

<p>Term expired: Jan. 9, 2006 <i>(In April 2006, Cummins repeated previous statements that he would not stay for the whole second term and that he was leaving for private sector later that year)</i> Called: June 2006 Resigned: December 2006</p>		•
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Biographies of U.S. Attorneys from Arkansas

EASTERN DISTRICT

Attorney General Appointment of Tim Griffin (___ years old at appointment)

Background:

- B.A. from Hendrix College in Arkansas in 1990
- Graduate school at Pembroke College, Oxford University in 1991
- J.D. from Tulane Law School in 1994

- Trial Counsel, U.S. Army JAG Corps. Criminal Law Branch, Office of the Staff Judge Advocate, September 2005–May 2006 & August–September 2006 (approximately 9 months)
- Brigade Judge Advocate, U.S. Army JAG Corps., Operation Iraqi Freedom, Task Force Band of Brothers, 501st STB, 101st Airborne Division (Air Assault) May–August 2006 (approximately 3 months)
- Special Assistant to the Assistant Attorney General, Criminal Division, U.S. Department of Justice (approximately 15 months)
- Senior Investigative Counsel, Committee on Government Reform, U.S. House of Representatives January 1997–February 1998 & June 1998–September 1999 (approximately 2 ½ years combined)
- Associate Independent Counsel, U.S. Office of Independent Counsel David Barrett (approximately 16 months)
- Associate Attorney, General Litigation Section at Jones, Walker, Waechter, Poitevent, Carrere & Denegre, L.L.P. (approximately one year)
- Special Assistant to the President & Deputy Director, Office of Political Affairs, The White House (approximately 5 months; Note: On military leave after mobilization to active duty)
- Research Director & Deputy Communications Director, 2004 Presidential Campaign, RNC (approximately 2 ½ years)
- Deputy Research Director, 2000 Presidential Campaign, RNC (approximately 1 ½ years)
- Campaign Manager, Betty Dickey for Attorney General of Arkansas (approximately 3 months)
- Major, JAG Corps, U.S. Army Reserve, Commissioned 1st Lieutenant in June 1996
- Military Medals, Ribbons & Badges: Army Commendation Medal with Five Oak Leaf Clusters; Army Achievement Medal with Four Oak Leaf Clusters; Army Reserve Components Achievement Medal with Two Oak Leaf Clusters; National Defense Service Medal; Iraq Campaign Medal; Global War on Terrorism Service Medal; Armed Forces Reserve Medal with Bronze Hourglass and “M” Devices; Army Service Ribbon; and Army Reserve Overseas Training Ribbon with “3” Device; and Combat Action Badge.

George W. Bush USA: H.E. "Bud" Cummins (__ years old at nomination)

Nominated 11/30/2001; confirmed 12/20/2001

Talkers:

- Unlike Mr. Griffin, he did not attend top-rated universities.
- *However, like Mr. Griffin, he had political experience.* In 2000, he served as Arkansas Legal Counsel to the Bush/Cheney campaign, was part of the GOP Florida Ballot Recount Team in Broward County, and was an Arkansas Elector. He was also the Republican nominee for the U.S. Congress 2nd Congressional District in 1996.

Background:

- B.S./B.A. from University of Arkansas in 1981
- J.D. from University of Arkansas Little Rock School of Law in 1989
- Private Law Practice and State Director, NFIB/Arkansas (approximately 3 years)
- Chief Legal Counsel for the Arkansas Governor (approximately one year)
- Private Law Practice 1993-1996 (approximately 3 years)
- Clerk to Chief Judge, United States District Court, Eastern District of Arkansas (approximately one year)
- Clerk to United States Magistrate Judge, United States District Court, Eastern District of Arkansas (approximately 2 years)
- Five separate gubernatorial appointments as Special Justice to Supreme Court of Arkansas

Clinton USA: Paula Jean Casey (42 years old at nomination)

Nominated 8/6/93; confirmed 9/21/93

Talkers:

- Unlike Mr. Griffin, she did not attend top-rated universities.
- Unlike Mr. Griffin, she did not have military or federal prosecution experience.
- *However, like Mr. Griffin, she had political experience.* She volunteered on the political campaigns of the President who nominated her and was a former student of his. In addition to owing the President her job, then-Governor Clinton had also appointed her husband to a state agency position. She was also a law student of then-Professor Bill Clinton. (See *Associated Press*, 11/10/93)

Background:

- B.A. from East Central Oklahoma University in 1973
- J.D. from University of Arkansas Law School in 1976

- Staff attorney for the Central Arkansas Legal Services (approximately 3 years)
- Deputy Public Defender (less than one year)
- Supervisor of Legal Clinic at University of Arkansas Law School (approximately 2 years)
- Professor at the University of Arkansas Law School (approximately 8 years)
- Chief Counsel & Legislative Director to Senator Dale Bumpers (approximately 3 years)
- Lobbyist for the Arkansas Bar Association (approximately 1 year)

George H.W. Bush USA for EDAR: Charles A. Banks (40 years old at nomination)
 Nominated 12/17/87; confirmed 2/25/88

Talkers:

Background:

WESTERN DISTRICT

George W. Bush USA: Robert Cramer Balfe, III for WDAR (__ years old at nomination)
 Nominated 6/1/2004; confirmed 11/20/2004

Talkers:

- While he had local experience as a prosecutor, he did not have federal prosecution experience. Also, he did not attend top-rated universities.

Background:

- B.S. from Arkansas State University in 1990
- J.D. from University of Arkansas School of Law in 1994
- Prosecuting Attorney for the 19th Judicial District West (approximately 3 years)
- Deputy Prosecuting Attorney for the 19th Judicial District West (approximately 5 years)
- Secretary/Treasurer of the Arkansas Prosecuting Attorney's Association

George W. Bush USA for WDAR: Thomas C. Gean (__ years old at nomination)
 Nominated 8/2/2001; confirmed 10/23/2001

Talkers:

- While he did have local prosecution experience, he did not have any federal prosecution experience.

Background:

- Bachelor degree from University of Arkansas
- J.D. from Vanderbilt University Law School
- Prosecuting Attorney for the Sebastian County District Attorney's Office (approximately 4 years)
- Attorney with Gean, Gean, and Gean in Fort Smith, Arkansas (approximately 4 years)
- Attorney with Alston and Bird in Atlanta, Georgia (approximately 4 years)

Clinton USA for WDAR: Paul Kinloch Holmes, III (42 years old at nomination)

Nominated 8/6/1993; confirmed 9/21/93

Talkers:

- Unlike Mr. Griffin, he did not have any military or federal prosecution experience. He also did not have any state or local prosecution experience. He also did not attend top-rated universities.
- *Like Mr. Griffin, he had political experience.* He served as chairman of the Sebastian County Democratic Party and Sebastian County Election Commission from 1979-1983. (See *Arkansas Democrat-Gazette*, 10/19/00)

Background:

- B.A. from Westminster College in 1973
- J.D. from University of Arkansas in 1978
- Attorney for Warner and Smith, Fort Smith, Arkansas (approximately 15 years)

George H.W. Bush USA for WDAR: J. Michael Fitzhugh (38 years old at nomination)

Nominated 5/14/86; confirmed 6/6/86

Talkers:

- He had significant prosecution experience, but did not attend top-rated schools.

Background:

- Bachelor & law degrees from University of Arkansas

- Law Clerk for U.S. District Judge Oren Harris
- Law Clerk for U.S. District Judge J. Smith Henley
- Assistant U.S. Attorney for the Western District of Arkansas (approximately 11 years)

Biographies of U.S. Attorneys from Arkansas

**Clinton USA: Paul Kinloch Holmes, III (___ years old at nomination)
Nominated 8/6/1993; confirmed 9/21/93**

Talkers:

- **Unlike Mr. Griffin, he did not attend top-rated universities.**
- **Unlike Mr. Griffin, he did not have military or federal prosecution experience.**
- ***However, like Mr. Griffin, he had political experience. He served as chairman of the Sebastian County Democratic Party and Sebastian County Election Commission from 1979-1983. (See Arkansas Democrat-Gazette, 10/19/00)***

Background:

- **B.A. from Westminster College in 1973**
- **J.D. from University of Arkansas 1978**

- **Attorney for Warner and Smith, Fort Smith, Arkansas (approximately 15 years)**
- **Served as Chairman of the Arkansas Bar Association Natural Resources Law Section (approximately one year)**
- **Served as member of the Arkansas Bar Association House of Delegates (approximately three years)**
- **Member of the American Bar Association**
- **Member of Phi Alpha Delta**

**George H.W. Bush USA: J. Michael Fitzhugh (__ years old at nomination)
Nominated ____; confirmed __/__/85**

Talkers:

- **Unlike Mr. Griffin, he did not attend top-rated universities.**

Background:

- **Bachelor & law degrees from University of Arkansas**
- **Law Clerk for U.S. District Judge Oren Harris**
- **Law Clerk for U.S. District Judge J. Smith Henley**
- **Assistant U.S. Attorney for the Western District of Arkansas (approximately 11 years)**

George H.W. Bush USA: Charles A. Banks (___years old at nomination)
Nominated ___; confirmed 2/25/88

Talkers:

Background:

**George W. Bush USA: Thomas C. Gean (__ years old at nomination)
Nominated 8/2/2001; confirmed 10/23/2001**

Talkers:

- **Unlike Mr. Griffin, he did not have federal prosecution experience.**

Background:

- **Bachelor degree from University of Arkansas**
- **J.D. from Vanderbilt University Law School**

- **Prosecuting Attorney for the Sebastian County District Attorney's Office (approximately 4 years)**
- **Attorney with Gean, Gean, and Gean in Fort Smith, Arkansas (approximately 4 years)**
- **Attorney with Alston and Bird in Atlanta, Georgia (approximately __ years)**

**Bush USA: Robert Cramer Balfe, III (__ years old at nomination)
Nominated 6/1/2004; confirmed 11/20/2004**

Talkers:

- **Unlike Mr. Griffin, he did not attend top-rated universities.**
- **Unlike Mr. Griffin, he did not have military or federal prosecution experience.**

Background:

- **B.S. from Arkansas State University in 1990**
- **J.D. from University of Arkansas School of Law in 1994**

- **Prosecuting Attorney for the 19th Judicial District West (approximately 3 years)**
- **Deputy Prosecuting Attorney for the 19th Judicial District West (approximately 5 years)**
- **State Crime Laboratory Board**
- **Secretary/Treasurer of the Arkansas Prosecuting Attorney's Association**
- **Benton County Methamphetamine Task Force**
- **National District Attorney's Association**
- **Arkansas Bar Association**
- **Benton County Bar Association**

**George W. Bush USA: H.E. "Bud" Cummins (__ years old at nomination)
Nominated 11/30/2001; confirmed 12/20/2001**

Talkers:

- **Unlike Mr. Griffin, he did not attend top-rated universities.**
- ***However, like Mr. Griffin, he had political experience.* In 2000, he served as Arkansas Legal Counsel to the Bush/Cheney campaign, was part of the GOP Florida Ballot Recount Team in Broward County, and was an Arkansas Elector. He was also the Republican nominee for the U.S. Congress 2nd Congressional District in 1996.**

Background:

- **B.S.B.A. from University of Arkansas in 1981**
- **J.D. from University of Arkansas Little Rock School of Law in 1989**

- **Private Law Practice and State Director, NFIB/Arkansas (approximately 3 years)**
- **Chief Legal Counsel for the Arkansas Governor (approximately one year)**
- **Private Law Practice 1993-1996 (approximately 3 years)**
- **Clerk to Chief Judge, United States District Court, Eastern District of Arkansas (approximately one year)**
- **Clerk to United States Magistrate Judge, United States District Court, Eastern District of Arkansas (approximately 2 years)**
- **Five separate gubernatorial appointments as Special Justice to Supreme Court of Arkansas**
- **Chairman of Murphy Commission Committee on Corrections**
- **Law Journal, University of Arkansas Little Rock School of Law**
- **American Bar Association Certificate of Recognition- Land Use and Local Government**
- **American Jurisprudence Award – Agency and Partnership**
- **American Jurisprudence Award – Land Use**

Beck, Michael (OAG)

From: Sampson, Kyle
Sent: Thursday, February 08, 2007 4:32 PM
To: Beck, Michael (OAG)
Subject: 2 of 2 – U.S. Attorney issue
Attachments: Document.pdf

Please print (1) the attached letter and (2) the below e-mail for the AG. Thx.

From: Sampson, Kyle
Sent: Thursday, February 08, 2007 4:15 PM
To: Goodling, Monica; McNulty, Paul J; Elston, Michael (ODAG); Moschella, William; Hertling, Richard; Scolinos, Tasia
Subject: FW: Letter to Gonzales 2.8.07

My thoughts re the response:

- The full quotation (not the selective quote) of the AG's testimony more fairly represents his views about not asking U.S. Attorney to resign for so-called "political reasons," to wit: "I think I would never, ever make a change in a United States attorney for political reasons or **if it would in any way jeopardize an ongoing serious investigation. I just would not do it**" (emphasis added).
- The DAG's testimony clarifies that asking Cummins to resign, not because of underperformance, but to permit Griffin to serve, is not a "political reason":

SEN. SCHUMER: . . . 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 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. . . . So he started off with a strong enough resume, and the fact that he was given an opportunity to step in – . . . [where Cummins] may have already been thinking about leaving at some point anyway. . . . 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.

- Griffin is not an inexperienced prosecutor: he had far more federal prosecution experience (in the Criminal Division and in the U.S. Attorney's Office) than Cummins did when he was appointed, in addition to substantial military prosecution experience.

As for the specific questions:

- The decision to appoint Tim Griffin to be interim U.S. Attorney in the Eastern District of Arkansas was made on or about December 15, 2006, after the second of the Attorney General's telephone conversations with Sen. Pryor. Appointing Griffin to be U.S. Attorney (for the Western District of Arkansas) was first

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contemplated in the spring of 2004 [Monica, please verify], when Griffin was one of three names recommended by Rep. Boozman to fill the U.S. Attorney vacancy in that district that arose because of the resignation of Tom Gean on [insert date]; ultimately, Griffin withdrew his name from consideration for that appointment. Appointing Griffin to be U.S. Attorney (for the Eastern District of Arkansas) was first contemplated in the spring of 2006 [Monica, please verify], after Griffin had left the employment of the White House due to his being activated for full-time military service.

- I am not aware of anyone (other than Mr. Griffin) lobbying, either inside or outside of the Administration, for appointment. In the spring of 2006 [Monica, please verify], White House Counsel Harriet Miers asked the Department if Mr. Griffin (who then was on active duty) could be considered for appointment as U.S. Attorney upon his return from Iraq. As Griffin was well known to the Department (from his service in the Criminal Division, the U.S. Attorney's Office, and the White House), this request was considered favorably.
- Cummins' continued service as U.S. Attorney was not considered at the same time as the other U.S. Attorneys that the DAG acknowledged were asked to resign for reasons related to their performance. As the DAG testified, with regard to Cummins' continued service, "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." (Or where the DAG testified that he was "not disputing [the] characterization" that Cummins was "fired simply to let someone else have a shot at the job.")
- I am not aware of Karl Rove playing any role in the Attorney General's decision to appoint Griffin.
- Agree wholeheartedly that "[o]nce appointed, U.S. Attorneys, perhaps more than any other public servant, must be above politics and beyond reproach; they must be seen to enforce the rule of law without fear or favor." Historically, many U.S. Attorneys, prior to their appointment have political experience.
- Hertling should sign.

From: Scott-Finan, Nancy

Sent: Thursday, February 08, 2007 1:25 PM

To: Sampson, Kyle; Goodling, Monica; Elston, Michael (ODAG); Moschella, William; Hertling, Richard; Seidel, Rebecca; Scolinos, Tasia

Cc: Cabral, Catalina; Long, Linda E; Green, Saralene E

Subject: FW: Letter to Gonzales 2.8.07

Senator Schumer's press secretary just emailed me this Schumer/Reid/Durbin/Murray letter with regard to Cummins/Griffin.

United States Senate

WASHINGTON, DC 20510

February 8, 2007

The Honorable Alberto R. Gonzales
Attorney General of the United States
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001

Dear Attorney General Gonzales:

As you know, the Senate Judiciary Committee held a hearing this week to examine the growing politicization of the hiring and firing of United States Attorneys, our nation's top federal prosecutors.

Unfortunately, the hearing only served to intensify, rather than assuage, our concerns, particularly given the circumstances surrounding the ouster of Bud Cummins, who was the U.S. Attorney in the Eastern District of Arkansas until last December.

When you testified before the Committee on January 18, 2007, you stated unequivocally that you "would never, ever make a change in a U.S. Attorney position for political reasons." In a stunning admission, however, Deputy Attorney General Paul McNulty, in his own testimony on February 6th, acknowledged that Mr. Cummins was pushed out for no reason other than to install – without Senate confirmation – Tim Griffin, a former aide to Karl Rove. At the time, Mr. Griffin had minimal federal prosecution experience, but was highly skilled in opposition research and partisan attacks for the Republican National Committee. This strikes us as a quintessentially "political" reason to make a change.

We recognize, of course, that United States Attorneys serve at the pleasure of the President, but as several highly respected and distinguished former officials of the Department of Justice have noted, the dismissal of a well-respected U.S. Attorney simply to reward an inexperienced partisan is unprecedented.

Although Senators expect soon to be briefed privately about the alleged performance issues of several other U.S. Attorneys, we hope that you will quickly and publicly address the most troubling aspects of the Cummins ouster and Griffin appointment. We look forward to a fuller explanation of why a concededly well-performing prosecutor was terminated in favor of such a partisan figure:

- In particular, when was the decision made to appoint Tim Griffin to replace Bud Cummins?

OAG000001335

- Specifically, who lobbied on behalf of Tim Griffin's appointment, both inside and outside the Administration?
- Why was Bud Cummins told to resign in June of 2006, when the other dismissed officials were told in December of 2006? Was the reason to give the replacement, Tim Griffin, a chance to become ensconced at the U.S. Attorney's Office in Arkansas before making the appointment?
- In light of the unprecedented nature of the appointment, we are especially interested in understanding the role played by Karl Rove. In particular, what role did Karl Rove, with whom Griffin was closely associated, play in the decision to appoint Griffin?

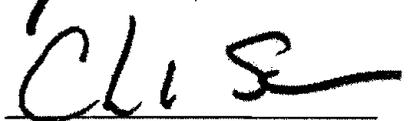
Given that Mr. Rove was himself apparently still being investigated by a U.S. Attorney in June of 2006, it would be extremely untoward if he were at the same time leading the charge to oust a sitting U.S. Attorney and install his own former aide.

These questions go to the heart of the public's confidence in the fair administration of justice. Once appointed, U.S. Attorneys, perhaps more than any other public servant, must be above politics and beyond reproach; they must be seen to enforce the rule of law without fear or favor.

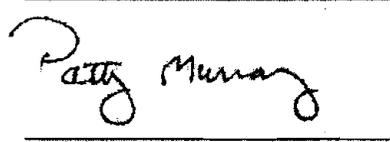
Given the issues raised in the recent hearing, we are naturally concerned about the Administration's professed commitment to keeping politics out of the Department of Justice. We hope that you will quickly put those concerns to rest.

Sincerely,









Beck, Michael (OAG)

From: Beck, Michael (OAG)
Sent: Friday, February 09, 2007 4:27 AM
To:
Subject: Fw: 2 of 2 -- U.S. Attorney issue

Attachments: Document.pdf

-----Original Message-----

From: Sampson, Kyle
To: Beck, Michael (OAG)
Sent: Thu Feb 08 16:31:55 2007
Subject: 2 of 2 -- U.S. Attorney issue



Document.pdf (493
KB)

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To: Goodling, Monica; McNulty, Paul J; Elston, Michael (ODAG); Moschella, William; Hertling, Richard; Scolinos, Tasia
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* Hertling should sign.

From: Scott-Finan, Nancy
Sent: Thursday, February 08, 2007 1:25 PM
To: Sampson, Kyle; Goodling, Monica; Elston, Michael (ODAG); Moschella, William; Hertling, Richard; Seidel, Rebecca; Scolinos, Tasia
Cc: Cabral, Catalina; Long, Linda E; Green, Saralene E
Subject: FW: Letter to Gonzales 2.8.07

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United States Senate

WASHINGTON, DC 20510

February 8, 2007

The Honorable Alberto R. Gonzales
Attorney General of the United States
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001

Dear Attorney General Gonzales:

As you know, the Senate Judiciary Committee held a hearing this week to examine the growing politicization of the hiring and firing of United States Attorneys, our nation's top federal prosecutors.

Unfortunately, the hearing only served to intensify, rather than assuage, our concerns, particularly given the circumstances surrounding the ouster of Bud Cummins, who was the U.S. Attorney in the Eastern District of Arkansas until last December.

When you testified before the Committee on January 18, 2007, you stated unequivocally that you "would never, ever make a change in a U.S. Attorney position for political reasons." In a stunning admission, however, Deputy Attorney General Paul McNulty, in his own testimony on February 6th, acknowledged that Mr. Cummins was pushed out for no reason other than to install – without Senate confirmation – Tim Griffin, a former aide to Karl Rove. At the time, Mr. Griffin had minimal federal prosecution experience, but was highly skilled in opposition research and partisan attacks for the Republican National Committee. This strikes us as a quintessentially "political" reason to make a change.

We recognize, of course, that United States Attorneys serve at the pleasure of the President, but as several highly respected and distinguished former officials of the Department of Justice have noted, the dismissal of a well-respected U.S. Attorney simply to reward an inexperienced partisan is unprecedented.

Although Senators expect soon to be briefed privately about the alleged performance issues of several other U.S. Attorneys, we hope that you will quickly and publicly address the most troubling aspects of the Cummins ouster and Griffin appointment. We look forward to a fuller explanation of why a concededly well-performing prosecutor was terminated in favor of such a partisan figure:

- In particular, when was the decision made to appoint Tim Griffin to replace Bud Cummins?

OAG000001339

- Specifically, who lobbied on behalf of Tim Griffin's appointment, both inside and outside the Administration?
- Why was Bud Cummins told to resign in June of 2006, when the other dismissed officials were told in December of 2006? Was the reason to give the replacement, Tim Griffin, a chance to become ensconced at the U.S. Attorney's Office in Arkansas before making the appointment?
- In light of the unprecedented nature of the appointment, we are especially interested in understanding the role played by Karl Rove. In particular, what role did Karl Rove, with whom Griffin was closely associated, play in the decision to appoint Griffin?

Given that Mr. Rove was himself apparently still being investigated by a U.S. Attorney in June of 2006, it would be extremely untoward if he were at the same time leading the charge to oust a sitting U.S. Attorney and install his own former aide.

These questions go to the heart of the public's confidence in the fair administration of justice. Once appointed, U.S. Attorneys, perhaps more than any other public servant, must be above politics and beyond reproach; they must be seen to enforce the rule of law without fear or favor.

Given the issues raised in the recent hearing, we are naturally concerned about the Administration's professed commitment to keeping politics out of the Department of Justice. We hope that you will quickly put those concerns to rest.

Sincerely,

Garry
CL

Dick
Patty Murray

Beck, Michael (OAG)

From: Sampson, Kyle
Sent: Thursday, March 01, 2007 12:03 PM
To: Beck, Michael (OAG)
Subject: Fw: Draft HJC testimony

Attachments: DRAFT Moschella Testimony.doc

Please print for me.

-----Original Message-----

From: Scott-Finan, Nancy
To: Moschella, William; Elston, Michael (ODAG); Sampson, Kyle; Goodling, Monica; Hertling, Richard
CC: Nowacki, John (USAE0); Silas, Adrien
Sent: Thu Mar 01 11:34:00 2007
Subject: FW: Draft HJC testimony



DRAFT Moschella
Testimony.doc ...

I am re-circulating for comments/additions the revised testimony that was sent around on Tuesday evening.



Department of Justice

STATEMENT

OF

**WILLIAM E. MOSCHELLA
PRINCIPAL ASSOCIATE DEPUTY ATTORNEY GENERAL
UNITED STATES DEPARTMENT OF JUSTICE**

BEFORE THE

**COMMITTEE ON THE JUDICIARY
UNITED STATES HOUSE OF REPRESENTATIVES**

CONCERNING

**“H.R. 580, RESTORING CHECKS AND BALANCES IN THE NOMINATION
PROCESS OF U.S. ATTORNEYS”**

PRESENTED ON

MARCH 6, 2007

**Testimony
of**

**William E. Moschella
Principal Associate Deputy Attorney General
U.S. Department of Justice**

**Committee on the Judiciary
United States House of Representatives**

“H.R. 580, Restoring Checks and Balances in the Nomination Process of U.S. Attorneys”

March 6, 2007

Chairman Conyers, Congressman Smith, and members of the Committee, thank you for the invitation to discuss the importance of the Justice Department’s United States Attorneys.

The Department of Justice strongly opposes H.R. 580, the “Preserving United States Attorneys Independence Act of 2007.” H.R. 580 would significantly alter the manner in which U.S. Attorney vacancies are filled by completely removing the Attorney General’s authority to appoint interim U.S. Attorneys and allocating that authority to an entirely different branch of government. Under H.R. 580, the Attorney General would have no authority whatsoever to fill a U.S. Attorney vacancy on an interim basis—even one of short duration. Instead, only the district court would have this authority.

As the chief federal law-enforcement officers in their districts, U.S. Attorneys represent the Attorney General and the Department of Justice before Americans in their district. U.S. Attorneys are not only prosecutors, however; they are government officials charged with managing and implementing the policies and

priorities of the Executive Branch. The Attorney General has set forth key priorities for the Department of Justice, and in each of their districts, U.S. Attorneys lead the Department's efforts to protect America from terrorist attacks and fight violent crime, combat illegal drug trafficking, ensure the integrity of government and the marketplace, enforce our immigration laws, and prosecute crimes that endanger children and families—including child pornography, obscenity, and human trafficking.

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. 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. This accountability ensures compliance with Department policy, and is often recognized by the Members of Congress who write to the Department to encourage various U.S. Attorneys' Offices to focus on a particular area of law enforcement.

The Attorney General and the Deputy Attorney General 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 and should be expected, particularly after a U.S. Attorney's four-year term has expired. 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. Of the U.S. Attorneys whose resignations have been the subject of recent discussion, each one had served longer than four years prior to being asked to resign.

Given the reality of turnover among the United States Attorneys, it is actually the career investigators and prosecutors who 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. For example, in the District of Minnesota and the Northern District of Iowa, the First Assistant took federal retirement at or near the same time that the U.S. Attorney resigned, which required the Department to select another official to lead the office.

At no time, however, has the Administration sought to avoid the confirmation process in the Senate 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. Not once. 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 to select candidates for nomination. The appointment of U.S. Attorneys by and with the advice and consent of the Senate is unquestionably the appointment method preferred by the Senate, and it is unquestionably the appointment method preferred by the Administration.

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 16 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 16 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 remaining positions—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 vacancies, the office of the U.S. Attorney must be filled on an interim basis. To do so, the Department relies on the Vacancy Reform Act (“VRA”), 5 U.S.C. § 3345(a)(1), when the First Assistant is selected to lead the office, or the Attorney General’s appointment authority in 28 U.S.C. § 546 when another Department employee is chosen. Under the VRA, the First Assistant may serve in an acting capacity for only 210 days, unless a nomination is made during that period. Under an Attorney General appointment, the interim U.S. Attorney serves until a nominee is confirmed the Senate. There is no other statutory authority for filling such a vacancy, and thus the use of the Attorney General’s appointment authority, as amended last year, signals nothing other than a decision to have an interim U.S. Attorney who is not the First Assistant. It does not indicate an intention to avoid the confirmation process, as some have suggested.

H.R. 580 would supersede last year’s amendment to 28 U.S.C. § 546 that authorized the Attorney General to appoint an interim U.S. Attorney to serve until a person fills the position by being confirmed by the

Senate and appointed by the President. Last year's amendment was intended to ensure continuity of operations in the event of a U.S. Attorney vacancy that lasts longer than expected. H.R. 580 would institute a new appointment regime without allowing the Attorney General's authority under current law to be tested in practice.

Prior to last year's amendment, the Attorney General could appoint an interim U.S. Attorney for the first 120 days after a vacancy arose; thereafter, the district court was authorized to appoint an interim U.S. Attorney. In cases where a Senate-confirmed U.S. Attorney could not be appointed within 120 days, the limitation on the Attorney General's appointment authority resulted in recurring problems. Some district courts recognized the conflicts inherent in the appointment of an interim U.S. Attorney who would then have matters before the court—not to mention the oddity of one branch of government appointing officers of another—and simply refused to exercise the appointment authority. In those cases, the Attorney General was consequently required to make multiple successive 120-day interim appointments. Other district courts ignored the inherent conflicts and sought to appoint as interim U.S. Attorneys wholly unacceptable candidates who lacked the required clearances or appropriate qualifications.

In most cases, of course, the district court simply appointed the Attorney General's choice as interim U.S. Attorney, revealing the fact that most judges recognized the importance of appointing an interim U.S. Attorney who enjoys the confidence of the Attorney General. In other words, the most important factor in the selection of past court-appointed interim U.S. Attorneys was the Attorney General's recommendation. By foreclosing the possibility of judicial appointment of interim U.S. Attorneys unacceptable to the Administration, last year's amendment to Section 546 appropriately eliminated a procedure that created unnecessary problems

without any apparent benefit.

The Department's principal objection to H.R. 580 is that it would be inappropriate, and inconsistent with sound separation of powers principles, to vest federal courts with the authority to appoint a critical Executive Branch officer such as a United States Attorney under the circumstances described in the bill. We are aware of no other agency where federal judges—members of a separate branch of government—appoint on an interim basis senior, policymaking staff of an agency. Such a judicial appointee would have authority for litigating the entire federal criminal and civil docket before the very district court to whom he or she was beholden for the appointment. This arrangement, at a minimum, gives rise to an appearance of potential conflict that undermines the performance or perceived performance of both the Executive and Judicial Branches. A judge may be inclined to select a U.S. Attorney who shares the judge's ideological or prosecutorial philosophy. Or a judge may select a prosecutor apt to settle cases and enter plea bargains, so as to preserve judicial resources. *See Wiener, Inter-Branch Appointments After the Independent Counsel: Court Appointment of United States Attorneys*, 86 Minn. L. Rev. 363, 428 (2001) (concluding that court appointment of interim U.S. Attorneys is unconstitutional).

Prosecutorial authority should be exercised by the Executive Branch in a unified manner, consistent with the application of criminal enforcement policy under the Attorney General. Court-appointed U.S. Attorneys would be at least as accountable to the chief judge of the district court as to the Attorney General, which could, in some circumstances become untenable. In no context is accountability more important to our society than on the front lines of law enforcement and the exercise of prosecutorial discretion, and the Department contends that the chief prosecutor should be accountable to the Attorney General, the President, and ultimately the people.

H.R. 580 appears to be aimed at addressing a problem that has not arisen. The Administration has repeatedly demonstrated its commitment to having a Senate-confirmed U.S. Attorney in every federal district. As noted, when a vacancy in the office of U.S. Attorney occurs, the Department typically looks first to the First Assistant or another senior manager in the office to serve as an acting or interim U.S. Attorney. Where neither the First Assistant nor another senior manager is able or willing to serve as an acting or interim U.S. Attorney, or where their service would not be appropriate under the circumstances, the Administration has looked to other Department employees to serve temporarily. No matter which way a U.S. Attorney is temporarily appointed, the Administration has consistently sought, and will continue to seek, to fill the vacancy—in consultation with home-State Senators—with a presidentially-nominated and Senate-confirmed nominee.

Thank you again for the opportunity to testify, and I look forward to answering the Committee's questions.

Beck, Michael (OAG)

From: Beck, Michael (OAG)
Sent: Thursday, March 01, 2007 12:16 PM
To:
Subject: Fw: Draft HJC testimony
Attachments: DRAFT Moschella Testimony.doc

-----Original Message-----

From: Sampson, Kyle
To: Beck, Michael (OAG)
Sent: Thu Mar 01 12:03:11 2007
Subject: Fw: Draft HJC testimony

Please print for me.

-----Original Message-----

From: Scott-Finan, Nancy
To: Moschella, William; Elston, Michael (ODAG); Sampson, Kyle; Goodling, Monica; Hertling, Richard
CC: Nowacki, John (USAE0); Silas, Adrien
Sent: Thu Mar 01 11:34:00 2007
Subject: FW: Draft HJC testimony



DRAFT Moschella
Testimony.doc ...

I am recirculating for comments/additions the revised testimony that was sent around on Tuesday evening.



Department of Justice

STATEMENT

OF

**WILLIAM E. MOSCHELLA
PRINCIPAL ASSOCIATE DEPUTY ATTORNEY GENERAL
UNITED STATES DEPARTMENT OF JUSTICE**

BEFORE THE

**COMMITTEE ON THE JUDICIARY
UNITED STATES HOUSE OF REPRESENTATIVES**

CONCERNING

**"H.R. 580, RESTORING CHECKS AND BALANCES IN THE NOMINATION
PROCESS OF U.S. ATTORNEYS"**

PRESENTED ON

MARCH 6, 2007

**Testimony
of**

**William E. Moschella
Principal Associate Deputy Attorney General
U.S. Department of Justice**

**Committee on the Judiciary
United States House of Representatives**

“H.R. 580, Restoring Checks and Balances in the Nomination Process of U.S. Attorneys”

March 6, 2007

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Thank you again for the opportunity to testify, and I look forward to answering the Committee's questions.

Sampson, Kyle

From: Sampson, Kyle
Sent: Wednesday, December 13, 2006 2:25 PM
To: Battle, Michael (USAE0)
Cc: McNulty, Paul J; Elston, Michael (ODAG); Moschella, William; Mercer, William W; Goodling, Monica; Sutton, Johnny K. (USATXW)
Subject: USA replacements

Mike, Bill Kelley called to report that they are weathering two main complaints: in making the calls, Battle (1) wasn't clear whether the USAs in question would be permitted to resign, or instead were being fired; and (2) was too abrupt. Bill seemed nonplussed by the complaints, but nevertheless passed them on to me.

Perhaps a second round of calls from you, Mike, to the relevant USAs is in order? Talkers would be something like:

- I wanted to be sure you understood that DOJ intends not to say anything about your leaving, but instead allow you to announce your resignation and the reasons for it;
- We want to work with you over the next six weeks to ensure a smooth transition; and
- It's in our interest for you to land on your feet and maintain our good relations with the Department -- how can I help?

Perhaps this is a bad idea? Thoughts?

Kyle Sampson
Chief of Staff
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530
(202) 514-2001 wk.
(202) 305-5289 cell
kyle.sampson@usdoj.gov

Tracking:	Recipient	Read
	Battle, Michael (USAE0)	
	McNulty, Paul J	Read: 12/13/2006 4:13 PM
	Elston, Michael (ODAG)	Read: 12/13/2006 3:35 PM
	Moschella, William	Read: 12/13/2006 3:50 PM
	Mercer, William W	Read: 12/13/2006 2:57 PM
	Goodling, Monica	
	Sutton, Johnny K. (USATXW)	