn't removed.

And to be fair to the attorney general, I think he would say he was relying on Kyle Sampson to get my input, and that's why we didn't have direct communication.

* * *

WATT: . . . Ms. Goodling testified before this committee that Senator Domenici had raised concerns about U.S. attorney David Iglesias and indicated that she briefed you on that fact prior to your Senate testimony. You were aware of it.

In fact, in her handwritten notes, there is a quote that says, "Domenici says he doesn't move cases." Ms. Goodling further testified that you told her not to reference these concerns expressed by Senator Domenici in the materials to be used in briefing Congress. Is that correct or is it incorrect?

MCNULTY: She explained -- and to the best of my memory, I...

WATT: My question is, did you instruct her not to include references to Senator Domenici's statement in her briefing materials in which she was preparing you for your testimony?

MCNULTY: I don't remember it that way. What I remember is we were trying to identify the issues, concerns associated with different U.S. attorneys. And we were discussing what those issues would be in relationship to David Iglesias. And certain characterizations were being listed in that chart, which you now have. And that, as far as I can remember, is discussing those different characterizations.

WATT: So you deny that you...

MCNULTY: Well, I don't want to say "deny," because...

WATT: ... instructed her not to include the references to Senator Domenici in the briefing materials?

MCNULTY: Her memory on that may very well be correct. And what she says is that I said we should let Senator Domenici speak for himself, rather than us speaking for him.

And I don't specifically recall that, but that may be -- that may be correct.

WATT: So did you find Senator Domenici's observations about Mr. Iglesias to be an important factor in the fact that he was on the list and was terminated?

MCNULTY: Well, when I saw his name on that list and I had to make my own judgment as to whether or not I objected to it, the phone conversation that I had with Senator Domenici on October 4th, which was a brief conversation in which he expressed his own dissatisfaction -- that certainly was a factor in my mind when I saw the name on the list. And just as the attorney general said, it affected his judgment.

WATT: So if you had instructed that that communication not be part of the briefing materials and failed to fully disclose that to the Senate, would it be accurate then for you to say that you were fully informing the Senate about factors that were important in making the determination of whether to put somebody on the list, leave them on the list, or remove them from the list?

MCNULTY: I think it wasn't inconsistent with that, and we were being as forthcoming as we could. Because we were identifying the things that we understood to serve as these justifications, but we didn't always reference the source of that information. We had congressional complaints involving Carol Lam in San Diego. We probably identified Carol Lam as somebody who was not moving or not acting consistent with the priorities of the department.

MCNULTY: So, in my mind, I was distinguishing between what the factors were that had been identified from the -- perhaps the source of that, and trying to respect the process of letting members, you know, convey their own views. And that's about as best as I can remember as to why we would try to distinguish there.

* * *

SANCHEZ: . . . As deputy attorney general in charge of our U.S. attorneys, tell us what information or belief you have about the firing of Mr. Graves.

MCNULTY: I have very limited knowledge about that. I was not...

SANCHEZ: You were not kept in the loop on that and you were not consulted.

MCNULTY: Well, remember, I started as deputy attorney general -- acting deputy -- on November 1st. I wasn't confirmed until March. And the phone call that he received was made in January. So that was before I was confirmed.

Now, having said that, I may have had some vague awareness that he was departing. But I was not consulted in his -- any decision to seek -- look, I think also you need to be careful. Mr. Graves' own words at his hearing a few weeks ago on the Senate side I think are somewhat in contrast to the language that's used with regard to him.

He did not refer to himself as -- he referred to himself as being pushed out, but he also talked about the fact that he was intending to leave and that he had no bitterness and he felt it was appropriate that he could be called and asked to go.

But, in any respect, I was not involved in that matter. And I didn't have any specific understanding of what was going on there.

* * *

JOHNSON: . . . Mr. McNulty, you testified at the Senate Judiciary Committee that Bud Cummins was forced out to make room for Tim Griffin to serve as U.S. attorney, and that it was not connected -- quote, "not connecting to the performance of Mr. Cummins."

* * *

JOHNSON: . . . Now, when you revealed the fact that Bud Cummins was being replaced for non-performance reasons and that the White House was involved in the decision to get rid of him and put someone else -- i.e., Tim Griffin -- in his place, that angered some people at the White House, correct?

MCNULTY: Evidently.

* * *

JOHNSON: It angered the attorney general.

MCNULTY: Apparently so.

JOHNSON: What gives you that impression?

MCNULTY: Again, an e-mail that has -- that came forward which -- I wasn't aware at the time that he was upset. But he...

JOHNSON: When did you become aware that he was upset?

MCNULTY: When I read the e-mail, that he apparently was, quote, "very upset" with my testimony, because he believed that it was a performance-related issue associated with Bud Cummins.

JOHNSON: Did it appear that he wanted to maintain a stance that all of the fired U.S. attorneys were fired due to performance-based reasons, as opposed to political reasons?

MCNULTY: Well, he explained that further at this hearing. And I think what he said was that he was just -- he misunderstood.

He thought that there had been some performance issue associated with Mr. Cummins and that he stood corrected once he learned that that was not the case.

* * *

LOFGREN: . . . I want to explore a little bit the situation in Missouri . . .

LOFGREN: . . . Are you familiar with this ACORN case that was brought?

MCNULTY: Yes.

LOFGREN: Did you have a role in approving the indictments in that case?

MCNULTY: Yes, I'll explain where the deputy's office came into that. And really quickly, I'm going on the back of your last question. An individual in my office is involved in interviewing interims that go into offices -- David Margolis -- and so I'm not clear just sitting here today what role he played in that selection. But it's quite likely that he was involved in that discussion. I just don't, personally, have any memory of that.

* * *

LOFGREN: ... Mr. Scholzman says it was Mike Elston who had spoken to him prior to the indictments.

MCNULTY: Oh, yes. I'll switch to that subject now. That's the ACORN issue you're asking about.

LOFGREN: That's correct.

MCNULTY: OK. What happened was that sometime shortly before those indictments were returned, we received notification that there was an intention to seek the indictments. I'm not sure if it was a phone call to Mike or a urgent report or something to that effect. We notified the Attorney General's Office that this was occurring. We told the Western District of Missouri to hold on until we had reviewed what was going on. We then checked with the Criminal Division responsible -- the Public Integrity Section oversees this area of the law -- and found out in discussing it with them and with this office in the Western District of Missouri and the assistant United States attorneys involved, some form of consultation, that the Criminal Division supported -- it had no objection to this going forward at that time. And, therefore, we informed the Attorney General's Office of that effect and were told that we didn't -- that there was no objection or to the case being sought.

LOFGREN: Well, what about the policy of the department that opposed bringing these indictments? Did you consider that?

MCNULTY: Well, that's what we looked for when we consulted with the Criminal Division. The people who were responsible for developing that policy and overseeing that policy are the Public Integrity Section folks in the Criminal Division. And those

same folks, who established that policy and police it, were the ones that said that this did not violate that policy and that it could be done. And once we were aware of that, we...

LOFGREN: Well, are you aware that Mr. Schlozman has now told the Senate that he wants to clarify that neither -- that the Public Integrity Section never directed or advised him on this case?

MCNULTY: Well, as best I know this issue, he's...

LOFGREN: That's what we've been told, at least.

MCNULTY: Right. It's a question of the word. I believe there's some communication about using the word "directed" versus seeking the advice.

LOFGREN: Well, it says directed or advised, is what he said.

MCNULTY: Well, advised there I think may also be a question of whether or not he was being prompted to or advised to do something proactively as opposed to consulting and getting the input from that office.

Because I'm pretty confident that the office...

(CROSSTALK)

LOFGREN: Well, if I could, because that's contradictory to what we've been told. And if we could follow up in writing on this, I think that would help.

MCNULTY: I'm very happy to help you try to get the clear answer to it.

But I think it's -- the record is that the Criminal Division was consulted and that he got the information he needed to know that it was appropriate to go forward. And I believe right now he's trying to make sure that he doesn't...

LOFGREN: Well, if we can count on your written clarification, I think that would be best.

MCNULTY: Absolutely.

* * *

CANNON: Reclaiming my time, I'd ask unanimous consent to submit for the record or to be included in the record an article in the L.A. Times, "U.S. Attorneys Fallout Seeps into the Courts," and just make a point...

SANCHEZ: Without objection, so ordered.

CANNON: Thank you, Madam Chairwoman.

Just to make a final point here...

SANCHEZ: That's two seconds.

CANNON: ... this article -- maybe I can -- the chair would indulge me for like...

SANCHEZ: We will grant you an additional 30 seconds.

CANNON: "Defense lawyers in a growing number of cases are raising questions about the motives of government lawyers who have brought charges against their clients. In court papers, they are citing the furor over the U.S. attorneys dismissals as evidence that their cases may have been infected by politics." This is not a neutral process that we're involved in. And I've tried to work very hard today to get all the questions out that we could ask Mr. McNulty. I thank the majority and also the members of our side for their intensity. And hope that we could actually move on, beyond this issue, quickly, because it is important to the country.

* * *

END

Senate Judiciary Committee Holds Hearing on U.S. Attorney Firings

LEAHY: . . And today the committee welcomes Sara Taylor. Until recently she was the White House political director.

* * *

TAYLOR:

Mr. Chairman, Senator Specter and members of the Senate Judiciary Committee, my name is Sara Taylor. Until about seven weeks ago, I served as the deputy assistant to the president and the director of the Office of Political Affairs at the White House.

Over the last eight years I've worked in different capacities for President Bush. I know the president to be a good and decent man. I am privileged to have had the opportunity to serve him, and I admire his unflinching devotion to always do what he believes is right for the country.

The professional opportunities President Bush gave me have and will continue to have a profound impact on my life. I am grateful for the confidence he has shown in me.

I am here today to testify pursuant to subpoena before this committee as a willing and cooperative private citizen. I must recognize, however, that the areas you would like to question me about today arise out of my service to the president in the White House.

I have received a letter from the counsel to the president informing me that the president has directed me not to testify concerning White House consideration, deliberation, communications, whether internal or external, relating to the possible dismissal or appointment of United States attorneys, including consideration of possible responses to congressional and media inquiries on the United States attorneys' matter.

I have attached a copy of Mr. Fielding's letter to me to the statement, as well as a letter that my counsel, Neil, wrote to the chairman and the ranking member.

LEAHY:

That'll be made part of the record.

TAYLOR:

OK. Thank you.

The president had made the determination that the disclosure of this information would interfere with the operation of the executive branch. I intend to follow the president's instruction. I do not have the ability independently to assess or question the president's determination.

The current dispute between the executive and congressional branches of our government is much bigger than me or my testimony here today.

In light of the president's direction, I will answer faithfully those questions that are appropriate for a private citizen to answer, while also doing my best to respect the president's directive that his staff's communication be privileged.

To the extent that I am not able to answer questions because of the president's directions, I commit to abide by a judicial determination that may flow from a subpoena enforcement action against the White House. While I may be unable to answer certain questions today, I will answer those questions if the courts rule that this committee's need for the information outweighs the president's assertion of executive privilege.

I look forward to answering your questions not covered by the president's assertion of executive privilege.

I understand that during this hearing, we may not agree on whether answers to particular questions fall within the prohibitions of Mr. Fielding's letter. This may be frustrating to both you and me.

I would ask that this committee not infer that an invocation of Mr. Fielding's letter signals knowledge on my part.

Within the constraints of Mr. Fielding's letter, I will do my best to answer your questions.

Thank you.

* * *

LEAHY:

Ms. Taylor, why did you resign as White House political director?

TAYLOR:

I -- I'm 32 years old, Senator. I have worked for the president for eight years. At my age, almost 33, I have additional career and additional personal goals in my life. And I thought that this was the right time for me to head off and look at other career opportunities.

LEAHY:

When did you first consider leaving the White House?

TAYLOR:

I considered it last year. I thought a lot about it. I don't know when I first -- probably around, you know, the summer, I wondered if I would stay until the end, if I would, you know. And I informed Mr. Rove of my decision to leave in December.

LEAHY:

Were the investigations into the replacement of so many U.S. attorneys at all a factor in your consideration?

TAYLOR:

Not whatsoever.

LEAHY:

And you did not tell anyone that that may have been a factor?

TAYLOR:

I'm sorry, I didn't understand...

LEAHY:

And you have not told anyone at any time that that might have been a factor...

TAYLOR:

I have never told anyone that.

* * *

LEAHY:

Are you -- this is a February 16, 2007, e-mail exchange between you and Kyle Sampson, is that correct?

TAYLOR:

It is.

LEAHY:

Are you familiar with this document?

TAYLOR:

I have seen this document.

LEAHY:

The last e-mail in the string is an e-mail from Mr. Sampson to an e-mail address st@gwb43.com.

TAYLOR:

Yes.

LEAHY:

Is that your Republican National Committee e-mail address?

TAYLOR:

That is a domain controlled by the Republican National Committee that I used when I had political matters.

LEAHY:

That was your Republican National Committee e-mail address?

TAYLOR:

Yes. That is in fact my address -- was my address.

LEAHY:

How frequently did you use this e-mail address?

TAYLOR:

I used it a fair amount. I mean, people had the address and e-mailed me. And it got a lot of news clips on it, and I read those. So I think it's fair to say I used it regularly.

LEAHY:

Any idea how often?

TAYLOR:

I don't -- I know from your press accounts that there are 66,000 e-mails. And I have heard that and I know that from the press. So I believe that there are 66,000 e-mails.

LEAHY:

That would be using it on occasion?

TAYLOR:

Well, it's a lot e-mail, I believe. And I don't know with certainty that the e-mail that I have goes back to either 2001 or 2002.

LEAHY:

Why did you send these e-mails regarding the department's handling of the U.S. attorney firings from your Republican National Committee e-mail account?

TAYLOR:

Because I can tell you, as an end user of the system that was set up early in the administration to make sure that the president's appointees, who on occasion had to address political matters never violated the Hatch Act.

And the reason for the e-mail account was so that I never put myself in a situation where I was violating the Hatch Act.

TAYLOR:

We particularly didn't want to spend taxpayer dollars on political matters. And so as a result of that system, I had, you know, two computers, two BlackBerrys, and, as somebody who just generally tried to be efficient with her time, sometimes just used the wrong computer.

* * *

TAYLOR: . . . I think that, again, the purpose of the e-mail account was to make sure that if, you know, the president was doing Republican fund- raising, as he has done in the past, that we were doing it on political equipment, not official equipment.

* * *

SPECTER: . . . Senator Leahy and I have a longstanding record for bipartisanship and agreeing on many, many, if not most, matters. But I think it's relevant for me to say at this time that I think your declining to answer the last series of questions by the chairman was correct, under the direction from White House counsel.

Whether White House counsel is correct on the assertion of executive privilege is a matter which will be decided by the courts. And as I said earlier, I think congressional oversight has the better of the argument. But it is not for us to decide. It's a judicial matter, if it's going to be framed that way.

But I do believe, when you are asked whether you had a conversation with the president, even though it does not go to the issue of content of the conversation, that it comes under the interdiction of White House counsel, which I agree that you are compelled to follow at this stage, having been an employee.

But it is my hope that your refusal to answer the questions as articulated by the chairman will not be the basis for a contempt citation. But I thought it important to have a contemporaneous statement by another lawyer, just another lawyer...

(LAUGHTER)

... as to my interpretation of the scope of the prohibition which you're laboring under.

Now, let's come to some of the substance which I think you may be in a position to shed some light on.

You served as political director at the White House?

TAYLOR:

I did.

SPECTER:

There has been a question raised about the resignation of the U.S. attorney in Arkansas, Bud Cummins, who was then replaced, on an acting basis, by Mr. Tim Griffin.

SPECTER:

And Mr. Tim Griffin was known to you from having served as the deputy political director. Would you -- you're nodding yes.

TAYLOR:

Yes, he was known to me. He was the deputy political director and I had known him for quite a bit longer than that.

SPECTER:

Now, Mr. Griffin had extensive experience as a prosecuting attorney, correct?

TAYLOR:

To my knowledge is that he had been a prosecutor -- a federal prosecutor for three years in different jobs -- I think two different jobs, if my memory serves me correct. I also know that Mr. Griffin was a 10-year JAG officer in the United States Army where he was also an Army prosecutor.

SPECTER:

And he had served as an assistant to the special prosecutor, Mr. Cineros (ph) (inaudible) investigation?

TAYLOR:

I believe that's correct.

SPECTER:

So he had very substantial experience as a professional in the prosecution field.

TAYLOR:

I believe he had significant experience.

SPECTER:

Now, with respect to the departure of Mr. Bud Cummins, who had been the United States attorney in Arkansas, to your knowledge, what were the circumstances of his interest in staying on or leaving?

TAYLOR:

No, I had heard awhile ago that he had planned to leave. I had read a press account that he...

SPECTER:

OK, awhile ago is when?

TAYLOR:

It may have -- I don't know the specific time range, Senator. I had heard that he had been considering this and maybe even as early as 2004 had indicated that he may be thinking about these things.

SPECTER:

But in any event, substantially before 2006?

TAYLOR:

I believe that's the case.

SPECTER:

The question has been raised as to whether Mr. Cummins was forced out in order to make room for Mr. Griffin. Do you have personal knowledge as to the answer to that question?

TAYLOR:

Let me try to, again, just answer this while also respecting the president's assertion of executive privilege.

TAYLOR:

Obviously, we're sitting here today because this whole situation was awkwardly handled.

To the best of my knowledge, Mr. Cummins had been considering leaving. Mr. Cummins had announced in the press that he was leaving. Mr. Cummins had said in the press that he'd been thinking of leaving for a year. Mr. Cummins further said that he was -- one of the reasons he was leaving is that he had four children, either college age or heading to college at some point.

And so, you know, we find ourselves in a situation where we have a U.S. attorney who had been planning to leave, to the best of my knowledge. We had identified an exceptionally qualified candidate. And, you know, unfortunately, Mr. Cummins has had to endure all this discussion about him being fired, which as far as I can tell he was, in fact, fired.

But it's sad because, unfortunately, he had already said he was leaving, so here we are talking about a guy who wanted to leave getting fired. And had people communicated this, we might not find ourselves in this situation or sitting here today.

* * *

SPECTER: . . . Now, there were also allegations that Ms. Miers, then White House counsel, had intervened, and also suspicions that Mr. Karl Rove had intervened to replace Mr. Griffin in place of Mr. Cummins.

What knowledge do you have of those matters?

TAYLOR:

Again, I'm trying to follow, sort of, this process here so that I'm respectful of the president's assertion of executive privilege.

All I can say about Tim is that Tim worked in the White House. He worked with a lot of people. He worked with people at the Justice Department because he did a tour of service there. He worked with people in Arkansas, that a lot of people knew this individual and a lot of people thought very highly of him. His character, his work ethic and his skill I think spoke very highly to who he was.

And so I don't think it would be -- I think it would be fair for the committee to assume that there are a lot of people who knew him and had an opinion of him and had the personal experience of working with him.

* * *

SPECTER:

Your testimony is that Mr. Cummins had planned to leave and that Mr. Griffin was a logical replacement and that's how you saw it?

TAYLOR:

Yes. And I think it would be fair for the committee to assume that other people saw it that way, too, and then -- basing that on the fact that Mr. Griffin worked there and other people knew him.

* * *

TAYLOR:

Well, Mr. Griffin served in the White House. He was a special assistant to the president. He worked with many members of the president's team, including the president's senior staff. He worked with the members of the Counsel's Office. He had done a tour of service at the Justice Department. He, because he's an Arkansas native, he worked closely people in Arkansas. So a lot of people knew him and thought highly of him.

So, you know, I can only assume that other people would draw the same conclusion about his character, his work ethic and his skill that I did.

* * *

KOHL:

Did you or Karl Rove ever discuss Mr. Biskupic's performance with Kyle Sampson or other Department of Justice officials?

TAYLOR:

I did not ever discuss it that I ever remember. I don't recall. I don't believe I did.

KOHL:

Did you ever discuss his performance or possible removal with anybody else in the White House?

TAYLOR:

I don't believe so.

KOHL:

Did anyone else at the White House discuss his performance with Kyle Sampson or other DOJ officials or suggest that he be removed from his position as the U.S. attorney?

TAYLOR:

I'm not aware of any.

KOHL:

Thank you very much, Mr. Chairman.

* * *

FEINSTEIN: . . . What was the basis for deciding which U.S. attorneys to fire? What criteria were used with which ones to let go?

TAYLOR:

I don't know the answer to that.

FEINSTEIN:

What was your role? Did you add or remove names?

TAYLOR:

I don't recall ever doing so.

* * *

FEINSTEIN: . . . When testifying before the Senate, Kyle Sampson, formerly chief of staff to attorney general, stated that the idea to avoid Senate confirmation for replacement of U.S. attorneys was a bad staff plan that was eventually rejected in January of this year.

He stated that you, Sara Taylor, supported the idea of avoiding Senate confirmation and that you were upset that the attorney general backed away from that strategy.

TAYLOR:

Is your question about the Arkansas situation or are you asking the question broadly?

FEINSTEIN:

I'm asking the question, he stated that you supported the idea of avoiding Senate confirmation and that you were upset that the attorney general backed away from that strategy. That's in his testimony on pages 88 to 93.

Essentially, I'm asking, is that correct?

TAYLOR:

I would -- I believe, if my memory serves me correct -- I read Mr. Sampson's testimony -- I believe that he was talking about the Senate -- the Arkansas situation specifically. And my recollection of my -- I was upset at one point. I was upset greatly at one point because the day...

FEINSTEIN:

Could you be -- I don't understand what you were upset about...

TAYLOR:

I'm trying to explain it -- I'm trying to explain it to you.

FEINSTEIN:

OK.

TAYLOR:

So the reasoning for me being so upset was that I saw a friend of mine, a colleague of mine who had become the U.S. attorney in the state of Arkansas -- and we can debate how that happened, but he was in fact the interim U.S. attorney. And as I understand it, I had a call where the attorney general had let Senator Pryor know that the White House would not be nominating Mr. Griffin. And then he, as I understand it, called Mr. Griffin to inform him of that decision. And so, yes, I was very upset about that.

FEINSTEIN:

That's not quite my question. Let me repeat it again.

Mr. Sampson testified that you supported the idea of avoiding Senate confirmation -- I'm not talking about the appointments, I'm talking about avoiding Senate confirmation -- and that you were upset that the attorney general backed away. Is that correct?

TAYLOR:

I don't believe that's an accurate reflection of my position.

My -- I was upset because we had pulled, in my view, sort of the rug out from underneath Tim Griffin and told him that we would not be nominating him. And that is why I was upset.

FEINSTEIN:

So it had nothing to do -- you were perfectly willing to have him go through Senate confirmation?

TAYLOR:

I expected he would go through Senate confirmation.

* * *

FEINSTEIN:

OK.

In an e-mail exchange between you and Mr. Sampson in February of this year, you said Bud Cummins was removed because he was quote, "lazy," end quote.

TAYLOR:

I was -- I'm sorry.

FEINSTEIN:

Since then, Mr. McNulty has testified before the House, and in response to your e-mail, said, "No one's ever described Mr. Cummins to me as being lazy."

What led you to conclude that Mr. Cummins was lazy?

TAYLOR:

That was an unnecessary comment, and I would like to take this opportunity to apologize to Mr. Cummins. It was unkind and it was unnecessary.

To answer your question, I had heard that. That may not be fair, and it is not my intention today to confound the embarrassment that e- mail may have caused him.

FEINSTEIN:

All right. But you did say that?

TAYLOR:

I said it, and it was in the e-mail yes.

FEINSTEIN:

OK. OK.

TAYLOR:

And I apologize for it.

* * *

FEINSTEIN: . . . In an e-mail to Kyle Sampson from William Kelley on Monday, December 4, 2006, he wrote, "We're a go for the U.S. attorney plan. White House, leg, political and communications have signed off and acknowledged that we have to be committed to follow through once the pressure comes."

FEINSTEIN:

Did you sign off or see that plan?

TAYLOR:

Senator, I have to infer that that is a deliberation and, based on my understanding, is not something I am to talk about here today.

FEINSTEIN:

All I'm asking is if you saw the plan. The answer's yes or no.

TAYLOR:

I did not see it. I don't recall seeing it.

* * *

FEINSTEIN:

Were you aware that U.S. attorneys were going to be called on December 7th, asked to summarily resign?

TAYLOR:

I -- again, under the president's assertion of executive privilege, I decline answering.

FEINSTEIN:

So you won't say whether you knew or didn't know?

TAYLOR:

Is that a fact-based question?

(CROSSTALK)

TAYLOR:

On advice of my counsel, I had heard that there would be some U.S. attorneys replaced. I don't recall knowing that that was the date that they were being replaced on.

* * *

SCHUMER: . . . did any person from the political sphere outside of the executive branch of the White House -- which is the full extent of the privilege claim -- communicated with you?

* * *

TAYLOR:

My job was the political director at the White House. One could say by definition I heard complaints about all things all the time from all over the country. That is a fair characterization. That is an unwritten part of the job description.

So, you know, as to specific...

SCHUMER:

Well, how about complaints about U.S. attorneys?

TAYLOR:

I suspect there were phone calls made to me at times complaining about them. I don't recall any specific phone calls.

SCHUMER:

OK.

You don't recall any specific phone calls?

TAYLOR:

I don't recall any specific phone calls.

* * *

DURBIN:

In the back of this whole debate about U.S. attorneys seems to be looming a question over and over again about questions of voter fraud and elections. And so I'd like to ask you, were you involved in the Bush-Cheney reelection effort in the last cycle?

TAYLOR:

Yes. I was a strategist for the president's reelection.

DURBIN:

OK.

And did Mr. Griffin work with you?

TAYLOR:

I worked with Mr. Griffin. He worked for the Republican National Committee, but, yes, I worked with him.

DURBIN:

And Monica Goodling testified that Mr. Griffin's role in reference to that campaign involved vote-cadging. Are you familiar with that term?

TAYLOR:

I have become familiar with that term through the press article I read. I can't say I could give you a definition of vote- cadging.

DURBIN:

Well, what I've been told is that when mail is sent to registered voters marked "do not forward," and then it's returned, that often those voters' credentials or capacity to vote is challenged.

It happens particularly among minorities, such as African- Americans.

So as I describe it -- and I think that description is adequate -- are you familiar with that practice of challenging voter credentials?

TAYLOR:

I -- you know, obviously, candidates and political parties and their staffs, going back long before any of us were in this room, on this Earth, have been challenging votes. So, yes, I mean, that has occurred. Yes.

DURBIN:

OK.

But, personally, were you involved in any of those so-called vote-cadging efforts?

TAYLOR:

Absolutely not.

DURBIN:

You weren't. Great.

TAYLOR:

And let me just say something, if I could, please.

I know Tim Griffin. He has extraordinary character. And I know what I've read about him and I know what's being said about him. And I appreciate Senator Specter, who made a really important point about how sometimes people's assertions about one comment or one misplaced statement can follow somebody for life.

And I think it is horrible what is being said about Tim Griffin. He has incredible character. And I don't believe he would ever do anything like that.

* * *

WHITEHOUSE:

As a longtime observer of political life, is it your opinion that the firing of 10 percent, approximately, of the U.S. attorney corps in mid-term is a customary practice of presidents of the United States?

TAYLOR:

My understanding is that in my -- and it's, in fact, true that U.S. attorneys are political appointees to the president. They serve at the pleasure of the president. They serve in the same capacity that I serve the president: at his pleasure.

And, you know, certainly I know there's been a lot of press on this issue. I understand President Clinton, I believe, removed all of the U.S. attorneys but one when he came into office.

So presidents have that prerogative. That is the way our government is set up.

WHITEHOUSE:

And to go back to my question, if -- is it your opinion, based on your experiences as a longtime observer of government, that a midterm firing of nearly 10 percent of the U.S. attorney corps is a customary practice of American presidents?

TAYLOR:

I don't recall what President Reagan and President Clinton did. I don't believe they did that, or perhaps they did and they did it in a way that was, you know, much more artful.

* * *

CARDIN:

Do you recall -- and I'm trying not to invade your use of the presidential privilege, although I would assume you would agree with me that if it involved serious wrongdoing, you, as a private citizen, can make some independent judgments here.

TAYLOR:

You're asking me if I'm able to make independent judgments?

CARDIN:

Correct.

(LAUGHTER)

If it involved serious wrongdoing.

TAYLOR:

Obviously, I think all human beings are able to make independent judgments.

CARDIN:

Concerning whether there was, in fact, serious wrongdoings involving political considerations on the firings of U.S. attorneys.

TAYLOR:

I believe that -- absolutely not. I don't believe there were any wrongdoing done by anybody. You're asking me what I believe, and I don't believe that anybody in the White House did any wrongdoing. I don't believe that. That is not...

CARDIN:

You base that conclusion on...

TAYLOR:

You just asked me -- I mean, you just asked me the question and I'm answering your question. And you're asking me, basically, my opinion, and I'm telling you I don't believe that anybody did any wrongdoing.

* * *

TAYLOR:

But you just asked me what I believed, and I'm telling you what I believed.

CARDIN:

That there was no wrongdoing done.

TAYLOR:

Yes.

* * *

LEAHY: . . . Now, since the 2004 election, did you speak with President Bush about replacing U.S. attorneys?

* * *

TAYLOR: . . . I did not speak to the president about removing U.S. attorneys.

LEAHY:

Did you attend any meeting with the president since the 2004 election in which the removal and replacement of U.S. attorneys was discussed?

TAYLOR:

I did not attend any meetings with the president where that matter was discussed.

LEAHY:

Are you aware of any presidential decision document since the 2004 election in which President Bush decided to proceed with a replacement plan for U.S. attorneys?

TAYLOR:

I am not aware of a presidential decision document.

* * *

LEAHY:

Thank you.

Now, when did you first become aware of reports of Mr. Griffin's 2004 involvement as chief of communications for the Bush-Cheney campaign in a vote-cadging scheme targeting largely African-American voters for removal from voter rolls in Florida when he was in the campaign in 2004?

TAYLOR:

After the election in 2004, Mr. Griffin called me, visited with me about it, and how upset he was about that somebody would make such an egregious claim against him. And that's when I first learned that he had been accused of it.

LEAHY:

Were you aware of a vote-cadging scheme targeting largely African-American voters in Florida?

TAYLOR:

I was neither aware of it and also don't believe that it occurred.

LEAHY:

So you thought he had not been involved.

TAYLOR:

I believed that he was not involved; that is what I believe.

LEAHY:

And you believe, further, that there had never been a vote-cadging scheme in Florida.

TAYLOR:

I believe and am aware of nothing, and don't believe that anybody who worked in a senior capacity for the president...

LEAHY:

That's not my question.

TAYLOR:

... would have engaged in any kind of...

LEAHY:

That's not my question, Ms. Taylor, and I -- you're certainly knowledgeable enough to know that was not my question. Let me repeat it.

Are you aware of any vote-cadging scheme targeting largely African-American voters in Florida?

TAYLOR:

I'm not aware of any. I do not believe there was one. And I'm confident...

LEAHY:

Not my question.

You're not aware of any such scheme?

TAYLOR:

I was never -- I'm not aware of any such scheme.

LEAHY:

OK.

I'm going to give you a copy of a document numbered OAG1622. Are you familiar with this document?

TAYLOR:

I'm sorry -- oh. Yes, I've seen this document before.

LEAHY:

It's a copy -- so people understand who can't see it, it's a copy of a February 28, 2007, e-mail from Scott Jennings to kr@georgewbush.com. White House counsel Fred Fielding, Kevin Sullivan, Dana Marino (ph) and Kyle Sampson copied to you, with a subject line, "N.M. U.S. attorney urgent issue." Is that correct?

TAYLOR:

Yes, I see the document. Yes.

LEAHY:

It says "urgent issue."

TAYLOR:

Yes, it says "urgent issue" in the document.

LEAHY:

Is kr@georgewbush.com a Republican National Committee e- mail address of Karl Rove?

TAYLOR:

I understand that to be the case, yes.

LEAHY:

You understand, or it is?

TAYLOR:

It is.

LEAHY:

Thank you.

This e-mail describes a phone call your deputy, Mr. Jennings, received from Senator Domenici's chief of staff regarding David Iglesias' statement that two members of Congress contacted him before the election to urge and to bring indictments before the election, and one hung up on him angrily, out of frustration over his answer.

Was the information received in this e-mail on February 28th of this year new to you?

TAYLOR:

I have read the press accounts of this situation, and so I guess...

LEAHY:

Prior to seeing this e-mail?

TAYLOR:

Well, I remember getting this e-mail, obviously, at the time, after this issue had blown up. So...

LEAHY:

When did you first become aware of these contacts with Mr. Iglesias?

TAYLOR:

You're asking about -- by the members?

LEAHY:

Yes.

TAYLOR:

When I saw this e-mail.

LEAHY:

And not heard anything about it before this?

TAYLOR:

To the best of my knowledge, when I saw this e-mail was the first time I was made aware of the contacts by the members.

LEAHY:

And were you aware of New Mexico Republican Party officials' complaints about Mr. Iglesias?

LEAHY:

Not the members, but Republican Party officials.

TAYLOR:

I can say that I was generally aware that many individuals in New Mexico, for whatever reason, did not think highly of this individual, but I...

LEAHY:

You were aware of...

TAYLOR:

Sorry.

LEAHY:

Ms. Taylor, I'm sure we'll give you plenty of chance to follow up if you like, but it would make life a lot easier if you would take the time to answer my question as I ask them.

Were you aware that New Mexico Republican Party officials complained about Mr. Iglesias?

TAYLOR:

I...

LEAHY:

I should think that's an easy yes or no.

TAYLOR:

Well, it's -- appreciate, Senator, I am mindful that I want to make sure that I have this right.

I believe that I know that people were upset with him. I do not recall specific individuals though, necessarily.

LEAHY:

OK.

When and how did you first become aware of these complaints?

TAYLOR:

I don't recall.

LEAHY:

Do you know why Mr. Iglesias was asked to resign?

TAYLOR:

I don't know. I know what I've read in the newspaper.

* * *

LEAHY: . . . When and how did you first learn of a packet of information Mr. Rove sent to Mr. Sampson related to voter fraud in Wisconsin prior to the 2006 elections? This is my last question, assuming you answer it.

TAYLOR:

I'm not sure that I recall that being -- I don't recall that. I don't recall that he did that. Was that in the press?

LEAHY:

I'm asking, did you ever learn of a packet of information Mr. Rove sent to Mr. Sampson related to voter fraud in Wisconsin prior to 2006 elections?

TAYLOR:

I don't recall knowing about that.

* * *

SPECTER:

Well, you were the political director, as you've already testified. Was there a political overtone to the replacement of Mr. Cummins by Mr. Griffin to try to carry out some political agenda as opposed to the public policies of the administration on the priority of federal prosecutions?

TAYLOR:

I don't believe that's the case at all.

I believe Mr. Griffin was extraordinarily well-qualified for that job. Mr. Griffin had just returned from Iraq where he had served our country in a forward operating unit, and it was an opportunity for him, as somebody who had been a prosecutor, to serve his country yet again.

And, you know, again, I'm telling you what I believe to be the case, and that's my assessment of his situation.

SPECTER:

Ms. Taylor, with respect to the resignation of U.S. attorney Carol Lam in San Diego, there have been questions raised as to whether the U.S. attorney was hot on the trail of confederates of former Congressman Duke Cunningham, who's now serving an eight-year jail sentence.

Are you in a position to shed any light on the truth or falsity of that suspicion?

TAYLOR:

I guess all I can say about that is that I really don't know much about her or why she -- other than what I've read in the press.

SPECTER:

You have been asked about U.S. attorney Iglesias in New Mexico. Are you in a position to shed any light on whether he was replaced -- asked to resign, replaced because of his alleged failure to prosecute vote fraud cases?

TAYLOR:

I don't believe that was the case. You know, I...

* * *

SPECTER:

Well, Ms. Taylor, I think your testimony has been helpful today specifically as to Arkansas, because you knew Mr. Griffin so well, having served with him in the Office of Political Director, with his being your assistant. And you know firsthand his qualifications as a prosecutor, and you have some personal knowledge as to the situation with Mr. Cummins with his having stated an intention to resign as early as 2004.

When we ask you questions about what you've read in the newspapers, we know you're doing your best. Frankly, that's not very probative here. But when you know Mr. Griffin and you know the situation with Mr. Cummins, that is helpful.

* * *

SCHUMER: . . . Did you ever hear from any political people outside the White House, outside the executive branch, complaints about how David Iglesias conducted himself as U.S. attorney?

TAYLOR:

I don't recall any specific complaints. I have a general impression that there were people -- many people who did not think highly of him. And I don't know specifically how -- you know, whether that was -- people internally repeating, you know, their views. I don't recall if that was somebody calling me. I just -- I don't recall any specific...

SCHUMER:

Any call. OK.

Now let me -- we know from e-mails and testimony that your deputy, Scott Jennings, arranged in 2006 for Justice Department officials to meet with two New Mexico attorneys active in Republican politics, Mickey Barnett and Pat Rogers.

Barnett and Rogers also told Matt Friedrich, the principal deputy of the DOJ Criminal Division, that David Iglesias was not pursuing a voter fraud prosecution quickly enough for their case.

And Mr. Friedrich also recalls hearing from Monica Goodling that Mr. Barnett and Rogers had gone over to the Justice Department that day from the White House. That's what he said. And he testified, "It was clear to me they did not want to him to be U.S. attorney."

Do you know whether this White House meeting happened?

TAYLOR:

I have read the account that it has occurred, so based on what other people say, I believe that it did occur.

SCHUMER:

But do you have any -- did you have personal knowledge of it occurring?

TAYLOR:

The first time I learned of it was when it was raised in the press.

SCHUMER:

Were you present at it?

TAYLOR:

I was not present at it.

SCHUMER:

OK.

And you don't know how many meetings there were in that regard?

Nor did you have anything to do with facilitating a meeting between -- you or your office -- between Mr. Barnett and Justice Department officials. Is that correct?

TAYLOR:

I don't recall ever facilitating a meeting.

SCHUMER:

OK.

Now, newspaper reports also say that New Mexico's Republican Party chairman, Allen Weh -- I think I'm -- W-E-H -- complained to a political liaison of Karl Rove's in 2005 about David Iglesias and asked that Mr. Iglesias be removed.

SCHUMER:

Mr. Rove later told Mr. Weh, personally, "He's gone."

Did you have any communications in regard to this with Mr. Weh?

TAYLOR:

I don't recall ever having communications with Mr. Weh about this issue.

SCHUMER:

Are you aware that Mr. Weh might have called someone else under your wing in the department?

TAYLOR:

I'm not aware of any phone calls that Mr. Weh made.

SCHUMER:

OK.

Did you know Mickey Barnett, Pat Rogers or Allen Weh at all?

TAYLOR:

I believe I have met Mickey Barnett and I believe that I have met Mr. Weh at a couple of occasions.

SCHUMER:

But nothing in relation to U.S. attorneys?

TAYLOR:

I don't recall ever talking to either of them about that topic.

SCHUMER:

OK, but you did talk with them.

TAYLOR:

Mr. Weh was the chairman of the New Mexico party, so I would see him at Republican National Committee meetings.

* * *

WHITEHOUSE:

OK.

I'd like to ask you to look at the e-mail that you've already looked at before. It's 1814.

TAYLOR:

I do have it.

WHITEHOUSE:

Yes?

TAYLOR:

Yes.

WHITEHOUSE:

There are two sentences in it that I want to ask you about. The first is the sentence or the clause, "You forced him to do what he did."

WHITEHOUSE:

Do you see that?

TAYLOR:

I do see that.

WHITEHOUSE:

Let me start by asking who "you" is in that sentence.

TAYLOR:

"You" is generally the Department of Justice.

WHITEHOUSE:

And who is "him"?

TAYLOR:

"Him" is Tim Griffin.

WHITEHOUSE:

And "he" is also Tim Griffin?

TAYLOR:

Yes, "you forced him" -- Tim Griffin -- "to do what he did."

WHITEHOUSE:

OK.

What is it that he was forced to do that is referenced here?

TAYLOR:

I believe that -- well, my e-mail may not be technically correct.

I believe that the -- when Senator Pryor was informed that the White House would not be going forward with Mr. Griffin's name as the U.S. attorney, that Mr. Griffin -- so Senator Pryor was aware of that information.

Then Tim was made aware of that information. And I believe that Tim rightly concluded that he, unfortunately, had the opportunity to either announce that he would not seek the nomination, or read about it in the newspaper the next day.

And the reason for my ire was simply because, you know, here we had a guy who had just returned from Iraq, he had just served as a reservist, in Mosul of all places. He comes back, he moves home, he becomes a U.S. attorney, and, you know -- and then he had to endure this process. And I was furious about it, and it's a really unfortunate set of circumstances.

WHITEHOUSE:

So the words "what he did" refers specifically to what?

TAYLOR:

It refers to him announcing that he would not seek the U.S. attorney slot; that he would not put his name forward to be nominated to be the U.S. attorney.

WHITEHOUSE:

OK.

The next phrase that I'm interested in is at the bottom of that same little paragraph. It's "why we got rid of him."

Let's start with the "we." Who is the "we" in there?

TAYLOR:

The "we" is collectively the administration. Mr. Cummins had been let go, and the administration let him go, so "we" is a collective term.

WHITEHOUSE:

OK.

TAYLOR:

We both worked -- both Kyle and I worked, obviously, in the administration.

WHITEHOUSE:

And how did "we" come to make that determination? What is the basis that connects "Bud is lazy" to "we got rid of him"?

TAYLOR:

I believe that -- again, Mr. Cummins was let go. It is not my goal or intention to confound any embarrassment that has been caused to him today. I feel badly about that.

TAYLOR:

I think this whole situation is incredibly unfortunate given the fact that Mr. Cummins, who has served the president and served the government well and is an honorable person, was put in a situation where he was planning on leaving and had there simply just been better communication on everyone's parts, that he would have done what he was planning on doing.

And we had a qualified, exceptional candidate who was willing to serve, interested in serving, and that we weren't able to find the situation where we were worked that process out, and now neither of them are serving as the U.S. attorney.

* * *

WHITEHOUSE:

To your knowledge, was the president involved in any way in the decision to remove these U.S. attorneys?

TAYLOR:

I don't have any knowledge that he was.

* * *

LEAHY: . . . When did you first learn that Todd Graves, the U.S. attorney for the Western District of Missouri, was being asked to resign?

TAYLOR:

My recollection of him resigning was when I read it in a newspaper. That's my recollection.

LEAHY:

Were you aware that he had been asked to resign?

TAYLOR:

I don't recall being aware.

LEAHY:

When did you first learn that Bradley Schlozman was being considered to replace him as interim U.S. attorney for that district?

* * *

TAYLOR: . . . I don't recall when he became the U.S. attorney. I recall, you know, sort of, being made aware of it in press accounts. I don't...

LEAHY:

Not really my question.

My question was, when did you first learn that was being considered as the interim U.S. attorney?

TAYLOR:

I don't recall ever -- I don't recall ever knowing...

* * *

LEAHY:

And we stand in recess.

List of Panel Members and Witnesses

PANEL MEMBERS:

SEN. PATRICK J. LEAHY, D-VT. CHAIRMAN

SEN. EDWARD M. KENNEDY, D-MASS.

SEN. JOSEPH R. BIDEN JR., D-DEL.

SEN. HERB KOHL, D-WIS.

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SEN. RUSS FEINGOLD, D-WIS.

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SEN. RICHARD J. DURBIN, D-ILL.

SEN. SHELDON WHITEHOUSE, D-R.I.

SEN. BENJAMIN L. CARDIN, D-MD.

SEN. ARLEN SPECTER, R-PA. RANKING MEMBER

SEN. ORRIN G. HATCH, R-UTAH

SEN. CHARLES E. GRASSLEY, R-IOWA

SEN. JON KYL, R-ARIZ.

SEN. JEFF SESSIONS, R-ALA.

SEN. LINDSEY GRAHAM, R-S.C.

SEN. JOHN CORNYN, R-TEXAS

SEN. SAM BROWNBACK, R-KAN.

SEN. TOM COBURN, R-OKLA.

WITNESSES:

SARA M. TAYLOR, FORMER DEPUTY ASSISTANT TO PRESIDENT BUSH AND DIRECTOR OF POLITICAL AFFAIRS AT THE WHITE HOUSE

CONGRESSIONAL TRANSCRIPTS
Congressional Hearings
Aug. 2, 2007

Senate Judiciary Committee Holds Hearing on U.S. Attorney Firings

LIST OF PANEL MEMBERS AND WITNESSES

LEAHY:

Good morning.

Today, the committee welcomes Scott Jennings, who's a special assistant to the president, the deputy director of political affairs.

* * *

JENNINGS:

Yes, sir. It's rather short. Thank you.

As I sit here today, I find myself, at the age of 29, caught in the middle of a constitutional struggle between two branches of government, quite literally between -- as Senator Specter said -- a rock and a hard place.

On the one hand, I am appearing before this committee pursuant to a subpoena that compels me to answer questions concerning the dismissal and replacement of U.S. attorneys. On the other hand, I have received a letter from the White House counsel asserting the president's claim of executive privilege over the very subject matter of the committee's subpoena.

The White House counsel's letter, which I have attached to my written testimony, directs me not to testify or produce documents concerning White House consideration, deliberations or communications, whether internal or external, relating to the possible dismissal or appointment of United States attorneys, including consideration of possible responses to congressional and media inquiries on the United States attorneys matter.

JENNINGS:

Please understand, Senators, that I have the utmost respect for this committee. And a contempt citation is not something that I take lightly.

To the contrary, if a court ultimately determines that Congress' need for the information outweighs the president's assertion of executive privilege, I would welcome the opportunity to answer your questions on the U.S. attorneys matter.

Until that time, however, I am compelled to abide by the president's directive, particularly given my status as a current White House employee.

In light of these considerations, as well as a desire to be as consistent as possible and avoid even the appearance of selectively answering questions, I will be unable at this time to answer any questions concerning White House consideration, deliberations or communications related to the U.S. attorneys matter, regardless of whether specific documents or conversations may already have been discussed publicly by others. To do otherwise would directly violate the president's order.

I recognize that this decision may not sit well with some members of this committee. For that, I am truly sorry.

Please know that it is every bit as frustrating for me as it is for you. But given the larger constitutional issues at stake, I am simply not in a position to defy the president's claim of privilege.

I hope that you can appreciate the difficulty of my situation. It makes Odysseus' voyage between Scylla and Charybdis seem like a pleasure cruise.

In conclusion, I will attempt today to answer your questions to the best of my ability within the parameters of the president's directive. However, to the extent that there are questions that I am unable to answer, I would like to reiterate, I am willing to abide by the ultimate resolution of this issue.

I commit to you that I will answer such questions at a later date, if the White House and the committee reach an agreement that permits me to do so or if a court rules that the committee is entitled to the information.

Thank you, sir.

* * *

LEAHY: . . . Now, a recent report by the House Committee on Government Oversight Reform documents extensive use by White House officials of nongovernmental Republican National Committee e-mail accounts for official purposes, such as communicating with federal agencies about federal appointments and policies. You're aware of that, are you not?

JENNINGS:

Yes, sir.

* * *

LEAHY:

I give you a copy of a document numbered OAG 112-113. This is a June 20, 2006, e-mail exchange between you and Monica Goodling.

* * *

LEAHY: . . . The second to last e-mail in the string is an e-mail to Ms. Goodling from an e-mail address, "sjennings@gwb43.com."

Is that your Republican National Committee e-mail address?

JENNINGS:

It was an e-mail address. And that particular e-mail address was ascribed to me in the past. It's no longer my Republican National Committee e-mail address.

LEAHY:

Do you have a Republican National Committee e-mail address now?

JENNINGS:

Yes, sir.

LEAHY:

And what is that?

JENNINGS:

It is jsj@gwb43.com.

LEAHY:

Why do you no longer have the other one?

JENNINGS:

Sir, after the e-mail address that is on this page was published in various places on the Internet and other places, I received a significant amount of junk, spam and otherwise what might be considered as hate e-mail. And so for those reasons, it was becoming overloaded. And we determined to change it so I wouldn't have to deal with that.

LEAHY:

OK.

The bottom of the e-mail you have is a signature that says, "J. Scott Jennings, Special Assistant to the President and Deputy Political Director of the White House," e-mail address listed in your signature with your official White House title, as sjennings@gwb43.com. Is that correct?

JENNINGS:

Yes, sir.

LEAHY:

How frequently did you use this e-mail address?

JENNINGS:

It -- I believe I've seen published accounts that have several thousand e-mails on an active server at the RNC. So it's fair to say that I used it daily.

LEAHY:

And would the thousands referred to -- would you think those are correct?

JENNINGS:

Yes, sir. I have no reason to believe it's not.

LEAHY:

The report said that they have received over 35,000 e- mails of which you were part. Does that seem out of line?

JENNINGS:

I think that the number is probably accurate. I think that, if you look at it in context, much of the e-mail that I received was of a bulk nature: press clippings, news releases and other junk e-mail.

So I think that, while it's a little inflated, I have no reason to believe the number is not accurate.

LEAHY: . . . This is not -- I'm not asking about something where you communicated with the president. This is a Republican National Committee e-mail. I'm asking you why -- not what you said or anything else -- but why did you use this?

JENNINGS:

May I have a moment, Senator, to confer?

LEAHY:

Of course, confer with your attorney.

JENNINGS:

I understand your question, Senator. I apologize. I want to answer it.

I think it might be helpful to give...

LEAHY:

Thought you might. Go ahead.

JENNINGS:

Yes, sir.

I think it might be helpful to give a little context about the use of the e-mail accounts.

I came to the White House, as you said, in 2005. And when I came I was given two e-mail accounts, as you know, and devices such as a BlackBerry and a laptop that were connected to my RNC e-mail account and only one device -- a computer desktop -- connected to my official account.

So over the course of time, it became efficient and crucial for me to be able to respond to communications in a 24/7 manner.

LEAHY:

But here we're talking about official business . . . .

Why would you use a Republican National Committee account rather than your official account? Wouldn't this be official business?

JENNINGS:

Senator, I understand your question.

I would also like to say that it's my understanding that out of an abundance of caution and to avoid possible Hatch Act violations, that's why we were issued these accounts. And over the course of time...

LEAHY:

Do you feel this was a Hatch Act violation, setting up this kind of a meeting?

JENNINGS:

No, sir.

LEAHY:

Then why'd you use it?

JENNINGS:

As I said, Senator, I would like to give some context about the e-mail accounts.

Over the course of time, the use of the Republican National Committee e-mail account became a matter of convenience and efficiency because I had access to it 24 hours a day, seven days a week, unlike my other e-mail account. And so...

LEAHY:

Were there other occasions on which you used an RNC e- mail account in connection with the development of plans to replace U.S. attorneys or the implementation of these plans or even the explanation of these plans?

JENNINGS:

Can you repeat the question, sir?

LEAHY:

Were there other occasions on which you used an RNC e- mail account in connection with the development of plans to replace U.S. attorneys?

JENNINGS:

Senator, I use my RNC account for many matters, including that.

* * *

SPECTER:

When you are deciding what e-mail account to use, there are certain requirements that governmental records be maintained, and there are also requirements that you not use federal equipment for political purposes. Is that correct?

JENNINGS:

Yes, sir.

SPECTER:

And what you have to do is to make a judgment as to whether it is essentially political or whether it is essentially governmental, in a judgment as to what e-mail equipment you use.

JENNINGS:

Yes, a judgment has to be made. And often a judgment has to be made in the midst of very chaotic days.

SPECTER:

In the midst of very chaotic situation?

JENNINGS:

Days. You know, with multiple incoming e-mails on both accounts and dealing with matters. It is -- sometimes it's snap decisions that have to be made.

SPECTER:

Are you representing to this committee that you're a busy man?

JENNINGS:

Sir, I would not represent to this committee that I am busier than anyone on this committee. But I am busy.

SPECTER:

Now answer my question.

JENNINGS:

Yes, sir, I am busy.

SPECTER:

OK.

And in general, what standards do you use in a judgment as to which e-mail account you ought to use?

JENNINGS:

May I have a moment, Senator? Thank you.

SPECTER:

I thought that was a pretty easy question, Mr. Jennings.

JENNINGS:

Right. I think, Senator, I'd like to explain how the e-mail account became, sort of, a default e-mail account on occasion.

Having access to it -- you know, they describe us in the Executive Office of the President on occasion as being 24/7 employees, and I frequently need access to communications 24 hours a day, seven days a week. And when I arrived and only found myself with access to one of the e-mail accounts, you know, 24/7, it over the course of time became a default e-mail account. People knew they could reach me at any time, not just when I happened to be sitting at my desk, which some days is infrequent.

So it became a default e-mail account, and we used it a lot, and I would submit that we were using it out of the interest of being efficient and responsive in our job duties.

* * *

SPECTER:

. . . how about the other people in the White House whom you work with? To what extent has this investigation been distracting to them?

JENNINGS:

I wouldn't want to speak for them, Senator. But I can only assume, if they've experienced the same level of distraction, that they would describe it as being distracting.

SPECTER:

Well, aside from what you assume, what have you observed?

JENNINGS:

Well, I've observed the White House Counsel's Office certainly working on it. So they're certainly, I think, distracted with these sorts of issues. But it's their -- obviously, it's their job to deal with them.

I think...

SPECTER:

Are you aware that there are people in the White House today working on legislation which would provide an expansion for the Foreign Intelligence Surveillance Act to enable our intelligence agencies to gather information which is transmitted overseas from one caller to a recipient overseas?

JENNINGS:

I'm aware of it, yes, sir.

SPECTER:

Are you aware that there's a heightened sense of security need, a concern that Al Qaida may be threatening the United States again at this time, with a high-level alert?

JENNINGS:

Yes, sir.

SPECTER:

And people in the White House are working on that?

JENNINGS:

I'm aware of it, yes, sir.

SPECTER:

And could they better spend their time worrying about that than about your potential criminal citation?

JENNINGS:

I think, yes, any time spent working on protecting America from an attack from Al Qaida is much better spent on that than on my criminal contempt citation.

SPECTER:

Well, then I'm not going to take up all my time. I'm going to let you go early.

Thank you, Mr. Chairman.

* * *

HATCH: . . . Mr. Jennings, under the current circumstances, I'm not sure what it means to welcome you to the Senate Judiciary Committee. But you should not be in the position you're in today, between a rock and a hard place, as you described it in your statement.

You made it clear that you're willing to talk about these issues under the right circumstances. The president has offered you, offered Karl Rove under certain circumstances, which is more than I think the president should have done.

Now, I believe you, Mr. Jennings, and I wish these circumstances had been allowed to exist so you could do just that, and we would all know just exactly what we want to know.

The Senate should not be in this position. We're in this position involving a clash between congressional subpoena and executive privilege because my Democratic colleagues have put us in this position. They chose from the beginning to ignore the separation of powers that gives authority to remove U.S. attorneys to the president. It's a plenary power. The president has a right to remove them for whatever reason.

And although this was poorly handled -- and I think everybody can agree with that, including the White House -- the fact of the matter is the president doesn't have to state reasons. They can be for any reasons, including political reasons.

They chose to insist that the president's reasons for exercising the president's own authority must somehow satisfy Democratic senators. They chose to insist that the executive branch's internal communication and decision-making about exercising the

executive branch's own authority is somehow a legitimate subject of congressional oversight. And that's what this is about.

They chose to make demands that they knew the executive branch would resist, demands my Democratic colleagues would resist just as fully if the roles were reversed. They chose to ask questions they know witnesses cannot answer and then they yell about a cover-up. They chose to cast mistakes or mishandling first as inconsistencies, then as improprieties and then even as illegalities, which nobody's been able to show.

In all of the thousands of documents that have been given up here, all of the seven or more hearings that we've held here or the hearings over in the House, they chose to drag this process on for nearly nine months, now pulling it from the political into the legal arena.

They chose to do all of that, and those choices are why we're in this position today and why you're in this position today.

Now, I personally wish they had made other choices. I wish that they had followed another course. I think we would be way ahead of the game had they done so, and we'd know exactly what people had said.

Now, it would be incorrect to say that my Democratic colleagues have absolutely nothing to show for their efforts. Congress said that allowing the attorney general alone to appoint interim U.S. attorneys could avoid Senate confirmation.

So we replaced that mechanism with allowing the attorney general and a district court judge to appoint interim U.S. attorneys, which equally can avoid Senate confirmation.

But in addition to that legislative triumph, there is the trashing of reputations and undermining of careers of hard-working career or public servants and the misleading of the American public about the proper relationship between the legislative and executive branches.

And, of course, there is the enormous and growing expense of this fishing expedition. Every time that net comes up empty -- and it has always come up empty -- my Democratic colleagues say they just know deep within their souls, in their bosom, that the fish are there. They just need one more cast of the net, they just need a bigger net. They just need to go deeper into the political ocean or step higher on the political food chain.

Is it any wonder that the American people's disapproval of our job performance has gone steadily higher as this sorry tale has continued from 52 percent in January and February, 56 percent in March and April, 60 percent in May and June, and 65 percent today?

In fact, some think that we -- some polls actually show that we're in less disfavor than the president of the United States, who is consistently being, you know, criticized for being low in the polls. Now, that's, to me, not a very good record of accomplishment.

So, Mr. Jennings, I do not want to add to your untenable discomfort by asking questions, at least under the current circumstances, I know you cannot answer. I just wanted to come here today to thank you for your service to the president of the United States and to the American people as well.

And I want to thank you for your sincere desire to cooperate with this committee under the right circumstances. My Democratic colleagues have chosen not to let those circumstances exist.

I've suggested that we should have done what the president offered a long time ago. Yes, it's not under oath. It's not in front of the public at large. It's not a perfect way of doing it, but it certainly would get us to the bottom of whatever questions they want to ask from top advisers in the White House who cannot be permitted to...

LEAHY:

Would the senator yield on that?

Was he aware that in the offer they said they would set the agenda, they would also limit what questions could be asked, so they would be getting not to the bottom of it at all?

HATCH:

I personally believe once that happens and once that's started, you'd be able to ask any questions you want to.

HATCH:

Now, there, undoubtedly, still would preserve certain rights that we have all fought for on this committee.

Now, let me just say, it was just a short while ago when we had -- when something occurred on this committee that was abysmal. We had a staffer on the then-majority -- I was chairman -- who somehow or other got into the personal communications between senators and their staffers -- not necessarily top staffers, but let's limit it to top staffers. What seems to be involved here are the president's top staffers.

And it was a terrible situation. I immediately announced it, exposed it. We immediately shut down the servers. We immediately got people in to resolve it.

And let me just finish, because my time is up. It went so far as to have the U.S. attorney have the FBI investigate. They wanted to get the servers and to go through the whole process and get those memoranda that were, in my opinion, wrongfully taken.

And, of course, our colleagues on the other side -- and I don't blame them for this; I agree with them and protected them on this -- did not want their internal, private memoranda disclosed to the public or disclosed to the court or disclosed to the U.S. attorney or disclosed to the FBI.

And that was the end of the investigation.

Now, that's what's involved here. I think we all have to understand that the president has certain rights, that there are certain executive privileges that do exist, especially so that they can -- so a president can preserve the right of his office to not be exposed to improper interrogations of his top advisers, any more than we in the Senate would like our private memoranda exposed as well.

Well, I've used up too much of my time. Thank you very much, Mr. Chairman.

LEAHY:

No, but I'm sure that Mr. Jennings appreciated having you on his side all the way through this.

HATCH:

He deserves having me on his side.

LEAHY:

No, the American people deserve to have him tell the truth and the whole truth and nothing but the truth.

HATCH:

And he has.

* * *

CARDIN: . . . let me try to ask some questions . . . to try to get at your role in the White House and how matters that involve political considerations were handled by you.

There's at least some indication that local political concerns you filtered through the White House, and tried to respond to set up appointments for people or to have those concerns at least understood by those in the executive branch.

CARDIN:

So let me exclude the Department of Justice complaints concerning U.S. attorneys; that's not what I'm asking.

Did you receive complaints or concerns or interest from local political establishments dealing with federal agencies in which the caller or person who communicated with you desired for you to communicate that to some agency or to set up certain appointments?

JENNINGS:

I think it's fair to say that I received telephone calls from people complaining about a number of things. You know, it's (inaudible) White House Office of Political Affairs, one of our roles is to, you know, deal with the public, especially outside, out in the states. And so we had frequent communications. And I -- I can say I've heard complaints about matters large and small.

CARDIN:

Did you get requests to set up appointments with individuals within certain agencies?

JENNINGS:

I had some requests, yes.

CARDIN:

And would you then follow up and call, I guess, a political appointee or some other person within the agency to set up a meeting?

JENNINGS:

Typically, I would deal with the White House liaison and just simply ask them, "Is there an appropriate way that this can be handled? Can you give us guidance? Can you give this person guidance on what they're trying to find out?"

And so I would say -- not typically, all the time -- that the White House liaison was the point of contact for trying to figure out the appropriate thing to do.

CARDIN:

I'm not interested in you giving me specific names, but could you give me specific examples?

JENNINGS:

Sure.

I recall getting a question once from a political contact in a state who had some issue regarding housing. And he thought maybe the right person he needed to speak with could be at the HUD.

So I called the White House liaison there and said, "Can you help point this gentleman in the right direction, find the appropriate meeting for him to have or at least give him guidance on how he might be able to get his questions answered?"

CARDIN:

Were you the point person in the political office in the White House to handle these types of requests?

JENNINGS:

I would get calls, but there are several staffers in the Political Affairs Office who handle, you know -- in other words, there's more than just one person working there and I think, you know, multiple people would get requests of similar nature.

CARDIN:

Again, excluding the U.S. attorney firing issue, did you get inquiries concerning the Department of Justice?

JENNINGS:

Senator, I don't have any specific recollection of any.

But, you know, I would get contacts about things that aren't U.S. attorneys. So, you know, like a U.S. marshal perhaps or a judge -- other similar positions.

There's also other politically appointed personnel at the Department of Justice. People make recommendations for certain things.

So, you know, I don't know if they would all be characterized as complaints, but...

CARDIN:

I'm not necessarily limiting this to complaints.

JENNINGS:

OK.

CARDIN:

People who had interests; they wanted to get a message across, they wanted an opportunity to get their position heard within the Department of Justice, again excluding the U.S. attorneys for the firing.

JENNINGS:

Yes, I wouldn't say that all the people were asking for meetings. In fact that rarely, in my experience, happens.

CARDIN:

And who would you contact at the Department of Justice?

JENNINGS:

Typically we would contact the White House liaison, as we would any other agency.

CARDIN:

And that person...

JENNINGS:

Well, during my tenure -- my belief is there have been two. One, of course, was Monica Goodling, who you all know. And previous to her, if I'm not mistaken, the White House liaison was a young lady named Jan Williams (ph).

CARDIN:

Now, did you have contact with both of them -- again, I'll leave out the U.S. attorney firing issues. Did you have contacts with both of them in your role?

JENNINGS:

Yes.

CARDIN:

And it would involve concerns expressed by -- or requests, rather than concerns -- requests from individuals who felt that they should have an opportunity to have their point of view heard?

JENNINGS:

Yes. Although to add some context to your question, I would say that a vast majority of the contacts that you might be referencing were people simply saying things like, "Hey, I know a great young lawyer who's interested in public service, can you recommend them for a political appointment?" or similar personnel-type recommendations.

CARDIN:

Let me ask one further question if I might, Mr. Chairman.

What procedures, if any, did you have in place to make sure that it would not be an inappropriate political interference with an agency, violating the Hatch Act, or just an inappropriate contact? Did you have a policy in place? Was there something written? Or was this left to your individual judgment?

JENNINGS:

Well, regarding -- let me speak to personnel recommendations, because it's the place where I think that I had the most contact, frankly.

And I -- you know, I never thought that making a personnel recommendation -- "Here's a guy who wants to serve or a girl who wants to serve, you know, they're a qualified lawyer, can you consider them?" -- I certainly didn't see any issues with that. We were doing that with every agency, in conjunction with our colleagues at Presidential Personnel.

So, you know, I never felt the need, I suppose, for any guidance about simply making or passing on a personnel recommendation.

CARDIN:

Including a complaint against someone in the agency?

JENNINGS:

Again, I'm struggling to come up with -- I mean, I know the issue you're moving around the outside of here.

But just in general, I don't recall a lot of complaints, frankly, where we had to pass it on in the way you're asking me, I think.

CARDIN:

But you would pass it along if you -- the ones that -- there weren't many, but you said you would.

JENNINGS:

Sure.

And what I would add to that is, we would pass things along for appropriate action. In other words, I think part of the filter here would be I'd say, "This person has this complaint or this issue or this recommendation or this question," and they'd say, "OK," and I'd say, "Can you appropriately find the right way to route it?"

CARDIN:

I guess my question is, a call's coming from the White House to an agency head or a congressional relations person -- a White House relations person, coordination person. Was there any filter in place to make sure that they understood, or to protect against undue political influence from your contact?

JENNINGS:

I never attempted to put any undue political influence in a contact.

And again, I would reiterate that what we always would ask for would be an appropriate routing of the question or whatever was being asked.

* * *

SCHUMER: . . . We know, from e-mails and testimony, that you arranged for Justice Department officials to meet with New Mexico attorneys active in Republican politics. These were Mickey Barnett -- that's in the memo that was talked about by Senators Leahy and Durbin. There was Pat Rogers, and there's another possible individual.

That meeting took place after a White House meeting, we've been told. So, first, let me ask you about the White House meeting with New Mexico Republican officials.

What can you tell us about this White House meeting in 2006? Were you present?

JENNINGS:

Senator, may I have a moment? Thank you.

* * *

SCHUMER:

Go ahead.

JENNINGS:

Yes, sir. Senator, I thank you for the time.

I had -- I recall -- to the best of my recollection -- it's been several months ago -- I recall having breakfast with Mickey and Pat while they were in town on other business.

SCHUMER:

So you did have breakfast with them. OK.

And was that at the White House?

JENNINGS:

I believe it was, yes, Senator.

SCHUMER:

And was there anyone else present, other than Mickey, Pat and yourself?

JENNINGS:

I don't recall anyone being present.

SCHUMER:

OK.

Were there any other such meetings? And if so, with whom, on what other dates?

JENNINGS:

Such meetings -- I'm sorry?

SCHUMER:

With Mickey Barnett, Pat Rogers and other White House officials?

JENNINGS:

I don't -- I don't have any recollection of any. But, you know, I should say that, as I'm aware of...

SCHUMER:

Are you aware of any here?

JENNINGS:

I don't have any recollection of any.

But I should say that I have a -- you know, I worked in New Mexico, so I knew Mickey and Pat. It wasn't unusual for us to have, you know, social interaction.

SCHUMER:

Right.

But this wasn't just a social meeting, right? This was related to this memo?

JENNINGS:

Senator, I -- let me have one moment, Senator. Thank you.

SCHUMER:

Please. Take your time.

* * *

JENNINGS:

Senator, thank you.

You know, to be candid, I don't recall this coming up. It was -- as I recall, it was a social breakfast. In fact, I think it was the first time I had had the chance to take my friends to the White House mess for breakfast. And it was more social in nature.

SCHUMER:

Right. OK.

And who's idea was it to have the meeting? Did they call you?

JENNINGS:

The meeting with me at the mess?

SCHUMER:

Yes.

JENNINGS:

No, I think they had informed me they were coming to town, and I had the idea that I would take them to breakfast.

SCHUMER:

OK.

Any of your superiors aware that you were having such a meeting?

JENNINGS:

I don't recall but...

SCHUMER:

And then what was -- did they bring up at the meeting that -- their dissatisfaction with Mr. Iglesias?

JENNINGS:

I don't have any specific recollection of it coming up.

SCHUMER:

They never said they didn't want him to say. They never talked him.

JENNINGS:

Again, it was a social breakfast.

I don't remember any conversations really about business in general. I just remember it being a social breakfast and me saying, "This is the White House Mess. It's run by the Navy, et cetera, et cetera."

* * *

LEAHY:

You testified earlier that you used your Republican National Committee BlackBerry out of convenience, 24/7, the very hard work that you have.

Does the White House ever issue BlackBerrys to their staff who have also strenuous hours?

JENNINGS:

I think some staffers were issued official BlackBerrys. I was not. And so...

LEAHY:

You ask for one?

JENNINGS:

Yes, sir.

LEAHY:

And what were you told?

JENNINGS:

This was very early in my employment. I was not yet the deputy director, I was still an associate director. And the president was doing a lot of travel in my region -- I managed the southern states. And I was receiving a lot of e-mail on my official account. And I requested at that moment and I was told that it wasn't the custom to give Political Affairs staffers those devices.

LEAHY:

Did you subsequently ever ask for one?

JENNINGS:

After the matters that have been discussed came to light, we have since been issued official devices.

LEAHY:

So you have one now.

JENNINGS:

Yes, sir.

* * *

CQ Transcriptions, Aug. 2, 2007

List of Panel Members and Witnesses

PANEL MEMBERS:

SEN. PATRICK J. LEAHY, D-VT. CHAIRMAN

SEN. EDWARD M. KENNEDY, D-MASS.

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SEN. RICHARD J. DURBIN, D-ILL.

SEN. SHELDON WHITEHOUSE, D-R.I.

SEN. BENJAMIN L. CARDIN, D-MD.

SEN. ARLEN SPECTER, R-PA. RANKING MEMBER

SEN. ORRIN G. HATCH, R-UTAH

SEN. CHARLES E. GRASSLEY, R-IOWA

SEN. JON KYL, R-ARIZ.

SEN. JEFF SESSIONS, R-ALA.

SEN. LINDSEY GRAHAM, R-S.C.

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