

# An Investigation into the Removal of Nine U.S. Attorneys in 2006



**U.S. Department of Justice  
Office of the Inspector General**



**U.S. Department of Justice  
Office of Professional Responsibility**

September 2008

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## **CHAPTER ONE INTRODUCTION**

On December 7, 2006, at the direction of senior Department of Justice (Department) officials, seven U.S. Attorneys were told to resign from their positions.<sup>1</sup> Two other U.S. Attorneys had been told to resign earlier in 2006.<sup>2</sup> When these removals became public in late 2006 and early 2007, members of Congress began to raise questions and concerns about the reasons for the removals, including whether they were intended to influence certain prosecutions.

Beginning in March 2007, the Office of the Inspector General (OIG) and the Office of Professional Responsibility (OPR) conducted this joint investigation into the removals of these U.S. Attorneys.<sup>3</sup> Our investigation focused on the reasons for the removals of the U.S. Attorneys and whether they were removed for partisan political purposes, or to influence an investigation or prosecution, or to retaliate for their actions in any specific investigation or prosecution. We also examined the process by which the U.S. Attorneys were selected for removal, and we sought to identify the persons involved in those decisions, whether in the Department, the White House, Congress, or elsewhere. In addition, we investigated whether the Attorney General or other Department officials made any false or misleading statements to Congress or the public concerning the removals, and whether they attempted to influence the testimony of other witnesses. Finally, we examined whether the Attorney General or others intended to bypass the Senate confirmation process in the replacement of any removed U.S. Attorney through the use of the Attorney General's appointment power for Interim U.S. Attorneys.

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<sup>1</sup> The U.S. Attorneys were Daniel Bogden, Paul Charlton, Margaret Chiara, David Iglesias, Carol Lam, John McKay, and Kevin Ryan.

<sup>2</sup> On January 24, 2006, Todd Graves was told to resign; on June 14, 2006, H.E. "Bud" Cummins was told to resign.

<sup>3</sup> In addition, we also conducted joint investigations of three other matters related to the subject matter of this investigation. We investigated allegations that the Department's former White House Liaison, Monica Goodling, and others in the Office of the Attorney General used political considerations to assess candidates for career positions in the Department, and on July 28, 2008, we issued a report describing our findings. We also investigated allegations that officials overseeing the Department's Honors Program and Summer Law Intern Program used political considerations in assessing candidates for those programs, and on June 24, 2008, we issued a report describing our findings in that investigation. In addition, we investigated allegations that former Civil Rights Division Assistant Attorney General (AAG) Bradley Schlozman and others used political considerations in hiring and personnel decisions in the Civil Rights Division. We will issue a separate report describing the results of that investigation.

## **I. Methodology of the Investigation**

During the course of our investigation, we conducted approximately 90 interviews.<sup>4</sup> Among the witnesses we interviewed were former Attorney General Alberto Gonzales; former Deputy Attorneys General Paul McNulty, James Comey, and Larry Thompson; and numerous current and former employees of the Office of the Attorney General (OAG), the Office of the Deputy Attorney General (ODAG), and the Executive Office for United States Attorneys (EOUSA). We interviewed eight of the nine U.S. Attorneys who were removed – Daniel Bogden, Paul Charlton, Margaret Chiara, Bud Cummins, Todd Graves, David Iglesias, John McKay, and Carol Lam. The ninth U.S. Attorney, Kevin Ryan, declined our request for an interview.

We also attempted to interview Monica Goodling, a former counsel to Attorney General Gonzales and the Department's White House Liaison. She declined to cooperate with our investigation. However, on May 23, 2007, Goodling testified before the United States House of Representatives Committee on the Judiciary pursuant to a grant of immunity issued by the United States District Court for the District of Columbia, and we reviewed the transcript of that hearing.

We also attempted to interview White House staff who may have played a role in the removals of the U.S. Attorneys. We discussed our request with the Office of Counsel to the President (White House Counsel's Office), and that office encouraged current and former White House employees to agree to be interviewed by us. Several former White House staff members agreed to be interviewed, including Deputy White House Counsel David Leitch; Director of Political Affairs Sara Taylor; Deputy Director of Political Affairs Scott Jennings; Associate White House Counsel Dabney Friedrich, Christopher Oprison, and Grant Dixon; and Paralegal Colin Newman. However, other former White House staff, including White House Counsel Harriet Miers, Assistant to the President and Deputy Chief of Staff and Senior Advisor Karl Rove, Deputy White House Counsel William Kelley, and Associate White House Counsel Richard Klingler, declined our request to interview them.

Miers's attorney told us that although he understood that considerations of executive privilege were not an issue between the Department of Justice and the White House since both are part of the Executive Branch, an interview with us might undermine Miers's ability to rely on the instructions she received from the White House directing her to refuse to appear for Congressional testimony. Rove's attorney advised us after consultation with Rove that he

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<sup>4</sup> Some of the people we interviewed were also interviewed in connection with our other joint investigations described in footnote 3.

declined our request for an interview. We were informed by the White House Counsel's Office that both Kelley and Klingler also declined our request.

We also interviewed several members of Congress and congressional staff regarding the removals. We interviewed Congresswoman Heather Wilson in relation to Iglesias's removal. We interviewed Congressman "Doc" Hastings and his former Chief of Staff, Ed Cassidy, in relation to the removal of McKay. We requested an interview with Senator Christopher S. "Kit" Bond in relation to Graves's removal, and he provided us with a written statement.

We also attempted to interview Senator Pete V. Domenici and his Chief of Staff, Steven Bell, about the removal of Iglesias and any conversations they had with the White House or the Department related to the removal. However, Senator Domenici and Bell declined our requests for an interview.<sup>5</sup>

In our investigation, we also reviewed several thousand electronic and hard copy documents, including documents the Department produced in response to Congressional investigations of the U.S. Attorney removals.<sup>6</sup> We obtained and searched the e-mail accounts of numerous current and former Department employees in, among other Department components, the Attorney General's Office, the Deputy Attorney General's Office, and EOUSA.

We also requested and received documents from the White House showing communications between the White House and outside persons and entities, including the Department of Justice, related to the removal of the U.S. Attorneys. However, the White House Counsel's Office declined to provide internal e-mails or internal documents related to the U.S. Attorney removals, stating that these documents were protected from disclosure because, according to the White House Counsel's Office, such material "implicate[s] White House confidentiality interests of a very high order. . . ." The White House did not formally assert executive privilege as grounds for withholding the material from us, but asserted that its "internal communications . . . are, in our judgment, covered by the deliberative process and/or presidential communications components of executive privilege in the event of a demand for them by Congress."

As we discuss in more detail in Chapter Three, in the course of our investigation we also learned that in early March 2007 Associate White House Counsel Michael Scudder had interviewed Department and White House

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<sup>5</sup> Domenici declined to be interviewed, but said he would provide written answers to questions through his attorney. We declined this offer because we did not believe it would be a reliable or appropriate investigative method under the circumstances.

<sup>6</sup> Some of these documents were produced to Congress in redacted form. However, we had access to and reviewed these documents in unredacted form.

personnel at the request of White House Counsel Fred Fielding in an effort to understand the circumstances surrounding the U.S. Attorney removals and be in a position to respond to this issue.<sup>7</sup> Based on his interviews, Scudder created a memorandum for Fielding containing a timeline of events, which was provided to the Department of Justice's Office of Legal Counsel (OLC) and to the Attorney General. Because the Scudder chronology appeared to contain information we had not obtained elsewhere in our investigation, we requested that OLC produce a complete copy of the final Scudder memorandum and all drafts of the memorandum. OLC declined to produce the document, stating that the White House Counsel's Office directed it not to do so. The White House Counsel's Office agreed to provide us with one paragraph in the memorandum related to information about Iglesias's removal, and two paragraphs containing information Rove provided to Scudder. White House Counsel notified us that these paragraphs contained information similar to previous public statements the White House made in the press. The White House Counsel's Office declined to provide to us a full copy of the memorandum, stating that it has a "very strong confidentiality interest" in not providing documents that were prepared to advise and assist the President and his advisors "in response to a public, ongoing, and significant controversy."<sup>8</sup>

The White House Counsel's Office eventually provided to us a heavily redacted version of the document, but the redactions made the document virtually worthless as an investigative tool. We disagree with the White House's rationale for withholding this document, particularly since the document was shared with OLC and e-mail records also show that drafts had been provided to former Attorney General Gonzales. We also disagree with the White House Counsel's Office decision not to provide us White House internal documents related to the U.S. Attorney removals and, as we discuss below, believe it hindered our investigation.

## **II. Organization of this Report**

In Chapter Two of this report, we provide background information about the jurisdiction and duties of U.S. Attorneys, how they are selected and evaluated, and their position in the Department's organizational structure.

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<sup>7</sup> We learned about this document from the Department's Office of Legal Counsel. In response to our document request, OLC had provided to us its final chronology, deleting all references to the Scudder chronology and all information derived from that document. When we obtained earlier drafts of the OLC chronology, we saw references to the Scudder memorandum as support for certain propositions in the chronology, including alleged communications between a member of Congress and the White House regarding Iglesias.

<sup>8</sup> A copy of a letter from Emmet Flood, Special Counsel to the President, describing the reasons for the White House's decision is included in Appendix A.

In Chapter Three, we describe in detail the background leading to the removal of the U.S. Attorneys in 2006, including the genesis of the plan to replace them, the various modifications of the plan in 2005 through 2006, and the involvement of the White House and Department officials in the development of the plan. We then discuss the removals and events following the removals, including the initial Congressional and public focus on the removals, the Department's efforts to explain the removals, the public statements and testimony of senior Department officials about the reasons for the removals, and the Congressional hearings regarding the removals.

In Chapters Four through Twelve, we discuss in detail the circumstances surrounding the removal of each of the nine U.S. Attorneys. We examine the reasons the Department offered for each removal, the process by which the U.S. Attorneys were selected for removal, the process by which they were removed, and our conclusions regarding their removal.

In Chapter Thirteen, we provide our conclusions about the process by which the U.S. Attorneys were selected for removal and removed, the reasons proffered for removal, the actions of senior Department leaders in the removal process, and whether any Department employee made false or misleading statements to Congress or the public related to the removals.<sup>9</sup>

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<sup>9</sup> With the exception of the nine U.S. Attorneys who were removed in 2006, we do not discuss in detail all of the U.S. Attorneys Kyle Sampson or others at the Department may have considered for removal between 2005 and 2006. However, in describing the removal selection process, we identify those U.S. Attorneys Sampson specifically mentioned to the White House in removal lists and e-mail correspondence concerning the removals. We also note what Department officials told us about why these U.S. Attorneys ultimately were not removed.

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## CHAPTER TWO BACKGROUND

In this chapter, we briefly discuss the duties of U.S. Attorneys, how they are selected and evaluated, and their position in the Department's organizational hierarchy.

### I. U.S. Attorneys

There are 93 U.S. Attorneys throughout the United States, Puerto Rico, the Virgin Islands, Guam, and the Commonwealth of the Northern Mariana Islands. Under the supervision of the Attorney General, who has statutory authority over all litigation in which the United States or any of its agencies is a party, U.S. Attorneys serve as the federal government's chief law enforcement officers in their districts.<sup>10</sup> See U.S. Attorney's Manual (USAM) § 3-2.100. U.S. Attorneys must interpret and implement the policies of the Department in the exercise of their prosecutorial discretion. As stated in the Department's USAM, a U.S. Attorney's "professional abilities and the need for their impartiality in administering justice directly affect the public's perception of federal law enforcement." USAM § 3-2.140.

U.S. Attorneys are appointed by the President with the advice and consent of the Senate. See 28 U.S.C. § 541. Because they are Presidential appointees and not covered by standard civil service protections, U.S. Attorneys are subject to removal at the will of the President.<sup>11</sup> U.S. Attorneys are appointed for 4-year terms, although upon expiration of their 4-year term they typically remain in office until they choose to leave or there is a change in Administration. USAM § 3-2.120.

Prior to March 2006, in the event of a vacancy in a U.S. Attorney's position, the First Assistant U.S. Attorney became the Acting U.S. Attorney, pending confirmation of a Presidential appointee, for a maximum 210-day period pursuant to 5 U.S.C. § 3345(a)(1). Alternatively, the Attorney General could appoint an Interim U.S. Attorney for that district to serve for a maximum of 120 days. 28 U.S.C. § 546(a) and (c). After 120 days, the federal district court could either reappoint the Interim U.S. Attorney or make its own

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<sup>10</sup> One U.S. Attorney is assigned to each of the judicial districts, with the exception of Guam and the Commonwealth of the Northern Mariana Islands where a single U.S. Attorney serves both districts.

<sup>11</sup> Presidential discretion under the statute is broad but not unlimited. The President has the discretion to remove a U.S. Attorney when "he regards it for the public good." See, e.g., *Parsons v. United States*, 167 U.S. 324, 343 (1897). Since a removal for an illegal or improper purpose would be contrary to the "public good," it would be impermissible.

appointment to serve until the vacancy is filled through Senate confirmation of a Presidential appointment. *See* 28 U.S.C. § 546 (c) and (d).

At the request of the Department, Congress enacted amendments to the USA Patriot Act in March 2006 which eliminated the district court from the process, removed the 120-day time limit, and permitted the Interim U.S. Attorney appointed by the Attorney General to serve until a Presidentially appointed U.S. Attorney was confirmed. *See* 28 U.S.C. § 546; Pub.L. 109-177, § 502.

As discussed in Chapter Three, in response to the events described in this report, in June 2007 Congress repealed this amendment. Therefore, according to 28 U.S.C. § 546, an Interim U.S. Attorney appointed by the Attorney General may serve up to 120 days or until the confirmation of a Presidentially appointed U.S. Attorney. If an Interim U.S. Attorney appointment expires before a Presidentially appointed U.S. Attorney is confirmed, the federal district court for that district appoints an Interim U.S. Attorney to serve until the vacancy is filled. *See* 28 U.S.C. § 546; *see also* USAM at § 3-2.160.

## **II. Selection of U.S. Attorneys**

To identify candidates for U.S. Attorney positions, the White House typically seeks recommendations from political leaders in the various districts across the country. During the time period under review in this report, Senators from the President's party normally submitted recommendations for U.S. Attorney candidates to the White House Presidential Personnel Office (PPO) or to staff in the White House Office of Political Affairs (OPA). If no Republican Senator represented a particular district, White House staff contacted OPA's designated "political lead" for that district. After panel interviews with Department and White House officials, and Deputy Attorney General and Attorney General concurrence, a candidate's name was recommended to the President.

If the President approved the recommendation, the Federal Bureau of Investigation (FBI) began a background investigation of the candidate. The results of the background investigation were forwarded by EOUSA to the Department's White House Liaison. After review of the background investigation, the White House Counsel's Office would state whether the candidate was "cleared." If the candidate was cleared, the White House informed EOUSA, which sent the nomination paperwork to the White House. The White House would then publicly announce the President's "intent to nominate" the candidate, and the White House would forward the nomination paperwork to the Senate.

While their nominations were before the Senate, U.S. Attorney candidates were subject to a “blue slip” process by which their home state Senators approved or disapproved of the nomination. The blue slip is a form printed on blue paper that the Senate Judiciary Committee uses to allow the home state Senators to express their views concerning a presidential nominee. According to the Congressional Research Service (CRS), by Senate tradition if a home state Senator indicates disapproval or otherwise fails to note approval on the blue slip, the chair of the Senate Judiciary Committee normally declines to take action on the nomination out of deference to the home state Senator. *See* CRS Report for Congress, “U.S. Attorneys Who Have Served Less Than Full Four-Year Terms, 1981-2006,” February 22, 2007, p. 1.

### **III. Department Evaluation and Interaction with U.S. Attorneys**

Appendix B contains a chart of the Department’s organizational structure.

According to federal regulation, the Attorney General supervises and directs the administration and operation of the Department of Justice, including the U.S. Attorneys’ Offices. *See* 28 C.F.R. § 0.5. The Deputy Attorney General assists the Attorney General in providing overall supervision and direction to all organizational units of the Department, including the U.S. Attorneys’ Offices. *See* 28 C.F.R. § 0.15. The Deputy Attorney General is authorized to exercise all the power and authority of the Attorney General, except where such power or authority is prohibited by law from delegation or has been delegated to another official. In the absence of the Attorney General, the Deputy Attorney General acts as the Attorney General. *See* 28 C.F.R. § 0.15. The Deputy Attorney General oversees the day-to-day operations of the Department of Justice and is the direct supervisor of U.S. Attorneys.

The Executive Office for United States Attorneys performs two primary functions with respect to the U.S. Attorneys’ Offices: (1) evaluating the performance of the U.S. Attorneys’ Offices, making appropriate reports and taking corrective action where necessary; and (2) facilitating coordination between the U.S. Attorneys’ Offices and other organizational units of the Department of Justice. *See* 28 C.F.R. § 0.22 (a)(1) and (2). With respect to the first function, periodic performance evaluations of U.S. Attorneys’ Offices are conducted by EOUSA’s Evaluation and Review Staff (EARS).

During EARS reviews, a U.S. Attorney’s Office performance evaluation is conducted over a period of 1 week by a team of experienced Assistant U.S. Attorneys (AUSAs) and administrative and financial litigation personnel from other U.S. Attorneys’ Offices. Each fiscal year, EARS conducts evaluations in approximately one fourth of the U.S. Attorneys’ Offices. Thus, any given U.S. Attorney’s Office should be evaluated every 3 to 4 years.

EOUSA's evaluation program serves various purposes, including providing on-site management assistance to U.S. Attorneys and assuring compliance with Department policies and programs. The program also serves as a mechanism by which evaluators can share ideas and best practices with the U.S. Attorneys' Offices.

According to the Chief of Staff and Deputy Director of EOUSA, the evaluation program also provides an opportunity for peers to evaluate peers in an objective manner. The evaluators, who are neither auditors nor inspectors, also make recommendations for improving the operation of the U.S. Attorney's Office.

Following the on-site EARS evaluation of a U.S. Attorney's Office, the EARS team leader prepares a document entitled "Draft Significant Observations" for the Director of EOUSA, who in turn provides the draft to the Deputy Attorney General but not to the U.S. Attorney. A "Follow-up Program" includes follow-up visits to the U.S. Attorney's Office by evaluators other than those who participated in the initial evaluation and EOUSA personnel. Follow-up teams verify corrective actions and provide needed assistance to the offices.

After completion of the follow-up review, the EARS staff produces a "Final Evaluation Report," consisting of a summary of the legal and administrative reports and the U.S. Attorney's response to those reports. The Director of EOUSA provides the Final Evaluation Report to the Deputy Attorney General and the U.S. Attorney.

Allegations of misconduct by U.S. Attorneys are generally investigated by either the OIG or OPR, depending on the nature of the alleged misconduct.<sup>12</sup> As presidential appointees, U.S. Attorneys are not subject to discipline or removal by the Department without the President's approval. In cases in which the Deputy Attorney General and the Attorney General conclude that removal is warranted, they normally request approval from the White House Counsel to ask for the U.S. Attorney's resignation. If the U.S. Attorney refuses to submit a resignation, the President can dismiss the U.S. Attorney.

#### **IV. Backgrounds of Department Officials**

In this section, we briefly summarize the backgrounds and duties of those individuals who had a major role in the removal of the U.S. Attorneys at issue in this review and in the Department's response to those removals.

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<sup>12</sup> OPR has jurisdiction to investigate allegations against U.S. Attorneys that involve the exercise of their authority "to investigate, litigate, or provide legal advice." The OIG has jurisdiction to investigate all other allegations against U.S. Attorneys. See 5 U.S.C. App. 3 § 8E.

Appendix C identifies the Department's senior managers at the time of the events discussed in this report.

**A. Alberto Gonzales**

Alberto Gonzales graduated from Rice University in 1979 and Harvard Law School in 1982. He began his legal career in private practice in 1982 at the law firm of Vinson and Elkins, where he became a partner. In 1994, he was appointed General Counsel to Governor Bush. In 1997, Gonzales was appointed Secretary of State for Texas. Gonzales also served as a Justice of the Supreme Court of Texas from 1999 to until 2001, when he became White House Counsel to President Bush. Gonzales served as White House Counsel until February 2005, when he was confirmed as Attorney General of the United States. Gonzales resigned as the Attorney General on August 27, 2007.

**B. Kyle Sampson**

Kyle Sampson graduated from Brigham Young University in 1993 and from the University of Chicago Law School in 1996. After law school, he served as a federal appellate court clerk, and then worked for 2 years in a private law firm in Salt Lake City. In 1999, he became a Majority Counsel to the U.S. Senate Committee on the Judiciary, where, among other things, he worked on the nominations of candidates for political positions in the Department of Justice. In 2001, Sampson moved to the White House as Special Assistant to the President and Associate Director for Presidential Personnel where he handled, among other duties, presidential appointments at the Department of Justice. Later in 2001 and continuing until 2003, Sampson served as Associate Counsel to the President. During that time, Sampson worked on legislative, policy, and environmental matters.

In August 2003, Sampson moved to the Department of Justice, where he first served as Counselor to Attorney General John Ashcroft. In February 2005, Sampson became Deputy Chief of Staff to Attorney General Gonzales, and in September 2005 he became Chief of Staff to the Attorney General. He remained in that position until his resignation from the Department in March 2007.

**C. Monica Goodling**

Monica Goodling graduated from Messiah College in 1995 and from Regent University School of Law in 1999. From 1999 to February 2002, Goodling worked at the Republican National Committee as a research analyst, senior analyst, and deputy director for research and strategic planning.

In February 2002, Goodling began work in a political position in the Department's Office of Public Affairs. In September 2004, Goodling was detailed for 6 months as a Special Assistant U.S. Attorney in the U.S.

Attorney's Office in the Eastern District of Virginia. In March 2005, Goodling was appointed as the political Deputy Director in EOUSA. According to her résumé, her responsibilities at EOUSA included oversight of and coordination between EOUSA and U.S. Attorneys' Offices across the country.

In October 2005, Goodling was appointed as Counselor to Attorney General Gonzales. In April 2006 she became the Department's White House Liaison and Senior Counsel to the Attorney General. Goodling's major responsibility as White House Liaison was to interview and process applicants for political positions in the Department, including U.S. Attorneys. Goodling remained in that position until she resigned in April 2007.

#### **D. Paul McNulty**

Paul McNulty graduated from Grove City College in 1980 and from Capital University School of Law in 1983. He began his legal career as Counsel for the House of Representatives' Committee on Standards of Official Conduct, where he served from 1983 to 1985. From 1985 to 1987, McNulty was Director of Government Affairs at the Legal Services Corporation. In 1987, he became Minority Counsel to the House Subcommittee on Crime.

McNulty joined the Department of Justice in 1990 as Deputy Director of the Office of Policy Development, and in 1991 he became the Director of the Department's Office of Policy and Communications.

McNulty worked for a private law firm in Washington from 1993 to 1995. He returned to work for Congress in 1995 as Chief Counsel to the House Subcommittee on Crime. He remained in that position until 1999 when he became Chief Counsel and Director of Legislative Operations for the House Majority Leader.

After serving on President Bush's transition team for the Department of Justice, McNulty was appointed Principal Associate Deputy Attorney General in January 2001. In September 2001, he was confirmed to be the U.S. Attorney for the Eastern District of Virginia. He served as U.S. Attorney until November 2005, when he became the Acting Deputy Attorney General. McNulty was confirmed as the Deputy Attorney General on March 17, 2006.

As Deputy Attorney General, McNulty was the U.S. Attorneys' immediate supervisor. He served as the Deputy Attorney General until his resignation in July 2007.

#### **E. Michael Elston**

Michael Elston graduated from Drake University in 1991 and Duke University School of Law in 1994. Following a 2-year federal appellate court clerkship, Elston went into private practice until 1999, when he became an

AUSA in the Northern District of Illinois. Elston subsequently served as an AUSA in the Eastern District of Virginia from April 2002 until December 2005, when he became Chief of Staff and Counselor to McNulty. Elston remained McNulty's Chief of Staff until his resignation in June 2007.

**F. David Margolis**

David Margolis is a career Associate Deputy Attorney General and the highest-ranking career attorney in the Department. Margolis graduated from Brown University in 1961 and Harvard Law School in 1964. He began his career with the Department in 1965 as an AUSA in the District of Connecticut. Beginning in 1969, he held a series of supervisory positions with the Organized Crime Section of the Criminal Division. In 1990, he became Acting Deputy Assistant Attorney General in the Criminal Division. In 1993, he was appointed as an Associate Deputy Attorney General and has remained in that position since that time.

Margolis's informal biography describes his duties as an Associate Deputy Attorney General to include acting as the liaison for the Deputy Attorney General with the FBI, the Criminal Division, and the U.S. Attorneys. Margolis is also normally responsible for recommending the Department's response in cases where the OIG or OPR make misconduct findings against high-level Department officials.

**G. William Mercer**

William Mercer graduated from the University of Montana in 1984 and received a master's degree in Public Administration from the Kennedy School of Government at Harvard University in 1988. Mercer then was a Presidential Management Intern in the Treasury Department's Office of Tax Policy from 1988 to 1989. Between 1989 and 1995, Mercer served in the Department of Justice as Counselor to the Assistant Attorney General and Senior Policy Analyst in the Office of Policy Development.

Mercer received a law degree from George Mason University School of Law in 1993. From 1994 to 2001, he worked as an AUSA in the District of Montana. He was confirmed as the U.S. Attorney in Montana in 2001.

Between June 2005 and July 2006, Mercer was the Principal Associate Deputy Attorney General while also serving as U.S. Attorney for Montana. In September 2006, Mercer was nominated to be Associate Attorney General. He served as Acting Associate Attorney General until June 2007, when he withdrew from consideration for the nomination. Mercer currently serves as the U.S. Attorney in Montana.

## **H. William Moschella**

William Moschella received an undergraduate degree from the University of Virginia in 1990 and a law degree from George Mason University School of Law in 1995. During and after law school, Moschella served in a variety of congressional staff positions, including Counsel to the House Committee on Government Reform, General Counsel to the House Committee on Rules, Chief Investigative Counsel to the House Committee on the Judiciary, and Chief Legislative Counsel and Parliamentarian to the House Committee on the Judiciary.

In May 2003, Moschella was confirmed as the Department of Justice's Assistant Attorney General for the Office of Legislative Affairs. In October 2006, Moschella was appointed Principal Associate Deputy Attorney General. He resigned from the Department in January 2008.

## **CHAPTER THREE FACTUAL OVERVIEW**

In this chapter, we provide a detailed chronology leading to the removals of the U.S. Attorneys, including the genesis of the plan and what we were able to discover about the White House's involvement in the plan. We discuss the selection process, the removal process, the reaction to the removals, and the Department's responses.

### **I. Development of U.S. Attorney Removal Lists**

As noted in Chapter Two, from January 2001 until October 2003 Kyle Sampson worked at the White House, first as a Special Assistant to the President in the Presidential Personnel Office and later as an Associate Counsel in the White House Counsel's Office. In his position in the Presidential Personnel Office, Sampson was responsible for, among other things, interviewing and recommending candidates for political appointments to positions in the Department of Justice. Sampson told us that, in that capacity, he participated in interviewing candidates for virtually all the U.S. Attorney positions filled during the first 9 months of the Bush Administration.

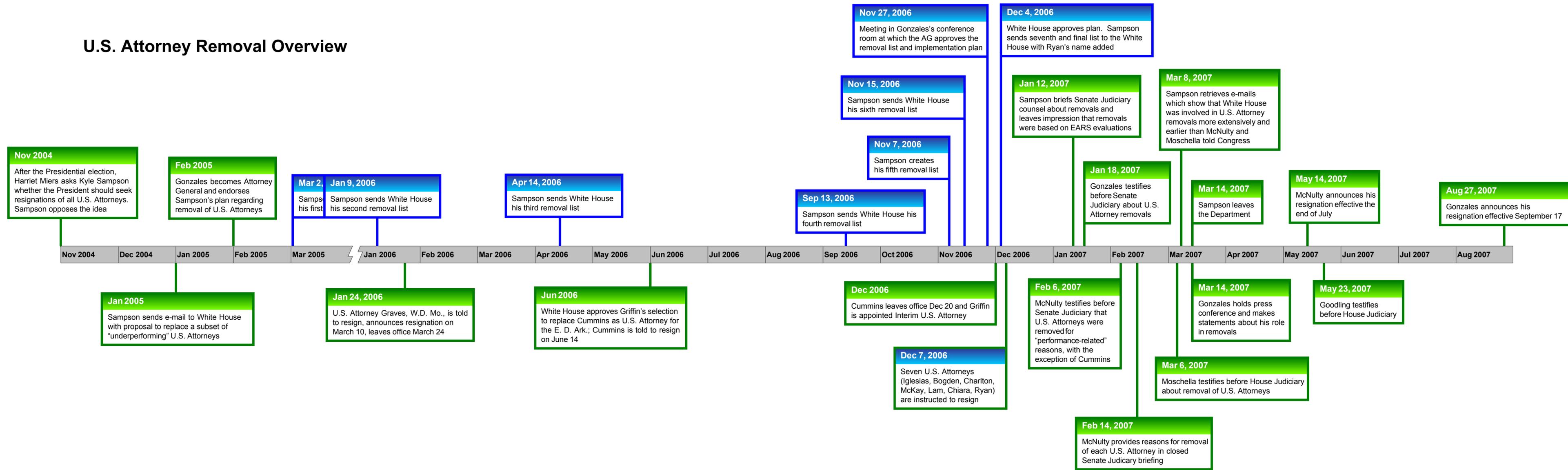
After moving to the White House Counsel's Office in September 2001, Sampson continued to be directly involved in the selection of U.S. Attorneys. He served on the interviewing panel for U.S. Attorneys and became the White House representative for U.S. Attorney appointments.<sup>13</sup> As part of his responsibilities, Sampson reviewed the résumés and questionnaires of all U.S. Attorney applicants and the background investigation files for these nominees.

In October 2003, Sampson joined the Department as Counselor to Attorney General John Ashcroft. In February 2005, when Attorney General Gonzales took office, Sampson became his Deputy Chief of Staff and later his Chief of Staff. Throughout his tenure in the Department, Sampson remained involved in the selection and appointment of U.S. Attorneys through his attendance at weekly judicial selection meetings at the White House during which U.S. Attorney appointments were decided.

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<sup>13</sup> Sampson said the interviewing panel for U.S. Attorneys generally included himself, an Associate White House Counsel with responsibility for the particular geographic area the potential candidate was being considered for, a person from the Presidential Personnel Office, David Margolis, the Director of EOUSA, and the Department's White House Liaison.

# U.S. Attorney Removal Overview



## **A. Genesis of Plan to Remove U.S. Attorneys**

We determined that the process to remove the U.S. Attorneys originated shortly after President Bush's re-election in November 2004.

In an e-mail on November 4, 2004, Susan Richmond, then the Department of Justice's White House Liaison, responded to requests from various Presidentially appointed personnel in the Department about guidance regarding the transition to the Bush Administration's second term. In the e-mail, which was sent to Department Presidentially appointed officials, including U.S. Attorneys, Richmond wrote that "the President has decided that he will not ask for letters of resignation." (Emphasis in original.) Richmond reminded the recipients of the e-mail, however, that "each of us serves at the pleasure of the President."

Although Richmond's November 4 e-mail notified the U.S. Attorneys that wholesale resignations would not be required, the issue of removal of certain U.S. Attorneys was being considered by the Administration. According to Sampson, sometime after the 2004 election White House Counsel Harriet Miers asked him whether the Administration should seek resignations from all 93 U.S. Attorneys as part of an idea to replace all Administration political appointees for the President's second term. Sampson said he told Miers that he thought it was not a good idea and he told other Department officials he "beat [it] back."<sup>14</sup> Sampson said he also told Miers he believed that all U.S. Attorneys had an expectation that they would at least serve their statutory 4-year term, and the terms did not begin to expire until fall 2005.

## **B. Process to Identify U.S. Attorneys for Removal**

In an e-mail on January 6, 2005, Deputy White House Counsel David Leitch forwarded to Sampson an e-mail from Office of White House Counsel Paralegal Colin Newman. The e-mail from Newman stated that "Karl Rove stopped by "to ask [Leitch] . . . 'how we planned to proceed regarding US Attorneys, whether we are going to allow all to stay, request resignations from all and accept only some of them, or selectively replace them, etc.'" In his forwarding e-mail to Sampson, Leitch proposed that they discuss the matter.

On January 9, 2005, Sampson replied by e-mail to Leitch stating that Sampson and the "Judge" [Gonzales] had discussed the matter a "couple of weeks ago." Sampson then shared with Leitch his "thoughts," which consisted of four points on the subject. First, Sampson pointed out that while U.S.

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<sup>14</sup> Miers was named by President Bush in November 2004 to succeed Alberto Gonzales as White House Counsel. Before becoming White House Counsel, Miers served in the Administration as Assistant to the President and Staff Secretary (2001-2003) and as Deputy Chief of Staff for Policy (2003-2004).

Attorneys serve at the “pleasure of the President,” they are appointed to 4-year terms. Sampson stated that none of the U.S. Attorneys had yet completed their 4-year terms, and it would be “weird” to ask them to leave before their terms were completed. Second, Sampson noted the “historical” practice of allowing U.S. Attorneys to complete their 4-year terms even after a party change in the Administration, notwithstanding the fact that the first Clinton and Bush Administrations deviated from that historical practice by removing their predecessor’s appointees without regard to the completion of their terms. Third, Sampson stated in the e-mail:

as an operational matter, we would like to replace 15-20 percent of the current U.S. Attorneys – the underperforming ones. (This is a rough guess; we might want to consider doing performance evaluations after Judge [Gonzales] comes on board.) The vast majority of U.S. Attorneys, 80-85 percent, I would guess, are doing a great job, are loyal Bushies, etc., etc. Due to the history, it would certainly send ripples through the U.S. Attorney community if we told folks that they got one term only (as a general matter, the Reagan U.S. Attorneys appointed in 1981 stayed on through the entire Reagan Administration; Bush41 even had to establish that Reagan-appointed U.S. Attorneys would not be permitted to continue on through the Bush41 Administration – indeed, even performance evaluations likely would create ripples, though this wouldn’t necessarily be a bad thing.<sup>15</sup>

Fourth, Sampson predicted that “as a political matter. . . I suspect that when push comes to shove, home-State Senators likely would resist wholesale (or even piecemeal) replacement of U.S. Attorneys they recommended. . .if Karl [Rove] thinks there would be political will to do it, then so do I.”

Sampson’s initial proposal to remove a percentage of U.S. Attorneys was not acted upon immediately, since both the White House Counsel’s Office and the Department of Justice were in transition. We did not find any response from Leitch to Sampson’s January 9 e-mail. Leitch told us he had no independent recollection of discussing the matter with Sampson, Rove, or anyone else before leaving the White House Counsel’s Office around this time.

However, Sampson’s proposal gained support in late February and early March 2005 after Gonzales was confirmed as Attorney General and Miers was installed as White House Counsel. At that time Sampson was appointed to be Gonzales’s Deputy Chief of Staff, and Gonzales authorized Sampson to proceed

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<sup>15</sup> Sampson described to us his thinking on this subject as possibly derived from the management philosophy of Jack Welch, former General Electric CEO, that the bottom 10 percent of any organization should be changed periodically for the good of the whole.

with a review for the purpose of identifying U.S. Attorneys for potential removal.

Gonzales told us that he endorsed the concept of evaluating the performance of U.S. Attorneys to see “where we could do better.” According to Gonzales, he told Sampson to consult with the senior leadership of the Department, obtain a consensus recommendation as to which U.S. Attorneys should be removed, and coordinate with the White House on the process. Gonzales told us that he did not discuss with Sampson how to evaluate U.S. Attorneys or what factors to consider when discussing with Department leaders which U.S. Attorneys should be removed.

### **C. The First List – March 2, 2005**

According to Sampson, sometime in February 2005 White House Counsel Miers asked him to provide recommendations in the event the Administration decided to ask for resignations from a “subset” of U.S. Attorneys.

In response, Sampson annotated a chart that listed all Presidentially appointed, Senate-confirmed U.S. Attorneys and the date each assumed their office.<sup>16</sup> On March 2, 2005, Sampson attended a regularly scheduled meeting of the judicial selection committee at the White House and gave Miers the 6-page typewritten chart, entitled “United States Attorneys - Appointment Summary (2/24/05).”

Many of the names on the chart were either crossed-through or highlighted in bold. In an e-mail to Miers after the March 2 meeting, Sampson explained the meaning of the markings on the chart:

bold = Recommend retaining; strong U.S. Attorneys who have produced, managed well, and exhibited loyalty to the President and Attorney General.

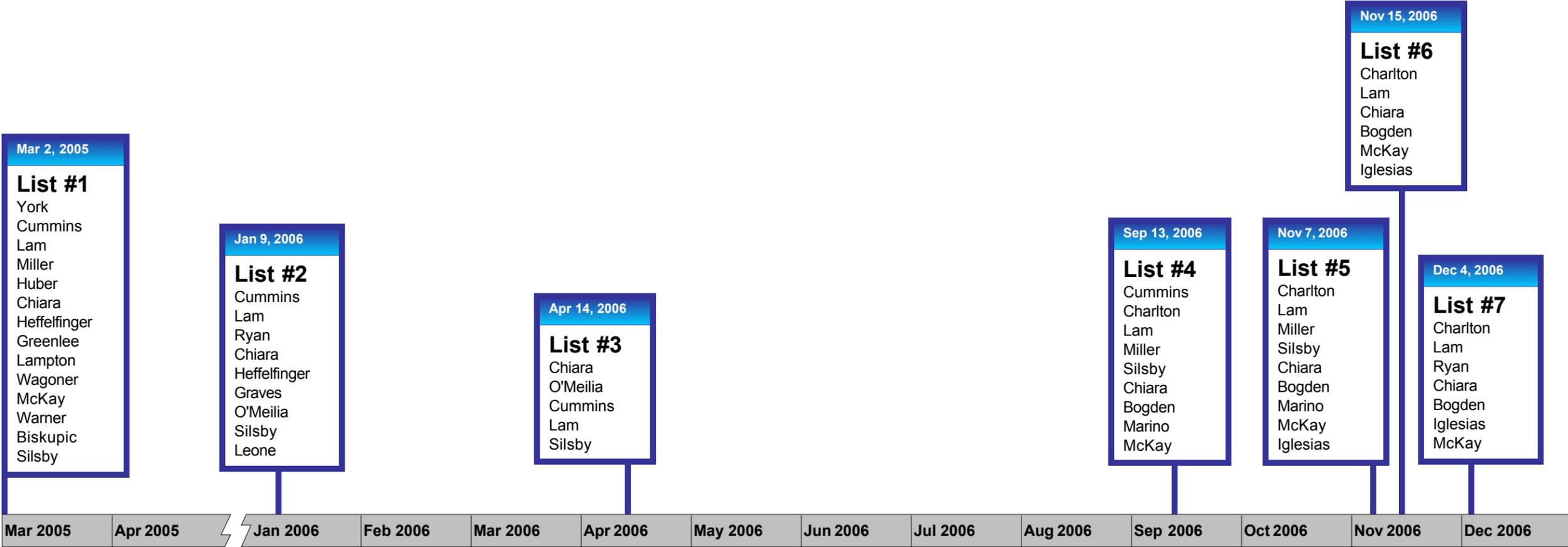
strikeout = Recommend removing; weak U.S. Attorneys who have been ineffectual managers and prosecutors, chafed against Administration initiatives, etc.

nothing = No recommendation; have not distinguished themselves either positively or negatively.

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<sup>16</sup> The chart also listed several other districts in which U.S. Attorneys were going through various stages in the nomination process.

# US Attorney Removal List Timeline



Names on lists are in original order

Nov 1, 2006

**Elston List**

Christie  
Connelly  
Buchanan  
Brownlee  
Wood

On the chart, as indicated by a strikeout of names, Sampson recommended removing the following U.S. Attorneys:<sup>17</sup>

- David York (S.D. Ala.);
- H.E. “Bud” Cummins (E.D. Ark.);
- Carol C. Lam (S.D. Cal.);
- Greg Miller (N.D. Fla.);
- David Huber (W.D. Ky.);
- Margaret M. Chiara (W.D. Mich.);
- Jim Greenlee (N.D. Miss.);
- Dunn O. Lampton (S.D. Miss.);
- Anna Mills Wagoner (M.D. N.C.);
- John McKay (W.D. Wash.);
- Kasey Warner (S.D. W.Va.); and
- Paula Silsby (D. Me.).<sup>18</sup>

Later that evening, Sampson e-mailed Miers a revised chart in which he struck out two additional names:

- Thomas B. Heffelfinger (D. Minn.);
- Steven Biskupic (E.D. Wis.).<sup>19</sup>

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<sup>17</sup> As noted below, Sampson said he came up with these 14 names based on his own “quick and dirty” review of U.S. Attorneys and said he intended that the names would be subjected to further vetting “down the road.” We did not investigate the circumstances of each U.S. Attorney who appeared on Sampson’s initial list, and we believe no conclusions can or should be reached about the performance of these U.S. Attorneys based on Sampson’s inclusion of their names on his list.

<sup>18</sup> According to Sampson, he did not list Silsby because he considered her a “weak” U.S. Attorney but because she had never been nominated by the President and was serving as Interim U.S. Attorney through a court appointment. Attorney General Ashcroft had appointed her Interim U.S. Attorney in 2001 for a 120-day term, and she was appointed Interim U.S. Attorney by the federal district court upon the expiration of the 120-day appointment by the Attorney General. Silsby had served as Interim U.S. Attorney since then with the support of Maine’s two Republican Senators. However, the White House did not recommend her for the permanent position, and Sampson wanted to replace her with a Presidentially nominated and confirmed U.S. Attorney.

<sup>19</sup> We discuss Heffelfinger’s resignation below in Section E.1. of this chapter. As to Biskupic, as part of our investigation we interviewed him to assess allegations that his prosecution of a local Democratic elected official played a role in Sampson’s subsequent deletion of his name from the removal list. Biskupic, who still serves as U.S. Attorney for the Eastern District of Wisconsin, told us that until the controversy about the removals of the (Cont’d.)

In the e-mail, Sampson also bolded Matt Orwig, E.D. Texas, (recommending retention of this U.S. Attorney) “based on some additional information I got tonight.” Sampson told us that he could not recall who supplied the new information about Orwig or what the information was.

All told, Sampson’s chart placed in the “strikeout” category 14 U.S. Attorneys, including 4 of the 9 who were ultimately told to resign in 2006: Bud Cummins, Carol Lam, Margaret Chiara, and John McKay. On the other hand, the chart placed in the “bold” category as “recommend retaining” 26 U.S. Attorneys, 2 of whom – David Iglesias and Kevin Ryan – were also among the 7 who were told to resign on December 7, 2006. The chart placed in the “no recommendation” category 39 U.S. Attorneys, 3 of whom – Paul Charlton, Todd Graves, and Daniel Bogden – were told to resign in 2006.

According to Sampson, his assessment of U.S. Attorneys reflected in the chart he e-mailed to Miers on March 2, 2005, was based both on judgments he formed about these U.S. Attorneys during his work at the White House and the Department over the previous 4 years and on input from other officials at the Department. Sampson told congressional investigators that in early 2005 he had consulted and relied upon several Department officials, including EOUSA Director Mary Beth Buchanan, Principal Associate Deputy Attorney General William Mercer, Deputy Attorney General James Comey, and Associate Deputy Attorney General David Margolis, for recommendations concerning which U.S. Attorneys to remove. However, Sampson told us that he could not specifically recall what these individuals said about particular U.S. Attorneys at the time. Sampson also said he viewed the initial chart as a “quick and dirty” response to Miers’s inquiry, and as a “preliminary list” that would be subject to “further vetting . . . down the road” from Department leaders.

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other U.S. Attorneys arose, he had no idea that Sampson had ever characterized him as a “weak” U.S. Attorney or had recommended that he be removed. Biskupic told us that he did not believe Sampson included him on the first list for reasons related to any public corruption cases his office was prosecuting. Biskupic also said he had no contact with anyone at the Department about public corruption prosecutions and that his office did not discuss the cases with anyone at the Department. Sampson told us he did not know anything about public corruption cases in Biskupic’s district until after Sampson resigned from the Department. Sampson said he could not recall why he had included Biskupic on the initial list, but said he vaguely recalled having a conversation with Deputy Attorney General McNulty much later in the process in which McNulty noted that Biskupic should not be recommended for removal because the Department did not want to arouse the ire of Wisconsin Congressman James Sensenbrenner. However, as we discuss below, we determined that Biskupic’s name was removed from the list sometime before January 2006, and McNulty did not become aware of the proposal to remove U.S. Attorneys until late October 2006. Accordingly, even if Sampson had such a conversation with McNulty, it could not have formed the basis for Sampson taking Biskupic’s name off the removal list much earlier in the year.

Sampson said he did not share the March 2 chart with Gonzales or any other Department officials at the time, but believed he briefed Gonzales about it. Gonzales told us he did not recall seeing the chart or being briefed about the names on it.

### **1. Input from Comey and Margolis**

We interviewed all the officials with whom Sampson said he consulted when preparing the March 2 chart. Only Deputy Attorney General Comey and Associate Deputy Attorney General Margolis said they recalled discussions with Sampson in early 2005 about this issue.

Comey said he recalled being consulted by Sampson before Sampson sent the U.S. Attorney chart to Miers in early March 2005. Based on his calendar entries, Comey said he met with Sampson on February 28, 2005, 4 days before Sampson e-mailed the chart to Miers. Comey told us that Sampson had asked for his input on the “weakest” U.S. Attorneys in the event an opportunity arose to make changes in the U.S. Attorney ranks. Comey said he was confident he named Kevin Ryan and Dunn Lampton as “weak” U.S. Attorneys, and he believed he placed Thomas Heffelfinger and David O’Meilia in that category as well.<sup>20</sup> However, Comey said he was not aware at the time that Sampson’s inquiry was part of a “process” to identify U.S. Attorneys for removal and was “close to certain” that Sampson did not attribute any role to the White House in the matter. Comey also stated that he considered this aspect of his February 28 meeting to be a “casual” conversation with Sampson that was raised “offhandedly” as a prelude to a different and more important subject to be discussed at the meeting – the possible merger of the Attorney General’s and Deputy Attorney General’s staffs.

Margolis told congressional investigators that sometime in late 2004 or early 2005 Sampson broached with him the subject of replacing certain U.S. Attorneys, although Margolis said he could not recall specifically when he and Sampson discussed the matter. According to Margolis, Sampson told him about Miers’s idea of replacing all U.S. Attorneys – an idea both he and Sampson considered unwise. Margolis said that Sampson believed, however, that Miers’s idea could be used as a way to replace some weak U.S. Attorneys and thereby make the U.S. Attorney ranks stronger in the second Bush term. Margolis said he strongly endorsed the idea of replacing weak or mediocre U.S. Attorneys. He said that in the past U.S. Attorneys were generally removed only for misconduct or gross incompetence tantamount to misconduct.

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<sup>20</sup> Comey said he was concerned about Ryan’s management of his office and had concerns about Lampton’s judgment and behavior concerning a case Comey oversaw while he was U.S. Attorney. In addition, Comey expressed concern about O’Meilia’s judgment regarding certain office expenditures during a time of budget difficulties. Finally, Comey said he was concerned that Heffelfinger was overly focused on Indian affairs issues.

Margolis said that when he and Sampson first discussed the issue, Sampson had a list of all current U.S. Attorneys and asked Margolis for his views on who the Department should consider removing. Margolis told us he was firm that two U.S. Attorneys should be removed on performance grounds – Ryan and Lampton. Margolis told us that he also suggested then (and more strongly later) that Chiara should be considered for removal. Margolis said he was aware of management concerns about Ryan and Chiara, and he said he had serious concerns about Lampton. Margolis also stated that there were roughly eight additional U.S. Attorneys who warranted a closer look, either because of general performance, specific conduct, or both.<sup>21</sup>

## **2. Reaction to the List from the Office of the White House Counsel**

Sampson said he received no immediate reaction from Miers to the names he had marked for possible removal on the March 2 chart, and said he did not discuss the basis for his individual recommendations with Miers. He said the only comment he recalled Miers making about the chart was that she was “pleased” to see that Sampson had placed Matt Orwig’s name in bold, indicating he should be kept. According to Sampson, Miers knew Orwig from Texas and thought highly of him.

In approximately February or March of 2005, the White House Office of Political Affairs was notified about the initiative to remove certain U.S. Attorneys. White House Political Affairs Director Sara Taylor told us that shortly after she began as Director of Political Affairs in February 2005, she became aware that the White House was considering replacing U.S. Attorneys. Taylor said that Miers and others in both the White House Counsel’s Office and the Department of Justice had discussed the idea that the advent of the President’s second term provided an opportunity to replace some of the U.S. Attorneys.

On March 23, 2005, Associate White House Counsel Dabney Friedrich, acting at Miers’s request, sent Sampson an e-mail asking him to confirm Miers’s understanding that the “plan” for replacing U.S. Attorneys was “to wait until each has served a four-year term.” Sampson replied that Gonzales, Miers, Friedrich, and he should discuss the issue, but it was his advice to replace certain U.S. Attorneys “selectively” (based on the March 2 chart) after the expiration of their 4-year terms. Sampson expressed concerns that to do otherwise might create turmoil with home state politicians and within the Department. Sampson also stressed that these were his views and “should not

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<sup>21</sup> Although some of the approximately eight additional names mentioned by Margolis appeared on subsequent lists prepared by Sampson, none of them were among the final group of nine U.S. Attorneys who were asked to resign in 2006.

be attributed to Judge [Gonzales].” Friedrich replied that she agreed “completely” with Sampson’s recommendation and would be surprised to hear differently from either Miers or Gonzales.

After this e-mail exchange between Sampson and Friedrich in late March 2005, it appears that the U.S. Attorney removal process remained dormant for several months. Sampson told us that Gonzales agreed with him that nothing should be done until the U.S. Attorneys had served out their 4-year terms. Sampson also told us he believed that Miers had adopted his advice to wait until the U.S. Attorneys had completed their 4-year terms before taking any action. Because the earliest term-expiration date of any U.S. Attorney on his chart did not come until November 2005, Sampson said he saw no urgency to the matter and put the issue on the back burner.

### **3. Fall 2005 – Further Consultations about the Removal of U.S. Attorneys**

#### **a. Battle**

In October 2005, Monica Goodling moved from EOUSA to become Senior Counsel in the Attorney General’s Office. Around this time, Goodling told Michael Battle, who had succeeded Mary Beth Buchanan as EOUSA Director in June 2005, that changes could be forthcoming in the U.S. Attorney ranks. According to Battle, Goodling told him the Administration wanted to give others an opportunity to serve and asked him if he had concerns about any particular U.S. Attorneys or “problematic” districts.

According to Battle, after meeting with Goodling he reviewed a list of U.S. Attorneys for possible removal. He said no names “jumped out” at him and he put the matter aside, expecting a follow-up call from Goodling that never came. Battle said neither Goodling nor Sampson thereafter sought his opinion on which U.S. Attorneys should be replaced. Battle said he did not hear from either of them on the subject until late January 2006, when Goodling called him with specific instructions to ask for the first U.S. Attorney resignation: Todd Graves.

#### **b. Mercer**

According to Mercer, sometime shortly after the 2004 election Sampson told him that Miers had proposed replacing all of the U.S. Attorneys, but Sampson had dissuaded her. Mercer said that sometime during the fall of 2005, Sampson asked for Mercer’s views on the performance of a number of U.S. Attorneys. Mercer said he did not recall Sampson stating that certain U.S. Attorneys would be asked to resign, but it was clear to Mercer that that was Sampson’s purpose in asking for his views.

Mercer said they did not have a formal meeting about the issue, but in the course of the conversation Sampson indicated that changes might be made in certain districts with productivity problems or policy compliance issues. Mercer said he recalled discussing with Sampson concerns about Lam's immigration record, and Mercer believed they also discussed concerns about Ryan's management. Mercer said he could not recall which other U.S. Attorneys he and Sampson discussed. Mercer said he had the sense that Sampson was also consulting with others, but he did not know who. According to Mercer, he had no further conversations with Sampson about the removal of U.S. Attorneys until December 2006 when the removal plan took effect.

### **c.     Comey**

In addition to the February 2005 discussion between Sampson and Comey discussed above, we found e-mail records indicating that Sampson broached the subject of removing certain U.S. Attorneys with Comey in August 2005, shortly before Comey's resignation.<sup>22</sup> On August 11, 2005, Sampson sent Comey an e-mail requesting a brief meeting to "get your assessment of our current crop of USAs." In the e-mail, Sampson pointed out that U.S. Attorneys' 4-year terms would begin to expire in September, and expressed the view that "there will be some sentiment to identify the 5-10 weak sisters, thank them for their four years of service, and give someone else the opportunity to serve." According to an e-mail from Comey to two other Department officials the next day, Sampson asked him about Chiara, Wagoner, McKay, Sheldon Sperling, and James Vines. Comey's e-mail indicated that he agreed with Sampson that Vines was weak but had no strong views on the others, except McKay who, Comey told Sampson, had been "great on my information sharing project."

### **d.     Buchanan**

Buchanan, who served as Director of EOUSA from May 2004 to June 2005, told us that Sampson informed her sometime after the 2004 election that he was undertaking a review of U.S. Attorneys, that some might be asked to leave, and that he might ask for her input. Buchanan said that Sampson was "very interested in management" issues and would occasionally ask her opinion on the 10 "best" and "worst" U.S. Attorneys, although she said she never directly answered his question. She told us, however, that she was familiar with the problems Ryan and Lam were having in their districts and discussed both of them with Sampson.

We showed Buchanan Sampson's March 2005 chart to determine whether she could recall discussions with Sampson about any of the U.S. Attorneys on the list whom Sampson had categorized as "weak." Buchanan

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<sup>22</sup> Comey left the Department in mid-August 2005.

said that of all the names on the list, Lam's name stood out because by then Department officials were concerned about her performance in immigration and Project Safe Neighborhoods matters.<sup>23</sup> Buchanan also stated that sometime in the spring of 2005, she and Margolis discussed sending a Special EARS team to investigate complaints about Ryan's management of the San Francisco U.S. Attorney's Office. Buchanan said she also discussed with Sampson concerns about Heffelfinger's focus on Native American issues, but she said she did not recall expressing any negative views about any other U.S. Attorney's performance.

Buchanan said that before she left EOUSA in June 2005 she probably discussed with Sampson her concerns about Graves, who first appeared on Sampson's January 2006 list. In the spring of 2005, Buchanan said, she talked to Graves about a Missouri newspaper article reporting that Graves's wife was awarded a lucrative non-competitive contract by Missouri Governor Matt Blunt to manage a local motor vehicle fee office for the state. According to Buchanan, she "probably would have" discussed that matter with Sampson, as well as her observation that Graves was not an active member of the Attorney General's Advisory Committee (AGAC) during his 2-year stint heading the AGAC's Child Exploitation and Obscenity Committee.

Other than Comey, Margolis, Mercer, Buchanan, and probably Goodling, we identified no other Department officials who discussed the performance of U.S. Attorneys with Sampson before January 2006.

#### **D. The Second List – January 2006**

##### **1. Sampson's January 1, 2006, Draft List**

Sampson drafted a memorandum dated January 1, 2006, to Miers stating that he was responding to her inquiry concerning "whether President Bush should remove and replace U.S. Attorneys whose 4-year terms have expired." Sampson said he could not remember specifically what prompted him to send the e-mail in January, and he speculated that it might have been just because it was the new year.

Sampson recommended in the memorandum that the Department and the White House Counsel's Office "work together to seek the replacement of a limited number of U.S. Attorneys." Similar to his e-mail of January 9, 2005, to Deputy White House Counsel Leitch, Sampson's 3-page draft memorandum to Miers in January 2006 cited the statutory authority for U.S. Attorneys' appointments, term of office, and removal. Sampson's memorandum also

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<sup>23</sup> Project Safe Neighborhoods is a Department initiative that involves collaborative efforts by federal, state, and local law enforcement agencies, prosecutors, and communities to prevent and deter gun violence.

pointed out “practical obstacles” to removing and replacing U.S. Attorneys, such as the significant disruption a “wholesale removal” would cause to the Department’s work, Senator’s opposition to the removal of U.S. Attorneys in their home districts, and the time-consuming process of finding suitable replacements who would have to undergo the background investigation process.

Sampson’s memorandum proposed that “a limited number of U.S. Attorneys could be targeted for removal and replacement, mitigating the shock to the system that would result from an across-the-board firing.” Under his proposal, EOUSA “could work quietly” with the designated U.S. Attorneys to “encourage them to leave government service voluntarily,” thereby giving them time to find work in the private sector and allowing them to “save face.” Sampson proposed that after the targeted U.S. Attorneys announced their resignations, the White House Counsel’s Office could work with the political leadership of the affected states to obtain recommendations for permanent replacements. Sampson also proposed that the eventual nominee for each vacated office could be appointed as an Interim U.S. Attorney by the Attorney General, pending Senate confirmation. In the January 1, 2006, memorandum to Miers, Sampson identified nine U.S. Attorneys with expiring terms who should be considered for removal:

- H.E. “Bud” Cummins (E.D. Ark.);
- Kevin V. Ryan (N.D. Cal.);
- Carol C. Lam (S.D. Cal.);
- Margaret M. Chiara (W.D. Mich.);
- Thomas B. Heffelfinger (D. Minn.);
- Dunn O. Lampton (S.D. Miss.);
- Todd P. Graves (W.D. Mo.);
- Anna Mills S. Wagoner (M.D. N.C.)<sup>24</sup>; and
- David O’Meilia (N.D. Okla.)

Sampson also recommended the removal and replacement of two U.S. Attorneys who were serving in an “acting” capacity: Paula Silsby (D. Me.) and William Leone (D. Colo.).<sup>25</sup>

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<sup>24</sup> We were unable to determine why Sampson listed Wagoner other than that he believed she was a weak U.S. Attorney.

For the first nine named U.S. Attorneys, Sampson noted the term expiration date and the names of the home-state Senators. For six of the nine, Sampson also suggested replacement candidates, including Tim Griffin for the Eastern District of Arkansas, who we discuss in Chapter Five.<sup>26</sup>

Sampson shared his draft memorandum with Goodling, who suggested some changes. She disagreed with two of Sampson's recommendations, Wagoner and Lampton. Goodling wrote on the draft that she "would keep" Lampton based on his performance in the aftermath of Hurricane Katrina. As to Wagoner, Goodling noted that she "would not put her on this list" based on Wagoner's performance in Project Safe Neighborhood (PSN) and her cooperation on "Patriot [Act matters] + AG visits, etc."

Goodling also noted two other categories: (1) "other problem districts," under which she named Paul Charlton (D. Ariz.); and (2) "Quiet/not sure about," under which she named Daniel Bogden (D. Nev.) and Tom Marino (M.D. Pa.), all of whom appeared on subsequent lists. Shortly thereafter, Sampson also created a draft of a 3-tier list containing 14 names, including Charlton (Tier 1), Bogden (Tier 2), and Marino (Tier 3).

We found no one else who said they saw the January 1, 2006, draft before it was revised and sent by e-mail to Miers. Attorney General Gonzales told us he did not see it at the time and did not recall discussing it with Sampson or Goodling.

## **2. The January 9, 2006, Memorandum from Sampson to the White House**

On January 9, 2006, Sampson sent Miers an e-mail which essentially incorporated his draft memorandum with Goodling's suggested modifications. Based on Goodling's recommendations, Sampson removed Wagoner's and Lampton's names from the list, thereby reducing to nine, including Silsby and Leone, the number of U.S. Attorneys recommended for removal. The nine U.S. Attorneys on the January 9 list were:

- H.E. "Bud" Cummins (E.D. Ark.);

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<sup>25</sup> Leone became the First Assistant U.S. Attorney in Colorado in 2001 and was appointed Interim U.S. Attorney in December 2004. He served as Interim U.S. Attorney until the confirmation of Troy Eid in August 2006. We found no evidence that Leone's replacement by a Presidentially appointed U.S. Attorney was unusual or improper.

<sup>26</sup> Most of the replacement candidates for the other five districts were current or former political appointees in the Department. Other than Griffin, only one suggested replacement on this list, John Wood, currently the U.S. Attorney for the Western District of Missouri, was ultimately nominated and confirmed.

- Carol C. Lam (S.D. Cal.);
- Kevin V. Ryan (N.D. Cal.);
- Margaret M. Chiara (W.D. Mich.);
- Thomas B. Heffelfinger (D. Minn.);
- Todd P. Graves (W.D. Mo.);
- David O’Meilia (N.D. Okla.);
- Paula Silsby (D. Me.); and
- William Leone (D. Colo.).

In his e-mail to Miers, Sampson proposed a 2-step removal process. He wrote that first, there needed to be agreement on the “target list” of U.S. Attorneys, and second, EOUSA needed to explore with the designated U.S. Attorneys their “intentions” and to indicate to them that they “might want to consider looking for other employment.”

After naming the nine U.S. Attorneys recommended for removal, Sampson described the basis on which he arrived at his recommendations: “I list these folks based on my review of the evaluations of their offices conducted by EOUSA and my interviews with officials in the Office of the Attorney General, Office of the Deputy Attorney General, and the Criminal Division.”

Sampson’s mention of “evaluations conducted by EOUSA” referred to EARS evaluations, the periodic evaluations of U.S. Attorneys’ Offices conducted by EOUSA. These reviews, which are typically conducted by a team of supervisory AUSAs selected from other districts, are described in more detail in Chapter Two of this report.

Notwithstanding Sampson’s representation in his e-mail to Miers, his recommendations were not based on his review of the pertinent EARS evaluations. Sampson admitted to us that he did not personally review EARS evaluations. Instead, Sampson told us that he had talked to Margolis “generally” about how various U.S. Attorneys were doing, and he “understood” that Margolis had reviewed EARS evaluations. Margolis confirmed that he reviews all EARS reports, but told us that the vast majority are favorable. According to Margolis, EARS evaluations are designed to help a U.S. Attorney manage his or her office, not to “help me decide who to fire.” Margolis said that he would only give serious weight and consideration to an EARS evaluation in the rare instance it was negative. In such an instance, Margolis told us, he would deliver a copy of the EARS report to the Principal Associate Deputy Attorney General or the Deputy Attorney General’s Chief of Staff (not the

Attorney General's Chief of Staff) with a note that there was a serious problem in the district.

With one exception, Margolis told us that he recalled no such problem in any of the districts where Sampson recommended a change in leadership. The lone exception was the Northern District of California, where Kevin Ryan was the U.S. Attorney.<sup>27</sup> Moreover, as discussed in the chapters describing the reasons proffered for removal of the individual U.S. Attorneys, we found that EARS evaluations did not support most of the recommendations that Sampson made.

Sampson acknowledged to us that the representation in his e-mail to Miers that his recommendations were premised on his review of EARS evaluations was not accurate. Sampson said that it would have been better if he had said that it was based on his understanding of somebody else's understanding of the reviews of the offices.

With respect to his reference to "interviews" of Department officials, Sampson testified to Congress that he had spoken with Goodling (from the Attorney General's Office), and Margolis (from the Deputy Attorney General's Office). However, contrary to the statement in his January 9 e-mail, he testified that he did not believe he had spoken to anyone in the Criminal Division except "in the most general terms." In addition, Sampson testified that he spoke with Buchanan and Comey. Sampson acknowledged that he did not conduct formal interviews with anyone, but rather said he "was aggregating views from different people" and did so by sounding people out in an informal setting in order to get their "frank assessments" of U.S. Attorneys. Sampson said he may have been clearer with some than with others as to the purpose for which he was gathering their views.

### **3. The First Removal: Todd Graves**

After sending his January 9, 2006, e-mail to Miers, Sampson did not receive an immediate response to his proposal, and no action was taken on his overall proposal for several months. Nevertheless, shortly after Sampson's January 9 proposal, action was taken to seek the resignation of Todd Graves, the U.S. Attorney for the Western District of Missouri.

On January 19, 2006, Sampson sent an e-mail to EOUSA Director Battle asking him to call when he had a few minutes to discuss Graves. Several days later (apparently before Battle spoke to Sampson), Goodling called Battle and

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<sup>27</sup> A Special EARS evaluation was commissioned by EOUSA in the fall of 2006 (at Margolis's urging) based on the results of the regular EARS evaluation in March 2006 and on numerous complaints made about Ryan's performance as U.S. Attorney. The special evaluation was intended to be an evaluation not only of the USAO but also of Ryan.

told him to call Graves to request his resignation. Goodling instructed Battle to tell Graves only that the Administration had decided to make a change, that his service was appreciated, and that the request was not based on any misconduct by Graves but simply to give someone else a chance to serve.

Shortly thereafter, on January 24, 2006, Battle called Graves and communicated the message as instructed by Goodling. Graves said he was “stunned” and “shocked” by the call, and said Battle would not explain why his resignation was sought. Graves subsequently complied with the instruction and on March 10, 2006, announced his resignation, effective March 24.

Although Graves was not originally identified in the 2007 congressional hearings as one of the U.S. Attorneys who was asked to resign in 2006 as a result of the “process” initiated by Sampson, we considered him part of that group. He was targeted for removal on Sampson’s January 9, 2006, list, and the script Battle followed in seeking Graves’s resignation was identical to the one he followed in conversations with the other eight U.S. Attorneys who were later told to resign.

However, as we discuss in greater detail in Chapter Four of this report, no Department employee involved in the process could explain why Graves was told to resign. Battle, who placed the call at Goodling’s direction, said he was not given the reasons. Goodling, who directed Battle to call Graves, stated in her congressional testimony that she would have done so only on instruction from Sampson. Sampson told congressional investigators that he had no recollection of the matter, believed that Goodling had handled it, and assumed that it was based on a finding of misconduct by Margolis. Margolis told us that there was no misconduct finding against Graves and expressly denied playing any role in Graves’s removal. Gonzales told us that he had no recollection about being consulted about Graves’s removal.

We also found no documentation within the Department describing the reasons that Graves was told to resign. However, we found that the White House Counsel’s Office played a role in his resignation. Although Sampson told congressional investigators that he had no recollection as to why he placed Graves’s name on the January 9 removal list and disclaimed any involvement in the January 24 resignation request to Graves, Sampson acknowledged to us that he discussed with the White House Counsel’s Office that the staff of Missouri’s Republican Senator Christopher Bond was urging the White House Counsel’s Office to remove Graves. We describe this issue, and the White House’s role in the removal of Graves, in more detail in Chapter Four.

#### **E. The Third List – April 14, 2006**

The proposal advanced by Sampson in his January 9 e-mail to Miers was not implemented at that time. As Sampson described it, the process was in a

“long thinking phase that bumped along and really didn’t have any traction to it” until the fall of 2006. According to Sampson, either Miers or Deputy White House Counsel William Kelley raised the issue from time to time, prompting Sampson to prepare another list, but then nothing happened, causing Sampson to question whether the removal proposal would ever be implemented.

We found that on April 14, 2006, 4 months after his January 9 e-mail, Sampson sent an e-mail to Associate White House Counsel Dabney Friedrich revising the list he had proposed in his January e-mail to Miers. Sampson recommended in the e-mail that the “White House consider removing and replacing the following U.S. Attorneys upon the expiration of their 4-year terms”:

- Margaret M. Chiara (W.D. Mich.);
- David O’Meilia (N.D. Okla.);
- H.E. “Bud” Cummins (E.D. Ark.); and
- Carol C. Lam (S.D. Cal.).

Sampson also proposed the removal and replacement of Paula Silsby, the Interim U.S. Attorney for Maine, and suggested that he could add another three to five names “[i]f you pushed me.” Three names that were on Sampson’s January 9 list were omitted from this updated list: Graves, Heffelfinger, and Ryan.

### **1. Heffelfinger**

In an e-mail to Friedrich immediately after he sent her the new list on April 14, 2006, Sampson pointed out that Graves and Heffelfinger, two of the names on his January 9 list, “already have left office.” As discussed above, Graves had been told in late January to resign and he left office on March 24, 2006. Heffelfinger had also resigned from the Department, effective March 1, 2006.

Unlike Graves, Heffelfinger told us he resigned without prompting from anyone at the Department. Heffelfinger said that he began thinking about leaving in the fall of 2005, and made the final decision on January 20, 2006, after learning he was eligible for early retirement. Heffelfinger said that he met with Deputy Attorney General McNulty on that day to inform him of his intentions, and Heffelfinger announced his resignation during the week of

February 13. His resignation took effect on March 1, 2006. Heffelfinger said at that time he had no idea that Sampson had ever proposed his removal.<sup>28</sup>

## **2. Ryan**

Of the nine names recommended for removal on Sampson's January 9 list, only one still serving U.S. Attorney, Kevin Ryan, was omitted from the April 14 e-mail to Friedrich. At this time Ryan's performance as U.S. Attorney for the Northern District of California had been subjected to sharp criticism from former prosecutors in the office, and in March 2006 an AUSA then serving in the office wrote a letter to the Department blaming Ryan for a mass exodus of experienced AUSAs during his tenure. That letter became the subject of a San Francisco newspaper article in early March recounting considerable discord within the USAO.

As discussed in footnote 27, an EARS evaluation of Ryan's office took place during the week of March 27, 2006. After the EARS evaluation, the team leader prepared a "Draft Significant Observations" memorandum for the Director of EOUSA highlighting his observations concerning high turnover and low morale, which line AUSAs attributed to Ryan's poor management style and practices. A draft report was completed in late May 2006 and provided to Ryan for review and comment. In July 2006, Ryan wrote a lengthy response taking exception to the draft report's conclusions concerning his management of the office.

According to Margolis, based on the results of the March evaluation, a special EARS team was commissioned to conduct a follow-up evaluation of the office. That evaluation occurred in late October 2006. A draft report was delivered to Margolis and Battle on November 22, 2006. Like the first one, this special evaluation concluded that the U.S. Attorney's Office suffered from serious morale problems attributable in large part to Ryan's management style.

Sampson told us he deleted Ryan's name from the April 14 list because he was aware of the negative EARS evaluation and felt that it would be "unfair and inappropriate" to remove Ryan in the midst of an ongoing evaluation. Sampson also expressed the view that while a U.S. Attorney can be removed "for any reason or no reason" once the evaluation process has been initiated,

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<sup>28</sup> Before leaving office, Heffelfinger prepared a management plan that called for elevating an experienced AUSA within the office to the position of Acting U.S. Attorney. His plan was rejected in favor of appointing Rachel Paulose, a former Minnesota AUSA and then Counsel to the Deputy Attorney General, to be Interim U.S. Attorney. Paulose was later nominated as U.S. Attorney and confirmed by the Senate on December 9, 2006. After significant controversy arose regarding her management of the office, she was transferred back to a position at Main Justice in November 2007.

“as a matter of policy” the U.S. Attorney should be given the benefit of the full evaluation before being removed.<sup>29</sup>

### **3. The Plan to Replace Cummins with Griffin**

On May 11, 2006, in response to an inquiry from Deputy White House Counsel William Kelley after a meeting the previous day at the White House, Sampson forwarded to Kelley his April 14 e-mail to Friedrich. In the e-mail, Sampson asked Kelley to call him to discuss having Rachel Brand (then head of the Department’s Office of Legal Policy) replace Chiara as the U.S. Attorney in the Western District of Michigan and Tim Griffin replace Bud Cummins in the Eastern District of Arkansas. Sampson also stated in the e-mail to Kelley that he wanted to discuss the “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.”

As discussed below, in response to this e-mail to Kelley no decision was made on Sampson’s overall proposal to remove the U.S. Attorneys. However, a decision was made to remove Bud Cummins and replace him with Tim Griffin.<sup>30</sup>

#### **a. Miers’s Request Regarding Griffin**

Sampson told Congressional investigators that Miers asked him in the spring of 2006 whether a place could be found for Griffin in the U.S. Attorney ranks.<sup>31</sup> Sampson said he examined his list and determined that since Cummins was already identified on the January 9 list as one of the prospective U.S. Attorneys to be removed, he felt he could accommodate Miers’s request.<sup>32</sup>

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<sup>29</sup> As we discuss later in this report, Ryan was the only U.S. Attorney of the nine to be evaluated by a Special EARS team. No other U.S. Attorney removed as a result of the process initiated by Sampson was accorded such treatment before being recommended for removal.

<sup>30</sup> Brand told us that she and Sampson did not seriously discuss whether Brand wanted to become U.S. Attorney until sometime in the fall of 2006. Brand said that she is from Michigan, but she was not interested in moving at the time, and she was not lobbying to become U.S. Attorney. According to Sampson, he and Deputy White House Counsel Kelley discussed Brand’s appointment in May 2006, but Brand did not show much interest at the time, and by the time the removal plan was underway Brand indicated she was not interested in becoming U.S. Attorney in Michigan for personal reasons.

<sup>31</sup> As more fully described in Chapter Five of this report, Griffin had worked for the Republican National Committee through the 2004 election, and then became Deputy Director of the Office of Political Affairs in the White House. In 2004, he was one of the candidates considered for the U.S. Attorney position in the Western District of Arkansas for which Robert Balfe was ultimately chosen.

<sup>32</sup> We also found evidence that the White House asked about replacing Debra Yang, the U.S. Attorney in the Middle District of California. According to Sampson, Miers had asked him whether Yang should be replaced because she had rejected an overture to serve on the Ninth (Cont’d.)

Sampson said that after consulting with a “few” people at the Department, he informed Miers that he thought it could be done. Sampson said that other than Goodling and the Attorney General, he could not recall whom he consulted about the Griffin matter. Gonzales told us he did not recall having any discussions with Sampson about Cummins or Griffin at the time.

According to e-mail records, in early June the White House formally approved Griffin’s selection for the U.S. Attorney position. On June 13, Goodling informed Sampson that the pre-nomination paperwork on Griffin had been completed. She also told Sampson that she would talk to EOUSA Director Battle the next morning, June 14, and also inform the Office of the Deputy Attorney General that “we are now executing this plan.”

#### **b. Battle Tells Cummins to Resign**

On June 14, 2006, Battle, acting on instructions from Goodling, called Cummins to ask for his resignation. In delivering the message, Battle followed the same talking points he had received from Goodling for the call to Graves in January. Battle thanked Cummins for his service, stated that the Administration wanted to give someone else the opportunity to serve as U.S. Attorney, and asked how much time Cummins needed to make arrangements to leave office.

Battle told us that he considered Cummins to be a good U.S. Attorney. Battle also said he was not told why Cummins was asked to resign or who would replace him. He said Cummins told him that he suspected the change was being made so Griffin could become U.S. Attorney.<sup>33</sup>

#### **4. Sampson Suggests that Patrick Fitzgerald Be Removed**

During the summer of 2006, no further action was taken on the plan to remove additional U.S. Attorneys. However, during this time, Sampson met at least once with Miers and Deputy White House Counsel Kelley to discuss the proposal. According to Sampson, sometime during the summer he met informally with Miers and Kelley after a judicial selection meeting at the White House. At this meeting they discussed the plan to remove U.S. Attorneys, and Sampson broached the subject of including Patrick Fitzgerald, the U.S. Attorney for the Northern District of Illinois, on the removal list.

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Circuit. Sampson testified that he had informed Miers that Yang was a “strong” U.S. Attorney who should remain in place. Sampson said that Miers accepted his explanation and did not raise the subject again. Yang resigned of her own volition in 2006 to take a job with a private law firm.

<sup>33</sup> On December 15, 2006, Cummins announced his resignation and left office on December 20, 2006.

Sampson testified to Congress that although Fitzgerald was widely viewed as a strong U.S. Attorney, Sampson had placed Fitzgerald in the “undistinguished” category on the initial list he sent to the White House in March 2005 because he knew that Fitzgerald was handling a very sensitive case and Sampson did not want to rate Fitzgerald one way or the other. At that time, Fitzgerald was serving as the Special Counsel investigating the leak of information relating to Central Intelligence Agency employee Valerie Plame, which ultimately resulted in the conviction of the Vice President’s Chief of Staff, I. Lewis “Scooter” Libby, for perjury and making false statements.

Sampson testified that when he brought up Fitzgerald’s name as a U.S. Attorney who could be added to the removal list, Miers and Kelley “said nothing – they just looked at me.” Sampson testified that as soon as he said it, he knew it was the wrong thing to do. He said he was not sure why he said it but thought that maybe he was “trying to get a reaction from [Miers and Kelley].” He said he “immediately regretted it” and retracted the suggestion. Sampson later told congressional investigators that it was “immature and flippant” of him to have even raised such a sensitive issue. Sampson also testified that he never seriously considered putting Fitzgerald on the list, and we found no evidence that Sampson ever discussed removing Fitzgerald with anyone at the Department.

#### **F. The Fourth List – September 13, 2006**

On September 13, 2006, Miers sent an e-mail to Sampson asking for his “current thinking on holdover U.S. Attorneys.” In a reply e-mail later that day, Sampson conveyed to Miers his current breakdown of “the U.S. Attorney ranks.”

After noting current and anticipated vacancies for U.S. Attorney positions, Sampson listed the following U.S. Attorneys under the heading “USAs We Now Should Consider Pushing Out:”<sup>34</sup>

- Paul Charlton (D. Ariz.);
- Carol C. Lam (S.D. Cal.);
- Greg Miller (N.D. Fla.);
- Paula Silsby (D. Me.);
- Margaret M. Chiara (W.D. Mich);

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<sup>34</sup> Sampson addressed Cummins’s situation in a separate section of his e-mail under the heading “USAs in the Process of Being Pushed Out.”

- Daniel Bogden (D. Nev.);
- Thomas Marino (M.D. Pa.); and
- John McKay (W.D. Wash.).

In a summary section of the e-mail, Sampson emphasized that he was “only in favor of executing on a plan to push some USAs out if we really are ready and willing to put in the time necessary to select candidates and get them appointed – it will be counterproductive to DOJ operations if we push USAs out and then don’t have replacements ready to roll.”

In his e-mail, Sampson also “strongly” recommended that the Administration “utilize the new statutory provisions that authorize the AG to make USA appointments.” As described in Chapter Two, before March 2006 the Attorney General could only appoint an Interim U.S. Attorney for a 120-day term, and upon expiration of the appointment the federal district court could make an indefinite appointment until the vacancy was filled by a confirmed presidential appointee. At the request of the Department, however, a provision had been included in amendments to the Patriot Act in March 2006 giving the Attorney General the authority to appoint an Interim U.S. Attorney until the vacancy was filled by a confirmed presidential appointee.<sup>35</sup>

In his e-mail, Sampson explained his recommendation to use the new interim appointment power as follows:

We can continue to do selection in JSC [White House Judicial Selection Committee], but then should have DOJ take over entirely the vet and appointment. By not going the PAS route, we can give far less deference to home-State Senators and thereby get (1) our preferred person appointed and (2) do it far faster and more efficiently, at less political cost to the White House.

Before sending this e-mail to Miers, Sampson had sent a draft of the e-mail to Goodling and asked her for any “corrections.” He did not send the draft to anyone else in the Department. The draft he sent Goodling was identical to the final e-mail he sent Miers with one exception: Anna Mills Wagoner of the Middle District of North Carolina was among the U.S. Attorneys listed in Sampson’s draft to be “pushed out,” but was not included in the final e-mail he

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<sup>35</sup> As also noted in Chapter Two, in June 2007 in the wake of the controversy surrounding the U.S. Attorney removals and allegations that the Attorney General’s Interim appointment power was being used to circumvent the Senate confirmation process, legislation was enacted repealing the March 2006 amendment and restoring the previous provision granting the local federal district court authority over Interim U.S. Attorney appointments upon the expiration of the 120-day appointment by the Attorney General.

sent to Miers. We determined that about 20 minutes after receiving Sampson's draft e-mail, Goodling replied that Wagoner's name should be removed because "there are plenty of others there to start with and I don't think she merits being included in that group at this time."<sup>36</sup> Sampson then removed Wagoner from the list before sending the e-mail to Miers.

### **1. Sampson's "Consensus" Process in Compiling the List**

The list of U.S. Attorneys for removal that Sampson e-mailed to Miers on September 13 differed substantially from his April 14 list. One name, O'Meilias, came off the list while five others were added: McKay, Charlton, Bogden, Marino, and Miller.

Sampson told us that he placed McKay, Charlton, Bogden, Marino, and Miller's names on the September 13 list based on information he had learned about them from a variety of sources.<sup>37</sup> He acknowledged, however, that these sources were not necessarily aware of Sampson's intended use of the information. Sampson also said he could not recall who specifically provided the information that resulted in each name being added to the list.

In his congressional testimony, Sampson repeatedly described the process by which names were placed on the U.S. Attorney removal list as one of "consensus" among Department leaders. For example, in his Senate Judiciary Committee testimony on March 29, 2007, and his subsequent interviews by joint House and Senate Judiciary Committee staff, Sampson described himself as the "aggregator" of names and as the manager of the "process." He testified before the Senate Judiciary Committee that "[i]t wasn't that I wanted names on the list" and that, while he had his own views, there was no one specific U.S. Attorney that he "personally" thought should be on the list. Sampson also testified at his Senate Judiciary Committee appearance that he had "done no independent research" before removing any U.S. Attorney and had relied on Margolis, McNulty, and Mercer to make recommendations. He said he had "consulted with the Deputy Attorney General and others who would have reason to make an informed judgment about the U.S. Attorneys."

However, we found that contrary to his testimony, Sampson did not add McKay, Charlton, Bogden, Marino, and Miller to the September 13 removal list as a result of discussions with Department leaders geared toward arriving at a consensus list of U.S. Attorneys to be recommended for removal. Aside from

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<sup>36</sup> As noted above, Goodling had previously recommended to Sampson in January 2006 that Wagoner's name be taken off his list of proposed U.S. Attorney removals. Sampson did so then at Goodling's request and did so again in September 2006.

<sup>37</sup> In his interview with us, Sampson said he could not recall why O'Meilias's name came off the list.

Goodling and possibly Gonzales, no other senior Department official was aware at that time that Sampson had sent to Miers the September 13 proposal, much less the two previous proposals recommending the removal of specific U.S. Attorneys. As previously noted, Battle told us that neither Goodling nor Sampson ever asked him about which U.S. Attorneys should be replaced. McNulty said he did not even become aware of the effort to remove U.S. Attorneys until late October 2006. Mercer said he had no conversations with Sampson about U.S. Attorneys, aside from his discussions about Lam in the fall of 2005. Margolis told us that aside from his discussions with Sampson in 2005, he did not recall having conversations with Sampson about removing U.S. Attorneys until sometime in November 2006.

Sampson told us he placed the additional names on the September 13 list based on “problems” he learned about over the summer, not because he “went and asked the Deputy Attorney General” or anyone else whether these particular U.S. Attorneys (or others) should be designated for removal. In response to our questions, Sampson stated that the “problems” he learned about between April and September with respect to McKay and Charlton involved specific conduct rather than overall performance. According to Sampson, McKay had “crossed swords” with the Deputy Attorney General’s Office over McKay’s endorsement of an information-sharing program, an issue we discuss in more detail in the chapter on McKay’s removal. In Charlton’s case, Sampson said he knew from his experience in the Attorney General’s Office, as well as from talking to McNulty and Elston, that Charlton had policy conflicts with the Deputy Attorney General’s Office over a death penalty case and the tape recording of FBI interrogations. Sampson said that in both of these matters Charlton was viewed as a maverick attempting to impose his will on significant issues that had national implications. We discuss in greater detail the reasons proffered for the removal of Charlton and McKay in Chapters Eight and Nine of this report, and our analysis of Sampson’s stated reasons.

With regard to Miller, Sampson told us he did not recall why he placed Miller’s name on the list, but said he had a general sense that Miller was mediocre. He described Bogden in the same way but offered no specifics to support his assessment of Bogden’s performance. Sampson said he placed Marino on the list because he perceived that Marino was not leading his office.

Sampson told us that the process of compiling the list of U.S. Attorneys for removal was neither “scientific” nor “formal.” Sampson said that when he discussed U.S. Attorneys with Department officials over time, he had a current chart listing all the names of the U.S. Attorneys on which he made notes. Sampson said he would keep the annotated chart until it became “dog-eared” and then he would throw it away and start over. Sampson said he “sometimes” made notes during his conversations with other Department officials, and at other times he either made no notes or made them “after the fact.” Sampson also told us that a lot of the information he gleaned from others he “just

remembered.” Sampson described the discussions he had with Department officials about U.S. Attorneys as “largely an oral exercise” with “some really rough tracking.”

## **2. The Removal Plan Takes Shape**

On September 17, 2006, Miers replied to Sampson’s September 13 e-mail by stating, “I have not forgotten I need to follow up.” Sampson told us that sometime in late September 2006, he discussed with Gonzales the status of his proposal to remove several U.S. Attorneys. At that time, according to both Gonzales and Sampson, Gonzales directed Sampson to coordinate with Department leadership, particularly McNulty, to make sure there was consensus on the recommendations.

Between September 13 and mid-November 2006, Sampson confined his discussions about the removal list to a small group: Goodling, Gonzales, McNulty, and Elston. According to Sampson, he did not discuss the September 13 list with Margolis or consult with him on later drafts of the list, even though Sampson described Margolis to congressional investigators as a “repository” of knowledge on U.S. Attorneys’ performance, and even though Sampson had sought Margolis’s views in the early stages of the process. Sampson stated that he “assumed” that McNulty would consult Margolis and that Sampson “relied” on McNulty and Elston to do so. However, neither McNulty nor Elston did, and Sampson never sought to verify his assumption or contact Margolis directly about the removal list.<sup>38</sup>

In late September or early October 2006, Sampson told Elston that the U.S. Attorney removal plan was moving forward. According to Elston, Sampson asked him to consult with McNulty and put together a list of U.S. Attorneys they would recommend for removal. Elston said he mentioned the concept to McNulty, and, according to Elston, McNulty was not “wild about it.” Elston said he took no other action on Sampson’s request because of the press of other business, as well as his and McNulty’s lack of enthusiasm for the plan.

On October 17, Sampson, having heard nothing from the Deputy Attorney General’s Office, sent Elston an e-mail in which he forwarded his e-mail exchanges with Miers from September 13 and 17, including Sampson’s proposal for “pushing out” certain U.S. Attorneys. In his e-mail to Elston, Sampson referred him to “my list of U.S. Attorneys we should consider replacing” and asked if his list “match[ed] up” with Elston’s list. Although Elston told us that he had created no such list, Elston replied by e-mail to

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<sup>38</sup> McNulty told us that he did not recall discussing the removal issue with Margolis but said he “believed” at the time that Margolis was “aware” of the issue, and McNulty said he made the “assumption” that Sampson had consulted him.

Sampson's question about whether their lists matched: "Very much so – I may have a few additions when I get back to my desk."

After receiving the October 17 e-mail from Sampson, Elston discussed Sampson's September 13 U.S. Attorney removal list with McNulty. According to Elston, McNulty's instinct from the "get-go" was that this was a "bad idea" and McNulty asked Elston, "Are we really doing this[?]."

McNulty told congressional investigators that even though he was aware of concerns about each of the U.S. Attorneys targeted for removal, he was "a softie" when it came to addressing such concerns with the U.S. Attorneys directly, and said the removal plan was contrary to the way he would have addressed such concerns. However, McNulty said he did not express his reservations about the removal plan to Sampson or the Attorney General.

McNulty told us that when he heard from Elston about the removal plan at this point, he was surprised because he had no inkling about such a removal plan. However, he did not object to the plan. McNulty said that the way Elston presented the plan to him was along the lines of "here is the idea, and here are the names of individuals identified [for removal]." McNulty said he understood from Elston that he was supposed to object if he did not agree that certain names belonged on the list.

When we asked McNulty why he did not object to the plan, he told us that he was "predominantly deferential" because he viewed Sampson and the White House as "the personnel people [who] . . . decide who comes and who goes." He also said he thought the removals were going to be handled in a way that would not harm the U.S. Attorneys who were being asked to resign.

Elston told us that he informed Sampson a few days after the October 17 e-mail that he had no additions to the list.

#### **G. Elston's List – November 1, 2006**

However, we found that on November 1, 2006, Elston sent a short e-mail to Sampson with the subject line "Other Possibilities":

These have been suggested to me by others:

- Chris Christie [D. N.J.];
- Colm Connelly [D. Del.];
- Mary Beth Buchanan [W.D. Pa.];
- John Brownlee [W.D. Va.];

- Max Wood [M.D. Ga.].

The e-mail named no sources and offered no reasons or explanations for the U.S. Attorneys on Elston's list.

Elston told us that his November 1 e-mail was not a response to Sampson's earlier request that he and McNulty prepare a list of U.S. Attorneys they recommended for removal. Rather, according to Elston, shortly after Elston told Sampson that he and McNulty had no additions for Sampson's October 17 list, Sampson asked him to check with others in the Department to see if there were other U.S. Attorney "problems." The idea, as Elston said he understood it from Sampson, was that there were only 2 years left in the Administration and if changes in the U.S. Attorney ranks were to be made, this was the time to do it. Elston said that in keeping with that premise, Sampson wanted to ensure that all U.S. Attorney issues had been identified so a decision on all U.S. Attorney removals could be made at one time.

Elston said that after receiving Sampson's request, he spoke with four or five Department officials, primarily in the Tax and Criminal Divisions (including Criminal Division Assistant Attorney General Alice Fisher and her Chief of Staff Matthew Friedrich), to ascertain whether there were any issues with U.S. Attorneys that needed to be explored. Elston said the names on his November 1 e-mail were the product of his "casual inquiries" on Sampson's behalf.

Elston also told us that his November 1 list did not constitute his recommendation that the named individuals be removed from office. He maintained in his interview with us that he did not believe any of the five U.S. Attorneys warranted removal. Elston said that he also expressed that view to Sampson when they discussed his November 1 list. He said that Sampson concurred that the five should not be added to the list. When we asked Elston why he furnished the names to Sampson if he did not endorse their removal, he said that he was simply doing what Sampson asked him to do: find out if other Department managers had issues with any U.S. Attorneys and report back on the results. According to Elston, his November 1 e-mail was not intended or taken as a recommendation for action.

Sampson recalled things differently. According to Sampson, he had asked Elston to "vet" the October 17 list with McNulty to see if any names should be added to or removed from the list. Sampson told us he did not know where Elston had obtained the additional names, but he understood Elston's list to be names that McNulty and Elston, and maybe Margolis, wanted to add to the list. Sampson said he believed that he and Elston discussed the basis for including the five additional names, and Sampson said he did not agree that any of the names on Elston's list should be included on the removal list. Sampson said that the process was that if one person thought that someone

should not be on the list, that name would not be included. Consequently, none of the names on Elston's list were added to Sampson's removal list.

Both McNulty and Margolis told us that Elston did not consult with them about the names on his November 1 list, and both said they did not know how Elston obtained the names.

#### **H. The Fifth List – November 7, 2006**

From September 13 until November 7, no changes appeared on Sampson's proposed U.S. Attorney removal list. On the evening of November 7, Sampson sent an e-mail to Elston (with a copy to McNulty) asking him to review the "Plan for Replacing Certain United States Attorneys" proposed in the e-mail and to provide comments as soon as possible so that he could forward the plan to Miers that evening. The e-mail included a list of nine U.S. Attorneys proposed for removal. The first eight names on Sampson's November 7 list were identical to the names on his September 13 and October 17 lists:

- Paul Charlton (D. Ariz.);
- Carol C. Lam (S.D. Cal.);
- Greg Miller (N.D. Fla.);
- Paula Silsby (D. Me.);
- Margaret M. Chiara (W.D. Mich);
- Daniel Bogden (D. Nev.);
- Thomas Marino (M.D. Pa.); and
- John McKay (W.D. Wash.).

One additional name was added that had not appeared on any previous list prepared by Sampson: David Iglesias (D. N.M.).

#### **1. Iglesias is Added to the List**

The removal of David Iglesias as U.S. Attorney in the District of New Mexico was perhaps the most controversial removal of all the U.S. Attorneys. As discussed in more detail in Chapter Six, it appears that Sampson put Iglesias on the removal list sometime after October 17 based largely on complaints about Iglesias's handling of certain voter fraud and public corruption investigations in New Mexico. Sampson said he knew that New Mexico Republican Senator Pete Domenici had called Attorney General Gonzales on three separate occasions in 2005 and 2006 to register complaints

about Iglesias's performance. Sampson said that in October 2006 he also learned from either Elston or McNulty that Senator Domenici had also called McNulty to complain that Iglesias was "not up to the job."

According to McNulty, Senator Domenici had criticized Iglesias's handling of public corruption cases and said that Iglesias was "in over his head." McNulty told us that Domenici's assertiveness and tone during the conversation were "striking." McNulty said that his conversation with Domenici was the type he would have discussed with Gonzales and Sampson, but he said he could not specifically recall doing so.

When we asked if the October 2006 complaint from Senator Domenici to McNulty was the most important factor in putting Iglesias's name on the list, Sampson said: "I don't remember putting his name on a list. I did it . . . but I don't remember doing it and I don't remember there being a specific reason for doing it . . . I knew these things generally about Mr. Iglesias and I apparently put his name on the list."

As we discuss in detail in Chapter Six, Iglesias revealed in early March 2007 that Senator Domenici had called him in late October 2006 and asked whether a specific public corruption case involving Democrats would be indicted before the upcoming November election. Iglesias later expressed publicly his belief that his removal was precipitated by Senator Domenici's disappointment with the negative answer Iglesias gave him. At the same time, Iglesias revealed that New Mexico Representative Heather Wilson had also called him in October to inquire about the status of public corruption cases. We also learned that officials and party activists of the New Mexico Republican Party complained to White House and Department officials about Iglesias beginning in 2004. The complaints centered around Iglesias's handling of voter fraud allegations and politically sensitive public corruption cases.

## **2. The Removal Plan**

In his November 7 e-mail, Sampson included a written plan for removing the nine U.S. Attorneys that contained four steps to be carried out over several days:

Step 1 – Battle was to call each of the named U.S. Attorneys and follow a prepared script seeking their resignations based on the Administration's desire to "give someone else the opportunity to serve" as U.S. Attorney for the remaining 2 years of the Administration.

Step 2 – While Battle was calling the designated U.S. Attorneys, Deputy White House Counsel Kelley (or the appropriate Associate Counsel) would call the senior Republican Senators from the affected states to inform them of the Administration's decision "to

give someone else the opportunity to serve” as U.S. Attorney for what remained of the President’s second term. Sampson stated parenthetically that, if pushed, Kelley would explain that “the determination is based on a thorough review of the U.S. Attorney’s performance.” The senators would also be told that they would be looked to for recommendations for the new U.S. Attorney.

Step 3 – During November and December 2006, the Department, working with the White House Counsel, would evaluate and select candidates for either appointment as Interim U.S. Attorneys pursuant to the Attorney General’s new statutory authority to confer indefinite appointments, or as Acting U.S. Attorneys (for a 210-day period) under a separate statutory provision.<sup>39</sup>

Step 4 – The Department and White House Counsel would proceed on an expedited basis to identify, evaluate, and recommend candidates for the permanent U.S. Attorney position (Presidentially appointed, Senate-confirmed) in each district.

Step 3 in the plan called for the Department and the White House to identify Interim U.S. Attorney candidates. According to Sampson, however, at the time the plan was activated there were no replacement candidates “in the queue.” We found no evidence that as of November 7, Sampson or other Department officials had identified any candidates to replace the U.S. Attorneys who were to be removed. Nevertheless, the Department and the White House decided to proceed with the plan to remove the listed U.S. Attorneys.

### **3. Reaction to the November 7 List and Plan**

On the evening of November 7, Elston replied to Sampson’s e-mail, stating:

This looks fine to me – trying to get Paul’s [McNulty] input as well.

The only concern I have is that Paul just visited NDFla and asked that Greg Miller not be on the list. He does seem to be running things well (if somewhat independent of DOJ).

Sampson in turn responded that he would “wait for the DAG’s input (but no later than tomorrow).”

Sometime between November 7 and November 15, Sampson said he took Miller’s name off the list. He said he did so because “the Deputy [Attorney General] asked that it be taken off.”

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<sup>39</sup> The statutory provision, 5 U.S.C. § 3345(a)(1), allows the President to appoint the First Assistant United States Attorney as Acting U.S. Attorney for a 210-day period or until a nominee is confirmed, whichever is sooner.

McNulty told us that at the time he had recently visited Miller's district and did not perceive any problems with Miller's performance.

Following the dissemination of the November 7 list, Sampson deleted two other names – Silsby and Marino – from the list, but not because anyone disagreed with the removal recommendation. According to Sampson, Silsby's and Marino's names were removed because both were believed to have the political support of their home-state Senators and the judgment was made not to risk a fight with the Senators over the proposed removals. According to Sampson, McNulty said that Marino had been recommended by Senator Arlen Specter from Pennsylvania. Sampson told us that they did not ask for Marino's resignation because of the risk of a "brush fire" with the Senator. McNulty stated that he had no recollection of any such conversation with Sampson about Marino and doubted that the conversation took place.

With respect to Silsby, Sampson told us that the Maine Senators (Collins and Snowe) supported Silsby and the judgment was made "not to fight the Senators on that." The other U.S. Attorneys on Sampson's November 7 list, including Iglesias, remained on the list.

According to McNulty and Elston, discussions with Sampson concerning the remaining names on the November 7 removal list – Charlton, Lam, Chiara, Bogden, McKay, and Iglesias – focused on whether there was a good reason to take them off rather than on the reason they were on the list in the first place. McNulty said that the U.S. Attorney removal process was an initiative of the Office of the Attorney General related to a "personnel matter" that was within the province of the Attorney General, and that he therefore deferred to the Office of the Attorney General in the matter. McNulty also told us that Sampson did not ask for his permission to engage in the removal effort or seek his approval. McNulty said the only role he was asked to play was to review the list for the purpose of removing any name with which he disagreed. McNulty said his reaction to the November 7 plan was a mixture of surprise that it was being implemented and deference to the personnel prerogatives of the Attorney General's Office. However, he also said he felt that the plan was reasonable in that each U.S. Attorney would be given ample time to make the transition to private life.

Both McNulty and Elston said they were familiar with the issues surrounding Lam, Chiara, Charlton, and McKay, and neither argued in favor of taking any of those four off the list. With respect to Bogden, McNulty said that he knew little about Bogden's performance but was told by Sampson that he was on the list because he was not an effective or dynamic leader in an important district with "special challenges."<sup>40</sup> McNulty told us that he

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<sup>40</sup> In the Department's after-the-fact justifications for Bogden's removal, which we discuss below, Las Vegas was characterized as an important district with special challenges (Cont'd.)

accepted Sampson's explanation without looking into Bogden's record because of his "deferential approach" toward the Attorney General's Office in this matter.

Later, however, after the final removal decisions had been made on November 27, McNulty told Sampson he was "skittish" about Bogden's removal because, as a career federal prosecutor, Bogden's transition to the private sector might pose financial hardships on his family. McNulty said that after Sampson told him that Bogden was single, he dropped the issue.

McNulty also did not object to Iglesias's inclusion on the removal list. As we discuss in more detail in Chapter Six, McNulty said he was unaware of any problems with Iglesias until he received a telephone call on October 4 from Senator Domenici complaining about Iglesias's handling of public corruption cases and said that he was "in over his head." McNulty told us that when he saw Iglesias's name on the list, he associated it with Senator Domenici's complaint and viewed the decision to remove Iglesias as falling in the "category of personnel," meaning something that was outside his "bailiwick."

Elston said he did not object to the removal of either Bogden or Iglesias because he viewed both as "mediocre" U.S. Attorneys. He also said he believed at the time that Iglesias's name was placed on the list because of Senator Domenici's call to McNulty in October 2006. He said he was not given any other reason at the time for Iglesias's name being added at such a late date. He stated that "everybody" deemed the Senator's call to McNulty as significant.

## **I. The Sixth List – November 15, 2006**

### **1. The Revised Plan**

On November 15, Sampson sent an e-mail to Miers and Kelley attaching a revised list of U.S. Attorneys recommended for removal. The list of U.S. Attorneys proposed for removal in the revised list had been pared to six:

- Paul Charlton (D. Ariz.);
- Carol C. Lam (S.D. Cal.);
- Margaret M. Chiara (W.D. Mich.);
- Daniel Bogden (D. Nev.);

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because it was a target for terrorism and had significant levels of violent crime and organized crime.

- John McKay (W.D. Wash.); and
- David Iglesias (D. N.M.).

The names of Miller, Marino, and Silsby were deleted from the list.

Sampson's November 15 e-mail also contained an implementation plan that was similar to, but more elaborate than, the draft that accompanied Sampson's November 7 e-mail to Elston. In particular, the second step, that Kelley would call home state "political leads," no longer contained the language that, if pushed, Kelley should explain that the determination was based on a "thorough review" of the U.S. Attorney's performance. Instead, a new Step 3 was added entitled "Prepare to Withstand Political Upheaval," which addressed the subject of resisting pressure from U.S. Attorneys and their political allies to keep their jobs. According to this new Step 3, the response to any such appeals would be that the Administration had decided to seek the resignations in order to give someone else a chance to serve.

Sampson's redrafted plan still had EOUSA Director Battle making the calls to the U.S. Attorneys using talking points Sampson provided. The plan also still called for the Department and White House Counsel's Office to evaluate and select interim candidates and to carry out the selection, nomination, and appointment of U.S. Attorneys pursuant to the regular nomination and Senate confirmation process.

In his e-mail to Miers and Kelley on November 15, Sampson stated that he had consulted with the Deputy Attorney General but had not yet informed others "who would need to be brought into the loop," including Acting Associate Attorney General Mercer, Battle, and the Chair of the Attorney General's Advisory Committee, U.S. Attorney for the Western District of Texas Johnny Sutton. Sampson also stated in the e-mail that everyone must be "steered to withstand any political upheaval that might result" and that if the White House and the Department were to "start caving to complaining U.S. Attorneys or Senators, then we shouldn't do it – it'll be more trouble than it is worth."

Sampson's plan called for implementation of the removals that same week, although he informed Miers and Kelley that he would wait for the "green light" from them. He also proposed to "circulate" the plan within the Department and asked that Miers and Kelley circulate it to "Karl's [Rove] shop." Once that was done, according to Sampson's e-mail, Kelley would make the "political lead calls" and Battle would call the U.S. Attorneys slated for removal.

## **2. Execution of the Plan is Postponed**

For logistical reasons, the plan could not be carried out on the schedule Sampson suggested. After receiving Sampson's November 15 e-mail, Miers responded that she would have to determine if the plan required the President's attention. She stated that the President had left town the night before and she

would not be able to get his approval “for some time.” Sampson responded by asking Miers who would determine if the President needed to be apprised of the removal plan. Sampson told us that he never received an answer to that question, and the documents provided to us by the White House do not mention this issue. As stated previously, Miers and Kelley from the White House Counsel’s Office refused our requests for interviews.

According to Margolis, in approximately mid-November Sampson either showed him a list, or read from a list, of six U.S. Attorneys that Sampson indicated were to be removed. Margolis told us that he was struck more by the names Sampson did not mention than the ones he did. In their discussions of the topic of underperforming U.S. Attorneys, Margolis had consistently named Ryan and Lampton, but neither name was mentioned by Sampson on this occasion. Margolis told us that he asked Sampson why Ryan and Lampton were not on the list and Sampson responded that he would look into it. Margolis told us that he did not think to question Sampson about five of the six U.S. Attorneys who were on Sampson’s list and did not know why they were on the list. He told us he was more focused on the names that were omitted and assumed Sampson had valid reasons for five of the six he named.

### **3. The November 27, 2006, Meeting in the Attorney General’s Office**

In the meantime, Sampson scheduled a meeting for November 27 to discuss the U.S. Attorney removal plan with Department officials. On the morning of November 27, a meeting was held in the Attorney General’s conference room attended by Gonzales, Sampson, McNulty, Goodling, Principal Associate Deputy Attorney General William Moschella, and Battle. Elston was unavailable and Margolis was not invited.

Of those in attendance, Moschella was the only one who had not previously been involved in some aspect of the removal plan. Moschella had been appointed the Principal Associate Deputy Attorney General in early October 2006 after serving for several years as the Assistant Attorney General for the Department’s Office of Legislative Affairs. He told us that at the time of the meeting he was generally aware of a matter involving removal of some U.S. Attorneys, but had not been involved in the details.

The 3-page document discussed in Sampson’s November 15 e-mail containing the list of six U.S. Attorneys proposed for removal and the steps to be taken to implement the plan was distributed to the attendees at the meeting. By all accounts, there was little discussion about the reasons the named U.S. Attorneys had been designated for removal or whether anyone objected to the plan as a whole or as it applied to any particular U.S. Attorney. For example, Battle told us it was clear to him that the decision to remove the

named U.S. Attorneys had already been made, and the discussion at the November 27 meeting focused on implementing the plan.

**a. Gonzales's Recollection of the November 27 Meeting**

In our interview of him, Gonzales told us he did not recall the November 27 meeting at which he approved the plan to request the resignations of six U.S. Attorneys. However, everyone else in attendance at the meeting stated that Gonzales was present, that he received a copy of the 3-page implementation plan, and that he gave his approval to proceed.

While Gonzales told us he had no independent recollection of the November 27 meeting, he described the process and his role in it. In contrast to Sampson's description of himself as the "aggregator," Gonzales described himself as a delegator. He said he had given broad instructions to Sampson to evaluate the current ranks of U.S. Attorneys to determine, in concert with senior Department officials and the White House, where improvements could be made. Gonzales told us that it was not in his "nature to micromanage." He said he surrounded himself with "good people" to whom he delegated responsibility with the "expectation that they're going to do their jobs."

According to Gonzales, while Sampson had provided him "periodic" and "very brief updates" about the U.S. Attorney removal plan over time, they had no discussion of "substance" in terms of the reasons underlying the removals, and Gonzales said he did not know who was "going on and off the list" until November 27 at the earliest. Gonzales also stated that while it was his decision to approve the removals, he made it based on the recommendation of Sampson and the consensus of Department leaders. However, he said that he never asked Sampson or anyone else how they arrived at their recommendations or why each U.S. Attorney warranted removal. Instead, he said he "assumed" that Sampson engaged in an evaluation process, that the recommendations were based on performance issues, and that they reflected the consensus of senior management in the Department.

**b. McNulty Asks to Add Ryan to the List**

According to McNulty, the November 27 meeting was "much shorter than an hour," and during the session the group discussed the logistics of the removal plan. In her congressional testimony, Goodling said that at the meeting the group discussed whether the U.S. Attorneys should be told in person that they were being removed, but the concern was that the U.S. Attorneys would then want to "litigate the reasons" for their removal. Goodling said that someone pointed out that because the U.S. Attorneys served at the pleasure of the President it was not necessary to tell them the reasons why they were being removed.

According to Sampson, although the original plan called for Battle to call the U.S. Attorneys who were being removed, the group also discussed whether McNulty should notify the U.S. Attorneys in person while they were in Washington, D.C., for a Project Safe Childhood conference. Sampson told us that McNulty said he did not want to make the calls because it would have made him uncomfortable to do so. McNulty told us that it would have been unpleasant to tell the U.S. Attorneys they were being removed, but he said he did not recall “being asked to [notify the U.S. Attorneys], or that being part of any plan.” McNulty said that having Battle make the calls was consistent with the notion of keeping the removals in a “lower key.”

Sampson said the group ultimately decided that Battle would make the calls, and they would execute the plan after December 6, when the U.S. Attorneys would be back in their districts after attending the conference.

Sampson said that shortly after the meeting adjourned, McNulty told him that Ryan should be included on the list based on the results of the recently concluded Special EARS review. Sampson said he did not recall doing so, but said he would have spoken to Gonzales soon after the meeting and received his approval to add Ryan’s name to the list, bringing the total number of U.S. Attorneys designated for removal to seven.

### **c. White House Approval of the Removal Plan**

In the week following the November 27 meeting, Sampson awaited word from the White House Counsel’s Office on whether the Department was authorized to proceed with the removal plan. Sampson told us that around this time he gave Deputy White House Counsel Kelley a “thumbnail” sketch of the reasons each U.S. Attorney was placed on the list. Sampson stated that Kelley raised no objection.

According to Sampson, the White House “was deferential to the Department of Justice’s view on who should be on this list” throughout the process. Sampson claimed that aside from Miers’s question about U.S. Attorney Yang and her request to find a spot for Griffin, no one at the White House had asked that a name be placed on or taken off the list at any time.

## **J. The Seventh and Final List – December 4, 2006**

### **1. The White House Approves the Plan**

On Monday, December 4, 2006, Kelley sent an e-mail to Sampson (with a copy to Miers) stating: “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.”

Sampson responded: “Great. We would like to execute this on Thursday, December 7 (all the U.S. Attorneys are in town for our Project Safe Childhood conference until Wednesday; we want to wait until they are back home and dispersed, to reduce chatter).” Sampson also reiterated who had responsibility for making the political calls: the Attorney General was to call Senator Kyl of Arizona regarding Charlton; either Miers or Kelley was to call Senator Ensign of Nevada regarding Bogden and Senator Domenici of New Mexico regarding Iglesias; and the White House Office of Political Affairs was to call the political “leads” for California (regarding Lam and Ryan), Michigan (regarding Chiara), and Washington (regarding McKay), all of which had no Republican Senator.

Later during the evening of December 4, Sampson e-mailed to Kelley and Miers a revised removal plan that included Ryan’s name. Minutes later, Sampson e-mailed the revised plan to McNulty, Battle, Goodling, Moschella, and Elston, together with the e-mail string containing Kelley’s authorization to proceed. In his forwarding e-mail to the Department officials, Sampson suggested that AGAC Chair Sutton and Acting Associate Attorney General Mercer be notified. The e-mail also suggested noon on Thursday, December 7 for Battle to begin making his calls to the seven U.S. Attorneys who would be removed. That evening, Sampson also sent an e-mail to Scott Jennings and Jane Cherry, who worked in the White House Office of Political Affairs, with a list of current U.S. Attorney vacancies and a list of “vacancies expected shortly” – a list that included the seven U.S. Attorneys who would be called on December 7. Sampson wrote that the purpose of the e-mail was to notify the White House that “we need to get some names generated pronto.”

The next day, December 5, Sampson e-mailed the revised plan to Mercer so that he would be prepared in the event he received calls from “the field.” From the context of the e-mail, it is clear that Mercer had not been involved in the process until then. Sampson informed Mercer that the “Administration has decided to ask some underperforming USAs to move on (you’ll remember I beat back a much broader – like across the board – plan that [the White House Counsel’s Office] was pushing after 2004.).”

## **2. The Implementation of the Removal Plan**

On the morning of December 7, 2006, the plan was executed. Gonzales and Sampson called Senator Kyl regarding Charlton’s removal. The Senators and political leads for the other U.S. Attorneys were also notified in accordance with the plan’s instructions.

During the afternoon of December 7, Battle called each of the seven U.S. Attorneys on the removal list and essentially followed the script from

Sampson's plan in asking each to resign.<sup>41</sup> Battle said he told each U.S. Attorney that the Administration thanked them for their service but was looking to move in another direction and give somebody else a chance to serve and was therefore asking them to submit their resignation by the end of January 2007. According to Battle, some of the U.S. Attorneys asked why, and some asked for more time. Battle said that none of the U.S. Attorneys got upset with him, but he had the sense for some that, given their strong personalities, there would be some "push back." However, Battle said that all agreed to comply with the request to resign.

As we discuss below, as well as in the chapters assessing the reasons proffered for the removal of each U.S. Attorney, the U.S. Attorneys said they were surprised and stunned at the calls asking them to resign. They told us, and e-mails and other documents drafted in the aftermath of Battle's December 7 calls confirm, that they were confused about why they were asked to resign and upset that they were given so little notice before the deadline for their resignations.

## **II. The Aftermath of the Removals**

In the months following the December 7, 2006, calls to the U.S. Attorneys, various concerns arose relating to their removals, including how the process of selecting U.S. Attorneys for removal was conducted, whether the removals of specific U.S. Attorneys were sought for an improper political purpose, and whether the Department intended to bypass Senate confirmation by using the Attorney General's authority to make indefinite Interim U.S. Attorney appointments of their replacements.

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<sup>41</sup> Step 2 of the plan provided talking points for Battle to use when informing the U.S. Attorneys that they were expected to resign:

- What are your plans with regard to continued service as U.S. Attorney?
- The Administration is grateful for your service as U.S. Attorney but has determined to give someone else the opportunity to serve as U.S. Attorney in your district for the final two years of the Administration.
- We will work with you to make sure there is a smooth transition, but intend to have a new Acting or Interim U.S. Attorney in place by January 31, 2007.

Step 3 provided that if the U.S. Attorneys questioned the decision and wanted to know who decided, Battle's response was to be: "The Administration made the determination to seek the resignations (not any specific person at the White House or the Department of Justice.)" If asked "why me," the response was: "The Administration is grateful for your service, but wants to give someone else a chance to serve in your district." If the U.S. Attorney said that s/he needed more time, the response was to be: "The decision is to have a new Acting or Interim U.S. Attorney in place by January 31, 2007 (granting "extensions" will hinder the process of getting a new U.S. Attorney in place and giving that person the opportunity to serve for a full two years.)"

The subsequent revelation that seven U.S. Attorneys had been asked to resign on the same day prompted congressional inquiries into the removals. On January 16, 2007, Senator Dianne Feinstein stated on the Senate floor that seven U.S. Attorneys had been removed without cause. Media reports also disclosed that two of the U.S. Attorneys had recently investigated high-profile public corruption investigations at the time of their removals – Lam had successfully prosecuted California Republican Congressman Duke Cunningham, and Charlton was engaged in an ongoing investigation of Arizona Republican Congressman Rick Renzi. In addition, the media reported allegations that McKay was removed for failing to pursue voter fraud complaints following the closely contested Washington State gubernatorial election in November 2004.

In a press conference on February 28, 2007, Iglesias disclosed that he had received telephone calls in October 2006 from two unidentified members of Congress who pressured him to indict a public corruption case in New Mexico before the November 2006 election. In his congressional appearance on March 6, Iglesias stated that the two members of Congress who allegedly pressured him were New Mexico Senator Pete Domenici and Representative Heather Wilson. Iglesias testified that he believed he was removed as U.S. Attorney because he failed to respond to their desire to rush public corruption prosecutions.

We discuss in the following sections the immediate reaction to the removals, the Department's response, and the events that followed.

#### **A. The U.S. Attorneys' Initial Reactions**

After receiving the calls from Battle on December 7, Lam, Bogden, Iglesias, and Chiara contacted McNulty. Lam, Bogden, and Iglesias sought more time before submitting their resignations while Chiara sought McNulty's assistance in finding her a new position. McNulty did not immediately respond to these requests.

Lam also contacted Margolis to inquire whether she had been asked to resign because she was the subject of any misconduct investigation. Margolis told us that he first became aware that the removal plan had actually been implemented when he received the call from Lam. He said that when the plan had not been carried out by mid-November 2006, he assumed it was not going to go forward. Margolis told Lam that her removal was not because of any misconduct issue.

According to e-mail records, Ryan complained to his contacts at the White House about his treatment. Charlton and Bogden contacted Mercer and asked why they were being removed. However, consistent with Sampson's plan, the U.S. Attorneys were given no explanation for the firings other than

that the Administration wanted to give someone else a chance to serve. Most of the U.S. Attorneys also sought more time before they had to resign.

On December 14, McKay sent an e-mail to all U.S. Attorneys announcing that he planned to resign the following month. On December 15, Cummins sent an e-mail to all U.S. Attorneys announcing that he would resign the following week.

**B. Concern that the Department Intended to Bypass Senate Confirmation for Replacement U.S. Attorneys**

On December 15, 2006, Attorney General Gonzales and Arkansas Senator Mark Pryor discussed Gonzales's intention to appoint Tim Griffin as the Interim U.S. Attorney to replace Cummins. Gonzales informed Senator Pryor that he intended to appoint Griffin to be Interim U.S. Attorney, and Gonzales expressed his hope that Senator Pryor would be able to support Griffin for the nomination after he had had a chance to serve. According to Gonzales, Senator Pryor said he would not commit to supporting Griffin's nomination at that time.

In an e-mail dated December 19, 2006, Sampson drafted talking points to respond to inquiries about the circumstances of Griffin's appointment. The talking points included the statements that when a U.S. Attorney vacancy arises, someone needs to be appointed, even if on an interim basis to fill the vacancy, that Griffin was appointed Interim U.S. Attorney because of the timing of Cummins's resignation, and that the Department "hoped that there would be a U.S. Attorney who had been nominated and confirmed in every district." Sampson sent a copy of this e-mail to Associate White House Counsel Chris Oprison.

In response, Oprison told Sampson he had discussed with Miers the Department's response to press inquiries about the circumstances of Griffin's appointment. Oprison expressed concern to Sampson about problems with Griffin's nomination, noting that it seemed that the Arkansas Senators would neither commit to supporting Griffin nor say they would not support him. Oprison also stated that since the Attorney General's appointment of Griffin was of unlimited duration pursuant to the Patriot Act amendment, the talking points used to respond to press inquires about Griffin should "avoid referring to [Griffin] as 'interim.'"

Sampson immediately responded in an e-mail, "I think we should gum this to death . . . ." Sampson suggested in his e-mail that because Griffin's interim appointment would be technically of unlimited duration, if either of the Democratic Senators from Arkansas would not agree to support Griffin's nomination once he was nominated and after he had served as Interim for a period of time, the Department could "run out the clock" to the end of the Bush

Administration while appearing to act in good faith by asking the Senators for recommendations, interviewing other candidates, and pledging to “desire” a Senate confirmed U.S. Attorney. Sampson also stated in the e-mail, “our guy is in there so the status quo is good for us.” Sampson added, “I’m not 100 percent sure that Tim was the guy on which to test drive this authority, but know that getting him appointed was important to Harriet, Karl, etc.”

When confronted with this e-mail during his congressional testimony, Sampson characterized his discussion of using the interim appointment authority to bypass Senate confirmation as a “bad idea at the staff level.” He told us that the idea was confined to Griffin. Sampson also said Attorney General Gonzales never seriously considered it.<sup>42</sup> Gonzales told us he could not recall whether he discussed this issue with Sampson at that time, but said he thought it was a “dumb idea.”

### **C. The Department Begins to Publicly Respond to Concerns About the Removals**

Shortly after McKay and Cummins announced their resignations, most of the U.S. Attorneys began discussing their removals among themselves. By December 17, several of the U.S. Attorneys speculated among themselves that the Department had asked 10 to 12 U.S. Attorneys to resign.

In mid-to-late December 2006, the news media began to report on the removals. For example, on December 19, in an online story entitled *U.S. Attorney Ousted*, a New Mexico television station reported that Iglesias had been asked to resign. During the same period, other news outlets began asking the Department for comment on the removals of U.S. Attorneys.

#### **1. Articles About Cummins’s Removal**

In late December 2006, various articles began appearing in the Arkansas media regarding Cummins’s resignation, Griffin’s appointment as Interim U.S. Attorney, and the concerns of Arkansas Senators Pryor and Blanche Lincoln that the Department intended to circumvent the confirmation process by appointing Griffin as Interim U.S. Attorney.

On December 27, 2006, the Arkansas Democrat Gazette published an interview with Griffin discussing the Senators’ concerns. The article included a statement from Department of Justice spokesman Brian Roehrkasse that Griffin’s appointment was meant to be temporary until Griffin could go through the formal nomination and confirmation process, and that the Department had asked Senator Pryor to meet with Griffin. According to the article, Roehrkasse

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<sup>42</sup> This matter is discussed in detail in Chapter Five.

stated, “often, the first assistant U.S. Attorney in the affected district will serve as the acting U.S. Attorney until the formal nomination process begins for a replacement,” but added “the first assistant is on maternity leave.” Roehrkasse also stated, “Tim was chosen because of his significant experience working as a federal prosecutor in both Arkansas and in the Justice Department in Washington, D.C.”

Cummins told us that when he read the article he began to have doubts about the Department’s credibility. Cummins said that Griffin had been working in the U.S. Attorney’s Office since September 2006, and Cummins had known since June of that year that Griffin was going to take his place. Cummins also said that the maternity leave status of his First Assistant was not a reason for Griffin’s appointment as the Interim U.S. Attorney because the Department and the White House had always intended that Griffin would replace Cummins as either Interim or permanent U.S. Attorney, or both.

We found no indication that anyone ever considered at the time appointing the office’s First Assistant as Interim U.S. Attorney. The First Assistant (now the U.S. Attorney) told us that she had no discussions with anyone at the Department about the possibility of serving as Interim U.S. Attorney when Cummins resigned. In addition, our review of e-mails between Sampson and Goodling demonstrates that as early as August 2006 they discussed using the Attorney General’s appointment authority to appoint Griffin Interim U.S. Attorney because it was unclear whether Senator Pryor would support Griffin’s nomination.

We sought to determine where Roehrkasse obtained the information that implied that the First Assistant’s maternity leave was a reason for Griffin’s appointment as the Interim U.S. Attorney. When we interviewed Roehrkasse, he told us that he thought he had received the information from Goodling and Sampson. Roehrkasse said he recalled receiving a question from a reporter concerning the circumstances of Griffin’s appointment, and either Sampson, Goodling, or both gave Roehrkasse three talking points: (1) Griffin was chosen because he had significant experience; (2) the President might nominate him to be the permanent U.S. Attorney; and (3) the First Assistant was not available because she was either going on maternity leave or was on maternity leave.

Sampson told us that the information about the First Assistant’s maternity leave did not come from him but likely came from Goodling. Sampson said he recalled being present when Goodling briefed the Attorney General before his December 15 telephone conversation with Pryor, and that Goodling mentioned to Gonzales, in response to one of Gonzales’s questions during the briefing about what was happening in the district, that the First Assistant was on maternity leave. Sampson acknowledged that Griffin was slated to be appointed Interim U.S. Attorney all along. However, he told us he

did not consider correcting any misimpression that Goodling had created because he did not believe the circumstances called for him to do so.<sup>43</sup>

We asked Roehrkasse whether he thought the statements he made concerning the First Assistant being unable to serve because she was on maternity leave were misleading. Roehrkasse said that he saw no problem with the statements. He said the quote about the First Assistant being on maternity leave was a fact and that it was not as if he had said “[the first assistant] was passed over [for consideration as Interim U.S. Attorney] because she was on maternity leave.” Roehrkasse also said that when he spoke with the reporter he believed, based on what Goodling and Sampson had told him, that one of the reasons the First Assistant was not chosen to be Interim U.S. Attorney was that she was on maternity leave.

Roehrkasse said he did not learn that the article may have contained inaccuracies until after the controversy over the U.S. Attorney removals erupted. However, we found no evidence that the Department attempted to correct Roehrkasse’s misleading information at the time.

## **2. Senators Express Concern About the Removals**

By early January 2007, other news articles reported that several U.S. Attorneys across the country had been asked to resign. On January 9, 2007, Senators Patrick Leahy and Dianne Feinstein wrote Attorney General Gonzales a letter expressing concern that the Department had removed the U.S. Attorneys without cause and intended to “appoint interim replacements and potentially avoid the Senate confirmation process.” The two Senators requested information “regarding all instances in which you have exercised the authority to appoint an interim United States Attorney.” The Senators also requested information “on whether any efforts have been made to ask or encourage the former or current U.S. Attorneys to resign their position.”

On January 11, Senator Pryor sent Attorney General Gonzales a letter expressing concern that the Administration had forced Cummins to resign in order to appoint Griffin. Pryor stated that he was “astonished” that the Department’s liaison had told his staff and the media that the First Assistant was not chosen to be the Interim U.S. Attorney because she was on maternity leave, and he expressed concern that Griffin’s appointment was intended to bypass the Senate confirmation process.<sup>44</sup> The same day, Senators Feinstein,

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<sup>43</sup> As noted above, Goodling refused to be interviewed by us.

<sup>44</sup> In a January 31, 2007, letter responding to Senator Pryor signed by Richard Hertling, Acting Assistant Attorney General for the Office of Legislative Affairs, the Department wrote that it was committed to having a Presidentially appointed, Senate-confirmed U.S. Attorney in every district. The Department denied that the Administration sought to avoid the Senate confirmation process, and said that Griffin was chosen to serve as Interim U.S. Attorney (Cont’d.)

Leahy, and Pryor introduced legislation designed to restore the authority of federal district courts to appoint Interim U.S. Attorneys when 120 days had passed without a Senate-confirmed U.S. Attorney.

As noted previously, we found no evidence that the Department had candidates waiting to be nominated to replace the U.S. Attorneys at the time of their removals. McNulty told us that in late December to mid-January, when the individual U.S. Attorneys had begun announcing their resignations, Sampson consulted with him about possible replacements. McNulty said Sampson assured him that the replacement process was being conducted “by the book,” and that the Department was initially attempting to select the First Assistants to act as Interim U.S. Attorneys.

McNulty said Sampson also told him that the Department was working with the Senators or state commissions to obtain the names of individuals who would go through the nomination process. Our review of e-mail records and other documents confirmed that the Department was in fact working with state congressional delegations and others to obtain the names of individuals to undergo the nomination and confirmation process for U.S. Attorneys.

### **3. Sampson’s January 2007 Briefing of Senate Judiciary Committee Staff**

In response to the January 9, 2007, letter from Senators Feinstein and Leahy alleging that the Department had asked several U.S. Attorneys to resign “without cause” and that the plan was to appoint “interim replacements” and avoid the Senate confirmation process, Sampson called Senator Feinstein’s chief counsel, Jennifer Duck, to set up a meeting with her and Senator Leahy’s chief counsel, Bruce Cohen. The purpose of the meeting, according to Sampson, was to “mollify” the Senators that the Department’s actions were not sinister.

We found that Sampson’s representations at the meeting with Senate staff exacerbated rather than mollified the skepticism concerning the U.S. Attorney removals. On January 12, 2007, Sampson and Richard Hertling, who had recently assumed the position of Acting Assistant Attorney General for the Office of Legislative Affairs, met with Duck and Cohen in Cohen’s office. According to Hertling, who said he knew little about the controversy at the time, Sampson attempted to impress upon Duck and Cohen that the removals were the result of a process the Department had been engaged in for some time of identifying the U.S. Attorneys who were the “weakest performers,” and that

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because of his qualifications, not because the First Assistant was on maternity leave. The Department’s letter did not address Senator Pryor’s assertion that the Administration had forced Cummins to resign so that Griffin could be appointed.

the process included a review of EARS evaluations. Hertling told us that one of the things that stuck in his mind about the meeting was Sampson's "specific reference" to EARS evaluations as a basis for the selection of these particular U.S. Attorneys for termination. Hertling said he left the meeting with the "distinct impression" that EARS evaluations were central to the process Sampson had described.

We also interviewed Duck and Cohen. According to Duck, Sampson said all the U.S. Attorneys who were removed were "underperformers." When Duck asked how they were evaluated, Sampson first said the decisions were based on EARS evaluations, but later said that while some were based on EARS evaluations, some were based on other factors such as caseload, responsiveness to policy initiatives, resource allocation, and the like.

Cohen similarly stated that Sampson stressed that the Department decided to remove certain "underperforming" U.S. Attorneys and that the removals were based on periodic performance reviews – EARS evaluations. According to Cohen, Sampson initially spoke of the value of EARS reports in determining which U.S. Attorneys fell into the "underperforming" category, but he backtracked when Duck pressed him for copies of the EARS reports for each removed U.S. Attorney.

Cohen and Duck also told us that Sampson emphasized that all the affected U.S. Attorneys were removed on the basis of performance, including Cummins, whose replacement by Griffin had triggered the Senate's interest in the first place. According to Duck, Sampson said that Cummins was considered an "underperforming" U.S. Attorney, and the Attorney General had appointed Griffin Interim U.S. Attorney upon Cummins's resignation because the First Assistant was on maternity leave and not available to accept the appointment.

Sampson told us that he mentioned EARS evaluations only in the context of explaining Ryan's removal, which he considered of particular interest to Senator Feinstein. Sampson said he doubted that he would have suggested that the other removals were based on EARS evaluations because "that wouldn't have been accurate." In addition, Sampson said that he could not recall whether he told Duck and Cohen that Cummins was removed based on performance issues like the other seven. Sampson acknowledged, however, that he viewed Cummins's removal as performance-based at the time. When we asked Sampson if he distinguished Cummins from the other removed U.S. Attorneys, as McNulty did later, on the ground that someone in the

Administration (Miers) had asked that Griffin be given the opportunity to serve, Sampson replied: “I don’t remember what I said.”<sup>45</sup>

Sampson’s meeting with Duck and Cohen did not satisfy the Senate Judiciary Committee members that the U.S. Attorneys were removed for legitimate reasons. On January 16, Senator Feinstein criticized the removals in a statement on the Senate floor, asserting that several U.S. Attorneys were forced to resign so that the Attorney General could appoint interim replacements pursuant to the Patriot Act amendment and thereby avoid Senate confirmation. Feinstein noted that she had learned that seven U.S. Attorneys had been forced to resign without cause, including two from California, “as well as U.S. Attorneys from New Mexico, Nevada, Arkansas, Texas, Washington, and Arizona.”<sup>46</sup>

On January 25, Senator Charles Schumer issued a notice scheduling a hearing for early February 2007 on whether the Department was “politicizing” the “hiring and firing” of U.S. Attorneys. The previous day, Hertling had contacted Preet Bharara, Senator Schumer’s Chief Counsel on the Senate Judiciary Committee, and arranged a meeting on January 26 for Sampson and Hertling to brief Bharara on the U.S. Attorney issue.

According to Bharara, Sampson’s theme at the briefing on January 26 was that Senator Feinstein’s denunciation of the removals on the Senate floor on January 16 was misguided. Bharara told us that Sampson maintained that none of the U.S. Attorneys were removed in order to stymie any investigation. Bharara said that Sampson stressed that, to the contrary, there were performance reasons for each removal, and while Sampson declined to go into specifics at this meeting, he assured Bharara that if he knew all the details he would agree with the Department’s decisions. Although Bharara told us he did not have a specific recollection of what Sampson said about the role EARS evaluations played in the removal decisions, Bharara recalled that he was eager to obtain the EARS reports after hearing what Sampson said. Bharara also said he was surprised when he later heard McNulty say at a closed briefing with members of the Senate Judiciary Committee and staff on February 14 that EARS evaluations did not reflect problems with most of the U.S. Attorneys who were forced to resign.

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<sup>45</sup> Sampson said that Cohen pressed him on the total number of U.S. Attorneys who were removed. Sampson assured him that the number was seven, plus Cummins. It was revealed during subsequent congressional hearings that Todd Graves was also asked to resign in January 2006 under circumstances similar to the other eight U.S. Attorneys.

<sup>46</sup> Feinstein included Texas by mistake.

**D. Elston's Telephone Calls to Charlton and McKay on January 17, 2007**

Attorney General Gonzales was scheduled to testify at an oversight hearing before the Senate Judiciary Committee on January 18, 2007. During January 2007, senior Department staff participated in several sessions to prepare the Attorney General for his upcoming congressional testimony.

Elston told us that during one session held on January 17, 2007, the day before Gonzales's congressional testimony, the group discussed how Gonzales would handle questions about the U.S. Attorney removals. As noted above, by mid-January the media was raising questions about the resignations of Cummins, McKay, Iglesias, Lam, Bogden, Ryan, and Charlton.

Elston said that after the January 17 preparation session, McNulty expressed concern for the U.S. Attorneys about whom members of Congress and the media were speculating, but who had not publicly confirmed they had been asked to resign. Elston told us that, at the time, the Department's goal was to allow the U.S. Attorneys to leave on their own terms and announce their resignations in accordance with their own sense of appropriate timing.

According to Elston, McNulty was concerned that the U.S. Attorneys might be worried about what the Attorney General was going to say about them in his testimony at the January 18 hearing. Elston said the concern was that they might publicly announce that the Department had sought their resignations, in anticipation that the Attorney General would say they had been removed. Elston said that on January 17 McNulty asked him to call McKay, Charlton, and Ryan to let them know that the Attorney General was not going to testify about who had been removed or about the basis for the removals.

We were unable to determine why Elston was chosen to call only McKay, Charlton, and Ryan. Elston said he believed that someone else was assigned to call the others. However, we did not find any indication that anyone else in the Department was asked to place calls to the other U.S. Attorneys prior to the Attorney General's testimony.

On January 17, Elston called McKay at 5:30 p.m., and an e-mail reflects that Elston called Charlton shortly afterwards. Elston said he did not speak to Ryan, but instead spoke to Ryan's First Assistant. Elston said he gave McKay, Charlton, and Ryan's First Assistant the same message: that when the

Attorney General testified, he would not name the U.S. Attorneys or discuss the reasons for their removal.<sup>47</sup>

### **1. Telephone Call to McKay**

According to McKay, Elston began the telephone conversation by saying that people in the Department were surprised they had not seen any “incendiary comments” from McKay in the press. McKay said that Elston then stated that the Attorney General would make only general statements in his Senate testimony about the resignations, would not state that the U.S. Attorneys had been fired, and would not disclose the reasons for their removal.

McKay told us that because Elston began the conversation by saying that the Department had noticed McKay had not discussed his removal in the press, and then said that the Attorney General also would not discuss why McKay had resigned, McKay believed that Elston was offering him a *quid pro quo*: “You keep quiet, we won’t say anything.”

According to McKay, Elston then asked if he had any response. McKay said he replied that he would stay quiet not because the Attorney General would not disclose why he had been fired, but rather because he believed it was his duty to do so. McKay said he acknowledged to Elston that he served at the pleasure of the President and said he would not say anything that reflected poorly on the President or on the Department.

McKay’s contemporaneous notes of this conversation indicate that he also told Elston that his reputation in Seattle was secure and would not be tarnished by anything the Department said about him. McKay’s notes further state: “I wasn’t given an explanation and I never asked why.” McKay’s notes also state that Elston was clearly trying to do “damage control” in the wake of media reports about the removals.

When McKay later testified before the Senate Judiciary Committee on March 6, he did not discuss his conversation with Elston. However, in subsequent written testimony to the House Judiciary Committee and during our interview, McKay said he felt that Elston was attempting to threaten him into remaining silent about his removal.<sup>48</sup>

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<sup>47</sup> Elston’s conversation with Ryan’s First Assistant is reflected in a January 18, 2007, e-mail Elston sent to Sampson, Moschella, Goodling, Mercer, and McNulty. In that e-mail, Elston stated that he gave the First Assistant his “talkers for McKay and Charlton and asked her to convey them to Kevin [Ryan].” Elston also stated that the First Assistant told him that Ryan was not returning phone calls and was trying to “stay out of this.”

<sup>48</sup> In their written statements to the House Judiciary Subcommittee following their testimony on March 6, 2007, both Charlton and McKay stated that they felt that Elston was attempting to persuade them to remain silent about their dismissal.

## **2. Telephone Call to Charlton**

Charlton told us that he viewed Elston's phone call to him as a veiled threat. Charlton said that Elston told him that the Department's senior management had noticed that he had not been commenting in the media, and he wanted Charlton to know that the Attorney General was not going to comment on why Charlton had been asked to resign.

Charlton said he had not been told the reasons for his resignation but thought it was because of his disagreement with Department leaders concerning a death penalty case. He told us that he thought at the time of Elston's call that he did not care if the Attorney General disclosed to Congress that he resigned over a disagreement about the death penalty. Charlton said he interpreted Elston's call as a warning that the Attorney General would make comments about Charlton unless he remained quiet.

Charlton said he spoke to McKay shortly after his conversation with Elston, and after the two compared notes Charlton concluded that at the very least Elston was trying to intimidate them.

## **3. Elston's Description of the Telephone Calls**

When we interviewed Elston, he denied calling McKay and Charlton in an attempt to threaten them to remain silent, and denied offering them a *quid pro quo* in exchange for their silence. Elston noted that he made the calls at the close of business on the day before the Attorney General's testimony, and that he did not see the Attorney General prior to his testimony. Elston also said that no one asked him to report back as to whether Charlton and McKay were going to continue to remain silent about their removals and he did not do so.

During our interview, we showed Elston the notes McKay took shortly after their telephone conversation. Elston said he did not recall McKay making several of the statements contained in his notes, and Elston said he believed that some statements in the notes were "a fabrication." Elston stated that if the conversation had gone the way it was described in McKay's notes, it would have caused him such alarm that he would have reported to McNulty that there was a problem with McKay.

We found no evidence that Elston discussed with anyone his conversations with McKay and Charlton until March 2007, when Cummins testified before Congress about a similar conversation, discussed below, that Cummins had with Elston on February 20, 2007.

**E. Attorney General Gonzales's January 18, 2007, Testimony Before the Senate Judiciary Committee**

On January 18, 2007, Attorney General Gonzales testified before the Senate Judiciary Committee. In response to questioning from Senator Feinstein concerning why several U.S. Attorneys were asked to resign, Gonzales stated:

[S]ome people should view [the resignations] as a sign of good management. What we do is we make an evaluation about the performance of individuals. And I have a responsibility to the people in your district that we have the best possible people in these positions.

And that's the reason why changes sometimes have to be made, although there are a number of reasons why changes get made and why people leave on their own.

Gonzales also testified, "I am fully committed, as the Administration's fully committed, to ensure that, with respect to every United States Attorney position in this country, we will have a Presidentially appointed, Senate-confirmed United States Attorney." At the hearing, Gonzales declined to disclose publicly the number of U.S. Attorneys who had been removed or the reasons for their removal, stating that he did not want to get into a public discussion of personnel decisions. Gonzales asserted that he would never make a change in a U.S. Attorney position for political reasons, or if it would jeopardize an ongoing serious investigation.

One week later, the Senate Judiciary Committee scheduled a hearing for February 6, 2007, on "Preserving Prosecutorial Independence: Is the Department of Justice Politicizing the Hiring and Firing of U.S. Attorneys?" Sampson and Hertling recommended that McNulty testify at the hearing because the Department needed someone senior to validate the removal decisions and McNulty was perceived to have a good relationship with Senator Schumer, who was scheduled to chair the hearing.

McNulty told us that even though he was not responsible for initiating the removals of the U.S. Attorneys, he agreed to testify as a favor to Sampson because he recognized the need for a top-level Department official to respond to the Senate's concerns. McNulty told us that the Department believed that in addition to the U.S. Attorney removals, the Senate was concerned about the Attorney General's authority to make indefinite Interim U.S. Attorney appointments.

## **F. Cummins Seeks Advice from Elston**

In early February, Cummins notified Elston that members of Senator Pryor's and Senator Schumer's staffs had asked Cummins to testify at the upcoming Senate Judiciary Committee hearing. Elston informed Sampson that Cummins had declined the invitation but told Elston that if the Department wanted him to testify he would explain the circumstances of his resignation and would also strongly support the Attorney General's authority to appoint Interim U.S. Attorneys for an indefinite period.

Sampson responded that he did not think Cummins should testify because he would have to provide truthful answers to questions such as whether he had resigned voluntarily, whether he was asked to resign because he was underperforming, and whether Griffin had discussed becoming U.S. Attorney and avoiding Senate confirmation. According to Elston and Cummins, Elston told Cummins that the Department would take no position on whether he should testify.

## **G. McNulty's February 6, 2007, Testimony Before the Senate Judiciary Committee**

### **1. McNulty's Use of the Term "Performance-Related" to Describe the Removals**

By the time McNulty testified on February 6, the media had reported that Lam, Ryan, McKay, Iglesias, Bogden, and Charlton had been told to resign on the same day.

At the hearing, McNulty stated that with the exception of Cummins, the resignations of the U.S. Attorneys were requested for "performance-related" reasons. With respect to Cummins, McNulty testified that he was removed in order to give Griffin a chance to serve as U.S. Attorney.

McNulty used the term "performance-related" at least five times in his testimony to describe why the U.S. Attorneys (other than Cummins) were removed. In response to a question about whether the White House was involved in the removals, McNulty testified that he was "sure [that the White House] was consulted before [the Department made] the phone calls" to the U.S. Attorneys because the U.S. Attorneys were presidential appointees. During his testimony, McNulty declined to publicly disclose how many U.S. Attorneys were asked to resign or their identities. Instead, he agreed to privately brief members of the Senate Judiciary Committee about the removals, and this closed briefing was scheduled for February 14, 2007.<sup>49</sup>

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<sup>49</sup> McNulty's written statement to the Senate Judiciary Committee focused on reassuring the Committee that the Department did not intend to bypass the Senate confirmation process when it appointed Interim U.S. Attorneys under 28 U.S.C. § 546. The (Cont'd.)

According to McNulty, he had two preparation sessions before his February 6 testimony with a group of senior Department employees. According to calendar entries, the group consisted of Sampson, Goodling, Moschella, Elston, Battle, Office of Public Affairs Director Tasia Scolinos, Roehrkasse, EOUSA Principal Deputy Director John Nowacki, Hertling, and two other employees from the Office of Legislative Affairs. Moschella told us that he and Goodling were present only for a short time at one of the sessions because they were involved with the rollout of the Department's budget on one of those days.

McNulty said that the group decided that he would generally say no more than what the Attorney General had said in his January 18 testimony, which was that the Department had considered the U.S. Attorneys' performance before deciding to remove them. McNulty said the group unanimously agreed that McNulty would say that the removals were "performance-related," but would not get into specifics about the U.S. Attorneys' performance. McNulty said that the group did not discuss the specific reasons for each U.S. Attorney's removal during the preparation sessions.

When we asked McNulty whether the Department officials at the preparation sessions discussed how McNulty's using the word "performance" to describe the U.S. Attorneys might be received, he said they did not consider it. McNulty told us that the term "performance-related" did not sound as negative during the preparation sessions as the U.S. Attorneys who were removed later perceived it.<sup>50</sup> McNulty said, "[i]n the end I chose that word because I ran it by everybody, and folks felt like that was the best way to deal with it and so I went forward using it."

McNulty said that the group also discussed what McNulty would say about Cummins's removal, because of the controversy arising out of the Attorney General's appointment of Griffin to be Interim U.S. Attorney. McNulty said he told the group in his preparation sessions that he would say that during the summer of 2006 Cummins had been asked to move on to make a place for Griffin.<sup>51</sup>

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written statement also touched on the removals, noting that U.S. Attorneys serve at the pleasure of the President and can be removed "for any reason or for no reason." The statement declared that the Department was committed to having "the best possible person" installed as U.S. Attorney in every district. The statement also stressed that U.S. Attorneys were never removed or encouraged to resign in an effort to retaliate for, or to interfere with or influence, a particular investigation, criminal prosecution, or civil case.

<sup>50</sup> In an e-mail exchange dated March 26, 2007, between McNulty and Scolinos describing his February 6 testimony and the preparation sessions that preceded it, McNulty wrote, "Kyle was in full agreement with my answers . . . we all thought performance was a safe word."

<sup>51</sup> According to both McNulty and Goodling, sometime during the summer of 2006, Goodling had briefed him about Griffin replacing Cummins as U.S. Attorney.

McNulty told us that he did not connect Cummins with the other removals, and that when Goodling told him they were making an opportunity for Griffin in the summer of 2006, the stated justification was that Cummins had indicated he was going to move on, not that the White House wanted to replace him with Griffin. McNulty said he also made the distinction between Cummins's removal and the other U.S. Attorney removals during his preparation sessions and that no one, including Sampson, disagreed with him or objected to his drawing that distinction.

Handwritten notes McNulty made for his February 6 testimony reflect that the issue of White House involvement was discussed during his preparation sessions. His notes state: "WH personnel and counsel consulted – POTUS appointments." However, we found no indication that there was any discussion of the exact timing and level of the White House's involvement during these preparation sessions.

## **2. Attorney General Gonzales's Reaction to McNulty's Testimony**

Several witnesses told us that Attorney General Gonzales, who was traveling in Buenos Aires at the time of McNulty's February 6 hearing, was extremely unhappy after learning through press accounts about McNulty's testimony. According to Roehrkasse, who was traveling with the Attorney General, Gonzales was unhappy because he thought McNulty's testimony that Cummins was not removed for performance-related reasons was inaccurate. Roehrkasse also said Gonzales expressed dismay that McNulty testified that the other U.S. Attorneys were removed for performance-related reasons. Sampson told us that he spoke to the Attorney General about McNulty's testimony and that Gonzales was upset because of the way McNulty had characterized Cummins's departure.

When we asked Gonzales about McNulty's testimony, he told us that he was upset because he was confused, believing up to that point that Cummins was removed because of poor performance. Gonzales said that he later learned, likely from Sampson, that Cummins was removed to put Griffin into the U.S. Attorney position.<sup>52</sup> We asked Gonzales how he could reconcile that with the fact that he had since become aware that Sampson said he put Cummins on the list in March 2005 and January 2006 because he thought Cummins was an underperformer. Gonzales told us that he wondered about that as well, but said he did not have an answer for us.

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<sup>52</sup> Sampson's and Gonzales's statements on this point are inconsistent, however. When we asked Gonzales about Cummins, he told us that he believed Sampson had corrected his original impression and told him that Cummins was not removed for performance reasons. However, as we note in Chapter Five, Sampson was the source for the notion that Cummins was removed because he was an underperformer.

Gonzales told us that he was also unhappy because he felt that by testifying that the U.S. Attorneys were removed for performance-related reasons, McNulty had opened the door to a public examination of the reasons for the removals.

Tasia Scolinos, the Director of the Department's Office of Public Affairs, was present for both Gonzales's and McNulty's preparation sessions prior to their Congressional testimony. She told us that Gonzales had been consistently adamant about not wanting to say publicly that the U.S. Attorneys were removed because of their performance, even though he implied as much during his January testimony. Scolinos said that she understood that Gonzales was upset about McNulty's testimony both because of Gonzales's concern for the reputations of the former U.S. Attorneys, and because Gonzales thought McNulty's testimony about Cummins was inaccurate.

According to McNulty, however, he and Gonzales never discussed the matter. Gonzales said he did not recall discussing the issue with McNulty.

### **3. U.S. Attorneys' Reaction to McNulty's Testimony**

Several of the U.S. Attorneys who had been removed were angered by McNulty's February 6 testimony. They were upset in part because McNulty's testimony was the first time they heard they had been removed for reasons related to their performance. For example, Bogden stated in an e-mail at the time, "It would have been one thing if performance had been the reason and they told us as much, however, I was told differently by Battle, Mercer, and McNulty."<sup>53</sup> In an e-mail on February 7, Iglesias forwarded to Charlton and McKay a news article describing McNulty's testimony with a notation "Gloves will be coming off."

Shortly after McNulty's February 6 testimony, the House Judiciary Subcommittee contacted several of the U.S. Attorneys to invite them to testify at an upcoming hearing into the U.S. Attorney removals, which eventually was scheduled for March 6.

#### **H. The February 8 Letter from Several Senators**

On February 8, 2007, Senators Harry Reid, Charles Schumer, Richard Durbin, and Patty Murray sent Attorney General Gonzales a letter noting that

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<sup>53</sup> As we discuss in Chapter Seven, Bogden said that Battle told him on December 7 only that U.S. Attorneys serve at the pleasure of the President and it was time to step down; Mercer told him on December 8 that the Republicans had a short, 2-year window and wanted to take advantage of it by getting future Republican Party candidates on board as U.S. Attorneys; and McNulty told him that neither his performance nor the performance of his office entered into the equation.

McNulty's testimony intensified their concerns about politicization of the hiring and firing of U.S. Attorneys. The Senators characterized as "stunning" McNulty's testimony that Cummins was removed for no other reason than to make way for Griffin. The Senators requested information regarding the timing of the decision to appoint Griffin to replace Cummins, the identity of individuals who lobbied on behalf of Griffin's appointment, the disparity between Cummins being asked to resign in June 2006 when the other U.S. Attorneys were asked to resign in December 2006, and the role Karl Rove played in the decision to appoint Griffin. Sampson immediately began drafting a response that was sent on February 23, which we discuss in Section K below.

## **I. McNulty's February 14 Closed Briefing for the Senate Judiciary Committee**

### **1. Preparation for the Briefing**

During his February 6 testimony, McNulty had agreed to privately brief the Senate Judiciary Committee about the basis for each U.S. Attorney's removal. The briefing was scheduled for February 14. McNulty told us that he did not need much help preparing for the closed briefing because he believed he was familiar with the reasons for each dismissal. McNulty said his own thoughts about the fired U.S. Attorneys seemed to be a significant piece of what would justify the removals.

However, McNulty met with senior Department leaders sometime during the week between February 6 and February 13 to discuss the upcoming briefing. It is unclear who was present or exactly when they met, but e-mails and witness testimony indicate that McNulty discussed the issues in a meeting with Sampson, Elston, Margolis, Goodling, and Moschella prior to his February 14 briefing.

According to McNulty, he did not ask the group what he should say about the White House's involvement. McNulty said he also did not ask about the timing of the White House's involvement in the removal of U.S. Attorneys because he thought he knew when the process began, based on when he was first notified about it in the fall of 2006.

Margolis said he recalled that the topic of the White House's involvement came up during the preparation session. Margolis said McNulty stated that if asked, he would say that the Department came up with a list of U.S. Attorneys to remove and the White House was involved only to sign off on the proposal. He said no one at the session corrected McNulty or disclosed the level of the White House's involvement in the removals. During our interview, Margolis said that in hindsight he could have pointed out that the White House had proposed firing all the U.S. Attorneys early on in the President's second term. However, Margolis told us that he did not believe that McNulty's statement was

inaccurate because he knew that the Department had assembled the list. Margolis said he also mistakenly assumed that McNulty knew as much as he did about the White House's involvement.

Sampson said that during McNulty's preparation session they did not specifically discuss anything about the White House's role beyond Cummins's replacement with Griffin. Sampson said the focus of the preparation session was on other subjects, such as why each of the U.S. Attorneys had been replaced and how to respond to concerns that the Department intended to use the interim appointment authority to evade the Senate confirmation process.

McNulty asked Goodling for information for the briefing and gave her guidance on the type of information he needed, such as what the various issues were for each removed U.S. Attorney, facts about the district and the U.S. Attorney's term, and information about the EARS evaluations for each district. According to witnesses and documents, Goodling made handwritten notes of what the participants said during the preparation session concerning the basis for each of the removals, and she and Nowacki put that information into a typed chart for McNulty to use during the congressional briefing.<sup>54</sup>

Goodling's notes indicate that the group discussed what McNulty should say about each removed U.S. Attorney. In a category entitled "Leadership Assessment" on the chart Goodling created, she listed parts of what the group discussed that ostensibly served as justification for each U.S. Attorney's removal. The notes and the chart, which was drafted on February 12, 2007, appear to be the first time that the Department actually listed the specific reasons alleged to be the basis for each removal.

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<sup>54</sup> Goodling, the only person other than Sampson involved in the preparation session who knew the extent and the history of the White House's involvement in the U.S. Attorney removals initiative, did not discuss the issue in her immunized testimony before the House Judiciary Committee beyond her opening statement that she became aware of the initiative in 2005. Goodling also stated in her testimony that she believed McNulty had greater knowledge than he expressed in his testimony about the history of the White House's involvement because she had briefed him about Griffin during the summer of 2006. However, on June 21, 2007, in testimony before the House Subcommittee on the Judiciary, McNulty said that while he was aware in the summer of 2006 that Griffin was going to replace Cummins, he was not aware that Griffin came to the Department's attention through the White House. McNulty stated that while he had known for months that "Cummins was asked to move over so that Mr. Griffin would have a chance . . ." he did not know exactly how Griffin came to the Department's attention, and he also noted that in Goodling's testimony before Congress, she said she was not particularly aware of how Griffin came to the Department's attention. McNulty said, "I just didn't know the specifics of how he came to be recommended to us. We later learned that Ms. Miers contacted Kyle Sampson, and that's the – the way." As previously noted, Goodling declined our request for an interview, so we were not able to question her concerning McNulty's statement about his knowledge of the White House's involvement in the removal of the U.S. Attorneys.

## **2. McNulty's Briefing for the Senate Judiciary Committee**

On February 14, 2007, McNulty briefed members of the Senate Judiciary Committee in a closed session concerning the reasons for the removals. Moschella, Hertling, and Nancy Scott-Finan of the Department's Office of Legislative Affairs were also present from the Department. Goodling was also supposed to attend the briefing, but in her Congressional testimony, she said McNulty instructed her to remain outside the room in order to discourage the Senators from asking questions about the White House's role in the removals. McNulty said he did not recall instructing Goodling to remain outside, but he said he was concerned that Goodling's presence would make the removal process seem more "political" given the fact that Goodling's position at the Department was uniquely associated with the Department's political appointments.

The briefing was not transcribed, although Scott-Finan took notes. According to those notes, McNulty began the briefing by stating that the U.S. Attorneys had not been told the reasons for their removal, and he requested that the briefing remain confidential. McNulty also said that some of the issues with certain U.S. Attorneys predated his time at the Department. McNulty stressed at the briefing that the Department did not have candidates outside of the U.S. Attorneys' Offices waiting to be appointed Interim U.S. Attorneys.

According to Hertling, Senator Schumer asked McNulty if the Department would share the EARS evaluations with the Judiciary Committee because Sampson had referenced them as something that the Department's senior management had considered as part of the review process. Scott-Finan's notes indicate that McNulty said that the EARS evaluations were mostly positive, there were no misconduct issues underlying the removals, and that the EARS evaluations were designed to review office management rather than how the U.S. Attorneys dealt with Main Justice.

According to Scott-Finan's notes, McNulty stated that he had been consulted about the process of identifying U.S. Attorneys about whom the Department had serious questions and was considering the possibility of asking them to resign. McNulty stated that the process began within the Department in September or October 2006. McNulty also stated that the Department had sent the removal list to the White House Counsel's Office in October 2006 and asked if they had any objection to the names, and they voiced no objections. McNulty then described the specific reasons for each U.S. Attorney's removal.

With respect to the reasons for individual removals, Scott-Finan's notes indicate that McNulty said the following about the U.S. Attorneys at the closed briefing:

- Bogden lacked energy and leadership, and was “good on guns but not good on obscenity cases.”
- McKay was “enthusiastic but temperamental,” had made promises that the Department could not support regarding information sharing, and was resistant to Department leadership.
- Lam’s statistics for gun prosecutions placed her close to the bottom of all the U.S. Attorneys’ offices, and the Department had also discussed with Lam her poor record on immigration cases. McNulty acknowledged that no one followed up to see if she had changed her handling of gun and immigration cases before she was asked to resign.
- Ryan’s office was the subject of a special EARS evaluation because the Department was concerned about his failures as a manager.
- Charlton was asked to resign because of his insubordination in resisting the Department’s “way of doing business” in a death penalty case and his poor judgment in attempting to establish a rule that the FBI should tape-record interrogations.
- Iglesias was underperforming, was an absentee landlord who was “physically away a fair amount,” and the Department had received congressional complaints about him.<sup>55</sup>
- Another U.S. Attorney [Chiara] was removed because of serious morale issues in the office and a loss of confidence in her leadership.<sup>56</sup>
- Cummins was not removed for performance reasons, and the Department had always intended to send Griffin through the nomination process.

Scott-Finan’s notes reflect that McNulty was asked several follow-up questions regarding Cummins. In response to a question concerning why the First Assistant, who was on maternity leave, was passed over for the Interim U.S. Attorney position, McNulty said that she was not passed over and that “Griffin was our guy all along.” McNulty said that Griffin’s name came up in the spring of 2006 as a replacement for Cummins, who had said publicly that he was thinking of moving on. Senator Schumer asked how it happened that

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<sup>55</sup> As discussed in more detail in Chapter Six of this report concerning Iglesias’s removal, McNulty told us he purposely did not mention specific complaints from Senator Domenici during the briefing because he did not want to put the Senator “in a bad light or a difficult position.”

<sup>56</sup> E-mail records show that McNulty did not mention Chiara by name because she had not yet announced her resignation publicly and he was trying to find a position for her in the Department.

Griffin was recommended to replace Cummins, and McNulty responded that Harriet Miers had called Sampson to determine whether the Department could find a place for Griffin. Senator Schumer asked McNulty whether Karl Rove was the instigator of Griffin's replacement of Cummins. McNulty responded that he "wouldn't put it that way" and said that it was rare for the White House to make U.S. Attorney recommendations without getting the names from home state members of Congress or other elected political officials.

McNulty's statement during the closed briefing that Miers intervened on behalf of Griffin's appointment appeared in a New York Times article on February 15, the day after the briefing. That same day, Associate White House Counsel Oprison sent an e-mail to Goodling asking her about the statement attributed to McNulty. Oprison told us that he sent the e-mail because he did not know that Miers had asked Sampson if the Department could find a place for Griffin. Oprison said he could not recall whether Goodling was able to supply any information about Miers's involvement in finding a position for Griffin.

Oprison said that when he discussed the New York Times article with Deputy White House Counsel Kelley later that morning, Kelley seemed as surprised as Oprison, and Oprison said Kelley's reaction led him to believe that the statement about Miers's involvement was inaccurate. However, Oprison said he did not recall any further discussion about Miers's involvement in the appointment of Griffin.

## **J. Elston's Alleged Threat to Cummins**

### **1. Cummins's Quote in The Washington Post**

According to Cummins, several of the removed U.S. Attorneys learned about the content of McNulty's closed briefing from various Senate staffers shortly after the briefing.

On February 18, 2007, a Washington Post article stated that the removed U.S. Attorneys were enraged by McNulty's hearing testimony and comments at the closed briefing, and felt betrayed because they had stayed silent about their removals. The article also noted that nearly all of the removed U.S. Attorneys had positive job evaluations, contrary to McNulty's public statements that they were dismissed for "poor performance." Cummins was quoted in the newspaper article as stating that Justice Department officials had "crossed a line" by publicly criticizing the performance of the U.S. Attorneys. The article quoted Cummins:

They're entitled to make these changes for any reason or for no reason or even for an idiotic reason, but if they are trying to suggest that people have inferior performance to hide whatever

their true agenda is, that is wrong. They should retract those statements.

In an e-mail on February 18, Bradley Schlozman, at the time the Interim U.S. Attorney for the Western District of Missouri, forwarded a copy of the Washington Post article to Elston. Schlozman's e-mail stated, "Does Cummins really feel it's in his interest to bash the AG like that?! . . . His public criticisms do not surprise me in the least. But it's no less offensive. . . ." Later that evening, Elston responded, "This is going to get ugly, I'm afraid."

## **2. Elston's Telephone Call to Cummins**

### **a. Cummins's Account of the Telephone Call**

On February 20, 2007, Elston telephoned Cummins to discuss the Washington Post article in which Cummins was quoted. Elston said he made that call on his own initiative because he was upset at what Cummins was quoted as saying in the article and thought it was inconsistent with the tone of his and Cummins's previous conversations. According to both Cummins and Elston, during January and February they had had several cordial conversations about whether Cummins should accept congressional invitations to testify and whether Cummins would publicly support Griffin's nomination. Cummins said that because McNulty had testified that Cummins was not removed for performance-related reasons but rather to give Griffin a chance to serve, Cummins initially felt he had no problems with the Department.

Cummins told us that initially he was hoping the Department would see he was still "on the team" in the event a judgeship opened up in the Eastern District of Arkansas. Cummins said that most of the removed U.S. Attorneys had a conference call to discuss congressional invitations to testify and to compare notes concerning their removals in light of McNulty's testimony and his comments at the closed briefing. Cummins said that after learning the circumstances of their removals, he began to have concerns because he felt that Department management had not treated the U.S. Attorneys fairly.

Cummins said that Elston began their February 20 telephone conversation by questioning Cummins about the quote attributed to him in the February 18 Washington Post article. Cummins said Elston "came on strong" at the beginning of the conversation, but when Cummins asked Elston if Cummins's quote was untrue, Elston backed down. According to Cummins, Elston expressed concern that Cummins's remarks were inconsistent with Cummins's previous expression of support for the Department.

Cummins said that during their discussion, Elston described himself as being part of a group that felt the Department had been too restrained and should publicly explain why the U.S. Attorneys were removed. According to Cummins, Elston said something to the effect that if the U.S. Attorneys kept

commenting to the media about their removals, the Department would have no choice but to publicly disclose the reasons for their removals. Cummins said Elston implied that there was a body of information that no one had access to concerning the U.S. Attorneys that justified their removals. Cummins told us that Elston might have made that comment out of concern for the U.S. Attorneys as a prediction of how the dynamics would play out. However, Cummins said he thought Elston was clearly implying that if the U.S. Attorneys kept causing trouble, the Department would have to reveal embarrassing information about them to defend itself.

Cummins told us that he believed Elston knew Cummins would pass the message along to the other U.S. Attorneys. Cummins said he did not believe Elston was trying to stop the U.S. Attorneys from making public comments, but was relaying the message that if they kept talking to the media it was likely that the Department might have to publicly reveal information concerning why the U.S. Attorneys were removed.

**b. Cummins’s E-mail to Bogden, Charlton, Iglesias, Lam, and McKay about the Telephone Call**

Shortly after his conversation with Elston on February 20, Cummins sent an e-mail to Bogden, Charlton, Iglesias, Lam, and McKay describing his conversation with Elston. Cummins informed them that the essence of Elston’s message was that the Department believed it was taking “unnecessary flak to avoid trashing” the U.S. Attorneys. Cummins wrote that Elston implied that if the U.S. Attorneys continued to talk to the media or to organize behind-the-scenes congressional pressure, the Department would be forced to offer public criticisms of the U.S. Attorneys in order to defend its actions more fully. Cummins wrote in the e-mail: “I was tempted to challenge him and say something movie-like such as ‘are you threatening ME???’ but instead I kind of shrugged it off.”

Cummins also wrote in the e-mail that he had made it a point to tell Elston that the U.S. Attorneys had turned down multiple invitations to testify before Congress, and that Elston had responded that the Department would see such testimony as a major escalation of the conflict “meriting some unspecified retaliation.” Cummins wrote that it sounded like a threat that the Department would make public McNulty’s closed presentation to the Senate Judiciary Committee. Cummins noted that he did not want to overstate the threatening undercurrent in his conversation with Elston, “but the message was clearly there and you should be aware before you speak to the press again if you choose to do that.”<sup>57</sup>

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<sup>57</sup> At a subsequent congressional hearing, Cummins testified that this conversation was a congenial phone call and he did not directly characterize Elston’s remarks as a threat. (Cont’d.)

**c. Elston's Account of the Telephone Call**

Elston told congressional investigators that he had called Cummins on February 20 to discuss the statement attributed to Cummins in the Washington Post article that the Department had crossed a line by publicly criticizing the performance of the U.S. Attorneys who had been removed. Elston said Cummins denied telling the reporter that the Department had crossed a line, noting that the phrase was not in quotes, and Elston said he took Cummins at his word. Elston said he believed he and Cummins had developed a good rapport and the statement attributed to Cummins in the newspaper article seemed out of character with their previous conversations, during which Cummins had expressed his gratitude for McNulty's public testimony distinguishing Cummins from the other U.S. Attorneys.

Elston said he believed the Department had made a major effort not to publicly disclose the reasons for asking for the U.S. Attorneys' resignations, but the reasons had been leaked to the media within days of McNulty's closed briefing. Elston said that by the time he spoke with Cummins, he realized that it would likely be necessary for the Department to disclose publicly the reasons for the removals. Elston said he believed Cummins misinterpreted his remarks, which he said were more along the lines of saying that it was a shame that the reasons for the U.S. Attorneys' removals were being discussed in the media because it was tarnishing the Department as well as the reputations of the individual U.S. Attorneys. Elston also asserted that it did not make sense that he threatened Cummins when McNulty had already stated that Cummins was in a different position than the other U.S. Attorneys. According to Elston, the Department had no derogatory information with which to threaten Cummins.

Elston said he did not recall the issue of congressional testimony arising during his February 20 conversation with Cummins. Elston said that if he and Cummins had discussed the issue, he would have reiterated that the Department would take no position on whether or not the U.S. Attorneys should testify.

Elston said he never intended to send Cummins or anybody else a message. Elston stated that he had no reason to believe Cummins was in contact with the other U.S. Attorneys, and he said he did not know that shortly thereafter Cummins sent an e-mail to the other U.S. Attorneys describing their conversation.

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Rather, he said "[i]t might have been a threat, it might have been a warning; it might have been an observation, a prediction . . . [or] friendly advice."

## **K. The Department's Response to the Senators' Letter**

As previously noted, on February 8, 2007, the Department received a letter from Senators Reid, Schumer, Durbin, and Murray requesting information concerning Cummins's removal and Griffin's appointment as his replacement. Sampson drafted the Department's response for Acting OLA Assistant Attorney General Hertling's signature, and Sampson circulated the draft to others in the Department and the White House for comment.<sup>58</sup> The letter was reviewed and edited by Associate White House Counsel Oprison and returned to Sampson, who had the final sign-off on the language.<sup>59</sup>

On February 23, the Department sent its response to the Senators, signed by Hertling. The response stated that none of the U.S. Attorneys were removed in an attempt to influence an ongoing investigation. The letter described why the replacement of Cummins with Griffin was appropriate, and stated that "it was well-known, as early as December 2004, that Mr. Cummins intended to leave the office and seek employment in the private sector." The letter also stated that the decision to replace Cummins with Griffin was "first contemplated in the spring or summer of 2006, [and] the final decision to appoint Griffin as interim U.S. Attorney was made on or about December 15, 2006, after Attorney General Gonzales had spoken to Senator Pryor." The letter also asserted that "The Department is not aware of Karl Rove playing any role in the decision to appoint Mr. Griffin."

We found these statements to be misleading. As we fully describe in Chapter Five of this report concerning Cummins's removal, the statement that it was "well known" in December 2004 that Cummins intended to leave office was misleading. The statement concerning the timing of Griffin's appointment and the statement disclaiming Rove's involvement in Griffin's appointment were also misleading and they did not accurately portray what Sampson knew about those issues.<sup>60</sup>

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<sup>58</sup> Department officials who received a draft of the letter for review included McNulty, Elston, Goodling, Hertling, Moschella, and Scolinos. Sampson asked Goodling to verify certain factual assertions he had made concerning Griffin's appointment.

<sup>59</sup> At the time, Oprison had been an Associate White House Counsel for 4 months and lacked first-hand knowledge of the events at issue. In an e-mail to Sampson on February 23, 2007, Oprison attached the letter with "slight revisions," along with the message that "Fred [Fielding], as I, want to ensure that it is absolutely consistent with the facts and that it does not add to the controversy surrounding this issue."

<sup>60</sup> On March 28, 2007, the Department wrote another letter informing Senators Leahy and Schumer that its review of documents revealed that representations in Hertling's February 23 letter were inaccurate.

## **L. Events in March 2007**

### **1. March 3 Washington Post Article**

On March 3, 2007, the Washington Post published an article about the U.S. Attorney removals that included information provided by Brian Roehrkas from the Department's Office of Public Affairs and McNulty. The article contained several misstatements: "the list of prosecutors was assembled last fall;" the White House "did not encourage the dismissals;" and "the seven fired prosecutors were first identified by the Department's senior leadership shortly before the November elections."

According to the article, the Department had backed away from arguing that the decision to remove the U.S. Attorneys was "performance-related." The article stated that Department officials acknowledged that the removals were undertaken primarily because the Administration was unhappy with the prosecutors' policy decisions.

Later that same day, Sampson e-mailed Roehrkas about the article and wrote: "Great work Brian. Kudos to you and the DAG."

McNulty acknowledged that he talked to the two reporters who wrote the article and said he provided the information as he knew it at the time. During his interview with congressional investigators, McNulty stated that he did not know for certain that the statement that the White House "did not encourage the dismissals" was inaccurate, because the word "encourage" was a general term. In addition, McNulty said he could not say that the statements concerning when the list was assembled and when the Department's "senior leadership" identified the U.S. Attorneys who would be removed were incorrect because that was when he first learned about the list of U.S. Attorneys to be removed.

Sampson also told congressional investigators that he did not think the statements in the article were inaccurate because, in his mind, the action phase of the project did take place in the fall of 2006. He characterized the earlier lists as "a highly deliberative sort of thinking process." Sampson admitted that there was encouragement from the White House to come up with a list of U.S. Attorneys to be fired, but he described the White House's involvement as "episodic."

### **2. House and Senate Hearings**

In early February 2007, the Commercial and Administrative Law Subcommittee of the House Judiciary Committee contacted the Department to request that McNulty testify at an upcoming hearing concerning the Attorney General's authority to make interim appointments of U.S. Attorneys. McNulty directed that Principal Associate Deputy Attorney General Moschella appear as

the Department's witness at the hearing and at a staff briefing to be held prior to the hearing.

The hearing was scheduled for March 6, 2007, and the closed staff briefing was scheduled for March 1. On February 28, 2007, Cummins sent an e-mail to EOUSA Director Battle informing him that the House Subcommittee intended to subpoena Cummins and several of the other dismissed U.S. Attorneys to testify at the March 6 hearing. Later that day, Hertling informed Sampson, Goodling, Moschella, and Elston that the Subcommittee would subpoena Lam, McKay, and Iglesias.

### **3. Cummins's February 20 E-mail Surfaces**

Both the Senate Judiciary Committee and the House Judiciary Subcommittee had scheduled hearings for March 6 on the removals of U.S. Attorneys. Cummins, Lam, Iglesias, and McKay were scheduled to testify before the Senate Judiciary Committee in the morning and before the House Subcommittee in the afternoon. Moschella was scheduled to testify before the House Subcommittee in the afternoon.

McKay told us he was so offended by Elston's February 20 "warning" to Cummins that the U.S. Attorneys should not testify that he related the incident to Senate staff when they interviewed him prior to his appearance before the Judiciary Committee. McKay's remarks made their way to a reporter, who called the Department for comment before the hearing.

E-mails show that on Sunday, March 4, Roehrkasse told Elston he needed to speak with him about calls Elston had made in late February to some of the U.S. Attorneys. Roehrkasse told us that Elston informed him he did not call any of the U.S. Attorneys in February, with the exception of Chiara. Elston noted that he had talked to McKay and Charlton prior to the Attorney General's congressional hearing in January to inform them that the Attorney General was not going to mention their names or discuss their offices.

Roehrkasse said that when he asked Elston if he had any other conversations with any of the removed U.S. Attorneys, Elston said he had talked to Cummins in February when Cummins asked him if the Department had any position on whether he should accept congressional invitations to testify. Roehrkasse said Elston denied telling Cummins he should or should not testify, and Elston denied threatening Cummins. Roehrkasse said that because he did not understand what the reporter was referring to, both he and Elston called the reporter.

According to Roehrkasse, the conversation with the reporter was very hostile, and the reporter continued to insist that Elston had threatened retaliation if the U.S. Attorneys kept talking publicly about their dismissals. Roehrkasse said that the reporter refused to identify her source, and Elston

insisted that he had no conversation with any U.S. Attorney in which he discussed what should or should not be said about their removals. Elston also stated to the reporter that he had talked to Cummins, but only in the context of telling him that the Department had no opinion on whether or not he should testify.

Roehrkasse said that when the reporter said she was still going to write the story, he questioned how she could do so when an official from the Department had contradicted on the record an anonymous source's vague allegation of a threatening telephone conversation. Roehrkasse said he was so upset that he called the reporter's editor to complain, and the editor agreed to hold the story.

Cummins told us that a reporter contacted him on March 5 and told him that a source had given her information about Cummins's conversation with Elston, and the reporter was going to write a story about it for the following day. Cummins said that the reporter told him she had contacted the Department earlier to ask for comment, and Roehrkasse had flatly denied that the call between Cummins and Elston took place. According to Cummins, the reporter told him that Roehrkasse pressured the reporter to kill the story, calling the reporting "irresponsible."

Cummins said that the reporter also told him that she had talked to Elston, who denied that the call took place. According to Cummins, the reporter told him that Elston said Cummins was a liar and tended to exaggerate. Cummins told us that "that did not sit well with me." He told the reporter about the February 20 e-mail to McKay, Lam, Iglesias, Bogden, and Charlton describing his conversation with Elston.

According to e-mails, toward the end of the day on March 5 the reporter informed Roehrkasse that she was going to write the story, and Roehrkasse told Elston he wanted to talk with him "about February 20." Elston again denied that he had spoken with any of the U.S. Attorneys around February 20, with the exception of Chiara.<sup>61</sup> Elston wrote Roehrkasse, "All of my calls occurred before the USA announced his/her resignation. Once the person announced, I had no further conversations with them."

Roehrkasse said at that point he was unaware of Cummins's February 20 e-mail to the U.S. Attorneys describing his conversation with Elston. Accordingly, Roehrkasse said he provided the reporter with the following quote: "It is unfortunate that the press would choose to run an

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<sup>61</sup> According to Elston, he had "many" conversations with Chiara in January and February because she was seeking additional time before she resigned.

allegation from an anonymous source from a conversation that never took place.”

The reporter’s story appeared on Tuesday, March 6 and cited interviews with two unnamed former U.S. Attorneys.<sup>62</sup> The story stated that Roehrkasse had criticized the publication for running the story. The story also noted that while the U.S. Attorney who received the call said he regarded the tone of the conversation as congenial and not intimidating, he had informed the other removed U.S. Attorneys about the call and one of them had told the reporter he considered Elston’s remarks to be a threat.

Cummins, McKay, Lam, and Iglesias testified before the Senate Judiciary Committee on the morning of March 6. During the testimony, Senator Schumer asked McKay whether he had received any communication from the Department designed to dissuade him from testifying or making public comments. McKay referred Schumer to Cummins, who produced his February 20 e-mail and related the story of his conversation with Elston, adding that he did not necessarily consider Elston’s remarks to be a threat. A Department official attending the hearing immediately faxed a copy of the e-mail to Moschella and Elston, noting that the e-mail would likely be raised during Moschella’s hearing before the House Judiciary Subcommittee that afternoon.

The Department issued a public statement that day which described Elston’s February 20 conversation with Cummins as “private and collegial” and stated that it was “somehow being twisted into a perceived threat by former disgruntled employees grandstanding before Congress . . . .” The statement also denied that Elston told any U.S. Attorneys what they should and should not say about their dismissals. The statement further noted that “any suggestion that such a conversation took place is ridiculous and not based on fact.”

When we asked Roehrkasse about the Department’s public statement describing as “ridiculous and not based on fact” that such a conversation took place, he told us that he still believed it was accurate. However, he said he regretted saying that the U.S. Attorneys were “grandstanding before Congress.” He said he could have used a different phrase than “disgruntled employees,” but he said that at the time he thought that Cummins had taken liberties describing his conversation with Elston. Roehrkasse said that even after he reviewed Cummins’s e-mail he did not question Elston’s account of events because Cummins had conceded during his Senate testimony that he did not perceive the conversation as a threat.

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<sup>62</sup> See Marisa Taylor, McClatchy Newspapers, *U.S. Attorney Worried ‘Gloves Would Come Off’ Over Criticism of Ouster*, March 6, 2007.

After learning about Cummins’s statements at the hearing, Elston immediately drafted a letter to Senator Schumer in which he noted that he was “shocked and baffled” by Cummins’s February 20 e-mail. Elston wrote that he did not understand how anything he told Cummins could have been construed as a threat. Elston wrote that he never tried to suggest to Cummins what he or the other U.S. Attorneys should or should not say about their resignations.

As discussed above, Elston denied to us making any remarks to Cummins that could have been construed as a threat. Elston also said it was inconsistent for Cummins to imply that Elston’s remarks conveyed a threat, since Cummins had consistently said how grateful he was that McNulty had separated Cummins from the other U.S. Attorneys when McNulty testified about the removals.

#### **4. Moschella’s Testimony Before the House Judiciary Subcommittee**

##### **a. Preparation Sessions**

Moschella had two preparation sessions prior to his closed congressional briefing on March 1 and his testimony on March 6 before the House Judiciary Subcommittee. The sessions were attended by Sampson, Goodling, Nowacki, and Roehrkasse.<sup>63</sup> According to Moschella, the focus of the sessions was primarily on the various issues surrounding the Attorney General’s interim appointment authority, which Congress was seeking to repeal at the time.

Moschella, who had not been involved in the process leading to the removal of the U.S. Attorneys, said he first became familiar with the reasons underlying the U.S. Attorney removals by attending McNulty’s closed congressional briefing. Moschella said he prepared for his testimony with the same materials McNulty had used for his briefing.<sup>64</sup>

##### **b. Discussion in Preparation Sessions About White House Involvement**

Moschella told us that during one of his preparation sessions someone asked what he would say if he was asked when the White House became involved in the removals. Moschella said he answered the same way he had heard McNulty answer the question in McNulty’s February 14 briefing before the Senate Judiciary Committee: the White House became involved in the fall

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<sup>63</sup> According to Elston, he was invited but did not attend these preparation sessions.

<sup>64</sup> Moschella asked Goodling to re-format the chart she had developed for McNulty detailing the reasons for each U.S. Attorney’s removal to make it more user-friendly.

of 2006, primarily to sign off on the proposal. Moschella said he could not recall who asked the question.

The group that prepared Moschella for his Congressional testimony included Sampson, Goodling, Hertling, Nowacki, Scott-Finan, and Roehrkasse.<sup>65</sup> He told us that although neither Sampson nor Goodling ever affirmatively represented that the White House's involvement with the U.S. Attorney removals began in the fall of 2006, they should have explained that the White House had been involved in the matter earlier. Moschella said no one corrected his misunderstanding concerning the timing or level of the White House's involvement in the removals during his preparation sessions.

Moschella also said that the timing of the origin of the removal process was not discussed in his preparation sessions. He said he had heard McNulty say that the process of removing U.S. Attorneys began during the fall of 2006, and Moschella believed that to be the case until he learned differently a few days after his testimony.

Roehrkasse confirmed to us that the issue of the White House's involvement in the U.S. Attorney removals was discussed during the preparation sessions for Moschella's testimony. Although he said he could not recall specifically what was said, Roehrkasse told us that Sampson and Goodling led him and Moschella to believe that the White House's involvement was much less than it actually was. According to Roehrkasse, Sampson advised Moschella about what to say about this issue, although the advice focused on the level of the White House's involvement rather than the timing of its involvement. Roehrkasse said he recalled Sampson mentioning that the White House had clearly signed off on the proposal at the end of the process.

Sampson told us he believed that questions concerning the specific timing of the removal process and the nature of the White House's involvement did not arise in the preparation sessions. He said that he was not focused on the historical background of the process at the time. Sampson said that his perception at the time of the preparation sessions was that the "action phase" of the process took place in the fall of 2006. Sampson said that the preparation sessions were focused on the salient questions at the time, which were whether the U.S. Attorneys were removed in order to interfere with a particular prosecution and whether the administration intended to bypass the Senate confirmation process.

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<sup>65</sup> Of that group, only Sampson and Goodling had full knowledge at the time concerning the removals and the White House's involvement in the process.

**c. March 5 Meeting at the White House to Discuss Moschella's Testimony**

At this time, e-mails between Sampson and White House officials show that the White House was concerned that the Department had not adequately explained why the U.S. Attorney removals were justified. Until the day of Moschella's public testimony, which occurred on March 6, the Department had not publicly described its reason for requesting the resignation of each U.S. Attorney.

On March 5, Deputy White House Counsel Kelley called a meeting with Sampson, McNulty, Moschella, Elston, Hertling, Scolinos, Roehrkasse, and Battle. White House Counsel Fred Fielding, Associate White House Counsel Michael Scudder, and Karl Rove also attended the meeting. Kelley's e-mail stated that the purpose of the meeting was to discuss the Administration's position on all aspects of the U.S. Attorney removals issue, including what the Department would say about the removals and the Attorney General's interim appointment authority.

According to several witnesses, Rove came in to the meeting for only a few minutes and then left. Battle said Rove spoke at the meeting but he could not recall what he said. McNulty said that he could not specifically recall either, but thought Rove said something to the effect that Moschella's testimony should explain why the U.S. Attorneys were removed. None of the witnesses said they could recall specifically what Rove said at the meeting, although all agree that the discussion generally centered on what Moschella should say about the reasons for each U.S. Attorney's removal.

According to Moschella, there was significant discussion at the meeting about whether to publicly discuss the specific reasons for the removals. Moschella said that Attorney General Gonzales had expressed concern about damaging the reputations of the U.S. Attorneys, and no one at the meeting wanted to say anything derogatory about them. Moschella told us that, nevertheless, the consensus in the meeting was that he should publicly state the reasons for each U.S. Attorney's removal. McNulty said the primary concern White House officials expressed at the meeting was that because the U.S. Attorneys were going to testify and might suggest that they were removed for improper reasons, Moschella should specify the Department's justification for each U.S. Attorney's removal.

Sampson said that in addition to discussing what Moschella should say in his testimony about the removals, the group discussed what Moschella would say about the pending legislation to repeal the Attorney General's interim appointment authority. According to Sampson, the Department had submitted written testimony to the White House for clearance through the

Office of Management and Budget which said that the Administration opposed the repeal.

Hertling told us that the purpose of the White House meeting was to discuss the proposed legislation as well as what Moschella would say about the removals. Hertling said that the White House Communications Office wanted to know what Moschella would say about the removals in order to prepare for press inquiries resulting from his testimony. Hertling said it was not a meeting to prepare Moschella for his testimony but was instead a briefing for the White House about what Moschella planned to say.

Sampson and Moschella said that the White House and the Department also decided at the meeting that the Administration should not oppose the repeal of the Attorney General's authority to appoint Interim U.S. Attorneys. According to Moschella, although the White House was "sympathetic" from a policy standpoint to the Department's belief that the Attorney General's power to appoint Interim U.S. Attorneys was justified, the White House was of the opinion, given the bad press and the political atmosphere, that the Administration should not oppose the repeal.

#### **d. Moschella's Testimony**

Moschella testified before the House Judiciary Subcommittee on the afternoon of March 6, just prior to the testimony of former U.S. Attorneys Lam, McKay, Iglesias, Cummins, Charlton, and Bogden, who were present when Moschella testified.<sup>66</sup> Moschella began his testimony by stating that each of the U.S. Attorneys was removed "for reasons related to policy, priorities and management – what has been broadly referred to as 'performance-related reasons.'" Moschella then briefly discussed the justifications for the removals.

Moschella did not mention Chiara and Ryan by name because they were not present at the hearing and had not publicly acknowledged that the Department had asked them to resign along with the others. Moschella instead stated that two unnamed U.S. Attorneys were removed because they had problems managing their districts.

Moschella testified that Lam was removed because her gun prosecution numbers were "at the bottom of the list" and her immigration prosecution numbers "didn't stack up." Moschella stated that the Department "had policy differences" with McKay and was "concerned with the manner in which he went

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<sup>66</sup> Several days prior to his hearing, Moschella provided a closed, more detailed briefing for members and staff of the House Subcommittee, similar to the briefing McNulty had given the Senate Judiciary Committee. According to Moschella, the briefing concluded before he had discussed all of the U.S. Attorneys, and he finished the briefing by telephone shortly before his public testimony.

about advocating particular policies,” including McKay’s “advoca[cy] for a particular [information sharing] system.”

Moschella testified that Cummins was removed not for performance-related reasons but to give Griffin a chance to serve. Citing the importance of Bogden’s district of Las Vegas, Moschella said that “there was no particular deficiency,” but there was an interest in “seeing renewed energy and renewed vigor in that office, really taking it to the next level.” Moschella said that the Department had the general sense that Iglesias’s district was “in need of greater leadership,” and that Iglesias “had delegated to his first assistant the overall running of the office.” Moschella stated that Charlton had instituted a policy in his district, without first obtaining Department approval, that required the FBI to tape-record interrogations, and he had refused to abide by the Attorney General’s decision to seek the death penalty in a particular case.

Moschella’s testimony was the first time the U.S. Attorneys heard from the Department the alleged reasons for their removals.

Moschella testified incorrectly that the process to remove the U.S. Attorneys had begun in early October 2006. Moschella stated that the White House eventually became involved in the removals, but he mistakenly implied that it was only to sign off on the proposal because the U.S. Attorneys were Presidential appointees. Moschella told us he based his testimony on what he had heard McNulty say in his public testimony and during his closed briefing before the Senate Judiciary Committee.

Lam, Iglesias, McKay, Charlton, Cummins, and Bogden testified immediately following Moschella. Among other things, Iglesias challenged Moschella’s assertion that he was dismissed because the office “lacked leadership,” and he cited statistics showing improvement in the number and types of prosecutions and convictions in his office. Bogden said that he resented Moschella’s implication that he was asked to step down “so new blood could be put in” to the position. Bogden noted that he was very proud of what his staff had accomplished during his tenure as U.S. Attorney. Charlton testified about the irony of Moschella’s statement that he was removed because he had implemented the taping policy in his district in February 2006, because he had offered to resign at the time rather than to rescind the policy.

Cummins testified that the Department “horribly mismanaged” the U.S. Attorney removals. Cummins stated that Moschella had suggested that the U.S. Attorneys had done something wrong but the Department had not told the U.S. Attorneys why they were removed. McKay disputed Moschella’s assertion that he was removed because of the way he advocated the information sharing system, and said that all of his work on the program had been authorized by former Deputy Attorney General Comey. Lam responded to Moschella’s statement regarding her immigration and gun prosecution statistics by stating

that her emphasis in immigration cases was on tackling larger cases, and that gun prosecutions were being handled “extremely responsibly” by the local District Attorney’s Office.

Iglesias testified that he believed he was forced out as U.S. Attorney for the District of New Mexico because he failed to respond to political pressure to indict a public corruption case against a Democratic official before the November 2006 election. In his testimony, Iglesias revealed that New Mexico Representative Heather Wilson and Senator Pete Domenici separately telephoned him in October 2006 to ask about the status of a pending public corruption matter. Iglesias said that in both calls he believed he was being pressured to bring an indictment before the November election.

#### **M. Attorney General Gonzales’s March 7 Op-Ed Article**

Moschella’s testimony increased concerns about the reasons why the U.S. Attorneys were removed. Sometime during the first week of March 2007, a USA Today reporter told the Department’s Office of Public Affairs that the newspaper would soon editorialize on the U.S. Attorney removals, and offered the Department the opportunity to provide an “opposing view essay.” Public Affairs Director Scolinos recommended to McNulty, Sampson, Goodling, and Moschella that the Department submit an editorial under Gonzales’s name so that it would “pack some punch.” Sampson agreed with Scolinos’s recommendation.

On March 7, 2007, USA Today published an editorial under Attorney General Gonzales’s name entitled, “They lost my confidence.” The editorial contained two statements that further exacerbated the controversy: “While I am grateful for the public service of these seven U.S. Attorneys, they simply lost my confidence”; and “I hope that this episode ultimately will be recognized for what it is: an overblown personnel matter.” Gonzales told us that he did not authorize either statement to be contained in the editorial. We therefore investigated how the editorial was developed.

Roehrkasse told us that he wrote the first draft of the editorial. His draft, which we reviewed, expressed the Department’s regret regarding the manner in which the removals were handled. A sentence at the end of the draft stated that U.S. Attorneys serve at the pleasure of the President and that “[i]f they are not executing their responsibilities in a manner that furthers the management and policy goals of departmental leadership, it is appropriate that they be replaced with other individuals.” Roehrkasse sent the draft to one of the Attorney General’s speechwriters, asking her to edit and “polish” the essay.

The speechwriter changed the tone of the essay to stress that the removals were essentially a personnel matter. The edited version began by noting that “the handling of personnel matters is one of the toughest

challenges employers face,” and concluded with a sentence characterizing the controversy about the removals as a “tragically overblown personnel matter.” Our review of documents and e-mails shows that most of that new phrase remained in every draft version thereafter, and appeared in the published version as an “overblown personnel matter.”

Scolinos received a copy of the draft essay at 4 p.m. on March 6 and made only a few edits before forwarding it to Sampson for further review and for the Attorney General’s approval. Scolinos told us that USA Today’s 6:30 p.m. deadline was rapidly approaching when Sampson called to tell her he had made some edits to the essay but could not e-mail them to her because the Department’s computers had crashed.

Scolinos said that the essay was past due when Sampson and Attorney General Gonzales brought it to her office. Because the computers were still down and because Scolinos was on a call with another reporter, Sampson read the editorial to a USA Today reporter over the telephone in another office while Gonzales waited in Scolinos’s office.

Scolinos said that when Sampson read the editorial to the USA Today reporter, he inserted into the essay the line, “While I am grateful for the public service of these seven U.S. Attorneys, they simply lost my confidence.” Scolinos said when Gonzales later heard what Sampson had read to USA Today, he told her he was unhappy because he had told Sampson to remove the line containing the phrase “tragically overblown personnel matter,” but Sampson left part of the phrase in, and he added the line “they simply lost my confidence” without Gonzales’s knowledge. Scolinos said that Gonzales told her that he would not have said that, and that Sampson nevertheless tried to defend the statement.

According to Scolinos, Gonzales asked if they could retract the essay. Scolinos advised against it, given the fact that the Attorney General’s Chief of Staff had just called in an editorial purporting to be from the Attorney General.

Sampson told us that he added the phrase “they lost my confidence” because he had to make a quick judgment while dictating the essay over the telephone, and he believed the language the Attorney General wanted to use in its place was “bad grammar.”<sup>67</sup> Sampson acknowledged that he had added the phrase without the Attorney General’s approval.

Gonzales told us that the phrase was “a terrible thing to say about somebody,” and the essay did not reflect what he wanted to say. However,

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<sup>67</sup> Sampson told congressional investigators that the language the Attorney General wanted to use was something to the effect of “we thought we could do better,” or “we thought a change could improve the office.”

when we asked Gonzales how his Chief of Staff could inaccurately represent to a national newspaper that the words of the essay were the Attorney General's, Gonzales said, "I don't have an answer for that." Gonzales told us that he had stopped reading newspapers by the time the essay was published on March 7, and that he never talked directly with Sampson about the essay after it appeared.

#### **N. Additional Documents Come to Light**

Over the next several days, the controversy about the removal of the U.S. Attorneys intensified further. On March 7, the Senate Judiciary Committee asked the Attorney General to make certain Department staff, including Sampson and Goodling, available for interviews or public testimony about the removals. On March 8, the House Judiciary Subcommittee requested documents and other information related to the removals.

Also on March 8, Gonzales met with Senators Leahy, Schumer, Feinstein, and Specter to discuss their request to interview Department staff and to obtain documents concerning the removals. At the end of the meeting, Gonzales agreed to produce the documents. He also agreed to discuss making Goodling and Sampson available for interviews.

According to Roehrkassee, in an attempt to present a clearer picture of the Department's involvement in the U.S. Attorney removals, Scolinos and Roehrkassee had planned to brief reporters from The Washington Post and The New York Times on Friday, March 9 about the chronology of the removal plan so that the reporters could write stories to appear over the weekend. According to Roehrkassee, the stories were supposed to follow up on Moschella's testimony about the specific reasons for the removals by providing an explanation of how the removals came about.

On the evening of March 7, Roehrkassee informed Sampson that he needed documents and other information about the removals to provide background information to the reporters, and Roehrkassee arranged to meet with Sampson the following day. Sampson prepared for his meeting with Roehrkassee by printing out documents and e-mails from his computer concerning the removals.

Roehrkassee said that when he met with Sampson on March 8, Sampson discussed how he had met with Comey, Mercer, and McNulty and developed the removal list after "picking their brains" about which U.S. Attorneys they would recommend for replacement. Roehrkassee said Sampson also told him that the removals had been in the works with the White House Counsel's Office for a long time. Roehrkassee said that Sampson showed him an e-mail to Harriet Miers dated January 6, 2006, containing a list of U.S. Attorneys he recommended for removal, which showed that the White House had been

involved much earlier than the fall of 2006. Roehrkasse said that Sampson also told him that he had had conversations with the White House dating back to the beginning of 2005 about removing U.S. Attorneys.

Roehrkasse said that he took copies of the documents Sampson had printed out, and that shortly after his meeting with Sampson he realized while reviewing the documents that Moschella's congressional testimony was inconsistent with what the documents showed. Roehrkasse said he discussed his concerns with Scolinos, and together they discussed the problem with officials in the White House Communications Office. According to Roehrkasse, it was the first time White House communications officials became aware of the origin of the plan to remove the U.S. Attorneys, and of the White House's greater level of involvement in the removals.

According to Gonzales, during the afternoon of March 8 Scolinos called to inform him of the discovery of the documents. Gonzales then discussed the matter with McNulty, who Gonzales said was very unhappy that he was not correctly informed about the timing and substance of the White House's involvement in the removals. Gonzales said he instructed Scolinos to discuss the matter with Sampson to address the problem.

Moschella told us that in the late afternoon of March 8 he saw Goodling in the hallway and she looked very distraught and upset. According to Moschella, when he asked what was wrong Goodling was evasive but said there was something going on in the Office of Public Affairs concerning the U.S. Attorney matter.<sup>68</sup>

Moschella said that after he spoke with Goodling, he went to see McNulty, who was on his way out of the office. Moschella said he asked McNulty if he thought he knew the whole story concerning the U.S. Attorney removals. Moschella said McNulty told him that there was more to the story, but he did not have time to discuss it at that point. Moschella said McNulty told him that Sampson had found some documents that shed light on the removals. Moschella said that when he discussed the matter with Sampson later that evening, Sampson showed him the e-mails indicating far earlier, more active White House involvement in the U.S. Attorney removals than Moschella had testified about.

Moschella said he was "flabbergasted" when he saw these documents. Moschella said he immediately told Sampson that the Department's Office of Legal Counsel would have to become involved in light of this new information

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<sup>68</sup> According to Margolis, Goodling came into his office late on March 8 extremely distraught over the revelation of Sampson's documents, and asked whether Margolis had spoken to Sampson. Margolis also said that Goodling implied that her career in the Department was over, but she did not state specifically what she had done.

and would need to oversee the Department's response to congressional document requests. Moschella told us he was very angry with Sampson and expressed that anger in no uncertain terms.

Sampson told us that when he initially retrieved the documents and e-mails he was not focused on the issue of what the Department had represented to Congress about the timing and nature of the White House's involvement in the removals. Sampson also said he had not focused on that issue during the preparation sessions for McNulty's and Moschella's testimony.

Sampson said that when he initially located the e-mails, he felt that they proved that the Department was always planning to work with the Senate to find replacements for the U.S. Attorneys and that there were no politically connected candidates slated to replace the U.S. Attorneys.<sup>69</sup> Sampson also said that the documents proved that the Department and the White House had been discussing the removal of U.S. Attorneys for a long time, which he said refuted the claim that U.S. Attorneys were removed to interfere with, or in retaliation for, any prosecution.

Sampson said he did not realize the documents presented a problem until he showed them to Moschella, who expressed concern that Congress would believe he had testified falsely. Sampson said he told Moschella his fear was unjustified. Sampson said that both Moschella and McNulty seemed upset with him, but Sampson did not believe he had misled them into testifying inaccurately. Sampson said that when he read the documents to Margolis later and asked what he thought, Margolis said, "I think you're going to be testifying [before Congress]."

Sampson said that until March 8, there had been no discussion of the Department making documents or additional Department staff available to Congress. However, Sampson said he knew that subpoenas were on Congress's agenda, and he thought there would be a battle with Congress over executive privilege regarding the documents. Sampson stated that when Attorney General Gonzales met with the Senators on the afternoon of March 8, the Attorney General "caved" and agreed to make all staff and all the documents available. Sampson said he recognized that this meant the documents he had just discovered would be produced to Congress.

McNulty told us that at some point during the afternoon of March 8, he went to Sampson's office and Sampson showed him the documents indicating earlier, more substantive White House involvement in the removals. McNulty

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<sup>69</sup> It is unclear how the earlier e-mails would have helped prove this point because the Attorney General's appointment authority was not signed into law until March 2006. Moreover, the January 6, 2006, e-mail already listed potential replacements for several of the U.S. Attorneys.

said that when Sampson showed him the e-mails, Sampson said something to the effect of “here is a new issue we are going to have to address.” McNulty said he did not study the documents closely but saw that there were references to compiling names prior to the October 2006 timeframe that McNulty had discussed in his closed briefing with the Senate Judiciary Committee. McNulty said that what he saw of Sampson’s documents was sufficient to call into question the accuracy of his and Moschella’s congressional testimony. McNulty said Sampson did not seem excessively troubled when he showed McNulty the documents, although Sampson appeared to realize it was a major development.

Early the next morning, Friday, March 9, Sampson offered the Attorney General his resignation. Sampson told us that it had been “a tough week,” and Gonzales was not happy with him after the USA Today editorial appeared on March 7. Sampson said that after the documents came to light on March 8, he believed the Department needed someone to manage its response to Congress, but given his role in creating the predicament he did not think he was the right person to do so. He said that when he offered Gonzales his resignation, he told Gonzales that he was sorry for his role in creating a “political scandal.” Sampson later testified to Congress he believed that as Chief of Staff he could have, and should have, helped to prevent the Department from making incorrect representations about the U.S. Attorney removals. Sampson said that he felt “honor bound” to accept his share of the blame for the problem and to hold himself accountable.

Gonzales did not accept Sampson’s resignation immediately. During the morning of March 9, McNulty, Moschella, Sampson, and Hertling met with Steve Bradbury, Acting Assistant Attorney General for the Office of Legal Counsel, to discuss how to proceed. According to Moschella, Sampson did not apologize or explain why he did not tell McNulty or Moschella about his contacts with the White House Counsel’s Office before the fall of 2006.

Later that day, employees from the Department’s Office of Information and Privacy began conducting searches on the Department’s senior staff’s computers and in files for documents relevant to the removals to produce documents requested by Congress. The searches continued over the weekend and for several days thereafter. On March 13, the Department began producing documents to Congress.

According to McNulty, Gonzales asked him to formulate a plan to address how the Department should handle the problems the controversy had brought to light concerning the removals and how they were accomplished. McNulty said Gonzales expressed some ideas to him over the telephone, and on Saturday, March 10, McNulty drafted a memorandum entitled “United States Attorneys Reforms and Remedies.” Among the suggestions in the memorandum were developing a systemic performance review process for U.S.

Attorneys; reviewing the U.S. Attorney's Manual reporting requirements for contacts between political officials and U.S. Attorneys; establishing a protocol to ensure that the discipline or removal of a U.S. Attorney is not inappropriately connected to a public corruption case; directing the Department's Office of Professional Responsibility to conduct an investigation into the removals of the U.S. Attorneys; assisting Bogden, Iglesias, and Chiara with future employment, perhaps in the Department; and communicating the Attorney General's regret regarding the handling of the removals directly to the U.S. Attorneys.

#### **O. Sampson's Resignation**

On Monday, March 12, the Attorney General accepted Sampson's resignation. Gonzales said when he accepted the resignation he told Sampson that the USA Today editorial had really hurt Gonzales.

Sampson told us that when Gonzales accepted his resignation, Sampson told Gonzales he thought accepting the resignation was a mistake, but Gonzales was adamant that Sampson needed to resign. Sampson said he told Gonzales it was his prerogative, but said he had offered his resignation earlier only because he thought it was the honorable thing to do.

After offering his resignation as Chief of Staff, Sampson attempted to arrange another political appointment in the Department as a Counselor to the Assistant Attorney General in the Environment and Natural Resources Division (ENRD). Sampson told us he was concerned about not having a job lined up, and he asked Gonzales to reassign him elsewhere in the Department while he considered what to do next. Sampson said his reassignment to ENRD did not occur, because after the Attorney General's press conference on March 13 and the subsequent media coverage Sampson thought he needed legal representation. Sampson resigned and left the Department effective March 14, 2007.

#### **P. The Scudder Memorandum**

During our investigation, we also learned that in early March 2007 White House Associate Counsel Michael Scudder (a former Department attorney) was directed by the White House Counsel to prepare a chronology of events related to the U.S. Attorney removals. According to the White House Counsel's Office, the chronology was developed so that the White House could respond to inquiries about the matter. To accomplish that task quickly, Scudder interviewed several people in the Department and within the White House, including Karl Rove. As a result of his interviews and review of documents, in March 2007 Scudder produced at least two drafts of a memorandum setting out a chronology of events related to the removals of the U.S. Attorneys.

Scudder also provided these drafts to the Department's Office of Legal Counsel (OLC). When OLC prepared its own more extensive chronology of events, it used Scudder's draft memoranda to supplement its efforts. According to e-mail records, around March 20, 2007, as part of Attorney General Gonzales's effort to understand the circumstances surrounding the removals, OLC provided Scudder's memorandum to Gonzales. However, Gonzales told us he did not recall seeing Scudder's chronology.

We asked OLC for a copy of the memorandum and all the drafts, but OLC declined, stating that the White House Counsel's Office had directed OLC not to provide them to us. We thereafter engaged in discussions with the White House Counsel's Office during this investigation in an attempt to obtain the Scudder memorandum. The White House Counsel's Office agreed to read one paragraph of the memorandum to us, and provided us with two paragraphs of information concerning Rove that had already been reported publicly, but declined to provide any further information from the memorandum. Eventually, the White House Counsel's Office provided us with a heavily redacted version of the document. We believe the refusal to provide us with an unredacted copy of this document hampered our investigation.

#### **Q. Attorney General Gonzales's March 13 Press Conference**

On Tuesday, March 13, Attorney General Gonzales held a brief press conference concerning the U.S. Attorney removals. According to Roehrkasse, the purpose of the press conference was to show that the Department was in control of the situation now that it had become clear that there was a greater level of White House involvement than Department officials had previously portrayed, and to respond to the perception that the Department was withholding information.

Gonzales began the press conference by stating that all political appointees serve at the pleasure of the President. He stated that he would in no way support an effort to circumvent the Senate's advice and consent role with respect to the appointment of U.S. Attorneys. He acknowledged that the Department had made mistakes, said he accepted responsibility for them and pledged to find out what had gone wrong. Gonzales also said that incomplete information had been given to Department officials, who then communicated that information to Congress. Gonzales then stated that "all political appointees can be removed by the President of the United States for any reason" and that he stood by the decision to remove the U.S. Attorneys.

During the press conference, Gonzales made several statements about his own role in the removal process that were inaccurate. Gonzales specifically stated that he "was not involved in seeing any memos, was not involved in any discussions about what was going on." Later in the press conference, Gonzales

reiterated, “I never saw documents. We never had a discussion about where things stood.”

Gonzales later testified to Congress that he should have been more careful about his public statements and that he had not reviewed relevant documents or his calendar before the press conference. Gonzales said that once the documents contradicting the Department’s prior public statements came to light, he had felt it necessary to quickly and publicly defend the Department from accusations about improper conduct.

### **R. Attorney General Gonzales Directs an Investigation**

In accordance with the plan Gonzales and McNulty had discussed during the weekend, on March 12 Gonzales, McNulty, and Elston discussed having the Department undertake an internal investigation of the removals. An e-mail dated March 13, from Elston to Marshall Jarrett, Counsel of the Office of Professional Responsibility (OPR), stated that the Attorney General had directed OPR to investigate the basis for the removals. Elston wrote in the e-mail to Jarrett:

As we discussed last night . . . The Office of Professional Responsibility (OPR) has been directed to undertake an expedited investigation of whether any of the removals of the USAs on December 7, 2006, were intended to interfere with or in retaliation for a public integrity investigation. OPR has also been directed to make recommendations on how best to avoid or effectively respond to such alleged appearances in the future.

On March 14, OPR delivered a preservation of records memorandum to the Attorney General’s office.

A few days later, the Inspector General learned about the assignment of the investigation to OPR and objected, stating that he believed the Office of the Inspector General (OIG) had jurisdiction to investigate these issues. OPR disagreed. Eventually, the OIG and OPR agreed to conduct this investigation jointly, and the scope of the resulting investigation was much broader than suggested by Elston’s e-mail.

### **S. Attorney General Gonzales’s Conversation with Goodling**

On Thursday, March 15, Goodling met with Attorney General Gonzales to request a transfer. According to Gonzales, Goodling came into his office in an extremely distraught state, and sat down in a slouched position with her head bowed holding her hands together. Gonzales told us that Goodling said she was paralyzed and could not do her work. Gonzales asked her why and she said something about having had the same information that Sampson had. Gonzales told us he had the impression that Goodling was feeling guilty or

confused or frightened. Gonzales said he told her, “No one intentionally has done anything wrong.” He said he wanted to reassure her and began to tell her what he knew about what had happened with regard to the U.S. Attorney removals. However, Gonzales told us he did not remember specifically what he told her about the removals.

Gonzales told us that, in the meeting, Goodling sought a transfer either to another component in the Department or to the Eastern District of Virginia as an Assistant United States Attorney. Gonzales also recounted for us a detailed and very personal story he said Goodling told him during their conversation concerning why she went to law school and wanted to become a prosecutor. According to Gonzales, he told Goodling he would consider her request for a transfer and assured her that they would get through the current situation. Gonzales said it seemed that Goodling felt better and left his office.

In her testimony about this incident before the House Judiciary Committee, Goodling said the conversation with Gonzales made her uncomfortable because she was concerned they might have to testify about the U.S. Attorney removals at some point. Goodling confirmed in her testimony that she was distraught and was seeking a transfer, and that Gonzales told her he would need to think about it. Goodling said that after that part of the conversation, Gonzales was “just trying to chat” and said “let me tell you what I can remember.” According to Goodling, Gonzales laid out his general recollection of some of the events concerning the removals, and then asked her if she had any reaction to what he said. Goodling said that Gonzales mentioned that he thought that everybody who was on the removal list was there for a performance-related reason, and he had been upset with McNulty because he thought McNulty wrongly testified that Cummins was removed only to give Griffin a chance to serve. In her congressional testimony, Goodling said there was more to her discussion with Gonzales, but she said she could not recall anything further at that time.

Goodling said she remembered thinking that it was not appropriate for them to be discussing these issues at that point because they both might have to testify later, and so she did not respond. Goodling said that before the conversation took place the Attorney General had informed her that the Department was negotiating whether she would be interviewed or would testify before Congress. In her congressional testimony, Goodling said she did not believe that Gonzales was trying to shape her recollection.

When we asked Gonzales about his conversation with Goodling, he said that he did not see how anyone could attempt to shape Goodling’s testimony because she was normally such a “very confident, strong-willed young woman.” Gonzales said he did not recall talking to Goodling about Cummins or about being upset with McNulty. When we asked Gonzales why he had such a detailed memory of other aspects of their conversation, such as her demeanor

and the story about why she went to law school and wanted to be a prosecutor, but could not recall if they discussed Cummins and McNulty, Gonzales conceded, “it may very well be. I’m not saying that I didn’t talk about Bud Cummins or didn’t talk about McNulty.” When we asked Gonzales whether he considered that it might have been inappropriate for him to discuss his recollections with Goodling, he told us that he did not give it any thought at the time because he was just trying to help her.

#### **T. Goodling Resigns from the Department**

On March 15, Chuck Rosenberg, the U.S. Attorney for the Eastern District of Virginia, agreed to serve as the Attorney General’s interim Chief of Staff after Sampson resigned. Rosenberg recalled that on March 16 Goodling came into his office at Main Justice extremely distraught, stating that her life was ruined. Rosenberg said she mentioned wanting to transfer to the Eastern District of Virginia to become an AUSA. Rosenberg told Goodling that he wanted to talk to her but was unable to do so at the time.

Rosenberg said that when Goodling left his office, he expressed his concern about her well-being to Gonzales, who told him that Goodling had been to see him earlier in a similar emotional state. Rosenberg said he and Gonzales did not discuss the substance of Gonzales’s conversation with Goodling, only her emotional state. Rosenberg said he learned only after Goodling testified before Congress that Gonzales may have discussed issues with Goodling concerning the removals.

After Rosenberg spoke to Gonzales about Goodling, Rosenberg enlisted the assistance of Courtney Elwood, who was then the Attorney General’s Deputy Chief of Staff, to help Goodling. According to Elwood, Goodling was visibly shaking, crying, and in extreme distress. Elwood said that Goodling said that after Gonzales’s press conference on March 13, she felt she had been accused of misleading McNulty in the representations he made to Congress about the removals. Elwood urged Goodling to take some time off to take care of herself.

On March 19, Goodling scheduled annual leave through the end of March. Goodling never returned to work at the Department, and she resigned from the Department, effective April 7, 2007.

#### **U. Subsequent Events**

According to Rosenberg, by late March or early April 2007 Gonzales was seeking ways to reach out to the U.S. Attorneys who had been removed in December 2006. Rosenberg said that Gonzales discussed writing a personal note to each of the U.S. Attorneys and enclosing an Op-Ed piece he would write that contained his personal apology to them. Rosenberg said that Gonzales drafted notes for an essay admitting that the U.S. Attorneys had not been

treated well and that they were excellent public servants, even though they had been asked to leave. However, the essay was never sent for publication. Instead, according to documents we reviewed, the Attorney General's written testimony for his April 19 hearing before the Senate Judiciary Committee contained an apologetic tone for the way the removals were handled.

In his written remarks prior to his April 19 testimony, Gonzales stated that the U.S. Attorneys "deserved better – they deserved better from me and from the Department of Justice which they served selflessly for many years." Gonzales stated that "Each is a fine lawyer and dedicated professional. I regret how they were treated, and I apologize to them and to their families for allowing this matter to become an unfortunate and undignified public spectacle. I accept full responsibility for this."

Gonzales testified before the Senate Judiciary Committee on April 19 and the House Judiciary Committee on May 10, 2007. In response to questions concerning the circumstances of the removals, Gonzales stated that he had not spoken to Sampson or to others who were involved in the removals once he became aware the matter was being investigated. Gonzales also stated that he had not discussed the removals with other fact witnesses in order to protect the integrity of the OIG-OPR investigation.

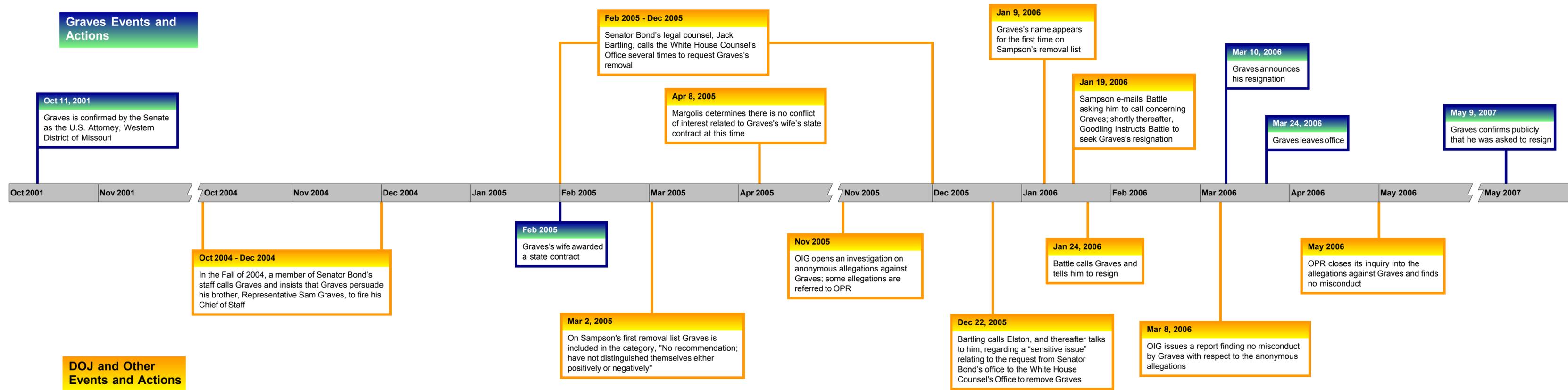
In his testimony before the Senate Judiciary Committee on July 24, 2007, Gonzales acknowledged he had had a conversation with Goodling on March 15 during which he discussed his recollection of some of the facts regarding the removals. However, Gonzales said he did so only in the context of trying to console and reassure Goodling that she had done nothing wrong.

On May 14, McNulty announced that he would resign as Deputy Attorney General and he left the Department at the end of July 2007.

On August 27, Gonzales announced his resignation as Attorney General, effective September 17.

In the next nine chapters, we examine in detail the circumstances surrounding each U.S. Attorney's removal and our analysis of the reasons the Department proffered for each removal.

# Todd Graves Timeline



## **CHAPTER FOUR TODD GRAVES**

### **I. Introduction**

Before and during the congressional hearings that followed the December 7, 2006, removals of U.S. Attorneys, the Department represented to Congress that seven U.S. Attorneys, plus Bud Cummins, were the only U.S. Attorneys removed as a result of the process Kyle Sampson initiated in 2005 to identify and remove “underperforming” U.S. Attorneys. In his January 12, 2007, briefing on Capitol Hill, Sampson assured staff for Senate Judiciary Committee members Senators Patrick Leahy and Dianne Feinstein that those eight were the only U.S. Attorneys told to resign in 2006. Until May 2007, Department witnesses who appeared before Congress on the matter testified about the group of eight, and no one mentioned that Todd Graves of the Western District of Missouri had been told to resign in January 2006.

On May 9, 2007, however, Graves publicly confirmed that he had been told to resign in January 2006. Although the Department did not initially identify Graves as one of the U.S. Attorneys who was told to resign as a result of the process Sampson initiated in 2005, we concluded that Graves should be considered part of that group. Graves was targeted for removal on Sampson’s second list, issued on January 9, 2006, and the script Battle followed in asking Graves to resign was identical to the one Battle followed with the other eight U.S. Attorneys.

In our investigation into the circumstances of Graves’s removal, we were hampered by several factors: Sampson’s and Goodling’s stated failures of recollection as to the reason for Graves’s removal; Goodling’s refusal to cooperate with our investigation; the lack of cooperation by former White House Counsel Harriet Miers and members of her staff, especially former Associate White House Counsel Richard Klingler; and the absence of any documentation memorializing the reasons for Graves’s removal. Despite these impediments, we were able to reconstruct much of the circumstances underlying Graves’s removal, which we discuss below. In this chapter, we also analyze the Department’s stated reasons for requiring Graves’s resignation.

#### **A. Graves’s Background**

Graves graduated from the University of Virginia School of Law in 1991 with a J.D. and a Master’s degree in Public Administration. He began his legal career in 1991 as an Assistant Attorney General for the state of Missouri. Between 1992 and 1994, Graves worked for a law firm in Missouri. In 1994 he

was elected Platte County Prosecuting Attorney and was reelected in 1998. He served in that position until he became U.S. Attorney.

Graves's nomination as the U.S. Attorney for the Western District of Missouri was sponsored by Missouri Senator Christopher S. "Kit" Bond. On July 30, 2001, the White House announced its intent to nominate Graves. While the nomination was pending Senate approval, Graves was appointed as Interim U.S. Attorney on September 17, 2001. On October 11, he was confirmed by the Senate as U.S. Attorney.

In December 2001, Graves was appointed co-chair of the Child Exploitation Subcommittee of the Attorney General's Advisory Committee. His 4-year term as U.S. Attorney expired on October 11, 2005.

### **1. The EARS Evaluation of Graves's Office**

Graves's office underwent an Evaluation and Review Staff (EARS) evaluation in early March 2002, a few months into his tenure. The 2002 report noted that Graves was well regarded and respected by community leaders, agency personnel, and a majority of the federal judges in the district. The report stated that "the perception of the USAO staff as to his performance is positive, even in this early stage of his tenure." The office was not scheduled for another EARS evaluation until September 2006, which was several months after Graves was removed.

### **2. Graves's Status on the Removal lists**

On the first list of U.S. Attorneys Sampson sent to the White House on March 2, 2005, Graves was one of many U.S. Attorneys included by Sampson in the category of those who had not distinguished themselves either positively or negatively. However, on the second list Sampson sent to Miers on January 9, 2006, Graves was one of seven U.S. Attorneys Sampson suggested for removal.

As discussed in Chapter Three, less than 2 weeks later, on January 19, Sampson e-mailed Battle, asking him to call when he had a few minutes to discuss Graves. Shortly thereafter, Goodling called Battle with instructions to call Graves and seek his resignation. Battle was instructed to tell Graves only that the Administration had decided to make a change, that his service was appreciated, and that the request was not based on any misconduct by Graves but simply to give someone else a chance to serve.

Battle placed the call on January 24. Graves said that when he received the call, he was stunned and shocked. Graves complied with the direction to resign, and on March 10, 2006, publicly announced his resignation, effective March 24.

## **B. Reasons Proffered for Graves's Removal**

In her immunized testimony before the House Judiciary Committee on May 23, 2007, Goodling stated that she had “conflicting memories” about the circumstances that led to the request for Graves’s resignation. Goodling said she thought that Graves’s resignation was related to the “fact that he was under investigation by the Inspector General” at the time. Similarly, Sampson stated to congressional investigators, and initially to us, that there was “some controversy around Graves” that Sampson said he associated with an OPR or OIG investigation. However, Sampson told us that he could not “really remember” why Graves was placed on the January 9 list or why he was asked to resign 2 weeks later. Sampson also said he did not recall playing any role in asking for Graves’s resignation. Even after reviewing his January 19 e-mail asking Battle to call him about Graves, Sampson said that all he remembered about Graves’s resignation was Goodling coming into his office and saying, “Graves has to go.” Sampson stated that, based on what Goodling said, his “perception” was that Associate Deputy Attorney General David Margolis had made that determination as a result of an OPR or OIG investigation.<sup>70</sup>

Margolis told us, however, that he was not consulted about Graves’s removal, and he did not make any determination or recommendation to remove Graves. Moreover, as discussed below, we determined that Graves was not asked to resign based on any misconduct allegations. Rather, Graves faced opposition from the staff of his home-state Senator, Senator Bond, which we concluded likely led to his removal.<sup>71</sup> We describe and analyze these issues below.

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<sup>70</sup> Sampson did not discuss Graves during his testimony before the Senate Judiciary Committee on March 29, 2006. On July 10, 2006, during his third day of interviews with congressional staff, Sampson was asked about Graves and, as he did later in his interview with us, claimed a failure of recollection on the subject. He stated that he did not have a specific recollection of placing Graves’s name on the January 9, 2006, removal list, but said he knew that Graves was not part of the process that resulted in the resignations of the eight U.S. Attorneys who were the subject of the congressional investigation. Sampson said he believed that Graves’s resignation was handled by Margolis, and said he did not recall the January 19, 2006, e-mail he sent to Battle asking him to call to discuss Graves.

<sup>71</sup> We asked Senator Bond for an interview regarding the circumstances surrounding Graves’s removal and any communications between his office and officials in the Department and the White House. In a letter responding to our request, Senator Bond declined to be interviewed. He added in the letter that, to the best of his recollection, he did not communicate with anyone in the Administration concerning Graves’s performance at any time during Graves’s tenure as U.S. Attorney and that he did not believe he personally had any additional information to contribute.

## **II. Chronology of Events Related to Graves's Removal**

### **A. The Misconduct Allegations**

In 2005, two allegations of misconduct were made against Graves. The first, in March 2005 from the Executive Director of the Missouri Democratic Party, related to Graves's wife. The second, in October 2005 from an anonymous source, related to various actions by Graves. Both complaints were investigated, and neither resulted in a misconduct finding against Graves.

#### **1. Allegations Concerning Graves's Wife**

In February 2005, newly elected Missouri Governor Matt Blunt's Administration awarded a no-bid contract to Graves's wife to manage a motor vehicle license office in a heavily populated area near Kansas City. In Missouri, license agents are independent contractors who, under contract with the state's Department of Revenue, receive a portion of the fees collected by the license office.

In a letter dated March 1, 2005, Cory Dillon, the Executive Director of the Missouri Democratic Party, urged Attorney General Gonzales to remove Graves from office based on his wife's acceptance of the no-bid contract. The letter alleged that in addition to Graves's wife, her brother and two staff members of U.S. Congressman Sam Graves (U.S. Attorney Graves's brother) were awarded similar license fee office contracts.

On March 2, 2005, the Kansas City Star reported on Dillon's letter to Gonzales. The next day, the newspaper ran an editorial criticizing the contract and opining that U.S. Attorney Graves now had a "clear conflict of interest" if any investigation of the Governor's Administration should arise.

After receiving an inquiry from the White House about this issue, Sampson referred the matter to Chuck Rosenberg, who at the time was the Chief of Staff to the Deputy Attorney General. According to Sampson's March 16, 2005, e-mail to Rosenberg, the White House had asked "(1) whether we have looked into the allegations made against Graves . . . and (2) what our conclusion is, i.e., whether we are comfortable that he doesn't have any legal or ethical issues."

The matter was thereafter referred by Associate Deputy Attorney General Margolis to the Executive Office for U.S. Attorneys (EOUSA), which in turn referred the matter to the OIG. After reviewing the matter and discussing the issue with Margolis, the OIG decided not to open an investigation based on the absence of any pending investigations that presented an actual or apparent conflict of interest for Graves.

In a letter dated April 8, 2005, Margolis informed Graves that “[a]fter reviewing the substance of Mr. Dillon’s letter, consulting with OIG, and considering additional information, I have determined that there is no existing conflict of interest that requires further action at this time.” Margolis further advised Graves that he should be mindful of the Department’s “procedures by which you should seek recusal from any existing or future matter in which a conflict of interest exists.” Margolis pointed out that “[l]ike all United States Attorneys, you are expected to adhere to all legal and ethical obligations in carrying out your duties.”

In his interview, Graves told us that he had brought the Dillon complaint to the attention of EOUSA Director Mary Beth Buchanan after he learned about it on the Internet. According to Graves, he called EOUSA because he believed he had done nothing wrong and wanted to respond publicly to what he viewed as Dillon’s false allegations that he had a conflict of interest. Graves also told us that he later used Margolis’s letter in his public responses to demonstrate that he had not engaged in any impropriety in connection with his wife’s contract.

Graves stated that at no time did any Department official raise any question concerning the propriety of his wife’s contract or suggest that his wife’s contract placed his position as U.S. Attorney in jeopardy. Moreover, Graves said that no Department or Administration official ever raised with him any concerns about the quality of his performance as U.S. Attorney.

However, William Mercer, the Principal Assistant Deputy Attorney General at the time, told us that he recalled Sampson voicing at some point “real concerns” about Graves’s wife’s contract because it did not reflect well on the U.S. Attorney’s Office. Margolis told us that he would not have been surprised if the license fee contract issue “played a huge role” in Sampson’s decision to place Graves on the U.S. Attorney removal list. As Margolis recalled it, Sampson was “really hot about it” because Sampson thought the arrangement made the Department and the Administration “look bad,” despite Margolis’s finding that Graves did not commit any misconduct.<sup>72</sup> However, Margolis could only speculate as to Sampson’s thinking because he was never consulted on the decision to remove Graves and was not even aware of the resignation request until it was made public in May 2007.

We found no expression of concern in Sampson’s March 17 e-mail to Rosenberg referring the Graves matter to him. When congressional

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<sup>72</sup> In a March 17, 2005, e-mail to Rosenberg, Margolis stated: “[I]t strikes me that this is more an indictment of the system out there than of the conduct of Graves, but I must admit that it looks like the days of boss tweed or the pendergrast machine.” In an e-mail to Elston and Mercer on December 19, 2005, Margolis called the conflict allegation “flimsy” and “not substantiated.”

investigators asked Sampson about Graves's removal, he said he had no specific recollection of being involved in Graves's removal. Sampson also said he could not recall discussing Graves's removal with Gonzales, McNulty, or Margolis, who generally handled the removal of U.S. Attorneys who had committed misconduct. Sampson also did not express any consternation about the license fee contract matter to us during his interview, and he essentially disclaimed any responsibility for requesting Graves's resignation.

## **2. Anonymous Allegations Regarding Graves**

In the fall of 2005, the OIG received an anonymous letter containing allegations that Graves had committed various acts of misconduct. Graves told us that he believed the source of the anonymous complaint was an employee that his office was seeking to terminate.

In late November 2005, the OIG opened an investigation into two of the allegations contained in the letter: (1) that Graves had attended a political fundraiser, an activity that would be prohibited by the Hatch Act and by Department policy, and (2) that Graves was driven to the fundraiser in a government car by a paralegal in the U.S. Attorney's Office. The OIG referred the remaining allegations to EOUSA and to Margolis to determine whether further investigation was warranted by the Department or OPR.

In response, in early December 2005 OPR informed EOUSA that it would investigate an allegation in the anonymous letter that Graves had shared confidential information about an impending indictment with his brother, a private attorney, to assist him in advertising for potential class action victims of a defendant in a federal criminal case. In an e-mail dated December 19, 2005, Margolis informed Michael Elston, Chief of Staff to the Deputy Attorney General, and Mercer of the allegations the anonymous source had made against Graves, and noted that he intended to defer further investigation of the remaining allegations in the letter pending the conclusion of the OIG and OPR investigations.

As noted above, Graves's name first appeared on Sampson's January 9, 2006, list of U.S. Attorneys that the White House should consider replacing. On January 24, Graves was asked to resign, and on March 10, 2006, he announced his resignation, effective March 24.

However, at the time Graves was told to resign both the OIG and OPR investigations were ongoing, and both were eventually resolved in his favor, albeit after he had announced his resignation. In a report dated March 8, 2006, 6 weeks after Graves was told to resign, the OIG concluded that Graves did not commit misconduct. The OIG investigation found that Graves did not in fact attend a political fundraiser; rather, his appearance at the building where the fundraiser was held was confined to having his photograph taken

with the Vice President after the event – a permissible activity for a U.S. Attorney.<sup>73</sup> In May 2006, OPR closed its investigation after determining that Graves did not have a brother who was engaged in the private practice of law.

## **B. Complaints About Graves**

As described above, in their congressional testimony neither Sampson nor Goodling offered an explanation for why Graves was placed on Sampson's January 9, 2006, removal list other than their vague recollection that the internal Department investigations involving Graves may have been the basis for his removal. Battle told us that he understood from Goodling that Graves's removal was not related to any allegation of misconduct, but rather in order to make a change in the office.

During the course of our investigation, we found another factor that was most likely the reason for Graves's removal.

### **1. Senator Bond's Congressional Staff Complain About Graves to White House Staff**

In 2001, Missouri Senator Bond had sponsored Graves for the U.S. Attorney position, but we learned that support for Graves in Senator Bond's office had waned by 2005. On at least two occasions in 2005, Jack Bartling, Senator Bond's legal counsel, contacted the White House Counsel's Office to request a change of the U.S. Attorney for the Western District of Missouri.

According to Bartling, he called Associate White House Counsel Grant Dixon several times to seek Graves's removal. Bartling said his calls were not prompted by Senator Bond and described the matter as a "staff issue" handled by himself and Bond's Chief of Staff. Bartling said that he did not discuss Graves's situation or his calls to Dixon with Senator Bond. Bartling stated that Bond was the undisputed leader of the Republican congressional delegation in Missouri and it would have been beneath Bond to be involved in Graves's removal.

Bartling told us that his calls to Dixon at the White House seeking Graves's removal were instead prompted by discord between the in-state staffs of Senator Bond and U.S. Representative Sam Graves, a Missouri Republican congressman who was Todd Graves's brother. According to Bartling,

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<sup>73</sup> The OIG report also found that Graves's use of the government vehicle was not improper, although it did question the appropriateness of Graves asking a paralegal, whose duties did not include driving the U.S. Attorney, to drive him to the event. However, the report noted that the paralegal did not object, and the OIG did not find Graves's actions to be misconduct. Rather, the report recommended that in the future Graves should avoid making such requests.

Congressman Graves's operation "did not run business" the way the Bond operation tried to run business. Bartling said that Bond's staff also wanted Todd Graves to try to rein in his brother, but Todd Graves did not do so.

Bartling said that at some point, possibly in a third call to the White House Counsel's Office, he also raised the issue of Graves's wife accepting a no-bid contract from Governor Blunt that paid considerably more than what the highest-paid state employees made. Bartling told us that he viewed that appointment as posing a conflict of interest for Graves as the chief federal law enforcement officer in the western part of the state, who might be called upon to investigate allegations against the Blunt Administration.

Dixton was the only person from the White House Counsel's Office involved in the Graves matter who agreed to be interviewed by us, and he confirmed that Bartling called him about Graves. Dixton told us that Bartling called him in the spring of 2005 and expressed interest in changing the U.S. Attorney for the Western District of Missouri when Graves's 4-year term expired in October 2005. Dixton stated that while he had no distinct recollection of doing so, he probably brought Bartling's request to the attention of Sampson and Deputy White House Counsel William Kelley. However, Dixton said he recalled having only one conversation with Bartling, and he did not recall discussing the issue of Graves's wife's no-bid contract during that conversation.

In approximately August 2005, the responsibility in the White House Counsel's Office for legal issues in the Eighth Circuit (which includes Missouri) was assumed by Associate White House Counsel Richard Klingler. We determined that based on the timing of the calls from Bartling, it is likely that at least Bartling's final call raising the issue of Graves's wife's state contract to the White House Counsel's Office was taken by Klingler rather than Dixton. Klingler, who now works at a private law firm, informed us through the White House Counsel's Office that he declined to be interviewed in our investigation.

## **2. The Department Learns About Bond's Staff's Complaints**

According to Bartling, by the summer of 2005 the concerns he expressed about Graves to the White House Counsel's Office made their way to the Department. Bartling told us it was clear to him from his conversations with the White House Counsel's Office that the matter had been "kicked over" to the Department of Justice. In addition, Bartling said that he had an interview with the Department in the fall of 2005 for a position in the Office of the Deputy Attorney General, and at some point during the interviewing process Elston asked Bartling if Senator Bond was still interested in changing the U.S.

Attorney for the Western District.<sup>74</sup> When we questioned Elston about this issue, he told us that he first learned that Graves had lost Bond's support from Bond's staff, not from someone in the Department.

Elston also told us he did not recall discussing with Bartling the reasons why Bond wanted to make a change in the U.S. Attorney position, but Elston said he had his own assumptions based on his familiarity with the discord between Bond Republicans and Graves Republicans in Missouri. Elston said he did not discuss his conversation with Bartling with McNulty or others in the Department because it did not occur to him to do so.

As previously noted, on December 19, 2005, Margolis had informed Elston and Mercer about the anonymous allegations made against Graves. We determined that in late December 2005, Bartling exchanged e-mails and phone calls with Elston concerning Graves. On December 22, 2005, Bartling informed Elston by e-mail that he had accepted a position with the Treasury Department starting in late January 2006. Bartling also suggested that the two talk after the first of the year about a "sensitive issue" involving Graves "that has to be handled the right way." In reply, Elston asked Bartling if he was aware of the "most recent allegations" involving Graves, and Elston invited Bartling to call him "sooner rather than later." According to Bartling, when he and Elston spoke later by telephone, Elston told him only that there were "ethics allegations" against Graves, but Elston did not go into specifics.<sup>75</sup>

When we asked Elston about this conversation with Bartling, he said that Bartling had told him previously that Senator Bond's office had asked the White House to discreetly "make a change" in the Western District of Missouri, and Bartling called him in December 2005 to ask him to "keep his ear to the ground" to ensure that the Senator's role in requesting White House action on Graves was not being disseminated within the Department. Elston stated that Bartling was not asking him to find out whether Graves was going to be removed. Elston said that, to the contrary, Bartling "was telling me that it was

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<sup>74</sup> Elston had lived and worked in Missouri for 5 years after he graduated from law school in 1994. According to Bartling, he and Elston met for the first time in 2005 at a lunch arranged by a mutual friend at the Department.

<sup>75</sup> Elston told us he was referring to the anonymous letter containing multiple allegations, some of which were referred to the OIG and OPR. Elston said his conversation with Bartling on the subject was brief and that he would not have gone into the details of the allegations themselves. When we raised with Elston our concern that he disclosed confidential information about misconduct allegations against Graves, he told us that "the gist" of what he was conveying to Bartling was not the substance or merits of the allegations, but rather that the investigation of those allegations would "delay the request to the White House to have [Graves] moved on." Although we found no evidence that Elston disclosed the substance of the allegations to Bartling, the fact that an allegation was lodged with the Department was itself confidential information that Elston should not have disclosed.

going to happen.” According to Elston, the “sensitive issue” mentioned in Bartling’s December 22 e-mail was Senator Bond’s role (through Bartling) in seeking Graves’s removal, and Bartling wanted Elston’s assistance to keep the Senator’s name from being linked to Graves’s anticipated ouster.<sup>76</sup>

According to Elston, he was not involved in the decision to seek Graves’s resignation. Elston stated that he did not discuss his communications with Bartling with Sampson, McNulty, or anyone else in the Department, or otherwise attempt to accelerate Graves’s removal. Elston said that any effort to expedite the matter “would have undermined [Bartling’s] principal purpose, which was for me to make sure that Senator Bond’s contact with the White House was kept confidential.”

During our interview with Graves, he confirmed the existence of “friction” between Senator Bond’s staff and the staff of Congressman Graves, but Graves stated that he was not party to it and did not want to be involved in it. Graves told us that in the fall of 2004 a member of Senator Bond’s staff called him and angrily insisted that Graves use his influence to persuade his brother to fire his brother’s Chief of Staff. According to Graves, when he declined to get involved, the Bond staffer informed him that “they could no longer protect [his] job.” Graves told us that he never discussed this call with his brother and did not report it to anyone in the Department. Graves told us that “if something like this could cost me a prosecutor’s job, they could have it.”

### **C. Graves is Told to Resign**

As described above, on January 24, 2006, EOUSA Director Battle, acting on instructions from Goodling, called Graves and told him to resign. Battle said he told Graves that the Administration had decided to give someone else a chance to serve; that his service was appreciated; that the decision was not based on any misconduct by him; and that he had served admirably and done a good job.

Graves told us that when Battle called him, Graves suspected that the decision was related to the call he had received from Bond’s staffer more than a year earlier. He said he asked Battle if he had a “senator problem.” In their first conversation, according to Graves, Battle “sort of acknowledged that maybe that was it,” but in a subsequent conversation Battle informed him that Senator Bond had “nothing to do with it.” Graves told us that he was ready to move on to the private sector at the time anyway, but he wanted to stay long enough to try a particular case and to have his federal retirement vest. He told

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<sup>76</sup> Elston stated that he assumed the sensitivity of the matter had to do with the fact that Graves’s brother was a congressman from Missouri.

us that the Department denied his request to remain as U.S. Attorney long enough to accomplish these objectives.

Graves told us he called Senator Bond's Chief of Staff in Washington, who was fairly new at that job and was an old friend of Graves. According to Graves, the purpose of the call was two-fold: to find out if his removal was related to the in-state Chief of Staff's call to him 18 months before and to request more time to try a pending murder case. Graves said the Washington Chief of Staff told him that the Department was claiming that Graves was removed because of poor performance. Graves said he responded that the Department had told him the "exact opposite" when he was told to resign and that he believed his removal was caused by Senator Bond's in-state Chief of Staff. The Washington Chief of Staff said he would look into it. Graves said that when the Washington Chief of Staff called him back, he told Graves that Bond "went to bat" for him to extend his stay as U.S. Attorney, but the Department refused.

On January 24, 2006, Bartling, who by then had started his new job at Treasury, e-mailed Elston to inform him that Graves had called Senator Bond's Washington Chief of Staff to say that he was told that Bond's office wanted him out "because Bond wanted new blood in the post." In the e-mail, Bartling asked who called Graves and "what happened to Plan B." Both Bartling and Elston told us that they did not recall what Bartling's reference to "Plan B" meant. Bartling said that it was his "guess" that Plan B referred to using the recent ethics allegations lodged against Graves as the basis for the Department's removing Graves on its own initiative rather than attributing his removal to Senator Bond's request that Graves be removed.

Elston told us he was never able to confirm that Graves was told that Bond wanted him removed, and Elston suspected, based on information he said he gleaned from Goodling and Klingler, that Graves "was just making a right-on guess" and had called the Senator's office to try to confirm his suspicions that Bond was behind the request for his resignation.<sup>77</sup>

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<sup>77</sup> Elston told us he checked with Goodling and Klingler only to learn what Graves had been told by Battle. Elston said he did not ask them the real reason for Graves's removal because he thought he knew the answer. Elston said that he engaged in only limited efforts to ascertain what Graves was told because at the time he was being courted by Bond's staff to replace Graves as U.S. Attorney for the Western District of Missouri. Elston said he ultimately withdrew his name from consideration for the U.S. Attorney position because he had only recently become the Deputy Attorney General's Chief of Staff and thought it too soon to leave the post.

#### **D. Department Comments About Graves's Resignation**

Aside from Sampson's January 9, 2006, e-mail to Miers recommending that Graves and several other U.S. Attorneys be removed, we found no documentation memorializing the request for Graves's resignation or the reasons for it. Sampson initially told us that he could not "really remember" why Graves was placed on the January 9 list or why he was asked to resign 2 weeks later. He said he did not recall playing any role in asking for Graves's resignation. Even after reviewing his January 19 e-mail asking Battle to call him about Graves, Sampson said that all he remembered about Graves's resignation was Goodling coming into his office and saying, "Graves has to go." Sampson stated that, based on what Goodling said, his perception was that Margolis had made the determination that Graves should resign as a result of an OPR or OIG investigation.

In Goodling's testimony before the House Judiciary Committee in May 2007, she denied Sampson's assertion that she handled the request for Graves's resignation without Sampson's guidance. Goodling said she recalled seeing Graves's name on Sampson's January 2006 removal list. She said she thought that Graves was one of nine U.S. Attorneys who had been asked to resign in 2006 until she heard Sampson refer to only eight U.S. Attorneys during a meeting with the Attorney General in January 2007. Moreover, Goodling stated that she did not recall instructing Battle to ask for Graves's resignation. However, she said that if she had directed Battle to call Graves to request his resignation, "it would have been at Mr. Sampson's request. I wouldn't have had that kind of authority."

Margolis also disputed Sampson's supposition about Margolis's role in Graves's removal. Margolis is the career Department official responsible for the referral (typically to the OIG or OPR) of misconduct allegations lodged against U.S. Attorneys and other senior Department officials. Margolis told us that Graves was not the subject of a misconduct finding by either the OIG or OPR at the time and that he did not initiate a request for Graves's resignation. Moreover, Margolis told us that neither Sampson nor Goodling consulted him on Graves's removal and he knew nothing about it until after the circumstances surrounding Graves's resignation were made public in the spring of 2007.

According to Margolis, when the Department has sought the resignation of a U.S. Attorney based on misconduct (usually upon completion of an OIG or OPR investigation resulting in a misconduct finding), the practice has been for Margolis to brief Sampson; for Sampson to inform the Attorney General and to call the White House Counsel's Office to explain the contemplated action in order to ensure that the White House would be prepared to fire the U.S. Attorney in the event he declined to resign voluntarily; and then for Margolis to call the U.S. Attorney and request his resignation. Sampson testified that it

was his “perception” that this process was followed in Graves’s case. However, Margolis was not involved in the process and neither briefed Sampson (or Goodling) on any alleged misconduct by Graves nor called Graves to request his resignation. Moreover, unlike the other Department requests for U.S. Attorney resignations during Sampson’s tenure – each of which Sampson recalled discussing with the White House Counsel’s Office – Sampson said he had no recollection of discussing the Graves matter with the White House Counsel’s Office. Instead, he surmised that the appropriate White House contacts were handled by Goodling.

McNulty, who was Acting Deputy Attorney General at the time, testified before the House Judiciary Subcommittee that he was not consulted about Graves’s removal. Former Attorney General Gonzales said that he would have expected a Department request for the resignation of a U.S. Attorney to have been cleared with him. Gonzales told us he “can’t imagine it didn’t happen.” He said, “I’m sure I was told and I don’t remember.” However, he stated that he had no recollection of being consulted about Graves’s removal.

During his congressional testimony, Sampson maintained that he had almost no memory of why he placed Graves on the January 9 list or why Graves was asked to resign 2 weeks later. When congressional investigators asked if Associate White House Counsel Klingler would have approved the dismissal of Graves, Sampson replied: “I don’t remember. I don’t remember specifically. The general practice would have been to check with the counsel, not an associate counsel.”

However, 5 months later, when we asked Sampson whether Klingler played a role in Graves’s removal, Sampson told us, “And that’s another thing that I do remember is that Klingler was the person that was responsible for this in the White House Counsel’s Office and that he was speaking with Senator Bond’s people.” Sampson also told us he understood that Senator Bond “was not happy with Graves and wanted him out.” This was the first time Sampson acknowledged the existence of pressure by Bond’s office playing any role in Graves’s resignation.

### **III. Analysis**

At the outset, we note that our analysis of Graves’s removal was hindered because we were unable to interview Associate White House Counsel Klingler, who our investigation revealed was closely involved with Senator Bond’s staff concerning Graves’s removal, and Goodling, who instructed Battle to call Graves after she had told Sampson “Graves has got to go.” In addition, the White House declined to provide any internal documents relating to the removal of the U.S. Attorneys, including Graves.

We found no evidence to support the claim that Graves was asked to resign because of OIG and OPR investigations into the allegations made against him. In fact, at the time Graves was asked to resign, the internal investigations of Graves were ongoing and no misconduct findings had been made. Moreover, neither McNulty nor Margolis – the two senior Department officials who normally would have been involved in a decision to remove a U.S. Attorney for misconduct – were consulted about Graves’s removal. Margolis said he was neither aware of the resignation request to Graves nor involved in the decision to seek it.

In addition, in his interview with us Sampson acknowledged that as a “general philosophy” he would await the completion of an OPR or OIG investigation before recommending the removal of a U.S. Attorney. Yet, the OIG and OPR investigations were ongoing at the time Battle was instructed to seek Graves’s resignation, and no misconduct had been substantiated. In fact, neither the OIG nor OPR ultimately concluded that Graves had committed misconduct. Moreover, if Sampson had recommended to the White House that Graves be removed based on the mere existence of the OIG and OPR investigations, such action would have been contrary to existing Department practice and his claimed “general philosophy.”

We do not believe, however, that the ongoing OPR and OIG investigations were the reason for Graves’s removal. Rather, the evidence indicates that Graves was instructed to resign because of complaints to the White House Counsel’s Office by Senator Bond’s staff. Although Sampson initially professed not to recall why Graves was removed, he eventually told us that Associate White House Counsel Klingler was “speaking with Senator Bond’s people,” and that “Bond was not happy with Graves and wanted him out.” Moreover, the decision to remove Graves came within a month after overtures from Bartling, Senator Bond’s legal counsel, to Elston to keep Senator Bond’s staff’s interest in removing Graves a secret. E-mail records also show that the day Battle called Graves and directed him to resign, Bartling expressed concern that Graves had learned from someone at the Department that Bond was responsible for his removal.

It remains unclear whether Sampson or Goodling was the conduit for pressure from Senator Bond’s staff or the White House for Graves’s removal. Sampson claimed little recollection about the matter, other than mentioning some controversy surrounding Graves and Goodling’s pronouncement that “Graves has to go.” Sampson suggested that Goodling essentially handled Graves’s resignation on her own initiative without his guidance or approval.

However, we find it difficult to credit that assertion in light of the fact that Sampson included Graves on the January 9, 2006, list of U.S. Attorneys to be removed that he sent to Miers, and that Sampson sent an e-mail to Battle on January 19 asking to discuss Graves. Shortly thereafter, on January 24,

Battle called Graves and asked for his resignation. Moreover, in her appearance before Congress, Goodling disputed Sampson's testimony about her role in forcing Graves to resign. Goodling testified that she would only have instructed Battle to request Graves's resignation if Sampson had told her to do so. Goodling also claimed little recollection of Graves's removal other than that there were misconduct investigations of him ongoing at the time. Goodling was not asked about the role the White House played in Graves's removal, however, and we were not able to question Goodling about this (or any other) subject because she refused to be interviewed by us.

Regardless of whether Sampson or Goodling was responsible for Battle's call to Graves, we believe the evidence indicates that the friction between Senator Bond's staff and the staff of Graves's brother, a Republican congressman from Missouri, precipitated Graves's removal. Both Graves and Bartling told us that a member of Bond's staff was irate that Graves refused to become involved in a dispute between his brother's staff and Bond's staff. We find it extremely troubling that the impetus for Graves's removal as U.S. Attorney appears to have stemmed from U.S. Attorney Graves's decision not to respond to a Bond staff member's demand to get involved in personnel decisions in Representative Sam Graves's congressional office.

We also believe that Sampson should have more closely scrutinized what Associate White House Counsel Klingler told him about why the White House decided to remove Graves. At the very least, Sampson should have discussed the basis for Graves's removal with McNulty and Gonzales. We found no evidence that he did so. He also did not discuss the decision to remove Graves with Margolis, notwithstanding Sampson's later claim that it was his "perception" that Margolis had made the determination that Graves should be removed as a result of an OPR or OIG investigation. In fact, that was not true.

In addition, at the time Sampson should have at the very least determined the reasons for directing Graves to resign to ensure that Graves's removal was not based on improper political reasons. Moreover, no one discussed with Graves Senator Bond's alleged concerns about him. It also appears that no one considered whether Graves was an effective U.S. Attorney before seeking his removal.

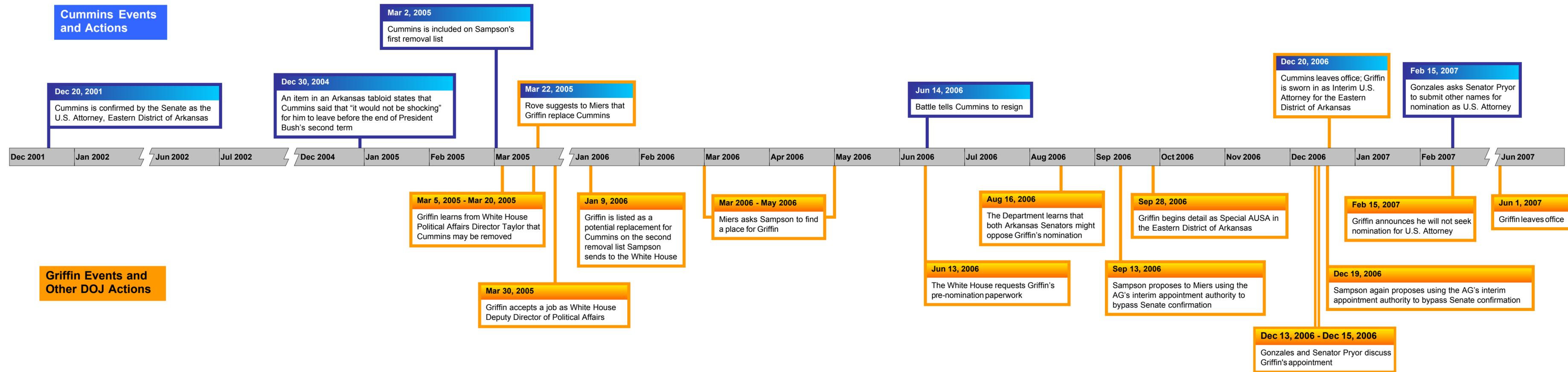
We believe the way the Department handled Graves's removal was inappropriate. Although U.S. Attorneys serve at the pleasure of the President, it is the Department's responsibility to protect its independence, and the independence of federal prosecutors, by ensuring that otherwise effective U.S. Attorneys are not removed for improper political reasons. The fact that the impetus for Graves's removal appears to have stemmed from his decision not to intervene in a personnel dispute between Senator Bond's staff and staff in Representative Sam Graves's office is a disturbing commentary on the Department of Justice's support for U.S. Attorneys.

We also believe that the process that resulted in Graves's forced resignation was troubling. As noted above, although Sampson claimed that the pending OIG and OPR investigations may have played a role in the decision to remove Graves, no one consulted with Margolis, the Department official knowledgeable about the allegations and the investigations, to determine the status of those investigations.

Moreover, even after the removal no one in the Department accepted responsibility for the decision to remove Graves, with each senior official claiming that others must have made the decision. Just as troubling, according to Sampson's and Gonzales's recollection, it does not appear that anyone consulted with the Attorney General about the decision to tell a U.S. Attorney to resign. If true, that is a stunning example of lack of oversight or knowledge by the Attorney General about important personnel matters regarding a high-level Department official.

In sum, we believe the manner in which the Department handled Graves's removal was inappropriate. Although U.S. Attorneys serve at the pleasure of the President and can be removed for no reason, the Department should ensure that otherwise effective U.S. Attorneys are not removed because of an improper reason. The evidence indicates that the likely reason for Graves's removal was pressure from the office of Senator Bond. While U.S. Attorneys are often sponsored by their state Senators, when they take office they must make decisions without regard to partisan political ramifications. To allow members of Congress or their staff to obtain the removal of U.S. Attorneys for political reasons, as apparently occurred here, severely undermines the independence and non-partisan tradition of the Department of Justice.

# H.E. "Bud" Cummins Timeline



## **CHAPTER FIVE**

### **H.E. “BUD” CUMMINS**

#### **I. Introduction**

This chapter examines the removal of H.E. “Bud” Cummins III, the former United States Attorney for the Eastern District of Arkansas, and his replacement by Timothy Griffin in December 2006.<sup>78</sup> We also discuss the Department’s response to congressional concerns about Griffin’s appointment, including the representations made about the reasons for Cummins’s removal, and whether the Department intended to bypass the normal Senate confirmation process by appointing Griffin as the Interim U.S. Attorney after Cummins’s removal.

#### **A. Cummins’s Background**

Cummins graduated from the University of Arkansas Law School in Little Rock in 1989. He served as a law clerk in the Eastern District of Arkansas, first for U.S. Magistrate Judge John Forster, Jr. from 1989 to 1991, and then for U.S. District Judge Stephen M. Reasoner in 1991. Following his clerkships, Cummins started a private law practice in Little Rock in 1992, where he remained until 1995. He unsuccessfully ran for an Arkansas seat in the U.S. House of Representatives during 1995 and 1996. Between 1997 and 1998, Cummins was the Chief Legal Counsel to Arkansas Governor Mike Huckabee. In 1998, he returned to the private sector to resume a private law and lobbying practice. In 2000, Cummins served as a counsel to the Bush-Cheney campaign.

Cummins said that early in the 2000 Bush campaign he worked closely with Arkansas Senator Tim Hutchinson and made it known that if Governor Bush won the election he would seek Hutchinson’s support for the U.S. Attorney nomination for the Eastern District of Arkansas. In early 2001, Hutchinson forwarded Cummins’s name to the White House recommending him for that position.

On November 30, 2001, Cummins was nominated by the President to be the U.S. Attorney for the Eastern District of Arkansas. He was confirmed by the Senate and took office on December 20, 2001.

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<sup>78</sup> As we discuss in more detail below, Griffin served as a political appointee in the Department’s Criminal Division from 2001 to 2002, and he was detailed for 9 months as a Special Assistant U.S. Attorney to Cummins’s District. Griffin also served as Research Director for the Republican National Committee before the 2004 election, and in March 2005 began working at the White House as Deputy Director of the Office of Political Affairs.

## **B. The EARS Evaluations of Cummins's Office**

In 2002 and 2006, EARS teams conducted evaluations of Cummins's office. Both evaluations described Cummins as highly regarded by the judiciary, law enforcement, civil client agencies, and office personnel. The 2006 evaluation reported that the senior management team, led by Cummins, "effectively managed the office's operations and personnel." The report also stated that the office had "established strategic goals that were appropriate to meet the priorities of the Department and the needs of the District." The evaluators found that Cummins was involved in the day-to-day management of the office and was active in Department of Justice matters, serving on various Attorney General Advisory Committee subcommittees. Cummins also received high marks in the EARS evaluation for the office's anti-terrorism, anti-drug, and reduction of gun violence programs.

## **C. Cummins's Status on the Removal Lists**

Cummins was 1 of 14 U.S. Attorneys whom Sampson identified for removal on the first list he supplied to the White House on March 2, 2005. As noted in Chapter Three, that list characterized those identified for removal as "weak U.S. Attorneys who have been ineffectual managers and prosecutors, chafed against Administration initiatives, etc." Cummins's name remained on every removal list until his resignation in December 2006.

## **D. Reasons Proffered for Cummins's Removal**

We found that Department officials proffered conflicting reasons for Cummins's removal.

Sampson told congressional investigators and us that Cummins's name appeared on the March 2005 list because he believed that Cummins was an underperforming U.S. Attorney.

However, in McNulty's February 6, 2007, testimony before the Senate Judiciary Committee, McNulty stated that Cummins was not removed for performance reasons but was removed because the White House wanted to give Griffin a chance to serve as U.S. Attorney. The chart that Goodling prepared for McNulty's closed Senate briefing stated that because Cummins had completed his 4-year term as U.S. Attorney and had indicated he would not serve out his entire second 4-year term, the Department worked on developing a replacement plan. In McNulty's closed briefing to members of the Senate Judiciary Committee on February 14, 2007, he stated that Cummins had said publicly that he was thinking of moving on, and McNulty added that it seemed appropriate to give Griffin a chance to serve as U.S. Attorney.

In March 2007, however, in response to congressional document requests concerning the U.S. Attorney removals, the Department publicly

released e-mail between Sampson and White House Political Affairs Director Sara Taylor in which Taylor wrote that Cummins was removed because he was “lazy.”

When Cummins announced his resignation in December 2006, Arkansas Senators Mark Pryor and Blanche Lincoln publicly expressed concern that Cummins was improperly removed to make way for Griffin and that the Administration intended Griffin’s appointment to bypass the Senate confirmation process. In the remainder of this chapter, we discuss Cummins’s performance, the reasons for his removal, and Griffin’s appointment. We then address whether the appointment of Griffin as Interim U.S. Attorney was intended to bypass the normal Senate confirmation process.

## **II. Chronology of Events Related to Cummins’s Removal**

### **A. Cummins’s Performance**

#### **1. Sampson’s Statements**

Sampson told us that he could not recall whether he learned anything specific about Cummins’s performance as U.S. Attorney between 2001 and 2005 that caused him to indicate that Cummins was a “weak U.S. Attorney” on the March 2, 2005, list of U.S. Attorneys Sampson sent to White House Counsel Miers.

Sampson told us that he did not perceive Cummins in a positive light even at the time of Cummins’s nomination as U.S. Attorney. Before coming to the Department, Sampson had served in the White House Office of Presidential Personnel and in the White House Counsel’s Office. Sampson said that he had reviewed Cummins’s résumé in 2001 when Cummins was going through the nomination process. He thought Cummins was not particularly distinguished and was unsuitable for nomination as U.S. Attorney. Sampson also stated that because presidential nominations are subject to the political process and home-state politicians exercised a lot of power over nominations, the strongest candidate was not always selected.

Sampson acknowledged that the information he gained from Cummins’s nomination process colored his view of Cummins even after he became the U.S. Attorney. Sampson said he perceived Cummins to be mediocre and said he did not think he was alone in that perception, commenting that he thought Department leadership also perceived Cummins to be mediocre. However, as described below, we were unable to find any evidence that Sampson discussed Cummins’s performance with any Department officials prior to identifying him for potential removal in March 2005.

## **2. Department Managers' Statements**

None of the Department leaders we interviewed said they recalled discussing Cummins's performance with Sampson. Former Deputy Attorney General Comey told us that he did not think Cummins ever "crossed his radar screen" while he was Deputy Attorney General. Associate Deputy Attorney General David Margolis said that he did not believe he had any contact with Cummins after he interviewed Cummins prior to his nomination. Margolis stated that during the subsequent 4 years he had never heard anything bad about Cummins, either directly or indirectly.

Paul McNulty, who succeeded Comey as Deputy Attorney General in November 2005, told us that he did not know Cummins very well and did not have an opinion about his performance. McNulty also stated during his Senate Judiciary Committee hearing that nothing stood out in his mind concerning any issues with Cummins's performance as U.S. Attorney. McNulty also testified that he did not consider Cummins to be in the same category as the other U.S. Attorneys removed in December 2006 in that the others were removed for performance-related reasons while Cummins was told to resign so that another candidate, Tim Griffin, could serve as the U.S. Attorney. McNulty's Chief of Staff Michael Elston also told us he was unaware of any concerns about Cummins's performance as U.S. Attorney.

Former EOUSA Director Mary Beth Buchanan, who also served as the Chair of the Attorney General's Advisory Committee from 2003 to 2004, told us that she could not assess Cummins's performance because Cummins had a low profile. She said she did not have any negative information about Cummins, but also did not know of anything exceptional about Cummins's work in his district either. Buchanan said, however, that it was difficult for certain U.S. Attorneys to stand out when their districts did not have the same type of crime as larger districts.

EOUSA Director Michael Battle, who became Director of EOUSA in June 2005, told us that he was not aware of any problems or dissatisfaction within the Department concerning Cummins's performance. Rather, Battle stated that he and EOUSA Acting Deputy Director Natalie Voris considered Cummins to be one of the top five U.S. Attorneys. Battle said that Cummins was one of the easiest U.S. Attorneys to work with, and Voris told us that Cummins was "a charismatic guy who cared about his district."

Attorney General Gonzales told us that he visited Cummins's district in the fall of 2005 and thought Cummins was "a nice guy." Gonzales said he could not recall being aware of any concerns about Cummins.

## **B. Cummins's Removal and Griffin's Appointment**

### **1. Griffin's Background**

J. Timothy "Tim" Griffin graduated from Tulane University Law School in 1994 and began his legal career at a private law firm in New Orleans. Between 1995 and 2000, he worked at a series of legal jobs in Arkansas and in Washington, D.C. Griffin was a local prosecutor in Pine Bluff, Arkansas; an Associate Independent Counsel in the investigation of former Housing and Urban Development Secretary Henry Cisneros; and a Senior Investigative Counsel on the Campaign Finance Investigation run by the House Committee on Government Reform. Griffin also joined the U.S. Army Reserve Judge Advocate General Corps in 1996 as a First Lieutenant and was subsequently promoted to the rank of Major. In 1999, Griffin became Deputy Research Director at the Republican National Committee (RNC) for the 2000 presidential campaign.

Griffin told us that in 2001 he had expressed interest in becoming U.S. Attorney in the Western District of Arkansas, but Senator Hutchinson decided to recommend Thomas Gean for that position.

In March 2001, Griffin obtained a political appointment as a Special Assistant to the Assistant Attorney General for the Criminal Division. Griffin was detailed from the Department of Justice Criminal Division to the U.S. Attorney's Office in the Eastern District of Arkansas as a Special Assistant United States Attorney (SAUSA) from September 2001 to June 2002. Griffin was a SAUSA in the Eastern District when Cummins became the U.S. Attorney there in December 2001. After finishing his SAUSA detail in June 2002, Griffin returned to the Republican National Committee as Research Director and Deputy Communications Director.

In early 2004 while working at the Republican National Committee, Griffin again sought the nomination for U.S. Attorney in the Western District of Arkansas.<sup>79</sup> Griffin said that Congressman John Boozman, who was the senior Republican in Arkansas's congressional delegation, submitted Griffin's name to the White House along with three other candidates for this position.

In February 2004, a panel of Department of Justice and White House officials, including Sampson, Margolis, White House Liaison David Higbee, and Associate White House Counsel Grant Dixton interviewed Griffin. Sampson told us that Griffin was the panel's first choice, but Griffin withdrew from consideration and the panel chose Robert Balfe.<sup>80</sup> Griffin told us that he

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<sup>79</sup> The U.S. Attorney in this district, Thomas Gean, had resigned in February 2004.

<sup>80</sup> On June 1, 2004, the White House nominated Balfe to be the U.S. Attorney, and he was confirmed on November 21, 2004.

withdrew his name from consideration after his interview because he knew that Karl Rove and other Republican Party officials wanted him to continue to work on the 2004 presidential campaign. Griffin said he also agreed to withdraw because he knew his nomination was unlikely to move forward since it was an election year.<sup>81</sup>

## **2. Griffin Learns Cummins's Name is on the Removal List**

According to both Cummins and Griffin, the two were on friendly terms after Griffin completed his detail in the Eastern District of Arkansas U.S. Attorney's Office in 2002. Cummins told us that as a SAUSA Griffin had done a good job as the office's Project Safe Neighborhoods coordinator. In August 2002, shortly after Griffin left the U.S. Attorney's Office, Cummins wrote Griffin a laudatory letter thanking him for his service. Cummins said that after Griffin left the office, he was very good about staying in touch, and a review of Cummins's e-mail traffic shows numerous friendly e-mails between Griffin and Cummins throughout 2004 into 2005.

Cummins told us that by December 2004 he had begun to consider the possibility of resigning as U.S. Attorney if the right opportunity presented itself, but he had no firm plans to leave at that time and he was not actively seeking other employment. On December 30, 2004, the Arkansas Times, a weekly free paper self-described as "Arkansas's Newspaper of Politics and Culture," carried a small item in its "Insider" section noting that Cummins had told a reporter that with four children to put through college, it would not be shocking for him to leave before the end of President Bush's second term.

In December 2004, Griffin left the Republican National Committee and in January 2005 began work under a 3-month consulting contract. Griffin said he spent the 3 months planning his upcoming April 2005 wedding and trying to figure out what his next job would be. Griffin said that although he really wanted to work at the White House, he also explored the possibility of obtaining a political appointment to the Department of Justice in which he would then be detailed to lead a Project Safe Neighborhoods initiative in southwestern Arkansas, under the jurisdiction of the U.S. Attorney's Office for the Western District of Arkansas and recently confirmed U.S. Attorney Balfe. Such an arrangement would have permitted Griffin to be a Department employee and to remain in Arkansas.

In February 2005, Sara Taylor became the Director of Political Affairs at the White House, reporting directly to Karl Rove. Taylor began looking for

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<sup>81</sup> Associate White House Counsel Dixton, who was on the panel that interviewed Griffin, told us that although Griffin did extremely well during the interview, Congressman Boozman did not support Griffin because Boozman felt strongly that Balfe was the better candidate based on his extensive prosecutorial experience in Arkansas.

someone to become her deputy, and Taylor and Griffin knew each other from the presidential campaign. According to Griffin, in March 2005 he began discussing with Taylor the possibility of becoming Deputy Director of Political Affairs at the White House.

On March 2, 2005, Sampson provided to White House Counsel Harriet Miers his first list of U.S. Attorneys to be removed. Sampson described 14 U.S. Attorneys on the list as “weak, ineffectual” or as having “chafed against administration initiatives.” Cummins was 1 of the 14.

Taylor told us that shortly after she began serving as White House Director of Political Affairs, she became aware that the White House was considering replacing U.S. Attorneys. Taylor said that Miers and others in both the White House Counsel’s Office and the Department of Justice had discussed the idea that the beginning of the President’s second term provided an opportunity to replace some of the U.S. Attorneys.

Griffin told us that in mid-March 2005 he learned from Taylor that Cummins was on a list of U.S. Attorneys the White House was considering replacing. Griffin said that even prior to formally being hired by the White House as Deputy Political Director and placed on the White House payroll, he attended the “Directors” meetings at the White House. After one of these meetings, Taylor showed him a list of U.S. Attorneys who were going to be asked to resign.<sup>82</sup> According to Griffin, Cummins’s name was on the list. Griffin stated that Taylor told him she did not know why Cummins was on the list, but Griffin said he speculated to Taylor that it was because Cummins had lost his sponsor when Senator Tim Hutchinson lost his re-election bid in 2002.

### **3. Griffin Expresses Interest in the U.S. Attorney Position**

Griffin said that in addition to the possibility of becoming White House Deputy Director of Political Affairs, he was also interested in becoming an Associate White House Counsel. Griffin told us that he met with Miers sometime in March 2005 to discuss working in the White House Counsel’s Office. However, according to Griffin, he did not think he had the credentials to be considered for an Associate White House Counsel position.

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<sup>82</sup> It is unclear why Griffin was attending these meetings. According to Griffin, Taylor had offered him the Deputy Director of Political Affairs position in February 2005, but he told her he could not begin until after his wedding in Arkansas in early April. Taylor insisted she needed him to begin immediately, so as a compromise Griffin said he volunteered a few days a week acting as Taylor’s Deputy when he was in Washington. Griffin said that the Directors meetings were regular morning meetings called by Rove and attended by the Directors and Deputies of the White House offices under Rove’s supervision, such as the Office of Political Affairs and the Office of Intergovernmental Affairs.

Griffin said that he also knew before he met with Miers that the White House wanted to replace Cummins. In the course of their conversation, Miers asked him what he wanted to do with his career, and she told him that the position of U.S. Attorney for the Eastern District of Arkansas might become vacant. She asked him if that was something he would be interested in. Griffin told Miers that his goal at the time was to work in the White House, but he also said that he wanted to be U.S. Attorney in the future. Griffin said that Miers expressed the concern to him that he might have difficulty becoming a U.S. Attorney after having worked for the White House Office of Political Affairs.

A review of the limited e-mail traffic that the White House provided to us during this investigation shows that Miers, Rove, and Taylor discussed employment options for Griffin in late March 2005. In an e-mail exchange dated March 22, 2005, Miers informed Rove that among the options she had discussed with the White House Presidential Personnel Office was to place Griffin in a political slot in one of the two Arkansas U.S. Attorney's Offices, or to have Griffin replace the Deputy Director of the Office of Legal Policy at the Department of Justice. Rove responded, "What about him for the U.S. Attorney for the Eastern District of Arkansas?" Miers replied to Rove that it was "definitely a possibility" because the U.S. Attorney there was going to be replaced. In the March 2005 e-mail, Miers also wrote that she and Griffin had discussed Griffin's desire to someday become U.S. Attorney, but Griffin told her he wanted to work at the White House in the immediate future. Miers wrote that Griffin told her that he knew the U.S. Attorney position required Senate confirmation and could take time, and Griffin was seeking more immediate employment because he was going to be married soon.

Rove forwarded his e-mail exchange with Miers to Taylor. Taylor responded, "My fear is they end up putting him [Griffin] at Justice (which he does not want to do); it's a year before he's made U.S. Attorney, if ever." In another e-mail dated March 24, 2005, Taylor wrote to Rove that Griffin "would love to be U.S. Attorney – he'd love to come here in the meantime."

At the end of March 2005, Griffin decided to accept the offer to become Deputy Director of Political Affairs at the White House.<sup>83</sup> Griffin said that Taylor made it clear to him when he took the job that he had to commit to staying at the White House until after the November 2006 election unless the Arkansas U.S. Attorney position opened up before then. Griffin began working at the White House on April 14, 2005.

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<sup>83</sup> Griffin said that as Deputy Director of Political Affairs he primarily focused on hiring political appointees throughout the Executive Branch, with the exception of the appointment of U.S. Attorneys, which was handled by the White House Counsel's Office.

Cummins said that throughout 2005 he and Griffin had numerous conversations about Griffin becoming U.S. Attorney when Cummins left, although Cummins said he had always assumed that the decision to resign would be his to make. Cummins told us that he just assumed Griffin would get the job because he was so well connected politically.

Griffin told us that even though he had such conversations with Cummins, he did not take action to push Cummins to move on. Rather, Griffin said, "I was laying low." Griffin also said that under no circumstances would he have told Cummins that his name was on a list of U.S. Attorneys the White House was seeking to replace. Griffin said that to him, Cummins being removed and his becoming U.S. Attorney were on two separate tracks. Griffin said, "I didn't know why he was being fired, but I knew that if he was going to be fired, then I wanted to be considered for that job."

In August 2005, while still working at the White House, Griffin was notified that his Army Reserve unit was going to be mobilized to Fort Campbell, Kentucky. Griffin left the White House for Fort Campbell in September 2005. Griffin said that before he left he discussed with Miers his concern that someone else would be appointed U.S. Attorney before Griffin's tour of duty ended. Griffin said he had a distinct recollection that in either August or September 2005 Rove told him that he and Miers had discussed Griffin's desire to become U.S. Attorney, and Rove indicated to Griffin something to the effect that "it may work out."

Griffin said that while he was on Army Reserve duty during the fall of 2005, he was in frequent contact with Scott Jennings (who had replaced Griffin as the White House Deputy Director of Political Affairs) and others in both the White House and the Department of Justice. Jennings told us he did not know why Cummins was removed. Jennings also said he believed Cummins had publicly stated that he was looking for another job. Jennings said that while it was the White House's intention that Griffin would eventually become U.S. Attorney in Arkansas, he did not believe that Cummins would be removed in order to make that happen.

As noted previously in this report, the initiative to replace U.S. Attorneys lay dormant for several months after Sampson sent Miers his March 2005 list. Cummins told us that although he had thought he might begin job hunting by the end of 2005, the First Assistant U.S. Attorney in his office took early retirement and Cummins felt it was not a good time to be out of the office actively seeking employment.

#### **4. January 2006 Removal List Identifies Griffin as Cummins's Replacement**

On January 9, 2006, after consulting with Goodling, Sampson sent an e-mail to Miers and Deputy White House Counsel William Kelley discussing “the remov[al] and replace[ment] of U.S. Attorneys whose four year terms have expired.” Sampson provided the names of nine U.S. Attorneys he recommended removing, along with potential replacement candidates for five of them. As one of the five replacements, Sampson recommended that Griffin replace Cummins in the Eastern District of Arkansas.

During the fall of 2005 and spring of 2006, while on Army Reserve duty, Griffin had stayed in contact with Jennings and others in the White House, and with Sampson at the Department. Sampson told congressional investigators that sometime in the spring of 2006 Miers asked him about the possibility of Griffin becoming U.S. Attorney in the Eastern District of Arkansas. Sampson said that since Cummins was on the list of U.S. Attorneys who might be removed, Sampson began to move the process forward. Sampson told us that he believes, however, that the White House would have deferred to the Department if it had indicated reluctance to remove Cummins.

We were unable to find any documentation reflecting Miers's inquiry to Sampson in the spring of 2006 about Griffin replacing Cummins. We found one e-mail dated April 10, 2006, in which Griffin informed Sampson that he was going to be sent to Iraq the following month and asked Sampson, “Is everything still on track?” Griffin forwarded his résumé to Sampson on April 26, 2006, and wrote, “Thank you for all your help. I greatly appreciate it.”

In an e-mail dated May 11, 2006, Sampson asked Deputy White House Counsel Kelley to call to discuss Griffin's nomination for U.S. Attorney in the Eastern District of Arkansas. In early June 2006, Griffin sent by e-mail his résumé and military biography to Associate White House Counsel Richard Klingler, who was assigned to work on U.S. Attorney and judicial nominations in the Eighth Circuit, which included Arkansas.

Griffin told us that while he was in Iraq he communicated with Jennings and Rove about becoming U.S. Attorney when he returned to the United States. According to Griffin, no one promised him he would be U.S. Attorney when he returned, although Rove assured him that the White House was at a minimum obliged to bring him back to the White House because he had been on military leave.

## 5. Griffin's Nomination Process

On June 13, 2006, an administrative assistant to Miers called EOUSA Acting Deputy Director Natalie Voris to request pre-nomination paperwork for Griffin for the position of U.S. Attorney in the Eastern District of Arkansas.<sup>84</sup> Voris told us that she thought there was a mistake because there was no vacancy in Arkansas at the time. According to Voris, the routine procedure was to forward the pre-nomination paperwork after candidates had been interviewed by the Department's selection panel, and after the White House Judicial Selection Committee had made its decision about who to recommend to the President. Voris said the June 13 request from the White House "raised a lot of red flags in [her] mind" because she had never heard anyone say that Cummins was leaving, and there had been no panel interviews for the Eastern District of Arkansas U.S. Attorney position. Voris said she talked to Goodling, who confirmed that the pre-nomination paperwork should be filled out for Griffin because Cummins was being asked to resign so Griffin could take his place.

As requested, Voris transmitted Griffin's pre-nomination paperwork to the White House on June 13, 2006. Later that evening, Goodling sent Sampson an e-mail informing him that the White House had received Griffin's pre-nomination paperwork. Goodling informed Sampson that she would direct EOUSA Director Battle to call Cummins the following day to tell him to resign.

E-mail records show that Goodling kept Sampson informed about the status of Cummins's resignation and Griffin's upcoming nomination. Sampson said that once the President had approved Griffin to be the nominee on June 21, 2006, all that was left for the Department to do was to "make it happen."

In her congressional testimony, Goodling said she advised McNulty in the early spring of 2006 that Griffin would be replacing Cummins at some point, and a June 13 e-mail to Sampson from Goodling states that she had advised the Office of the Deputy Attorney General that "this was likely coming several months ago." McNulty told us that he was aware sometime during the summer of 2006 that Cummins had been asked to move on to make a place for Griffin, but he said he did not know at the time how Griffin had come to the Department's attention.

Gonzales told us that he recalled that "the White House was interested in seeing if we could find a way to get Griffin in," and that Griffin was "well

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<sup>84</sup> Voris said that the pre-nomination paperwork consists of the candidate's résumé, a photograph, a White House data information sheet containing the personal data of the candidate, and a transmittal memorandum from the Attorney General to the White House Counsel recommending the candidate for possible presidential nomination.

qualified,” although Gonzales said he could not recall how he learned that information. Gonzales approved the pre-nomination paperwork forwarding Griffin’s name to the President on June 13, 2006.

Battle told us that Goodling instructed him to call Cummins, thank him for his service, and tell him that the Administration wanted to give someone else the opportunity to serve. Battle said that Goodling also asked him to determine how much time Cummins would need to move on and to report back to her his reaction. According to Battle, Goodling did not tell him who was going to replace Cummins. Battle said he was upset about having to make the call to Cummins, especially because he had visited Cummins’s district a few months earlier and had had a great visit. Battle said he had spent 2 days in the district meeting with Cummins’s management staff, and said he believed the office was performing at a high level. However, Battle did not raise any objections or discuss his concerns with any Department leaders. He made the call to Cummins, as instructed, on June 14, 2006.

Battle said that when he called Cummins, Cummins asked whether he had done something wrong. Battle responded that he had been asked to make the call but was not aware of anything and was not in a position to discuss the matter. Battle said he told Cummins something along the lines of “U.S. Attorneys serve at the pleasure of the President and sometimes the Administration wants to go in a different direction and give someone else the opportunity to serve.” Battle said that Cummins said he knew he was going to be asked to move on, and was aware that Griffin would likely replace him.

Cummins said Battle told him he would likely have 60 to 90 days to resign. Cummins told us that although he had had a few conversations with friends and colleagues about leaving, he had not done much to seek other employment. Cummins said that he “had no plan to leave without a plan, and I didn’t have a plan the day they called me.” Cummins said he assumed that Griffin or someone else had become impatient after Cummins had indicated to Griffin that he would resign but had not done so. Cummins said that after the call from Battle, he began looking for a job in the private sector.

**a. Allegation that the Department Intended to Bypass the Senate Confirmation Process**

One of the allegations concerning Griffin’s appointment to replace Cummins was that the Administration intended to bypass the traditional Senate confirmation process by installing Griffin as Interim U.S. Attorney pursuant to 28 U.S.C. § 546. As described previously in this report, prior to its amendment in March 2006 the statute allowed an Interim U.S. Attorney appointed by the Attorney General to temporarily serve for 120 days, after which the federal district court could appoint an Interim U.S. Attorney to serve until a new U.S. Attorney was confirmed by the Senate. The amendment

provided that the Attorney General could appoint an Interim U.S. Attorney to serve indefinitely, or until the Senate confirmed a new U.S. Attorney. In the next section, we discuss the facts leading to Attorney General Gonzales's December 2006 decision to appoint Griffin to be the Interim U.S. Attorney.

### **b. The Pre-Nomination Process**

On June 20, 2006, Goodling informed Sampson that Battle had instructed Cummins to resign. On June 21, the White House's Judicial Selection Committee voted in favor of Griffin's nomination, and the President signed the intent to nominate Griffin for the upcoming vacancy.

According to e-mails exchanged between Goodling and Griffin in late June and early July 2006, Goodling notified Griffin that the Department would begin his background investigation during the week of June 28. However, on July 5, 2006, Goodling informed Griffin that the investigation had been delayed because the White House had neglected to contact the Arkansas Senators to inform them of the intent to nominate Griffin, which was the standard procedure.<sup>85</sup> Griffin responded that "both chiefs of staff [to the Senators] are my very good friends . . . it could potentially be a mistake if they were not the first people in each office to hear my name and learn of movement on my front." Goodling replied that she had discussed the matter with Associate White House Counsel Klingler, who told Goodling that he would make the calls and would reach out to Griffin if they needed his assistance.

According to both Griffin and Cummins, in early July Klingler called Arkansas Congressman Boozman, the Republican leader of Arkansas's congressional delegation, and told him that the White House had decided to remove Cummins as U.S. Attorney and replace him with Griffin. According to Cummins, when Boozman's staff informed the Democratic Senators' staffs, the news apparently was not well received.

Cummins said that Bob Russell, Senator Pryor's Chief of Staff, called him to confirm what they had heard from Boozman's staff – that Griffin was going to replace Cummins as U.S. Attorney. Cummins said he explained to Russell that he had been thinking about leaving, and he told Russell he did not believe it was in his best interest for Senator Pryor to raise concerns about his removal. Cummins said he was not embarrassed that he was being removed

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<sup>85</sup> Goodling's e-mail informed Griffin that the standard procedure was for the White House to wait to ask the Department of Justice to send the pre-nomination paperwork until after the home-state Senators had been consulted, and she acknowledged that the White House had called the Department "a little too soon." According to Sampson, the normal procedure for nominating U.S. Attorneys was to have a vacancy and then to solicit candidate's names from the home-state Senators or from the lead congressional delegation member in the President's party.

because he did not have any questions about his performance as U.S. Attorney. However, he thought it would be enormously embarrassing to the Department to have to explain that the White House wanted to remove him merely to let Griffin serve as the U.S. Attorney.

In early August 2006, while Griffin was still in Iraq, the White House arranged for him to speak to Senator Pryor about his proposed nomination. According to Griffin, the telephone call did not go well. Griffin said that both Pryor and his Chief of Staff told Griffin they had concerns about his qualifications to be U.S. Attorney.

Griffin said that although he was filling out the paperwork in preparation for the nomination process at that time, he was discouraged by the conversation with Senator Pryor and thought that if worse came to worst the President might give him a recess appointment as U.S. Attorney.<sup>86</sup> In mid-August, Griffin returned to the United States.

**c. Indefinite Interim Appointment Proposed for Griffin**

Griffin told us that in August 2006, sometime after he had spoken to Senator Pryor, he learned that an appointment under the Patriot Act amendment would allow him to serve as Interim U.S. Attorney indefinitely. Griffin said he had the sense that was a definite possibility in the face of Pryor's opposition, although he said he did not want to have to use that avenue.

In August 2006, Sampson, Goodling, and Jennings discussed how to proceed with Griffin's nomination in view of Senator Pryor's opposition. Another concern was that Griffin was still considered a White House employee when he returned from Iraq, although Griffin said the White House had no position open for him at the time.

In an e-mail to Sampson on August 18, Goodling proposed that the Department hire Griffin as a political appointee and then detail him to the Eastern District of Arkansas as Interim U.S. Attorney. Goodling said that because Cummins had not yet resigned, however, she would give him a target date for his resignation, "particularly if we go this route since it's a lot faster than the nom/conf route, obviously." In the August 18 e-mail exchange, Sampson and Goodling discussed whether to appoint Griffin to the Criminal Division or the Deputy Attorney General's Office, and Sampson wrote that he

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<sup>86</sup> Griffin said that at this point he was not aware of the March 2006 change in the law which permitted the Attorney General to appoint an Interim U.S. Attorney for an indefinite period of time.

did not “think it should really matter where we park him here, as AG will appoint him forthwith to be [U.S. Attorney].”

Scott Jennings told us that he learned from the White House Office of Legislative Affairs that the Arkansas Senators had reservations about Griffin, which Jennings characterized as “political concerns.” Jennings said that the problem with the Senators did not change his thinking about having Griffin go through the Senate confirmation process; rather, he said he was wondering what extra measures would have to be taken to make sure that Griffin’s nomination was ultimately successful. Sampson and Jennings both told us that the intent at this time was to have Griffin go through the confirmation process, but first be appointed Interim U.S. Attorney and, as Jennings put it, “show the Democratic senators [in Arkansas] he’s up for the job.” Jennings said they reasoned that if they could get Griffin into the office he could bolster his credentials and that would demonstrate to the Senators that he was capable and should therefore be confirmed.

Cummins said that by August 2006 he knew that Griffin would not be back in Arkansas until the end of September. Cummins said he told Griffin that if Griffin abruptly arrived as Interim U.S. Attorney just after Cummins resigned without having another job, it would be obvious that the White House had forced Cummins out, which could pose difficulties for Griffin. Cummins said he proposed to Griffin that a cleaner transition would be for Griffin to return to the Eastern District of Arkansas as a Special Assistant U.S. Attorney while Cummins finalized his plans to return to the private sector. On August 24, 2006, Griffin contacted Jennings about Cummins’s proposal, and Jennings e-mailed Sampson asking for his opinion about the proposal. Sampson replied, “I think it’s a great idea and endorse it wholeheartedly.”

On August 24, 2006, the Arkansas Times printed an editorial stating that Cummins would likely be stepping down in the near future. The editorial speculated that Griffin would be Cummins’s successor.<sup>87</sup> The editorial also implied Griffin may have participated in voter caging in past elections, noting:<sup>88</sup>

He’d likely have to endure some questioning about his role in massive Republican projects in Florida and elsewhere by which

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<sup>87</sup> Cummins said he had initiated a conversation about his upcoming resignation with a reporter for the Arkansas Times, in part because he did not want his resignation to appear to be shocking and in part because he was trying to get the word out that he was available for employment in the private sector. However, Cummins said that he was not the source of the remainder of the information in the editorial.

<sup>88</sup> Voter caging refers to the practice of sending mail to addresses on the voter rolls, compiling a list of the mail that is returned undelivered, and using that list to purge or challenge voters’ registrations on the grounds that the voters on the list do not legally reside at their registered addresses.

Republicans challenged tens of thousands of absentee votes. Coincidentally, many of those challenged votes were concentrated in black precincts.

Goodling forwarded the article to Sampson and Jennings. We found no indication that the article raised concerns about Griffin at the Department or at the White House.

By the end of August, the Department stopped preparing the paperwork for Griffin to go through the formal presidential nomination and Senate confirmation process. In an e-mail dated August 30, 2006, Griffin informed an EOUSA staff member that he had spoken with Jennings and “[H]e doesn’t see any reason to proceed with the senate paperwork since the appointment will occur the other way.” Jennings told us that while he did not recall discussing the issue with Griffin, by August 30 the White House was aware it would not be nominating Griffin at that time. Jennings said that instead Griffin would be given a political appointment in the Department so that he could then be detailed to Little Rock “to wait out Bud Cummins.”

In an e-mail dated September 13, 2006, Miers asked Sampson for the “current thinking on holdover U.S. Attorneys . . . .” Later that day, Sampson provided Miers with another removal list that included districts where the U.S. Attorney position was vacant, soon to be vacant, and rumored soon to be vacant. In his e-mail to Miers, Sampson described Cummins as a “USA in the Process of Being Pushed Out,” and he described eight other U.S. Attorneys as “USAs We Now Should Consider Pushing Out.” Sampson noted, “I strongly recommend that, as a matter of Administration policy, we utilize the new statutory provisions that authorize the AG to make USA appointments.” Sampson wrote that by bypassing the Senate confirmation process, “we can give far less deference to home-state Senators and thereby get (1) our preferred person appointed and (2) do it far faster and more efficiently, at less political cost to the White House.”

Sampson told congressional investigators that his recommendation to use the Attorney General’s appointment authority in this manner never got any “traction” for any district other than the Eastern District of Arkansas. Sampson said he did not recall discussing the recommendation with Attorney General Gonzales at the time.

Gonzales told us that he had no specific recollection of discussing with Sampson at this time the idea of using his interim appointment authority to bypass Senate confirmation, and Gonzales said he would not have supported it.

**d. Griffin Returns to Arkansas as a Special Assistant U.S. Attorney**

Griffin's military leave ended on September 26, 2006, and he returned to the White House for 1 day. On September 28, 2006, he was appointed to a political position as a Counselor to the Criminal Division Assistant Attorney General and was immediately detailed to the U.S. Attorney's Office in Little Rock as a Special Assistant U.S. Attorney.

Griffin told us that because he considered Cummins to be a friend, he did not want to push him out without having another job. Griffin said that when Cummins still did not have another job by October 2006, Griffin asked Cummins to stay until after the election in November 2006, because Griffin was concerned that if Cummins left before the election Griffin would be the subject of political attacks.

Cummins said that he had made up his mind to leave sometime in November, but Griffin asked him to stay until Griffin returned in mid-December from a long-planned vacation.

In mid-October 2006, Sampson forwarded to Elston, the Deputy Attorney General's Chief of Staff, the e-mail Sampson had sent to Miers on September 13 listing the status of certain U.S. Attorneys recommended for replacement and noting that Cummins was "in the process of being pushed out." In an e-mail dated October 17, 2006, Elston responded that he agreed with Sampson's recommendations. Elston told us that he did not question Cummins's inclusion on the list because he understood that Cummins had indicated he was going to resign and the Administration had chosen Griffin to take his place.

**C. Attorney General Gonzales Appoints Griffin Interim U.S. Attorney**

In an e-mail on December 1, 2006, Griffin notified Goodling that Cummins intended to resign on December 20, 2006.

On December 8, a panel composed of Battle, Margolis, and Goodling interviewed Griffin for the position of Interim U.S. Attorney. Later that day, Goodling sent an e-mail to Griffin informing him that the Attorney General intended to appoint him Interim U.S. Attorney, and she asked Griffin to "keep this information close hold . . . until we notify the Chief Judge and the Senators of the Attorney General's action." Griffin said that after his interview with the panel, Goodling informed him that he would be appointed pursuant to the Patriot Act amendment, which would allow him to serve indefinitely.

On December 13 and 15, 2006, Attorney General Gonzales and Senator Pryor discussed Gonzales's intention to appoint Griffin Interim U.S. Attorney.

According to Sampson, Pryor had contacted the Attorney General on December 13 after he learned that Cummins planned to resign on December 20.

Gonzales told us that during their conversation on December 15, he informed Senator Pryor that he was going to appoint Griffin to be Interim U.S. Attorney to replace Cummins, and he sought to determine whether Pryor would eventually support Griffin's nomination. Gonzales said he conveyed his hope that Senator Pryor would do so, and asked Pryor to meet with Griffin. Gonzales said that when he informed Senator Pryor that Griffin was going to serve as Interim U.S. Attorney, he also told Pryor that he wanted to see how Griffin would perform and that Griffin's interim appointment would also give Pryor the opportunity to see how Griffin would do. According to Gonzales, Pryor agreed to meet with Griffin sometime after the upcoming holidays.<sup>89</sup>

#### **D. Public Concerns About Griffin's Appointment**

On December 16, 2006, Griffin forwarded to Goodling an article that appeared on the front page of the Arkansas Democrat Gazette stating that Senator Pryor was "irked" by the "surprise notice that ex-Rove aide [was] named U.S. Attorney." Goodling responded that the important thing was that Pryor's position concerning Griffin was somewhat open and Griffin had a real opportunity as Interim U.S. Attorney to win Pryor's support. On December 18, Goodling forwarded the article to Oprison at the White House.

In an e-mail on December 19, Sampson directed the Department's Office of Public Affairs to use talking points he wrote in responding to press inquiries about the circumstances of Griffin's interim appointment. The talking points stated that when a U.S. Attorney vacancy arises, someone needs to be appointed even if on an interim basis to fill the vacancy, that Griffin was appointed as the Interim U.S. Attorney because of the timing of Cummins's resignation, and that the Department "hoped that there would be a U.S. Attorney who had been nominated and confirmed in every district."

Oprison e-mailed Sampson on December 19 that he believed the term "Interim U.S. Attorney" was problematic because the Arkansas Senators could use Griffin's interim status to press for their own nominee rather than supporting Griffin's nomination. Oprison also expressed concern that the

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<sup>89</sup> Sampson also spoke with Arkansas Senator Blanche Lincoln's Chief of Staff about Griffin. In an e-mail dated December 15, 2006, to Goodling and Associate White House Counsel Chris Oprison, Sampson wrote:

"Chris, I think the White House (you) needs to continue the dialogue with the Senators re our desire to have the President nominate, and the Senate confirm, Griffin. They think they smell a rat, i.e., that we are doing an end around of their advice and consent authority by exercising the new, unlimited AG appointment authority."

Arkansas Senators were “taking steps to back [the Department and the White House] into a corner” by refusing to commit to considering Griffin’s nomination.

Sampson responded to Oprison in an e-mail on the same day, “I think we should gum this to death . . . .” Sampson suggested that because Griffin’s interim appointment was technically of unlimited duration, the Department could ask the Senators to give Griffin a chance and if they still opposed Griffin after a period of time, the Department could “run out the clock” while appearing to be acting in “good faith” by asking the Senators for recommendations, interviewing other candidates, and pledging to desire a Senate-confirmed U.S. Attorney. Sampson wrote, “our guy is in there so the status quo is good for us.” Sampson also noted that there was a risk that Congress would repeal the Attorney General’s appointment authority for Interim U.S. Attorneys. Finally, Sampson wrote, “I’m not 100 percent sure that Tim was the guy on which to test drive this authority, but know that getting him appointed was important to Harriet, Karl, etc.”

Sampson, who later testified that using the interim appointment authority to bypass Senate confirmation was a “bad idea at the staff level,” told us that the idea of using this new authority was confined to Griffin and not any other U.S. Attorney positions. He admitted that he had advocated for more widespread use of the authority in September 2006, but said he did not really believe it was practical and Attorney General Gonzales never seriously considered it. Sampson told us that he was not sure that the Attorney General would have genuinely considered using the authority even in Griffin’s case. Sampson said that at the time the Department was experiencing some pressure from White House Political Affairs Director Taylor and others at the White House to use the appointment authority for Griffin in the face of Senator Pryor’s reluctance to commit to supporting his nomination. Sampson stated that he believed Attorney General Gonzales was far too cautious and careful and would not support the idea of bypassing Senate confirmation. Sampson said that at the time he believed that Gonzales was hopeful that he could persuade Senator Pryor to support Griffin’s nomination.

Sampson said that by late December 2006 or early January 2007, Gonzales had specifically rejected the idea of using the interim appointment authority to install Griffin indefinitely as U.S. Attorney, although Sampson said he could not remember exactly when he and Gonzales discussed the issue.

Gonzales told us that he could not recall a specific discussion with Sampson about use of the interim authority to bypass the Senate confirmation process. However, Gonzales said he recalled that Sampson raised the possibility of using the authority to appoint Griffin and Gonzales opposed it, thinking it was “a dumb idea.”

Oprison told us that he did not think Sampson was speaking for the Department when he sent the December 19 e-mail suggesting that “we should gum this death.” Oprison said he did not think there was a plan to avoid sending Griffin’s nomination to the Senate for confirmation, although he described it as a very fluid situation. Oprison said he recalled discussions at the White House about whether they should seek other candidates or stick with Griffin, but the ultimate decision was to stick with Griffin.

However, several individuals, including Cummins, told us that Griffin stated openly and repeatedly that he would be in the office for 2 years, with or without Senator Pryor’s approval, pursuant to the Attorney General’s interim appointment authority. Balfe, the U.S. Attorney for the Western District of Arkansas, told us that when he asked Griffin how he could stay on as U.S. Attorney without Pryor’s approval of his nomination, Griffin said he was promised he would be U.S. Attorney for 2 years, whether Pryor approved or not. Balfe said he could not recall whether Griffin told him about the Patriot Act provision at that time or if he already knew about it from press accounts, but he said he understood that Griffin meant he would be in office for more than 120 days. U.S. Attorney Jane Duke, who was the First Assistant U.S. Attorney in the Eastern District of Arkansas at the time, told us that when Senator Pryor began to question Griffin’s credentials, Griffin told her that Pryor did not have to approve his nomination because Griffin was going to be placed in office under a little-known provision in the Patriot Act and his appointment would not expire. Griffin acknowledged to us that he discussed his potentially indefinite appointment openly and he “probably” said that he would be U.S. Attorney for 2 years with or without Pryor’s support.

Cummins also told us that around this time he ran into Bob Russell, Senator Pryor’s Chief of Staff, who asked Cummins if it was true that the Department intended to keep Griffin in office without Pryor’s approval. Cummins said he did not confirm Russell’s speculation, but he did not deny it either because he did not want to lie.

On December 20, 2006, Cummins officially resigned as U.S. Attorney and Griffin was sworn in as the Interim U.S. Attorney.

On January 9, 2007, Griffin, accompanied by Nancy Scott-Finan of the Department’s Office of Legislative Affairs, met separately with Arkansas Senators Pryor and Lincoln. Scott-Finan told us that both Senators were upset that Griffin had been appointed Interim U.S. Attorney in anticipation that he would be nominated for the permanent position without any prior consultation with them.

Scott-Finan said that Senator Pryor also asked Griffin about allegations that he had participated in voter caging. Scott-Finan said Griffin “explained [it] away” by putting it in the context of a “direct mail marketing” process, and he

characterized what the Republican National Committee had done as checking for bad addresses rather than challenging voters. In response to Senator Pryor's statement that by checking for bad addresses Griffin was laying the groundwork for challenging voters, Griffin told Pryor that in the end votes were not challenged. In addition, Griffin said that any decisions to challenge votes were made above his level. Scott-Finan said that she had the sense that Senator Pryor was not open to considering Griffin's nomination.

Cummins told us that by January 2007 he had begun to be concerned that the story he told publicly – that he had been planning to leave but had agreed to help Griffin transition into the role of U.S. Attorney – was being questioned in light of the numerous articles that were published concerning the U.S. Attorney removals in general and articles about Griffin's appointment in particular. Cummins, who characterized his previous responses to such questions as "evasive", said he did not want to lie if he was asked directly whether he was fired.

On January 13, the Arkansas Democrat Gazette ran a story quoting Cummins as saying that the Director of EOUSA had asked him to step down and had assured Cummins that his removal was not because of his job performance, but rather because the Administration wanted to give someone else the opportunity to be the U.S. Attorney.

On January 17, Gonzales spoke again with Senator Pryor about whether Pryor would support Griffin's nomination and confirmation. According to Gonzales, Pryor expressed his concern that the Attorney General was using his appointment authority to avoid the Senate confirmation process. Gonzales said he pointed out to Pryor that he could have appointed Griffin for 120 days under the old law governing the Attorney General's appointment authority. Gonzales said he told Pryor that if Pryor decided he could not support Griffin, then the Administration would solicit other candidates.

#### **E. The Attorney General's and the Deputy Attorney General's Testimony**

On January 18, the day after Gonzales spoke to Senator Pryor, the Attorney General testified before the Senate Judiciary Committee that the Department had asked certain U.S. Attorneys to resign after evaluating their performance, and these changes were made pursuant to his responsibility to ensure that the Department had "the best possible person" in each district. Gonzales also testified that the Administration was fully committed to having a Presidentially appointed, Senate-confirmed U.S. Attorney in each district.

Cummins told us that he grew concerned when he learned about the Attorney General's testimony because it implied that the dismissals were undertaken in order to improve the management in each office, and he said he

“knew damn well that wasn’t why they were changing out the U.S. Attorney in Little Rock.” Cummins said that since he had now admitted publicly he had been asked to leave, he believed the Attorney General’s testimony lumping him together with the other U.S. Attorneys who had been asked to resign put Cummins in an embarrassing position. Cummins therefore called McNulty to express his concerns, and Elston, McNulty’s Chief of Staff, returned Cummins’s call.

This began a series of telephone calls and e-mail exchanges between Cummins and Elston. Cummins said he expressed concern to Elston about the accuracy of the Department’s public statements and the unfairness of the Attorney General’s Senate testimony regarding the need to improve management in each district, which did not apply to Cummins. Cummins said he told Elston he was also concerned about the Attorney General’s statement that the Department was going to nominate and confirm a U.S. Attorney in every district because Griffin had indicated to Cummins more than once that he would stay on as Interim U.S. Attorney with or without Senator Pryor’s support. Cummins said that Elston indicated to him that there were serious performance-related reasons for the removal of the other U.S. Attorneys, although they did not discuss specific U.S. Attorneys. Cummins also said that Elston told him that Griffin would have to go through the nomination process or resign because the Department would not agree to let him serve indefinitely as Interim U.S. Attorney.

Elston told us that because he had no reason to believe that performance was an issue with Cummins, he was sympathetic to Cummins’s concerns about being categorized as having been removed to improve management in his district.<sup>90</sup> McNulty told us he was also sympathetic to Cummins because his sense of the situation was not that Cummins was underperforming, but that the Administration wanted to give Griffin the opportunity to serve as U.S. Attorney.

McNulty said that he discussed Cummins with Sampson and others during the preparation sessions for his upcoming congressional testimony, and no one told McNulty there were performance concerns with Cummins. Therefore, on February 6 when McNulty testified before the Senate Judiciary Committee, he publicly stated that Cummins was in a separate category from the other U.S. Attorneys because he was asked to step aside not for performance reasons but to make way for Griffin.<sup>91</sup>

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<sup>90</sup> Elston also said that when he learned about the Department’s effort to identify weak U.S. Attorneys and ask them to move on, he distinguished Cummins from the others because Elston understood that Cummins had said he was planning to leave but had not yet left.

<sup>91</sup> In addition, McNulty later told congressional investigators that Sampson did not tell him during the preparation for his Senate testimony that Cummins was put on the list or (Cont’d.)

## **F. The Department's Written Response to Congressional Concerns About Griffin's Appointment**

In light of McNulty's testimony regarding Cummins and Griffin, on February 8 Senators Harry Reid, Charles Schumer, Richard Durbin, and Patty Murray wrote to Attorney General Gonzales to express concern about the circumstances of Cummins's removal and Griffin's appointment. The Senators requested information concerning issues such as the timing of the decision to appoint Griffin to replace Cummins and the role Karl Rove played in the decision to appoint Griffin.

The Department responded to the Senators' letter on February 23, 2007. Sampson drafted the response, which was signed by Richard Hertling, the Acting Assistant Attorney General for the Office of Legislative Affairs. Sampson circulated the draft response to Goodling, McNulty, Elston, Moschella, Hertling, and Scolinos. The letter was reviewed and edited by Associate White House Counsel Oprison and returned to Sampson, who had the final sign-off on the language.

The Department's response made three affirmative statements: (1) "It was well known as early as December 2004, that Mr. Cummins intended to leave"; (2) "the decision to have Mr. Griffin replace Mr. Cummins was first contemplated in the spring or summer of 2006 [and] the final decision to appoint Mr. Griffin . . . was made on or about December 15"; and (3) "The Department is not aware of Karl Rove playing any role in the decision to appoint Mr. Griffin."

All three of these statements were misleading. On March 28, 2007, the Department informed Senators Leahy and Schumer that its review of documents collected in response to congressional requests revealed that the representations made in the Department's February 23 response were inaccurate. The Department did not specify the inaccuracies in Hertling's letter, but simply noted that the documents the Department had produced contradicted certain statements in the February 23 letter.

With respect to the first misleading statement - that the Department knew in December 2004 that Cummins intended to leave - Cummins had not announced in December 2004 that he intended to leave. The only indication

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removed for any performance-related reasons. Further, Elston told us that Sampson was "in the room" during McNulty's preparation session when the group discussed what McNulty would say, and no one said there were performance issues related to Cummins's removal. In an e-mail after McNulty's testimony, which contained Sampson's proposed draft response to congressional concerns about Cummins's removal, Sampson endorsed McNulty's testimony that Cummins's removal was not connected to his performance "but more related to the opportunity to provide a fresh start with a new person in that position."

we found relating to Cummins's intent to leave his position at some point in the future was his statement in the small news item in the December 30, 2004, edition of the Arkansas Times, a free weekly Arkansas paper. As previously mentioned, the article stated that with four children to put through college, Cummins said he would likely begin exploring other career options, and that "it wouldn't be 'shocking' . . . for there to be a change in his office before the end of Bush's second term."

We asked Cummins whether it was true that in December 2004 he had made it known that he planned to leave office. He told us that he had only discussed the issue in general terms, as indicated in the article in the Arkansas Times. Cummins said he did not recall discussing his leaving office with anyone at the Department at the time, and he characterized as "ludicrous" the idea that senior managers at the Department made personnel decisions based on an article about Arkansas politics appearing in a free weekly tabloid.<sup>92</sup>

The second misleading statement in the letter – that Griffin's appointment was first contemplated in the spring of 2006 – is directly contradicted by the January 9, 2006, e-mail Sampson sent to Miers, discussed above, in which Griffin is listed as a replacement for Cummins. The statement that the final decision to appoint Griffin was made around December 15, 2006, following Gonzales's discussion with Senator Pryor, is also misleading. As noted previously in this chapter, Sampson informed Goodling on August 18, 2006, that the Attorney General would appoint Griffin U.S. Attorney "forthwith."

The third misleading statement in the Department's letter was the statement that the Department was not aware of Karl Rove being involved in the decision to appoint Griffin. However, in a December 19 e-mail to Oprison at the White House, Sampson stated that he knew Griffin's appointment "was important to Harriet [and] Karl."

Oprison, who reviewed and edited the Department's draft response to the Senators, told us that when he reviewed the draft he did not remember Sampson's December 19 e-mail. In an e-mail to Sampson on February 23, 2007, Oprison attached the letter with "slight revisions," along with the message that "Fred [Fielding], as I, want to ensure that it is absolutely consistent with the facts and that it does not add to the controversy surrounding this issue." Oprison told us that he had not been employed at the White House when the issue of Griffin's appointment first arose. He also stated

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<sup>92</sup> We found evidence that Deputy White House Liaison Angela Williamson forwarded the 2004 Arkansas Times article to Goodling on February 5, 2007. Sampson forwarded the article to Kelley at the White House on February 21, 2007, with the notation: "Addendum to the Cummins tick tock." However, we found no evidence that anyone at the Department was aware of the article prior to February 5, 2007.

that it was likely he was asked to review the response because Deputy White House Counsel Kelley was not in the office and there was a short turn around time for the response. Oprison stated that because the response was from the Department, he did not feel it was his role to “exercise due diligence” to confirm the factual assertions contained in the letter, even though the letter contained representations concerning White House personnel.

Sampson testified to the Senate Judiciary Committee that he “widely circulated” the draft response to the letter and that no one disagreed with the statement claiming no knowledge that Rove played any role in Griffin’s appointment. Sampson also said that at the time he drafted the response, he was unaware of whether Rove actually was interested in Griffin’s appointment. When Sampson was asked about the contradiction between this response and his December 19 e-mail in which he asserted that he knew that Griffin’s appointment was “important to Harriet and Karl,” Sampson said the December 19 e-mail was based on an assumption on his part. Sampson said he knew firsthand that Griffin’s appointment was important to Sara Taylor and Scott Jennings at the White House, and he assumed that since they reported to Rove, Griffin’s appointment was also important to Rove. Sampson said that when he was drafting the February 23 response, he thought to himself that he did not know whether Rove was actually interested in Griffin’s appointment. Sampson also said he did not recall ever discussing the matter with Rove.

Moreover, Sampson told us that he believed the other statements in the letter were accurate. With respect to the statements that Griffin’s appointment was first contemplated in the spring of 2006 and the final decision to appoint him was made on December 15, Sampson testified that when he drafted the response he was focused on when the Attorney General independently decided to appoint Griffin, which Sampson stated was after Gonzales had discussed the matter with Senator Pryor in mid-December 2006. Sampson said the response he drafted reflected this timing, and said he circulated it to make sure others thought it was accurate.

We also determined that in the initial draft of the Department’s February 23 response, Sampson proposed to Goodling, McNulty, Elston, Moschella, Hertling, and Scolinos that the letter state up front that “in the spring of 2006, White House Counsel Miers asked the Department if Mr. Griffin could be considered for appointment as U.S. Attorney upon his return from Iraq.” Sampson told us that the wording was changed in the final version of the letter to delete any mention of Miers and to make the White House’s role in Griffin’s appointment seem more passive. When we asked Sampson why that change was made, he said he had the general sense after the back-and-forth with the White House concerning the letter that Miers’s name was deleted so as not to “feed red meat up to these guys.”

During our interview, Sampson described the incoming letter as “pretty accusatory,” and he said he tried to draft a response that was accurate, responsive, and agreeable to the White House. Sampson said he believed the Department’s response was accurate, although he did not personally check the factual assertions in the letter.

Richard Hertling, who became Acting Assistant Attorney General for the Office of Legislative Affairs on January 9, 2007, after serving 4 years in the Department’s Office of Legal Policy, told us that the responses were too “cute.” Hertling acknowledged that the Department’s response misstated the timing of the decision to appoint Griffin and whether Rove was involved in Griffin’s appointment. Hertling said that at the time he signed the response he was unaware that the facts as stated in the letter were not accurate. Hertling said he did not even become aware that the U.S. Attorneys had been removed until sometime in mid-January 2007, after he became Acting Assistant Attorney General. Hertling said that Sampson prepared the response to the specific questions about Griffin.<sup>93</sup> Hertling said he assumed that the response was truthful, accurate, and complete, and said he had no basis to question the representations contained in the letter.

With respect to the statement that Rove did not play a role in the decision to appoint Griffin, Hertling told us that he had a vague recollection of asking Sampson whether Rove was involved in Griffin’s nomination. According to Hertling, Sampson responded that he did not talk to Rove about Griffin and he did not think Gonzales did either. Hertling said he did not press the issue because the way the statement was worded seemed accurate.

#### **G. Griffin Withdraws**

On February 15, 2007, Attorney General Gonzales and Senator Pryor again discussed whether Pryor would support Griffin’s nomination as U.S. Attorney. Gonzales told us that during their conversation Pryor indicated he would not support Griffin’s nomination. Gonzales said he then told Pryor that he would confer with the Arkansas congressional delegation for names of other individuals to consider for the U.S. Attorney position, as he had previously agreed to do.

Griffin told us that Goodling called him immediately after Gonzales’s conversation with Pryor to tell him about the discussion. Later that evening, Griffin announced that he was withdrawing his name from consideration for the permanent U.S. Attorney position.

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<sup>93</sup> Sampson prepared the initial draft response and asked Goodling to verify the specific dates concerning Griffin’s appointment.

During our interview, Gonzales said he was reluctant to discuss with us conversations he had with the White House concerning his commitment to Senator Pryor to find other candidates. Gonzales said, however, that the White House was “unhappy that I had honored my commitment” to Pryor.

Griffin told us that Rove informed him that individuals in the White House were unhappy with Gonzales when they learned that he told Pryor that he would not recommend Griffin’s nomination to the White House because Pryor would not support Griffin.

Shortly after Griffin withdrew his name from consideration, Gonzales told Griffin that the process of identifying alternate candidates, vetting them, and preparing a nomination would take several months and that Gonzales was happy to have Griffin serve as Interim U.S. Attorney while the process moved forward. Griffin did so for several months and resigned on June 1, 2007.

#### **H. Taylor’s Comment Concerning Cummins**

On February 16, 2007, after Griffin had announced he was withdrawing his name from the nomination process, White House Political Affairs Director Sara Taylor sent Sampson an e-mail expressing anger at the manner in which the Department had “forced” Griffin to withdraw. Taylor also stated in the e-mail that, “McNulty refuses to say Bud is lazy – which is why we got rid of him in the first place.”

When we asked Taylor why she had the impression Cummins was “lazy,” she said she did not personally know Cummins and she did not recall specifically where she first heard that Cummins was lazy.<sup>94</sup> Taylor told us that she had the general impression that lawyers in Arkansas did not think highly of Cummins, but also said she did not recall how she received that impression. Taylor said it was possible that she received a negative impression of Cummins from Griffin, but she said she did not believe that he was her only source. She stated that because Griffin was on her staff, she talked to “tons of Arkansans” who visited the White House whenever they were in Washington. Taylor said she likely gained her impression of Cummins through a combination of information from Griffin and from other Arkansas attorneys.

Griffin told us he did not remember ever telling Taylor that Cummins was lazy. Griffin said he did not personally believe Cummins was lazy. However, he said that he had heard similar comments about Cummins from other people and was sure he had passed on the comments. Griffin admitted that in 2005 and 2006 he might have made negative comments about Cummins to

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<sup>94</sup> In her Senate testimony, Taylor stated that she wanted to apologize to Cummins for her “unkind and unnecessary comment.”

Sampson, Taylor, and others along the lines of complaining about Cummins's failure to get another job.

We asked former White House Deputy Director of Political Affairs Jennings whether he was aware of any criticism concerning Cummins's performance as U.S. Attorney. Jennings told us that he had heard both Griffin and Taylor criticize Cummins. Jennings said "the knock on [Cummins] specifically from Mr. Griffin was that [Cummins] was generally regarded as being lazy, and it was a widely known thing in legal circles in Little Rock." Jennings said that Griffin and Taylor also criticized Cummins for not being in the office while he was looking for another job. Jennings acknowledged that Taylor's awareness about events in Arkansas most likely came from Griffin.

### **III. Analysis**

#### **A. Cummins's Removal**

Similar to our investigation into the reasons for Graves's removal, our investigation of Cummins's removal was hindered by the refusal of several former White House employees to cooperate with our investigation. In particular, Rove, Miers, Kelley, and Klingler had important and relevant information for our investigation, but they refused to cooperate with our investigation and be interviewed by us. However, we believe we were able to ascertain the reasons for Cummins's removal.

Sampson included Cummins as one of many "weak U.S. Attorneys" on his first removal list in March 2005. When we interviewed Sampson, he said that he could not recall specifically why he identified Cummins for potential removal on this list. Sampson said he felt that Cummins was mediocre and an underperformer, although he also said he could not recall learning anything specific about Cummins's performance between 2001 and 2005 that would have supported this belief. Sampson acknowledged that his view of Cummins was colored by information he gained from Cummins's nomination process, not from Cummins's performance as U.S. Attorney. While Sampson told us that he thought other Department managers also viewed Cummins's performance as mediocre, none of the Department managers we interviewed confirmed this or said they had provided such an assessment to Sampson.

In fact, several of the Department's senior managers, including Deputy Attorneys General Comey and McNulty, Associate Deputy Attorney General Margolis, and EOUSA Director Buchanan, told us they did not hear anything negative about Cummins's performance. Michael Battle, the Director of EOUSA at the time of Cummins's removal, had an extremely positive view of Cummins's service as U.S. Attorney. Battle said that he was not aware of any problems or dissatisfaction within the Department concerning Cummins's performance, and Battle added that he considered Cummins to be one of the

top five U.S. Attorneys in the country. In addition, the two EARS evaluations of Cummins's office over a 4-year period were positive about his management of the office and his adherence to the Department's priorities.

We also found no factual underpinning for certain derogatory public comments that surfaced about Cummins after the Department removed him. For example, the Department produced to Congress e-mail records between Sampson and White House Political Affairs Director Taylor. In one e-mail, Taylor commented angrily that Cummins was "lazy – which is why we got rid of him in the first place." Taylor subsequently apologized for this comment, and we found no support for this comment during our investigation.

The evidence shows that once Sampson provided to the White House his initial list of U.S. Attorneys recommended for removal, White House officials pushed for Griffin to replace Cummins. In mid-March 2005 Karl Rove suggested to White House Counsel Harriet Miers that Griffin could be considered for Cummins's U.S. Attorney position, and Miers discussed with Griffin his desire to become a U.S. Attorney. Over the next year, throughout Griffin's tenure both at the White House and during his military service, Griffin continued to discuss his desire to be U.S. Attorney in Arkansas with Rove and Miers.

In Sampson's January 2006 list of U.S. Attorneys, he recommended that the White House remove Cummins and listed Griffin as a potential replacement for Cummins. After the removals, Sampson claimed that by January 2006 Cummins had indicated that he intended to resign and that this was the reason Griffin was chosen to replace him. In fact, Cummins had not stated at that time when he intended to resign. Rather, Cummins had only indicated to a small Arkansas newspaper that it would not be shocking for him to leave before the end of President Bush's second term.

Nevertheless, in June 2006, before Cummins had made any plans to resign, the White House began Griffin's pre-nomination process. On June 14, EOUSA Director Battle was instructed to ask Cummins for his resignation and inform him that the Administration wanted to give someone else the opportunity to serve. While Battle was surprised and upset at the directive, he did not question it and made the call as instructed.

In sum, while Sampson said he thought Cummins was "mediocre," primarily based on his interview of Cummins before he became the U.S. Attorney, neither Sampson nor anyone else in the Department evaluated Cummins's performance before Cummins was placed on the initial removal list. After that, the White House began pressing for Griffin to be placed in Cummins's position, and in June 2006 Cummins was instructed to resign to provide a place for Griffin.

## **B. Misleading Statements about Cummins's Removal**

We found that after Cummins was instructed to resign and Griffin was announced as his replacement, senior Department leaders made a series of conflicting and misleading statements about Cummins's removal.

First, in talking points Sampson drafted on December 19, 2006, for the Department's Office of Public Affairs to use in response to any press inquiries about the circumstances of Griffin's appointment, Sampson wrote that when a U.S. Attorney vacancy arises someone needs to be appointed even if on an interim basis to fill the vacancy and that Griffin was appointed because of the timing of Cummins's resignation. In fact, the White House and the Department had directed Cummins to resign so that Griffin could take his place. The Department's talking points left the misleading impression that because of the unexpected timing of Cummins's resignation, the Department had to install Griffin as Interim U.S. Attorney. In fact, the Department planned to remove Cummins and install Griffin.

In his January 18, 2007, testimony before the Senate Judiciary Committee, Attorney General Gonzales testified that the Department had asked U.S. Attorneys to resign after evaluating their performance, and changes were made pursuant to the Attorney General's responsibility to ensure that the Department had "the best possible person" in each district. However, we found no evidence that either Sampson or any other Department official evaluated Cummins's performance. Nor does the evidence show that Griffin was chosen to replace Cummins because Griffin was considered to be the "best possible person" for the job.

Moreover, contrary to the Attorney General's testimony, Deputy Attorney General McNulty testified in his February 6 appearance before the Senate Judiciary Committee that Cummins was not asked to step aside for performance reasons, but rather to make way for Griffin. In an e-mail after the testimony, Sampson endorsed McNulty's statement that Cummins's removal was not connected to his performance, but was "more related to the opportunity to provide a fresh start with a new person in that position."

After this public testimony, the Department made other misleading statements about Cummins's removal. The most troubling were the representations contained in the February 23 response to a letter from several Senators raising concerns about Cummins's removal. The Department's February 23 letter, drafted by Sampson and circulated to various Department senior managers and the White House, made three significant misleading statements. The first was that "It was well known as early as December 2004 that Mr. Cummins intended to leave . . . ." In fact, as noted above, Cummins had simply said it would not be shocking for him to leave before the end of President Bush's second term.

The second concerned the timing of when the White House first contemplated Griffin's appointment and when the final decision was made to appoint Griffin. The letter stated that "the decision to have Mr. Griffin replace Mr. Cummins was first contemplated in the spring or summer of 2006 [and] the final decision to appoint Mr. Griffin . . . was made on or about December 15 . . . ." In fact, as discussed above, Griffin's appointment was contemplated earlier than that, and the Department decided to appoint him to be the U.S. Attorney much earlier than December 15, 2006.

The third misleading statement in the letter was that "The Department is not aware of Karl Rove playing any role in the decision to appoint Mr. Griffin." This statement is contradicted by the evidence described in this chapter which indicated that Rove was involved in the decision to appoint Griffin and that Sampson was aware of that fact. The statement is also contradicted by Sampson's own e-mail on December 19 to Associate White House Counsel Chris Oprison in which Sampson wrote, "I'm not 100 percent sure that Tim was the guy on which to test drive this authority, but know that getting him appointed was important to Harriet, Karl, etc." While Sampson later explained this e-mail by stating that he "assumed" but did not know that Rove was involved in the decision to appoint Griffin, we found this justification unpersuasive and belied by the evidence.

### **C. Interim Appointment of Griffin**

Finally, our investigation examined the allegation that the Department intended to appoint Griffin to be Interim U.S. Attorney indefinitely by using the new authority granted to the Attorney General in the Patriot Reauthorization Act to bypass the Senate confirmation process.

We concluded that when the Department initially developed and implemented the plan to replace Cummins with Griffin, it intended to nominate Griffin and seek his confirmation through the normal Senate process. After Cummins was directed in June 2006 to resign, the White House's Judicial Selection Committee voted in favor of Griffin's nomination, and the President signed off on the intent to nominate Griffin. However, the White House did not follow the traditional practice of informing the home-state congressional delegation and soliciting U.S. Attorney candidate names. This deviation from the customary procedure contributed to the belief that the Administration intended to bypass the Senate's normal role in U.S. Attorney nominations.

The selection of Griffin quickly ran into opposition from members of Congress from Arkansas, particularly Senator Pryor. The evidence indicated that at this point the Department officials responsible for Griffin's nomination – particularly Sampson and Goodling – considered appointing Griffin to be the Interim U.S. Attorney indefinitely, using the new Patriot Act authority. For example, Griffin told us that he learned from Goodling sometime after he had

spoken to Senator Pryor that an appointment as Interim U.S. Attorney under the Patriot Act amendment would allow him to serve as U.S. Attorney indefinitely.

Moreover, although Sampson and Jennings told us that the problems with the Arkansas Senators did not change their thinking about having Griffin go through the traditional nomination and Senate confirmation process, the documentary evidence does not support this claim. For example, by mid-August 2006 the Department had stopped preparing the paperwork for Griffin to be nominated by the President and confirmed by the Senate. In addition, in an e-mail dated August 30, 2006, Griffin informed an EOUSA employee that he had spoken with Jennings who “doesn’t see any reason to proceed with the senate paperwork since the appointment will occur the other way.” In a September 13, 2006, e-mail to Miers, Sampson also wrote, “I strongly recommend that, as a matter of Administration policy, we utilize the new statutory provisions that authorize the AG to make USA appointments.” Sampson wrote that by bypassing the Senate confirmation process, “we can give far less deference to home-state Senators and thereby get (1) our preferred person appointed and (2) do it far faster and more efficiently, at less political cost to the White House.”

Gonzales told us that he had no specific recollection of discussing this issue with Sampson at the time, although he said he did not support using the interim appointment authority to bypass the Senate confirmation process.

In December 2006, after Cummins resigned, Griffin was appointed as Interim U.S. Attorney. Gonzales discussed Griffin’s appointment in several conversations with Senator Pryor. According to Gonzales, he asked Pryor to support Griffin and said that Griffin’s interim appointment would give Pryor the opportunity to see how Griffin performed. Pryor did not respond positively, and a newspaper article from Arkansas stated that he was “irked” by the surprise notice of Griffin’s appointment as Interim U.S. Attorney. Sampson then wrote another e-mail suggesting that Griffin should remain as the Interim U.S. Attorney indefinitely, bypassing Senate confirmation. In response to concern from White House Associate Counsel Oprison that the Arkansas Senators could use Griffin’s interim status to press for their own nominee, Sampson responded “I think we should gum this to death . . . .” Sampson also wrote that because Griffin’s interim appointment was of unlimited duration, the Department could “run out the clock” while appearing to be acting in good faith by asking the Senators for recommendations, interviewing other candidates, and pledging to desire a Senate-confirmed U.S. Attorney.

Sampson later disavowed this e-mail, labeling it a “bad idea at the staff level.” He also said that he did not really believe the plan was practical, and that Attorney General Gonzales never seriously considered it. Gonzales also told us that he did not support this idea. In addition, in the face of continuing

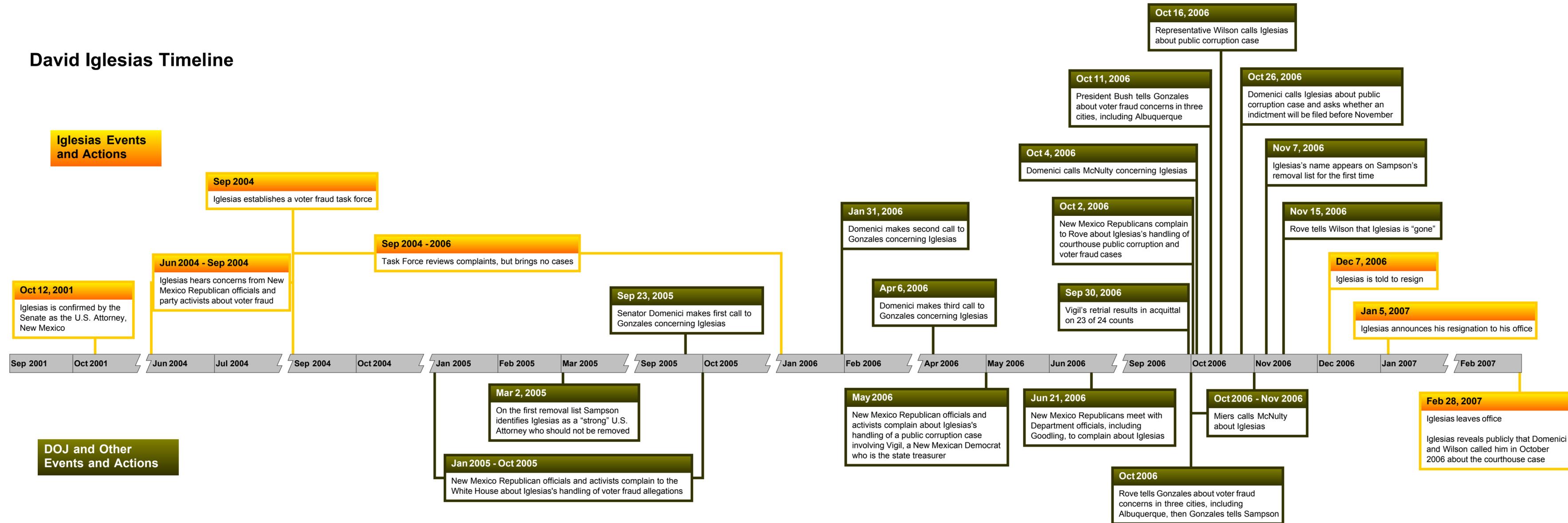
opposition from Senator Pryor to Griffin's appointment, Griffin resigned and the Department sought other candidates to be nominated to the U.S. Attorney position.

Our investigation did not find evidence that Attorney General Gonzales ever supported the idea to appoint Griffin to an indefinite term to avoid the Senate confirmation process. However, the evidence showed that he was not closely involved in Griffin's appointment process, and that Sampson, the main architect and implementer of the plan to replace U.S. Attorneys, advocated making Griffin the Interim U.S. Attorney indefinitely when his nomination was opposed by the Arkansas Senators. According to Sampson's and Gonzales's recollections, Sampson took these actions on his own, without input and supervision from Gonzales. But Sampson's ideas were more than "a bad idea at the staff level" – he advocated a plan and began implementing it. Only in the face of determined opposition by Senator Pryor, as well as the controversy surrounding the removal of the other U.S. Attorneys, did Sampson abandon this plan.

In sum, we concluded that Cummins was not removed for performance reasons, as initially suggested by the Department. His performance was never evaluated, and no Department leader had suggested that Cummins's performance was lacking. Sampson stated that he thought Cummins was "mediocre" but he never assessed his performance, and he later agreed with McNulty that Cummins was not removed for performance reasons. Rather, the evidence shows that the main reason for Cummins's removal, and the timing for his removal, was to provide a position for former White House employee Griffin.

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# David Iglesias Timeline



## **CHAPTER SIX DAVID IGLESIAS**

### **I. Introduction**

This chapter examines the removal of David Iglesias, the former United States Attorney for the District of New Mexico.

#### **A. Iglesias's Background**

Iglesias received his law degree from the University of New Mexico School of Law in 1984. From 1984 to 1988, he served in the U.S. Navy Judge Advocate General's Corps (JAG). After leaving active duty service, he has served on reserve duty in the Navy JAG, where he holds the rank of Captain.

From 1988 through 1991, Iglesias was an Assistant Attorney General in the New Mexico Attorney General's Office, after which he served as an Assistant City Attorney in Albuquerque from 1991 to 1994. Between 1994 and 1995, he participated in the White House Fellows program as a Special Assistant to the Secretary of Transportation. He served as Chief Counsel for the New Mexico Risk Management Legal Office between 1995 and 1998, and as General Counsel for the New Mexico Taxation and Revenue Department from 1998 to 2001. In 2001, he worked at a private law firm in Albuquerque.

In 1998, Iglesias ran unsuccessfully as the Republican Party's candidate for New Mexico Attorney General. During the campaign, staff from U.S. Senator Pete Domenici's office provided advice and logistical support, and Iglesias met personally with Senator Domenici on several occasions. Domenici also made a videotaped statement endorsing Iglesias's candidacy, which Iglesias used to raise campaign funds. Iglesias told us that because of the Senator's interest and support, Iglesias regarded him as a mentor and someone who might be able to help Iglesias if he continued to pursue a political career.

U.S. Representative Heather Wilson successfully ran for a seat in Congress from New Mexico in 1998, and Iglesias campaigned with her at several events. Iglesias said that previously, when Wilson was the Secretary of the New Mexico Department of Children, Youth and Families from 1995 to 1998, he worked with her on several matters while he was in the state's Risk Management Legal Office.

During the 2000 Presidential campaign, Iglesias headed a New Mexico state-level organization called "Lawyers for Bush." He said that after the election he learned that he could apply directly for the New Mexico U.S. Attorney position through a White House website. He submitted his résumé

and simultaneously informed Senator Domenici's staff that he was interested in the job.

Iglesias and three other candidates were eventually selected to be interviewed by Senator Domenici. Iglesias told us he believes he may have been the only one whose name was sent on to the Department of Justice. He said he was interviewed at the Department by Associate Deputy Attorney General David Margolis, Kyle Sampson (then with the White House Office of Presidential Personnel), and a third official from the Executive Office for United States Attorneys (EOUSA). After subsequent interviews with Attorney General John Ashcroft and Deputy Attorney General Larry Thompson, Iglesias was nominated by the President for the U.S. Attorney position on August 2, 2001, confirmed by the Senate, and sworn in on October 17, 2001.<sup>95</sup>

Iglesias was appointed as the Chair of the Border and Immigration Subcommittee of the Attorney General's Advisory Committee (AGAC) and served in that position until 2005.

According to Iglesias, at various times in 2004 the White House asked him to consider an appointment to be Director of EOUSA, or an Assistant Secretary at the Department of Homeland Security, two positions he said he was not interested in pursuing. Documents also reflect that around the same time Sampson and others in the Department considered him as a potential candidate for U.S. Attorney vacancies in the Southern District of New York and the District of Columbia.

## **B. The EARS Evaluations of Iglesias's Office**

Iglesias's office received EARS evaluations in 2002 and 2005, and both reports were positive. The 2002 EARS evaluation stated: "The United States Attorney was well respected by the client agencies, judiciary, and USAO staff. He provided good leadership . . . and was appropriately engaged in the operations of the office." The 2005 EARS evaluation stated: "The United States Attorney . . . was respected by the judiciary, agencies, and staff. The First Assistant United States Attorney . . . appropriately oversaw the day-to-day work of the senior management team, effectively addressed all management issues, and directed resources to accomplish the Department's and the United States Attorney's priorities." The EARS reports did not contain any criticisms or concerns about Iglesias's leadership.

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<sup>95</sup> Iglesias hired as his Executive Assistant U.S. Attorney (EAUSA) Rinaldo Armijo, a former colleague from both the state Attorney General's Office and Albuquerque city government. Iglesias hired Larry Gomez, a career prosecutor who had been with the New Mexico U.S. Attorney's Office (USAO) since 1979 as the First Assistant U.S. Attorney and Criminal Chief.

### **C. Iglesias's Status on the Removal Lists**

As discussed in Chapter Three, in March 2005 Sampson sent to the White House the first list of U.S. Attorneys recommended for removal. On that list, Sampson identified Iglesias as 1 of 26 "strong" U.S. Attorneys who should be retained by the Department. Iglesias did not appear on any of Sampson's subsequent removal lists until the list Sampson circulated on November 7, 2006, 1 month before Iglesias and the other U.S. Attorneys were removed.

### **D. Reasons Proffered for Iglesias's Removal**

As described in Chapter Three, in February 2007 when the Department began to prepare witnesses for their congressional testimony regarding the U.S. Attorney removals, Monica Goodling and others created a chart with a list of the reasons justifying the removals. In her handwritten notes describing the reasons, Goodling wrote that Iglesias was an "underachiever in a very important district," that he was an "absentee landlord," that he was "in over his head," and that "Domenici says he doesn't move cases."

Senator Domenici made three telephone calls to Attorney General Gonzales in 2005 and 2006, and one to Deputy Attorney General Paul McNulty in October 2006, complaining about Iglesias's performance. However, Domenici's complaints were omitted from the list of reasons for Iglesias's termination, both in the final typewritten chart that Goodling prepared for McNulty's use in his February 14, 2007, briefing of the Senate Judiciary Committee and from Department officials' initial statements about Iglesias's removal.<sup>96</sup>

According to the talking points McNulty used to prepare for the February 14 briefing for the Senate Judiciary Committee and notes of the meeting taken by Nancy Scott-Finan, an Office of Legislative Affairs official who attended the briefing, McNulty gave the following reasons for Iglesias's removal:

- He was "under-performing";
- He was an "absentee landlord," who was out of the office a fair amount of time and who relied on the First Assistant U.S. Attorney to run the office; and
- The Department had received congressional complaints about Iglesias.

McNulty confirmed to us that he did not mention Senator Domenici in this congressional briefing. McNulty said that he did not want to refer to

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<sup>96</sup> We describe the telephone calls from Domenici later in this chapter.

Domenici because he was “concerned about . . . putting the Senator in a bad light or in a difficult position” and that he wanted to keep his conversation with Domenici “confidential . . . . It was just a courtesy.” In her written testimony to the House Judiciary Committee, Goodling, the Department’s White House Liaison, also stated that Domenici’s complaints about Iglesias were omitted from the list of reasons for Iglesias’s removal at McNulty’s suggestion.

On March 6, 2007, Principal Associate Deputy Attorney General William Moschella testified before a House Judiciary Subcommittee about the reasons for the removals of each U.S. Attorney. Moschella stated that Iglesias’s removal was based on concerns about his management of the New Mexico U.S. Attorney’s Office:

There was a general sense with regard to this district . . . 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 [Larry Gomez] the overall running of the office.<sup>97</sup>

Moschella, like McNulty, did not mention Domenici’s calls to Department officials.

Iglesias himself was the first to publicly disclose that Senator Domenici may have had a role in his removal. In a press conference on February 28, 2007, without naming Senator Domenici or Representative Wilson, Iglesias stated that he had received telephone calls from two members of Congress who pressured him to indict a public corruption case before the November 2006 election. In response, on March 4 and March 6, respectively, Domenici and Wilson released written statements confirming that they had called Iglesias but denying that they pressured him in any way.

In his testimony before the Senate Judiciary Committee on March 6, 2007, Iglesias again stated that he believed he was asked to resign because he failed to respond to political pressure to indict a public corruption case against Democratic officials before the November 2006 election. In his Senate testimony, Iglesias described the telephone calls he received from Senator Domenici and Representative Wilson in October 2006 regarding the status of a pending public corruption matter, and Iglesias testified that in both instances he felt he was being pressured to bring an indictment before the November election.

Sampson testified before the Senate Judiciary Committee on March 29, 2007, about the removals of the U.S. Attorneys. Sampson stated that he did

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<sup>97</sup> As we discuss in Section II. A. below, Moschella’s statements about the EARS report were inaccurate.

not recall the reasons Iglesias was placed on the November 7 removal list, but said the fact that Senator Domenici had made three calls to the Attorney General and one call to the Deputy Attorney General regarding Iglesias may have influenced the decision to remove Iglesias. Sampson said he recalled McNulty saying that Domenici would not mind if Iglesias's name stayed on the list. Sampson also stated that there were management concerns about Iglesias. He said that in 2005 William Mercer, at the time the Principal Associate Deputy Attorney General, "expressed negative views about Mr. Iglesias . . . and recommended that he not be reappointed . . . as chair of the Border Committee."<sup>98</sup> Sampson also stated that "at some point, Mr. David Margolis . . . indicated to me . . . that [Iglesias] wasn't a strong manager, that he delegated a lot to his First Assistant."<sup>99</sup>

On April 19, 2007, Gonzales told the Senate Judiciary Committee that Iglesias had "lost the confidence of Senator Domenici" because he "did not have the appropriate personnel focused on cases like public corruption cases." In his May 10, 2007, testimony before the House Judiciary Committee, Gonzales added that because Iglesias did not have Domenici's confidence, it was "enough for me to lose confidence in Mr. Iglesias." During Gonzales's House and Senate testimony, he also stated that in one of his conversations with Domenici the Senator mentioned voter fraud cases.

Gonzales also testified that in the fall of 2006 Karl Rove had mentioned to him his concern over voter fraud in three cities, one of which was Albuquerque, New Mexico. Gonzales said he did not recall, but did not dispute, that President Bush expressed similar concerns to him about the same three cities on October 11, 2006.

## **E. Investigative Limitations**

It is important to note that our investigation into Iglesias's removal was hampered, and is not complete, because key witnesses declined to cooperate with our investigation. In particular, former White House officials Harriet Miers and Karl Rove, both of whom appear to have significant first-hand knowledge regarding Iglesias's dismissal, refused our requests for an interview

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<sup>98</sup> When he chaired the Attorney General's Advisory Committee in February 2005, Mercer had recommended to Sampson that Iglesias and several other subcommittee chairs be replaced because Mercer did not think they were as effective chairmen as Mercer thought they should be. However, Mercer told us that while some of the names on Sampson's U.S. Attorney removal list did not surprise him when he first saw the list on December 5, 2006, he had not expected to see Iglesias on the list.

<sup>99</sup> However, as detailed below, Margolis told us he was certain that he told Sampson about these allegations only after Iglesias was removed. Margolis said he only became aware of Iglesias's delegation of authority to his First Assistant when he interviewed a replacement for Iglesias after his removal.

even though the White House Counsel's Office informed them both, as it did all current and former White House staff who we wanted to interview, that the Counsel's Office encouraged them to cooperate with our investigation and submit to an interview.

In addition, Senator Domenici and his Chief of Staff, Steve Bell, also declined to be interviewed by us. Domenici initially told us through his counsel that he would be "pleased to assist" our investigation once a pending Senate Ethics Committee investigation of his phone call to Iglesias was completed. We renewed our requests for interviews after the Senate ethics inquiry was concluded. Bell continued to decline to be interviewed. Domenici also declined to be interviewed, but said he would provide written answers to questions through his attorney. We declined this offer because we did not believe it would be a reliable or appropriate investigative method under these circumstances. In contrast, Representative Wilson cooperated with our investigation and was interviewed by us three separate times.<sup>100</sup>

In addition, we were not provided documents from the White House that we believe are critical to our investigation. As noted in Chapter One, the White House Counsel's Office declined to provide us internal White House e-mails and documents related to the removals of the U.S. Attorneys. Moreover, as described in Chapter One, the White House refused to authorize the Department's Office of Legal Counsel to release to us drafts of a chronology of events related to the U.S. Attorney firings prepared by Associate White House Counsel Michael Scudder in cooperation with Department staff. The White House only authorized the release of one paragraph of that chronology related to Iglesias, Harriet Miers, and Representative Wilson, and two paragraphs containing information Rove provided to Scudder but did not allow the release of other information from that chronology.

We interviewed Mickey Barnett, an attorney and former Republican state Senator from New Mexico, who provided documents to the U.S. Senate pursuant to a subpoena in connection with the Senate Ethics Committee investigation of Senator Domenici's telephone call to Iglesias. Although Barnett gave us several documents from among those he produced to the Senate, he refused to give us all the documents he produced and we are not able to obtain them from the Senate Ethics Committee.

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<sup>100</sup> Patrick Rogers, a New Mexico Republican Party activist who complained about Iglesias to Department and White House officials, notified us through his attorney that he would not agree to be interviewed. In one letter, he also stated that he would "consider providing testimony to DOJ, but only if the interview is conducted in public."

## **II. Chronology of Events Related to Iglesias's Removal**

In this section, we examine the reasons proffered for Iglesias's removal. We first discuss the Department's assertion that Iglesias was removed because he was an "absentee landlord" and because he delegated many of his duties and responsibilities to his First Assistant U.S. Attorney.

We then describe in detail the factual chronology regarding Iglesias's handling of voter fraud and public corruption cases in his district. We analyze whether the complaints about his handling of these cases were the cause of his removal. We also examine the nature and extent of both congressional and New Mexico Republican Party activists' complaints to the White House and to the Department about Iglesias's handling of these cases, and we describe the events leading to Iglesias's removal.

### **A. Alleged Concerns about Iglesias's Management**

As noted above, in both its written materials and public testimony, the Department justified Iglesias's removal based in part on an allegation that he was an "absentee landlord" who over-delegated authority to run the U.S. Attorney's Office to his First Assistant.

We determined that during the preparation sessions for McNulty's closed briefing, when Department senior officials were discussing the reasons they would present to Congress as justifications for the removals, someone raised the allegation that Iglesias had been an "absentee landlord." No one we interviewed remembered who called Iglesias an absentee landlord at this meeting. According to Margolis, when he heard at the meeting the allegation that Iglesias was an absentee landlord, he told Goodling that the allegation had been "corroborated" by New Mexico First Assistant U.S. Attorney Gomez when he interviewed with Margolis and Goodling for Iglesias's vacant U.S. Attorney position, after Iglesias had been removed. However, Margolis told us that he was not aware of any allegations concerning Iglesias's management style until after Iglesias was removed because his knowledge was derived solely from his interview of Gomez.

As noted above, Moschella testified to the House Judiciary Subcommittee that an EARS report "picked up some management issues, and Mr. Iglesias had delegated to his first assistant the overall running of the office." Moschella also testified that he did not recall whether the EARS report characterized Iglesias's delegation of authority to his First Assistant as "appropriate." We reviewed both EARS reports and found nothing in them to substantiate Moschella's claim that an EARS report referred to any management issues regarding Iglesias's delegation of authority. The 2002 EARS report stated "The United States Attorney was well respected by the client agencies, judiciary, and USAO staff. He provided good leadership . . . and was appropriately engaged in the

operations of the office.” Similarly, the 2005 EARS report stated that Iglesias was respected by agencies, the courts, and his staff, and that his First Assistant “appropriately oversaw the day-to-day work of the senior management team.”

Attorney General Gonzales testified to the Senate Judiciary Committee on April 19, 2007, that an “absentee landlord” issue regarding Iglesias was “not in my mind, as I recall, when I accepted the recommendation [for Iglesias’s removal].” Gonzales also told us that his recollection was that at the time he approved Iglesias’s removal, the only criticism of which he was aware came from Senator Domenici, and he was not aware at that time of any concern about over-delegation of authority by Iglesias to his First Assistant.

Both McNulty and Mercer testified to Congress that they did not know the basis for the allegations that Iglesias was an absentee landlord or that he overly delegated authority. McNulty said that he did not interpret the phrase “absentee landlord” to mean that Iglesias was physically out of his office. Rather, McNulty said that he interpreted the phrase to refer to Iglesias’s management style. McNulty said that he did not know who thought that Iglesias was an absentee landlord prior to the time that Iglesias was removed. Mercer told us that he had “no idea” how much time Iglesias spent in his office, and he told congressional investigators that he did not have “any idea about what sort of a leader or manager [Iglesias] was” in his office.

Former EOUSA Director Buchanan told congressional investigators that she was “surprised” that Iglesias was removed. She said that “everything I knew about [Iglesias] was positive.” Former EOUSA Director Battle also told congressional investigators that he “could see no reason” why Iglesias was removed. Battle told us that “Iglesias was doing a good job.”

Sampson testified to the Senate Judiciary Committee, however, that he had heard concerns about Iglesias’s management. He said Margolis had indicated to him that Iglesias was not a strong manager and that he “delegated a lot” to his First Assistant. Sampson said he could not recall when Margolis told him this. But, as discussed previously, Margolis told us he was certain that he told Sampson about these allegations only after Iglesias was removed. According to Margolis, when he interviewed First Assistant Gomez for the vacant U.S. Attorney position, Gomez explained his qualifications for the U.S. Attorney position by noting that he ran the day-to-day operations of the office. Margolis told us that he thought that Gomez’s statement that he ran the day-to-day operations of the office “corroborated” the allegation that Iglesias was an absentee landlord. However, Margolis also told us that Gomez said nothing negative about Iglesias during his interview.

Yet, Gomez told congressional investigators that he did not think that Iglesias over-delegated authority or was an absentee landlord. Gomez was

Iglesias's First Assistant and Criminal Chief from the fall of 2001 until he became Acting U.S. Attorney upon Iglesias's removal. Gomez has been a career federal prosecutor since 1979. Gomez told congressional investigators that he agreed with the 2005 EARS report that found that Iglesias "appropriately" delegated authority to him to oversee the day-to-day work of the office. Gomez also said that he never told the EARS evaluators that Iglesias over-delegated authority or was absent from the office for an unusual amount of time. Gomez said that he met with Iglesias daily when he was in the office, and spoke by phone with him generally every day when Iglesias was out of the office. Gomez added that, prior to Iglesias's removal, Gomez never heard anyone say that Iglesias over-delegated authority or was an absentee landlord. Gomez said that Iglesias was "engaged in his office," and that Iglesias's management style was "very good." Gomez said he never heard complaints from others about Iglesias's management style.

Rumaldo Armijo became Iglesias's Executive Assistant in 2001. Armijo told us that he never heard anyone express concern that Iglesias was an absentee landlord or that Iglesias did not spend enough time in the office. Armijo said that he believed that Iglesias's delegation of authority to Gomez was appropriate. Armijo said that Iglesias was "a strong leader" and that he was "very active in everything that went on here."

Iglesias told us that no one at "Main Justice" or in his office ever told him that he over-delegated authority. Iglesias said he delegated "routine" matters to Gomez, but that he decided "major issues." Iglesias said he told Gomez that he did not need to know "about every little case that's going on" but that he did need to know about "cases that affect policy, national priorities, or have media impact." Iglesias denied he was an absentee landlord, saying many of his trips out of the office were to Washington to work on Department matters. Iglesias said that as an officer in the Naval Reserve, he was away from the office from 4 to 6 days at a time, including weekends. As a Naval Reserve officer, he was required to serve 36 duty days a year, and he said that he probably averaged 40 to 45 days of service a year. But Iglesias said that no one ever told him that his absences were hurting his office.<sup>101</sup> Iglesias also told us that he was in constant Blackberry communication with his office when he was away.

In sum, we concluded that the allegation that Iglesias was an absentee manager who had delegated too much authority to his First Assistant was an after-the-fact justification for Iglesias's termination and was not in fact a reason he was placed on the removal list.

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<sup>101</sup> Margolis told us that during the preparation sessions for McNulty's testimony everyone agreed that Iglesias's absences from the office as a result of his military duty were "honorable" and not the reason why Iglesias was deemed to be an absentee landlord.

## **B. Voter Fraud and Public Corruption Matters**

In the remainder of this chapter, we describe the facts concerning the complaints about Iglesias's handling of voter fraud and public corruption matters, which we concluded was the real reason Iglesias was removed as U.S. Attorney.

### **1. Initial Complaints of Voter Fraud**

Iglesias told us that sometime during the summer of 2004, he became aware of concerns about voter fraud in New Mexico.<sup>102</sup> The New Mexico media began focusing on the issue around that time, and the New Mexico USAO received complaints of possible registration fraud from several sources, including the Democratic Clerk of Bernalillo County, Mary Herrera.

Iglesias said that he also received pressure from the Republican Party of New Mexico to pursue voter fraud cases before the 2004 elections. Scott Jennings, then the White House Associate Director of Political Affairs, told us that many Republicans believed that fraudulent registration by Democratic Party voters in New Mexico was a widespread problem and that it had cost President Bush the state in the 2000 Presidential election.<sup>103</sup> Among those who urged Iglesias to investigate and prosecute voter fraud cases in New Mexico were Allen Weh, the Chairman of the state Republican Party; Patrick Rogers, a former general counsel to the state Republican Party who continued to represent the party on voter fraud and ballot access issues;<sup>104</sup> Mickey Barnett, an attorney and former Republican state senator active in party politics; Steve Bell, Chief of Staff to Senator Pete Domenici; and Darren White, the elected Republican Sheriff of Bernalillo County and Chairman of the 2004

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<sup>102</sup> The terms "voter registration fraud," "voter fraud," and "election fraud," generally refer to practices such as fraudulently registering persons who are not eligible to vote, paying individuals to vote, attempting to vote multiple times, or impersonating a non-voting legitimately registered voter.

<sup>103</sup> The results of several recent presidential and congressional elections in New Mexico were extremely close, and the state was almost evenly balanced between votes for Republicans and Democrats. For example, in the 2000 presidential election Al Gore received 286,783 votes and George Bush received 286,417 votes, a difference of 366 votes. In 2006, incumbent House of Representative member Heather Wilson received 105,986 votes and her Democratic challenger Patricia Madrid received 105,125 votes, a difference of 861 votes. The New Mexico Republican Party became increasingly concerned about allegations of voter fraud in New Mexico, because it believed such fraud benefited Democrats by increasing the number of Democratic voters. As a result, Republican Party officials and activists began asking Iglesias to take action to address those concerns.

<sup>104</sup> Iglesias told us that Rogers had represented Iglesias's campaign for Attorney General pro bono in 1998 when Iglesias contested a fine imposed by the state for late reporting of campaign contributions. Rogers also represented the Wilson campaign in 2006.

Bush-Cheney campaign in New Mexico.<sup>105</sup> Iglesias said he knew all of these individuals and considered many of them to be his friends.

On August 6, 2004, Weh sent Iglesias an e-mail proposing that Iglesias's office become involved in "the party's voter fraud working group" headed by Sheriff White. Weh copied his e-mail to Representative Wilson; Senator Domenici's Chief of Staff Bell; Sheriff White; Greg Graves, former Executive Director of the New Mexico Republican Party; New Mexico Republican Congressman Steve Pearce; and Pearce's Chief of Staff, Jim Richards. Bell responded to Weh's e-mail that this was a "critical matter" due to concerns about potential violation of voter registration laws.

Iglesias responded that he would ask his office's voting rights expert, Executive Assistant U.S. Attorney Rumaldo Armijo, to coordinate a meeting regarding the proposal and contact White. No one associated with this proposal that we interviewed, including Weh, White, Wilson, Armijo, and Iglesias, said they recalled that the proposed working group was ever established, or that Iglesias's office participated in any such group. However, as detailed below, Iglesias's office continued to receive complaints from Republican officials and party activists about allegations of voter fraud in New Mexico.

## **2. Representative Wilson's Complaint Concerning Voter Fraud**

On August 17, 2004, Representative Wilson wrote a letter to Iglesias complaining about what she considered to be evidence of possible voter fraud in her district. In the letter, Wilson stated that an unusually large number of mailings from her office to newly registered voters had been returned as undeliverable, and she asked Iglesias's office to "investigate whether these voter registrations were lawful and whether any organizations or groups are intentionally causing false voter registration forms to be filed with the county clerk."<sup>106</sup>

Iglesias responded to Wilson in a letter dated October 29, 2004, informing her that he was referring her complaint to the FBI "for their review and possible action. The FBI will determine whether a federal investigation may be warranted." Wilson forwarded Iglesias's response to her Chief of Staff with the handwritten comment, "What a waste of time. Nobody home at US

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<sup>105</sup> Sheriff White referred several voter fraud complaints to the New Mexico USAO in early August 2004, including a case that received significant attention in the local press involving the registrations of a 13- and a 15-year-old. White is currently a Republican candidate for Congress in one of New Mexico's three congressional districts.

<sup>106</sup> Wilson told us that there was no connection between the e-mail messages from Weh and Bell and her complaint to Iglesias.

Attorney's Office." Wilson told us that she faulted Iglesias for failing to pursue her August 17 complaint regarding possible voter fraud in a timely manner.

### **3. Formation of the Election Fraud Task Force**

We determined that in response to these and other complaints, Iglesias consulted with his staff, spoke to attorneys in the Department's Civil Rights and Criminal Divisions, and contacted federal prosecutors in other districts with experience in voter fraud matters.

After discussions with the Criminal Division's Public Integrity Section, Iglesias decided to form a state and federal task force to address what he then believed to be a serious problem of voter fraud in the state. However, in order to avoid any public perception that the task force was seeking to advance a Republican political agenda, Iglesias also sought the participation of the Democratic Secretary of State, Rebecca Vigil-Giron, who agreed to assign an employee to the task force. The New Mexico Department of Public Safety (the state's law enforcement agency), the U.S. Veteran's Administration Inspector General's Office, the FBI, and DOJ's Public Integrity Section (PIN) also agreed to participate.<sup>107</sup>

On September 7, 2004, the New Mexico USAO issued a press release announcing the formation of the Election Fraud Task Force. Two days later Iglesias announced at a press conference that a voter fraud (Task Force) hotline had been created, and he stated that allegations of fraud would be investigated thoroughly. In addition to Executive Assistant U.S. Attorney Armijo, two experienced career AUSAs from Iglesias's office were assigned to work with the Task Force.<sup>108</sup>

However, Iglesias's task force approach to allegations of voter fraud drew immediate criticism from some New Mexico Republicans. Former Republican state senator Barnett wrote an e-mail to Iglesias stating that "[m]ost of us think a task force is a joke and unlikely to make any citizen believe our elections and voter registrations are honest." Former Republican Party general counsel Rogers complained to Iglesias that he had "includ[ed] the target on the task

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<sup>107</sup> The Chief of the Department's Public Integrity Section, Noel Hillman, and the Public Integrity Section's Election Crimes Branch Director, Craig Donsanto, also participated in this task force.

<sup>108</sup> Around this time, in a letter dated September 8, 2004, Senator Domenici complained to the Department's Civil Rights Division that incidents of voter registration fraud in New Mexico raised "serious concerns about the integrity of the upcoming elections." The Senator's letter was referred to the Department's Office of Legislative Affairs, which sent a generic response on November 23, 2004, stating that the Department investigates such allegations and "where appropriate" prosecutes them. We found no evidence that the Department took any other action in response to the letter.

force,” apparently a reference to the participation of an employee from the Secretary of State’s Office.<sup>109</sup> Sheriff White told us that he thought the USAO should have investigated and prosecuted cases without involving state agencies, and that Iglesias’s concern about appearing nonpartisan was misguided.

Although criticized by some New Mexico Republicans, Iglesias’s task force approach received recognition within the Department. For example, in October 2005 Iglesias was asked to speak at a Department-sponsored symposium on voting integrity. In addition, according to an attorney in the Public Integrity Section, Iglesias’s approach to the problem in New Mexico was held up by the Department as an example of how to handle voter fraud investigations.

#### **4. Continuing Complaints About Voter Fraud**

On September 15, 2004, the New Mexico USAO arranged for Rogers to meet with the FBI Supervisory Special Agent assigned to the Task Force. At the meeting, Rogers complained that large numbers of new voter registration forms in the state were fraudulent and should be investigated. Rogers identified an “ACORN” worker in particular as being responsible for a significant number of false registrations.<sup>110</sup> Barnett told us that Republican activists hired a private investigator to identify and locate the ACORN worker in question, but they were unable to locate the worker.

On September 19, 2004, Rogers sent an e-mail to Iglesias and Armijo stating that because the Democratic Party had questioned the validity of the voter fraud claims, Rogers wanted to “dig up all past info,” and asked if there was “any easy way to access the public info related to voter fraud from the [USAO] (public) files? Asap? Before Nov 2?” Iglesias responded that he would look into Rogers’ question “asap and let you know what is publicly available.” Iglesias subsequently identified a case the New Mexico USAO had prosecuted in the early 1990’s, retrieved the file, and provided public information about the case to Rogers, who thanked him by e-mail “for the public info.”

On September 29, 2004, Rogers sent an e-mail to Iglesias, Armijo, and more than 20 persons associated with the New Mexico Republican Party,

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<sup>109</sup> On the day the Task Force was announced, Rogers sent an e-mail to Iglesias criticizing the task force approach and attaching a copy of a deposition Rogers took of the employee from the Secretary of State’s Office assigned to the Task Force in a lawsuit contesting the state’s interpretation of a voter identification law.

<sup>110</sup> ACORN, an acronym for the Association of Community Organizations for Reform Now, describes itself as “the largest community organization of low- and moderate-income families, working together for social justice and stronger communities.” One of ACORN’s projects is to register new voters.

including Senator Domenici's press secretary Ed Hild, Domenici's Chief of Staff Bell, Representative Wilson's Chief of Staff Bryce Dustman, New Mexico Republican Party Chairman Weh, and state Republican Party Executive Director Graves. Rogers's lengthy e-mail included the following observations:

I believe the [voter] ID issue should be used (now) at all levels – federal, state legislative races and Heather [Wilson]'s race . . . . You are not going to find a better wedge issue . . . . I've got to believe the [voter] ID issue would do Heather more good than another ad talking about how much federal taxpayer money she has put into the (state) education system and social security. . . . This is the single best wedge issue, ever in NM. We will not have this opportunity again . . . . Today, we expect to file a new Public Records lawsuit, by 3 Republican legislators, demanding the Bernalillo county clerk locate and produce (before Oct 15) ALL of the registrations signed by the ACORN employee . . . .<sup>111</sup>

In a letter dated September 23, 2004, New Mexico Republican Party Executive Director Graves asked Iglesias to investigate an alleged theft of Republican voter registration forms from the office of the New Voter Project, an organization that seeks to register young people to vote. On October 21, 2004, Graves copied Iglesias on another complaint to the Bernalillo County Clerk asking that the Republican Party be allowed to inspect ACORN voter registration cards allegedly found during a drug raid.

Weh also continued to pressure Iglesias to bring voter fraud prosecutions before the 2004 election. On September 24, 2004, Weh sent Iglesias and several Republican political figures, including the chiefs of staff to New Mexico's Republican congressional delegation (Jim Richards, Bryce Dustman, and Steve Bell) an e-mail about voter fraud that included the following statement:

We are still waiting for US Attorney Iglesias [sic] to do what his office needs to do to hold people accountable, and have informed him that doing it after the election is too late. I have copied him on this e-mail for his info.

In his message to Iglesias, Weh wrote: "Vote fraud issues are intensifying [sic], and we are looking for you to lead."

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<sup>111</sup> Because of the political nature of this and other e-mails he received from Rogers and Weh, Iglesias had previously asked them to use his personal e-mail account for these types of e-mails. However, both Rogers and Weh continued to contact Iglesias on occasion through his government e-mail account.

Weh told us he copied this e-mail to New Mexico Republican officials because he intended to send Iglesias the message that if he “cares about his professional reputation [he should] get his butt in gear and do what he is paid to do.”

In mid-October 2004, Weh forwarded Iglesias an e-mail message he had received from Congressman Pearce’s Chief of Staff with an attached newspaper article about voter fraud in Colorado. The next day, Weh forwarded an e-mail to Iglesias from the assistant to Senator Domenici’s Chief of Staff Bell that was addressed to Weh, Rogers, and John Dendahl, a former Republican Party Chairman and gubernatorial candidate. The original message read: “From Steve Bell. This [voter fraud] is really getting out of control.” Weh added the following message for Iglesias: “The game clock is running!”

## **5. Election Fraud Task Force Review of Complaints**

The USAO’s Election Fraud Task Force met several times before the November 2004 election to review complaints of voter fraud. Iglesias informed his staff that Department of Justice policy prohibited their influencing the outcome of an election and that he did not believe the Department would authorize the commencement of any prosecutions before election day.

According to an AUSA on the Task Force, most of the complaints the Task Force received involved what it considered to be relatively minor matters, such as campaign yard signs being stolen, harassing phone calls, or registration problems, and these complaints were referred to local election officials. Other potentially more serious matters, including the complaints from Representative Wilson, Sheriff White, Graves, and Rogers, were referred either to the FBI or to the New Mexico Department of Public Safety for investigation.

In total, the Task Force received more than 100 complaints prior to the 2004 election. The FBI investigated several potential violations of federal law and presented written summaries of the evidence it developed to the USAO. EAUSA Armijo and Craig Donsanto from the Department’s Public Integrity Section reviewed the summaries and made preliminary determinations regarding prosecutive decisions, which Iglesias reviewed and approved. With respect to Representative Wilson’s August 17, 2004, complaint of voter fraud discussed above, the FBI ultimately determined that the correspondence from her office to newly registered voters had been returned as undeliverable because of incomplete addresses on voter registration cards, errors made by Wilson’s office in addressing the envelopes, or because the voters, many of whom were college students, had changed addresses since registering. The FBI recommended, and EAUSA Armijo concurred, that the matter should be closed without further investigation or prosecution.

With respect to the allegation that an ACORN worker was responsible for a significant number of false voter registrations, the FBI identified and interviewed the worker in question. As a result of the investigation, the USAO and the Public Integrity Section jointly concluded that there was insufficient evidence of criminal intent on the subject's part to justify prosecution. Iglesias told us that he viewed this case as the strongest one to come out of the Task Force, but that the evidence nevertheless did not justify going forward with a criminal prosecution.

Iglesias also told us that when the Task Force began, he sincerely believed it would develop cases worth prosecuting. Contemporaneous e-mail records show that Iglesias encouraged his staff to pursue the Task Force cases, and that he believed the USAO needed to send a zero-tolerance message about voter fraud. Iglesias told us that in the final analysis, however, he concluded that there was insufficient evidence in any of the cases the Task Force reviewed to support criminal prosecution by the USAO or state authorities. The Task Force stopped meeting after the 2004 elections, but it was not officially disbanded until 2006 when the FBI completed the last of its investigations.

#### **6. Iglesias's Meeting with Weh Regarding his Handling of Voter Fraud Complaints**

Iglesias said that sometime in 2005, while many of the Task Force investigations were still pending, he heard from a friend who had connections in the New Mexico Republican Party that the party was unhappy with his handling of voter fraud cases. Iglesias said he felt unable to respond directly to such reports and knew he could not provide information about ongoing investigations. However, he said he wanted to get the message out to his fellow Republicans that he would prosecute "provable" voter fraud cases but would not bring a case unless it could be proven beyond a reasonable doubt. His friend agreed to pass the message along, but Iglesias later heard that many people in the Republican Party were still upset with him.

In a further attempt to defuse the situation, Iglesias called state Republican Party Chairman Weh, and the two met briefly for coffee near Weh's home on May 6, 2005. Iglesias said he tried to explain to Weh that he wanted to prosecute provable voter fraud cases but could not go forward without sufficient evidence.

Weh told us that Iglesias began the meeting by asking if he was "in trouble" with the Republican Party, and that he tried to blame the lack of prosecutions on the FBI's failure to commit resources. Weh also said he told Iglesias that Iglesias needed to do something about voter fraud and that he should have already done something about it.

## **7. Complaints to the White House Regarding Iglesias's Handling of Voter Fraud Cases**

Weh said that although his meeting with Iglesias was cordial, he remained unconvinced by Iglesias's explanation. Weh told us that he also thought Iglesias was unqualified for his position as U.S. Attorney, and Weh said he had concluded by then that Iglesias had failed to adequately investigate and prosecute voter fraud crimes. Weh added that his opinion of Iglesias was widely shared by New Mexico Republicans, and that he made his views known to many people.

Weh said he complained about Iglesias to Scott Jennings in the White House sometime in 2005, and told Jennings that Iglesias should be replaced.<sup>112</sup> E-mail records we obtained from the White House confirm that Weh wrote to Jennings about Iglesias on August 9, 2005. His message to Jennings, which was copied to Karl Rove, Sara Taylor, Tim Griffin, and Steve Bell, stated:

We discussed the need to replace the US Atty in NM several months ago. The brief on Voter Fraud at the RNC meeting last week reminded me of how important this post is to this issue, and prompted this follow up. As you are aware the incumbent, David Iglesias, has failed miserably in his duty to prosecute voter fraud. To be perfectly candid, he was 'missing in action' during the last election, just as he was in the 2002 election cycle. I am advised his term expires, or is renewed, in October. It is respectfully requested that strong consideration be given to replacing him at this point . . . . If we can get a new US Atty that takes voter fraud seriously, combined with these other initiatives we'll make some real progress in cleaning up a state notorious for crooked elections.

Several other Republican officials and activists complained about Iglesias to the White House as well. Former Republican state senator Barnett told us that at one point he asked Iglesias why he was not bringing voter fraud cases. He said that Iglesias replied that he did not have enough people to work the cases, Department policy prohibited them from bringing cases close to the election, and the voter fraud statute required proof that the defendant intended to influence the election. Barnett said he concluded that Iglesias was responsible for the lack of prosecutions, and began complaining about his performance to people he knew at the White House and the Republican National Committee.

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<sup>112</sup> Jennings worked for Sara Taylor, White House Director of Political Affairs, who in turn reported to Rove.

Senator Domenici's Chief of Staff Bell also began complaining about Iglesias to the White House sometime in 2005. Jennings told us that shortly after joining the White House in early 2005, he received criticism of Iglesias's performance as U.S. Attorney from Bell. Jennings said Bell told him on a periodic basis that he was unhappy with Iglesias's response to complaints about voter fraud, among other issues, and that the White House should replace him. Jennings said he passed that information along to his immediate superiors at the time, Taylor and Griffin.<sup>113</sup>

Jennings said that after he was promoted to the position of Deputy Director of the White House Office of Political Affairs in October 2005, he continued to hear similar complaints from Bell, including complaints about Iglesias's handling of public corruption prosecutions (which we discuss below). Jennings said he relayed that information to Taylor and Rove.

According to Jennings, sometime in 2006 Bell told him that Senator Domenici was going to call the White House Chief of Staff, Josh Bolten, about Iglesias. Jennings notified Taylor and Rove so that Bolten could be given a heads-up. We do not know whether this call was made, and if so what was discussed.

## **8. Complaints Concerning Iglesias's Handling of Public Corruption Cases**

In 2006, Iglesias was also subject to criticism from both New Mexico Republican activists and New Mexico Republican members of Congress for his alleged failure to prosecute effectively or on a timely basis two significant public corruption matters in his district, the Vigil case and the "courthouse case." We discuss those two matters in turn.

### **a. The Vigil Case**

In late 2002 or early 2003, the subject of a counterfeiting investigation told the U.S. Secret Service that he had information about bribes being paid to New Mexico's Democratic State Treasurer, Robert Vigil, to obtain government contracts. The case was referred to the Albuquerque office of the FBI, which opened an investigation and notified the New Mexico USAO. A career prosecutor in the office's White Collar Crime Section was assigned to the case, and Vigil and his predecessor in the Treasurer's office, Democrat Michael Montoya, were indicted in September 2005.

Montoya pled guilty to one count of extortion and agreed to testify as a government witness. Three other participants in the bribery scheme also pled

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<sup>113</sup> As noted above, Bell declined to be interviewed by us.

guilty and agreed to cooperate. Vigil's trial began in April 2006 and went to the jury on May 21, 2006. After 1 day of deliberation, the judge concluded that the jury was hopelessly deadlocked and declared a mistrial. According to press accounts, one juror was unwilling to convict Vigil and refused to deliberate with his fellow jurors.

Shortly after the mistrial, New Mexico Attorney General Patricia Madrid, Representative Wilson's Democratic opponent in the upcoming November 2006 election for a Congressional seat, indicted the government's four cooperating witnesses. This was viewed by some as a political move to help Madrid in her election bid, and as likely to hurt the government's case because those witnesses would be less likely to cooperate with the federal investigation while facing state criminal charges for the conduct. Wilson told us that she thought Iglesias should have responded publicly to the state indictments, and she said that his failure to do so demonstrated a failure of leadership on his part.<sup>114</sup>

Representative Wilson told us that shortly after the mistrial, Senator Domenici's Chief of Staff Bell called her and asked what she had heard about the trial.<sup>115</sup> Wilson told him she had heard that the government had a good case but that it was not presented well. She said Bell told her that the Senator's office had received the same information. Bell also told Wilson that Senator Domenici had come to the conclusion that the district needed a new U.S. Attorney. According to Wilson, she cautioned Bell that removing Iglesias right away could adversely affect the Vigil re-trial and said that Bell seemed to agree. Wilson said that she and Bell had several subsequent conversations about Iglesias in which Wilson expressed her growing concern that Iglesias was not doing his job.

Iglesias told us that soon after the Vigil mistrial, Senator Domenici summoned Iglesias to his office in Albuquerque and asked him if he needed more prosecutors to handle white collar crime. Iglesias said he responded that he had enough resources in that area, but that he needed more people to do immigration work. Iglesias also told us that he was reluctant to ask for more resources since he was aware that Arizona U.S. Attorney Paul Charlton had been criticized because people in the Department thought he had lobbied his home-state Senator for additional prosecutors.<sup>116</sup>

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<sup>114</sup> The AUSA who tried the Vigil case told us that USAO management considered issuing a public response to Madrid's action, but ultimately decided the better course was not to respond to the state indictments. Iglesias told us that he and his First Assistant were concerned that a public statement would be seized on by either the Madrid or the Wilson campaign and that the USAO would be accused of trying to affect the election.

<sup>115</sup> Wilson said that she has known Bell since she entered Congress in 1998, and that she talks with him often on issues of mutual concern.

<sup>116</sup> We describe this issue in Chapter Eight on Charlton's removal.

Senator Domenici refused our request to interview him. In a public statement issued on March 4, 2007, however, Domenici stated that he had had discussions with Iglesias over the years about resource issues in the USAO.

According to Iglesias, the Vigil re-trial, which began in September 2006, proved to be more difficult than the first trial because Vigil's attorneys knew the government's case in its entirety and were able to use that information to their advantage in cross-examination. The defense also had additional impeachment material because of the state charges against the cooperating witnesses, and one cooperator refused to testify at the second trial because of the pending state charges.

On September 30, 2006, Vigil was convicted on 1 count of attempted extortion and acquitted on the remaining 23 counts in the indictment. The verdict was seen by many of Iglesias's critics, including Representative Wilson, as a defeat for the USAO. Vigil was eventually sentenced to 37 months in prison.

#### **b. The "Courthouse Case"**

Iglesias's office handled another significant public corruption case in 2006. This case began in the fall of 2005, when an attorney representing the receiver in a state court civil proceeding provided the USAO with information he had uncovered about possible bribes to state officials in connection with the construction of a new county courthouse. The USAO notified the FBI and opened a grand jury investigation. The AUSA handling the Vigil case was also assigned to this case, which was given the code name "Operation Black Robe" but was commonly referred to as the "courthouse case."

During the course of the courthouse case investigation, the grand jury issued subpoenas for documents to financial institutions and to the administrative offices of the state court. Word of the subpoenas spread quickly, and additional information about the government's investigation came to light as the state court civil law suit progressed. In March 2006, a newspaper article identified former Democratic state Senator Manny Aragon as the target of the USAO's investigation.

As described below, this case was not indicted before the November 2006 election, which drew complaints from New Mexico Republican activists.

#### **9. Senator Domenici's Calls to Attorney General Gonzales Regarding Iglesias**

From September 2005 through April 2006, Senator Domenici telephoned Attorney General Gonzales on three occasions to complain about Iglesias's performance as U.S. Attorney: on September 23, 2005, January 31, 2006, and

April 6, 2006. Gonzales said the calls concerned Iglesias's handling of voter fraud and public corruption matters.

Gonzales testified before the Senate Judiciary Committee on April 19, 2007, that:

In the fall of 2005, when [Domenici] called me [he] 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.

According to Gonzales, Domenici did not mention any specific cases, only "public corruption cases." Gonzales further testified that Domenici never asked him to fire Iglesias, but "simply complained about the – whether or not Mr. Iglesias was capable of continuing in that position." In testimony before the House Judiciary Committee on May 10, 2007, Gonzales again stated that in his first conversation with Domenici, the Senator had expressed concern about whether Iglesias had "his best people working" on public corruption cases. Gonzales added that in one of their subsequent conversations Domenici "mentioned voter fraud cases."<sup>117</sup>

According to calendar entries from the Office of the Attorney General, Sampson and Moschella may have been in the room with Gonzales during the three calls, and Goodling may have been present for the April 6 call. According to Moschella, Gonzales never used a speaker phone, so they would have heard only his side of the conversation. Moschella said he has no memory of the calls and is not certain that he was present for any of them, but said he talked to Domenici's Chief of Staff Bell prior to at least one of the calls. Based on that conversation, Moschella said he believed that the Senator was concerned about the district's caseload and that he planned to tell Gonzales that the USAO needed additional resources. Sampson stated that he did not remember any details of Gonzales's telephone conversations with Domenici.

Goodling testified before the House Judiciary Committee that she "knew that Senator Domenici had told the Attorney General he had some concerns with public corruption," but she was not questioned in detail about the telephone conversations and she declined our request to interview her.

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<sup>117</sup> The USAO did not begin to try the Vigil case until May 2006, and we believe that Attorney General Gonzales was incorrect when he stated that Senator Domenici's 2005 call concerned public corruption matters. We found no evidence of complaints about Iglesias's handling of public corruption matters until after the first Vigil trial concluded. We believe it is likely that all of Domenici's calls to Gonzales, not just one of the later ones as Gonzales testified, concerned the voter fraud issue. However, we were unable to interview Domenici about this matter, and Gonzales told us that he did not have a specific recollection of which matter was discussed in which call.

Gonzales said he did not say anything to Iglesias about the telephone calls from Senator Domenici, and we found no evidence that Gonzales directed that the Department examine the merits of Domenici's criticism. Gonzales told us that, in retrospect, he would have expected that someone would have looked into the complaints about Iglesias that Senator Domenici related to McNulty, which we discuss below. Gonzales said to us: "You can't have, you know, a member of Congress calling and making an allegation and not checking it out and seeing whether or not there's anything there to it." Gonzales also told us that he "would hope" that the reason why Iglesias was removed was "more than simply Domenici calling and saying, 'I have concerns about . . . David Iglesias.'"

### **10. Complaints to the Department Regarding Voter Fraud and Corruption Cases**

As the 2006 elections approached, Patrick Rogers, the former general counsel to the New Mexico state Republican Party and a party activist, continued to complain about voter fraud issues in New Mexico. In a March 2006 e-mail forwarded to Donsanto in the Public Integrity Section, Rogers complained about voter fraud in New Mexico and added, "I have calls in, to the USA and his main assistant, but they were not much help during the ACORN fraudulent registration debacle last election."

In June 2006, Rogers sent the following e-mail to Executive Assistant U.S. Attorney Armijo:

The voter fraud wars continue. Any indictment of the Acorn woman would be appreciated. . . . The ACLU/Wortheim [sic] democrats will turn to the camera and suggest fraud is not an issue, because the USA would have done something by now. Carpe Diem! <sup>118</sup>

In June 2006, Mickey Barnett said he asked White House Deputy Political Affairs Director Jennings to set up a meeting for Barnett and Rogers at the Department of Justice to discuss Iglesias's performance. According to Barnett, he had complained to Jennings about Iglesias approximately 5 to 10 times by that point. Barnett told us that he wanted to ask someone at the Department about three explanations Iglesias had given him for why he had not indicted any voter fraud cases: (1) the USAO did not have enough resources; (2) Department policy prohibited them from bringing cases close to the election; and (3) the voter fraud statute required proof that the defendant intended to influence the election. Jennings arranged a meeting for Barnett with Goodling on June 21, 2006, when Barnett planned to be in Washington

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<sup>118</sup> This was apparently a reference to the Chairman of the New Mexico Democratic Party at the time, John Wertheim.

for interviews related to his pending nomination to the U.S. Postal Service Board of Governors.

Jennings told us that he did not know that Barnett wanted to complain to the Department about Iglesias, only that the meeting concerned a matter Barnett did not want to discuss with the USAO in New Mexico.<sup>119</sup> In an e-mail message to Goodling, Jennings asked her to meet with Barnett and Rogers, and Jennings characterized the subject matter as “sensitive.”

On the afternoon of June 21, 2006, Barnett and Rogers met with Goodling in her office at the Department. Barnett said they explained their concerns about Iglesias and outlined the questions they had about what Iglesias had told them regarding voter fraud cases. Barnett told Goodling that Iglesias was failing to prosecute good voter fraud cases, and Barnett also mentioned delays in a public corruption case (the “courthouse case” discussed above). According to Barnett, Goodling took extensive notes during the 20-minute meeting, but provided no feedback. Barnett said that after they finished explaining their concerns, Goodling telephoned Matthew Friedrich, then Chief of Staff to Criminal Division Assistant Attorney General Alice Fisher, and asked if she could bring Barnett and Rogers to his office.

Friedrich told us that he remembered being called by Goodling, and that while waiting for her to arrive he telephoned Noel Hillman, the former Chief of the Public Integrity Section, who was then a Counselor to Assistant Attorney General Fisher while his nomination to be a federal judge was pending. Friedrich asked Hillman to sit in on the meeting. Shortly thereafter, Goodling brought Barnett and Rogers to Friedrich’s office and left them with him.

While they waited for Hillman to arrive, Friedrich, Barnett, and Rogers made small talk about New Mexico and Albuquerque. Friedrich told us that he had the impression that Barnett and Rogers were not particularly knowledgeable about how the Department operated. He said they told Friedrich that they had already complained to Goodling about Iglesias’s performance as U.S. Attorney and explained that they were unhappy with how he had handled voter fraud in New Mexico. They stated that one case in particular, involving ACORN, had not been vigorously pursued in their opinion. At some point during the discussion, Hillman joined them, and he and Friedrich tried to explain how the Department handled such cases. Friedrich said he told Barnett and Rogers that they could contact the Public Integrity Section if they felt voter fraud cases were being ignored in New Mexico. The courthouse case was not discussed.

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<sup>119</sup> Barnett told us that he explained the purpose of the meeting to Jennings, although he acknowledged that he was not entirely sure how much he told him.

Barnett told us that Friedrich and Hillman listened carefully to their complaints and gave them all the time they needed to explain the problem. He said that when he and Rogers realized they were starting to repeat themselves, they ended the meeting, which had lasted about an hour. According to Barnett, Friedrich and Hillman listened attentively but were extremely circumspect and did not provide any information or refer them to anyone else in the Department.

According to Jennings, the next day Barnett and Rogers joined him at the White House mess for breakfast, but they did not discuss Iglesias or voter fraud issues.

### **11. Complaints to Senator Domenici**

Barnett told us that 2 weeks after his June 21 meeting at the Department, when he returned to Washington for his confirmation hearing, he spoke briefly in person with Senator Domenici. He told the Senator that he wanted to talk about three or four items, which he had written down on a 3-by-5 card. The first item was Iglesias, but when he said to the Senator, "Do we need to discuss Iglesias?" Domenici simply replied, "Nah." According to Barnett, Domenici was familiar with his complaints about Iglesias by then, and Barnett concluded from the Senator's response that no further discussion was necessary. Barnett said that Domenici never told him what, if anything, he had done or was planning to do about the complaints regarding Iglesias.

Iglesias told us that after the Vigil mistrial he learned from a friend in the New Mexico Republican Party that Rogers had sent a 14-page letter to Senator Domenici complaining about Iglesias's performance as U.S. Attorney.

### **12. Complaints to Karl Rove about Delays in the Courthouse Case**

In July 2006, another newspaper article identified former Democratic state senator Aragon as the target of the courthouse case investigation. On October 2, 2006, an article in the Albuquerque Tribune quoted a local FBI spokesman as stating the FBI had completed its investigation and had turned the case over to the U.S. Attorney's Office.<sup>120</sup>

That same day, Barnett sent a copy of the Albuquerque Tribune article by e-mail to Rove and Jennings at the White House, and to Rogers, with the message:

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<sup>120</sup> The FBI spokesman was reported to have said, "It's basically with them. As far as I know, we've completed our investigation."

Karl,

This article confirms what I mentioned Saturday.<sup>121</sup> An FBI agent told me more than six months ago that their investigation was done and been turned over to the US Attorney a long time ago. He said agents were totally frustrated with some even trying to get out of New Mexico. I can put you or anyone you designate with lawyers knowledgeable about the US Atty office – including lawyers in the office – that will show how poorly it is being run.

Scott Jennings was kind enough to set up an appointment at the Justice Department several months ago where Pat Rogers and I laid all this out. I hope Justice can now be persuaded to send out some cracker jack prosecutor and perhaps promote Iglesias to a Justice department position.

We still await the results of the task force Iglesias convened about this time two years ago on the clear Acorn fraudulent voter registrations. We were told it would look to [sic] “political” to indict anyone that close to the election. Then we never heard anything else.

Barnett told us that the FBI agent he referred to in his e-mail was the agent who was handling his background investigation for the Postal Service Board of Governors. According to Barnett, that agent was not assigned to the courthouse case, and Barnett said he received no information from anyone with first-hand knowledge of the case.

Barnett also told us that his comment in the e-mail about promoting Iglesias to a Department of Justice position reflected his and Rogers’s belief that Iglesias should be replaced with an aggressive public corruption prosecutor and “kick[ed] . . . upstairs” to a supervisory position at the Department or the White House.

Barnett further stated that although he did not attend the fundraising lunch that brought Rove to Albuquerque on September 30, 2006, he met Rove at the airport that day and accompanied him to a short meeting with Republican Party volunteers.<sup>122</sup> Barnett said he told Rove about the alleged delays in the courthouse public corruption case and the ACORN voter fraud cases, and Barnett said he complained about Iglesias’s failure to move these cases forward. According to Barnett, Rove indicated that he was aware of the

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<sup>121</sup> Weh told us that Rove had been in Albuquerque on Saturday, September 30, 2006, for a Republican National Committee fundraising lunch that Weh hosted for a small group of donors at his house.

<sup>122</sup> Several attendees at the fundraiser told us that neither Iglesias nor the courthouse case was discussed at the lunch.

complaints about Iglesias, although Rove did not tell Barnett what, if anything, he planned to do about the situation. Barnett said that by this time he had complained about Iglesias to Rove, Domenici, and other officials at the White House or the Republican National Committee on many occasions.

We asked the trial AUSA handling the courthouse case about the FBI spokesman's comments in the October 2 Albuquerque Tribune article. The AUSA said that the courthouse grand jury investigation was still underway at that time, and that a great deal of work remained to be done before the case would be ready to indict. Subpoenas for documents were outstanding, additional subpoenas had to be issued, witnesses remained to be interviewed, and the AUSA had just finished retrying the Vigil case. The AUSA told us that no one with any knowledge of the investigation would have described it as complete at that time.<sup>123</sup>

The AUSA acknowledged that FBI officials in New Mexico thought the courthouse case should have been indicted right after the Vigil retrial, and that the FBI case agents were unhappy with the USAO's decision not to assign another prosecutor to the courthouse case after the first Vigil trial.

### **13. Senator Domenici's Telephone Call to Deputy Attorney General McNulty**

On October 4, 2006, Senator Domenici called Deputy Attorney General McNulty. According to McNulty, the conversation was very brief. McNulty said Domenici expressed his concerns about Iglesias's abilities in general terms such as, "he's not up for the job," he's in "over his head," and he is "not getting the job done." McNulty said Domenici did not refer to any specific case and only talked in generalities about Iglesias's lack of fitness for the job. According to McNulty, Domenici did not ask the Department to replace Iglesias or to do anything specific.

McNulty said he has no specific recollection of discussing Domenici's phone call with Gonzales or Sampson, but he told us that it is the type of contact he would have passed along to them. McNulty told congressional investigators that he did not take any steps to find out what had triggered Domenici's call, or take any steps "of an investigative nature" in response to the call.

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<sup>123</sup> On March 29, 2007, 1 month after Iglesias left office, the New Mexico U.S. Attorney's Office obtained an indictment charging Manny Aragon and three others with mail fraud, money laundering, and conspiracy in connection with the courthouse case. Also, on that day, the USAO announced plea agreements with three other defendants in the case. On August 23, 2007, the grand jury returned a 28-count superseding indictment, adding an additional defendant. The case is still pending trial.

Sampson said he learned in October 2006, most likely from Elston, that Senator Domenici had called McNulty on October 4 to complain that Iglesias was not “up to the job.” Sampson said he remembered McNulty mentioning the call and that Domenici had said that Iglesias did not move cases and was in over his head. Sampson said that he did not recall McNulty recommending the removal of Iglesias based on the call. However, McNulty told congressional investigators that Domenici’s call was a “significant factor” in why he did not object to Iglesias’s removal or ask that Iglesias’s name be taken off the list.

Gonzales told us that he was not aware that Senator Domenici had called McNulty “until this whole thing became very public.”

#### **14. White House Communications with Attorney General Gonzales**

President Bush and Karl Rove both spoke with Attorney General Gonzales in October 2006 about their concerns over voter fraud in three cities, one of which was Albuquerque, New Mexico. There is conflicting evidence about exactly what was communicated to Gonzales, and what the Department’s response was to these concerns.

On March 13, 2007, in response to reporters’ questions about the removals of U.S. Attorneys, White House spokesman Dan Bartlett stated that the President had told Gonzales in late 2006 that he had been hearing about election fraud concerns from members of Congress regarding three cities: Albuquerque, Philadelphia, and Milwaukee. Bartlett said the President did not identify any U.S. Attorney by name. Gonzales told Congress and us that although he had no specific recollection of his discussion with the President, he did not dispute Bartlett’s assertion. Gonzales testified to the Senate that after checking his calendar he believed his meeting with the President was on October 11, 2006.

Gonzales testified several times that in the fall of 2006, Rove had also told him that he had “concerns” about voter fraud in three cities. Gonzales told us that he thought these were the same three cities that Bartlett said the President mentioned to Gonzales during his October 11 meeting. Gonzales stated that he surmised that his conversation with Rove preceded his conversation with the President because of a remark made by Bartlett. Bartlett had told the media that when the President raised the issue of voter fraud with Gonzales, Gonzales replied, “I know, and we are looking at those issues.” Based on that statement, Gonzales told us that he thought his comment was referring to his prior conversation with Rove. Gonzales testified that he had no recollection of Rove asking or telling him to remove Iglesias.

Gonzales testified that he recalled mentioning his conversation with Rove to Sampson and asking him to look into the matter. Sampson told

congressional investigators that he recalled that after the removals became public, Gonzales told him that he recalled the President telling him in October that Domenici had concerns about Iglesias. Sampson said that Gonzales told him that Rove had concerns about voter fraud enforcement by three U.S. Attorneys, in Albuquerque, Philadelphia, and Milwaukee, and that Gonzales had asked Sampson to look into the allegations. Sampson said he in turn asked Matthew Friedrich, then a Counselor to the Attorney General, to look into the allegations. Sampson said that he had no recollection of Friedrich ever getting back to him on the issue.

Friedrich told congressional investigators that according to his notes, on October 12, 2006, Sampson asked him to look into concerns from the White House about voter fraud enforcement in Albuquerque, Philadelphia, and Milwaukee. Friedrich did not recall Sampson identifying anyone at the White House who raised those concerns. According to Friedrich, he then called Benton Campbell, the Chief of Staff to Criminal Division Assistant Attorney General Alice Fisher, and asked him for an update on jurisdictions where voter fraud enforcement was a problem. Campbell in turn called Public Integrity Section attorney Donsanto, the Department's expert on voter fraud matters. Based on his notes of their conversation, Friedrich said that Campbell had told him that voter fraud in Albuquerque was "not too bad," but that in rural New Mexico it was "bad." Friedrich said he passed this information on to Sampson. As noted above, however, Sampson said he did not recall hearing back from Friedrich on the issue.

According to Campbell, Donsanto gave him an overview of voter fraud issues in several districts, including New Mexico. With respect to New Mexico, Donsanto told Campbell that enforcement of voter fraud in Albuquerque was good, but that there were problems in rural counties. Campbell said that Donsanto mentioned that the New Mexico voter fraud initiative had not produced any cases. Campbell also said that Donsanto said something to the effect that the district did not follow up on cases and seemed reluctant to prosecute. Donsanto told us, however, that he thought Iglesias pursued voter fraud cases vigorously and fairly.

Both Gonzales and Sampson testified that Gonzales did not recommend that Iglesias be placed on the removal list as a result of the call from Rove. According to Gonzales, he neither intended nor expected Sampson to add Iglesias's name to the removal list based solely on the fact of Rove's complaint.

## **15. Iglesias's Meeting with Rogers**

On October 11, 2006, Iglesias met with Rogers to discuss voter fraud issues. The meeting was prompted by an e-mail Rogers sent to EAUSA Armijo on October 3, 2006, attaching an item from a local political blog that was

critical of the Republican claim that election fraud was a growing crisis in New Mexico. Rogers wrote in his e-mail:

[T]his is probably not the best time to remind you guys of the ACORN disasters, but I wanted to make sure you and David saw the Democrat's analysis of the task force. History being the lie generally agreed upon, [the blogger's] spin is the "history" of fraud in NM. Call when you can.

Armijo forwarded the e-mail to Iglesias, who suggested scheduling a meeting with Rogers. On October 11, 2006, Iglesias, Armijo, and Rogers met for lunch at an Albuquerque restaurant. After some small talk, Rogers brought up the issue of voter fraud and complained that Iglesias had not responded to the problem. According to Iglesias, he did not discuss the details of any Task Force cases, but he told Rogers that "if we have a prosecutable case, we'll prosecute it. If we don't, we won't." Armijo said he confirmed with Rogers that the FBI had interviewed him about his voter fraud complaints, but said he and Iglesias did not discuss the details of any cases with him.

Armijo also said that during the lunch Rogers mentioned the recent newspaper article about the courthouse case. Armijo was not involved in that prosecution, and told Rogers he had not seen the article. Armijo told us that he believed Rogers was looking for information about what the USAO was planning to do in that case. Armijo did not respond, and said that Iglesias cut off the discussion by telling Rogers they could not talk about a pending case.

## **16. Representative Wilson's Telephone Call to Iglesias**

On Sunday, October 15, 2006, Representative Wilson e-mailed a newspaper article about public corruption prosecutions in other states to her Chief of Staff, her campaign manager, another campaign aide, and Domenici's Chief of Staff Bell with the message, "FBI or those close to them are talking about public corruption cases ongoing in other states." Bell forwarded the message to Jennings in the White House with the comment, "Seems like other USAttorneys (sic) can do their work even in election season. And FBI has already admitted they have turned over their evidence to the USA in NM and are merely awaiting his action . . . ."

According to Wilson, her e-mail to Bell was not intended as a reference to Iglesias. However, the next day, October 16, 2006, Wilson telephoned Iglesias to ask about delays in public corruption matters being handled by his office. Wilson told us that a day or two before the call, a constituent had complained to her that Iglesias was intentionally delaying public corruption prosecutions in the district. According to Wilson, the constituent did not refer to any particular matter, just corruption cases in general. According to Wilson, the constituent

alleged that sealed indictments had already been returned, and that Iglesias was delaying their release for no reason.

Wilson refused to identify the constituent to us and would not provide any information that would allow us to assess the constituent's bias, motives, or credibility. She simply asserted that the constituent was a reliable source whom she believed to be knowledgeable about the matter. However, contrary to what Wilson was told, there were no sealed indictments in the courthouse case in October 2006.

According to Wilson, she told Iglesias in her telephone call that she had heard he was intentionally delaying corruption prosecutions. Iglesias responded that the accusation was not true and that the AUSA who handled corruption cases had simply been tied up with the Vigil trial. Wilson said she then asked if delaying the release of sealed indictments rang any bells with him. Iglesias responded that his office sometimes sealed national security cases or juvenile cases, but that such a practice would not necessarily apply to corruption cases. Wilson said she closed the conversation by stating that she would take him at his word.

Wilson, who had served in the Air Force, told us that because she thought she was speaking as one former military officer to another, she intended that final phrase to convey that Iglesias's word was good enough for her and that she considered the matter closed. According to Wilson, she did not discuss this conversation "with any other legislative or executive official" and "did not tell New Mexico Senator Pete Domenici or anyone on his staff about the matter or her telephone conversation with Mr. Iglesias . . . or any other official." Wilson denied calling Iglesias in an effort to induce him to file any indictments prior to the election, which was only weeks away, in order to influence the outcome of the election.

Iglesias told us that Wilson called him and said she had heard something about sealed indictments in corruption cases. Iglesias knew that the only pending public corruption case that had been reported in the press at that time was the courthouse case, so he concluded Wilson was referring to that matter. He said he was wary of discussing a pending investigation, and he deflected the question with a general statement about how the office sometimes used sealed indictments in juvenile cases or in national security matters. Wilson ended the conversation by saying something like, "Well, I guess I'll have to take your word for it." Iglesias told us that, based on her tone, he concluded that she was disappointed by his response.

Iglesias did not report Congresswoman Wilson's call to anyone in the Department even though he acknowledged knowing that the U.S. Attorneys'

Manual required him to report the call.<sup>124</sup> He said that he considered Wilson to be a friend, that he thought she had simply exercised poor judgment in calling him, and that he believed the matter would go no further.

### **17. Senator Domenici's Telephone Call to Iglesias**

Iglesias said that approximately 10 days after Wilson's call, sometime around October 26, 2006, and possibly on a weekend, Steve Bell called him at home in the morning and told him that Senator Domenici wanted to talk to him about some complaints he had heard. Domenici came on the line and, without any preliminary small talk, asked about the district's corruption matters. Iglesias said he took this as a reference to the courthouse case, the only publicly known corruption investigation in the office at the time. Domenici asked Iglesias if he was going to file an indictment before November.

Iglesias told us that he wanted to be responsive without revealing any information, so he tried to hedge his answer by saying that he did not think so. According to Iglesias, Domenici then said, "Well, I'm very sorry to hear that," and hung up.

Iglesias told us he turned to his wife, who was in the room during the call. She asked him who he had been talking to, and he said, "You're not going to believe what just happened," and described the call.

We also interviewed Iglesias's wife about her knowledge of the Domenici phone call. She confirmed that she was in the room with Iglesias when he took the call from Senator Domenici on his cell phone. She said it may have been a weekend morning because they were both in casual clothes. She described her husband's tone during the call as serious, as if he were receiving bad news, and his body language suggested to her that it was not a friendly conversation. She said at one point in the conversation she heard him say, "I don't think so."

Mrs. Iglesias estimated that the conversation lasted 2 minutes, and said the call ended abruptly without a "good bye" or any other closing words. At first, neither of them could believe that Senator Domenici had hung up the phone, and she suggested that Iglesias's cell phone had dropped the call and that Domenici would call back.

According to Iglesias, he felt ill after the call. He said he believed Domenici had asked for confidential information about an ongoing investigation, and that Iglesias would pay in some way for refusing to cooperate with him.

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<sup>124</sup> USAM Section 1-8.010 requires that all congressional requests to U.S. Attorney's Offices for information about or assistance with non-public matters must promptly be reported to the Counsel to the Director of EOUSA.

Iglesias said he did not mention the call to anyone other than his wife until after he was asked to resign. He said that he decided not to report the call to the Department, which he knew was required by the U.S. Attorneys' Manual, out of a combination of personal admiration for the Senator and gratitude for his past assistance, all of which made Iglesias unwilling to embarrass or create difficulties for Domenici. Iglesias said he also believed that he was unlikely to be the winner in a dispute with Senator Domenici.

On March 4, 2007, after Iglesias's removal and public disclosure of the telephone call, Domenici issued the following public statement about the call to Iglesias:

I called Mr. Iglesias late last year. My call had been preceded by months of extensive media reports about acknowledged investigations into courthouse construction, including public comments from the FBI that it had completed its work months earlier, and a growing number of inquiries from constituents. I asked Mr. Iglesias if he could tell me what was going on in that investigation and give me an idea of what timeframe we were looking at. It was a very brief conversation, which concluded when I was told that the courthouse investigation would be continuing for a lengthy period.

In retrospect, I regret making that call and I apologize. However, at no time in that conversation or any other conversation with Mr. Iglesias did I ever tell him what course of action I thought he should take on any legal matter. I have never pressured him nor threatened him in any way. . . .

My conversations with Mr. Iglesias over the years have been almost exclusively about this resource problem and complaints by constituents. He consistently told me that he needed more help, as have many other New Mexicans within the legal community.

My frustration with the U.S. attorney's office mounted as we tried to get more resources for it, but public accounts indicated an inability within the office to move more quickly on cases. Indeed, in 2004 and 2005 my staff and I expressed my frustration with the U.S. Attorney's office to the Justice Department and asked the Department to see if the New Mexico U.S. Attorney's office needed more help, including perhaps an infusion of professionals from other districts.

This ongoing dialogue and experience led me, several months before my call with Mr. Iglesias, to conclude and recommend to the Department of Justice that New Mexico needed a new United States Attorney.

As a result of Senator Domenici's acknowledgement that he called Iglesias in October 2006 to discuss an ongoing criminal investigation, the Senate Select Committee on Ethics opened an investigation of Domenici on March 7, 2007. The Ethics Committee interviewed Senator Domenici, Iglesias, and others, and on April 24, 2008, issued a Public Letter of Qualified Admonition to Senator Domenici. The letter stated that the Ethics Committee found "no substantial evidence to determine that [Domenici] attempted to improperly influence an ongoing investigation." The Ethics Committee's letter also stated that Domenici's telephone call "created an appearance of impropriety" because of the "approaching election which may have turned on or been influenced by the prosecutor's actions in the corruption matter."

As noted above, in response to our request for an interview, Senator Domenici initially informed us through counsel that he would cooperate with our investigation after the Senate Ethics Committee finished its investigation. At the conclusion of the Ethics Committee investigation, we again asked Domenici for an interview. Domenici's counsel requested that we provide him in advance with the subject matter of our questions. When we did so, Domenici continued to decline to be interviewed, stating that there were "institutional implications" to such an interview, and noting that he served on a committee with oversight over the Department. Domenici's counsel also expressed concern that our interview would be recorded and under oath. Although we agreed to consider waiving these conditions, Domenici again refused our request for an interview. Finally, Domenici's counsel offered to respond through his attorneys to written questions. We declined that offer because we do not believe it would be a reliable or appropriate investigative method under these circumstances.

#### **18. Allegation Concerning Representative Wilson's Telephone Call to Harriet Miers**

As mentioned in Chapters One and Three of this report, during our investigation we learned that in March 2007, to prepare a timeline of events related to the U.S. Attorney firings, White House Associate Counsel Michael Scudder interviewed several people in the White House and in the Department, and also gathered information from Office of Legal Counsel (OLC) Acting Assistant Attorney General Steven Bradbury, who had interviewed other Department managers about the U.S. Attorney removals. Although the White House refused to provide us with a complete copy of Scudder's memorandum, it provided to us small portions of it, including the following paragraph:

In approximately October 2006, Paul McNulty received a telephone call from [White House Counsel Harriet] Miers in which she relayed a telephone conversation she had with Representative Wilson from New Mexico. McNulty recalls Miers stating that Wilson was displeased with David Iglesias's performance as U.S. Attorney in

New Mexico. McNulty does not recall Miers relating any concern about Iglesias not prosecuting voting fraud.

According to Bradbury, the information in this paragraph was relayed to Bradbury by McNulty, and Bradbury subsequently relayed it to Scudder. If true, the information in this paragraph about the call – particularly the timing – would be significant, because it would show that Wilson was complaining to the White House about Iglesias shortly before the 2006 election, and that the White House relayed her complaints to the Department in October 2006, both of which occurred just before Iglesias’s name first appeared on the list of U.S. Attorneys to be removed.

However, Representative Wilson told us she was certain that she never had a telephone conversation with Miers about Iglesias or any other related matter, never had a substantive discussion with her in person, and may never have spoken to her at all on any matter. Wilson suggested that we confirm her representations by examining White House telephone logs. We subsequently asked the White House Counsel’s Office to produce telephone logs that would show Miers’s calls in October and November 2006. In response, the Counsel’s Office told us that there were no entries in Miers’s telephone logs reflecting any conversations with Representative Wilson in September, October, or November 2006.

McNulty told us that Miers called him and said that Wilson had complained to her about Iglesias. But McNulty said that the call occurred in November 2006, not October 2006 as represented in Scudder’s chronology. McNulty said he was certain that Miers told him about Wilson’s complaint only after Iglesias had been added to the list of U.S. Attorneys to be removed (the November 7, 2006, list), and after that list had been transmitted to the White House.

Miers refused our requests for an interview. We were therefore unable to resolve whether or when this call occurred.

### **III. Iglesias’s Removal**

#### **A. Iglesias is Added to Sampson’s List**

As noted above, on November 7, 2006, Sampson sent Elston a revised list of U.S. Attorneys slated for removal that included Iglesias’s name for the first time. Elston responded to Sampson that the list looked “fine” to him, and he forwarded it to McNulty that evening.

In their various statements to Congress and to us, the Department officials who Sampson identified as being involved in the final stage of the U.S. Attorney removal process – Gonzales, McNulty, Goodling, and Elston –

disclaimed any responsibility for causing Iglesias's name to be placed on Sampson's U.S. Attorney removal list in the first instance. McNulty stated that he did not add Iglesias to the list. Elston told us he did not recommend adding Iglesias to the list, although he assumed his removal had something to do with Senator Domenici's call to McNulty. Goodling testified that she did not know who put Iglesias on the list. Gonzales stated that he lost confidence in Iglesias because Senator Domenici had lost confidence in him, but that he did not add Iglesias to the list.

As discussed below, Sampson gave inconsistent testimony to Congress and to us about his knowledge of who put Iglesias on the removal list and why. In his testimony before the Senate Judiciary Committee on March 29, 2007, Sampson was asked: "Who was responsible for your consideration of David Iglesias to be added to the list?" Sampson answered that "sometime after October 17 . . . an effort was made . . . by myself, the Deputy Attorney General, his chief of staff, [and] Monica Goodling" to look at the U.S. Attorneys whose 4-year term had expired for the purpose of determining whether additional names should be added to the removal list and, as a result, four names, including Iglesias, were added. According to Sampson, the other three names came off the list but Iglesias's name remained "because nobody suggested that he come off."

In fact, as described in Chapter Three of this report, only one name – Iglesias – was added to the list between October 17 and November 7. The three names that came off the list after October 17 – Tom Marino, Greg Miller, and Paula Silsby – had already appeared on the previous list on September 13, 2006.

Sampson told the Senate Judiciary Committee that the fact that Senator Domenici had made three calls to the Attorney General and one call to McNulty regarding Iglesias may have influenced the decision to remove Iglesias. Sampson also testified that he recalled McNulty saying that Senator Domenici would not mind if Iglesias's name stayed on the list.

Sampson also told the Senate that concerns about Iglesias's management contributed to his removal, including Mercer's recommendation to remove Iglesias as chair of an AGAC subcommittee and Margolis's statement suggesting that Iglesias delegated too much authority to his First Assistant. Yet, Sampson also acknowledged in his testimony that he did not attempt to verify any of the information he received about Iglesias and did not review an EARS evaluation of Iglesias's office.

In his subsequent interview with Senate Judiciary staff on April 15, 2007, Sampson stated "I don't remember how Mr. Iglesias first got on the list. I remember that after he was on the list, there was discussion about whether he

should remain on the list. But I don't have any memory about how that came to be."

In his interview with us, Sampson gave a conflicting and confused account of how Iglesias was added to the removal list:

I don't remember putting his name on the list. I did it, because I was the one who did that, but I don't remember doing it and I don't remember there being a specific reason for doing it. You know, I knew these things generally about Mr. Iglesias, and I apparently put his name on the list.

When Sampson referred to "these things" in this quotation, he said he was referring to what he thought he had heard about Iglesias in October 2006, including Domenici's and Rove's communications with the Department combined with bits and pieces of information he had learned about Iglesias before then. Sampson also said he recalled hearing from Matthew Friedrich that Republicans in New Mexico were unhappy with Iglesias and that this may have been a factor he considered.<sup>125</sup> In addition, Sampson said he knew that in early 2005 Mercer had recommended that Iglesias be replaced as the head of an AGAC subcommittee for lack of effective participation.

Sampson also told the Senate that "to the best of my memory" he knew about Margolis's allegation that Iglesias over-delegated authority to his First Assistant before October 2006. However, as we discussed above, Margolis did not become aware of the First Assistant's comment until he was interviewed for Iglesias's position, after Iglesias's removal.

With respect to his various accounts of why Iglesias was placed on the list, Sampson told us: "The way Iglesias got on the list is I sort of generally knew all of these things, and in looking back over the list again, put him on, and then nobody suggested that he come off."

Sampson claimed that no one at the White House exerted any pressure to place Iglesias's name on the U.S. Attorney removal list. He testified that he

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<sup>125</sup> Yet, Friedrich told us that he did not tell Sampson about the complaints from Rogers and Barnett until February 28, 2007, the day of Iglesias's press conference, which was well after he was told to resign. On that date, Friedrich was traveling with Gonzales, Sampson, and AAG Fisher to a meeting in San Diego. Fisher, who was seated at the front of the plane with Gonzales and Sampson, called him to the front and asked what he knew about voter fraud in New Mexico. Friedrich said he gave them a brief account of his meeting with Rogers and Barnett, and related what Campbell had told him about New Mexico and other districts. However, Friedrich told us that he is certain that he did not tell Sampson about Rogers and Barnett before then because he regarded their complaints as unsubstantiated. We concluded that Sampson did not learn about this complaint until after Iglesias had been removed.

did not recall anyone at the White House, including specifically Rove and Miers, suggesting that Iglesias needed to be removed.

## **B. White House Knowledge of the Decision to Remove Iglesias**

The 2006 mid-term congressional elections occurred on November 7, 2006. At 1:03 p.m. that day, Domenici's Chief of Staff Bell sent Rove an e-mail about ballot problems in a New Mexico precinct. Bell ended his e-mail with the statement, "We worry still about the USA here." Rove responded at 1:35 p.m.: "I'd have the Senator call the Attorney General about this."

On November 15, 2006, Representative Wilson attended a White House breakfast meeting with a dozen or so Republican members of Congress who had just won closely contested elections. Rove was also present. Wilson told us that as the meeting was breaking up she approached him and said, "Mr. Rove, for what it's worth, the U.S. Attorney in New Mexico is a waste of breath." Rove responded, "That decision has already been made. He's gone." According to Wilson's calendar, the meeting occurred from 7:30 to 8:30 a.m.

Department e-mail records show that Sampson sent the November "USA Replacement Plan" that first included Iglesias's name to Miers at the White House on November 15, 2006, at 10:55 a.m. There is no record of the list being provided to the White House before then. Yet, neither Sampson nor any of the other Department or White House officials we interviewed said that the White House was told that Iglesias had been added to the removal list before then. As described previously, Miers and Rove declined our requests for an interview. Thus, we were unable to determine how or why Rove knew that Iglesias was slated to be replaced when he spoke to Wilson earlier in the morning on November 15.

## **C. Iglesias is Told to Resign**

Consistent with Sampson's written plan for terminating the U.S. Attorneys, on the morning of December 7, 2006, Deputy White House Counsel Kelley informed Senator Domenici's office that Iglesias was being asked to resign. After the call, Kelley reported to Sampson, "Domenici's COS [chief of staff] is happy as a clam."

Iglesias told us that on the afternoon of December 7, 2006, he was at the Baltimore Washington International airport when he received a message to call EOUSA Director Michael Battle. Iglesias said he returned the call right away and asked what was going on. Battle told him that the Administration wanted "to go a different way" and asked him to submit his resignation by the end of January 2007. Iglesias asked if there was a problem, to which Battle replied

that he did not know and did not want to know, but that “it came from on high.”<sup>126</sup>

Iglesias told us that he had no previous indication the Department had any problem with his performance as U.S. Attorney, and that he had expected to stay in office until the end of the Bush Administration. Iglesias said he had not thought about his next job and knew that he would need more time to line something up.

On December 14, 2006, Weh attended a Christmas party at the White House and asked Rove, “When are we ever going to get rid of Iglesias?” Weh told us that Rove responded, “He’s been told.”

On December 18, 2006, Iglesias asked Battle by e-mail for additional time before he stepped down as U.S. Attorney. On January 5, 2007, not having heard back from Battle, Iglesias made the same request by e-mail to McNulty. McNulty passed the request along to Sampson, who gave his approval. McNulty let Iglesias know later that day that he had until the end of February 2007 to leave office.

Iglesias thanked McNulty by e-mail and asked if he could use him as a reference. McNulty replied, “I would be happy to be a reference for you.” Iglesias made the same request to Attorney General Gonzales through Sampson, who responded, “You can list the AG as a reference – not a problem.”<sup>127</sup>

#### **IV. Analysis**

In this section, we provide our analysis regarding the reasons proffered for Iglesias’s removal. However, at the outset it is important to note that we were unable to fully investigate these issues because of the refusal by several former key White House officials, including Harriet Miers and Karl Rove, to cooperate with our investigation. In addition, the White House would not provide us any internal documents and e-mails relating to the removals of

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<sup>126</sup> Shortly after receiving the December 7 call from Battle, Iglesias spoke by telephone with U.S. Attorney Johnny Sutton from the Western District of Texas, the Chair of the AGAC. Iglesias told Sutton about the call and asked for his advice. According to Iglesias, Sutton said, “This is political. If I were you, I’d go quietly.” Sutton told us he remembers the conversation, but said that if he used the word “political,” it would have been in the context of, “we’re all political appointees, and there’s not a lot we can do if they ask us to leave.” He stated that he had no advance knowledge of any political considerations that may have been behind Iglesias’s removal.

<sup>127</sup> Iglesias told us that he made the reference requests because he was trying to understand why he had been fired. He said he reasoned that if he had been fired for poor performance, neither official would have been willing to serve as a reference.

Iglesias or the other U.S. Attorneys. Our investigation was also hindered by the refusal of Senator Domenici and his Chief of Staff to agree to an interview by us. In addition, we were not able to interview Monica Goodling, who also declined to cooperate with our investigation.

As a result, important gaps remain in the facts regarding Iglesias's removal as U.S. Attorney. As discussed at the end of this chapter, we believe this investigation should be pursued further, and we recommend that a counsel specially appointed by the Attorney General work with us to further examine the reasons behind Iglesias's removal and whether criminal laws were violated.

However, as discussed below, we believe the evidence we uncovered showed that Iglesias was removed because of complaints to the Department of Justice and the White House by New Mexico Republican members of Congress and party activists about Iglesias's handling of voter fraud and public corruption cases. We concluded that the other reasons proffered by the Department after his removal were after-the-fact rationalizations that did not actually contribute to Iglesias's removal.

Moreover, we determined that the Department never objectively assessed the complaints raised by New Mexico politicians and activists about Iglesias's actions on the voter fraud or public corruption cases, or even asked Iglesias about them. Rather, based upon these complaints alone and the resulting "loss of confidence" in Iglesias, the Department placed Iglesias on the removal list and told him to resign along with the other U.S. Attorneys.

As we discuss below, by these actions we believe Department leaders abdicated their responsibility to ensure that prosecutorial decisions would be based on the law, the evidence, and Department policy, not political pressure.

In the following sections, we discuss in turn the inaccurate reasons proffered by the Department for Iglesias's removal, the real reason that we were able to determine in this investigation, and the unanswered issues regarding Iglesias's removal.

#### **A. Iglesias was not Removed Because of Management Issues**

On Sampson's first list of U.S. Attorneys sent to Miers at the White House in March 2005, Iglesias was identified as 1 of 26 "strong" U.S. Attorneys who should be retained by the Department. Iglesias did not appear on any of Sampson's subsequent removal lists until the list Sampson circulated on November 7, 2006, after Republican members of Congress and party activists from New Mexico had repeatedly complained to the White House and the Department about Iglesias's handling of voter fraud and public corruption cases.

After the U.S. Attorneys were removed and as part of their preparations for their congressional testimony about the removals, Department officials constructed a list of reasons justifying the removals. This list, and McNulty's subsequent briefing of Congress using this list, stated that Iglesias was removed in part because he was an "underperformer" and an "absentee landlord" who over-delegated authority to his First Assistant U.S. Attorney. Similarly, Moschella stated in his congressional testimony, again based on the information from this list of reasons, that Iglesias's removal was based in part on concerns about his management and that his office was in need of greater leadership.

Based on our investigation, we concluded that these statements were disingenuous after-the-fact rationalizations that had nothing to do with the real reason for Iglesias's removal. As noted above, Iglesias was identified as a strong U.S. Attorney on Sampson's initial U.S. Attorney removal list, and nothing changed substantively to alter that assessment – except the complaints from New Mexico politicians and party activists about his handling of voter fraud and public corruption cases.

The two EARS evaluations of his office completed during his tenure as U.S. Attorney do not support claims that Iglesias was an "absentee landlord" who "over delegated," or that the office lacked strong leadership. For example, the 2002 EARS evaluation described Iglesias as "well respected by the client agencies, judiciary, and USAO staff. He provided good leadership . . . and was appropriately engaged in the operations of the office." Similarly, the 2005 EARS evaluation noted that Iglesias "was respected by the judiciary, agencies, and staff." It added that his First Assistant appropriately oversaw the day-to-day work of the office's senior management team, effectively addressed all management issues, and directed resources to accomplish the Department's and the U.S. Attorney's priorities. Neither of these EARS evaluations criticized Iglesias for his management of the New Mexico U.S. Attorney's Office.

We also found no evidence that any Department official ever raised any concerns about Iglesias's management of the office to him, or to others within the Department, prior to his removal.

The testimony of Sampson, who placed Iglesias on the removal list, also did not support these alleged reasons for his removal. Sampson initially stated that he did not recall the reasons Iglesias was placed on the November 7 removal list, although he said the fact that Senator Domenici had made three calls to the Attorney General and one call to McNulty complaining about Iglesias may have influenced his decision. Sampson's only claim that was vaguely related to a management concern was that he had heard that Principal Associate Deputy Attorney General Mercer said in 2005 that Iglesias and several other U.S. Attorneys should not be reappointed as chairs of subcommittees of the Attorney General's Advisory Committee (AGAC) because

they were not as effective as chairmen as Mercer thought they should have been. Yet, Iglesias was not included on the first four removal lists Sampson produced in 2005 and 2006. Moreover, no other U.S. Attorneys were removed because of some concern about their effectiveness in chairing an AGAC subcommittee. Even Mercer told us that he did not expect to see Iglesias on the list of U.S. Attorneys to be removed.

We concluded that the alleged concern that Iglesias was an “absentee landlord” or that he had delegated to his First Assistant too much authority to run the office had nothing to do with Iglesias’s removal. Other than Sampson, none of the witnesses involved with reviewing the various U.S. Attorney removal lists said that they considered Iglesias’s alleged absence from the office or delegation of management responsibility as reasons for his dismissal.

Moreover, although Sampson testified to Congress that Associate Deputy Attorney General Margolis had indicated at some point that Iglesias “delegated a lot to his First Assistant,” Margolis told us that he never heard about that claim until after Iglesias was removed, during his interview of Larry Gomez, Iglesias’s First Assistant, for the U.S. Attorney position. However, according to Margolis, he heard from Gomez only that he ran the day-to-day operations of the office, and Margolis thought that this statement “corroborated” the allegation that Iglesias was an absentee landlord. Margolis acknowledged that Gomez said nothing negative about Iglesias during his interview. In fact, Gomez told us that he did not think that Iglesias over delegated authority or was an absentee landlord. Gomez said that Iglesias was “engaged in his office,” and that that Iglesias’s management style was “very good.” In addition, Gomez said he never heard complaints from others about Iglesias’s management style. Rumaldo Armijo, Iglesias’s Executive Assistant, also told us that he never heard anyone express concern that Iglesias was an absentee landlord or that Iglesias did not spend enough time in the office. Armijo said that he believed that Iglesias’s delegation of authority to Gomez was appropriate, that Iglesias was “a strong leader,” and that he was “very active in everything that went on here.”

It is true that Iglesias was a Captain in the Navy Reserves and was required to serve reserve duty for 36 days each year. However, the Department and the White House knew about these responsibilities when he was appointed, and no one raised that as a concern during his tenure as U.S. Attorney. Further, neither of the two EARS reviews raised that concern.

In sum, we believe the Department’s claims after Iglesias’s removal that concerns about his management of his office or that he was an “absentee landlord” were justifications created after-the-fact in an attempt to buttress the rationale for his removal. We found no evidence that any such concerns actually contributed to Iglesias’s removal.

## **B. Complaints about Iglesias's Handling of Voter Fraud and Public Corruption Cases**

The evidence we uncovered in our investigation demonstrated that the real reason for Iglesias's removal were the complaints from New Mexico Republican politicians and party activists about how Iglesias handled voter fraud and public corruption cases in the state.

As detailed above, many Republicans in New Mexico believed that fraudulent registrations by Democratic Party voters was a widespread problem in New Mexico, an evenly divided state politically that has had very close national elections. Beginning in the summer of 2004, New Mexico Republican Party activists talked to Iglesias about the "party's . . . efforts" on the voter fraud issue, and sought to involve him in those efforts.

In response to the allegations of voter fraud, and after discussions with the Department's Criminal Division about the issue, Iglesias formed an Election Fraud Task Force to examine the complaints. The Task Force's participants included the FBI and election law experts in the Department. Iglesias also sought to explain to New Mexico Republican Party officials the Department's policies regarding the appropriate handling of such complaints.

We found that Iglesias's approach to these complaints received recognition from within the Department as an example of how to handle voter fraud investigations. In addition, the Chief of the Public Integrity Section's Election Crimes Branch, Craig Donsanto, told us that he thought Iglesias pursued voter fraud cases vigorously and fairly, and that he had no complaints about Iglesias's office's attention to those matters.

However, New Mexico Republican officials were dissatisfied with Iglesias's task force approach and its prosecutorial decisions on individual voter fraud cases. Consequently, they began making repeated and vociferous complaints about Iglesias's handling of these cases, first directly to Iglesias, then to the Department, to New Mexico Republican members of Congress, and to the White House. These complaints generated requests from Senator Domenici and Representative Wilson for Iglesias's removal. It also appears that the complaints from the New Mexico Republicans reached the highest levels of the White House, including Karl Rove.

We found that Senator Domenici called Attorney General Gonzales three times about Iglesias – in September 2005, January 2006, and April 2006. Domenici declined to be interviewed by us, and Gonzales's testimony was vague about the substance of each of the three calls. However, Gonzales told us he recalled that Domenici questioned whether Iglesias should remain in his position as U.S. Attorney and mentioned voter fraud and public corruption cases as areas of concern.

In addition, in 2006 New Mexico Republican officials began complaining about Iglesias's alleged delay in indicting a case, known as the courthouse case, against a prominent Democrat prior to the 2006 congressional mid-term election. However, the New Mexico AUSA handling the matter told us that the courthouse investigation was still ongoing at that time, that a great deal of work remained to be done before the case would be ready to indict, and that no one with any knowledge of the investigation would have described it as complete at that time.

In October 2006, shortly before the elections, the complaints about Iglesias intensified. On September 30, 2006, and October 2, 2006, New Mexico Republican political activist Mickey Barnett complained to Rove and others that Iglesias was not moving quickly enough on the courthouse case and was not prosecuting voter fraud cases before the election. According to Barnett, Rove said he was familiar with the complaints about Iglesias. On October 4, Senator Domenici called McNulty expressing concern about Iglesias's lack of fitness for the job of U.S. Attorney.

Also in October 2006, according to Gonzales, Rove expressed concern to him about voter fraud in three jurisdictions, including Albuquerque, New Mexico. Gonzales said he mentioned the conversation to Sampson and asked him to look into it. In addition, on October 11 President Bush told Gonzales he was receiving complaints from congressmen regarding voter fraud in three jurisdictions (apparently the same three that Rove discussed with Gonzales). Although Gonzales told us he did not recall this conversation with the President, he did not dispute that it occurred. Sampson told congressional investigators that he recalled that after the removals became public, Gonzales told him that he recalled the President telling him in October that Domenici had concerns about Iglesias. Sampson said that Gonzales told him that Rove had concerns about voter fraud enforcement by U.S. Attorneys in Albuquerque, Philadelphia, and Milwaukee.

On October 15, Representative Heather Wilson sent an article to Senator Domenici's Chief of Staff, Steve Bell, noting public corruption prosecutions in states other than New Mexico. Bell forwarded the complaint to the White House, stating that other U.S. Attorneys were able to "do their work in an election season." The next day Wilson called Iglesias inquiring whether he was delaying public corruption investigations. Ten days later, around October 26, Senator Domenici called Iglesias about the courthouse case, and asked Iglesias if an indictment would be filed "before November." When Iglesias responded that he did not think it would, Domenici said he was sorry to hear that and hung up.

Several days later, on November 7, Iglesias appeared on Sampson's removal list for the first time. Sampson transmitted this list to the White House on November 15. Yet, even before the list was transmitted, the White

House had apparently been informed that Iglesias's name had been included on it.

We found that the Department officials who Sampson identified as being involved in the final stage of the U.S. Attorney removal process – Gonzales, McNulty, Goodling, and Elston – disclaimed any responsibility for causing Iglesias's name to be placed on this list. McNulty stated to us that he did not add Iglesias to the list. Elston told us he did not recommend adding Iglesias to the list, although he assumed his removal had something to do with Senator Domenici's call to McNulty. Goodling testified to Congress that she did not know who put Iglesias on the removal list.

When Gonzales was asked about Iglesias's removal during his hearing before the House Judiciary Committee, he noted that Senator Domenici had lost confidence in Iglesias, and also said that “[n]ot having the confidence of the senior senator and the senior leadership in the Department was enough for me to lose confidence in Mr. Iglesias . . . .” However, Gonzales also testified that he hoped that Iglesias was not removed solely because of Domenici's calls.

In Sampson's congressional testimony, he disclaimed knowledge of how or why Iglesias was added to the removal list. He ultimately acknowledged that he added Iglesias to the list sometime between October 17 and November 7, 2006, but stated that he had no specific recollection of why he did so. He said that at the time he added Iglesias to the list he was aware that Senator Domenici had complained to Gonzales and McNulty about Iglesias, and that Gonzales had received some sort of complaint from Rove about voter fraud. He said he later learned that the President had raised similar concerns to Gonzales. However, Sampson stated to us that he did not know about the President's comment when he put Iglesias on the removal list.

In sum, we believe the evidence shows that the complaints about Iglesias from New Mexico Republican politicians and party activists, both to the Department and to the White House, caused Sampson to place Iglesias on the removal list. Once Iglesias was on the list, none of the senior Department leaders questioned his inclusion or asked that he be taken off the list.

We believe that Senator Domenici's complaints were the primary factor for Iglesias's placement on the list. Although Gonzales and McNulty stated that Domenici never directly asked the Department to replace Iglesias, the nature of Domenici's criticisms left little doubt that he wanted a new U.S. Attorney in New Mexico. Gonzales said that Domenici “complained about . . . whether or not Mr. Iglesias was capable of continuing in that position.” According to McNulty, Domenici criticized Iglesias's handling of public corruption cases and said that Iglesias was “in over his head.” McNulty said that Domenici's assertiveness and tone during the conversation were “striking.”

Yet, we found no evidence that anyone in the Department examined any of the complaints about Iglesias through any careful or objective analysis. Although Gonzales said he asked Sampson to look into Rove's concerns about voter fraud enforcement in New Mexico, Gonzales never followed up with Sampson about his findings or to ensure that the complaints were objectively examined. McNulty said he did not take any steps to find out what had triggered Domenici's telephone call or take any steps "of an investigative nature" in response. Gonzales told us that in retrospect he would have expected that someone would have looked into the complaints. Gonzales said "you can't have, you know, a member of Congress calling and making an allegation and not checking it out and seeing whether or not there's anything there to it."

However, no one reached out to anyone in the U.S. Attorney's Office or the FBI to ask about the voter fraud or public corruption cases, or whether Iglesias was inappropriately delaying an indictment in a prominent public corruption investigation. More importantly, no one in the Department ever asked Iglesias about these complaints, or why he had handled the cases the way he did.

Rather, Gonzales, McNulty, Sampson, and those involved in the decision to remove Iglesias accepted at face value that the complaints raised about Iglesias by New Mexico Republican officials were a sufficient reason to remove him. Because of complaints by political officials who had a political interest in the outcome of these voter fraud and public corruption cases, the Department removed Iglesias, an individual who had previously been viewed as a strong U.S. attorney.

We believe that these actions by Department officials were a troubling dereliction of their responsibility to protect the integrity and independence of prosecutorial decisions by the Department. These officials had an obligation to determine that the complaints about Iglesias and the suggestions that he be removed were not made to influence the investigation and prosecution of the courthouse case or the voter fraud cases. Yet, they took no action to look into the matter.

In our view, the primary responsibility for this dramatic failure rests with Attorney General Gonzales, Deputy Attorney General McNulty, and Chief of Staff Sampson. While Sampson placed Iglesias's name on the removal list, neither Gonzales nor McNulty ensured that the complaints about Iglesias were appropriately and objectively assessed. Gonzales said he asked Sampson to look into the complaints, but never inquired about the outcome of any review or ensured that the complaints were fairly assessed. McNulty abdicated any responsibility for Iglesias's removal, stating that he did not add Iglesias to the list, that he did not have any reason to recommend his removal at the time, and that he assumed whoever placed him on the list had an independent

reason for doing so. But neither Gonzales nor McNulty inquired whether a Department prosecutor was being unfairly criticized for appropriately doing his job – weighing the evidence on particular cases in accord with the law and Department policy, and determining whether and when a prosecution was warranted.

We recognize that Senators and other political officials can recommend to the White House candidates for U.S. Attorney in their states, and they can use political factors in determining who to recommend. But once U.S. Attorneys assume office, they are obligated to put political considerations aside when making prosecutive judgments on individual cases. Inevitably, their decisions may displease the political officials who initially supported them.

If a U.S. Attorney must maintain the confidence of home-state political officials to avoid removal, regardless of the merits of the U.S. Attorney's prosecutorial decisions, respect for the Department of Justice's independence and integrity will be severely damaged and every U.S. Attorneys' prosecutorial decisions will be suspect. The longstanding tradition of integrity and independent judgments by Department prosecutors will be undermined, and confidence that the Department of Justice decides who to prosecute based solely on the evidence and the law, without regard to political factors, will disappear.

In sum, we believe that Department's actions in this case to remove Iglesias – based on complaints from New Mexico political officials and party activists about his handling of particular criminal cases and without any action to determine whether the complaints were legitimate or whether they were made in an effort to influence the initiation or the timing of an investigation or prosecution for political gain – were an abdication of senior Department leaders' responsibilities, independence, and integrity.

### **C. Additional Issues**

First, we believe it is also important to point out that Iglesias was not completely blameless in this matter. Department policy requires that any requests from members of Congress or congressional staff (including telephone requests) to U.S. Attorney's Offices for non-public information must be promptly reported to the Counsel to the Director of EOUSA. See Section 1-8.010 of the United States Attorneys' Manual (USAM). This requirement is important because the Department needs to be aware of elected officials' requests relating to both matters of policy and to ongoing or prospective investigations, in part to ensure the absence of political pressure or influence.

Iglesias acknowledged that he was aware of this requirement but that he did not report to EOUSA either Representative Wilson's or Senator Domenici's telephone calls. He said that he considered Wilson to be a friend, that he

thought she had simply exercised poor judgment in calling him, and that he believed the matter would go no further. Iglesias also stated that he decided not to report Senator Domenici's call out of a combination of personal admiration for the Senator and gratitude for his past assistance. Moreover, Iglesias said he believed that he was unlikely to be the winner in a dispute with Senator Domenici.

As Margolis later noted, had Iglesias reported these calls as he should have, it would have made it more difficult for the Department to remove him without first examining the substance of the complaints raised against him. Whether this is true or not, Iglesias should have reported the telephone calls from the members of Congress, as he later acknowledged to us, and his failure to do so violated Department policy.

Moreover, we found that Iglesias's answer to the question Domenici posed in their telephone conversation was inappropriate. Iglesias acknowledged that he understood Domenici to be asking him about whether a grand jury indictment in a specific case – the courthouse case – would be filed before November. Iglesias should have told Domenici that he could not answer that question. Instead, he answered, "I don't think so." Although Iglesias told us that he was trying to be responsive without providing information, the words he used gave Domenici the answer to his question about the timing of the courthouse case indictment.

In contrast, according to Iglesias, when Wilson called him she said she had heard something about sealed indictments in public corruption cases, apparently seeking non-public information about the courthouse case, the only public corruption case that had been reported in the press at that time. Iglesias did not disclose any non-public information in response.

We believe that Iglesias committed misconduct both in answering Domenici's question and in failing to report the contacts from Wilson and Domenici pursuant to Department policy. However, while we believe Iglesias committed misconduct, this does not excuse or mitigate in any way the Department's actions in this matter.

Second, we are troubled by McNulty's failure to discuss Senator Domenici's call to him in his congressional briefing when he described the reasons for Iglesias's removal. McNulty said he did not want to refer to Senator Domenici because he was "concerned about . . . putting the Senator in a bad light or in a difficult position" and that he wanted to keep the conversation between Domenici and him about Iglesias "confidential . . . . It was just a courtesy." McNulty also attempted to defend his action by noting that he had disclosed in his briefing generic "congressional concerns" about Iglesias.

We disagree with McNulty's actions, and do not believe that Senator Domenici's call should have been kept confidential or that the Department owed the Senator any "courtesy" with regard to his multiple complaints about Iglesias, which led to Iglesias's removal. Rather, McNulty and the Department owed Congress and the public a duty to provide full, honest, and complete testimony regarding this matter. McNulty failed to provide such testimony as a result of his misguided attempt to shield Domenici from criticism. And, as discussed above, not only did the Department fail to provide details about the real reason Iglesias was fired, it also proffered after-the-fact rationalizations for Iglesias's termination, such as concerns with his management and that he was an "absentee landlord."

Third, we were concerned about the accuracy and consistency of Sampson's testimony before Congress and his statements to us about why Iglesias was placed on the removal list. Sampson claimed not to remember why Iglesias was placed on the list and disclaimed responsibility for the decision. In addition, his testimony was varying, vague, and sometimes contrary to the evidence, despite the fact that it concerned an event that happened only a few months before his testimony. For example, Sampson told the Senate Judiciary Committee that sometime after October 17, 2006, the Deputy Attorney General, his Chief of Staff, the Attorney General, and Goodling looked at the U.S. Attorneys whose 4-year terms had expired to determine whether additional names should be added to the removal list and, as a result, four names, including Iglesias, were added. According to Sampson, the other three names came off the removal list but Iglesias's name remained "because nobody suggested that he come off." In fact, only Iglesias's name was added to the list between October 17 and November 7 – the three other names had already appeared on previous lists.

In his subsequent interview with House and Senate Judiciary staff, Sampson stated that he did not remember how Iglesias's name first came to be placed on the list. Sampson also testified that Senator Domenici had made three calls to the Attorney General and one to McNulty regarding Iglesias and that these calls may have influenced the Department's decision to remove Iglesias, but he did not recall whether they did.

In his interview with us, Sampson acknowledged that he put Iglesias's name on the removal list, but said he did not remember putting it on the list and did not remember there being a specific reason for adding it. He also said he placed Iglesias on the list based on what he had heard about him in October 2006 regarding complaints from Senator Domenici, combined with bits and pieces of information he had learned about Iglesias before then. We question why Sampson could not remember the precise reason why he placed Iglesias on the removal list, given the relatively short passage of time since the incident, the fact that Iglesias's name was the only one placed on the list at that time, and the high-profile nature of the contacts (three calls to the Attorney General

and one to the Deputy Attorney General) from a Senator. Sampson's other inaccurate explanations about why Iglesias was placed on the list, such as his over-delegation of authority to his First Assistant, also caused us to doubt the candor of his explanations, and we question whether he provided us the full story about Iglesias's placement on the list.

#### **D. Unanswered Questions**

We believe we were able to ascertain with reasonable assurance that the complaints from New Mexico Republican politicians and party activists about Iglesias's handling of voter fraud and corruption cases were the reasons for his removal as U.S. Attorney. However, based upon our inability to compel the cooperation of certain witnesses and obtain White House documents, we were not able to identify the role the White House played in the decision to remove Iglesias. Nor could we uncover all the evidence regarding the role of congressional or New Mexico Republican party activists in Iglesias's removal. As discussed above, we were not able to interview Senator Domenici, his Chief of Staff Steve Bell, Monica Goodling, and several White House officials, including Harriet Miers and Karl Rove. The White House also would not provide us internal documents related to the removals of U.S. Attorneys.

While Sampson said he did not place Iglesias on the list at the behest of the White House, his claimed recollection of the reasons for Iglesias's removal was inconsistent and vague. In addition, Attorney General Gonzales did not dispute that he had conversations with the President and, separately, with Rove about voter fraud in several districts, including in New Mexico, although Gonzales said he did not recall the specifics of the conversations. The limited evidence we were able to obtain about the White House's involvement in Iglesias's removal showed that Rove was interested in and aware of the plan to remove Iglesias. Indeed on the morning of November 15, 2006, before Sampson sent his list to the White House with Iglesias's name on it for the first time, Rove told Representative Wilson that the decision to remove Iglesias had already been made. Nevertheless, we were unable to determine Rove's precise role. Moreover, it appears that Miers spoke to McNulty about Iglesias in the fall of 2006, although we could not determine when or what exactly was discussed.

Iglesias's removal led to serious allegations that he was dismissed for improper partisan political reasons – namely, to influence voter fraud prosecutions in a closely divided state or to affect the timing of a public corruption case against a prominent Democrat in order to influence the outcome of the election. While we were able to obtain a significant amount of evidence related to Iglesias's removal, we could not obtain all the evidence related to these allegations.

Therefore, we recommend that a counsel specially appointed by the Attorney General work with us to further investigate these issues. We believe obtaining this additional information is important for several related reasons.

First, it is important to be able to ascertain the full facts relating to why Iglesias, and other U.S. Attorneys, were removed.

Second, we believe this counsel should consider whether Sampson or other Department officials made false statements to Congress or to us about the reasons for the removal of Iglesias or other U.S. Attorneys. The false statements statute applies to any individual who “in any matter within the jurisdiction of the executive [or] legislative . . . branch of the Government of the United States, knowingly and willfully – (1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact; [or] (2) makes any materially false, fictitious, or fraudulent statement or representation . . . .” 18 U.S.C. § 1001(a).<sup>128</sup>

As described above, we are concerned about Sampson’s testimony before Congress and his statements to us about the reasons for the removal of Iglesias, as well as his statements about other U.S. Attorneys. For example, while Sampson claimed he did not remember the reasons that Iglesias was placed on the removal list, and that he did not recall anyone at the White House, including Rove and Miers, suggesting that Iglesias needed to be removed, other evidence suggests White House involvement in Iglesias’s removal. We question why Sampson could not recall the precise reason why he placed Iglesias on the removal list, given the relatively short passage of time between the incident and his testimony, and the fact that Iglesias’s name alone was added, for the first time, to the November 2006 list. Moreover, Sampson’s other misleading after-the-fact explanations for why Iglesias was placed on the list caused us to further doubt the candor of Sampson’s explanations.

We believe that interviews of witnesses who refused to cooperate with us, such as Goodling, Rove, and Miers, and a review of White House documents would provide more evidence to determine whether Sampson or anyone else made false statements to Congress or to us about the reasons for the removals of Iglesias or the other U.S. Attorneys. Without such additional testimony and documents, we cannot fully assess the accuracy of testimony provided by Sampson and other Department officials to us or Congress.

Third, we believe a full investigation is necessary to determine whether other federal criminal statutes were violated with regard to the removal of

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<sup>128</sup> With regard to investigations by Congress, the statute applies to “any investigation or review, conducted pursuant to the authority of any committee, subcommittee, commission or office of the Congress, consistent with applicable rules of the House or Senate.” 18 U.S.C. § 1001(c)(2).

Iglesias. For example, Iglesias and others have alleged that he was removed in retaliation for his failure to accelerate the indictment of a public corruption case and his alleged failure to initiate voter fraud investigations. Iglesias said that Representative Wilson, who was running for reelection in a close race, called him before the 2006 election and asked him about delays in public corruption cases being handled by his office, apparently referring to the courthouse case. In addition, Iglesias believed that Senator Domenici attempted to pressure him to indict the courthouse case before the election in order to benefit Wilson, and when Iglesias declined to do so Domenici engineered his removal. The evidence we have developed so far shows that Wilson and Domenici in fact called Iglesias shortly before the election, and that the substance of the calls led Iglesias to believe he was being pressured to indict the courthouse case before the upcoming election. Moreover, New Mexico Republican politicians and party activists contacted Iglesias, the Department, and the White House to complain about Iglesias's handling of voter fraud investigations and public corruption cases.

It is possible that those seeking Iglesias's removal did so simply because they believed he was not competently prosecuting worthwhile cases. However, if they attempted to pressure Iglesias to accelerate his charging decision in the courthouse case or to initiate voter fraud investigations to affect the outcome of the upcoming election, their conduct may have been criminal. The obstruction of justice statute makes it a crime for any person who "corruptly . . . influences, obstructs, or impedes, or endeavors to influence, obstruct or impede, the due administration of justice . . . ." 18 U.S.C. § 1503(a). While we found no case charging a violation of the obstruction of justice statute involving an effort to accelerate a criminal prosecution for partisan political purposes, we believe that pressuring a prosecutor to indict a case more quickly to affect the outcome of an upcoming election could be a corrupt attempt to influence the prosecution in violation of the obstruction of justice statute. The same reasoning could apply to pressuring a prosecutor to take partisan political considerations into account in his charging decisions in voter fraud matters.

In addition, the wire fraud statute bars "any scheme or artifice to defraud" that is furthered by the use of interstate wire communications. 18 U.S.C. § 1343. A "scheme or artifice to defraud" includes "a scheme or artifice to deprive another of the intangible right of honest services." 18 U.S.C. § 1346. The elements of an honest services wire fraud case are: (1) a scheme or artifice to defraud by depriving another of the intangible right of honest services; (2) an intent to defraud; and (3) the use of interstate wire communications to execute the scheme. *See generally United States v. Sawyer*, 85 F.3d 713, 723-727 (1st Cir. 1996); *United States v. Welch*, 327 F.3d 1081, 1104 (10th Cir. 2003). An individual who conspires or attempts to induce a public official to violate a public duty can be prosecuted for wire fraud. *See* 18 U.S.C. § 1349.

As a United States Attorney, Iglesias had a duty to prosecute cases without regard to his own professional or personal considerations, and without regard to partisan political considerations. See United States Attorneys' Manual § 9-27.000 (Principles of Federal Prosecution) and § 9-27.260 (A)(3) (Initiating and Declining Charges – Impermissible Considerations). If anyone used interstate wire communications to pressure Iglesias to take partisan political considerations into account in his charging decision in the courthouse case, that could violate the wire fraud statute.

Senator Domenici declined our request for an interview. So did his Chief of Staff, who was involved in both fielding and making complaints about Iglesias's handling of the courthouse case and voter fraud matters and thus should have knowledge about whether there were efforts to influence Iglesias to consider partisan political factors in his charging decisions. Although Wilson consented to be interviewed, she refused to tell us the identity of the constituent who allegedly told her that Iglesias was intentionally delaying public corruption prosecutions in her district. An interview of that person could potentially provide evidence regarding Wilson's intent in calling Iglesias and complaining to others about him.

In addition, the evidence indicates that Monica Goodling may have knowledge of the nature of the complaints about Iglesias to Department officials or the White House, and the reasons for Iglesias's removal, but she also refused to cooperate with our investigation. Moreover, we were unable to interview Rove and Miers about the complaints that reached them about Iglesias and any actions they took in response. Nor have we been able to review relevant White House documents, such as the Scudder memorandum and internal e-mails.

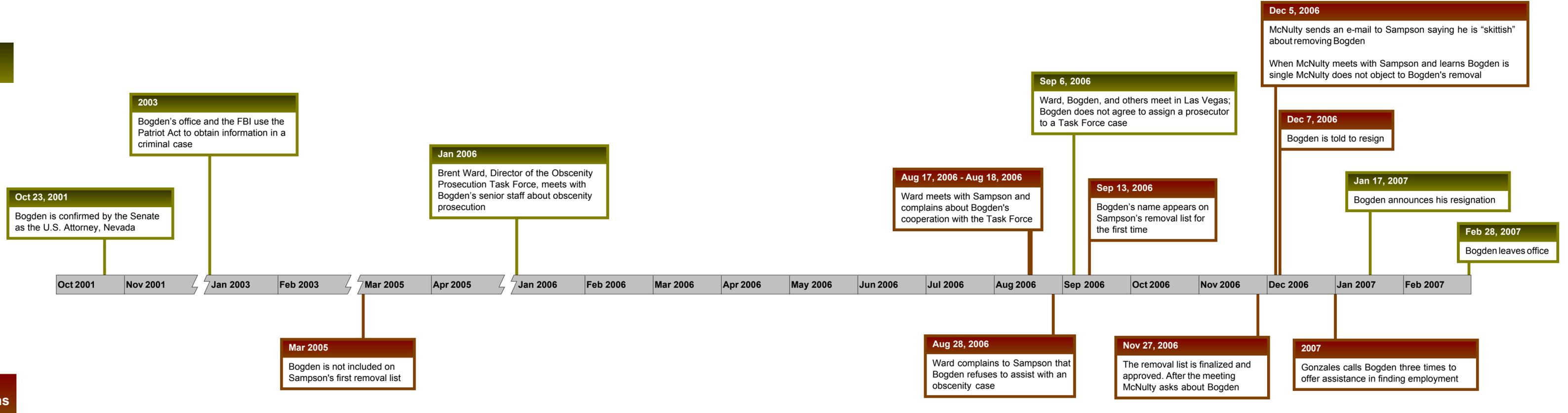
We want to make clear that we are not stating that the evidence we have uncovered thus far establishes that a violation of the false statements, obstruction of justice, or wire fraud statutes has occurred. However, we believe that the evidence collected in this investigation is not complete, and that serious allegations involving potential criminal conduct have not been fully investigated or resolved.

We recommend that a counsel specially appointed by the Attorney General assess the facts we have uncovered, work with us to conduct further investigation, and ultimately determine whether the totality of the evidence demonstrates that any criminal offense was committed. Because we do not have the authority to compel witness testimony or the production of documents from the White House, we cannot pursue this investigation further on our own. We believe that this matter should be fully investigated, the facts and conclusions fully developed, and final decisions made based on all the evidence.

# Daniel Bogden Timeline

## Bogden Events and Actions

## DOJ and Other Events and Actions



## **CHAPTER SEVEN**

### **DANIEL BOGDEN**

#### **I. Introduction**

This chapter examines the removal of Daniel Bogden, the former United States Attorney for Nevada.

##### **A. Bogden's Background**

Bogden received his law degree in 1982 from the University of Toledo College of Law. He served as a member of the United States Air Force Judge Advocate General's Office from 1982 until 1987. From 1987 until 1990, Bogden was a prosecutor in the Washoe County District Attorney's Office in Reno, Nevada. He was hired as an Assistant United States Attorney in the District of Nevada in 1990, and was named Chief of the Reno office in 1998.

In 2001, Bogden was approached by Nevada U.S. Senator John Ensign and asked if he was interested in becoming the U.S. Attorney for the District of Nevada. Bogden said that Ensign also asked him if he had a political party affiliation. Bogden told Ensign that he was unaffiliated and voted for who he believed to be the best candidate.

Bogden was nominated to be the United States Attorney for the District of Nevada on September 4, 2001, and sworn in on November 2, 2001.

##### **B. The EARS Evaluation of Bogden's Office**

During his tenure as U.S. Attorney, Bogden's office underwent one EARS evaluation in February 2003. The EARS evaluation stated:

United States Attorney Bogden and his supervisory [staff] were well respected by the USAO staff, the investigative and client agencies, and the judiciary . . . . The senior management team appropriately managed the Department's criminal and civil priority programs and initiatives . . . . 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. He was actively involved in the day-to-day management of the USAO.

##### **C. Bogden's Status on the Removal Lists**

On Kyle Sampson's first list of U.S. Attorneys recommended for removal, which he sent to the White House on March 2, 2005, Bogden was identified as

1 of 40 U.S. Attorneys who had not distinguished themselves either positively or negatively. At the beginning of January 2006, Sampson prepared a draft memorandum for White House Counsel Miers identifying 11 U.S. Attorneys for replacement, which he shared with Monica Goodling, then Senior Counsel to the Attorney General. Goodling made handwritten notes about Bogden on a copy of the draft memorandum: “Quiet/not sure about – Bogden.” However, Sampson did not include Bogden in the January 9, 2006, list he sent to Miers.<sup>129</sup>

Bogden also was not included in Sampson’s April 2006 list of U.S. Attorneys to be removed.

Bogden’s name first appeared on the fourth removal list Sampson sent to Miers on September 13, 2006, and he remained on the list through December 7, 2006, when he was told to resign. He announced his resignation on January 17, 2007, and left office on February 28, 2007.

#### **D. Reasons Proffered for Bogden’s Removal**

As described in Chapter Three, in February 2007 when the Department began to prepare witnesses for their congressional testimony regarding the U.S. Attorney removals, Goodling and others created a chart of the reasons justifying the removals. In her handwritten notes describing the reasons for Bogden’s removal, Goodling wrote: “very important – terror, violent crime, drugs in important district, resistant to AG priorities (obscenity task force), Margolis, in over his head.”

Based on Goodling’s notes, the Department created several versions of a typewritten chart containing justifications for the U.S. Attorney removals. The reasons for Bogden’s removal were stated in one of these charts as follows:

Similarly, Nevada is what we consider to be a very important district that was underserved.

Given the large tourist population that visits each year, it’s well-known that Las Vegas could present a target for terrorism. It has also struggled with violent crime, drugs, and organized crime. This is an office where we have the right to expect excellence and aggressive prosecution in a number of priority areas.

Despite the national focus the Attorney General requested for offices to place on the federal crime of obscenity, which coarsens

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<sup>129</sup> Shortly after his January 2006 discussion with Goodling, Sampson created a draft of a 3-tier list in which he identified Bogden as a “Tier 2” candidate who was not recommended for immediate termination, but who was a possible future candidate for replacement.

society, the USA failed to support the Department's prosecution of a case that was developed within his district.

This is another district where, now that Mr. Bogden has finished his four-year term (and then some), we thought we could make a change to bring more dynamic leadership to the office.

On February 14, 2007, Deputy Attorney General Paul McNulty briefed the Senate Judiciary Committee on the U.S. Attorney removals. The notes of this meeting prepared by Nancy Scott-Finan, an official in the Department's Office of Legislative Affairs who attended, and the talking points that McNulty used to prepare for the meeting reflect that McNulty gave as reasons for Bogden's removal that Bogden "lacked energy and leadership" and he was "good on guns, but not good on obscenity cases."

During Principal Associate Deputy Attorney General William Moschella's March 6, 2007, testimony, he told the House Judiciary Subcommittee that while there "was no particular deficiency" concerning Bogden, the Department removed him to obtain "renewed energy" and "renewed vigor" in his office.

During our investigation, we could not determine who was responsible for Bogden's name being placed on the U.S. Attorney removal list. Sampson, who described himself as the "aggregator" of information and the keeper of the list, acknowledged that he must have physically placed Bogden's name on the list. But he denied that he made the decision to add Bogden to the list, and said that he did not remember who made the recommendation. Sampson said he did not remember how Bogden got on the list "except that there was a general view that he was mediocre, and he stayed on the list." Other than Goodling, no one we interviewed said they recommended that Bogden be placed on the removal list. Attorney General Alberto Gonzales told us that he did not have an independent basis for understanding why Bogden was to be removed. Gonzales also expressed regret to us that no one talked to Bogden before he was removed. Gonzales stated that he wished that "someone had talked to all of these folks beforehand, just to make sure we understood their side of the story, but particularly with respect to Bogden."

As we describe in more detail in Section II. D. below, Deputy Attorney General McNulty said that because he did not know why Bogden's name was on the list of U.S. Attorneys to be removed, he looked more closely at Bogden's removal than he did at others on the list. McNulty asked Sampson if Bogden "had done something wrong," and commented that he was "skittish" about removing him. When McNulty was told that Bogden was single and did not have a family, McNulty agreed to his removal.

Associate Deputy Attorney General David Margolis told congressional investigators that prior to the December 7 removals, he had no understanding of how or why Bogden was removed. We asked Margolis about Goodling's

handwritten notes summarizing the reasons why Bogden was removed, which included the notations “Margolis” and “in over his head.” Margolis told us that he never said to anyone that Bogden was “in over his head” because he did not think that was an accurate description of Bogden’s performance, which Margolis described to us as “average.” Margolis told us that he did not know why Goodling would have written his name in her notes concerning Bogden’s removal.

Chief of Staff to the Deputy Attorney General Michael Elston told congressional investigators that he did not suggest that Bogden be removed. According to Elston, he did not object to Bogden’s removal because he thought that although Bogden “didn’t really do anything wrong,” he was not “doing anything great.”

Goodling was the only witness who said she affirmatively recommended that Bogden be removed. In her May 2007 immunized testimony to the House Judiciary Committee, Goodling stated that Sampson consulted with her in January 2006 about the list of candidates for removal he planned to send to Miers. She said that at that time she recommended that Bogden be added to Sampson’s list. Goodling also submitted a written statement to the House Judiciary Committee in which she said that she made the recommendation to remove Bogden because she did not know of any specific accomplishments in his district and because she recalled some criticism of Bogden involving the Patriot Act.

However, Goodling’s testimony that she recommended Bogden’s removal in January 2006 is inconsistent with her contemporaneous notes from that time. Goodling’s handwritten notes on a copy of a draft of Sampson’s January list state, “Quiet/not sure about – Bogden.” Sampson said he did not remember Goodling mentioning any Patriot Act issue with respect to Bogden, and we were unable to interview Goodling because she declined to cooperate with our investigation.

Even Goodling, however, disclaimed that her recommendation was the reason Bogden was removed. In her testimony before the House Judiciary Committee, Goodling noted that after her January 2006 recommendation, Sampson did not include Bogden on the removal lists he sent to the White House in January and April 2006. She said she therefore assumed that Bogden’s name appeared on the September 2006 U.S. Attorney removal list “for reasons unrelated to my assessment nine months earlier.”

## **II. Chronology of Events Related to Bogden’s Removal**

In this section, we describe our findings concerning the stated reasons for Bogden’s removal, including Bogden’s response to a request from the Department’s Obscenity Prosecution Task Force to prosecute an obscenity case

in Nevada, alleged concerns about his energy and leadership, and his use of a Patriot Act provision in prosecuting a criminal case.

## **A. Obscenity Prosecution**

In 2006, the Department's Obscenity Prosecution Task Force (Task Force) asked Bogden to assign an Assistant U.S. Attorney from his office to prosecute an adult obscenity case. As described below, Bogden's response to the request became one of the reasons proffered for his removal.

### **1. Obscenity Prosecution Task Force**

In 2005, the Department created the Obscenity Prosecution Task Force in the Criminal Division in Main Justice. The Task Force has a small staff of approximately two to four attorneys. The current Director of the Task Force, Brent Ward, was a former U.S. Attorney in Utah in the 1980s. Because of its small size, the Task Force relies upon assistance from U.S. Attorneys' Offices across the country to prosecute the cases it identifies.

According to Ward, the Task Force seeks to prosecute adult obscenity matters in which there is no allegation that minors or children are involved, and no allegation that the persons involved were coerced or otherwise forced to perform the acts alleged to be obscene. Ward told us that it was common for the Task Force to encounter strong resistance from U.S. Attorneys' Offices when asked to prosecute such cases. A Task Force trial attorney also said that the Task Force does not "get a real warm reception" from U.S. Attorneys' Offices when it requests assistance. He said that he could think of only 1 or 2 people he had worked with over the last 15 months who "really wanted" to assist in such prosecutions.

According to the Department's stated reasons for Bogden's removal, obscenity prosecutions were a leadership "priority" for the Department. We found that Ward often sought to invoke the Attorney General's priorities when trying to persuade U.S. Attorneys' Offices to assist the Task Force with obscenity prosecutions. However, documents and e-mails also reflect that Ward himself vociferously complained that obscenity prosecutions were not, in fact, a Department priority. For example, Ward prepared an August 17, 2006, outline of matters to discuss with Sampson in which he noted that the Department's 2003-2008 strategic plan omitted obscenity as a prosecution priority. In addition, in December 2006 Ward sent an e-mail to several Criminal Division front office staff, including Assistant Attorney General Alice Fisher, complaining that a draft set of Criminal Division enforcement priorities omitted obscenity prosecutions. Ward stated that the omission would encourage U.S. Attorneys already hesitant to take on such cases to refuse them. Ward also sent a copy of this e-mail to Sampson on December 12, 2006.

## **2. Task Force Request to Bogden and Complaints About His Response**

In January 2006, Ward met with Bogden's First Assistant U.S. Attorney and his Criminal Chief to discuss, in general terms, potential obscenity prosecutions in Nevada. According to Ward, they told him that they were not interested in pursuing adult obscenity cases in Nevada.

In August 2006, Task Force officials began to plan a visit to the Nevada U.S. Attorney's Office to request that Bogden assist in a proposed criminal obscenity prosecution concerning allegations that Internet videos depicted obscene acts.

On August 16, 2006, Ward sent an e-mail to the Task Force trial attorney and the FBI agents assigned to the Task Force stating that he had scheduled a September 6 meeting with Bogden and his staff in Las Vegas to request that a grand jury be opened and that Bogden assign an AUSA to assist in the prosecution. Ward and the trial attorney told us that the Task Force preferred that a local prosecutor take the first chair at trial because of the perceived importance of persuading the jury that the case was an important local issue and not one being pushed solely by attorneys from Washington, D.C.

On August 17 or 18, 2006, a day or two after Ward had arranged the meeting with Bogden, Ward met with Sampson to discuss problems that the Task Force was encountering throughout the country. Both Ward and Sampson were from Utah, and Ward said that he was a friend of Sampson's brother, who lived in Salt Lake City. Ward said he had used that connection to communicate with Sampson before he came to Washington to lead the Task Force. We also found that Ward frequently complained directly to Sampson about the problems encountered by the Task Force.

In Ward's prepared outline for the meeting with Sampson, Ward identified several reasons why he believed the Task Force's mission was not succeeding, including insufficient resources and lack of support from the FBI, the Criminal Division front office, and the Office of the Attorney General. Ward's outline also contained the following notation: "Big districts thumb nose – word gets around CDCA, AZ, NV." Ward told us that he and Sampson discussed during that meeting problems Ward had encountered in the Los Angeles U.S. Attorney's Office (U.S. Attorney Debra Yang), the Phoenix U.S. Attorney's Office (U.S. Attorney Paul Charlton), and the Las Vegas U.S. Attorney's Office (Bogden).

On August 28, Ward sent an e-mail to Bogden to confirm their September 6 meeting and to inform Bogden that he would be accompanied by the Task Force trial attorney and three FBI agents. Bogden replied the same day acknowledging the scheduled meeting, but stated that he would likely not

agree to Ward's request for assistance due to "severe manning and personnel shortages" in the district.

Ward was angered by Bogden's response and forwarded it to several senior Department officials, including Sampson. In his e-mail to Sampson, Ward remarked, "This is now typical and has brought our efforts virtually to a standstill." Ward asked Sampson in the e-mail whether Attorney General Gonzales would consider calling the districts, including Bogden's, to encourage them to cooperate with the Task Force. We did not find any response from Sampson to this e-mail. Sampson told us that he "may have" discussed Ward's complaints with Gonzales, but Sampson said he did not recall whether or not he did so.

On August 29, Ward also forwarded Bogden's response to Matthew Lewis, a Senior Counsel in the Criminal Division front office. Ward repeated some of the comments he had made to Sampson about Bogden's response, and also said that it would be bad for the FBI agents to go with him to the scheduled meeting "and listen to the lame excuses of a defiant U.S. Attorney." Lewis responded that he would forward the e-mail to three other officials in the Criminal Division front office, including Chief of Staff Matthew Friedrich. A few hours later, Ward forwarded Bogden's response to Friedrich, along with other complaints about the reasons why the Task Force was unable to accomplish its mission.

On August 30, Friedrich forwarded Ward's e-mail to Elston, saying they needed to discuss the matter. Elston responded, "Don't throw in the towel yet." Elston told us that his phrase "don't throw in the towel" meant that he hoped that he could get the Office of the Deputy Attorney General to take some kind of action to move the Task Force cases forward.

The day before his September 6 trip to Las Vegas, Ward sent an e-mail to Bogden to request a private meeting with him. In his response, Bogden repeated his previous comment that his office lacked the resources to provide Ward with much assistance. Ward responded by stating that the Attorney General had made obscenity prosecutions a priority, and that he wanted Bogden to assign an AUSA to the matter. Bogden replied that "the AG has set a number of priorities" and that because of staff shortages, "we find ourselves unable to cut one AG priority [in] order to deal with other priorities."

Ward and several FBI agents met with Bogden and several of his senior staff on September 6 in Las Vegas. Bogden said that he also asked the local FBI Special Agent in Charge to attend the meeting with Ward and his team. Bogden said that before the meeting he met alone with Ward and again told him that he lacked the resources to take on the adult obscenity matter.

In his interview with us, Bogden said that in addition to the resource issue, he did not view the case Ward presented to him as particularly significant. He said it was a “small potatoes” prosecution that would not have made “a huge impact.” Bogden also said that the participants in the allegedly obscene acts depicted were the target of the investigation and his wife. Bogden also said that the target lacked significant assets and that there were no money laundering or criminal tax aspects to the case.

Bogden also told us that he was not persuaded by the Task Force that venue for the prosecution was in Nevada because it was not clear where the website was located for venue purposes. In addition, Bogden said that the case “needed a whole lot of work,” and the sole basis for the prosecution was the fact that an agent had viewed the material on the website and thought it obscene. Bogden said he did not consider the videos to be particularly egregious. Bogden said more work was needed regarding the subject, his finances, and the venue issue.

Ward disagreed with Bogden’s assessment of the case, although he acknowledged that the target had few assets. Ward and the trial attorney said that the target and his wife were participants in the videos, but asserted that other females appeared in the videos as well. Ward and the trial attorney also told us that the material depicted women being abused and engaging in egregious behavior. Ward said he thought the case was a significant matter.

The meeting between Bogden, Ward, and their staffs ended without a resolution as to whether Bogden’s office would accept the case.

On September 13, 1 week after Ward’s meeting with Bogden and 2 weeks after Ward complained to Sampson and Criminal Division personnel about Bogden’s refusal to assist in the obscenity case, Bogden’s name appeared on Sampson’s removal list for the first time.<sup>130</sup>

On September 20, 2006, Ward sent an e-mail to Sampson with another complaint about Bogden and Charlton:

We have two U.S. Attorneys who are unwilling to take good cases we have presented to them. They are Paul Charlton in Phoenix (this is urgent) and Dan Bogden in Las Vegas. In light of the AG’s comments at the NAC to “kick butt and take names”, what do you suggest I do?<sup>131</sup> Do you think at this point that these names

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<sup>130</sup> Charlton’s name also appeared on the September 13 removal list for the first time.

<sup>131</sup> A few weeks earlier, Gonzales had spoken at a conference on obscenity prosecutions at the Department’s National Advocacy Center. Ward acknowledged to us that Gonzales had not actually said he would “kick butt and take names,” and that his recitation of Gonzales’s comments was not verbatim.

should go through channels to reach the AG, or is it enough for me to give the names to you?

Sampson responded that Ward should go through regular channels. Ward therefore sent an e-mail that same day to several Criminal Division front office staff stating in part, “the Attorney General expressed his desire to ‘take the names’ of U.S. Attorneys who will not assign an AUSA on obscenity cases. . . . There are two U.S. Attorneys who fit squarely in that category right now, Paul Charlton . . . and Dan Bogden . . . I would like to position them for calls from the Attorney General.”

Sampson told us that he never examined the facts underlying Ward’s complaints about Bogden because he did not have “any reason to doubt Mr. Ward.” Sampson said he did not recall whether the obscenity prosecution issue caused him to place Bogden on the list. Sampson also said he did not recall raising this issue with Gonzales.

McNulty told us that in the fall of 2006 he may have had some knowledge about the issues regarding Bogden and the obscenity prosecution, but that he had no clear recollection of the matter.

According to Bogden, Ward called him in October 2006 to again ask that he assign an AUSA to the Task Force matter. Bogden said he offered to give Ward office space, grand jury time, secretarial assistance, and prosecution advice, but not an AUSA. Bogden said that Ward rejected this offer, insisting that a local prosecutor was necessary to try the case.

Bogden said that he also recommended to Ward that if the case were to be prosecuted, it should be brought in Reno where jurors might be more receptive than Las Vegas jurors to an obscenity prosecution. According to Bogden, Ward rejected this suggestion as well.<sup>132</sup> Bogden also said that he told Ward to check back with him about assigning a prosecutor to the obscenity case in early 2007 when Bogden was slated to fill several open AUSA slots.

## **B. Bogden’s Alleged Lack of Energy and Leadership**

In their testimony and interviews with us, Department officials characterized Bogden’s performance as U.S. Attorney as mediocre. Sampson said that although he did not remember how Bogden got on the removal list, “there was a general view that he was mediocre, and he stayed on the list.” McNulty said Bogden lacked “energy and leadership.” Moschella said Bogden was replaced so that his office would have renewed “energy” and “vigor.”

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<sup>132</sup> Ward said he did not recall Bogden suggesting Reno as a venue for the prosecution. However, Charlton recalled that Bogden told him that Ward had rejected Reno as a venue for the case and insisted on Las Vegas.

Elston said he did not object to Bogden's removal because he was not "exercising inspired leadership."

Goodling's chart listing the reasons the Department proffered for each U.S. Attorney's removal included the comment under Bogden that Nevada was a "very important" district, in part because it could be a target for "terrorism." However, no one we interviewed raised that contention or offered any evidence that this was considered a reason for removing Bogden. Elston, for instance, told us that "I don't recall anyone talking about Las Vegas being a prime target for terrorism."

As discussed previously, the only EARS evaluation during Bogden's tenure was completed in 2003. The report stated that "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. He was actively involved in the day-to-day management of the USAO." We found no criticisms of Bogden's management of the U.S. Attorney's Office in the EARS report.

Former Deputy Attorney General James Comey told the Senate Judiciary Committee that he thought Bogden "was an excellent U.S. attorney . . . . I thought very highly of him . . . . When I left in August of 2005, I couldn't have thought of a reason why he should be asked to resign."

Margolis told congressional investigators that he had "no reason to support or question" Bogden's performance. Margolis told us that he thought Bogden was a "ham andegger," which Margolis said meant "average." However, Margolis also said that he did not know anything about Bogden that would "cause me to put him on the list."

EOUSA Director Battle told congressional investigators that he did not know why Bogden was removed, and that he was not aware of any issues regarding Bogden when Battle served as EOUSA Director. Battle told us that Bogden was the person who "surprised me the most" when he learned he was to be removed. Former EOUSA Director Mary Beth Buchanan told congressional investigators that she did not have any reason to believe that there was "anything negative" regarding Bogden's performance, and that she did not recall hearing anything good or bad about his office.

We also found no evidence that any Department official involved in the removals spoke with EOUSA or Criminal Division officials about how Bogden was performing. In addition, McNulty stated in an e-mail to Sampson on December 5, 2006 – 2 days before the removal plan was to be executed – that he had not looked at Bogden's district's performance. Gonzales told us that he "wish[ed]" someone had talked to Bogden to get his side of the story before he was removed.

Further, there appeared to be no systematic effort to assess whether there were other allegedly “mediocre” U.S. Attorneys who should be removed at the same time as Bogden. Sampson said he was uncertain whether there were other U.S. Attorneys who were more “mediocre” than Bogden who were not removed.<sup>133</sup>

Sampson also admitted that there may have been U.S. Attorneys who were more mediocre than Bogden who were not fired because they had political backing. When we asked Sampson whether “there could be people who are even worse than Bogden, but they just hadn’t been identified,” he answered, “Correct. There could be people that were worse than Bogden, but we thought we don’t want to pick that political fight [with home state senators].” Sampson agreed that Bogden was removed not just because he was “mediocre,” but also because he lacked political support.<sup>134</sup>

### **C. Patriot Act Criticism**

As described above, Goodling also raised in her congressional testimony that she recommended to Sampson that Bogden be removed in part because she recalled that Bogden had been criticized for an incident in his district involving the Patriot Act. Goodling also testified that during the November 27, 2006, meeting in the Attorney General’s conference room where the U.S. Attorney removal decisions were finalized and approved, she told the group

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<sup>133</sup> When Sampson was asked, “Wouldn’t you be the prime person in a position to know how Mr. Bogden ranked relative to all the other United States Attorneys?” he replied,

Sitting here today, I don’t – look, I don’t think – sitting here today, I’d have to look at that list of U.S. Attorneys and think back and say were any of these more mediocre than Mr. Bogden. I don’t think there were, or they would have been on the list as well. Perhaps. I’m not sure. I don’t know.

<sup>134</sup> Some media reports also suggested that Bogden was removed because of concerns over his handling of voter fraud allegations in Nevada. As discussed in detail in the chapter on U.S. Attorney Iglesias, in the fall of 2006 Karl Rove told Gonzales that he was concerned about voter fraud in three cities, none of which were in Nevada. Gonzales asked Sampson to inquire about Rove’s concerns. Sampson in turn asked Matthew Friedrich, then Counselor to the Attorney General, to follow up on Rove’s information. Friedrich consulted with Criminal Division Chief of Staff Benton Campbell, who in turn consulted with Craig Donsanto, the Criminal Division’s expert on voter fraud issues, to obtain information responsive to Friedrich’s request. Donsanto mentioned to Campbell a list of jurisdictions with alleged voter fraud problems; one of them was Nevada. This information is reflected in Friedrich’s handwritten notes of his subsequent conversation with Campbell. Friedrich said he passed on the information he received from Campbell to Sampson, but Sampson said he did not recall ever hearing back from Friedrich. No one in the Department ever cited voter fraud as a reason for Bogden’s removal. Bogden told us that after media stories about these documents were published, he consulted with his election law coordinator in the USAO and confirmed that his office has never had any serious voter fraud issues during his tenure. We found no evidence to support any speculation that Bogden’s removal was related to any voter fraud issue.

that she was aware of “one case involving use of the Patriot Act that had gotten a little messy a few years ago.”

Goodling was apparently referring to a criminal case in 2003 in which the FBI in Nevada had used a provision of the Patriot Act to obtain financial information about a strip-club owner and elected officials who may have received bribes from the club owner. The matter generated media coverage and congressional criticism for using a Patriot Act provision in a criminal matter involving the strip club. At the time, Goodling worked in the Department’s Office of Public Affairs, and her e-mails show that she was involved in responding to the media coverage.

Bogden explained to us that FBI investigators had used a provision of the Patriot Act to obtain financial information in order to gather evidence necessary for grand jury subpoenas for certain accounts and financial institutions. Bogden said that the investigators had received approval to use the investigative technique “from the highest level of the FBI.”

Bogden also said that he had been in constant contact with Department officials in Washington, and no one ever expressed any concern about this incident with him. In addition, he said that former Attorney General John Ashcroft and former Deputy Attorney General Comey had each visited Nevada twice, and Attorney General Gonzales had visited Nevada once while Bogden was U.S. Attorney, and none of them had ever raised the issue with him.

We also conducted an extensive search of Department e-mails regarding this issue, including e-mails to and from senior Department officials in the Office of the Attorney General, Office of the Deputy Attorney General, and Criminal Division. We found no criticism by them of the FBI and the USAO’s use of the Patriot Act provision in this case, other than complaints that the FBI had disclosed use of the Patriot Act to the press.

In addition, we found that Goodling did not include any mention of the Patriot Act matter in her handwritten notes memorializing the Department’s justifications for the U.S. Attorney removals. Sampson told us that he did not recall Goodling mentioning a Patriot Act issue and did not recall any criticism of Bogden related to the Patriot Act. No Department official other than Goodling cited use of the Patriot Act as a reason for Bogden’s removal in public or closed congressional testimony.

#### **D. McNulty’s Qualms About Removing Bogden**

Goodling testified before the House Judiciary Committee that at the November 27, 2006, meeting to finalize the plan to remove several U.S. Attorneys, McNulty 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?” According to Goodling, Sampson responded that “it was a general kind of sense that we could do better.”

EOUSA Director Battle stated that immediately after the November 27 meeting, McNulty asked him if he knew why Bogden was going to be removed. Battle said he told McNulty that he was not aware of any problems with Bogden.

McNulty continued to be concerned about Bogden’s removal. On December 5, 2006, 2 days before the plan to remove the U.S. Attorneys was to be executed, McNulty sent an e-mail to Sampson stating:

I’m still a little skittish about Bogden. He has been with DOJ since 1990 and, at age 50, has never had a job outside government . . . . I’ll admit [I] have not looked at his district’s performance. Sorry to be raising this again/now; it was just on my mind last night and this morning.

After McNulty sent this e-mail, he met with Sampson to discuss his concerns about removing Bogden. Elston or Mercer may also have been present at the meeting. Sampson testified that “his best guess” was that the meeting lasted “about 90 seconds.” When asked what occurred during those 90 seconds Sampson stated:

My recollection is that Mr. McNulty and those other people came into my office, and I said, “I got your e-mail.” And he said, “I’m just concerned about Bogden” – you know, essentially what he says in the e-mail, about that he’s 50, hasn’t had a job in [the] private sector, and what about his family. And I think Mike Elston or Bill Mercer said, “He’s a bachelor. He’s single.” And Mr. McNulty said, “Okay. Never mind,” and then got up and left my office.

Elston denied that he ever told McNulty that Bogden was single, and stated that he never knew Bogden’s marital status. Mercer, who was the Principal Associate Deputy Attorney General at the time, also denied telling McNulty at this meeting that Bogden was single.<sup>135</sup>

According to McNulty, he told Sampson that he was “worried about [Bogden’s] wife and kids. I was worried it might have an impact on his family . . . .” McNulty said that Sampson told him that Bogden “didn’t have a family,

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<sup>135</sup> Mercer said he recalled a conversation he had with McNulty and Sampson that occurred later in 2006 or in early 2007 when they were discussing Bogden’s request for an extension of his departure date. Mercer told us that during that conversation he told Sampson and McNulty that he did not think that Bogden had children.

he was single.” McNulty said he then replied “I guess I don’t have any objection to going forward.”

### **E. Bogden’s Removal and Gonzales’s Concerns**

According to Bogden, Battle called him on December 7, 2006, told him that he served at the pleasure of the President, and told him to resign by January 31, 2007. Bogden said he asked why he was being asked to resign and Battle responded that “they just want to move the office in another direction.” Bogden said he received no other information from Battle.

Bogden subsequently called Mercer to obtain more information about why he was asked to resign. Bogden said that Mercer told him that there was a window of opportunity for the Administration to build up the résumés of candidates for judgeships and political offices. Mercer later testified to congressional staff that he did not recall making such a statement to Bogden.

Bogden then called McNulty. Bogden said he asked McNulty if he was fired because of his performance or the performance of his office. According to Bogden, McNulty told him that performance “didn’t enter into the equation.”

Bogden said that he spoke with Gonzales three times after he was asked to resign. During each conversation, Gonzales asked Bogden whether he could help him obtain a new position, and each time Bogden asked Gonzales to reinstate him as the U.S. Attorney. Gonzales refused. Gonzales testified to Congress that he did not speak with any of the other fired U.S. Attorneys after they were asked to resign. Gonzales stated that the reason he called Bogden to offer his assistance in finding new employment was that he believed Bogden was “the closest call.” Gonzales told us that he did not know why Bogden was asked to step down.

### **III. Analysis**

As with the removals of several other U.S. Attorneys, we were unable to identify the person responsible for placing Bogden on the removal list. Goodling stated that in January 2006 she recommended to Sampson that Bogden be removed. However, Goodling’s testimony is inconsistent with her January 2006 contemporaneous handwritten note stating “Quiet, not sure about” Bogden. Goodling also stated that she did not believe her recommendation was the reason Bogden was removed. This is consistent with the fact that after Goodling’s recommendation, Bogden did not appear on the January 2006 removal list or the next list Sampson sent in April 2006. Rather, Bogden was first placed on the list in September 2006, shortly after Sampson received complaints from the head of the Obscenity Prosecution Task Force about both Bogden and Charlton, who was also placed on the list for the first time.

No other Department leader told us that they recommended that Bogden be placed on the removal list, and we found no documents or evidence showing who made the ultimate decision. Sampson acknowledged that he must have physically placed Bogden's name on the list, but denied that he had made the decision to do so and said that he did not remember who made the recommendation.

We found no support for one of the reasons the Department proffered for why Bogden was placed on the list – the Patriot Act incident mentioned by Goodling. The use by Bogden's office and the Nevada FBI of a provision of the Patriot Act to obtain evidence in a criminal case occurred in 2003, several years before his removal. Goodling did not include any mention of the Patriot Act matter in her handwritten notes memorializing the Department's justifications for the U.S. Attorney removals. In addition, Sampson told us that he did not recall Goodling mentioning this issue and did not recall any criticism of Bogden related to his use of the Patriot Act. No Department official other than Goodling cited the Patriot Act matter as a reason for Bogden's removal in public or closed congressional testimony, and we found no evidence that it contributed to Bogden's removal.

It appears that some Department officials believed that voter fraud was an issue in Nevada. However, no one complained about Bogden's handling of any allegations of voter fraud, and we found no evidence to support any speculation that Bogden's removal was related to any voter fraud issues.

Rather, we believe that the primary reason for Bogden's inclusion on the removal list was the complaints by Ward, the head of the Department's Obscenity Prosecution Task Force, about Bogden's decision not to assign a Nevada prosecutor to a Task Force case. The evidence shows that in August 2006 Ward, who knew Sampson's brother and who frequently spoke directly with Sampson about Task Force matters, complained about Bogden to Sampson. Sampson stated that he was aware of Ward's complaints, although he said he did not recall whether those complaints played a role in the decision to remove Bogden. We found Sampson's lack of recall particularly suspect, given his role in the removal process.

It does not appear that any Department official other than Sampson knew that Bogden was placed on the September 2006 removal list because he refused to assign an attorney to assist the Department's Obscenity Prosecution Task Force. Rather, it appears that, at most, some of those involved thought Bogden was being removed because he was a "mediocre" U.S. Attorney and the Department "could do better." Attorney General Gonzales and Deputy Attorney General McNulty were apparently never informed as to the real reason for placing Bogden's name on the list of U.S. Attorneys to be removed.

We are troubled that neither Sampson nor any other Department official involved in the removal process ever asked Bogden for his explanation about Ward's complaint. No one asked about Bogden's rationale for declining to assign a prosecutor to the obscenity case, his competing resource needs for other priority issues, his view of the strength of the case, or his alternative offer to provide assistance to the Task Force with office space, grand jury time, secretarial support, and prosecution advice.

As another reason for Bogden's removal, Department officials testified and told us that Bogden was considered to be a mediocre U.S. Attorney, and he lacked energy and leadership. However, no one involved in the removals said that Bogden was placed on the list because he was "mediocre." Based on our investigation, we found that this argument was raised late in the process, after Bogden was already on the list. According to Goodling's congressional testimony, when McNulty asked at the November 27 meeting why Bogden was on the list, Sampson said there was a "sense we can do better." Similarly, Elston told us that although he did not recommend that Bogden be removed, he did not object to Bogden being on the list because there was a "general sense" that his office lacked leadership and energy. Sampson also told congressional investigators that he could not recall why Bogden was placed on the list "except that there was a general view that he was mediocre, and he stayed on the list."

However, we found that no one involved in the removal process ever objectively assessed any concerns about Bogden's performance. No one examined any statistical measures of his office's work compared to other USAOs, or inquired about the assessment of local law enforcement officials about him. No one involved in the removals reviewed the EARS report about Bogden's office.

We also found no evidence that Department officials ever raised concerns about Bogden's performance with him before he was removed.<sup>136</sup> No one involved in the removal process even contacted the Department officials who would likely be most knowledgeable about Bogden's performance, such as EOUSA Director Battle or Associate Deputy Attorney General Margolis, before placing Bogden on the list.

Battle said that Bogden was the person who "surprised me the most" when he learned he was to be removed. Margolis said that Bogden was an average U.S. Attorney, and that he did not know anything about Bogden that would have caused him to recommend Bogden's removal.

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<sup>136</sup> Also, according to Bogden, when he asked McNulty if he was fired because of his performance or the performance of his office, McNulty replied that performance "didn't enter into the equation."

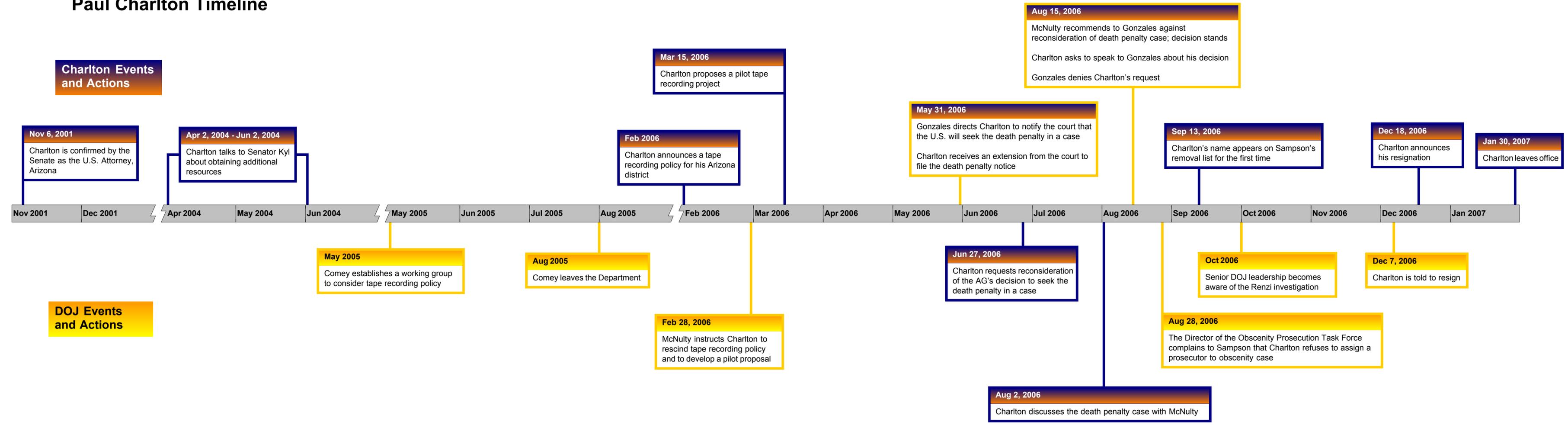
We also found it noteworthy that Sampson admitted that other U.S. Attorneys who were also considered “mediocre” were not removed. Sampson acknowledged to us that there may have been U.S. Attorneys whose performance was worse than Bogden’s but who were not removed because they had the right political connections. We are troubled that a Department of Justice official would make such a statement indicating that the standard by which he assessed whether U.S. Attorneys should be removed was not mediocrity, but rather mediocrity without political support.

In addition, we are concerned about the reasoning for why Bogden remained on the list when McNulty had qualms about it, just before the removal plan was to be implemented. McNulty was troubled by Bogden’s inclusion on the list and asked to meet with Sampson 2 days before the removal plan was implemented. According to McNulty, he told Sampson that he was worried about the impact of Bogden’s removal on his wife and kids. When Sampson told McNulty that Bogden was single, McNulty dropped his objection. The fact that Bogden was not married or did not have children was irrelevant to his performance as U.S. Attorney or to an objective, reasonable assessment of his performance. We question whether Bogden’s marital or family status was an appropriate basis on which to decide whether he should or should not be removed as U.S. Attorney.

Finally, we find it remarkable that Attorney General Gonzales and Deputy Attorney General McNulty stated that they did not know why Bogden was being removed. In our view, the fact that the Attorney General and Deputy Attorney General were apparently in the dark as to the reasons why Bogden was placed on the removal list demonstrates the flawed nature of their oversight of the U.S. Attorney removal process.

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# Paul Charlton Timeline



## **CHAPTER EIGHT**

### **PAUL CHARLTON**

#### **I. Introduction**

This chapter examines the removal of Paul Charlton, the former United States Attorney for the District of Arizona.

##### **A. Charlton's Background**

Charlton graduated from the University of Arizona Law School in 1988, and then clerked for the Arizona Court of Appeals. In 1989, he became an Assistant Attorney General in the Organized Crime and Racketeering Division of the Arizona Attorney General's Office. In 1991, he became an Assistant U.S. Attorney (AUSA) in the United States Attorney's Office (USAO) for the District of Arizona.

Charlton said he considered seeking the Arizona U.S. Attorney position sometime in December 2000, and friends recommended him to Arizona Senators Jon Kyl and John McCain. In the spring of 2001, following Charlton's interviews with the two Senators, the Department appointed him as Interim U.S. Attorney. After serving 120 days, Charlton was reappointed on an interim basis by the federal district court. He was nominated by the President for the permanent position on July 30, 2001, and was confirmed by the Senate on November 6, 2001.

In April 2005, Charlton was appointed as the Chair the Border and Immigration Subcommittee of the Attorney General's Advisory Committee (AGAC), replacing David Iglesias.

##### **B. The EARS Evaluation of Charlton's Office**

Charlton's office underwent an EARS evaluation at the end of 2003. The evaluation stated that he was "well respected by USAO staff, investigative and civil client agencies, [the] local law enforcement community, [the] Native American Nations, and [the] judiciary regarding his integrity, professionalism, and competence." The only criticism we found in the EARS evaluation was a note that his adherence to a chain of command structure in the office had "led to a perception by some that he is inaccessible" and "not open to suggestions or criticism."

##### **C. Charlton's Status on the Removal Lists**

As we discussed in Chapter Three, in March 2005 Kyle Sampson provided to White House Counsel Harriet Miers a list containing the names of

all U.S. Attorneys, divided into three categories: (1) those he recommended be retained, whom he described as “strong U.S. Attorneys who performed well and exhibited loyalty to the President and Attorney General,” (2) those he recommended be removed, described as “weak U.S. Attorneys who have been ineffectual managers . . . and chafed against administration initiatives,” and (3) those for which he provided no recommendation, who had not “distinguished themselves either positively or negatively.” Sampson identified Charlton on the March 2005 list as a U.S. Attorney who had not distinguished himself either positively or negatively.

Charlton’s name did not appear on the second removal list that Sampson sent to the White House on January 9, 2006. However, as we discuss below, Monica Goodling suggested to Sampson around that time that Charlton be considered for removal. While Sampson did not include Charlton on his second removal list of U.S. Attorneys, he placed Charlton’s name on a draft list of other U.S. Attorneys who might eventually be considered for removal. Charlton’s name also did not appear on the third removal list Sampson sent to the White House on April 14, 2006, of U.S. Attorneys recommended for removal.

On September 13, 2006, Sampson sent a fourth list to the White House containing the names of U.S. Attorneys “We Now Should Consider Pushing Out.” Charlton’s name appeared on that list and stayed on successive lists until he was told to resign on December 7, 2006.

## **II. Chronology of Events Related to Charlton’s Removal**

As noted in Chapter Three, in preparation for McNulty’s closed briefing of the Senate Judiciary Committee on February 14, 2006, senior Department officials discussed the reasons that supported the removals of the U.S. Attorneys. Based on their discussion, Goodling created a chart for McNulty to help him prepare for the briefing. As the basis for Charlton’s removal, the chart cited “repeated instances of insubordination” and “actions taken that were clearly unauthorized.” The chart stated: (1) Charlton advocated for additional resources for his office directly with Senator Kyl; (2) Charlton instituted a policy for tape recording interrogations; (3) Charlton did not timely file a notice that the Department would seek the death penalty in a particular case; and (4) Charlton refused to prosecute obscenity cases.<sup>137</sup>

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<sup>137</sup> The chart Goodling prepared for McNulty’s closed briefing also indicates another reason for Charlton’s termination: that “contrary to guidance from Main Justice that it was poor judgment,” Charlton allowed an employee to take leave without pay so that she could become press secretary for a candidate in the 2002 Arizona gubernatorial campaign. However, we found no evidence that this was ever raised as justification for Charlton’s removal. When we asked Charlton about it, he said that EOUSA approved this arrangement but with certain (Cont’d.)

According to notes taken during the closed briefing of the Senators, McNulty stated that Charlton was “insubordinate as to the Department’s way of doing business” concerning the death penalty and taping interrogations. McNulty also told the Senators that he was personally aware of friction between Charlton and other officials at the Department.

On March 29, 2007, Sampson testified to Congress that Charlton was removed because of policy disputes with the Department in a death penalty case and an initiative in his district to tape record interrogations. Sampson also suggested that Charlton had improperly advocated directly with Senator Kyl for additional resources for his office.

In our investigation, we examined the facts surrounding each of the allegations concerning Charlton’s removal. In the remainder of this chapter, we describe those facts and then provide our findings regarding the reasons for Charlton’s removal. In addition, we examine allegations appearing in the media in the aftermath of the removals that Charlton was removed because of his involvement in the investigation of Republican Congressman Rick Renzi.

#### **A. Charlton’s Discussions With Senator Kyl**

As noted above, one of the justifications raised as a basis for Charlton’s removal was that he had, in McNulty’s words, “worked outside proper channels” to obtain an increase in the number of staff positions for the Arizona U.S. Attorney’s Office. McNulty told congressional staffers that although the issue had predated his tenure as Deputy Attorney General, he learned from the group in the preparation session for his testimony that Charlton had dealt directly with Senator Kyl concerning additional prosecutors in Arizona, and as a result the Department had to move AUSA positions out of larger districts to provide additional positions to Arizona.

This issue surfaced in the spring of 2004. Charlton said that in the spring of 2004, Arizona Congressman J.D. Hayworth sent a letter to Attorney

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constraints, such as that the employee could not indicate that she worked in the U.S. Attorney’s Office. Charlton stated that he had received a letter from EOUSA that it was permissible for the employee to work on the campaign, but not advisable even with the constraints EOUSA suggested. According to Charlton, the employee therefore resigned from the U.S. Attorney’s Office to work on the campaign. In his congressional interview, Margolis said he was concerned at the time about the employee going on leave without pay status to work on the campaign because he thought it made the Department look too political. However, Margolis said the incident happened early on in Charlton’s tenure, and he said he recalled it only on the eve of McNulty’s preparation session. Margolis pointed out that it could not have been a ground for Charlton’s termination because no one knew about it until the group met to discuss the reasons. We concluded that this was another example of the group including after-the-fact rationalizations that did not in fact play any part in the placement of a U.S. Attorney on the removal list.

General Ashcroft asking why the Arizona U.S. Attorney's Office was not doing more to support immigration prosecutions on the border. Charlton said that after the Department received the letter, Sampson called him on behalf of the Attorney General to ask how many more positions he needed to make a difference. Charlton said he told Sampson that 10 additional prosecutors could make a significant impact on the district's immigration prosecution numbers. Charlton said Sampson indicated he would work on getting the additional positions for Arizona.

Charlton told us that shortly after his conversation with Sampson, Senator Kyl made his annual visit to the district.<sup>138</sup> Charlton said Kyl asked whether there was anything that the district needed, and Charlton mentioned to Kyl his conversation with Sampson about getting 10 additional positions for the office. Charlton said he believed that Senator Kyl subsequently spoke to Attorney General Ashcroft about this issue. Charlton said that he did not ask Senator Kyl to intervene on his behalf for more resources. He said he told Kyl about his conversation with Sampson as part of the discussion of what was happening in terms of obtaining additional resources to prosecute illegal immigration. Documents show that the U.S. Attorney's Office subsequently received funding for seven additional prosecutors and six support staff.

In her testimony before the House Judiciary Committee, Goodling stated that she considered Charlton to be a problem because during her tenure in EOUSA she received complaints that Charlton had had unauthorized discussions with a member of Congress (Senator Kyl).

In his March 29 appearance before the Senate Judiciary Committee, Sampson testified that he recalled individuals in the Office of the Attorney General expressing concern that Charlton had directly contacted Senator Kyl in order to obtain additional resources for his office.<sup>139</sup> During Sampson's hearing, however, Senator Kyl publicly stated that he wanted to correct any misimpression that Charlton had initiated the conversation with him. Kyl stated that he recalled one occasion where Charlton told him the office needed more prosecutors to handle immigration cases, and that it was likely that Charlton was responding to a question Kyl had asked. Kyl said that he believed his subsequent discussion with Attorney General Ashcroft assisted in obtaining additional resources for the Arizona U.S. Attorney's Office.

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<sup>138</sup> According to both Charlton and a statement by Senator Kyl, the Department was aware of their annual meetings at which they discussed what was generally happening in the district.

<sup>139</sup> During our interview, Sampson said he had nothing further to add on this topic beyond his prior congressional testimony.

Deputy Attorney General James Comey told us that he recalled hearing at the time that members of Attorney General Ashcroft's staff were upset that Charlton had gone around the Department to obtain additional resources. Comey said he could not recall who told him about the issue, but he remembered members of the Attorney General's staff complaining that Charlton had gone to Senator Kyl, who then spoke to Ashcroft, reportedly causing Ashcroft to feel blindsided and compelled to provide the district with the additional resources Charlton had previously discussed with Sampson. Comey told us it was the only criticism he had ever heard about Charlton while he worked at the Department.<sup>140</sup>

## **B. Tape Recording Interrogations**

Sampson testified to Congress that one of the main reasons he recommended Charlton be removed was that Charlton had attempted to require federal law enforcement agents in Arizona to tape record interrogations.

E-mail traffic shows that in the spring of 2004 Charlton began exploring with the Department's senior leadership whether federal law enforcement agents should tape record interrogations. Charlton told us he believed his office was losing cases because of a failure to tape record interrogations. He said that in the Arizona state criminal justice system where Charlton had begun his career as a prosecutor, interrogations were generally tape recorded. He said that when he became U.S. Attorney, he wanted to change what he believed was an antiquated policy and implement a policy that would protect both crime victims and defendants.

Charlton said he first raised the issue with Deputy Attorney General Comey during a closed session at the U.S. Attorney's conference in San Diego in 2004, and a few days later Comey's Chief of Staff, Chuck Rosenberg, raised it with the FBI. Charlton said Rosenberg told him that the FBI was opposed to changing the policy.

### **1. Department Considers Tape Recording Policy**

During the spring of 2005, the Department's Office of Legal Policy worked with Charlton to consider the tape recording policy and to create a strategy to address expected resistance from Department law enforcement agencies about recording interrogations. Charlton told us that he also raised the issue with

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<sup>140</sup> We note that other people also heard that Charlton had been criticized for allegedly requesting additional resources from Senator Kyl. For example, as we discuss in Chapter Six, Iglesias told us that he was reluctant to respond when asked in 2006 by Senator Domenici if he needed more resources since he was aware that Charlton had been criticized because people in the Department thought he had lobbied his home-state Senator for additional resources.

Attorney General's Advisory Committee (AGAC) Chair Johnny Sutton, who opposed changing the policy.

Charlton raised the issue with Comey again at the U.S. Attorney's conference in Arizona in 2005. In May 2005 Comey established a working group, which included Charlton, to formally consider the matter. According to Charlton, the working group discussed the issues several times, but after Comey left the Department in August 2005 and McNulty became Deputy Attorney General in early November 2005, the issue did not move forward.

E-mail and other documents also show that throughout late 2005 Charlton was trying to persuade the FBI to agree to expand its taping policy.<sup>141</sup> In early December 2005, the working group engaged in an e-mail exchange with Michael Elston, McNulty's Chief of Staff, discussing the merits of the recording policy. However, Charlton said that by December 2005 McNulty had not yet indicated a willingness for the working group to continue studying the issue. According to former Principal Deputy Assistant Attorney General William Mercer, by the end of 2005 the working group had not reached a consensus on whether to recommend a taping policy, although the FBI representatives in the group were supposed to be preparing a memorandum discussing various options.

## **2. Charlton Implements a Taping Policy in His District**

Charlton said that when nothing further happened by early 2006 concerning his desire to begin tape recording interrogations in Arizona, it was clear to him that if there was going to be a change in the policy, he would have to implement it in his district. Charlton said he believed that he could isolate his district in a way that would not affect other cases nationwide. Charlton also said that his district was uniquely situated because of its federal jurisdiction over the prosecution of crime on the 21 Indian reservations in Arizona. He said that establishing a tape recording policy in his district would assist in the prosecution of the many violent crime cases occurring on the Indian reservations, but would not affect other districts that did not have federal jurisdiction over such local crimes. Charlton also said his policy was flexible enough that if federal agents believed that they could not tape record an interrogation, they could conduct the interview without taping it.

In early February 2006, Charlton formally notified his office and all Special Agents in Charge of federal law enforcement agencies in his district

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<sup>141</sup> The FBI's policy provides that use of tape recorders in interviews is permissible in limited circumstances on a selective basis after obtaining authorization from the FBI field office's Special Agent in Charge.

about his new policy, which was scheduled to take effect on March 1, 2006.<sup>142</sup> Charlton acknowledged to us that he did not discuss his decision to implement the new tape recording policy in his district with the Department's leadership.

According to Charlton, after his announcement most of the law enforcement agencies in Arizona expressed no concerns to him about the new tape recording policy beyond questions about the mechanics of the program, such as whether the U.S. Attorney's Office would purchase the recorders. Charlton said that as he had expected, both the FBI and the DEA objected to implementation of the new policy and complained to the Deputy Attorney General's Office.

According to McNulty, FBI Director Robert Mueller called him in late February 2006 and complained that Charlton's Arizona tape recording policy could jeopardize criminal prosecutions in other districts that did not record interrogations. McNulty said he spoke to Charlton at a U.S. Attorneys' conference in Orlando on March 1, 2 days before the policy was to go into effect, and told him to rescind it, but Charlton refused to do so. Charlton told us that he told Principal Associate Deputy Attorney General Mercer that he would prefer to resign rather than rescind the policy.

Charlton said that McNulty repeated FBI Director Mueller's views about the policy and expressed concern that he could not persuade Mueller to change his position opposing the taping policy. Charlton said his conversation with McNulty was interrupted before they resolved anything, and McNulty asked Mercer to continue discussing the matter with Charlton.

### **3. Pilot Project for Charlton's District**

Charlton said that Mercer persuaded him to design a pilot project for tape recording interrogations rather than submitting his resignation over being forced to rescind the new policy. Charlton said Mercer told him to forward the proposal for a pilot project to him, and Mercer assured him that it would receive expeditious and favorable review.

Mercer also told Charlton that McNulty was upset because Charlton had committed a "procedural foul" by not clearing the initiative with the Deputy Attorney General's Office prior to its implementation. Charlton said that Mercer's "procedural foul" comment led him to believe that he could alleviate

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<sup>142</sup> The policy stated that "Cases submitted to the U.S. Attorneys Office for the District of Arizona for prosecution in which an investigative target's statements has been taken, shall include a recording, by either audio or audio and video, of that statement . . . the recording shall cover the entirety of the interview to include the advice of Miranda warnings and any subsequent questioning." The policy contained an exception for circumstances "where a taped statement cannot reasonably be obtained . . ."

the concerns by framing implementation of the new policy as a pilot program in his district rather than as a finalized Department policy change.

Charlton told us that he wanted something in writing from McNulty's office reflecting his agreement with Mercer. Charlton therefore asked Elston to confirm in writing that McNulty had asked that implementation of the new policy be delayed until his staff could review the policy and the pilot program proposal. On February 28, Elston wrote an e-mail to Charlton stating:

[McNulty] is very interested in having you submit a proposal to have a pilot program in your district. Such a proposal would receive expeditious consideration. [McNulty] understands this issue and is interested in energizing the Department's consideration of it. You are the best advocate for the proposed policy, and he hopes you will play a significant role in the Department's review and the interagency review process.

Charlton submitted his proposal for the pilot program to McNulty on March 15, 2006. In August 2006, McNulty's staff recommended that he approve it. However, McNulty took no action. Charlton said that he followed up with Mercer at least once a month thereafter concerning the status of the pilot program, and Mercer reassured him that although McNulty was hesitant about the program, he would approve it.

McNulty told us that he had supported the pilot program mainly as an accommodation to Charlton because Charlton had already announced the policy to his office and to law enforcement agencies in his district, and it would have been awkward for him to rescind it. However, McNulty told us that he did not believe that the Department should pursue the policy. We found no indication that anyone from McNulty's office told Charlton that McNulty in fact did not support the pilot program.

McNulty also told us that he thought Charlton showed poor judgment in proceeding to implement a new policy that had national implications without first obtaining Department approval. McNulty said that he had most likely discussed this matter with Sampson in their regular senior leadership meetings. McNulty told congressional investigators that he did not see Charlton's actions at the time as insubordinate, although he acknowledged that Charlton's actions concerning the taping policy came to his mind when he saw Charlton's name on the list of U.S. Attorneys to be fired. However, McNulty told us that if it had been up to him he would not have fired Charlton because of his attempt to implement the new tape recording policy. Nevertheless, McNulty said he did not ask Sampson to remove Charlton's name from the list.

## **C. The Death Penalty Case**

Around the same time that Charlton was seeking to implement the new taping policy, he disagreed with senior Department officials over a decision to seek the death penalty in an Arizona case involving a defendant who was being prosecuted for using a firearm to commit a murder during a drug deal.

### **1. The Department's Procedure for Death Penalty Cases**

The U.S. Attorneys' Manual describes the Department's death penalty review process. First, the U.S. Attorney sends a memorandum containing the facts and legal analysis in the case to the Assistant Attorney General for the Criminal Division in support of a recommendation to seek or not to seek the death penalty. The Assistant Attorney General then forwards the package to the Criminal Division's Capital Case Unit (CCU). The CCU reviews the material from the U.S. Attorney and any material submitted by defense counsel, and passes it on for a recommendation from the Attorney General's Review Committee for Capital Cases (the Committee).<sup>143</sup> The Committee makes a recommendation to the Attorney General through the Deputy Attorney General. The Deputy Attorney General provides his recommendation to the Attorney General when the Committee's recommendation differs from that of the U.S. Attorney.

According to the Deputy Chief of the Criminal Division's CCU, as a matter of practice it is also understood that a representative from the Deputy Attorney General's Office calls the U.S. Attorney to consider the district's view of the case when the district recommends against seeking the death penalty but the Committee votes in favor.

The Attorney General makes the final decision about whether or not to seek the death penalty. The Attorney General conveys the final decision to the U.S. Attorney in a letter authorizing the U.S. Attorney to seek or not to seek the death penalty. However, attorneys in the CCU convey by telephone or e-mail the Attorney General's decision to the U.S. Attorney's Office as soon as the decision is made.

### **2. The Death Penalty Decision**

In a memorandum to Criminal Division Assistant Attorney General Alice Fisher dated December 16, 2005, Charlton requested that the Department not seek the death penalty for the defendant who allegedly had committed a

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<sup>143</sup> The Committee is composed of career officials and political appointees from the Criminal Division, the Office of the Deputy Attorney General, the Capital Case Unit, and a rotating group of Assistant United States Attorneys.

murder during a drug deal.<sup>144</sup> Charlton told us that representatives of his office met with the Committee in the spring of 2006 to argue that the death penalty was not appropriate in this case. According to e-mail traffic, however, the Committee recommended in late May 2006 that the government seek the death penalty. The Deputy Attorney General also recommended that the death penalty be sought in this case.

Elston signed the recommendation for Deputy Attorney General McNulty on May 30, 2006, because McNulty was out of the country at the time. According to e-mail records, as of the morning of May 30, 2006, the Attorney General had not yet considered the Deputy Attorney General's endorsement of the Committee's recommendation, even though a court notice (called the "seek notice") was supposed to be filed on the following day, May 31.<sup>145</sup>

As noted above, as a matter of practice a representative from the Office of the Deputy Attorney General calls the U.S. Attorney to consider the district's view of the case when the district recommends against seeking the death penalty but the Committee votes in favor. Charlton told us that McNulty's office did not give him a chance to respond to the Committee's recommendation before the Attorney General made his decision to seek the death penalty in this case.<sup>146</sup>

In addition, according to Charlton, he was not notified that McNulty had recommended to the Attorney General that the government should seek the death penalty. Charlton said he first learned that the Attorney General had made a decision on May 31, 2006. On that day, the AUSAs handling the case were notified by a CCU attorney that the Attorney General had signed the letter to Charlton authorizing him to seek the death penalty.

Charlton's office did not file the notice of intent to seek the death penalty on May 31 in order to allow Charlton time to further discuss the matter with the Department. The same day Charlton received the letter from the Attorney General, an AUSA in Charlton's office filed a motion requesting an extension of time to file the notice. Later that day, the court extended the deadline to

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<sup>144</sup> According to Department documents describing the crime, the defendant in that case allegedly ordered a large quantity of methamphetamine from his supplier and murdered her when she delivered part of it to the apartment where the defendant lived.

<sup>145</sup> The "seek notice" is the document filed in the U.S. district court stating that the United States intends to seek the death penalty against the defendant.

<sup>146</sup> We determined that in early May 2006, coordination between the Deputy Attorney General's Office and the U.S. Attorneys' Offices concerning capital cases was assigned to a former Associate Deputy Attorney General who left the Department before the Arizona case came to Deputy Attorney General McNulty for decision. Former Counselor to the Deputy Attorney General Joan Meyer took over the former Associate Deputy Attorney General's capital case responsibilities in late June-early July 2006.

June 30, and on the defendant's subsequent motion, extended the deadline to August 20, 2006.

### **3. Charlton Seeks Reconsideration of the Decision**

Charlton contacted Jeffrey Taylor, a Counselor to the Attorney General who had responsibility for death penalty matters, and expressed his unhappiness that he had not had an opportunity to speak with McNulty or the Attorney General about the recommendation before the Attorney General decided the matter.<sup>147</sup> Charlton said that, at Taylor's suggestion, he decided to request reconsideration of the decision.

Charlton then contacted Criminal Division Assistant Attorney General Fisher to see if she would weigh in on the matter. Charlton said he and Fisher discussed the process by which Charlton could seek reconsideration of the decision. According to Fisher, she told Charlton she was uncertain about how Charlton should proceed without a showing that the circumstances had changed in the case because she could not simply overrule the Attorney General's decision. Fisher said she advised Charlton to contact the Deputy Attorney General's Office.<sup>148</sup> Charlton said he considered his conversations with Taylor and Fisher as support for his view that the matter was not final and was open for reconsideration.

In a June 27, 2006, memorandum addressed to Fisher, Charlton requested reconsideration in part because the defense had not presented evidence in mitigation to the Capital Case Committee prior to the Attorney General's decision. Charlton's letter enclosed the mitigation evidence submitted by the defense and also requested that Fisher direct the Committee to meet with Charlton and the AUSAs assigned to the case to hear their arguments for reconsideration.

According to an e-mail dated July 11, an AUSA in Charlton's office called the CCU to determine if it planned to meet with Charlton about the request for reconsideration. A CCU trial attorney informed the AUSA by e-mail that "any decision to confer with your office and the defense is within the discretion of [Assistant Attorney General Alice Fisher]. As yet, we are unaware of any

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<sup>147</sup> Charlton noted that during Ashcroft's tenure as Attorney General he had successfully sought reconsideration of the Department's recommendation in another death penalty case after discussing the matter with Deputy Attorney General Comey. Comey confirmed to us that after Charlton raised concerns about the case, Comey changed the advice he was planning to give Attorney General Ashcroft, who agreed with the "no seek" recommendation.

<sup>148</sup> Charlton told us he was not sure whether the request to reconsider should go through the Deputy Attorney General's Office at that point, and he said Fisher was not sure either. He said he contacted Fisher because she oversaw the Death Penalty Review Committee.

request for such a conference.” Charlton responded that he would call Fisher, and e-mail traffic shows that a conference call between Charlton’s office, Fisher, and the CCU was scheduled for Thursday, July 13.

Fisher told us that during the conference call on July 13 she raised the issue of whether she could appropriately handle the request to reconsider because it was not a request for authorization to withdraw the notice based on changed circumstances, but was instead a request that she reconsider the Attorney General’s original decision.

On July 17, the CCU forwarded for Fisher’s signature a memorandum to the Attorney General which stated that Charlton’s request for reconsideration did not present the new evidence required to revisit the Attorney General’s original decision. The memorandum also stated that “the United States Attorney declined to file the notice of intent to seek the death penalty following the Attorney General’s May 31, 2006 decision, opting instead to seek reconsideration.” The memorandum stated that the material submitted by the defense did not “clearly identify any actual mitigating evidence that the Committee and the Attorney General have not already considered” and recommended against reconsideration of the Attorney General’s decision to seek the death penalty in the case.

Our review of e-mails and other documents shows that until July 17, officials in the Deputy Attorney General’s Office were unaware that Charlton had not filed with the court the notice that the Department intended to seek the death penalty. On that day, Joan Meyer, a Counselor in McNulty’s office, forwarded the CCU memorandum to Jeff Taylor in the Attorney General’s Office with the notation that “This seems somewhat disrespectful to the Attorney General . . . I don’t know how the USA thinks he has the discretion to decline to file in May.” Taylor responded by e-mail to Meyer that he had told Charlton that if Charlton thought there were changed circumstances he could ask for reconsideration. However, Taylor wrote that he did not know that Charlton had not filed the notice. Taylor then asked Meyer to contact Charlton to find out why he chose that course.

According to e-mail records, Meyer contacted Charlton that day, and Charlton told her he did not know he was required to file the “seek notice,” especially since the court had granted an enlargement of time in which to do so. Meyer informed Taylor in an e-mail that she told Charlton that the notice should have been filed when Charlton received notification of the Attorney General’s decision. Meyer also suggested to Taylor affording Charlton the courtesy of going through the review process again, but expressed concern that it might set an adverse precedent. Meyer wrote, “When the AG makes a decision, the USA needs to implement it.”

Taylor responded that he would discuss the matter with Sampson, and he asked Meyer to inform Elston. The following day, Taylor wrote to Meyer, “After discussing this with Kyle [Sampson] I think Charlton should be directed to file the seek notice in the pending matter.”

#### **4. Charlton Asks to Speak to Attorney General Gonzales About the Decision**

In an e-mail dated July 20, 2006, Meyer informed Elston that she had called Charlton to tell him to file the notice, and that Charlton said he understood but wanted to speak to “someone higher up, presumably the DAG or the AG.” In her e-mail to Elston, Meyer said she told Charlton it would be better to discuss the issue with Deputy Attorney General McNulty. She concluded her e-mail with: “This usa is just not going to take no for an answer.” When Elston responded that he would call Charlton, Meyer replied, “Thanks. Things like this are an abuse of the process.”

On July 20, Elston called Charlton to discuss the matter. Charlton told us that during this conversation, Elston told him there were individuals in the Department who thought Charlton had disregarded the Attorney General’s order to file the death penalty notice. After their conversation, Charlton sent an e-mail to Elston stating:

At no time was anyone attempting to ignore or refuse to file as the AG requested. Everyone here thought that [not filing the notice and obtaining an enlargement of time to file it] was the appropriate way to handle this matter in a case where we hoped to have a reconsideration of this matter. It was, until very recently, my understanding that we did not have to file our notice until the date required by the Court. No disrespect of any kind was intended. I apologize if anyone saw it as otherwise.

In an e-mail to Meyer on July 21, Elston told her about his conversation with Charlton and asked for Meyer’s input concerning the substantive aspects of Charlton’s request for reconsideration. Meyer responded, “I don’t want to accuse him of anything but I find it very difficult to believe that he was doing anything but trying to circumvent the AG’s ruling.” Meyer added that she believed Charlton “obviously has a problem with the death penalty, either because of the resource issue or personal philosophy.”<sup>149</sup> Meyer also recommended that Elston tell Charlton there would be no meeting or “redoing

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<sup>149</sup> When we asked Charlton about this claim, he stated that he was not opposed to the death penalty and that he believed the death penalty should be imposed “where the law required it.” He said the concern in this case was that the evidence was not sufficient to seek capital punishment.

the process” and instead instruct him to file the notice no later than the following week.

On July 31, Elston e-mailed Meyer and Taylor that he had spoken to Charlton and that Charlton had requested a conference call with McNulty. Taylor responded, “Charlton is really pushing it with this.” Elston also wrote that Charlton might seek to discuss the matter with the Attorney General “if (when) he gets no satisfaction from us, but we will try to dissuade him from making that request.”

On August 2, Charlton spoke with McNulty and Elston by telephone about his request for reconsideration. Charlton said he told McNulty and Elston that he did not believe the U.S. Attorney’s Office would be successful in obtaining the death penalty before the jury. Charlton explained to McNulty that the case was based on testimony from cooperating witnesses who were all drug dealers or users, and the government had modest forensic evidence in part because the Department had allegedly refused to pay for exhuming the victim’s body from a landfill south of Phoenix. Charlton said McNulty had little reaction to his presentation, although Charlton said McNulty agreed to discuss the death penalty recommendation with the Attorney General.

McNulty told us that he considered his conversation with Charlton to be the appropriate thing to do given the circumstances of the underlying case and Charlton’s view that the Attorney General should reconsider his decision. McNulty said that Charlton “pushed hard,” but after listening to Charlton’s views and after his own evaluation of the case, his recommendation to the Attorney General was that the decision to seek the death penalty should stand.

McNulty told congressional investigators that to his knowledge Charlton was the only U.S. Attorney to ever disregard a “seek letter.” McNulty also said that when Charlton did not file the notice with the court after receiving the Attorney General’s letter, it was “rather significant” because it was well established that U.S. Attorneys are required to comply with the Attorney General’s direction once a decision is made. Mercer, who was the U.S. Attorney in Montana and Principal Associate Deputy Attorney General at the time, told us that “based on training and understanding” U.S. Attorneys are aware that unlike other cases, they do not possess discretion in deciding whether or not to seek the death penalty in a capital case. Mercer said that despite the wording in the letter from the Attorney General stating, “You are authorized to seek the death penalty,” all U.S. Attorneys know that upon

receipt of such a letter they are required to inform the court the prosecution will seek the death penalty.<sup>150</sup>

## **5. Attorney General Gonzales Denies Charlton's Request to Reconsider**

McNulty said that although he believed that Charlton had failed to follow the rules, he attempted to address Charlton's request to reconsider the decision to seek the death penalty. McNulty told us he carefully reviewed the file after he spoke with Charlton, and he then met with Attorney General Gonzales and presented Charlton's arguments. Calendar entries indicate that on August 15, 2006, a meeting between Gonzales and McNulty was scheduled from 3:30 p.m. to 3:45 p.m. to discuss Charlton's request for reconsideration. McNulty told us he informed Gonzales that Charlton had made no new arguments since the Attorney General's original decision, and McNulty therefore recommended that Gonzales maintain his position that the death penalty was appropriate in this case. According to McNulty, Gonzales believed his previous decision to seek the death penalty was appropriate.

In Gonzales's public testimony before the Senate Judiciary Committee on July 24, 2007, he said he had no specific recollection of the case or of his conversation with McNulty. During our interview, Gonzales told us that he was surprised to learn shortly after making the original decision that Charlton's office had not filed the notice. Gonzales said he did not recall taking any action at the time other than perhaps asking McNulty to discuss the matter with Charlton.

Charlton told us that shortly after McNulty's meeting with Attorney General Gonzales, Elston called Charlton to inform him of Gonzales's decision. According to Charlton, Elston told him that McNulty had spent a considerable amount of time discussing the issue with Gonzales, "perhaps 15 minutes." Charlton said he thought at the time that common sense would prevail if Gonzales could listen to Charlton make the presentation. Charlton said that he asked Elston if he could speak personally with the Attorney General about the case and Elston advised him that it would be unwise to seek an audience with the Attorney General.

During Elston's interview with congressional staff, he said he advised Charlton not to request a meeting with Gonzales because Elston believed he knew what Gonzales would say. Elston said he did not think it was worth it to Charlton to waste "political capital" with Gonzales to discuss the case further.

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<sup>150</sup> According to the Deputy Chief of the Capital Case Unit, this situation prompted a change in the wording of the Attorney General's letters to U.S. Attorneys in death penalty cases, which now states, "You are authorized *and directed* to seek the death penalty."

Elston also said that the entire incident caused him to question Charlton's judgment about how he had handled the matter.

According to an e-mail dated August 15, 2006, at 6:51 p.m., Elston forwarded to Sampson Charlton's request to meet with Gonzales. Elston wrote to Sampson, "In the 'you won't believe this category', Paul Charlton would like a few minutes of the AG's time." Elston told Sampson he had explained to Charlton that Charlton had already been given "extensive, unusual process" and Elston had also told Charlton he did not think it was a good idea for him to press the matter further, but Charlton insisted that Elston make the request. Sampson responded at 7:00 p.m. with a one word e-mail, "Denied."

The following day, August 16, 2006, Elston informed Charlton by e-mail that the Attorney General "has declined your invitation to speak further about the case," and Elston instructed Charlton to file the notice that the government was seeking the death penalty. That same day, Charlton's office filed the notice.<sup>151</sup>

## **6. Sampson Places Charlton's Name on the September 2006 Removal List**

Less than 1 month later, on September 13, 2006, Sampson included Charlton's name on his removal list for the first time. Sampson testified to Congress that Charlton was placed on the September 13 list based on policy disputes Charlton had with the Deputy Attorney General's Office during the summer of 2006. According to Sampson, Charlton's action in the death penalty matter was one of the two primary reasons he placed Charlton's name on the September 13 list. The other was Charlton's efforts to institute a new policy in his district requiring tape recording of interrogations.

### **D. Obscenity Prosecutions**

Another issue that was raised in McNulty's preparation session for his closed briefing of the Senate Judiciary Committee, and also listed in Goodling's chart as a reason justifying Charlton's removal, was Charlton's alleged resistance to prosecuting obscenity cases identified as significant by the Department's Obscenity Prosecution Task Force (Task Force). Although we did not find that any Department official asserted in testimony or interviews that Charlton's removal was based on this issue, we examined this claim because it was listed in Goodling's chart.

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<sup>151</sup> On September 2, 2008, the defendant pled guilty to murder, drug, and weapons charges and agreed to a life sentence.

## **1. The Obscenity Prosecution Task Force Requests Charlton's Assistance**

Charlton and Brent Ward, the Director of the Task Force, first met in March 2006 to discuss the investigation of an alleged distributor of illegal pornography in Arizona. Charlton said that Ward requested that Charlton assign an AUSA from his office to act as the "second chair" to a Task Force trial attorney through the investigation and ultimate prosecution of the case. Charlton told us that he initially expressed reluctance to assist the Task Force because he believed his office did not have sufficient resources to take on the additional cases the Task Force had identified. Charlton also said that while he believed that Task Force attorneys should be primarily responsible for the prosecutions, he nevertheless agreed to support the case by assigning a prosecutor to assist the Task Force attorney assigned to the Arizona case. According to e-mail traffic, on March 8, 2006, Charlton provided Ward with the name of an AUSA in Arizona who would assist with the investigation and prosecution of the case.

On April 26, 2006, Ward e-mailed a report to Criminal Division Assistant Attorney General Fisher describing what he called the "first wave" of cases from the Task Force. Ward also provided the names of the U.S. Attorneys who had been assisting the Task Force so that Fisher could personally commend them for their assistance. In that report, Ward wrote that Charlton had been "very cooperative," but he also noted that Charlton's office appeared to have serious resource issues that might preclude providing trial assistance to the Task Force. Ward informed Fisher that trial assistance was absolutely crucial for the Arizona case and requested that she encourage Charlton "to stick it out with [the Task Force]." We found no indication that Fisher responded to Ward or spoke to Charlton about the matter at that time.

## **2. Task Force Complaints About Charlton**

On May 22, 2006, Ward, accompanied by an FBI Washington Field Office Special Agent in Charge (SAC) and a Task Force trial attorney, met with Charlton in Arizona to discuss the investigation of the pornography distributor.<sup>152</sup> The case against the distributor was indicted in Arizona the following day. According to Charlton, Ward tried to persuade Charlton to have his office take over the case or to assist with the trial. Charlton said that he was unable to do so because the assigned AUSA had a busy caseload of his own, but Charlton said he would provide office space for the Task Force attorney.

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<sup>152</sup> The Task Force's investigative work was handled by the Adult Obscenity Squad, a nationwide FBI initiative operating out of the FBI's Washington, D.C., Field Office.

E-mail records show that by the end of June 2006, Ward had begun to request that Fisher's office assist him in persuading Charlton and U.S. Attorney Debra Yang of the Central District of California to accept responsibility for prosecution of two Task Force cases. Criminal Division Chief of Staff Matthew Friedrich said he called Charlton to ask him to take over the case in Arizona, and Charlton told him he did not have the resources to do so. Friedrich said that after he spoke to Charlton, he told Elston about Ward's complaints that Charlton refused to take over the case or assist with the trial. According to Friedrich, however, adult obscenity cases were not a high priority for the Deputy Attorney General's Office at that time and no one from the Deputy Attorney General's Office raised a concern about them.<sup>153</sup>

In July 2006 Friedrich informed Elston and Principal Associate Deputy Attorney General Mercer that he wanted McNulty's office to direct Charlton and Yang to lend resources to handle specific obscenity cases. At Friedrich's request, in early August Mercer spoke to Charlton about taking over the Arizona task force case. Charlton said that his office was not in a position to assume responsibility for the case, but said that one of his AUSAs would assist with the case when it got closer to trial.

In an August 28, 2006, e-mail, Ward complained to Sampson that the Task Force's efforts were at a standstill because Charlton, Bogden, and Yang refused to take over the obscenity cases the Task Force had identified and had begun to develop in their districts. Ward also complained that he was unable to get either Fisher or Friedrich to meet with him to discuss the matter. Ward asked Sampson whether the Attorney General would consider calling the U.S. Attorneys to instruct them to take over the cases. We found no response to Ward's request, and Sampson told us he did not recall discussing the matter with Gonzales.

On August 29, 2006, Ward sent an e-mail to Friedrich stating that Charlton and Bogden's failure to cooperate with the Task Force was going to lead to a "showdown with the FBI." Ward also wrote that the FBI seemed to minimize its participation in the Task Force after Charlton allegedly "thumbed his nose" at Ward and the FBI SAC at their May 22, 2006, meeting. Friedrich forwarded Ward's e-mail to Elston, who responded, "don't throw in the towel yet."

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<sup>153</sup> Fisher noted that U.S. Attorneys do not report "in any way, shape, or form" to the Criminal Division, but rather to the Deputy Attorney General. According to Fisher, the attitude of the U.S. Attorneys' Offices towards the Task Force was mixed. According to Fisher, several districts were interested in pursuing cases but lacked the resources to do so. Fisher added that the Task Force was established as a small team of two to four attorneys who worked closely with the FBI to identify potential cases for referral to U.S. Attorneys, but the Task Force itself was not designed to prosecute cases.

Elston said that he and McNulty discussed the matter in early September 2006, and McNulty indicated he wanted to familiarize himself with the cases so he could discuss them with the U.S. Attorneys. Elston told us that he knew Friedrich was frustrated at how long it was taking McNulty to directly contact the U.S. Attorneys about the obscenity cases, but Elston said McNulty wanted to have all the information concerning Ward's complaints before he called them about the cases. In an e-mail to Friedrich on August 31, 2006, Ward prepared a timeline describing his interactions with Charlton for a proposed briefing of McNulty concerning the Arizona obscenity case.

Between September 13 and 15, 2006, the Department's National Advocacy Center (NAC) in Columbia, South Carolina, hosted a training seminar for Department personnel and other law enforcement agencies about investigating obscenity cases. Attorney General Gonzales spoke at the seminar and underscored that obscenity prosecutions were a Department priority.

Following the seminar, Ward continued to complain about Charlton and other U.S. Attorneys. In a September 20, 2006, e-mail to Sampson, Ward stated that Charlton and Bogden were unwilling to take "good cases" presented to them. Ward asked, "In light of the Attorney General's comments at the NAC . . . what do you suggest I do?" Ward also asked Sampson whether it was necessary for him to go through the chain of command to complain to the Attorney General or whether telling Sampson about Charlton and Bogden was sufficient. Sampson responded that Ward should go through the regular channels to avoid "step[ping] on [Fisher]'s or [McNulty]'s toes."

That same day, Ward again complained to Friedrich and others in the Criminal Division, stating, "I would like to position them [Charlton and Bogden] for calls from the Attorney General." On September 21, 2006, Ward provided Friedrich with summaries of the "problem districts" in which he described Charlton as "a hardened hold-out [who] will probably not budge until the AG calls, if then." We found no evidence that the Attorney General or anyone else ever called Charlton to discuss these matters.

During his interview with us, Sampson stated that he did not place Charlton's name on the September 13 list because of Ward's complaints about Charlton's lack of cooperation on obscenity cases.<sup>154</sup> Sampson said he could not recall anything about Charlton beyond his actions concerning the death penalty matter and his attempt to implement the recorded interrogations policy as the basis for placing Charlton on the list. Sampson said that he did not ask McNulty or anyone else about Charlton but he had learned in passing

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<sup>154</sup> Sampson said failure to participate in the obscenity prosecutions may have been a factor in the decision to place Bogden on the list, although he said he could not recall if it was a factor in Bogden's removal.

sometime during the summer of 2006 about Charlton's actions regarding the death penalty and recorded interrogations issues.

McNulty told us that at no time did he associate Charlton with concerns about failing to undertake obscenity prosecutions. McNulty said that when he learned in late October 2006 that Charlton was on the list of U.S. Attorneys to be removed, Charlton's actions concerning the tape recording policy and the death penalty case were foremost in his mind.

### **E. Investigation of Congressman Renzi**

Another issue that surfaced in media reports concerned whether Charlton's removal was connected to the investigation of Republican Congressman Rick Renzi of Arizona or to a media leak about the investigation.<sup>155</sup>

The FBI's investigation of Renzi began in early 2005. The Arizona U.S. Attorney's Office participated in the investigation, and the Department's Public Integrity Section joined the case in the fall of 2005. In October 2006, senior leadership in the Department became aware that Charlton's office and the Department's Public Integrity Section were jointly handling the investigation. According to Benton Campbell, who replaced Friedrich as Assistant Attorney General Fisher's Chief of Staff at the end of September 2006, the Criminal Division began to closely supervise aspects of the investigation in mid-October 2006 after Fisher learned that Charlton's office planned to employ a certain investigative technique.

On Thursday, October 19, 2006, Charlton's office submitted a request to the Criminal Division to seek a court order to use the investigative technique. The following day, an Associated Press (AP) reporter told Department spokesperson Brian Roehrkasse that the AP planned to publish an article reporting that the Department was investigating Renzi for bribery and that the Department was using a wiretap in the investigation. Fisher responded that Campbell would brief Roehrkasse about the investigation, but cautioned that the report was not accurate.

According to Charlton, on Saturday, October 21 an Internet blog falsely reported that the Arizona U.S. Attorney's Office was "up on a wire" and had already indicted Renzi but was sitting on the indictment until after the upcoming election. In an October 22 e-mail to Elston requesting assistance in obtaining expedited consideration of Charlton's request to use the particular investigative technique, Charlton discussed the media reports and noted that

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<sup>155</sup> The investigation focused in part on an allegation that Renzi agreed, in exchange for a monetary payment, to sponsor federal legislation to buy land from a former business associate.

up to this point the Department had declined to comment. Charlton informed Elston that after becoming aware of the news report, Renzi had contacted the Arizona FBI office to ask if he was under investigation, but the FBI had refused to comment.

According to Charlton, on Monday, October 23 Renzi's Chief of Staff left a voicemail for Charlton and his public affairs officer inquiring about the status of any case against Renzi. Charlton said they did not return the staff member's calls, and the office's Criminal Chief immediately reported the calls to John Nowacki, a Deputy Director in EOUSA.

Charlton told us that by October 24 supervisors in the Criminal Division had approved the request to seek the investigative technique, but Assistant Attorney General Fisher's office had not yet approved the request. Charlton said he tried to discuss the matter with Criminal Division Chief of Staff Campbell to no avail, and then went directly to Fisher. Charlton told us that Fisher expressed concern about moving forward more quickly with the investigative technique for two reasons: (1) a recent controversy concerning whether the Department was overaggressive in obtaining and executing a search warrant in U.S. Representative William Jefferson's congressional office and, (2) the risk that disclosure of the Renzi investigation before the election could interfere with the election.

On October 25, stories about the Renzi investigation appeared in The Washington Post and The New York Times, and both quoted an unnamed Department official stating that the investigation was in a preliminary stage.

Documents show that Fisher approved the investigative technique request on October 26. Campbell said that during the week of November 2, he informed Charlton's office that no one was authorized to take any other investigative steps until after the election.

E-mail records show that in early November 2006, Charlton complained to Fisher that Campbell's oversight of the investigation was becoming "far too restrictive." Campbell told us that he recognized that the Arizona U.S. Attorney's Office was frustrated with the extent of his review, but he believed it was justified by the extraordinary circumstances of the case. Campbell also told us that his conversations with Charlton were very professional. He said that Charlton was "backing his people" and was not unreasonable. Campbell also said that the Arizona U.S. Attorney's Office was ultimately able to take all the investigative steps it had requested. Campbell also said he was shocked when he learned in December 2006 that Charlton had been asked to resign because he had just spoken with Charlton 6 weeks earlier.

Fisher said she did not have any input into the issue of which U.S. Attorneys were to be removed. She said that if any of her thoughts or opinions

were used in the decision-making process, it was without her knowledge or permission.

Sampson testified before the Senate Judiciary Committee that Charlton's removal was not related to the Renzi investigation. He also stated that to his knowledge no one from the White House or outside the Administration advocated for Charlton's removal. McNulty told us that he was unaware of any information that would support the conclusion that Charlton's removal was related to the Renzi investigation. McNulty also said he heard no complaints from the Attorney General or the White House about Charlton's actions in the Renzi investigation.

#### **F. Charlton's Resignation**

On December 7, 2006, EOUSA Director Battle called Charlton and told him that the Department wanted him to resign as U.S. Attorney by the end of January. According to Charlton, his call with Battle was a "very curt" conversation. Charlton said after speaking with Battle he called Acting Associate Attorney General Mercer, who told him that the action was being taken so others would have the opportunity to serve as U.S. Attorney before the end of the President's term.

Charlton said that at the time he thought he was probably asked to resign because of the difficulties he had with the Department concerning the death penalty matter and the taping policy. On December 18, 2006, Charlton submitted a letter of resignation to the President and the Attorney General stating that he would resign effective January 30, 2007.

On December 21, 2006, after Charlton announced his resignation, he sent an e-mail to Mercer notifying him that the media had asked whether Charlton's resignation was connected to the leak in the Renzi investigation. Mercer told us he could not specifically recall discussing the matter with Charlton, other than advising Charlton to respond to media inquiries about his resignation by making it clear that it was Charlton's decision to resign.

### **III. Analysis**

In this section, we analyze the various reasons that have been proffered for why Charlton was removed as U.S. Attorney.

#### **A. Renzi Prosecution**

We found no evidence that Charlton was removed because of his office's investigation and prosecution of Congressman Renzi, as was alleged in some media reports after the U.S. Attorney removals became public. Sampson and other Department officials denied this claim, and our review of Department e-

mails and documents did not find any indication that these investigations had anything to do with Charlton's removal. Moreover, the case was handled jointly by the Arizona U.S. Attorney's Office and the Department's Public Integrity Section beginning in the fall of 2005, and Charlton's name did not appear on any removal list until September 2006.

Sampson testified that he was not aware of the Renzi investigation when he put Charlton's name on the removal list in September 2006, and we found no evidence that the investigation played any role in Charlton's removal. It is also noteworthy that after Charlton's removal, the Renzi investigation and prosecution continued unabated, resulting in Renzi's indictment in February 2007. The case is pending.

### **B. Obscenity Prosecution**

One of the issues listed in Goodling's chart as a justification for Charlton's removal was his alleged resistance to assisting in the prosecution of Obscenity Prosecution Task Force cases. It is unclear whether, and to what extent, the task force leader's complaints about Charlton played a role in his removal.

Sampson stated that he did not recall placing Charlton on the list for reasons other than Charlton's actions concerning the tape recording policy and his disagreements with the Department about seeking the death penalty in a particular case. Elston and McNulty also told us they did not recall that Charlton's alleged failure to assist the Obscenity Prosecution Task Force was a factor in his removal.

However, we found that Ward, the Task Force leader, complained directly to Sampson and indirectly to Elston about Charlton throughout the summer of 2006, shortly before Sampson placed Charlton on the list. Ward also complained to Sampson about Bogden, who was also placed on the September 13, 2006, removal list for the first time. Yet, Charlton and Bogden were not the only U.S. Attorneys about whom Ward complained, and those other U.S. Attorneys were not removed. While it is not clear to what extent Charlton's alleged failure to assist the Task Force was a factor in his removal, we believe it played a part in Sampson's decision to put him on the list.

### **C. Discussion with Senator Kyl About Resources**

Department officials believed that Charlton had improper discussions with Senator Kyl to seek more resources for the Arizona U.S. Attorney's Office. During McNulty's preparation session for his closed briefing for the Senate Judiciary Committee, Sampson mentioned Charlton's discussion with Kyl about resources as justification for Charlton's removal. Sampson later testified before the Senate Judiciary Committee that he recalled officials in the Office of the Attorney General thinking that Charlton had directly contacted Senator Kyl

in order to obtain more resources for his office. Goodling testified that Charlton's unauthorized discussions with members of Congress were on her mind when she examined Sampson's draft list in early 2006. Moreover, Iglesias told us that he was aware that Charlton had been criticized because people in the Department thought he had lobbied his home-state Senator for additional prosecutors, evidencing how strongly and widely held this view was in the Department.

In fact, Charlton did not approach Senator Kyl for additional resources. Rather, after an Arizona Congressman had raised to the Department the need to devote more resources to border prosecutions, Sampson asked Charlton for his views, and Charlton confirmed his need for additional resources. Shortly after Sampson's conversation with Charlton, Senator Kyl visited Charlton's office and asked Charlton directly whether there was anything the district needed. Charlton mentioned to Kyl his conversation with Sampson about seeking additional attorney positions for the Arizona U.S. Attorney's Office. Charlton did not ask Senator Kyl to intervene on his behalf for more resources; he was responding to Kyl's question. Nevertheless, when Senator Kyl later pressed the Department for more resources for Arizona, Department officials apparently believed that Charlton had acted inappropriately.

We concluded that Sampson's, Goodling's, and other Department officials' erroneous belief that Charlton had acted inappropriately with Senator Kyl was another factor in the decision to remove him. However, we do not believe that this issue was the most significant factor in Charlton's removal. The incident occurred in 2004, and none of the early removal lists included Charlton's name. Rather, as discussed next, we believe that the primary reasons for Charlton's removal were the Department's view of his actions regarding the tape recording of interrogations and, most important, its view of his persistent efforts to reconsider the Department's decision to seek the death penalty in a particular case.

#### **D. Tape Recording Policy**

Sampson testified that he placed Charlton on the U.S. Attorney removal list because of Charlton's actions in attempting to implement a tape recording policy in his district and because of his actions in the death penalty case.

With regard to the tape recording of interrogations, we determined that Charlton began exploring this issue in 2004 because he believed the absence of recordings was undermining prosecutions in his district. Charlton first raised the issue with Deputy Attorney General Comey, who established a working group that included Charlton to consider the matter. However, the working group did not reach a consensus. After McNulty became the Deputy Attorney General, the working group became dormant, and Charlton decided to implement a tape recording policy in his district without consulting the

Department's leadership. As Charlton expected, the FBI opposed the policy and complained to McNulty about it.

Shortly before Charlton's tape recording policy was scheduled to take effect, McNulty spoke with Charlton at a U.S. Attorneys' conference and told him to rescind it. Charlton refused to do so, telling McNulty he would prefer to resign rather than rescind the policy. According to Charlton, the conversation was interrupted and McNulty asked Principal Deputy Attorney General Mercer to continue discussing the matter with Charlton.

Mercer told us that he persuaded Charlton to design a pilot program for tape recording interrogations rather than submit his resignation. Charlton agreed to develop the pilot program, and McNulty's Chief of Staff Michael Elston sent an e-mail to Charlton stating that McNulty was very interested in the pilot program and that it would receive expeditious consideration. Elston added that McNulty understood the issue and was interested in energizing the Department's consideration of it, and that McNulty hoped that Charlton would play a significant role in the Department's review and the subsequent interagency review process. However, we found no evidence that Charlton's pilot program was finally approved.

We believe that Charlton should have consulted with Department officials before implementing a policy requiring recording of interrogations in his district, and his unilateral action was unauthorized and inappropriate. However, after the issue was discussed with McNulty and his staff, agreement was reached that Charlton would design a pilot program. Thereafter, Charlton continued to pursue the issue, with apparent support from the Deputy Attorney General's Office.

McNulty told us that he thought the incident demonstrated poor judgment by Charlton. McNulty said he told Sampson about Charlton's actions at one of their regular senior leadership meetings, and Sampson said this was one of the reasons for Charlton's removal. However, McNulty also told congressional investigators that he did not see Charlton's actions at the time as insubordinate. McNulty told us that if it had been up to him, he would not have chosen to remove Charlton because of his attempt to implement the recording policy. However, McNulty acknowledged that he did not ask Sampson to remove Charlton's name from the list when McNulty saw it. Mercer also told us that he did not think Charlton's actions concerning the taping policy should have served as a basis for his removal because Charlton had ultimately "stood down" and agreed to work on the pilot program. Moreover, after the dispute with McNulty about the taping policy, which occurred in February and March 2006, Charlton was not included on the next version of the U.S. Attorney removal list that Sampson forwarded to the White House on April 14, 2006. Nonetheless, we concluded that Charlton's actions in the matter were a significant factor in Sampson's decision later to place

Charlton on the list, and also in no other Department official's advocating for his removal from the list.

### **E. The Death Penalty Case**

We believe that Charlton's action related to the death penalty case during the summer of 2006 was the most significant factor in Charlton's removal.

As described above, Charlton felt strongly that the death penalty should not be sought in a particular case based on his conclusion that there were deficiencies in the evidence. After the case was examined through the Department's review process, however, Attorney General Gonzales accepted the recommendation to seek the death penalty and issued a letter authorizing Charlton to notify the court of the Department's intentions.<sup>156</sup>

Contemporaneous e-mail records and interviews show that the Deputy Attorney General's staff and the Attorney General's staff were upset when they learned that, after the Attorney General's decision, Charlton's office did not promptly file the death penalty notice, but instead obtained an enlargement of time from the court in order to request that the Attorney General reconsider the issue. The Deputy Attorney General's and the Attorney General's staffs believed that Charlton was insubordinate in not filing the notice, and that his attempts to seek a meeting with Attorney General Gonzales on the issue were an abuse of the review process. We believe that the perception about Charlton's conduct in this matter, along with complaints about the tape recording issue, his perceived contact with Senator Kyl concerning resources, and his failure to assist the Obscenity Prosecution Task Force all contributed to Sampson's decision to include Charlton on the September 13, 2006, list of U.S. Attorneys to be removed.

We do not agree that Charlton's forceful advocacy on the death penalty case constituted insubordination. Charlton did not receive notice of the initial recommendation by the death penalty review committee and was not provided an opportunity to advocate against the committee's recommendation. Moreover, Charlton was not informed of the outcome until he received notice that the Attorney General had authorized Charlton to seek the death penalty.

When Charlton learned of the decision, he contacted the Attorney General's Counsel Jeffrey Taylor about an opportunity to be heard on the matter and, with Taylor's encouragement, he sought reconsideration of the decision. Charlton then obtained an extension of time from the court for filing

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<sup>156</sup> It is important to note that we did not examine the merits of Charlton's position about the strength of the evidence in this case, nor did we examine in detail the Department's death penalty review process in this matter. Such an examination is beyond the scope of our investigation, which focused on the reasons for Charlton's dismissal.

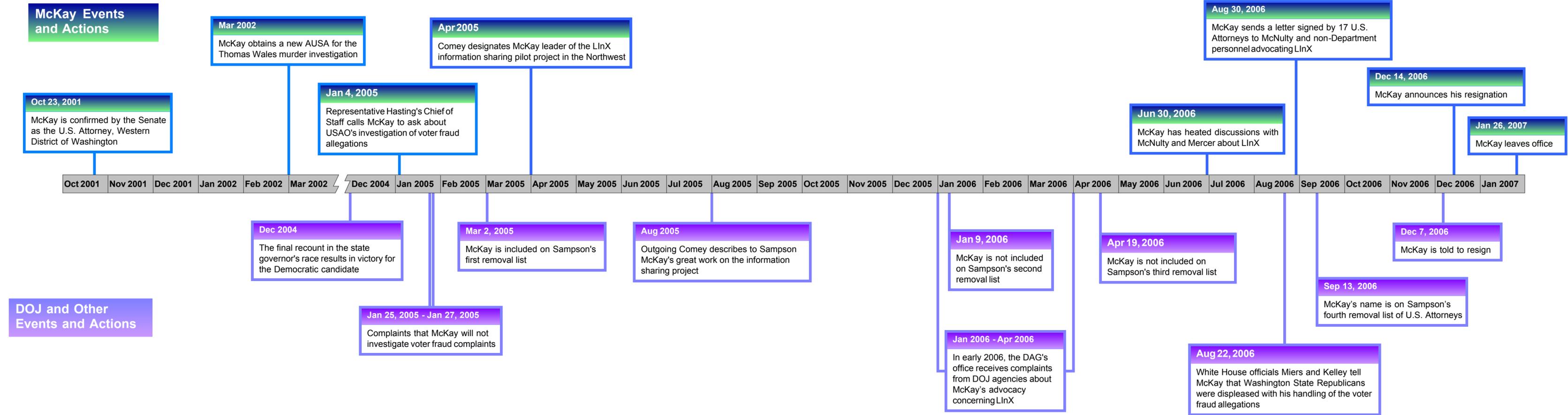
the death penalty notice. Later, when he was informed that Department staff believed his decision to seek an enlargement of time rather than file the notice was “insubordination,” he immediately sent an e-mail stating that he did not intend to ignore the Attorney General’s decision or exhibit any disrespect, but believed it appropriate to seek reconsideration of the Attorney General’s decision particularly since he had not had an opportunity to discuss the issue with the Deputy Attorney General before the Attorney General made a final decision.

As a result of Charlton’s persistence in seeking reconsideration of the death penalty decision, McNulty spoke with Charlton and later discussed the issue with Attorney General Gonzales, who affirmed his initial decision. Charlton then sought to speak with Gonzales directly, which according to Elston caused Department leaders to further question Charlton’s conduct.

In sum, while Department officials may have concluded that Charlton should have accepted the Department’s decision and complied with it promptly, we do not believe it is insubordinate for a U.S. Attorney to press for an audience with the ultimate decision makers in a matter as important as the decision to seek the death penalty. We believe an issue of this magnitude warrants full and vigorous examination and debate within the Department, and that Charlton’s request to speak directly to the Attorney General was neither insubordinate nor inappropriate.

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# John McKay Timeline



## **CHAPTER NINE**

### **JOHN MCKAY**

#### **I. Introduction**

This chapter examines the removal of John McKay, the former United States Attorney for the Western District of Washington.

##### **A. McKay's Background**

McKay graduated from Creighton University Law School in 1982. From 1982 to 1989, he worked in a private law firm in Seattle, Washington. He was named a White House Fellow in 1989 and served as a Special Assistant to FBI Director William Sessions until 1990. In 1990 McKay returned to private law practice in Seattle, where he remained until 1997 when he was named President of the Legal Services Corporation. He served in that position until he became the U.S. Attorney for the Western District of Washington. McKay was nominated on September 19, 2001, confirmed by the Senate on October 24, and sworn in as U.S. Attorney on October 30, 2001.

##### **1. The EARS Evaluations of McKay's Office**

McKay's office underwent two EARS evaluations, the first in May 2002 shortly after his arrival as the U.S. Attorney, and the second in March 2006. The 2002 evaluation was positive, stating that "McKay was setting appropriate goals and priorities and was doing an outstanding job furthering interagency cooperation." The evaluation also stated that "McKay was well respected by his staff, the judiciary and all the law enforcement and civil agencies."

The 2006 evaluation described McKay as an "effective, well-regarded, and capable leader" of the office and of the local law enforcement community. It noted that the office had established strategic goals to meet the priorities of the Department and the needs of the district. The only criticism concerned McKay's office's sentencing practices. The evaluation stated that the office lacked a uniform procedure for documenting the Criminal Chief's approval of motions seeking downward departures in sentencing recommendations where defendants had provided substantial assistance to the government.

##### **2. McKay's Status on the Removal Lists**

As discussed in Chapter Three, McKay's name was included on Sampson's first removal list which Sampson sent to White House Counsel Harriet Miers in March 2005. In August 2005 Deputy Attorney General Comey told Sampson that McKay had been "great on my information sharing project," and Sampson took McKay's name off the next two U.S. Attorney removal lists

he sent to the White House in January and April 2006. However, McKay's name reappeared on Sampson's September 2006 list, and it remained there until McKay was told to resign on December 7, 2006.

## **B. Reasons Proffered for McKay's Removal**

A variety of reasons were proffered for McKay's removal. McNulty stated in a closed briefing to members of the Senate Judiciary Committee in February 2007 that McKay was "enthusiastic but temperamental," had made promises that the Department could not support regarding information sharing with other law enforcement agencies, and was resistant to direction from Department leadership. McNulty also stated that McKay's performance was deficient because his district was not seeking to appeal sentences that fell below the sentencing guideline range.

The news media also reported allegations that McKay was removed because of his alleged failure to investigate claims of voter fraud in the wake of the 2004 Washington State governor's race.

Sampson testified in March 2007 that he believed he included McKay's name on the March 2005 list because McKay was overly aggressive in seeking resources to investigate the 2001 murder of an Assistant U.S. Attorney in McKay's district. Sampson also stated that he placed McKay on the September 13, 2006, list because he perceived that the Deputy Attorney General's office was not pleased with the way McKay had tried to force the Deputy's hand on an information sharing initiative known as LInX.

Our investigation examined each of these alleged reasons for McKay's removal. In the remainder of this chapter, we describe the facts related to these issues in chronological order and then provide our analysis regarding the reasons for McKay's removal.

## **II. Chronology of Events Related to McKay's Removal**

### **A. The Wales Murder Investigation**

As noted above, Sampson testified that he may have identified McKay for removal on the March 2005 list after Department officials raised concerns about McKay's actions in connection with the investigation of the October 11, 2001, murder of Seattle Assistant U.S. Attorney (AUSA) Thomas C. Wales. Sampson stated that he learned that there had been a conflict between McKay and former Deputy Attorney General Larry Thompson in which McKay demanded that Thompson take certain actions concerning the investigation of the murder.

McKay became U.S. Attorney for the Western District of Washington 6 weeks after the September 11 terrorist attacks and 3 weeks after the murder of AUSA Wales. Wales, who was a highly regarded and well liked AUSA, was at home in his basement office when someone shot and killed him through the basement window.

McKay said that when he became the U.S. Attorney, Wales's office was still surrounded by yellow crime scene tape. Associate Deputy Attorney General David Margolis had recused McKay's office from conducting the murder investigation, and according to McKay that decision was very controversial. McKay said that the office did not have confidence in the prosecutor Department officials had initially assigned to the case.

McKay said that shortly after he arrived as the U.S. Attorney in October 2001, he began to ask Deputy Attorney General Thompson and Thompson's senior staff to replace the prosecutor on the Wales investigation. McKay acknowledged to us that he had several "tense conversations" with Principal Associate Deputy Attorney General Christopher Wray concerning this issue. According to McKay, his tenacity paid off and in March 2002 a more experienced prosecutor was assigned to oversee the Wales murder investigation.

McKay also told us that while he was not directly involved in the investigation of Wales's murder, he pushed hard for the Department to commit more resources to the investigation. He said he felt it was his responsibility to be the conduit between the FBI's Seattle Division and the Department concerning the allocation of resources. For example, McKay said that he felt obligated to raise with Department officials and the FBI issues such as the number of FBI agents assigned to the investigation and whether it was appropriate to assign agents from FBI Headquarters or take resources away from the FBI's Seattle Division for the investigation. McKay said he thought he raised the issues in a professional manner, and he said that at no time did anyone share any concerns with him or otherwise indicate that they thought his conduct was inappropriate.

We found little contemporaneous documentation concerning McKay's interaction with Department officials regarding the Wales investigation. However, from interviewing the individuals McKay communicated with in the Deputy Attorney General's office concerning the matter, we believe that McKay accurately described his efforts to obtain more resources. Both Thompson and Wray described McKay as very aggressive about making certain that adequate resources were devoted to the investigation.

Thompson, who served as Deputy Attorney General until October 2003, said he did not recall any tension between himself and McKay. Thompson told us that he remembered people on his staff complaining about McKay's

constant pressure and demands for resources. Thompson acknowledged that on occasion he was irritated with the way McKay complained and pushed for more resources. Thompson emphasized that McKay did not do anything inappropriate. Thompson said that while he may have become annoyed with McKay's persistence, he was also aggravated by the actions of a number of other U.S. Attorneys. As he described the situation, it was "not new in the annals of the Department of Justice [that] a DAG got aggravated with a U.S. Attorney." Thompson said he never had any major problems with McKay, aside from some consternation at the way McKay was pushing the resource issue. However, Thompson said he did not remember discussing McKay with Sampson.

Wray, who served as Thompson's Principal Associate Deputy Attorney General, told us that McKay communicated to the Office of the Deputy Attorney General his perception that the Department did not commit appropriate resources to the Wales murder investigation. Wray told us that EOUSA officials and officials in the Deputy Attorney General's Office considered McKay to be "high maintenance," not just about the Wales murder investigation, but also with respect to other issues.<sup>157</sup> Wray said that when McKay's office had a stake in something, McKay approached the issues with a level of intensity that Wray said was not the norm among other U.S. Attorneys.

Wray told us that McKay's behavior was discussed among people in the Deputy Attorney General's Office informally in offhand conversation, but there was never any attempt to formally review McKay's actions. Wray also stated that he did not recall ever discussing McKay's conduct with Sampson. However, he said that he kept the Attorney General's Office apprised of the events concerning the replacement of the prosecutor in the Wales murder investigation. Wray said that it would not have been unusual to have discussed his interactions with McKay informally with the Attorney General's staff, but he said he had no specific recollection of doing so.

Margolis said he recalled that McKay was emotional in his interactions with the Department relating to the Wales murder investigation. However, Margolis told us that he gave McKay a lot of leeway because he was new to the Department and in a terrible situation. Margolis said that although he considered McKay to be extremely pushy, McKay's conduct was understandable given the situation in which McKay found himself when he became U.S. Attorney, trying to lead the office in the aftermath of Wales's

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<sup>157</sup> As an example, Wray cited McKay's aversion in 2003 to moving the U.S. Attorney's Office from commercial space into the courthouse in Seattle. Wray said that McKay's passion concerning the move to the courthouse struck him as "out of proportion" to the situation. An examination of e-mail traffic between McKay, Wray, and former EOUSA Director Guy Lewis shows that McKay argued with Lewis and Wray concerning the move and wanted the Deputy Attorney General to intervene.

murder and in the wake of the September 11 attacks when resources for matters other than terrorism investigations were scarce. Margolis also expressed skepticism to us that Sampson listed McKay for removal in his March 2005 because of any alleged confrontation with Thompson about the Wales investigation.

## **B. The Northwest LInX Project**

Despite any differences McKay may have had with some officials in the Deputy Attorney General's Office, all of the managers we interviewed agreed that McKay assumed a valuable leadership role in the Department's law enforcement information sharing initiative. McKay told us he became very interested in information sharing issues early in his tenure as U.S. Attorney. According to McKay, in 2002-2003 he began working on an initiative with officials of the Naval Criminal Investigative Service (NCIS) to build a state, local, and federal law enforcement record sharing program in the Puget Sound area in Washington.

McKay told us that by early 2004, NCIS had agreed to fund what eventually became known as the Northwest Law Enforcement Information Exchange (LInX) Project.<sup>158</sup> McKay said he enlisted Deputy Attorney General Comey to support the initiative, reasoning that Comey would have the ability to direct Department law enforcement agencies to share their records with the project.

Comey told us that when McKay explained the LInX program, Comey thought it could be used as part of the OneDOJ strategy to get Department law enforcement agencies to share information among themselves and to share information with state and local law enforcement. During our interview, Comey described McKay as a "visionary" concerning information sharing, and said that he wholeheartedly supported McKay's efforts.

In early 2005, Comey asked McKay to lead a pilot program in Seattle for entering DOJ law enforcement information into LInX. Comey said he knew the program would be controversial, even within the Department, because the law enforcement agencies did not openly share their information. In April 2005, Comey issued a memorandum to the Department's law enforcement agency component heads designating McKay as the leader of the Northwest LInX pilot program in Seattle. The memorandum directed Department component heads to participate in the program and specified deadlines for uploading law

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<sup>158</sup> Broadly speaking, LInX provides a searchable database of full text investigative data from federal, state, and local law enforcement agencies. According to McKay, LInX is designed to allow law enforcement officials to type in names, places, and events and bring up the actual law enforcement records containing the search term, similar to a Google-type search on the Internet.

enforcement records into the new system. Comey told us he issued this formal memorandum because he knew the federal agencies were not enthusiastic about the LInX program.

According to McKay, the Department's law enforcement components did not fully comply with Comey's directive. In addition, McKay said that once Comey announced his resignation in the spring of 2005, the Department component heads did not seem to consider the LInX project a priority, and there was no one at the Department who would be firm with the components about sharing their full text records in the system. McKay said that by the time McNulty became Deputy Attorney General in late 2005, McKay had begun to sense that the Department was less than enthusiastic about participating in the LInX project. We discuss this issue further below.

### **C. The Washington State Gubernatorial Election**

Around the same time that McKay assumed leadership of the Northwest LInX pilot program in early 2005, McKay's office also became involved in the controversy surrounding the Washington State governor's election. Along with the general election for federal offices on November 2, 2004, voters in Washington also elected a governor. The results of the federal contests were certified soon after the election, but the state gubernatorial result was too close to call. On November 17, 2004, the initial count indicated that Dino Rossi, the Republican candidate, received more votes than Christine Gregoire, the Democratic candidate. Following a recount, Rossi led Gregoire by a smaller margin than the initial count. A second recount, conducted by hand, resulted in Gregoire leading by fewer than 200 votes.

#### **1. McKay's Office Initiates a Preliminary Inquiry**

McKay told us that by the end of December 2004, an outside group had contacted him alleging that the recounts had revealed forged signatures on provisional ballot affidavits. Contemporaneous e-mails between McKay's office and Craig Donsanto, the Director of the Election Crimes Branch of the Criminal Division's Public Integrity Section, show that McKay's office sought advice concerning whether it could open a federal investigation if the dispute involved only an election for state office. Donsanto advised McKay's office against taking any action to investigate the allegations until the election authorities had certified the winner of the governor's race and any ensuing election contests in state court had run their course.<sup>159</sup>

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<sup>159</sup> A few days after Donsanto's advice, an AUSA in McKay's office distributed a legal memorandum to McKay and others in the office noting that federal jurisdiction required a showing that the alleged fraud exposed a federal race to potential harm, while the evidence of fraud the complainant had provided pertained only to the recount for the state governor's race.

McKay said he did not fully agree with that advice, and he directed that the FBI undertake a preliminary inquiry into the allegations of forged signatures on provisional ballot affidavits. An AUSA in McKay's office said that the FBI interviewed the individual who raised the initial complaint but took no further steps at that time because the election results had not yet been certified. Rather, McKay's office advised the complainant to provide any evidence to the local prosecutor because the dispute concerned the election of a state official. According to the AUSA, the election was certified on December 30, 2004, and immediately became the subject of state court litigation.

E-mails show that in early January 2005, McKay's office met with the FBI and consulted with Department officials to discuss the next steps in the matter. According to McKay, everyone at the meeting agreed that the allegations of voter fraud in the state election, without more, did not at that point provide a sufficient predicate for opening a federal grand jury investigation. E-mails between Donsanto and the AUSA also show that Donsanto counseled the U.S. Attorney's Office to refrain from being proactive and instead to collect facts and monitor the state court litigation. Donsanto told us that he gave this advice because he was concerned that the mere fact of an active federal investigation could be used as fodder in the state election contest.

On January 4, 2005, McKay drafted a public statement for use by the FBI and the U.S. Attorney's Office in responding to questions concerning the controversy surrounding the governor's race. The statement noted that federal law enforcement officials would receive and evaluate complaints of election fraud and voting rights abuses, but because the governor's race was a state election matter, citizens with information concerning the election should also provide that information to state officials.

## **2. Telephone Call to McKay from Congressman Hastings's Chief of Staff**

The same day McKay issued the public statement, Ed Cassidy, the Chief of Staff to Washington State Republican Congressman Richard "Doc" Hastings, telephoned McKay to discuss the contested governor's race. McKay said that Cassidy began asking him questions about the election and McKay's potential investigation, and McKay said he responded with information consistent with his public statement. McKay said that Cassidy began to say, "You know John, it's really important - " when McKay interrupted him and said, "Ed, I'm sure you're not about to start talking to me about the future direction of this case."

According to McKay, he took a very stern tone with Cassidy, and Cassidy quickly ended the call.<sup>160</sup>

McKay said he immediately discussed the call with the First Assistant U.S. Attorney and the Criminal Chief, who both said that McKay had handled the call appropriately. McKay said that they decided that he was not required to report the call to the Department because Cassidy did not cross the line and demand that McKay open an investigation.<sup>161</sup>

Cassidy told us that he did not place the call to McKay at the behest of Congressman Hastings. Rather, Cassidy said that after Rossi had lost the third recount, Hastings's constituents and state Republican Party officials expressed concern and outrage over the election to Hastings's office. Cassidy said that as Hastings's Chief of Staff he was concerned that Hastings not make inappropriate public statements if in fact there was an ongoing federal investigation into the election. Cassidy said he called McKay because he did not want Hastings to make "intemperate remarks" when confronted with questions concerning the election.

Cassidy said he explained to McKay his concerns and said that it would be helpful for him to know whether there was an open federal investigation in order to determine how Hastings should respond to questions. Cassidy said McKay provided him with the publicly available information that the U.S. Attorney's Office and the FBI were receiving and evaluating complaints. Cassidy said that when he called McKay he was confident that McKay would know what the appropriate boundaries were and would ensure that the conversation did not stray beyond them.

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<sup>160</sup> As we discussed in the Iglesias chapter, the U.S. Attorneys' Manual §1-8.010 requires that congressional contacts with U.S. Attorney's Offices be reported under certain circumstances:

All Congressional staff or member contacts with USAOs or USAO staff including letters, phone calls, visits or other means must be reported promptly to the United States Attorney (USA), First Assistant United States Attorney (FAUSA) or other designated senior staff prior to making any response. All requests for information or assistance, except for public information, must also be promptly reported to [the Counsel to the Director of EOUSA].

We did not find that McKay was required under this policy to report Cassidy's contact. As McKay described the conversation, he only provided public information in response to Cassidy's inquiry and cautioned Cassidy not to request non-public information; Cassidy refrained from doing so.

<sup>161</sup> McKay told us that he did not document the call, and he heard nothing further about it until Senate investigators asked him about it prior to his March 6, 2007, testimony before the Senate Judiciary Committee.

Cassidy said that he asked McKay whether it was likely that there would be a federal investigation based upon the complaints they were receiving, and that McKay responded, “I hope you’re not asking me to tell you something that I can’t tell you.” Cassidy said he told McKay he was not and he ended the call quickly. Cassidy also said there was nothing difficult or strained about the conversation, and he had no reason to believe that McKay thought the call was inappropriate at the time. Cassidy said he did not recall discussing the conversation with Congressman Hastings or otherwise having any conversations with anyone about his call to McKay.

Congressman Hastings told us he did not know how it happened that Cassidy placed the call to McKay. He said he did not remember telling Cassidy to call McKay, and he said he could not recall whether Cassidy told him he had done so. Hastings said that he may have also received constituent complaints about the election, and that concerns about voter fraud were a frequent topic of conversation in his district because of the controversy concerning the recounts. Hastings also told us that he believed that the controversy over the election was a state rather than a federal matter. Hastings also said that he never discussed McKay’s performance as U.S. Attorney with anyone at the White House or at the Department of Justice. When we asked whether Hastings had any misgivings about the way McKay handled the allegations about the election, Hastings said, “I never thought anything about it.” Hastings added that he had no misgivings about McKay.

As part of his response to the March 2007 disclosure that his Chief of Staff had telephoned McKay to discuss voter fraud matters in early 2005, Hastings disclosed that the head of the association that supplied information concerning allegedly forged signatures on provisional ballot affidavits had written a letter in July 2005 urging that Hastings tell the White House to replace McKay for failing to investigate the 2004 governor’s race. Cassidy told us that Hastings’s office did not respond to the letter. Congressman Hastings also told us that he would not have called the White House to complain about McKay because he generally did not get involved in personnel matters in the Executive Branch. In addition, none of the White House officials we interviewed said they had any recollection of any such call from Hastings.<sup>162</sup>

### **3. Complaints About McKay’s Handling of Voter Fraud Allegations**

By the end of January 2005, McKay had begun receiving complaints from various individuals and groups about the U.S. Attorney’s Office’s failure to investigate alleged voter fraud in the 2004 governor’s race. According to e-

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<sup>162</sup> However, we were unable to interview several White House officials, including Harriet Miers and Karl Rove, to ask them what they knew about the matter.

mails sent to McKay at the time, political groups forwarded to McKay news articles about the election and demanded to know why his office was not investigating the allegations. Consistent with his public statement in early January 2005, McKay responded that the FBI would consider information about voter fraud in the gubernatorial election, but it was generally a state rather than a federal matter.

According to e-mail and other documents written at the time, throughout January and February 2005 McKay consulted with experts in his office on election fraud and directed the FBI to closely examine the state court litigation. McKay also sought assurance from the AUSAs assigned to election fraud matters and from the Department that there was no basis for federal jurisdiction over the allegations of voter fraud.

According to FBI documents, in a letter dated April 28, 2005, an outside political group supplied evidence allegedly supporting its theory that provisional ballot affidavits had been forged. An AUSA in McKay's office who reviewed the evidence told us that he concluded that even if the affidavits had been forged, there was still no basis for federal jurisdiction over the alleged conduct. The AUSA said that the federal issues on the ballot were not part of the ongoing litigation, and the conduct affecting the absentee ballots was not considered state action because it was allegedly undertaken by a political party rather than a government entity.<sup>163</sup>

As noted above, Sampson identified McKay for removal on the first list he sent to the White House on March 2, 2005. Comey told us he had met with Sampson on February 28, 2005, shortly after Sampson became Deputy Chief of Staff to Attorney General Gonzales, to discuss two issues, one of which was Comey's assessment of the strongest and weakest U.S. Attorneys. Comey said he did not recall any mention of McKay or of the Washington State governor's race during that conversation.

Beginning in April 2005 and continuing throughout 2006, McKay received a steady stream of complaints concerning the perceived inaction of the U.S. Attorney's Office in investigating voter fraud complaints. Several complaints about McKay were also sent to Department officials. Sampson told congressional investigators he did not recall seeing any letters to Department officials complaining about McKay's purported refusal to open an investigation into the voter fraud allegations during the time Sampson served in the Attorney General's Office.

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<sup>163</sup> According to the AUSA, the association reported the conduct to the petitioners in the state court case, who in turn decided not to pursue the evidence on the ground that they perceived the handwriting analysis to be unreliable.

The trial in the state court election contest began on May 23, 2005. The court dismissed the action on June 6, 2005, finding that there was no evidence that fraudulent conduct had influenced the election outcome.

According to his contemporaneous e-mail and other documents we reviewed, McKay directed his AUSAs to closely monitor the state court litigation and follow up with the petitioners' investigators in order to determine whether there was a basis for federal involvement once the state process had concluded. McKay directed the AUSAs to monitor the petitioners' argument that Democrats had stuffed ballot boxes and said, "If they have evidence of these new claims, we will need to see it immediately." One of the AUSAs involved in the review said that when he asked the petitioners' investigators whether they had any direct evidence of fraud beyond what was presented at the state court trial, they told him they had no proof of anyone stuffing a ballot box. The petitioners' investigators also said they did not pursue the forged signatures issue because they did not believe the handwriting analysis was reliable and they said they had no specific evidence of anyone stealing votes.

In March 2006, the Department officially closed the matter.

#### **4. Statements of Department Officials**

We were unable to determine exactly how the allegation that McKay was put on the removal list for his alleged failure to prosecute voter fraud first arose.<sup>164</sup> When we asked Sampson whether he included McKay on his first list in March 2005 because of complaints about McKay's handling of voter fraud matters, Sampson told us that he did not believe he did so, and he also said he did not remember the issue being connected with McKay being asked to resign. Sampson told us that at some point he learned that people were critical of McKay for not getting into the middle of the controversy over the 2004 Washington State governor's race, but said he could not remember when he learned that.

Both Gonzales and McNulty said that they did not recall hearing any criticism or complaints about McKay's handling of the voter fraud allegations. In addition, Comey told us he did not remember hearing anything negative about McKay concerning the governor's race. Similarly, none of the other Department managers we interviewed said they recalled hearing any concerns about the way McKay handled the allegations of voter fraud.

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<sup>164</sup> It appears that this allegation was first raised in a newspaper article. On February 16, 2007, the Seattle Times reported a rumor in Seattle that the Department forced McKay to resign because he failed to investigate allegations of voter fraud. Congressman John Conyers mentioned the article during McKay's March 6, 2007, testimony before the House Judiciary Committee.

#### **D. 2006 LInX Issues**

In August 2005, just prior to Comey's departure, Sampson sought his assessment of certain U.S. Attorneys whose terms were expiring, including McKay. According to a contemporaneous e-mail from Comey, he told Sampson he agreed with one of Sampson's assessments and stated he had no strong views on the others, with the exception of McKay. Comey stated, "McKay has been great on my information sharing effort."<sup>165</sup>

In the fall of 2005, McKay was appointed to chair the Regional Information Sharing Working Group, a subcommittee of the Attorney General's Advisory Committee (AGAC). In that role, McKay began traveling around the country giving presentations about the benefits of LInX to other U.S. Attorneys.

According to Mercer, who was Principal Associate Deputy Attorney General at the time, in early 2006 the Deputy Attorney General's Office became concerned that McKay was advocating LInX as the Department's only information sharing initiative when it was one of several different information sharing initiatives used in U.S. Attorneys' districts nationwide. Mercer said in early 2006 the Deputy Attorney General's Office received complaints from Department law enforcement components that McKay was traveling around the country endorsing what was viewed as a Navy-funded system for nationwide use even though other U.S. Attorneys' districts used different information-sharing programs. However, we found no evidence that anyone shared those complaints with McKay.

McKay acknowledged that he presented LInX to other U.S. Attorneys and federal law enforcement entities in the districts as the Department's national information sharing vision. McKay told us that at the time he was unaware of the complaints or that the Department did not want to endorse any particular system. McKay said that he believed the other information systems were fundamentally different from the LInX program. McKay also said that through mid-2006, no one in the Department's leadership offices told him they disagreed with his assessment of LInX or indicated they wanted to go in a different direction on a national information sharing system.

In addition, McKay said that during a meeting with Pentagon officials on April 27, 2006, McNulty led him to believe that McNulty fully supported LInX as the Department's nationwide information sharing program. McKay said McNulty indicated to Department of Defense officials at the meeting that he fully supported LInX, including full text information sharing and robust participation by the Department law enforcement components. McKay said he

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<sup>165</sup> Sampson removed McKay's name from the second removal list in January 2006. McKay's name did not reappear on another removal list until September 2006.

came away from the meeting with the view that McNulty would soon draft a letter to the Deputy Secretary of Defense accepting an offer the Department of Defense made to help establish the LInX program in a second district and to partner with the Departments of Justice and Homeland Security to expand LInX nationwide.

McNulty, however, told us the issue was not as simple as McKay seemed to believe. McNulty noted that there were other types of information sharing systems used in other areas of the country, and he was attempting to address the complexities of a broader multi-law enforcement agency information sharing concept. McNulty said that several groups, including the Navy, had different agendas for information sharing with the Department, and he was attempting to address conflicting concerns, such as the extent to which the Department should open its records to outside entities. McNulty said he discussed with his staff the technology issues involved in information sharing, and they concluded that the Department needed to remain neutral about which systems it used.

### **1. Contentious Meeting with McNulty and Mercer**

McKay said that by the end of June 2006, he was concerned about the Department's inaction in endorsing LInX over other information sharing systems. According to McNulty and Mercer, the matter came to a head on June 30, 2006, when McNulty, Mercer, and McKay had what McNulty described as an intense meeting with McKay to discuss the future of LInX.

McNulty said that McKay expressed very strong views as to how the Department's information sharing strategy should proceed. McNulty told us that McKay refused to acknowledge what McNulty described as the complexities of the issue. McNulty said he became frustrated trying to get McKay to understand that there were many factors involved in developing a national information sharing strategy. According to McNulty, he tried to explain to McKay that there were other types of information sharing systems being used across the country and it was important to be neutral about a particular technology. McNulty said McKay persisted in trying to persuade McNulty to endorse LInX as the sole information sharing program for the entire Department. McNulty told us that he also described to McKay one Department law enforcement component's unease about sharing its law enforcement records with local law enforcement because those records contained sensitive source information and leads in cases, but McKay did not seem concerned about that. According to McNulty, McKay was not in a position to appreciate the complexities because he was not seeing the issues from a national perspective.

Mercer described McKay's conduct at the June 30 meeting as "hostile" and "confrontational," and said he believed McKay crossed over the line from

healthy discussion to accusing McNulty of failing to do anything to advance the LInX program. Mercer told us that he thought the meeting was a very significant event in terms of how McNulty perceived McKay. Mercer said McKay acted as though he were the decision maker concerning how the Department's information sharing program should proceed. Mercer also said that McKay did not seem to appreciate that it was up to McNulty to figure out a way to harmonize all of the different interests of the Department and come up with a coherent information sharing policy. Mercer acknowledged, however, that neither he nor McNulty warned McKay about his conduct either at the meeting or afterward.

McKay agreed that the meeting was intense, and said that he bluntly laid out his concerns that the Department's law enforcement components were not providing full information for the existing LInX programs and that McNulty had not followed up with the Department of Defense on its offer to contribute additional funding for new LInX systems. McKay said that he came away from the meeting still believing that the Department was going to move forward with LInX nationwide in partnership with the Department of Homeland Security and the Department of Defense. According to McKay, neither McNulty nor his staff informed him that the Department was going in a different direction and would not be endorsing LInX as the Department's sole information sharing initiative.

## **2. McKay's Bid for a Judicial Nomination**

During the summer of 2006, McKay sought a judicial nomination to the federal district court in Seattle, and the Department supported his nomination. Sampson wrote in an August 8, 2006, e-mail to one of McKay's U.S. Attorney colleagues, "It's highly unlikely we could do better in Seattle." Sampson also wrote that on behalf of Attorney General Gonzales he had raised the issue of McKay's nomination to the White House. Sampson said he viewed the job of U.S. Attorney as different from the job of a judge. Sampson stated that he liked McKay personally and thought McKay was "a personable guy." Sampson also said he "was always disposed for prosecutors to go on the bench."

However, the Washington state judicial selection panel did not recommend McKay for the judgeship. McKay said that after learning he had not received the recommendation, he called Harriet Miers, whom he knew from his tenure as President of the Legal Services Corporation. On August 22, 2006, McKay met with Miers and Deputy White House Counsel William Kelley about his interest in being selected for the judicial vacancy. McKay told us that he found out at this meeting that the White House Counsel's Office had been told that McKay had mishandled the investigation of voter fraud allegations stemming from the 2004 governor's election. According to McKay, the first

question Miers and Kelley asked him at the meeting was why Republicans in the state of Washington were angry with him.<sup>166</sup>

### **3. McKay's August 30 Letter to McNulty**

E-mail and other documents indicate that at the end of the summer 2006, tensions between McKay and members of the Deputy Attorney General's staff had continued to build over the LInX issue. On August 30, 2006, McKay prepared a letter he drafted to McNulty on behalf of the AGAC Regional Information Sharing Working Group. The letter, which contained the signatures of 17 U.S. Attorneys in addition to McKay, included a request that McNulty meet with the group. It also stated,

As the Department's "Field Commanders," we United States Attorneys believe that the LInX approach offers the best, most complete and proven path to real and effective law enforcement information sharing among federal, state, and local partners.<sup>167</sup>

The letter urged McNulty to endorse the LInX approach, support its expansion nationwide, mandate that DOJ law enforcement components share the full text of unclassified law enforcement records, and "direct DOJ policy and resources to support building, funding and management of LInX projects in partnership" with other agencies.

McKay told us he drafted the letter because he thought it would be useful to McNulty to have the views of the other U.S. Attorneys in the working group. McKay said he did not think the letter was controversial because he had the impression that McNulty had already agreed to the points in the letter. McKay said he reasoned that McNulty could use the letter to address any contrary arguments from the law enforcement components because McNulty could tell the components that he was responding to the concerns of Presidentially appointed U.S. Attorneys.

On August 31, 2006, McKay distributed the letter via e-mail to approximately 50 people, including U.S. Attorneys and Justice Department officials involved in the information sharing program, as well as to individuals at NCIS, state and local government officials involved in Northwest LInX, and an individual in the private sector involved in developing the LInX concept. McKay said he sent the letter to the non-Department individuals because they were either parties to the Memorandum of Understanding between the Department and the Northwest LInX Governance Board, or they had otherwise

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<sup>166</sup> As noted previously, both Miers and Kelley refused our request for an interview.

<sup>167</sup> This letter came shortly after a letter McNulty had received on August 27 from NCIS and local law enforcement leaders of Northwest LInX complaining about some federal law enforcement agencies' failure to share agency records.

worked with NCIS to develop the strategic plan for LInX. McKay said the non-Department officials whom he copied on the letter were “deeply involved” in the question of how much data the Department would provide. McKay said it was not his intention to put McNulty in a difficult position by copying the letter to the non-Department entities involved in LInX.

#### **4. McNulty’s Response to McKay’s letter**

In an e-mail on August 31, 2006, to Elston, McNulty’s Chief of Staff, a detailee in the Deputy Attorney General’s Office expressed outrage that the letter, which he characterized as an “internal deliberation” document, was shared with individuals outside of the Department of Justice. Elston telephoned McKay on September 1. According to McKay, Elston was extremely upset about the letter. McKay said he was alarmed and surprised to get the call because he had thought the letter would be well received based on his prior conversations with McNulty. McKay also said he did not believe the letter would be controversial because he had discussed the issues in the letter on numerous occasions with McNulty and McNulty had not disagreed with him.

McKay said that Elston accused him of trying to force McNulty to endorse LInX. McKay said he explained the issues to Elston and noted that the letter had been signed by all of the U.S. Attorneys in the Working Group. McKay said that Elston was also very angry that the letter had been distributed outside the Department. McKay acknowledged to Elston that the letter was sent to individuals outside the Department, but said that those individuals were involved in the Northwest LInX project, and it was not intended to be distributed to the general public. McKay said that by the end of his conversation with Elston he thought he had reassured Elston by explaining that the working group did not want to put McNulty in a difficult position but was only trying to voice the working group’s concerns. McKay said he also noted that in the letter the U.S. Attorneys had asked for a meeting with McNulty to discuss the issues. Elston told McKay that he would talk to McNulty and would be back in touch with him. According to Elston, McNulty decided to “wait things out” before agreeing to meet with the U.S. Attorneys.

On September 5, 2006, McNulty wrote an e-mail to the U.S. Attorneys who signed the letter, stating “I am quite disappointed that you have chosen to communicate with me in this way. It appears that you are trying to force me to take some specific actions.” McNulty wrote that the letter was “particularly distressing because it is shared with folks outside the Department. This is not the way we should be working through difficult issues.” McNulty also wrote, “There are other important considerations involved in this matter. Does anyone see the problem with the Department endorsing a specific brand of info sharing when there are other types being used with success in various regions?” McNulty wrote that “it is best to talk these things through a bit before laying down a challenge in writing which will set the Department up for

failure.” McNulty ended the message by stating, “I look forward to meeting with the working group, although now it will be a more challenging conversation.”

McKay said McNulty’s e-mail “scared the hell out of everybody.” McKay said that given the prior telephone call from Elston, he was not completely surprised by McNulty’s e-mail. However, McKay said that McNulty’s e-mail expressed views that were inconsistent with conversations he had previously with McNulty about the information-sharing initiative. McKay said he had briefed McNulty in great detail at the June 30 meeting concerning what McKay perceived to be the inadequacies of the other information sharing systems, and he thought McNulty had agreed with him. McKay also said that McNulty had never given him any indication that other information systems were still a concern until he received McNulty’s September 5 e-mail. McKay said that in his opinion, up to that point there was never truly a policy disagreement between McKay and Department leaders over LInX.<sup>168</sup>

#### **E. McKay Appears on the September 2006 Removal List**

On September 13, 2006, 8 days after McNulty sent his e-mail to the U.S. Attorneys, McKay’s name reappeared on Sampson’s list of U.S. Attorneys the Department recommended removing. Sampson listed McKay as one of six “USAs Who We Now Should Consider Pushing Out.”

Sampson said that he put McKay on the September 13 list because McNulty’s office was unhappy that McKay had tried to force McNulty to act on the LInX matter. Sampson added that McKay’s conduct in connection with the LInX matter had irritated McNulty and Elston. Sampson said it was likely he had learned from McNulty and Elston at the daily senior management meetings about McKay’s August 30 letter.

McNulty told us he likely expressed his frustration to Sampson about the way McKay was handling the LInX matter. However, McNulty told us he did not instruct Sampson to put McKay on the removal list. McNulty also said that he was prepared to work with McKay to resolve the issues. McNulty said that despite his frustration with McKay at the time, if Sampson’s removal plan had not been initiated, McKay’s conduct would not have warranted his removal.

As discussed in Chapter Three, McNulty did not become aware until the late fall of 2006 that McKay’s name was on a list of U.S. Attorneys to be removed. McNulty said he was “predominantly deferential” to Sampson as the Department’s personnel official who decided who to remove. McNulty said his

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<sup>168</sup> McKay noted that in January 2007 the Department of the Navy awarded McKay its highest civilian award, the Distinguished Public Service Award, for innovation in law enforcement leadership, based on his work promoting LInX.

first reaction, after being surprised that the U.S. Attorney removal plan was going to be implemented, was to ask himself if he had any objection to the names. He said he did not object to McKay's name on the list because he had questions about McKay's judgment in light of the way McKay had handled the LInX matter.

#### **F. McKay is Told to Resign**

McKay said he was very surprised when EOUSA Director Battle called him on December 7, 2006, and told him to resign. McKay said Battle told him that "the Administration wants to go in a different direction and they would like you to resign." McKay said he asked Battle what had happened and Battle told him he could not provide him with any further information.

McKay said Battle indicated that he should resign by the end of January. McKay said that although he immediately assumed he had done something wrong, he readily dismissed that from his mind because nothing had happened other than the LInX matter, and he said he never dreamed that that would be the cause for his dismissal. McKay said that he began to press Battle about whether he had done something wrong. Battle responded with words to the effect that "someone getting a call like this one is going to assume that they have done something wrong and that's not always the case." McKay said that during the call they did not discuss any issues concerning policy or performance or any other reason for his removal.

Battle confirmed McKay's account of the conversation. He said McKay asked Battle if he had done anything wrong and Battle responded that he was not in a position to tell him. Battle told us he did not know the reason why McKay had been asked to resign.

McKay told us that he believed he was still in the running to be a federal judge when he received the December 7 telephone call from Battle, but that as soon as he received the phone call he knew he would not be nominated. McKay said that a few days after Battle told him to resign he received a phone call from the White House stating that he was not going to receive the judicial nomination.

McKay announced his resignation on December 14, 2006, and left office on January 26, 2007.

#### **G. Allegation that McKay was Removed Because His District's Sentencing Statistics Were Out of Line**

As discussed in Chapter Three, on February 14, 2007, McNulty provided a closed briefing for the Senate Judiciary Committee. According to notes taken by Nancy Scott-Finan, an official in the Department's Office of Legislative Affairs, McNulty stated that one of the reasons for McKay's removal was that

sentencing statistics of the Western District of Washington were out of line with other districts and the office was not seeking to appeal sentences that were below the relevant ranges in the United States Sentencing Guidelines.

Sampson told us that although he put McKay on the September 13 list because of his behavior related to the LInX matter, the sentencing issues were another concern in Sampson's mind that justified McKay's removal. Sampson also told congressional investigators that he recalled hearing concerns from Mercer about McKay's district's sentencing practices, although Sampson said he could not recall when the discussion took place.<sup>169</sup> Sampson said he recalled discussing with Mercer the concern that McKay's office never sought to appeal downward departures that resulted in lesser sentences than called for under the sentencing guidelines.

Mercer told us that McKay's district's sentencing statistics could not have become an issue until well after the Supreme Court decided *United States v. Booker*, 543 U.S. 220 (2005) on January 12, 2005.<sup>170</sup> Mercer said that after that decision, in contrast to other districts McKay's district was not asking the Department's Solicitor General to authorize appeals in cases with major downward departures.

Mercer stated that he did not learn about McKay's district's sentencing issues until sometime in 2006 after the data from the Sentencing Commission was released for fiscal year 2005. Mercer said that he never contacted McKay about any concerns relating to sentencing issues in McKay's district, and he had no idea whether anyone else at the Department spoke to McKay about the concern.

McKay told us that he was never made aware that the Department was concerned about his office's sentencing statistics. McKay said he never had a conversation with anyone in Department leadership about the issue, and had no idea that anyone had expressed a concern that he was not complying with Department policy. McKay testified to Congress that the first he learned about the Department having such concerns was in Moschella's testimony before Congress on March 6, 2007, after McKay had been removed.

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<sup>169</sup> Sampson acknowledged that any discussions he had with Mercer concerning McKay's district's sentencing practices would have occurred at the earliest during the summer of 2005, after McKay's name initially appeared on the first list of U.S. Attorneys whom the White House might consider for removal. McKay's name was taken off subsequent removal lists, and did not reappear on the removal list until a few days after McKay sent the August 30, 2006, LInX letter to McNulty.

<sup>170</sup> In that case, the Supreme Court held in part that the sentencing guidelines were advisory rather than mandatory.

Margolis told congressional investigators that it was only after McKay was asked to resign that Margolis became aware of any concern regarding McKay's district's sentencing practices. Rather, according to Margolis, after he learned in late 2006 that McKay was going to be removed, Mercer told him McKay was on the list because he had acted like a bully when he tried to use other U.S. Attorneys to unfairly pin the Deputy Attorney General into a corner on an information sharing project.

### **III. Analysis**

The most serious allegation related to McKay's removal was that he was forced to resign because of complaints about his handling of allegations of voter fraud in the closely contested Washington State gubernatorial election in 2004. Sampson included McKay's name on his first removal list in March 2005, during the controversy about McKay's handling of the voter fraud allegations. However, Sampson stated that he did not believe he placed McKay's name on this list because of anything related to voter fraud allegations, and none of the other Department officials we interviewed said they recalled hearing any concerns about the way McKay handled such allegations.

Sampson took McKay's name off his next two removal lists, in January and April 2006, but subsequently put McKay back on the list in September 2006. McKay remained on subsequent removal lists and on December 7, 2006, was told to resign.

As discussed below, we were not able to conclude, based on the evidence, whether complaints about McKay's handling of voter fraud cases either did or did not contribute to his removal as U.S. Attorney. However, the evidence suggests that the primary reason for McKay's removal was his clash with Deputy Attorney General McNulty over the LInX information-sharing program.

#### **A. Voter Fraud Complaints**

McKay was included on Sampson's first removal list, which he sent to the White House on March 2, 2005, the same time as the controversy about voter fraud allegations connected to the 2004 Washington State governor's election. Sampson stated that he did not believe he put McKay's name on this first list because of McKay's handling of these voter fraud issues. Rather, Sampson said he believed he placed McKay's name on this list based on McKay's contentious relationship with the Deputy Attorney General's Office over the Wales murder investigation.

In August 2005, Deputy Attorney General Comey spoke very highly of McKay to Sampson, praising McKay's work on an information sharing project called LInX and calling McKay a "visionary" for his work on that project. After

Comey's comments to Sampson, McKay did not appear on Sampson's next two removal lists, in January 2006 and April of 2006.

McKay's name reappeared on Sampson's September 2006 list. Sampson told us that he placed McKay on the September 2006 list because McNulty's office was unhappy that McKay had tried to force McNulty to act on the LInX information-sharing matter.

McKay told us that White House Counsel Miers and Deputy White House Counsel Kelley told him at a meeting in August 2006 – a few weeks before McKay's name was placed back on the list – that Washington State Republicans were displeased with his handling of the voter fraud allegations. This suggests that someone complained to White House officials about the way McKay handled the allegations, but we do not know what impact any such complaints had on McKay's removal. Sampson told us he remembered hearing complaints at some point about McKay's handling of the voter fraud issues, although he did not remember when or who raised the complaints. As noted above, key White House officials such as Rove, Miers, and Kelley declined to be interviewed by us.

In sum, we could not determine whether complaints to the White House about McKay's handling of the voter fraud allegations stemming from the 2004 Washington State gubernatorial election contributed to his placement on the removal list, particularly without interviews of relevant White House officials.

## **B. Wales Murder Investigation**

Sampson told congressional investigators that he believed he had initially included McKay's name on his first removal list in March 2005 because McKay was overly aggressive with Deputy Attorney General Thompson in seeking resources to investigate the 2001 murder of AUSA Wales. However, we did not find significant corroboration for Sampson's claim. First, Thompson said he did not recall any tension between himself and McKay on this issue. While Thompson said he remembered people on his staff complaining about McKay's constant demands for additional resources for the case, Thompson also emphasized that McKay did not do anything inappropriate in connection with the Wales case.

Other Department managers we interviewed said that McKay was very aggressive about seeking additional resources for the Wales investigation and in seeking to replace the prosecutor originally assigned to the Wales investigation. Several officials told us that McKay was pushy and tended to complain a lot. Yet, we found no evidence that anyone suggested to Sampson that McKay should be removed because of his actions in the Wales case, and no one ever said to McKay that anything he did in advocating for more resources in the Wales case was inappropriate.

If Sampson's statement about why he put McKay on the list is accurate, we find it troubling that McKay's aggressive push for resources in the investigation of the murder of an AUSA from his office would result in his placement on a removal list. As Associate Deputy Attorney General Margolis stated, McKay's conduct was understandable given the situation in which McKay found himself when he became U.S. Attorney – trying to lead the office in the aftermath of Wales's murder and in the wake of the September 11 attacks when resources for matters other than terrorism investigations were scarce. Deputy Attorney General Thompson also said that while he may have become annoyed with McKay's persistence, he was also aggravated by a number of other U.S. Attorneys.

McKay's inclusion on the removal lists also underscores the fundamental problem with the entire removal process: the Department's failure to use consistent or transparent standards to measure U.S. Attorney performance and to determine whether a U.S. Attorney should be recommended for replacement. Instead, Sampson talked to a few people about who they thought were strong or weak U.S. Attorneys, and he relied on their impressions and comments about various U.S. Attorneys, without any attempt to corroborate the comments, seek alternative views, systematically evaluate the U.S. Attorneys' performance, or even allow the U.S. Attorneys to respond to any concerns about their actions. The *ad hoc* nature of Sampson's lists and Sampson's claim, if true, about why McKay's name appeared on the first list – allegedly for being too aggressive in seeking resources for an investigation of the murder of an AUSA – demonstrated the fundamentally flawed and subjective process he used to create these lists.

### **C. Sentencing Statistics**

We also did not find any evidence to support the claim, first raised in McNulty's closed briefing to the Senate Judiciary Committee, that McKay was removed because his district's sentencing statistics were out of line with other districts. No one raised this issue with McKay while he was U.S. Attorney, and this issue did not appear to come to light within the Department as a concern until after McKay had been removed. Although Mercer said he was aware sometime in 2006 that McKay's district's sentencing statistics were below par, we found no evidence that any other Department manager was concerned about it, discussed it among themselves, or raised it with McKay.

In sum, this purported reason appears to be another after-the-fact rationalization for why McKay was included on the removal list. We believe that raising this claim in the briefing to Congress was misleading and cast further doubt on the Department's credibility in providing the real reasons for the removals of the U.S. Attorneys.

#### **D. LInX**

Sampson told us that he placed McKay on the September 13 list because McNulty's office was unhappy that McKay had tried to force McNulty to act on the LInX information sharing system. Sampson told us that McNulty was irritated by McKay's August 30 letter urging McNulty to adopt LInX as the Department's sole information-sharing program. The letter, signed by 17 U.S. Attorneys in addition to McKay, was disseminated inside and outside the Department. The timing of McKay's placement on the September 13 list – only a few days after the controversy about his actions concerning LInX arose – supports Sampson's explanation for placing McKay on this removal list.

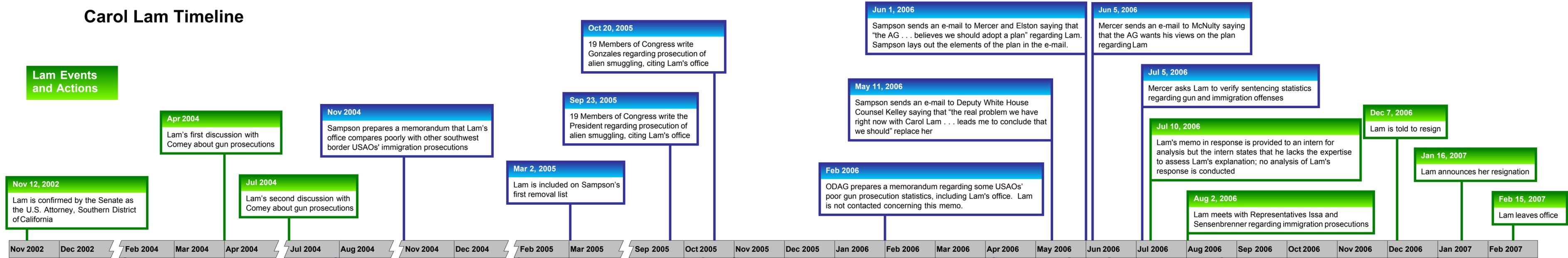
McNulty said he likely expressed his frustration to Sampson about the way McKay had handled the LInX matter in late August 2006. McNulty also told us he would not have recommended McKay's removal because of the LInX issue, but he did not say that to Sampson. Moreover, once McNulty learned about the removal plan in late October 2006 and saw McKay's name on the list, he did not tell Sampson to take McKay's name off the list.

In sum, we believe the evidence suggests that Sampson placed McKay on the list for removal because of his actions in the LInX matter. However, the Department's various descriptions of why McKay was removed severely undermined its credibility when it tried to explain its actions.

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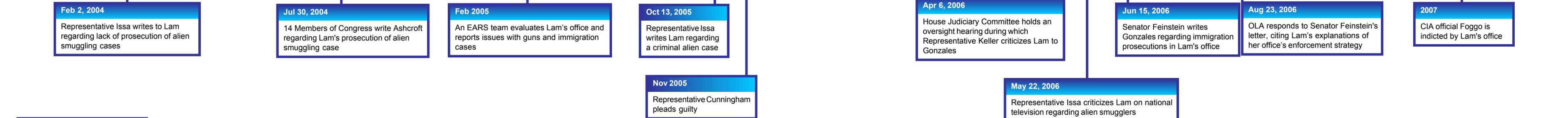
# Carol Lam Timeline

## Lam Events and Actions



Nov 2002   Dec 2002   Feb 2004   Mar 2004   Apr 2004   Jul 2004   Aug 2004   Nov 2004   Dec 2004   Feb 2005   Mar 2005   Sep 2005   Oct 2005   Nov 2005   Dec 2005   Jan 2006   Feb 2006   Mar 2006   Apr 2006   May 2006   Jun 2006   Jul 2006   Aug 2006   Sep 2006   Oct 2006   Nov 2006   Dec 2006   Jan 2007   Feb 2007

## DOJ and Other Events and Actions



## **CHAPTER TEN**

### **CAROL LAM**

#### **I. Introduction**

This chapter examines the removal of Carol Lam, the former United States Attorney for the Southern District of California.

##### **A. Lam's Background**

Lam received her law degree in 1985 from the Stanford University Law School. She then served as a clerk for a judge on the Second Circuit Court of Appeals. After her clerkship, Lam served as an Assistant United States Attorney (AUSA) in the Southern District of California from 1986 to 2000. In 2000, Lam was appointed as a California Superior Court judge.

In 2001, Lam applied for the position of U.S. Attorney and was interviewed twice at the Department. Lam described herself as “non-partisan” and told us she is not a registered member of any political party. Lam stated that during her second interview she believed that the interviewers asked for assurances that she supported the Department of Justice’s policies in light of the fact that she was not a Republican. Lam said she told the interviewers that she believed that “it is a responsibility of a U.S. Attorney to effect the Attorney General’s guidelines in a way that makes sense in the district.”

After her second interview, Kyle Sampson, Chief of Staff to the Attorney General, called her and offered her the position. Lam said she commented to Sampson that she had not “made things easy by virtue of the fact that I was a non-partisan.” According to Lam, Sampson did not respond to her remark.

On November 18, 2002, Lam was sworn in as the U.S. Attorney for the Southern District of California. She was told to resign on December 7, 2006, and her last day in office was February 15, 2007.

##### **B. The EARS Evaluation of Lam's Office**

Lam’s office underwent one EARS evaluation during her tenure as U.S. Attorney in February 2005. The EARS evaluators wrote that Lam was “an effective manager . . . respected by the judiciary, law enforcement agencies, and the USAO staff.”

The EARS evaluation, however, noted concerns about the U.S. Attorney’s Office (USAO) prosecution of firearms and immigration cases. The report stated: “The USAO intake and initial processing of criminal cases worked smoothly except for firearms cases . . . . The number of firearms cases

prosecuted by the USAO was well below the national average and well below the average of other USAOs in California.” The EARS evaluation also stated: “[T]he number of immigration cases handled per AUSA work year was statistically lower than the immigration cases handled per AUSA work year in the other Southwest Border USAOs.”

### **C. Lam’s Status on the Removal Lists**

As discussed in Chapter Three, Lam’s name appeared on Sampson’s first removal list in March 2005, and she remained on all the lists until her removal in December 2006.

### **D. Reasons Proffered for Lam’s Removal**

Sampson said that Lam was placed on the removal list because of concerns about her district’s prosecution of firearms cases and she remained on the list because of additional concerns over her office’s prosecution of immigration cases. Several senior Department officials told us they agreed Lam should be removed. For example, former Principal Associate Deputy Attorney General Mercer stated that when he discussed with Sampson possible U.S. Attorneys who could be removed, he would have suggested Lam if her name had not already been on the list.

Associate Deputy Attorney General Margolis, told congressional staff that while he thought Lam was “outstanding,” “tough,” and “honest,” she was also “probably insubordinate” about “what the priorities of the Department would be.” Deputy Attorney General Paul McNulty said that although he had serious concerns about Lam’s performance, he probably would have preferred to address those concerns by some method other than removal.

After the removals, the chart created by Monica Goodling to prepare McNulty for his congressional testimony stated with regard to Lam’s removal:

[Lam] continually failed to perform in relation to significant leadership priorities – these were priorities that were well-known within the Department . . . .

[T]he President and Attorney General have made clear that border enforcement is a top priority . . . . [Lam] failed to tackle this responsibility as aggressively and as vigorously as we expected and needed her to do . . . . The President has made clear that he expects strong immigration enforcement efforts, but SDCA [the U.S. Attorney’s Office for the Southern District of California] has only brought a fraction of the cases that other significant border districts are doing . . . .

[T]he President and both Attorneys General in this Administration made clear that, after terrorism, gun crime is the top priority and

an important tactic to fighting violent crime . . . . SDCA has only brought a fraction of the cases of other extra-large districts. Despite its size and population, it ranks 91 out of 93 districts in terms of average numbers of firearms cases since FY 2000 (doing only an average of 18 cases) . . . .

Thus, according to the statements of Department officials and this document, the Department removed Lam for two main reasons: her alleged failure to prosecute firearms and immigration cases. We discuss these reasons below, as well as another allegation that surfaced after Lam's removal – that she was removed because of her office's involvement in the investigations of Congressman Randy "Duke" Cunningham and Central Intelligence Agency (CIA) official Kyle Dustin Foggo.<sup>171</sup>

## **II. Chronology of Events Related to Lam's Removal**

### **A. Firearms Cases**

In 2001 the Department initiated Project Safe Neighborhoods (PSN), a national program designed to prevent and deter gun violence.<sup>172</sup> PSN was a priority of the Department. For example, it was discussed in the Department's 2003-2008 strategic plan, and since 2001 more than \$1.5 billion dollars has been allocated to PSN to hire prosecutors and implement programs to prosecute firearms cases and to reduce gun violence.

In early 2004, the Office of the Attorney General began to identify those United States Attorneys' Offices that it believed were "underperforming" in implementing PSN, based on data collected by EOUSA. In a March 10, 2004, memorandum to Sampson, who was Counselor to the Attorney General at the

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<sup>171</sup> This chart contained one other alleged reason for Lam's removal: "[R]ather than focusing on the management of her office, [Lam] spent a significant amount of her time trying cases – this is discouraged in extra-large districts, because these are offices that require full-time managers." In 2005, Lam had personally tried a lengthy criminal case lasting many months. Goodling also mentioned this reason in her congressional testimony when asked about Lam. However, we found no evidence that there was a concern among Department senior managers about Lam's decision to try the case herself, and we concluded that this reason was an after-the-fact rationalization to attempt to further justify her removal.

<sup>172</sup> Project Safe Neighborhoods is a Department initiative that involves collaborative efforts by federal, state, and local law enforcement agencies, prosecutors, and communities to prevent and deter gun violence. The Executive Summary maintained on the PSN Internet website contains a description of PSN which states, "The U.S. Attorney in each of the 94 judicial districts, working side by side with local law enforcement and other officials, has tailored the PSN strategy to fit the unique gun crime problem in that district. Criminals who use guns are prosecuted under federal, state, or local laws, depending on which jurisdiction can provide the most appropriate punishment . . . . [PSN] does not mandate a 'one-size-fits-all' approach' . . ."

time, the EOUSA Director identified 16 U.S. Attorneys' Offices whose PSN performance was "below their potential." Lam's office was one of these offices. The memorandum noted that Lam's office returned "only 17 firearms indictments" in FY 2003, and that her office's PSN indictments and defendants "per criminal work years for FY 2003 is the lowest in the nation." In subsequent Department analyses of PSN performance, the Southern District of California was identified as a district whose firearms prosecution performance was in need of improvement.

In the summer of 2004, Deputy Attorney General Comey made a series of telephone calls to, or had meetings with, 12 of the 16 U.S. Attorneys whose districts had been identified by EOUSA and the Attorney General's Office as PSN underperformers. Comey called Lam in July 2004.<sup>173</sup> According to Comey, he told Lam that PSN is "a priority of the Department; it's something incredibly important to the Attorney General and me, and to the President." Comey said that he told Lam that he wanted her "to really focus on this and make sure you are not missing something." Comey also described his own experience with PSN prosecutions in the Eastern District of Virginia and the Southern District of New York, telling Lam that federal prosecutors had a much larger role in gun prosecutions in Virginia than in New York, because of New York's strong state gun laws. Comey said he told Lam, as he told all the U.S. Attorneys he called, that he was not calling "just for the sake of getting your [PSN] numbers up."

When we asked Comey whether he thought that Lam understood that she needed to increase her PSN numbers, Comey said, "I was keen not to convey that directly." Comey also said that although he did not recall Lam's explanation for her office's low number of firearms cases, he thought it was acceptable to let state prosecutors handle gun prosecutions when the state had stricter laws, as Lam asserted was the case in California. However, Comey also told us that he expected her office's PSN numbers to increase because of the fact that the Deputy Attorney General had called her to discuss her district's low numbers. Comey said he did not tell Lam that a failure to improve her PSN numbers would result in her removal.

In a July 20, 2004, memorandum to Sampson, Spencer Pryor, a Counsel in the Office of the Deputy Attorney General and a participant in Comey's July phone call to Lam, summarized in a memorandum the results of Comey's calls to and meetings with the U.S. Attorneys about PSN. Pryor wrote that these efforts were designed as "an important reminder . . . that PSN is a Presidential priority that must be focused on by each of the U.S. Attorney's Offices and their

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<sup>173</sup> According to Lam, she had also had a prior discussion with Comey about PSN when he visited San Diego to speak at a U.S. Attorneys' conference in April 2004. Lam stated that her first conversation with Comey was much like the second.

respective PSN task forces.” Pryor’s memorandum stated that Lam “acknowledged problems with PSN initiative,” but that she explained that she had not received any PSN resources. Pryor’s memorandum disagreed with Lam’s assertion, stating that her district had received one new PSN prosecutor. Pryor also wrote that Lam said her district’s PSN case screening process was “broken,” and that a new system would help boost PSN prosecutions. Pryor also noted in the memorandum Lam’s statement that California’s “tough firearms” laws were responsible in part for the low PSN numbers in her district. Pryor concluded by stating that Lam’s office needed more resources to prosecute PSN cases.

Lam discussed her call with Comey in a July 7, 2004, e-mail to her staff. She wrote that Comey said the Southern District of California ranked 93 out of 94 USAOs in firearms prosecutions, with only 20 such cases in the past year. Lam reported that Comey told her he was not interested in bringing gun cases just for the sake of bringing gun cases, and that she told Comey she thought the district’s PSN numbers would be higher in the future, but not to expect a “meteoric rise.” Lam also stated in the e-mail that she explained to Comey that the district’s low numbers were a result of several factors: California has strong state gun laws; the Southern District is comprised of only two counties and local law enforcement does a good job prosecuting gun crimes; and her district already has an “immense” caseload. Lam also stated in her e-mail that her office would fix any problems it had with local law enforcement regarding the referral of gun prosecutions to her office. Lam told us that she believed Comey’s call was an “indirect” request for her to increase the office’s PSN numbers, because it was “obviously the reason he was calling.”

Lam also told us that she had hoped that her PSN prosecutions would increase as a result of a protocol her office had entered into with local law enforcement agencies in which those offices would refer to her office any firearm case where the federal sentence would exceed the state sentence by 24 months. In addition, Lam said that in 2005 or 2006 her office made concerted efforts to seek more firearm cases pursuant to the protocol by sending federal prosecutors to meet with local law enforcement agencies and by changing the way local officials handled the paperwork on firearm cases to make referrals easier. However, Lam said these measures were “a solution in search of a problem.” Lam said that she was disappointed when more cases were not referred to her office as a result of the protocol and her office’s efforts to implement it.

Comey left the Department in August 2005. In March 2006, the Office of the Deputy Attorney General prepared another memorandum for Deputy Attorney General McNulty regarding PSN performance by U.S. Attorneys’ Offices. The memorandum recommended that the Deputy Attorney General contact four U.S. Attorneys’ Offices regarding their poor PSN performance, one of which was Lam’s office. In addition, the memorandum identified 11 other

U.S. Attorneys' Offices where PSN performance could be resolved by the staffs of the Deputy Attorney General's Office and the USAO. The memorandum, which was also sent to Mercer and Chief of Staff to the Deputy Attorney General Elston, noted that Lam's office had filed only 12 PSN cases in FY 2005. However, the memorandum stated that PSN performance was not intended to be assessed by prosecution statistics alone.

We found no evidence that McNulty ever contacted Lam or the other three offices identified in this memorandum. McNulty told us that he "just didn't have the time to get around to the systematic review of the gun cases to go to different U.S. Attorneys and talk to them about the numbers."

However, Lam appeared to be aware that her PSN numbers continued to be low. In April 2006, she sent an e-mail to a fellow U.S. Attorney in which she said she was not going to a PSN conference because she was "too embarrassed."

On July 5, 2006, Mercer sent a facsimile to Lam with portions of a United States Sentencing Commission report for fiscal year 2005 containing sentencing statistics for the southwest border U. S. Attorneys' Offices. These statistics showed that in each year between 2002 and 2005, Lam's office was involved in the sentencing of fewer than 20 defendants whose primary offense was a firearms charge, and that other border districts were involved in far more such sentencings. According to the report, some border districts had approximately 10 times more defendants sentenced in gun cases than Lam's district. Mercer asked Lam to confirm that these statistics were accurate.<sup>174</sup>

After speaking with Mercer on July 5, Lam sent an e-mail to several people in her office and asked them to prepare a response to Mercer's fax. Lam wrote that Mercer had made the request because "the DAG had tasked him with looking at **resource allocations** to the various districts in light of the President's and AG's priorities." (Emphasis in original)

In a July 10, 2006, response to Elston, Lam stated that the statistics were "roughly accurate."<sup>175</sup> Lam noted that for fiscal year 2005 her office had

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<sup>174</sup> As discussed below, Mercer later testified to congressional investigators that when he sent the facsimile to Lam asking her to verify that the statistics were accurate, he did so at McNulty's direction. Mercer's facsimile also included statistics concerning immigration enforcement in her district, and he asked Lam to verify the accuracy of those statistics as well. Mercer told us that his facsimile to Lam about immigration statistics was in response to a plan by Gonzales and Sampson to address concerns over Lam's enforcement of immigration crimes, which we discuss in the next section.

<sup>175</sup> Lam sent the response to Elston because Mercer had left his position in the Deputy Attorney General's office to return to Montana as the full time U.S. Attorney. Mercer was later appointed Acting Associate Attorney General.

2,441 felony sentences, which was much higher than similarly sized districts in Massachusetts, Virginia, and the Northern District of California, although she acknowledged that the PSN number “remains low for now.” Lam also reiterated her explanations for her office’s low PSN numbers, writing that California had strict gun laws which were competently handled by local prosecutors; the Southern District of California contained only two counties, leading to consistent local enforcement of state gun laws; and that illegal guns were not a big problem in her district.<sup>176</sup> She stated in her response that to prosecute more gun cases would reduce the number of immigration prosecutions, and that her office had recently revised and liberalized a protocol with the local prosecutor whereby gun cases in which the federal sentence exceeded the state sentence by 24 months would be referred to her office for prosecution. She said the new protocol had resulted in very few referrals.

We found no evidence that anyone in the Department leadership offices had any further communications with Lam about her office’s gun prosecutions after this response in July 2006. Lam told us that she was not told, and did not know, that her explanation for why her PSN numbers were low was unpersuasive to Department managers. She said the only conversations she had about the issue had been the ones discussed above with Comey in April and July 2004, and Lam said that Comey “didn’t have a problem” with her explanation.

## **B. Immigration Cases**

The Southern District of California’s record regarding the criminal enforcement of immigration laws was also raised as a reason for Lam’s removal.

In 2004, 2005, and 2006, members of Congress complained publicly about the alleged failure of Lam’s office to aggressively prosecute violations of criminal immigration laws. These criticisms were also voiced by many Department officials. We describe below both the public and internal Department criticism of Lam’s immigration enforcement efforts, and her response to that criticism.

On February 2, 2004, Darrell Issa, a member of Congress from Southern California, wrote Lam regarding her office’s failure to prosecute an alien smuggler. A few months later, on July 30, 2004, 14 members of Congress from California wrote to Attorney General John Ashcroft to criticize the prosecution of alien smuggling in general, referencing an incident in the Southern District

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<sup>176</sup> Lam also asserted on several occasions that in 2005 San Diego had the lowest violent crime rate in 25 years. She stated that since the purpose of PSN was to reduce violent crime, this statistic showed that her decision to defer gun prosecutions to local prosecutors was sound.

of California in which an alien smuggler was arrested and then released without prosecution. On November 4, 2004, Sampson (then Counselor to the Attorney General) sent a memorandum to the Attorney General's Chief of Staff regarding the July 30 letter to Ashcroft. Citing statistics on the prosecution of immigration crimes, the memorandum concluded that the enforcement of criminal immigration laws by Lam's office compared poorly to other Southwest Border districts.

On September 23, 2005, 19 members of Congress wrote to President Bush to complain about the Department's failure to adequately prosecute alien smugglers, citing Lam's office as one example. A few weeks later, on October 13, 2005, Congressman Issa wrote to Lam regarding the failure to prosecute another criminal alien case. Issa referred to what he called Lam's "appalling record of refusal to prosecute" even the worst offenders. On October 20, 2005, 19 members of Congress wrote to Attorney General Gonzales requesting a meeting to discuss the Department's alleged failure to prosecute criminal aliens. The letter cited Lam's office's alleged policy of not prosecuting criminal aliens unless they were convicted of two prior felonies in the district.<sup>177</sup>

On April 6, 2006, the House Judiciary Committee held a Justice Department oversight hearing at which Attorney General Gonzales testified. Representative Richard Keller from Florida complained to Gonzales about Lam's "pathetic failure . . . to prosecute alien smugglers who have been arrested 20 times." Gonzales responded in part by saying that "I am aware of what you're talking about with respect to the San Diego situation . . . we are looking at the situation . . . and we are directing that our U.S. attorneys do more . . . ." <sup>178</sup>

On April 6, 2006, William Moschella, then the Assistant Attorney General for the Office of Legislative Affairs, sent an e-mail to the Office of the Attorney General stating that after speaking with Gonzales and Sampson he wanted to arrange a 10-minute telephone call between Gonzales and Congressman Issa to discuss "border enforcement in Southern California." Although the call was scheduled for April 17, it appears that it never occurred. On that date, Moschella was informed by e-mail that Gonzales thought the call was unnecessary in light of his congressional testimony on April 6 and his "subsequent sidebar with Issa." According to the e-mail, McNulty also said that if Gonzales were to talk to Issa, Gonzales could say that he had directed McNulty to look "into border enforcement practices in the San Diego area."

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<sup>177</sup> We found no evidence this meeting was ever held.

<sup>178</sup> According to Lam, no one in the Department notified her of Keller's criticism, and she learned of it only when another U.S. Attorney mentioned it in passing several months later.

On May 11, 2006, Sampson sent an e-mail to many of the Department's senior officials to inform them that President Bush would be giving a "major speech" regarding immigration reform, and that the Department would be assigned several matters related to border enforcement in connection with a Presidential initiative on immigration reform. On that same day, Sampson forwarded to Deputy White House Counsel William Kelley the April 14, 2006, removal list, which again included Lam. Sampson commented that "The real problem we have right now with Carol Lam . . . leads me to conclude that we should have somebody ready to be nominated on 11/18, the day her 4-year term expires."

On May 22, 2006, Congressman Issa complained on the Lou Dobbs television show on CNN about the refusal by Lam's office to prosecute alien smugglers. The show's producers had asked Lam's office for an official response to Issa's charges, which her office supplied prior to the broadcast. In the response, Lam's office questioned the validity of documents on which Issa had relied. Two days after the broadcast, Issa wrote to Lam regarding her response. The Department and Lam apparently never responded to Issa's letter.

On May 31, 2006, Counsel to the Deputy Attorney General Dan Fridman sent Mercer a draft analysis of immigration prosecutions in Lam's office, which Mercer forwarded to Sampson. The memorandum stated that it was prepared because of congressional and media attention on the office's enforcement of criminal immigration laws. The memorandum contained statistical data which indicated that the Southern District of California's immigration prosecution numbers in general were lower than those of several other southwest border districts. Sampson replied to Mercer that he also wanted a comparison between Lam's office and the Southern District of Texas (a district that was not included in the memorandum), and Mercer sent a final draft of the memorandum to McNulty on June 6, 2006, after receiving that data. The memorandum stated that the data showed that AUSAs in the Southern District of Texas were more productive and efficient in prosecuting immigration offenses than were AUSAs in Lam's office.

Also on May 31, Sampson sent an e-mail to Mercer asking "[has] ODAG ever called Carol Lam and woodshedded her re immigration enforcement? Has anyone?" Mercer responded, "I don't believe so. Not that I am aware of."

Sampson told congressional investigators that during the April to June 2006 time frame, the Department's senior management, including Attorney General Gonzales and Deputy Attorney General McNulty and their staffs, had "several conversations" about their concern over Lam's office's enforcement of immigration laws. Sampson stated that Gonzales had directed the Deputy Attorney General's Office to work with Lam's office to improve its immigration enforcement efforts, and that Sampson's e-mail as to whether Lam had been

“woodshedded” was seeking information as to whether the Deputy Attorney General’s Office had followed up with Lam as directed. Sampson said he recalled being concerned that the Deputy Attorney General’s Office had failed to communicate the Department’s concerns over immigration enforcement to Lam.

On June 1, 2006, Sampson sent an e-mail to Elston and Mercer stating that President Bush and Karl Rove had told Attorney General Gonzales that during the next 2 weeks the Department needed to “trumpet” its immigration enforcement efforts. That same day, Sampson sent another e-mail to Elston and Mercer, which Sampson said was related to his prior e-mail regarding immigration enforcement. Sampson wrote that “the AG has given additional thought to the SD [Southern District of California] situation and now believes that we should adopt a plan.”<sup>179</sup> Sampson outlined the plan, which set forth a series of steps to address the Department’s concerns regarding Lam:

Have a heart-to-heart with Lam about the urgent need to improve immigration enforcement in SD;

Work with her to develop a plan for addressing the problem – to include alteration of prosecution thresholds; additional DOJ prosecutors; additional DHS SAUSA resources; etc.

Put her on a very short leash;

If she balks on any of the foregoing or otherwise does not perform in a measurable way by July 15 [my date], remove her. (brackets in original)

AG then appoints new USA from outside the office.

Sampson’s e-mail stated that this was “the sort of thing for ODAG and EOUSA to execute.” He asked Mercer and Elston to “tune up my plan/list of bullets, and be prepared to (1) present such plan to the AG tomorrow or early next week for his approval and (2) execute the plan next week.”

On June 5, 2006, Mercer sent an e-mail to McNulty stating that the Attorney General wanted McNulty’s views on the proposed plan. McNulty responded by e-mail: “If [Lam’s] numbers are really bad, I may be in favor of a call inquiring about her exit plans. I’m concerned that a PIP for a USA may create some difficult issues.”<sup>180</sup>

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<sup>179</sup> A day earlier Sampson had sent an e-mail to Mercer stating that in connection with Lam’s office, “I got some guidance from the AG this morning and we need to talk.”

<sup>180</sup> A PIP refers to a “performance improvement plan,” a written document that sets forth specific goals and measures to help an employee improve his or her performance.

We found no evidence that the Attorney General's Office, the Deputy Attorney General's Office, or that anyone in EOUSA took any of the steps outlined in Sampson's June 1, 2006, plan to address the issues associated with the Southern District of California's enforcement of criminal immigration laws. For example, we found no evidence that, in response to this proposed plan, anyone had a "heart-to-heart" talk with Lam about immigration prosecutions by her office. We also found no evidence that anyone developed a "plan" to help address her district's performance or that anyone considered providing her office with additional resources, as discussed in Sampson's e-mail.

Sampson told congressional investigators and told us that he believed the Deputy Attorney General's Office failed to implement the plan that he and the Attorney General had developed. However, Mercer told us he believed that the Deputy Attorney General's Office did respond to the Attorney General's initiative. According to Mercer, McNulty thought that the first step in implementing the Attorney General's plan should be to ask Lam for her response to the statistics comparing the Southern District of California's immigration and firearm prosecutions to other southwest border districts. Therefore, as discussed previously, on July 5, 2006, Mercer sent Lam portions of the Sentencing Commission report for fiscal year 2005 containing sentencing statistics for the southwest border U.S. Attorneys' Offices. Although Mercer told us that he sent the statistics to Lam as part of the Attorney General's plan to improve Lam's performance, he did not tell her that. Mercer called Lam before sending the statistics on July 5 and told her that he wanted her to verify the accuracy of the statistics to make sure that they did not underrepresent her office's performance.

Lam told us that Mercer had called her and asked her to verify if the statistics were accurate. Lam also said that Mercer made some allusion to "looking at resources on the border." In a document that Mercer prepared for his congressional testimony, he wrote that he told Lam that he wanted her to verify that the statistics were accurate and told her that he had "reviewed data in conjunction with on-going discussions regarding DOJ resource allocations and DOJ priorities."

The statistics Mercer sent showed that in FY 2005 fewer immigration defendants were sentenced in Lam's district than any other southwest border district. In her July 10, 2006, written response, Lam stated that the statistics were "roughly accurate" and explained the statistics by stating that her office prosecuted only the most dangerous offenders and sought the highest sentences, which resulted in more trials with increased resources devoted to those trials. Lam wrote that she had made a decision in 2005 to reduce the number of alien smuggling cases accepted for prosecution because defendants convicted in those cases faced the lowest sentences and engaged in the least egregious behavior. Lam argued that her strategy of prosecuting the most

dangerous offenders greatly increased the number of immigration cases in which longer sentences were imposed and resulted in more resource-intensive trials.

After receiving Lam's response, Elston asked a summer intern in the Deputy Attorney General's Office to read and comment on the response. The intern sent Elston an e-mail stating that he lacked the expertise to assess Lam's justification for focusing on more serious crimes at the expense of not prosecuting less serious crimes. We found no evidence that anyone analyzed Lam's response.

McNulty told us that he recalled that in the summer of 2006 Mercer and another member of his staff (who we believe was probably Fridman) were tasked with evaluating immigration prosecutions in Lam's office. McNulty said that by the end of the summer they had identified options to approach the problem but that no decision was ever made about what options to pursue. McNulty did not identify what the options were. McNulty also asserted that Lam was aware of the evaluation of her office and participated by responding to that evaluation. It is likely that McNulty was referring to Mercer's sending the sentencing statistics to Lam and asking her to verify their accuracy. McNulty apparently did not know that Mercer had not told Lam that the Deputy Attorney General's Office was assessing her performance as part of a plan that could result in her removal.

On August 2, 2006, Lam met in her district with Representative James Sensenbrenner and Issa regarding immigration prosecutions. Lam summarized the results of her meeting in an e-mail she sent that day to the Department's Office of Legislative Affairs (OLA), which OLA circulated to several Department officials, one of whom sent it to Elston and Goodling. In her e-mail, Lam stated that she had explained her office's immigration enforcement priorities to the congressmen, that she chose to prosecute more serious offenders charged with offenses carrying longer sentences, and that it took more resources to prosecute those more serious cases.

The Attorney General had also received a letter from California Senator Dianne Feinstein on June 15, 2006, questioning immigration law enforcement in Lam's district. On August 23, 2006, OLA Assistant Attorney General Moschella replied to Senator Feinstein's letter, citing many of Lam's arguments about her office's immigration enforcement effort. The OLA letter stated that Lam's office focused on the worst offenders by bringing felony cases that would result in the longest sentences; that alien smuggling prosecutions were increasing; and that focusing on more serious crimes resulted in more trials, which were resource intensive and reduced the overall number of cases that could be brought.

Lam told us that after her meeting with Representatives Issa and Sensenbrenner, there was a “fairly quiet” period until she was told to resign. After the Department’s August 23 letter to Senator Feinstein, we found no further evidence of any criticism of Lam’s immigration prosecution efforts before she was removed.

### **C. Lam’s Removal**

According to Lam, EOUSA Director Battle called her on December 7, 2006, and thanked her for her years of service as U.S. Attorney. Battle then told her that the Department wanted to take her office in a new direction and told her to resign by January 31, 2007. Lam said she asked why, and Battle told her he did not know. Lam told us that she was “devastated,” in part because for days she thought she was the only U.S. Attorney fired. Lam said she understood from “history and tradition” that unless she committed misconduct, she would remain the U.S. Attorney until the end of the Administration.

Lam said she called McNulty a few minutes after Battle’s call to ask what had happened and whether she had done something to embarrass the Administration or the Department. According to Lam, McNulty refused to answer, saying he wanted to give some thought to the answers to her questions. Lam stated that McNulty never explained to her why she was fired. Lam also said that McNulty told her that he recognized that she had worked very hard and had even personally tried a long case (which Lam noted to us was one of the reasons the Department later proffered for her removal).

Lam said that some weeks later she commented to Elston during a telephone conversation that she was never told why she was asked to resign. Lam said that Elston responded, “I don’t know why that information would be useful to you.”

Lam said that she also called Margolis, who oversaw misconduct investigations against U.S. Attorneys, to find out whether she was fired for an ethics violation. Lam stated that Margolis told her that she was not the subject of any ethics investigation.

According to Margolis, when Lam called him after she was fired, Lam “speculated to me that [her removal] was over immigration and guns.” When we asked Lam about Margolis’s recollection, she said she did not recall speculating about whether those were the reasons she was asked to resign. She said she might have made such a comment, but did not recall doing so.

Lam said she made several attempts to delay her removal because of several important cases in her district. Lam said that Battle asked her to draft a memorandum supporting that request. Lam did so, but said she received no response for several weeks. Lam said that Elston eventually called her in early

January and told her that her request for an extension of time to resign was not viewed favorably in the Department. Lam said that she spoke with Elston shortly after that, and he told her that if she announced her resignation that day, she could delay her departure two weeks beyond January 31. Lam announced her resignation on January 16 and left office on February 15.

#### **D. Public Corruption Investigations**

When Lam's removal became public in early January 2007, there was public and congressional speculation that she was removed in retaliation for her office's prosecution of Randy "Duke" Cunningham, a Republican member of the House of Representatives, and her office's ongoing public corruption investigation of a high-ranking CIA official, Kyle Dustin Foggo.

In November 2005, after an investigation by Lam's office, Cunningham had pled guilty to conspiracy and tax evasion. In early 2006, Cunningham received a prison sentence of 8 years. In 2007, after an investigation related to the Cunningham matter, Lam's office indicted Foggo, then the third highest ranking CIA official, for, among other charges, conspiracy, wire fraud, and money laundering. Foggo's case is still pending.

To determine whether these prosecutions were related to Lam's removal, we conducted extensive searches of the e-mail accounts and electronic computer files of Sampson, McNulty, Elston, Goodling, and others in the Department who had any connection with the U.S. Attorney removals.<sup>181</sup> We also reviewed numerous documents related to the removals. We found no evidence indicating that Lam's removal as U.S. Attorney was in any way related to her office's investigation or prosecution of Cunningham, Foggo, or any other official, or that she was removed to affect other such investigations or prosecutions.

Department officials also denied that Lam was removed because of the Cunningham or Foggo cases. For example, Elston testified to congressional staff that the Cunningham prosecution was "incredibly significant," and noted that when he was an AUSA he assisted the Cunningham prosecution by securing a search warrant in the Eastern District of Virginia to obtain evidence related to the prosecution. Lam told us that she did not know why she was removed, but offered no evidence that it was because of the Cunningham or Foggo cases.

Some speculation in the media also suggested that Sampson's May 11 e-mail stating that "the real problem we have right now with Carol Lam" was related in some way to her office's investigation of Foggo. As discussed above,

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<sup>181</sup> Gonzales did not maintain a Department e-mail account or computer files.

however, Sampson's May 11 e-mail was sent shortly after Lam's office was criticized for its immigration prosecutions during a congressional hearing. Sampson also testified that his e-mail's reference to the "real problem" was Lam's "office's prosecution of immigration cases." The evidence we found supported that testimony.<sup>182</sup>

### **III. Analysis**

We found no evidence that Lam was removed because of the investigation or prosecution of Representative Cunningham or CIA official Foggo, as was claimed by some after the U.S. Attorney removals became public. Sampson and other Department officials denied this claim, and our review of Department e-mails and documents did not find any indication that these investigations had anything to do with Lam's removal. We also note that the investigation and prosecution of Cunningham and Foggo were aggressively pursued by career prosecutors in Lam's office, both during and after her tenure.

We determined that the Department's claim that inattention to management was a reason for Lam's removal was not accurate. Goodling testified and included in her summary document about the reasons for U.S. Attorney removals that Lam had personally tried cases rather than focused on the management of her office. We did not find any support that this had anything to do with Lam's removal, and we believe it was disingenuous for Goodling and the Department to raise this claim. This appears to be another after-the-fact rationalization used to further justify the removal of a U.S. Attorney, and we found that it played no role in the decision to remove Lam.

Rather, the evidence in our investigation demonstrated that Lam was removed because of the Department's concerns about her office's gun and immigration prosecution statistics. Sampson placed Lam on his first removal list, and she remained on all subsequent lists. Sampson consistently testified that concern about the low number of gun and immigration prosecutions by Lam's office was the reason for her removal. Other Department leaders corroborated Sampson's testimony.

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<sup>182</sup> Some people have alleged that an August 8, 2006, e-mail Elston sent to a colleague in the Deputy Attorney General's office asking, "have you heard back from Rizzo re SDCA case and WHC?" may have been related to Lam's removal. However, Elston stated that "Rizzo" referred to CIA Acting General Counsel John Rizzo, and that the Deputy Attorney General's Office was trying to assist Lam's office to obtain classified documents from the White House or the CIA that were relevant to an investigation. Elston denied that the e-mail related to the firing of Lam. In fact, contemporaneous e-mails in July and August of 2006 show that Lam's office was seeking the Deputy Attorney General's Office's assistance in obtaining classified information from the CIA on several matters, and that the White House Counsel's Office was involved in those discussions.

We also found that concerns about Lam's low number of gun and immigration prosecutions were raised in the February 2005 EARS evaluation. In addition, in the summer of 2004 Deputy Attorney General Comey raised with Lam the priority of Project Safe Neighborhoods gun prosecutions, and we found that the Department remained concerned with the low number of gun prosecutions in Lam's district. Her office's immigration prosecutions also received significant congressional attention. Moreover, the Department was troubled by the relatively low number of immigration cases brought by her office compared to other southwest border offices.

In response, Lam argued to the Department that the low number of gun prosecutions resulted from a variety of factors in her district, such as California's strong state gun laws; state and local law enforcement's effective prosecution of gun cases in her district; her district's heavy caseload; and the absence of a significant gun problem in her district. Lam also said that she made efforts to seek more gun cases from local law enforcement agencies, without success. With regard to immigration cases, Lam stated that she decided to prosecute the more serious offenders with charges that would result in the longest sentences, and that it took more resources to prosecute these types of cases.

Lam's explanations did not persuade Department leaders or assuage their concerns about her prosecutorial priorities. It is the President's and the Department's prerogative to remove a U.S. Attorney who they believe is not adhering to their priorities or not adequately prosecuting the types of cases that the President and the Department decide to emphasize. This is true for any U.S. Attorney, even one like Lam who was described by Margolis as otherwise "outstanding," "tough," and "honest," and who the EARS evaluation said was "an effective manager . . . respected by the judiciary, law enforcement agencies, and the USAO staff."

However, what we found troubling about Lam's case was that the Department removed Lam without ever seriously examining her explanations or even discussing with her that she needed to improve her office's statistics in gun and immigration cases or face removal.

In fact, while it was never implemented, the Department had outlined what we believe was a reasonable and appropriate approach to address its concerns about Lam's prosecutorial priorities. In June 2006, Sampson wrote an e-mail to Mercer and Elston that the Attorney General "believes that we should adopt a plan" with regard to the concerns about Lam. The plan included having "a heart-to-heart with Lam about the urgent need to improve immigration enforcement"; working with her to develop a plan to address the problem; and if she "balks" or otherwise does not perform in a measurable way, remove her. Sampson asked Mercer and Elston to comment on the plan and then execute it.

Yet, we found that neither Mercer nor Elston carried out the plan as outlined. Neither called Lam or had a “heart-to-heart” conversation with her about her “urgent” need to improve her district’s immigration enforcement, talked with her about her office’s prosecutions, or developed a plan to help her address her district’s performance with respect to immigration and firearms prosecutions. Moreover, no one put Lam on notice that she had to improve her performance in a measurable way or face removal, as the plan suggested.

Rather, when Mercer informed McNulty of the suggested plan, McNulty responded that “If [Lam’s] numbers are really bad, I may be in favor of a call inquiring about her exit plans. I’m concerned that a PIP [Performance Improvement Plan] for a USA may create some difficult issues.” But neither McNulty nor his staff ever made a call to Lam inquiring about her exit plans.

Mercer, who was Principal Associate Deputy Attorney General at the time, claimed that by faxing the sentencing statistics to Lam and asking her to verify them, he was executing the first step in the plan. Yet, even if he thought such action constituted the first step, he did not talk to Lam about her performance, execute any other steps of the plan, or even ask her about her exit plans, as McNulty had proposed.

The only action the Department apparently took in an attempt to assess Lam’s explanations for her office’s statistics was to direct a summer intern in the Deputy Attorney General’s Office to read and comment on her response to Mercer’s facsimile. The intern concluded that he lacked the expertise to assess Lam’s justifications for focusing on more serious immigration crimes instead of less serious crimes, and the Department conducted no analysis of her response.

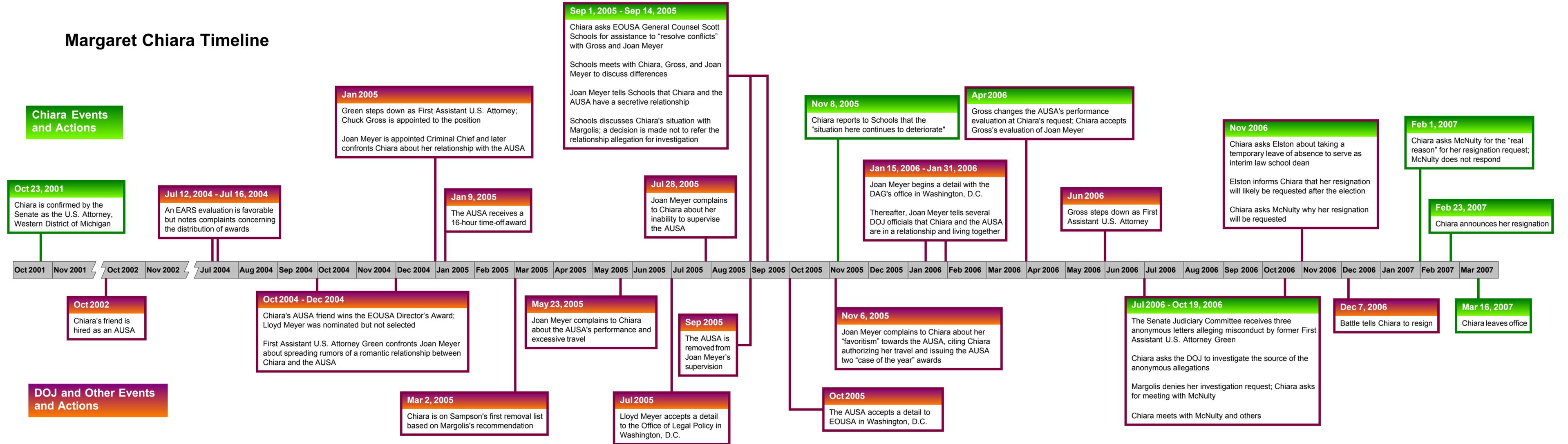
We found that neither Sampson, McNulty, Mercer, Elston, nor anyone else in the Department followed the plan outlined by Sampson at the behest of the Attorney General or directly addressed with Lam the issues of concern. We also found no evidence that Sampson or Gonzales ever inquired about whether the plan had been executed. Instead, on December 7, Lam was directed to resign.

We also believe the Department handled her forced resignation unfairly by never telling her why she was being instructed to resign, despite her repeated questions. Then, when she asked for additional time because of important pending cases in her office, she was granted a 2-week extension beyond January 31, but only if she announced her resignation that day.

In sum, we recognize that the President and the Department had the authority to remove Lam at their discretion based on concerns about her prosecutorial priorities and statistics. In this case the Department designed a reasonable plan to address the concerns regarding Lam’s gun and immigration

statistics, but no one implemented the plan or followed up to inquire why it had not been implemented. We believe the Department's actions provide a clear example of the disorganized removal process and the lack of oversight over that process.

# Margaret Chiara Timeline



## **CHAPTER ELEVEN MARGARET CHIARA**

### **I. Introduction**

This chapter examines the removal of Margaret Chiara, the former United States Attorney for the Western District of Michigan.

#### **A. Background**

Chiara received her law degree in 1979 from the Rutgers University School of Law. She worked at a private law firm from 1979 to 1982, and then as an assistant prosecutor in Cass County, Michigan, from 1982 to 1987. From 1988 to 1996, Chiara served two terms as the elected Prosecuting Attorney for Cass County. From 1993 to 1994, she also served as the President of the Prosecuting Attorney's Association of Michigan.

Upon completion of her second term as Cass County Prosecuting Attorney in 1996, Chiara was appointed Administrator of the Michigan Trial Court Assessment Commission, which evaluated and made recommendations for changes in the operation and funding of state trial courts. In 1999, Chiara began work as the Policy and Planning Director for the Michigan Supreme Court.

On September 4, 2001, Chiara was nominated by the President to be the U.S. Attorney for the Western District of Michigan. She was confirmed by the Senate on October 23, 2001.

During her tenure as U.S. Attorney, Chiara served on three subcommittees of the Attorney General's Advisory Committee (AGAC): Native American Issues, Management and Budget, and U.S. Attorneys' Offices Outreach.

Chiara was called by the Director of the Executive Office of U.S. Attorneys, Michael Battle, on December 7, 2006, along with the other U.S. Attorneys, and told to resign. She announced her resignation on February 23, 2007, and left office on March 16, 2007.

#### **B. The EARS Evaluation of Chiara's Office**

Chiara's office underwent one EARS evaluation during her tenure as U.S. Attorney. The EARS team's evaluation was conducted in July 2004. The EARS report stated that "The United States Attorney was a well regarded, hard-working, and capable leader who had the respect and confidence of the judiciary, the agencies, and USAO personnel." However, notwithstanding this

positive comment regarding Chiara, the EARS report noted “discontent within the Criminal Division” in the U.S. Attorney’s Office based on workload and productivity differences among Assistant U.S. Attorneys (AUSA). Additionally, the report commented that “a substantial number of AUSAs perceived that the actual process by which cash and time-off awards were determined was not equitable.” A draft report dated September 3, 2004, also commented that “[m]any AUSAs reported to evaluators [concerns about] the number and size of awards given to other AUSAs during the last 12 months. This information was found by evaluators to be generally inaccurate.”

### **C. Chiara’s Status on the Removal Lists**

On the first U.S. Attorney removal list, which Sampson e-mailed to White House Counsel Harriet Miers on March 2, 2005, Chiara was rated as “weak” and was 1 of 14 U.S. Attorneys whom Sampson recommended for removal. Chiara’s name appeared on every subsequent removal list.

### **D. Reasons Proffered for Chiara’s Removal**

As described in Chapter Three, in February 2007 when the Department began to prepare witnesses for their congressional testimony regarding the U.S. Attorney removals, Department of Justice White House Liaison Monica Goodling created a chart of reasons justifying the firings. The first draft of these reasons was reflected in Goodling’s two pages of handwritten notes. As to Chiara, Goodling wrote that “there was disarray in [her] office under her leadership . . . . [her office was] incredibly fractured . . . [she] lost [the] confidence of her subordinates and superiors.”

In the chart Goodling prepared, the reasons for Chiara’s removal similarly stated: “During USA’s tenure, the office has become fractured, morale has fallen, and the USA has lost the confidence of some career prosecutors. The problems here have required an on-site visit by management experts from our EOUSA to visit and mediate with members of the leadership team.”

On February 14, 2007, Deputy Attorney General Paul McNulty briefed members and staff of the Senate Judiciary Committee on the U.S. Attorney removals. According to notes of the closed briefing prepared by Office of Legislative Affairs official Nancy Scott-Finan who attended the session, and the talking points that McNulty used to prepare for the meeting, McNulty said at the meeting that one unidentified office (referring to Chiara’s office) had “serious morale issues” and there was a “loss of confidence” in her leadership.<sup>183</sup>

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<sup>183</sup> At the meeting, McNulty did not identify Chiara as the U.S. Attorney to whom he was referring because her removal was not yet public.

Chiara's identity as the seventh U.S. Attorney contacted by Battle on December 7, 2006, and told to resign was not publicly revealed until late February 2007. As a result of the controversy surrounding the removal of other U.S. Attorneys, Michigan Senators Carl Levin and Debbie Stabenow sent a letter to Attorney General Alberto Gonzales on February 13, 2007, asking whether either of Michigan's U.S. Attorneys had been asked to resign and, if so, the justification for the request. On February 23, 2007, the same day Chiara announced her resignation, Acting OLA Assistant Attorney General Richard Hertling sent a letter to Levin and Stabenow informing them that Chiara had been asked to resign for "performance-related reasons."

Two weeks later, in his testimony before the House Judiciary Committee on March 6, 2007, Principal Associate Deputy Attorney General William Moschella addressed the reasons for the removals of the six U.S. Attorneys who were also testifying before the Committee that day. With regard to the two U.S. Attorneys not present – Kevin Ryan from San Francisco and Chiara – Moschella stated that they had "problems managing their districts."

Several Department witnesses addressed questions about Chiara's removal in interviews with congressional investigators. Sampson told congressional investigators that Associate Deputy Attorney General David Margolis had expressed concerns to him about Chiara's "management problems." McNulty also used the phrase "management problems" when explaining to congressional investigators why Chiara was removed. Principal Associate Deputy Attorney General William Mercer told congressional investigators that Chief of Staff to the Deputy Attorney General Michael Elston informed him in October 2006 that Chiara was going to be replaced because of "performance assessments." Margolis told congressional investigators that Sampson consulted with him either in late 2004 or early 2005 about possibly removing some U.S. Attorneys. Margolis said that he either suggested that Chiara be removed or endorsed her removal at that time based on her "performance."

According to Chiara, no Department manager told her before Moschella's March 6 testimony that she was removed because of management deficiencies on her part. In interviews with us on May 30, 2007, and September 15, 2008, and a letter dated July 22, 2008, Chiara alleged that she was removed as U.S. Attorney because of baseless rumors that she had a homosexual relationship with a subordinate AUSA in her office. Chiara asserted that the rumors were spread by Joan Meyer, who was the Criminal Chief in Chiara's U.S. Attorney's Office from January 2005 to January 2006 and later served on detail as a Counselor in the Office of the Deputy Attorney General from January 2006 to February 2008, and also by Meyer's husband, Lloyd Meyer, who was an AUSA in Chiara's office from 1994 to 2005 and later served on detail in Washington, D.C., in the Office of Legal Policy (OLP) as a Senior Counsel from 2005 to 2006. Chiara stated that given the Meyers' detailee positions in the Department, they

likely conveyed the rumor of the homosexual relationship to the Office of the Attorney General and Deputy Attorney General's Office officials, and in particular to Goodling. Chiara said she believed that rumor resulted in her removal as U.S. Attorney.

## **II. Chronology of Events Related to Chiara's Removal**

### **A. Chiara's Inclusion on the Removal Lists**

Sampson told us he included Chiara's name as a U.S. Attorney recommended for removal on his first removal list, on March 2, 2005, primarily based on Margolis's opinion. Margolis told us that he either recommended Chiara for removal or endorsed her removal when her name was first raised by Sampson, and said he recalled discussing this issue with Sampson in late 2004 or early 2005, after the Presidential election. According to Margolis, he had serious questions about Chiara regarding her temperament and "turmoil in her office" when Sampson first broached with him the subject of removing underperforming U.S. Attorneys. Margolis also said his questions about her "kept on getting more serious" and his recommendation in favor of her removal became "stronger as time went on."

Margolis told us that he began having serious questions about Chiara's leadership after he was contacted by a former Department of Justice official who had recommended Chiara for the U.S. Attorney position in 2001. Margolis said this official contacted him sometime before he spoke to Sampson about the removals of U.S. Attorneys. The former Department official, whom Margolis knew well and respected highly, said he was aware of events within Chiara's office, and told Margolis that Chiara was "divisive" and that the office was "in turmoil."

Margolis said that the concerns he had about Chiara based on the former Department official's comments intensified when EOUSA General Counsel Scott Schools returned from a meeting with Chiara in September 2005 (which we describe below).

After Sampson's March 2, 2005, list, Chiara was included on each of Sampson's subsequent removal lists. As we discuss below, all but one of the senior Department officials responsible for determining which U.S. Attorneys should be removed – Sampson, McNulty, Elston, and Goodling – were aware of both the allegation that Chiara's office was in turmoil and the allegation that Chiara showed favoritism towards a subordinate AUSA with whom it was alleged that she had a sexual relationship. Only Attorney General Gonzales said that he was not aware of these allegations. Gonzales testified to Congress and told us that he did not recall knowing why Chiara was removed prior to her removal.

We discuss in the next section the conflict that arose in Chiara's office.

## **B. Factual Chronology Relating to Conflict in Western District of Michigan U.S. Attorney's Office**

### **1. U.S. Attorney's Office**

The U.S. Attorney's Office for the Western District of Michigan is located in Grand Rapids, Michigan, with branch offices in Lansing and Marquette. The office has about 85 staff members, including approximately 35 attorneys. Prior to Chiara becoming the U.S. Attorney in October 2001, AUSA Phillip Green served as Interim U.S. Attorney from January to October 2001. Joan Meyer served as Green's First Assistant U.S. Attorney.<sup>184</sup>

After Chiara's confirmation, Green became Chiara's First Assistant and Meyer stepped down to become a line AUSA. As described below, Chiara later appointed Meyer as the office's Criminal Chief.

### **2. Senior Management Conflicts in Chiara's Office**

Several witnesses in our investigation, including Chiara, described to us significant management conflicts during Chiara's tenure as U.S. Attorney. The conflicts began in the fall of 2004 and worsened over time. The conflicts related to allegations that Chiara was engaged in a sexual relationship with a subordinate AUSA and that as a result of the relationship Chiara showed favoritism toward the AUSA in granting monetary awards, bonuses, and other personnel actions. According to several witnesses, Joan and Lloyd Meyer were the primary sources of these allegations.

#### **a. Rumors and Allegations Regarding Relationship with AUSA and Favoritism**

##### **(1) Chiara's friend is hired**

The AUSA who was alleged to have an inappropriate sexual relationship with Chiara joined the U.S. Attorney's Office in October 2002. According to the AUSA, she and Chiara were friends at the time she applied for the position.<sup>185</sup>

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<sup>184</sup> Joan Meyer had also been the First Assistant in the late 1990s for former U.S. Attorney Michael Dettmer, who resigned in late 2000.

<sup>185</sup> The AUSA told us that her friendship with Chiara was disclosed to the USAO's hiring committee. However, Chuck Gross, then the Civil Chief and the head of the USAO's hiring committee, said he did not know at the time that the AUSA and Chiara were friends. Joan Meyer, who was also on the hiring committee, said that Chiara disclosed only a "professional relationship" with the AUSA before endorsing her as a "great prosecutor."

Chiara told us that she did not participate in the AUSA's hiring process other than to approve the committee's "unanimous" recommendation. Former First Assistant Green told us (Cont'd.)

Chiara also told us that the two were friends prior to the AUSA applying for the AUSA position, and that they became very good friends during the time they worked together in the USAO. Chiara said they met in 1996 and shared a professional bond stemming from their time serving as 2 of only 3 elected female county prosecutors in a state with 83 counties. Both Chiara and the AUSA told us that they did not have a sexual relationship, contrary to rumors circulated in the office and in the Department about them.

When the AUSA joined the U.S. Attorney's Office, she was assigned to work in the Criminal Division. Her caseload included violent crimes in Indian Country, including domestic violence and sexual assault matters. At the time, Joan Meyer and her husband were also AUSAs in the Criminal Division.

The AUSA told us that when she joined the USAO she had an apartment in the eastern part of the state, about a 2 ½ hour drive from the district's main office in Grand Rapids where she worked. She said that during her first year at the office, she occasionally (about two nights a month) stayed in a basement apartment in Chiara's house in Lansing in order to cut down her commute. The AUSA told us that she obtained her own apartment in Lansing during her second year in the office. However, she said that even after renting her own apartment in Lansing she occasionally stayed at Chiara's house to take care of Chiara's dog when Chiara was out of town. Chiara confirmed that the AUSA would occasionally stay in her house to care for her dog when she was on travel, and Chiara said that the AUSA was the only USAO employee to do so.

The AUSA said that during her first year at the U.S. Attorney's Office, to avoid the perception that she was receiving favorable treatment from Chiara, she drove her own car to the office rather than commute with Chiara and two other women who lived in Lansing and worked at the USAO. She said that after she moved to Lansing and rented her own apartment, she joined a car pool with Chiara and the two other USAO employees.

Both Chiara and the AUSA told us that they traveled together occasionally on business relating to meetings of the Native American Issues Subcommittee of the AGAC. Both said that they also took a vacation day on one such trip to Seattle to enjoy the sights. Chiara also said that the AUSA has stayed at Chiara's house in South Carolina a couple of times with her. The

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that Chiara told the hiring committee she was leaving the choice up to them. According to Green, the committee reached a consensus that the AUSA was the best qualified applicant. However, Gross told us that he opposed hiring the AUSA because he believed that another candidate was more qualified. He said there was no consensus on the committee for or against the AUSA, and he thought the decision to hire her was probably made by Chiara and Green. When we informed Chiara that Gross said that he had opposed the AUSA's hiring, Chiara said she had not known that and that she had been told the AUSA's selection was unanimous.

AUSA told us that she stayed at the South Carolina house at least one time without Chiara.

## **(2) Rumors about their relationship**

As noted above, an EARS team evaluated the USAO during the week of July 12-16, 2004. The EARS team leader was the First Assistant from another U.S. Attorney's Office. He told us that as part of the EARS process, he and his team provided questionnaires to, and then interviewed, virtually all USAO employees. The questionnaires and interviews sought employee views on the office and any problems or issues that they thought merited the EARS team's attention.

The EARS leader said that the team heard only one rumor about a relationship between Chiara and the AUSA during their week in the U.S. Attorney's Office. The leader said the rumor was so vague that he did not feel it warranted any mention in the report, or any follow up or independent investigation. He said he did not recall who made the allegation about the relationship, but he recalled that Joan Meyer did not provide this information or other negative information about Chiara or the office. The EARS leader said that he probably did not tell anyone outside the EARS team members about the rumor, but that if he had done so it would only have been to the EARS staff in EOUSA in Washington, D.C.

Lloyd Meyer told us that he told the EARS team about the allegations concerning Chiara's sexual relationship with the AUSA. He said that he understood that many AUSAs had told the EARS team about the rumors and that the rumors had circulated in the USAO since 2002.

The EARS team leader said that the EARS team did hear several complaints about inequitable distribution of awards, and that some of those complaints specifically concerned the AUSA. The leader said that he reviewed the AUSA's awards and concluded that they were justified because the AUSA prosecuted matters that no one else in the USAO wanted to prosecute, that she did so in a location far from the main office requiring considerable travel, and that she worked long hours.

According to former First Assistant Green, the rumors about a sexual relationship between Chiara and the AUSA began in the fall of 2004. Green attributed the rumors to Joan and Lloyd Meyer. He said that the rumors began to circulate after the announcement of an EOUSA Director's Award in the fall of 2004. According to Green, the AUSA's immediate supervisor had nominated her for the award, while Lloyd Meyer had nominated himself and another AUSA who tried a case with him. Chiara submitted both award nominations to EOUSA, which made the decision to give a Director's Award to the AUSA but

not to Lloyd Meyer or his co-counsel.<sup>186</sup> According to Green, Lloyd Meyer “went ballistic” when he learned that the AUSA had won the award and he did not. Green said he believed the Director’s Award fueled the rumors regarding a relationship between Chiara and the AUSA. Lloyd Meyer told us that he thought Chiara pulled strings at EOUSA to get the AUSA the award, although he admitted he had no evidence to support his assertion.

The AUSA told us that although she had heard complaints about favoritism towards her before receiving the award, the complaints intensified in the fall of 2004 after she won the Director’s Award. Chiara told us that Lloyd Meyer mounted a “campaign” to undermine her and drive the AUSA from the district after the AUSA won the award.

Green said that he knew that Lloyd Meyer, even more than Joan Meyer, was spreading rumors about an intimate relationship between Chiara and the AUSA. Green told us he confronted Joan Meyer in the fall of 2004 concerning the rumors, and Green said that Joan Meyer confirmed that Lloyd Meyer was “telling everyone.” Green said that he told Joan Meyer emphatically that the rumors were false.<sup>187</sup> He said that Joan Meyer insisted to him that she knew better and cited the example that Chiara and the AUSA had been seen driving into work together and therefore must be living together because the AUSA’s residence was a considerable distance from Grand Rapids. Green told us that he told Joan Meyer that the AUSA had an apartment in Lansing and often drove to the office with Chiara.

Joan Meyer told us that she had “speculated” to people in the office about the relationship between Chiara and the AUSA. When we asked Meyer about the basis for her speculation, she said she “had been noticing situations,” “putting two and two together,” “talking to people,” and came to believe that Chiara and the AUSA were living together. Meyer said she based her conjecture regarding their living arrangement on her observation that Chiara and the AUSA were driving to and from work together every day when the AUSA’s permanent residence was on the east side of the state, 6 hours from Grand Rapids.

Green also said that when he confronted Joan Meyer about the rumors in the fall of 2004, she mentioned to him a “huge award” of approximately \$20,000 that the AUSA had allegedly received. Green said he started laughing

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<sup>186</sup> Green said he submitted both nominations in different categories to avoid having colleagues competing against each other. Green also told us that he reviewed and finalized the award submissions and that Chiara only signed off on them.

<sup>187</sup> Green told us that Chiara and the AUSA were friends and nothing more. He said he was as “certain as [he] could be about two people who did not live” with him that they were not involved in a sexual or romantic relationship.

and told Meyer that the allegation was “preposterous” and explained to her that he came up with the office bonus amounts, not Chiara. He said that although he thought his response “struck a chord” with Meyer, the rumors persisted.

Green told us that the bonus rumors may have been started because of a change in the bonus award process Chiara instituted in the office in the spring of 2004. He said Chiara made the decision to award bonuses only to employees who received “outstanding” performance evaluations for the previous rating year. Green said under the new award process he made the recommendations as to the amounts to be awarded and Chiara talked to the supervisors to make sure that they were in agreement with the bonus recommendations. Green said it was his understanding that no supervisor voiced any objections to the new award system. This process, however, deviated from the past practice in the office under which the management team collectively determined the award recipients and the amounts of the bonuses. Green said he believed the change fueled rumors that the bonus determination process was “secretive” and that Chiara was “pulling the strings.” Green told us that he had devised the formula to determine the recommended bonus amount for each prospective awardee, and said he did not recall any instance in which the final bonus amount deviated from his recommendation.

Both Meyers also alleged to us that in December 2004 an incident occurred that generated further allegations of Chiara’s favoritism towards the AUSA. They alleged that Chiara directed the AUSA’s supervisor to give the AUSA a time-off award after her completion of a trial, against the recommendation of the AUSA’s immediate supervisor.

We determined that on December 28, 2004, Chiara sent an e-mail to the AUSA’s supervisor concerning time-off awards for several people, including the AUSA, who had been involved in a trial. Chiara’s e-mail stated that the AUSA deserved “no less than 32 and could easily be given 40 hours for pulling off this difficult evidentiary case against exceptionally tough odds.” Chiara also recommended a 24-hour award for an AUSA who had been “2nd chair” at the same trial, a 16-hour award for an employee who worked through the weekend in connection with the trial, and 4 and 0 hours, respectively, for two other employees involved in the trial. Chiara told us that she believed the AUSA merited a 32 or 40 hour time-off award because of the difficult preparation work for the trial, especially during the winter in Michigan’s Upper Peninsula.

In a reply e-mail, the supervisor stated that he had intended to submit 16-hour awards for the AUSA, the second-chair AUSA, and the employee who had worked through the weekend. He also said he would have submitted 4- and 8-hour awards for the two other employees. The supervisor also noted in the e-mail that while Chiara could increase the awards for the AUSA and the second chair AUSA, he was reluctant to propose such large time-off awards for

a 3-day trial. He stated that time-off awards were generally limited to 8 to 16 hours for week-long trials.

According to EOUSA records, the AUSA received a 16-hour time off award, effective January 9, 2005. EOUSA records also show that two of the staff mentioned in the e-mail exchange between Chiara and the supervisor received 16-hour time off awards, and one employee received a 4-hour time off award. Thus, contrary to the Meyers' assertion that Chiara gave the AUSA an award against her supervisor's recommendation, it appears that the supervisor intended to nominate the AUSA for an award independent of Chiara's suggestion, and that Chiara did not overrule the supervisor regarding the size of the time-off award.

Joan Meyer also asserted to us that the AUSA received a disproportionate amount of bonuses and time-off awards compared to other employees. Meyer said she "had no doubt" that the AUSA received "18 percent of the bonus pool" allocated for the 40 attorneys in the office. Both Meyers claimed that the AUSA received unmerited bonuses, and cited a story in the Grand Rapids Press on March 14, 2007, which included the allegation that the AUSA received 14% of the bonus money "paid to two dozen assistants."

Our review of bonus records maintained by EOUSA showed that for the 2004 fiscal year (October 1, 2003, to September 30, 2004, before the allegations first surfaced), the AUSA received a \$5,000 bonus. No other employee received a higher bonus, but four other line AUSAs, including Joan Meyer, received the same amount. The AUSA also received one "spot award" of less than \$500, which brought her total award money for the year slightly above the other four. Other AUSAs in the office received lesser bonus amounts. The AUSA's total award comprised roughly 9% of the total bonus pool for attorneys during that fiscal year. EOUSA records show that in the subsequent year, the AUSA received a "Special Act or Service Award" of \$500 and a \$3,000 bonus that was matched or exceeded by seven other AUSAs. The AUSA's percentage of the bonus pool for attorneys that year was roughly 7%.

Joan Meyer claimed that Chiara made the bonus decisions, and Meyer said she was unaware that anyone else played a role in the bonus determination. We found, however, that Green made the determinations regarding both recipients and amounts for the 2004 fiscal year, the first year that bonus amounts were called into question.<sup>188</sup> As described above, Green told us he explained to Joan Meyer his role in determining attorney bonuses.

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<sup>188</sup> Green was not involved in the bonus determinations for the 2005 fiscal year because he had stepped down as First Assistant by that time. Gross, his replacement as First Assistant, told us that Chiara participated in choosing the recipients and award amounts. Chiara told us that after much discussion, she and Gross came to a "consensus" about bonus (Cont'd.)

**b. Meyer Confronts Chiara About her Relationship with the AUSA**

In January 2005, Green stepped down as First Assistant and took a position as a line AUSA in the USAO's Criminal Division. Green told us that he stepped down "predominantly" because of the Meyers. He said that the rumors they were spreading about Chiara and the AUSA were "the straw that broke the camel's back."

Green said that while the office had morale issues under Chiara, it had had morale issues under Chiara's predecessor as well. He told us that he did not believe that there were widespread morale issues during Chiara's tenure and said that the 2004 EARS evaluation supported his belief. He also said that what morale problems existed were "driven by" the Meyers. Green said that the rumors about Chiara and the AUSA living together did not interfere with the functioning of the office "to any great extent." He said that aside from the Meyers, no one ever told him that Chiara was not competent to be the U.S. Attorney.

After Green stepped down, Chuck Gross was named First Assistant and Joan Meyer was selected as Criminal Chief. According to Chiara, she chose Gross as First Assistant and Meyer as Criminal Chief based upon Green's recommendation. She said Green reasoned that Gross was close to Meyer and could keep her "on track with her criminal [chief] responsibilities."

After a few months, however, the new management team was in conflict. One of Joan Meyer's new responsibilities as Criminal Chief was to supervise the AUSA. Meyer told us that her concern about the relationship between Chiara and the AUSA had "nothing to do with any purported homosexuality" but related to the impact the relationship had on Meyer's ability to supervise the AUSA. Meyer said she believed the relationship between Chiara and the AUSA made the AUSA "virtually unsupervisable."

Shortly after she became Criminal Chief, Joan Meyer asked Chiara directly if she was living with the AUSA. Meyer told us that being a "good supervisor and wanting to get it on the table," she confronted Chiara in First Assistant Gross's presence about the alleged relationship. Meyer said she told Chiara that it would be impossible to supervise the AUSA if she was living with Chiara. According to Meyer, Chiara told her not to assume anything. Meyer said she then asked Chiara directly if she and the AUSA were living together, but Chiara expressly declined to answer the question, telling Meyer it was irrelevant to her job and that she expected Meyer to supervise the AUSA.

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amounts for that year. Chiara told us that she did not recall disagreeing with Gross over the bonus amount for the AUSA.

Chiara confirmed that Meyer confronted her in early 2005 about the relationship. According to Chiara, Meyer said that she could not supervise the AUSA because of Chiara's interference. Chiara said Meyer asked her directly if the two had a personal relationship. Chiara told us she probably responded that Meyer had no right to ask that question.

Chiara told us that after the confrontation, she gradually became aware that the allegation about her relationship with the AUSA had become "an office-wide issue." Chiara told us that because of the "reign of terror" spread by Lloyd and Joan Meyer in 2005, her office had become a "disaster." However, Chiara told us that she never considered directly addressing this issue either with Joan Meyer or within the office. She also told us that she never considered formally removing herself from personnel decisions affecting the AUSA, such as awards and performance evaluations. Chiara said that she had other friends in the USAO besides the AUSA, and that she did not consider removing herself from decisions concerning them.

Joan Meyer said she believed the AUSA had numerous deficiencies in her performance. In addition, Meyer said she also started raising questions about the AUSA's travel because the AUSA was "disappearing" to numerous seminars, which Meyer said depleted the office's travel budget and required others to do the work the AUSA left behind. Meyer said the AUSA's travel authorizations were handled without her knowledge or approval. Meyer said she did not know who actually signed off on the AUSA's travel authorizations, but assumed it was Chiara. Chiara denied that she routinely signed off on the AUSA's travel authorizations, but said she would sign them in an emergency, as she would for any employee.

E-mails reflect that Joan Meyer raised these issues with Chiara in the spring and summer of 2005. On May 23, 2005, Meyer complained in an e-mail to Chiara and Gross about the AUSA's performance and excessive travel. We did not find any response to Meyer's e-mail.

On July 12, 2005, Meyer sent another e-mail to Chiara and Gross commenting that the AUSA was seeking a detail in Washington, D.C. and noting that Meyer's relationship with Chiara had "significantly deteriorated." On July 28, 2005, Meyer sent Chiara another e-mail complaining about her inability to supervise the AUSA, and stating that the AUSA had "unfettered professional and personnel access" to Chiara. Again, we found no responses to Meyer's e-mails.

In July 2005, Lloyd Meyer accepted a detail to the Office of Legal Policy in Washington, D.C. He said he took the detail because "the situation in that office was intolerable."

By September 2005, the relationship between Joan Meyer and the AUSA had become so strained that Chiara removed the AUSA from Meyer's supervision and assigned her to another supervisor on Chiara's management team. According to Chiara, Joan Meyer had stopped speaking with the AUSA.

In October 2005, the AUSA accepted a detail to EOUSA in Washington, D.C.

### **3. Chiara Requests Assistance from EOUSA**

In the fall of 2005, Chiara called EOUSA General Counsel Scott Schools and asked for his help to "resolve conflicts" between herself and her principal managers, Gross and Joan Meyer. According to Schools, Chiara believed that Meyer was "undermining her authority with her subordinates" and that Gross was "not supportive enough of her efforts to manage the office." Schools decided to visit the USAO, and before the visit he spoke by telephone with Meyer and Green.

According to Schools's written notes of his pre-meeting telephone conversations, Meyer asserted that Chiara was engaged in a relationship of a "secretive nature" with a female AUSA that resulted in the AUSA being rewarded excessively for her work. Schools's notes state that Meyer told Schools that Chiara and the AUSA were seen arriving at and leaving the office together and taking the same vacation days; that the relationship was an "open and notorious problem in the district"; and that the AUSA was being "singled out for awards" she did not deserve, and as a consequence morale in the office was "very low."

Schools's notes also reflect that Green disputed Meyer's contentions that there was an inappropriate relationship between Chiara and the AUSA or that Chiara gave preferential treatment to the AUSA. Green attributed the turmoil in the office to the Meyers, whom he described as "two troublesome AUSAs who have their own agenda" and were "spreading rumors" that Chiara and the AUSA were "living together and sleeping together."

On September 14, 2005, Schools met with Chiara, Gross, and Joan Meyer at a private attorney's office in Grand Rapids, Michigan, in an effort to resolve the differences among them. The three agreed upon guidelines proposed by Schools to improve communication within the management team, and they agreed to work together for the good of the office. According to Schools, the issue of Chiara's alleged relationship with the AUSA was not discussed. Chiara told us that she probably discussed the favoritism allegations with Schools, but said that that issue was only "one factor" out of many causing the management problems in her office.

We asked Schools if he came to any conclusion after his visit to the district about the management team in the office, and whether it appeared

effective or in disarray. Schools responded, “I would say it was closer to the disarray side.” When asked how much of the disarray was attributable to Joan Meyer’s allegation about the relationship between Chiara and the AUSA, Schools answered that he viewed the allegation as “a little bit tangential.” According to Schools, there was a “perception” by Meyer about the nature of Chiara’s relationship with the AUSA, but the larger complaint Meyer expressed was that “Ms. Chiara was a poor manager overall and the issues regarding [the AUSA] were a component of that but not the real driving issue behind the problem.”

Upon returning to EOUSA, Schools reported to Margolis on his meeting with Chiara and her managers. Schools said he gave Margolis his opinion that the office was in a “difficult situation”; that Chiara was “frustrated”; and that Schools was “not optimistic” that the management problems would be resolved. Schools said he told Margolis about Meyer’s allegation about the relationship between Chiara and the AUSA “even though at that point it wasn’t explicitly stated.”

Schools said he also discussed with Margolis whether Meyer’s allegation regarding Chiara’s and the AUSA’s relationship should be referred to the Office of the Inspector General (OIG) for investigation. Schools told us he considered it “a close question,” but that both he and Margolis believed the information furnished by Meyer was “too vague and insubstantial to merit referral to the OIG at that time.” In describing his decision not to refer the matter, Margolis told us that there was not a “threshold showing” that Chiara and the AUSA were engaged in an intimate relationship.

#### **4. Additional Incidents**

We found that Schools’s meeting with the three officials did not improve matters in the U.S. Attorney’s Office. On November 5, 2005, Gross sent Chiara a draft performance evaluation for the AUSA. Gross told us that the draft contained ratings for five job-related elements, and that he had given the AUSA a rating of “satisfactory” on four elements and “outstanding” on one element.

Gross said that Chiara pressured him to give the AUSA a more favorable evaluation. According to Gross, Chiara told him that the evaluation did not reflect the quality of the AUSA’s work, and that the AUSA would give Gross a binder of materials that he should consider when revising her performance evaluation. Gross said that Chiara did not directly tell him to change two of the four “satisfactory” ratings to “outstanding” so the AUSA would receive an overall rating of “outstanding,” but Gross said he was “confident” that had he not done so, Chiara would have given the evaluation back to him again.

Chiara told us that she believed that Joan Meyer drafted the AUSA’s evaluation, or that Meyer told Gross what to write. Chiara told us that she

thought Gross's draft evaluation was "outrageous" because the AUSA deserved an overall "outstanding" rating based on her work. Chiara said she told Gross to speak to judges and others who knew the AUSA's work, but Chiara said she did not recall telling Gross that the AUSA would give him a binder of materials.

Gross said that after reviewing the materials the AUSA gave him and talking to a federal magistrate and others who knew her work, he believed that he should revise one of the "satisfactory" elements to "outstanding." However, he said he did not feel that he should raise any other "satisfactory" rating. Gross said he ultimately changed the rating for one additional element to "outstanding" because he wanted Chiara to sign off on Joan Meyer's performance evaluation, who Gross had rated overall as "outstanding." Gross said that he presented both the revised AUSA's and Meyer's evaluations to Chiara, put them on her desk, and told her they were "connected." Chiara approved both evaluations. However, Chiara denied that her acceptance of the two evaluations was connected.

In a second incident, on November 6, 2005, Joan Meyer sent Chiara an e-mail commenting on the fact that the AUSA was receiving travel reimbursements from the office travel budget for her trips back to Michigan from Washington, D.C., although as described above the AUSA was on detail at the time to EOUSA. Meyer stated in the e-mail that even though the AUSA was on detail, other AUSAs perceived that her travel expense reimbursements showed favoritism because the office travel budget was tight. Meyer also stated that the AUSA had received two case-of-the-year awards from the USAO, and the second award was not recommended by the Criminal Division supervisors or the First Assistant. Meyer told Chiara that "many cases went unrecognized that were more meritorious" and that the AUSA's receipt of the second award was "perceived" to be the result of Chiara's favoritism. We found no response by Chiara to Meyer's e-mail. Chiara did not recall responding to this e-mail, but said she thought that if she responded it would have been orally.

Two days later, on November 8, 2005, Chiara sent an e-mail to Schools reporting that "the situation here continues to deteriorate" and welcoming any suggestions he might have. Chiara said that she may have sent this e-mail in part because of Meyer's e-mail to her 2 days earlier.

We did not find a specific response from Schools to this e-mail. However, in December 2005, after Meyer had announced her impending departure for a detail in the Office of the Deputy Attorney General, Schools suggested to Chiara that she advertise the positions of First Assistant and Criminal Chief.

## **5. The Relationship Rumors Spread**

In late January 2006, Joan Meyer stepped down as Criminal Chief and began a detail in Washington, D.C., as a Counselor in the Office of the Deputy

Attorney General. As noted above, her husband Lloyd Meyer had previously accepted a detail to OLP in July 2005, and the AUSA had accepted a detail to EOUSA in October 2005.

Most senior Department officials we interviewed who were involved in the removal of the U.S. Attorneys said they were aware of the allegations about the turmoil in Chiara's office and about an alleged relationship between Chiara and a female AUSA (though many did not know the identity of the AUSA). Several said they heard the allegations directly from Joan Meyer after she began her detail with the Deputy Attorney General's Office in late January 2006.<sup>189</sup>

Sampson told congressional investigators that he spoke to Margolis frequently about issues with U.S. Attorneys, and he had a "hazy recollection of him expressing or acknowledging concerns about Ms. Chiara." According to Sampson, both Goodling and Elston also expressed concerns about Chiara "late in the [removal] process." He said he remembered thinking at the time that the concerns raised by Elston – that Chiara's office was "fractured . . . and Ms. Chiara was not able to manage the in-fighting" – might have been generated by Joan Meyer.

In his interview with us, Sampson said that he heard from Goodling and Elston that "there were management difficulties and that [Chiara] was not the strongest of USAs." He also stated that he was aware of an allegation that Chiara was engaged in a romantic relationship with a female AUSA in her office. Sampson said that allegation came to his attention either directly from Joan Meyer or indirectly from Meyer through Elston. In addition, Sampson said that after Chiara's name had appeared on Sampson's first two removal lists and after Meyer had started in the Deputy Attorney General's Office, he had the "perception that the office was a disaster."

As discussed above, Margolis told us that he either recommended Chiara for removal or endorsed her removal in late 2004 or early 2005 when Sampson first raised her name. In addition, Margolis told us that Joan Meyer first broached with him the subject of the alleged relationship between Chiara and the AUSA sometime in early 2006, shortly after Meyer began her detail with the

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<sup>189</sup> Joan Meyer denied spreading rumors about Chiara and the AUSA living together. However, we found numerous e-mails from Meyer in 2006 when she was in the Deputy Attorney General's Office in which she made such allegations. We found e-mails from Meyer to seven different people in the USAO and to her husband in which she alleged that the AUSA was Chiara's "live-in girlfriend"; that Chiara's conduct evidenced "unfair treatment, blatant favoritism and the promotion of [Chiara's] live-in girlfriend's career at the expense of a government budget"; that "[the AUSA] is either keeping her job or walking out of our office with bonuses, a salary history and awards that she received, not because she deserved them, but because she is living with and vacationing with the US Attorney who is her life partner (whatever that means);" and that there was "the substantial likelihood that Chiara is benefiting financially from the bonuses and salary increases she is awarding [the AUSA]."

Deputy Attorney General's Office. According to Margolis, Meyer asserted that Chiara and the AUSA were living together. When Margolis asked Meyer how she knew this, she replied that Chiara and the AUSA would drive off together at the end of the day and that since Meyer knew that the AUSA lived too far away to commute, she inferred that the two must have been living together at Chiara's house. According to Margolis, after Meyer disclosed her observations and conclusions, she told Margolis that he had to report it to the OIG. Margolis told us that he told Meyer he was not a messenger and that she would have to report it herself since she was the one who claimed knowledge of the relationship.<sup>190</sup>

Other senior Department officials also became aware of the rumors surrounding Chiara and the AUSA before Chiara was removed. Goodling declined to speak with us, but as described in our previous report on politicized hiring by Goodling and others in the Office of the Attorney General, we found that Goodling was aware of the rumors of a sexual relationship between the AUSA and Chiara.<sup>191</sup> In fact, Goodling acted on those rumors by terminating the AUSA's detail at EOUSA after EOUSA had agreed to extend her detail for a second year. In addition, we found that Goodling attempted to prevent the AUSA from obtaining two other details in the Department. However, we did not find any evidence that Goodling recommended Chiara's removal.

McNulty also told us that he was aware of the allegations about Chiara and "a female employee." McNulty said he could not remember the source of the rumor, but he "heard that Joan [Meyer] had made some comment that had come up in the office about the relationship."

Elston said he was aware of the allegation that Chiara and the AUSA were living together and that their relationship had caused problems in the office. Elston said the source of this information was "primarily" Joan Meyer. However, Elston told us their "living together" was not the important issue to

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<sup>190</sup> Meyer did not report her allegations to the OIG. However, in August 2006 Meyer was interviewed in connection with an OPR investigation regarding anonymous allegations against former First Assistant Phil Green, which we discuss below. In her interview, Meyer raised with OPR the same allegations about Chiara and the AUSA even though they were unrelated to the pending investigation for which she was interviewed. She asked OPR to investigate or to refer the matter to the OIG. OPR informed Meyer that the allegations fell within the jurisdiction of the OIG and advised her to report the matter to the OIG if she believed that she had evidence to support the allegations. Meyer never did so. Meyer later told us that she never reported the allegations because "I was on [Chiara's] payroll . . . She was in control of my bonuses, my salary levels . . . I wasn't going to sign some sort of formal referral . . . while I was on her payroll." Meyer also noted that she had reported the allegations to Schools and Margolis.

<sup>191</sup> See *An Investigation of Allegations of Politicized Hiring's by Monica Goodling and Other Staff in the Office of the Attorney General*, pp. 128-130.

him with regard to Chiara. He said that the alleged favoritism in bonus awards was the important issue because of the effect it had on office morale.

Rachel Brand, then Assistant Attorney General for the Office of Legal Policy (OLP), was also aware of the relationship allegations. Brand said that Lloyd Meyer, then on detail to OLP, had complained to her “many times” about Chiara’s leadership and had claimed that Chiara was engaged in an inappropriate relationship with a female AUSA in the office. According to Brand, Lloyd Meyer told her that “everyone” knew the two were living together and that the AUSA was receiving the largest bonuses in the office. Brand said she also discussed these issues with Joan Meyer, then on detail to the Office of the Deputy Attorney General. Brand said she thought it “possible” that she conveyed to Sampson what she heard from the Meyers.<sup>192</sup>

Joan Meyer denied telling Sampson and McNulty her allegations about Chiara and the AUSA, but acknowledged having a conversation with Elston “sometime in 2006,” about the AUSA. She said she “may have even told [Elston] the story” about confronting Chiara about her living arrangements with the AUSA. Meyer told us that “I’ve never had extensive conversations with anybody in the Office of the Deputy Attorney General about Margaret Chiara.” She said she discussed the Chiara-AUSA relationship with Margolis “a little bit” in early 2006.

## **6. Chiara’s Request for an OPR Investigation**

In June 2006, First Assistant Gross left the USAO for a detail to Iraq. He said that by the time he left the office “morale was bad.” Gross said he and some other managers had “lost faith in [Chiara’s] ability to lead the office.” Gross said that the use of the word “fractured” to describe the USAO was not unfair. He told us that by that time “the vast majority” of staff thought Chiara was doing “a poor job or at best an okay job.”

In July 2006, three anonymous letters were sent to the Senate Judiciary Committee challenging the nomination of Green, Chiara’s former First Assistant, to be the U.S. Attorney for the Southern District of Illinois. The letters were referred to OPR by Illinois Senator Richard Durbin. OPR subsequently initiated an investigation.

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<sup>192</sup> In connection with his January 9, 2006, U.S. Attorney removal list, Sampson had proposed to Harriet Miers that Brand replace Chiara. In a subsequent e-mail to Deputy White House Counsel William Kelley on May 11, 2006, Sampson asked Kelley to call him to discuss “Rachel Brand for W.D. Mich.” Brand told us that sometime in 2006 Sampson broached the subject of her replacing Chiara as U.S. Attorney in Western Michigan. According to Brand, she and Sampson were good friends and he knew she had roots in Michigan and had previously expressed to him a general interest in becoming a U.S. Attorney. Brand eventually withdrew her name from consideration for the U.S. Attorney position for personal reasons.

In August 2006, Chiara asked the Department to conduct an investigation into who had sent the anonymous letters to the Senate Judiciary Committee. Chiara and others believed Lloyd Meyer had sent them, and Chiara believed the statements in the letters were deliberate falsehoods.

On October 2, 2006, after learning that the decision on whether to grant her request would be made by the Deputy Attorney General's Office, Chiara sent an e-mail to Elston and Margolis inquiring into the status of her request for an investigation into the source of the anonymous letters. Chiara sent another e-mail on October 4 to Margolis, requesting an opportunity to meet with him in Washington, D.C., or Grand Rapids so that she and her "senior management team" could more effectively convey the "severity and import of our office and district situation." In her e-mails to Margolis and others, Chiara said that this issue was important to her office because she believed one of her employees deliberately gave false and malicious information to the Senate, and because the anonymous letters were having an adverse effect on her office.

On October 6, Margolis forwarded several of Chiara's e-mails to Elston, Schools, and Moschella, among others. Elston responded to Margolis's e-mail by stating: "Perhaps it is time for her to move on if she can't manage her office."

On October 18, 2006, Margolis sent a lengthy e-mail to Chiara, denying her request for an investigation into the source of the anonymous letters. In explaining his decision, Margolis cited the Whistleblower Protection Act (WPA), 5 U.S.C. § 2302, and pointed out that, given the investigation undertaken by OPR into Green's alleged conduct, a parallel investigation into the source of those allegations would "serve little purpose other than to identify the individual possibly entitled to protection under the WPA." Margolis also pointed out that because the Senate Judiciary Committee asked OPR to investigate the merits of the allegations against Green, the Committee might well view the Department as more interested in retaliating against an employee who disclosed misconduct to Congress than in ascertaining the truth about the misconduct allegations. Margolis informed Chiara that he had determined that the best interests of the Department would not be served by conducting the investigation she requested.

Chiara was not satisfied with Margolis's decision and asked to meet with McNulty, Margolis, and Schools in Washington, D.C. The meeting was held on the afternoon on October 19, 2006. Margolis's decision was not altered.

According to Elston, Chiara's persistence in advocating for the investigation struck him as "weird." He told us that "everyone" thought such an investigation was a bad idea, but that Chiara kept pushing for it anyway.

Margolis told us that he had concerns about Chiara's performance long before the issue of her request for an investigation arose, but he said he was troubled by her request because it seemed Chiara was more interested in finding and punishing the anonymous letter writer than in ascertaining the truth or falsity of the allegations.

## **7. Chiara is Given Advance Notice of Her Removal**

In early November 2006, Chiara called Elston and broached the subject of taking a leave of absence from her U.S. Attorney position for a potential position as the interim dean of the Michigan State University Law School. After consulting with Sampson, Elston called Chiara on November 3 and informed her that a leave of absence was not an option, but that she should consider accepting the position anyway because the White House was likely to request her resignation shortly after the upcoming mid-term elections. According to Chiara, Elston stated to her that the mid-term election projections for Republican candidates were dim and that she was likely to be one of a number of U.S. Attorneys who would be asked to resign in order to accommodate unsuccessful Republican congressional candidates. According to Chiara, neither Elston nor any other Department official ever gave her any other explanation for the subsequent resignation request.

Elston told us that he was "trying to do her a favor" when he told Chiara of the possibility that her resignation would be requested after the election. He said he knew that Chiara's name was on Sampson's removal list and that action was expected to be taken shortly. He said he learned from Margolis that a leave of absence from a U.S. Attorney position was not permissible, and he said he did not want to see Chiara pass up an opportunity when he knew what she did not know – that her removal was in the offing. Elston said he did not recall telling Chiara that her position would be needed for an unsuccessful Republican congressional candidate, but acknowledged that "he beat around the bush in a big way" when Chiara asked him why her resignation might be sought. Elston said he told her he did not know the answer but offered "hypothetical possibilities," including political accommodation. Elston also told us that he was instructed by Sampson not to disclose the reason for the likely resignation request or to tell Chiara that her resignation would be requested.

After speaking with Elston, Chiara sent an e-mail to McNulty on November 5, 2006, asking for an explanation as to the reasons for the anticipated resignation request and expressed her dismay about Elston's "dire prediction." In a subsequent e-mail on November 7, Chiara asked McNulty to tell her why she would be asked to resign "as soon as the 'election dust settles.'"

## **8. Chiara's Removal**

Like the other U.S. Attorneys, Chiara received a telephone call from EOUSA Director Battle on December 7, 2006, asking for her resignation. As he told the other U.S. Attorneys, Battle said that the Administration appreciated her service but wanted to give someone else the opportunity to serve. After Battle's call, Chiara immediately asked McNulty for additional time beyond the January 31, 2007, resignation date proposed by Battle. Chiara was granted 2 extensions, the first for 1 month, and the second for a shorter period.

On February 1, 2007, Chiara sent an e-mail to McNulty in which she noted that news reports concerning other departing U.S. Attorneys indicated that they had been asked to leave for one of two reasons: failure to meet expectations or failure to follow Department directives. Chiara contended that she fit into neither category, and asked directly: "Why have I been asked to resign? The real reason, especially if true, would be a lot easier to live with." McNulty did not respond to the e-mail.

On February 23, 2007, Chiara announced her resignation, and she left office on March 16, 2007.

## **III. Analysis**

Based on our investigation, we concluded that concern about Chiara's management of the U.S. Attorney's Office was the reason for her removal.

Before Sampson created his first U.S. Attorney removal list in March 2005, Margolis recommended to him that Chiara be replaced. Margolis said he had serious questions about Chiara because of her leadership and temperament, and because of the turmoil in her office. Margolis told us that he began having these questions when he was contacted by a former Department of Justice official who had recommended Chiara for the U.S. Attorney position in 2001. This official, who said he was aware of events within Chiara's office and whom Margolis knew well and respected highly, told Margolis that Chiara was "divisive" and that her office was "in turmoil." Margolis said that his questions about Chiara became more serious and his recommendation in favor of her removal became stronger as time went on. Based on Margolis's recommendation, Sampson included Chiara on his first removal list, and she remained on every subsequent list until she was called by EOUSA Director Battle and told to resign on December 7, 2006.

We also assessed the allegations about Chiara that came to the attention of the Department's senior officials after she was first placed on the removal list, including an allegation that she showed favoritism toward a subordinate AUSA and a rumor that she was having a sexual or romantic relationship with that AUSA. We believe the allegation of favoritism by Chiara towards the AUSA

in her office, and Chiara's handling of the resulting turmoil, contributed to Margolis's and other Department leaders' concerns about her management. However, we did not conclude that the allegation that Chiara had a sexual relationship with the AUSA was the reason for her removal, as Chiara subsequently asserted.

As part of our investigation into the reasons for Chiara's removal, we examined how she and the Department handled the turmoil in her office. In September 2005, EOUSA General Counsel Schools traveled to her district to help resolve conflicts between herself and her principal managers, the First Assistant and Criminal Chief. After Schools's intervention, however, the conflicts did not abate. Even after that, Chiara interceded in a supervisor's performance evaluation of the AUSA she was alleged to be showing favoritism toward, and the conflicts in the office intensified.

We found that Chiara did not adequately address allegations about favoritism towards the AUSA. Regardless of the nature of their relationship, Chiara had interactions with the AUSA – who on occasion stayed in Chiara's basement apartment and sometimes walked Chiara's dog when Chiara was on travel – that resulted in questions of favoritism between a supervisor and a subordinate. Chiara's Criminal Chief, Joan Meyer, squarely confronted Chiara with the issue of favoritism and alleged that it was affecting Meyer's ability to supervise the AUSA and causing serious division within the office. This was a management issue that Chiara should have addressed. However, Chiara refused to address the questions directly and did not take action to abate the favoritism concerns.

Chiara had several opportunities to address this issue. She could have, for example, removed herself from significant decisions affecting the AUSA in order to quell the concerns about favoritism. She could also have discussed the allegations and an appropriate course of action to address them with Schools. She did not do so. Instead, Chiara exacerbated the favoritism concerns by intervening in the performance rating of the AUSA, and pressuring the AUSA's supervisor to raise the AUSA's overall performance evaluation from "satisfactory" to "outstanding."

We also found that shortly before Chiara was informed that she would be removed, Margolis and other Department officials concluded that she exhibited poor judgment in another matter. An anonymous source had made allegations against Chiara's former First Assistant, Phil Green, after he was nominated for another U.S. Attorney position, and OPR initiated an investigation into these allegations. However, Chiara repeatedly insisted that the Department investigate the source of the anonymous allegations, who Chiara believed to be Lloyd Meyer. Margolis said he reached the conclusion that Chiara was more interested in punishing the anonymous source than in finding out the truth of

the allegations, and he believed that Chiara's actions in this matter raised further concerns about her judgment.

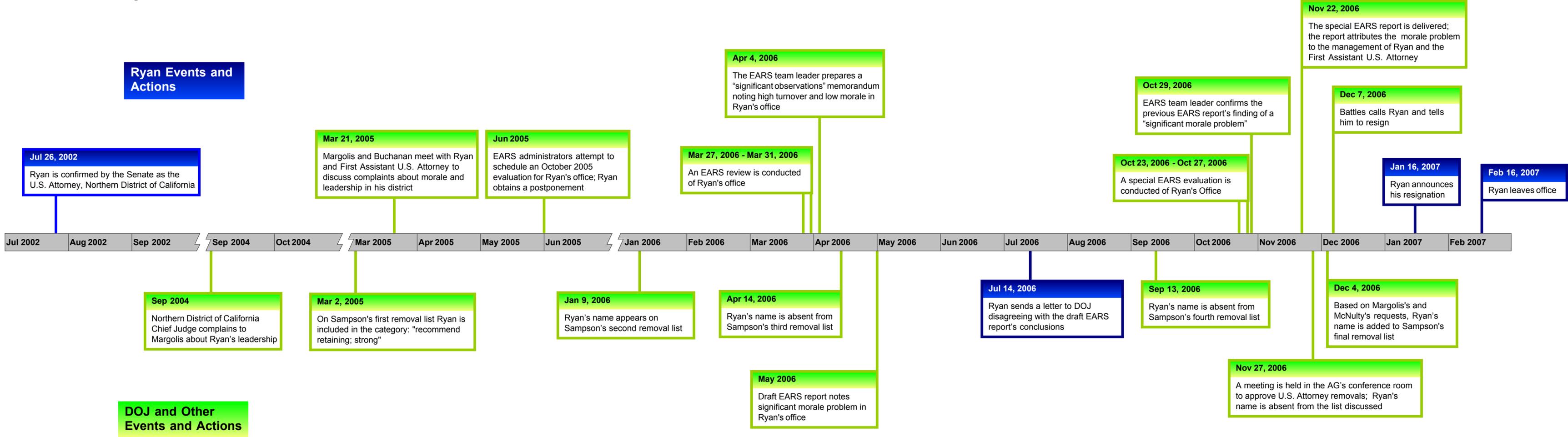
While we do not believe the Department's removal of Chiara was inappropriate, we also do not condone the rumors and allegations that Joan and Lloyd Meyer spread about Chiara and the nature of her relationship with the AUSA. Although both Meyers have left the Department, we believe that their conduct in spreading unproven rumors about a sexual relationship between a Department supervisor and subordinate, rather than report them to the OIG for investigation, was unprofessional. In addition, we believe it would have been better practice for the Department to have addressed the allegations of an inappropriate relationship and favoritism head on and asked for a review of them.

In sum, we concluded that the Department's action in removing Chiara was not based on inappropriate factors. Chiara was identified for removal as U.S. Attorney from the time Sampson developed his first list because of concerns raised about her management of the office, and those concerns intensified over time. While Department officials became aware of rumors of a sexual relationship between Chiara and a subordinate AUSA, which were inappropriately spread by the Meyers, we found that performance concerns, rather than these rumors, caused the Department to remove Chiara as U.S. Attorney.

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# Kevin Ryan Timeline

## Ryan Events and Actions



## DOJ and Other Events and Actions

## **CHAPTER TWELVE**

### **KEVIN RYAN**

#### **I. Introduction**

This chapter examines the removal of Kevin Ryan, the former United States Attorney for the Northern District of California. Ryan has not commented publicly about the reasons for his removal, and he did not cooperate with our investigation.<sup>193</sup>

##### **A. Background**

Ryan graduated from the University of San Francisco School of Law in 1984. From 1985 to 1996, he served as a Deputy District Attorney for Alameda County. In 1996, Ryan was appointed to be a Municipal Court Judge for the City and County of San Francisco. In 1999, Ryan became a California Superior Court Judge.

On May 15, 2002, Ryan was nominated by President Bush to be the United States Attorney for the Northern District of California. He was confirmed by the Senate on July 26, 2002, and sworn in on August 2, 2002.

##### **B. The EARS Evaluations of Ryan's Office**

Ryan's office underwent an EARS evaluation in 2003, approximately 6 months after he was sworn in as U.S. Attorney. The final report of the evaluation stated that "the overall evaluation was positive," and that Ryan was "dedicated to the effective management of the office and to the priorities of the Attorney General." The report described him as an effective leader in the District, and stated that "the judiciary was favorably impressed with the new United States Attorney."

The office was evaluated again in March 2006. The May 2006 draft of the final EARS report contained several negative comments, stating for example that "there are serious morale problems [among Criminal Division AUSAs] . . .

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<sup>193</sup> Ryan was the only one of the nine U.S. Attorneys who did not agree to be interviewed by us. We first contacted Ryan in May 2007, at the same time we contacted the others. After telling us that he would consider our request for an interview, Ryan never responded to our follow-up calls and e-mails. On December 17, 2007, we sent Ryan a letter seeking his cooperation and asking him to inform us whether he would agree to be interviewed. In response, Ryan contacted us by e-mail requesting additional information on the procedures for the requested interview. After obtaining the information and saying he would consider the matter and get back to us with an answer, Ryan did not contact us and did not respond to follow-up telephone and e-mail messages.

caused by the perception that U.S. Attorney Ryan and [the] First AUSA/ Criminal Chief . . . poorly manage Criminal Division AUSA personnel in San Francisco.” The report stated that AUSAs perceived Ryan as inaccessible, uninterested in their work, unresponsive to their concerns, too “insulated and cloistered,” and that he “makes decisions with minimal input from the line staff.” The report also noted that some of the AUSAs had expressed concern to the evaluators that Ryan and the First Assistant “might retaliate against those AUSAs who disagree with their decisions.”

The report stated that while Ryan “strongly disputed” the findings concerning his management style and attributed them to “a small group of ‘disgruntled’ AUSAs,” the evaluation team found that “the concerns about . . . Ryan’s management style and practices . . . were expressed by a majority of the line AUSAs in the Criminal Division . . . and by line AUSAs in every section and unit . . . and every level of experience.”

As a result of the negative assessment, in October 2006 Associate Deputy Attorney General Margolis and EOUSA Director Battle directed an EARS “Special Review Team” to conduct an additional evaluation to verify the morale issues identified in the earlier evaluation and to make recommendations to address them.

On November 22, 2006, the Special EARS Team provided its findings to Margolis and Battle. The report concluded that there were significant morale problems attributable to the management styles and practices of Ryan and the First Assistant U.S. Attorney. The report stated that Ryan and the First Assistant were viewed as “being vindictive when they perceived disloyalty or when their decisions were questioned.” The report stated that despite the earlier EARS evaluation, Ryan continued to dispute the degree of the morale problem in the office. The report noted that “from all accounts, the style and practices of the top leadership has not changed” since the March evaluators briefed Ryan on the team’s findings.

### **C. Status on the Removal Lists**

On Sampson’s initial removal list, which he e-mailed to Miers on March 2, 2005, Sampson characterized Ryan as a “strong” U.S. Attorney not recommended for removal. On the second list Sampson sent to the White House in January 2006, Ryan was one of seven U.S. Attorneys recommended for removal.

Ryan’s name was not on the third list Sampson sent to the White House in April 2006, and Ryan did not appear on any subsequent removal list until the final list on December 4, 2006.

EOUSA Director Battle called Ryan on December 7, 2006, to ask for his resignation. Ryan resigned as U.S. Attorney for the Northern District of California on February 16, 2007.

#### **D. Reasons Proffered for Ryan's Removal**

In his closed briefing to the Senate Judiciary Committee on February 14, 2007, McNulty stated that Ryan was asked to resign because of management failures documented in EARS evaluations of his office.

We found no public statements by Department officials discussing the reasons for Ryan's removal. However, in our interviews and in interviews with congressional investigators, Department officials consistently stated that the management problems associated with Ryan's office were the reasons for his removal.

## **II. Chronology of Events Related to Ryan's Removal**

### **A. Concerns About Ryan's Management**

Beginning in 2004, Department officials became aware of allegations that Ryan's management was causing turmoil in his office. In 2004, several San Francisco newspapers reported on the departures of several experienced prosecutors in the U.S. Attorney's Office and on problems with Ryan's management and the turmoil in his office.<sup>194</sup> In the fall of 2004, the Chief Judge for the U.S. District Court for the Northern District of California sent Margolis copies of the articles and called him to complain about Ryan's leadership. E-mail records between Margolis and EOUSA Director Mary Beth Buchanan in late October 2004 show that Margolis and Buchanan recognized the need to discuss the concerns with Ryan.

On January 31, 2005, another experienced prosecutor left Ryan's office. The day of his departure, the AUSA sent an office-wide "open letter" to Ryan complaining about long-standing morale and attrition problems in the office attributable to Ryan's management. The letter was forwarded to AUSAs in other U.S. Attorney's offices and to EOUSA. The Chief Judge in Ryan's district sent Margolis a copy of the letter on February 4, 2005, and asked him to consider the complaints. Margolis and Buchanan decided to meet with Ryan and the First Assistant U.S. Attorney in mid-March 2005 to discuss these issues.

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<sup>194</sup> See The Recorder, "Top Prosecutor Bolts from DOJ," July 9, 2004; "Ryan's Criminal Chief Steps Down," September 29, 2004.

On March 21, 2005, Margolis and Buchanan discussed the concerns with Ryan and his First Assistant. According to Margolis, he “read [Ryan] the riot act” about his management style and the attrition in the office, and he suggested to Ryan that it would be wise for him to ask the Department to undertake a special review of these management issues. According to Margolis and to correspondence from Ryan to Sampson, Ryan did not request such a review.

## **B. Sampson’s Discussions About Ryan in Early 2005**

At the same time that Margolis and Buchanan were discussing how to address the management issues regarding Ryan, Sampson began the process of categorizing the U.S. Attorneys to determine who should be recommended for removal. As noted above, on March 2, 2005, Sampson forwarded to Miers his first list of U.S. Attorneys, and he described Ryan as one of the strong U.S. Attorneys. Sampson told congressional investigators that he could not recall specifically why he rated Ryan positively on the March 2005 list. However, Sampson said that at the time, he considered Ryan to be “a really good guy and an honorable person who was working in a very difficult office . . . and he had a difficult time managing that office.” Sampson said he did not recall having conversations at that time with Comey, Margolis, or Buchanan in which they raised any concerns about Ryan.

However, we determined that Margolis, Comey, and Buchanan separately told Sampson sometime in early 2005 that they did not view Ryan favorably. Comey told us that when he met with Sampson on February 28, 2005, he told Sampson he considered Ryan to be a weak U.S. Attorney based on the morale problems in the office.<sup>195</sup> Comey said that he knew EOUSA was concerned about Ryan’s office and was working with Margolis to address the problems.

Margolis told us he could not recall exactly when Sampson first broached the subject of removing underperforming U.S. Attorneys in early 2005, although Margolis said he strongly recommended to Sampson that Ryan and Dunn Lampton of the Southern District of Mississippi be removed. Margolis said he was aware of the management problems in Ryan’s office, and he questioned Lampton’s judgment after learning about several matters Lampton was handling.

Buchanan told congressional investigators that her office had received complaints from a number of sources, including former staff members and

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<sup>195</sup> Comey recalled, based on his calendar entries, that he spoke with Sampson on February 28, 2005, 3 days before Sampson e-mailed the chart to Miers. The chart with Ryan’s name in bold, however, was dated February 24, 2005, 4 days before Sampson met with Comey. Thus, it seems likely that Sampson did not revise the list based on Comey’s comments about Ryan.

judges, about Ryan's management, and she said she discussed the matter with Sampson in the "early spring" of 2005.

### **C. Fall 2005 EARS Evaluation is Postponed**

According to Buchanan, she and Margolis decided to conduct a special EARS evaluation of Ryan's office to better pinpoint and address the problems in that office. Ryan's office was originally scheduled to undergo a regular EARS evaluation sometime in the spring of 2006. In light of the concerns about Ryan's management and the morale of the office, in June 2005 EARS administrators attempted to schedule the regular evaluation for October 2005, earlier than the regular 3-year cycle.

On June 10, 2005, Ryan's office requested that the review be postponed until sometime in 2006 because the office was experiencing key administrative personnel shortages related to several recent retirements. Margolis recommended to EOUSA that the request be denied in light of the serious issues in Ryan's office. EOUSA denied the request on June 23. Ryan telephoned the new EOUSA Director, Michael Battle, the following day to attempt to persuade him to postpone the evaluation.<sup>196</sup>

Battle told congressional investigators that he agreed to Ryan's request for an extension because Battle needed time to become knowledgeable about the issues in the district, and he wanted to give Ryan the chance to be able to "put his best foot forward." The evaluation was rescheduled for late March 2006. Margolis said that when Battle told him he had agreed to Ryan's request to reschedule the evaluation, Margolis expressed his disappointment.

According to Battle, even before he arrived at EOUSA he had heard that Ryan's district was "embattled." Battle told congressional investigators that Ryan was "in a siege and everybody was angry with him."

### **D. Events in 2006**

#### **1. Ryan is on Sampson's January 9, 2006, List of U.S. Attorneys Recommended for Removal**

Ryan was included on the list of U.S. Attorneys Sampson recommended for removal on January 9, 2006. Sampson told us that he believed he included Ryan at that time because by then he perceived that Ryan had "lost the office . . . the office turned on him." Gonzales also told us that he was aware of "serious management problems" in Ryan's office by January 2006. However,

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<sup>196</sup> Battle became Director of EOUSA on June 6, 2005, when Buchanan left to return to her district as U.S. Attorney.

Gonzales said he could not recall how or when he learned the information, and he speculated that it came from McNulty, Battle, or Sampson.

## **2. Controversy Concerning the Methodology of the EARS Evaluation**

In mid-January 2006, the EARS Team slated to review Ryan's office in March proposed interviewing former AUSAs as part of the evaluation in light of the allegations that numerous experienced prosecutors had resigned because of Ryan's poor leadership. Correspondence between Ryan and the EOUSA Assistant Director who was in charge of the EARS program for the Department shows that the team leader discussed the issue with Ryan in late January and Ryan was unhappy about the proposed interviews. In February 2006, Ryan stated his opposition to the proposal and to other aspects of the review in correspondence to the team leader and to the EOUSA Assistant Director. Ryan also expressed concern that the EARS team had already prejudged the office and had been tainted by the accounts of disgruntled former AUSAs. The Department's response to Ryan stated that the review would proceed as planned.

On January 18, 2006, Battle received a letter from an AUSA in Ryan's office containing the subject line "An Office in Distress – USAO, Northern District of California." The letter described the mass "exodus" of experienced AUSAs during Ryan's tenure and urged the Department to use the upcoming EARS evaluation to "investigate the causes underlying this unprecedented exodus of AUSAs and other personnel."

On March 8, 2006, a few weeks before the scheduled EARS evaluation, a San Francisco newspaper wrote an article about the letter, discussing at length the discord within the office and stating that "[c]riticizing Ryan's management has become a cottage industry since he was appointed by President Bush in 2002, with prosecutors, defense lawyers and at least one judge complaining about office management and the handling and selection of cases."

## **3. The March 2006 EARS Evaluation**

The EARS team conducted a 4-day on-site evaluation of the San Francisco U.S. Attorney's Office during the week of March 27, 2006. After its completion, Margolis sent an e-mail to Elston informing him that he had learned from EOUSA Director Battle that "staff and court comments were not positive." Margolis's e-mail informed Elston that the EARS team had originally planned to interview former AUSAs but had "temporarily backed off that plan at [U.S. Attorney] Ryan's insistence," so only current staff was interviewed. Margolis wrote that the complaints appeared to be "of the same nature as those that I brought to [U.S. Attorney] Ryan's attention [last spring]." Margolis said

that “we can decide if further inquiry is needed” after the team produced its draft observations.

On April 4, 2006, the EARS team leader prepared a preliminary memorandum to EOUSA highlighting his “significant observations” concerning the high turnover rate and low morale that line AUSAs attributed to Ryan’s poor management style and practices. The memorandum and a draft of the full report, which were submitted to Margolis in late May 2006, emphasized that “there is a significant morale problem among a number of AUSAs in the Criminal Division . . . caused, at least in part, by their perceptions that U.S. Attorney Ryan (and [the] First AUSA/Criminal Chief) poorly manages the Criminal Division AUSA personnel in San Francisco.” In a May 27, 2006, e-mail to Mercer, Elston, and Battle, Margolis wrote, “I think this report furnishes the predicate for sending the team back to interview former AUSAs as well as any persons suggested by Ryan.”

After reviewing the draft EARS report, Ryan wrote an 8-page letter, dated July 14, 2006, disagreeing with the report’s conclusions concerning his management of the office and asking that the sections criticizing his and the First Assistant’s management be deleted from the final version. Ryan described those sections as “personalized and unsubstantiated attacks.” He also complained that the EARS team was biased and the outcome of the evaluation seemed predetermined. Ryan stated that “Many of the morale issues . . . are the corollary of bringing much needed change to some of the longstanding policies and practices of this district.”

#### **4. The Special EARS Evaluation**

In September 2006, Battle informed Ryan that the Department had denied his request to delete portions of the evaluation and that he and Margolis had decided to send a “Special EARS Review” team to Ryan’s office to follow up on the March evaluation. The Special Review team planned to interview both current and former AUSAs. The team also planned to interview Ryan and the First Assistant, as well as individuals suggested by them.

Ryan wrote Sampson a letter dated October 8, 2006, complaining about the Special EARS follow-up evaluation and characterizing it as “a distraction forced upon us [which] is not only unfair, disruptive, and counterproductive; it is also a waste of taxpayer’s money.” Ryan also stated that the Department was not considering the office’s “great work on some cutting edge cases . . . in a very difficult environment and with strained resources.” Ryan wrote that he felt he had been treated unfairly by Margolis and the EARS evaluators. Ryan stated, “In my opinion, this is becoming dangerously close to using the resources of the DOJ to pursue a personal agenda.”

Sampson said he shared the letter with McNulty and asked him to figure out what should be done to address Ryan's concerns. Sampson said he forgot about Ryan's letter until late November 2006, when McNulty said he wanted Ryan added to the removal list.

McNulty told us that the March 2006 evaluation of Ryan's office was so negative that it demanded a substantial follow-up review. McNulty said that by October 2006 he was working closely with Margolis to address the "very significant management problems" the evaluation had identified in Ryan's office.

The special EARS evaluation was conducted during the week of October 23, 2006, as scheduled, with a team of eight veteran AUSAs who were also experienced EARS evaluators. Over a 3-day period, the team interviewed 42 current and former AUSAs, in addition to Ryan and the First Assistant. The team also considered a 14-page memorandum the First Assistant had drafted concerning the office's attrition rates, information concerning personnel decisions Ryan made between 2002 and 2006, and additional background information about current and former AUSAs whom the team had selected for interviews.

By memorandum dated October 29, 2006, the team leader, Ken Melson, then the First Assistant U.S. Attorney for the U.S. Attorney's Office for the Eastern District of Virginia (and currently the Director of EOUSA), advised Margolis of the team's significant observations. Among other things, Melson's 6-page memorandum confirmed the previous EARS report's finding of a "significant morale problem" in the U.S. Attorney's Office during Ryan's tenure. Melson also wrote that the morale problem had contributed significantly to the mass departure of experienced AUSAs from the office, which he attributed directly to the management style and practices of Ryan and the First Assistant. Melson reported that both current and former AUSAs described Ryan as "elusive, isolated, removed from office life, retaliatory, explosive, non-communicative, and paranoid." Melson also found "little evidence that the management practices and styles of U.S. Attorney Ryan and [the] First AUSA . . . have changed" since the March EARS evaluation and concluded that those management styles and practices were "inappropriate and harmful to the office." In closing, Melson summed up the morale of the office as "abysmal."

By memorandum dated November 22, 2006, addressed to Margolis and Battle, Melson provided the Special EARS Review 18-page formal report, which expanded on Melson's observations in his October 29 memorandum. Melson's final report was delivered 5 days before the Monday, November 27, 2006, meeting held in the Attorney General's conference room to finalize and approve the removal plan for U.S. Attorneys.

## **E. The Removal Lists**

As previously noted, after being on the January 2006 list, Ryan's name was not included on the subsequent lists Sampson sent to the White House in April, September, and November 2006. When we asked Sampson why he had removed Ryan's name from the lists after January 2006, he stated that it was likely he did so because he was aware that the evaluation process of Ryan's office was ongoing. Sampson stated that while a U.S. Attorney can be removed "for any reason or no reason," once the evaluation process has been initiated, "as a matter of policy" the U.S. Attorney should be given the benefit of the full evaluation before being removed.

McNulty told congressional investigators that he was "a little confused" as to why Ryan was not listed for removal on the September 13 or November 7, 2006, lists.<sup>197</sup> McNulty acknowledged that when he learned about the removal plan in October 2006, he did not tell Sampson to add Ryan to the list for removal, but he told us that even without the removal process, at some point he would have told Sampson that Ryan should be removed.

According to Elston, he and McNulty became aware of the problems in Ryan's office sometime during the summer of 2006. Elston said that Margolis reported on the issues concerning Ryan's management "with some frequency," although Elston said he did not suggest that Sampson add Ryan to the list when he learned about the removal plan in October because Margolis was handling the issues with Ryan. Elston said that while he was aware of concerns, he did not know the facts and did not know who was at fault.

As previously discussed, a meeting on the morning of November 27, 2006, was held in the Attorney General's conference room to finalize and approve the plan to remove U.S. Attorneys. Gonzales, Sampson, McNulty, Goodling, Moschella, and Battle attended. Elston was unavailable, and Margolis was not invited.

At the meeting, the Attorney General approved the plan for removing the six U.S. Attorneys on Sampson's November 7 removal list.<sup>198</sup> The attendees told us there was little or no discussion about the reasons the named U.S. Attorneys were designated for removal or whether anyone else should be added to the list.

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<sup>197</sup> We determined that McNulty did not see the September list until sometime after October 17, when Sampson forwarded to Elston the e-mail he sent Miers on September 13.

<sup>198</sup> The U.S. Attorneys on the November 7 list were Charlton, Lam, Chiara, Bogden, McKay, and Iglesias.

Sampson told us that after the meeting was adjourned, McNulty approached him and said that “Ryan needs to be on the list.” McNulty told congressional investigators he had no personal memory of doing this, but he said it was “consistent with what I was dealing with at the time.” Elston told us that McNulty added Ryan’s name to the list in late November after the results of the special review were analyzed.<sup>199</sup>

Although Sampson said he had no specific recollection, he said he believed that he conveyed McNulty’s views on Ryan to Attorney General Gonzales and received his approval to add Ryan’s name to the removal list. Gonzales told us that he did not know why Ryan was not on the November 27 list. He said it was “bizarre” that Ryan’s name was not listed because he knew that Ryan was “probably the number one person Margolis wanted to go.”

Margolis, who was not at the meeting, told us he was “astonished” when he learned that Ryan was not on the list. He said that he asked Sampson about it and Sampson gave Margolis the impression he would look into it. Sampson added Ryan’s name to the December 4 final list of U.S. Attorneys to be removed.

Battle called Ryan on December 7, 2006, and told him to resign. Battle told congressional investigators that he “had trepidations” about making the call to Ryan because he knew Ryan was angry about the Special EARS evaluation. Battle said he told Ryan that the Administration was requesting his resignation by the close of business on January 31, 2007. According to Battle, Ryan did not ask why his resignation was being requested; he just said “thank you very much” and hung up.

Ryan did not discuss his removal with anyone at the Department. On January 17, 2007, the night before Attorney General Gonzales was to testify at an oversight hearing before the Senate Judiciary Committee, Elston contacted Ryan’s office to assure him that the Attorney General would not discuss Ryan’s removal at the hearing. According to e-mail records, Ryan’s First Assistant returned Elston’s call and told Elston that Ryan was not returning phone calls from Senator Feinstein and from U.S. Attorney Carol Lam, who had also been told to resign. Elston stated that the First Assistant told him that Ryan

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<sup>199</sup> Margolis said that he played an instrumental role in adding Ryan to the list. According to Margolis, the Chief Judge in Ryan’s district told him she had asked members of Congress from California to request that the Department provide the EARS evaluations for Ryan’s office. In an e-mail dated December 1, 2006, Margolis informed Elston and Moschella about his conversation with the judge. Elston forwarded Margolis’s e-mail to Sampson, who responded that the “EARS evaluations seem pretty deliberative to me.” Elston responded to Sampson, “I agree,” and he said that, “This may also become unlikely if the list is expanded by one as we discussed earlier.” Sampson replied, “The list is expanded” and that he was “still waiting for the green light from the White House.”

“wanted us to know that he’s still a company man.” Ryan made no public statements about his removal, and he declined to cooperate with our investigation.

### **III. Analysis**

In sum, we found nothing inappropriate about the Department’s decision to remove Ryan or about the process the Department used to reach its decision. The evidence was clear that Ryan was removed because of concerns about his management of his office and the two EARS evaluations that severely criticized the management of his office. These EARS evaluations were conducted by independent and experienced career attorneys. Ryan’s responses to the criticisms were considered, but the Department did not find his arguments persuasive and believed he should be replaced.

The reasons proffered for Ryan’s removal are consistent with what our investigation found. In contrast to the process the Department used to decide whether to remove other U.S. Attorneys, the Department sought an objective evaluation of the allegations about Ryan’s performance, and Ryan was given an opportunity to respond to them. At the end of the process, the Department considered the reports and his responses, believed that Ryan’s office needed a change of leadership, and it implemented that change.

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## CHAPTER THIRTEEN CONCLUSIONS

Like other Presidential appointees, United States Attorneys can be removed by the President for any reason or for no reason, as long as it is not an illegal or improper reason. In the past, U.S. Attorneys normally were not replaced except in cases of misconduct or when there was a change in Administrations. Prior to the events described in this report, the Department of Justice had never removed a group of U.S. Attorneys at one time because of alleged performance issues. The way the Department handled the removal of nine U.S. Attorneys in 2006, and the after-the-fact reasons proffered for the removals of this group, resulted in significant controversy, concerns that the removals were undertaken for improper political purposes, and allegations that the reasons proffered by the Department for the removals were not accurate.<sup>200</sup>

We therefore investigated in detail how each of the nine U.S. Attorneys was selected for removal and the process used to remove them. In addition, we examined the accuracy of the public statements and congressional testimony by Department officials justifying the removals.

We concluded that the process the Department used to select the U.S. Attorneys for removal was fundamentally flawed, and the oversight and implementation of the removal process by the Department's most senior leaders was seriously lacking. In particular, we found that Attorney General Alberto Gonzales and Deputy Attorney General Paul McNulty failed to adequately supervise the U.S. Attorney selection and removal process, and they were remarkably unengaged in the process. Instead, Chief of Staff to the Attorney General Kyle Sampson, with very little input from other Department officials, designed, selected, and implemented the removal process, with little supervision or oversight. In addition, after the removals became public the statements provided by the Attorney General and other Department officials about the reasons for the removals were inconsistent, misleading, and inaccurate in many respects.

The most serious allegations that arose were that the U.S. Attorneys were removed based on improper political factors, including to affect the way they handled certain voter fraud or public corruption investigations and prosecutions. Our investigation found significant evidence that political partisan considerations were an important factor in the removal of several of

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<sup>200</sup> The nine U.S. Attorneys removed in 2006 were: Todd Graves, W.D. Missouri; H.E. "Bud" Cummins, E.D. Arkansas; David Iglesias, D. New Mexico; Daniel Bogden, D. Nevada; Paul Charlton, D. Arizona; John McKay, W.D. Washington; Carol Lam, S.D. California; Margaret Chiara, W.D. Michigan; and Kevin Ryan, N.D. California.

the U.S. Attorneys. The most troubling example was David Iglesias, the U.S. Attorney in New Mexico. We concluded that complaints from New Mexico Republican politicians and party activists about Iglesias's handling of voter fraud and public corruption cases caused his removal, and that the Department removed Iglesias without any inquiry into his handling of the cases.

However, we were unable to fully develop the facts regarding the removal of Iglesias and several other U.S. Attorneys because of the refusal by certain key witnesses to be interviewed by us, as well as by the White House's decision not to provide internal White House documents to us. Therefore, we recommend that counsel specially appointed by the Attorney General work with us to conduct further investigation and ultimately to determine whether the totality of the evidence demonstrates that any criminal offense was committed.

In this chapter, we first provide our analysis of the process used by the Department to remove the U.S. Attorneys. We then provide our findings concerning the conduct of each of the senior Department officials most involved in the removals, including an assessment of the accuracy of their statements explaining the removals.

## **I. Removal Process**

### **A. Oversight of the Process**

Shortly after the 2004 Presidential election, White House Counsel Harriet Miers raised with Sampson the idea of seeking resignations from all 93 U.S. Attorneys. Sampson, who at the time was Counsel to the Attorney General, told Miers he thought that it was not a good idea to ask for the resignations of all U.S. Attorneys. Sampson suggested as an alternative that the White House replace a much smaller number of U.S. Attorneys when their 4-year terms expired.

As noted, U.S. Attorneys are appointed for a term of 4 years. Typically, however, they remain in office beyond the expiration of their terms. Sampson wrote in a January 2005 e-mail to a White House official that "the vast majority of U.S. Attorneys, 80-85 percent, I would guess, are doing a great job, are loyal Bushies, etc., etc.," and he proposed developing a plan to remove approximately 15 to 20% of "underperforming" U.S. Attorneys.

Sampson discussed this proposal with Gonzales when Gonzales was White House Counsel. After he became the Attorney General in February 2005, Gonzales authorized Sampson to proceed with a review to identify those "underperforming" U.S. Attorneys who should be removed. While both Sampson and Gonzales told us and stated in their congressional testimony that the President can remove U.S. Attorneys for any reason or for no reason, it

appears that the original plan was to evaluate the performance of each U.S. Attorney and make recommendations to the White House as to who should be removed based upon that assessment.

We found that Gonzales delegated the entire project to Sampson and provided little direction or supervision. According to Gonzales, he told Sampson to consult with the senior leadership of the Department, obtain a consensus recommendation as to which U.S. Attorneys should be removed, and coordinate with the White House on the process. However, Gonzales acknowledged to us that he did not discuss with Sampson how to evaluate the U.S. Attorneys or which factors to consider. We found that Gonzales eventually approved the removals of a group of U.S. Attorneys without inquiring about the process Sampson used to select them for removal, or why each name was on Sampson's removal list. Gonzales also did not know who Sampson had consulted with or what these individuals had said about each of the U.S. Attorneys identified for removal. Instead, Gonzales told us he "assumed" that Sampson engaged in an evaluation process, that the resulting recommendations were based on performance, and that the recommendations reflected the consensus of senior managers in the Department. Each of those assumptions was faulty.

Gonzales also said he had little recollection of being briefed about Sampson's review process as it progressed over a year and a half. He claimed to us and to Congress an extraordinary lack of recollection about the entire removal process. In his most remarkable claim, he testified that he did not remember the meeting in his conference room on November 27, 2006, when the plan was finalized and he approved the removals of the U.S. Attorneys, even though this important meeting occurred only a few months prior to his testimony.

This was not a minor personnel matter that should have been hard to remember. Rather, it related to an unprecedented removal of a group of high-level Presidential appointees, which Sampson and others recognized would result in significant controversy. Nonetheless, Gonzales conceded that he exercised virtually no oversight of the project, and his claim to have very little recollection of his role in the process is extraordinary and difficult to accept.

We also found that Deputy Attorney General McNulty had little involvement in or oversight of the removal process, despite his role as the immediate supervisor of all U.S. Attorneys. McNulty was not even made aware of the removal plan until the fall of 2006. When McNulty learned about the plan, he thought it was a bad idea. However, he deferred to Sampson and did not raise his concerns with regard to the plan itself or, except in a couple of cases, the evaluation of specific U.S. Attorneys to be removed. Rather, he distanced himself from the project, both while it was ongoing and after it was implemented.

Moreover, we found that there was virtually no communication between Attorney General Gonzales and Deputy Attorney General McNulty about this important matter. Even when McNulty learned about the plan in the fall of 2006 (more than a year after Gonzales and Sampson initiated the removal process), he did not discuss any of his concerns about the plan with Sampson or Gonzales.

In addition, as discussed in the chapter on Carol Lam, the U.S. Attorney for the Southern District of California, in the summer of 2006 Gonzales and Sampson suggested a plan to address concerns they had with Lam's prosecutive decisions in gun and immigration cases, and asked the Deputy Attorney General's Office to execute the plan. Yet, McNulty and his staff did not implement the plan, and the Attorney General and his staff never followed up with the Deputy Attorney General about the outcome of the plan before Lam was removed.

After the U.S. Attorney removals, poor communication persisted between Gonzales and McNulty. For example, Attorney General Gonzales testified before Congress on January 17, 2007, that all the U.S. Attorneys were removed for performance reasons. However, Deputy Attorney General McNulty testified before another congressional panel less than 3 weeks later that H.E. "Bud" Cummins III, the U.S. Attorney for the Eastern District of Arkansas, was removed to provide a position for Tim Griffin, the Deputy Director of Political Affairs at the White House. Gonzales was upset by McNulty's testimony because, he told us, up to that point he believed that Cummins had been removed for poor performance. However, according to both Gonzales and McNulty, they never discussed Cummins's removal or McNulty's testimony.

## **B. Implementation of the Removal Plan**

We found no evidence that Gonzales, McNulty, or anyone else in the Department carefully evaluated the basis for each U.S. Attorney's removal or attempted to ensure that there were no improper political reasons for the removals.

Sampson was primarily responsible for creating the plan, selecting the U.S. Attorneys to be removed, and implementing the plan. He said he consulted with Department officials in informal settings to get their "frank assessments" of U.S. Attorneys, and Sampson described himself as the "aggregator" of their views. Sampson also testified that he had "no independent basis" for removing any U.S. Attorney and that he relied on other Department officials, such as McNulty, Executive Office for U.S. Attorneys (EOUSA) Directors Mary Beth Buchanan and Michael Battle, and Associate Deputy Attorney General David Margolis to make recommendations about who should be removed. He said, "[i]n my mind, they were the Department officials who

would have reason to make informed judgments about who might be added to such a list.”

This claim was misleading. Neither Sampson nor anyone else in the Department ever engaged in a systematic assessment of the performance of U.S. Attorneys to determine who was underperforming and should be replaced. Instead, Sampson’s evaluation process was casual, *ad hoc*, and anecdotal, and he did not develop any consensus from Department officials about which U.S. Attorneys should be removed.

For example, when Sampson asked Margolis for his input in early 2005, Margolis recommended that Kevin Ryan, Margaret Chiara, and Dunn Lampton from the Southern District of Mississippi should be considered for removal because of performance issues. He also suggested the names of about eight other U.S. Attorneys that deserved a “closer look.” After that, Margolis – the long-term career Department official with the most knowledge about U.S. Attorney matters – had little input into the process, except in November 2006 when Sampson read him a list of names of U.S. Attorneys who would be removed. EOUSA Director Battle received an initial inquiry from Monica Goodling in the fall of 2005 about whether he had concerns about any U.S. Attorneys, but he was not consulted again about the performance of any U.S. Attorney as part of Sampson’s process. Sampson even acknowledged to us that he did not make it clear to some of the people he consulted about the purpose for asking what they thought about particular U.S. Attorneys.

Sampson’s process for documenting the assessments he received of U.S. Attorneys was similarly arbitrary, disorganized, and unsystematic. He said he kept a chart listing all the names of the U.S. Attorneys on which he made notes based on conversations he had with others. Sampson said he would keep the annotated chart until it became “dog-eared” and then he would throw it away and start over. While Sampson said he sometimes made notes during his conversations with other Department officials, a lot of the information he gleaned from others he “just remembered.” Sampson described the discussions he had with Department officials about U.S. Attorneys as “largely an oral exercise” with “some really rough tracking.” Sampson did not keep any of these lists with his notes, and as a result we were forced to rely on Sampson’s vague and conflicting memories of the reasons for the removals of the U.S. Attorneys.

Neither Sampson nor anyone else involved in the removal process reviewed the performance evaluations of U.S. Attorneys’ Offices conducted by EOUSA’s Evaluation and Review Staff (EARS), except for the evaluations of Ryan’s office. Yet, Sampson told Miers and later told congressional staff that the selection of U.S. Attorneys to be removed was based in part on the results of EARS evaluations.

While Presidential appointees can be removed by the President at will and do not have the notice and due process protections afforded civil service employees, Sampson was supposed to determine which U.S. Attorneys should be removed based on an evaluation of their performance. Sampson told us that the removal plan was in accord with the management theory that removing a percentage of underperforming employees constitutes good management. However, if the purpose was to remove U.S. Attorneys who were underperforming, one would have expected Sampson to engage in a more systematic assessment of the U.S. Attorneys' performance, including a review of all EARS evaluations and direct and forthright conversations with senior officials in the best positions to assess the performance of U.S. Attorneys. None of that occurred.

In addition, neither Sampson nor anyone else in the Department asked several of the removed U.S. Attorneys for an explanation about the complaints that allegedly justified their removal. As a consequence, the telephone calls from Battle to the U.S. Attorneys telling them to resign were stunning to most of them. It is not surprising that the removals led to criticism from the U.S. Attorneys when the Department later stated publicly that they were removed for performance-related reasons after they had been told otherwise.

Moreover, as discussed in more detail in the chapters on the individual U.S. Attorneys, we found conflicting testimony about the reasons each U.S. Attorney was recommended for removal. In some cases, neither Sampson nor any other Department official acknowledged recommending that the U.S. Attorney be placed on the removal list. In other cases, the Department's senior leaders did not even know why Sampson placed the U.S. Attorney on the list.

Sampson's repeated assertion that "underperformance" was the decisive factor in the removal process was misleading. In fact, Sampson acknowledged that he considered whether a particular U.S. Attorney identified for removal had strong support from their home-state elected Republican officials. According to Sampson, a U.S. Attorney was considered for removal not merely if he was "mediocre," but if he was perceived as both mediocre and lacking political support. Conversely, Sampson acknowledged deleting from his removal list the names of several U.S. Attorneys whom he considered "mediocre" because he believed they had the political support of their home-state Senators and he did not think the Administration would want to risk a fight with the Senators over their removal.

While U.S. Attorneys are Presidential appointees who may be dismissed for any reason or for no reason, Department leaders failed to ensure that the removals were not undertaken for improper reasons. We believe that removing U.S. Attorneys based on their lack of political support could affect the integrity and independence of the Department's prosecutive decisions and the public's confidence that such decisions are insulated from political considerations.

U.S. Attorneys should make their prosecutive decisions based on the Department's priorities, the law, and the facts of each case, not on a fear of being removed if they lose political support.

We recognize that U.S. Attorneys are selected in part based on the recommendations of state and federal political officials. But once they assume office, U.S. Attorneys should leave politics behind and make their prosecutive decisions divorced from partisan political considerations. For Department officials to recommend the removal of U.S. Attorneys even in part because they do or do not have political support undermines the public's confidence that Department of Justice prosecutive decisions are based on the facts and the law and not on political considerations.

In short, we believe that senior Department officials – particularly the Attorney General and the Deputy Attorney – abdicated their responsibility to safeguard the integrity and independence of the Department by failing to ensure that the removal of U.S. Attorneys was not based on improper political considerations.

### **C. Reasons for the Removals of Individual U.S. Attorneys**

In Chapters Four through Twelve, we analyzed the reasons proffered by Department officials for the removal of each U.S. Attorney. Those chapters demonstrate how flawed the removal process was, and the evidence in those chapters also contradicts the Department's initial claims that U.S. Attorneys were removed for performance reasons.

In January 2006, Missouri U.S. Attorney Todd Graves was the first U.S. Attorney told to resign. As described in detail in Chapter Four, while our investigation into Graves's removal was hindered by the refusal of Goodling and key officials in the White House to be interviewed, the evidence showed that the primary reason for Graves's removal was complaints from the staff of Missouri Senator Christopher S. "Kit" Bond. Bond's staff urged the White House Counsel's Office to remove Graves because he had declined to intervene in a conflict between Senator Bond's staff and the staff of Graves's brother (a Republican Congressman from Missouri). Thus, it appears that Graves was told to resign because of a political dispute among Missouri politicians, not because of an objective assessment of his performance as U.S. Attorney.

Yet, we found that no one in the Department accepted responsibility for the decision to remove Graves. Each senior official we interviewed claimed that others must have made the decision. EOUSA Director Battle, who placed the call telling Graves to resign, said he did so at the direction of Goodling, and that Goodling did not provide him with the reasons for Graves's removal. Goodling stated in her congressional testimony that she would have instructed Battle to make the call to Graves only at Sampson's direction. Sampson said

that he had no recollection of the matter, that he believed Goodling had handled it, and that he assumed Graves's removal was based on a finding of misconduct by Margolis. Margolis told us there was no misconduct finding against Graves and that he played no role in Graves's removal.

In addition, according to Sampson and Gonzales, it is not clear whether anyone consulted with the Attorney General about Graves's removal. Gonzales told us he did not remember being told why Graves was asked to resign, although he said "can't imagine it didn't happen." He said, "I'm sure I was told and I don't remember."

In June 2006, Arkansas U.S. Attorney Bud Cummins was the second U.S. Attorney told to resign. Contrary to Gonzales's initial statement that the U.S. Attorneys had been removed after an evaluation showed they were underperforming, Cummins was not removed for any performance reasons. While Sampson stated that he thought Cummins was "mediocre," Sampson never assessed Cummins's performance and later agreed with McNulty's testimony to the Senate Judiciary Committee that Cummins was not removed for performance reasons. Rather, the evidence shows that the main reason for Cummins's removal was to provide a position for former White House official Tim Griffin.

The other seven U.S. Attorneys were all told to resign on December 7, 2006. The most controversial case was the removal of New Mexico U.S. Attorney David Iglesias. As discussed in Chapter Six, we were unable to uncover all the facts pertaining to his removal because of the refusal by key witnesses to be interviewed, including Rove, Miers, Goodling, New Mexico Senator Pete Domenici, and Domenici's Chief of Staff. As a result, we believe important gaps remain in the evidence regarding Iglesias's removal as U.S. Attorney.

However, the evidence we uncovered showed that Iglesias was removed because of complaints to the Department and the White House by Senator Domenici and other New Mexico Republican political officials and party activists about Iglesias's handling of voter fraud and public corruption cases in the New Mexico. We concluded that the other reasons proffered by the Department after Iglesias's removal – that he was an "absentee landlord," that he delegated too much authority to his First Assistant, and that he was an underperformer – were after-the-fact rationalizations that did not actually contribute to his removal.

We also found that the Department never investigated the complaints about Iglesias's decisions on voter fraud or public corruption cases, or even asked Iglesias about them. Rather, based upon the complaints about Iglesias and Senator Domenici's "loss of confidence" in him, Sampson placed Iglesias on the removal list. By accepting complaints from New Mexico political officials

as a basis for Iglesias's removal without investigating their validity, we believe Department leaders abdicated their responsibility to ensure that prosecutorial decisions would be based on the law, the evidence, and Department policy, rather than political pressure related to the handling of specific cases.

With regard to Nevada U.S. Attorney Daniel Bogden, as with Graves, we were unable to identify the person responsible for recommending that he be placed on the removal list. Bogden first appeared on the September 2006 removal list, shortly after Sampson received vociferous complaints from the head of the Department's Obscenity Prosecution Task Force that Bogden would not assign a prosecutor to a Task Force obscenity case. Yet, neither Sampson nor any other senior Department official asked Bogden for his response to this complaint. No one inquired about competing resource needs in Bogden's district, his view of the strength of the obscenity case, or his offer to provide assistance to the Task Force with office space, grand jury time, secretarial support, and prosecution advice.

It also appears that some Department officials believed that voter fraud was an issue in Nevada. However, no one complained about Bogden's handling of any allegations of voter fraud, and we found no evidence to support any speculation that Bogden's removal related to any voter fraud issues.

Department officials testified and told us that Bogden was considered to be a "mediocre" U.S. Attorney and lacked energy and leadership. Yet, we found no evidence that Department managers ever raised concerns about Bogden's performance with him before he was removed, and they also did not ask Department officials who would likely be most knowledgeable about Bogden's performance, such as Battle or Margolis, before placing Bogden on the removal list.

Moreover, except for Goodling, no one involved in the removals said they recommended that Bogden be removed, and Goodling denied that her recommendation was the cause of his removal. While Sampson acknowledged that he must have physically placed Bogden's name on the list, Sampson denied that he made the decision to do so and said that he did not remember who made the recommendation. Attorney General Gonzales stated that he did not know why Bogden was removed.

Sampson also acknowledged to us that there may have been other "mediocre" U.S. Attorneys whose performance was worse than Bogden's, but they were not removed because they had the right political connections. This admission is another example of the consideration of political factors in the removal process by the Department.

The reason for the removal of John McKay, the U.S. Attorney for the Western District of Washington, was difficult to determine. McKay was

included on Sampson's first removal list in March 2005 during a controversy about his handling of voter fraud allegations in connection with the contested 2004 Washington State gubernatorial election. However, Sampson stated that he did not believe he placed McKay's name on this removal list because of McKay's handling of voter fraud allegations, and none of the other Department officials we interviewed said they recalled hearing any concerns about the way McKay handled voter fraud allegations related to the election.

Sampson took McKay's name off the next removal list in January 2006, after Deputy Attorney General James Comey spoke highly of McKay's performance. Sampson subsequently placed McKay back on the list in September 2006. McKay told us that White House Counsel Miers and Deputy White House Counsel William Kelley told him at a meeting in August 2006 – a few weeks before McKay's name reappeared on the removal list – that Washington State Republicans were displeased with his handling of voter fraud complaints. Because Miers and Kelley, as well as Rove, declined to cooperate with our investigation, and because we were denied access to internal White House documents, we cannot rule out the possibility that McKay's handling of voter fraud complaints played a part in the decision to remove him from office.

Based on the available evidence, however, we believe that the main reason McKay's name was placed back on the list in September 2006 was his clash with Deputy Attorney General McNulty over the LInX information-sharing program, which McKay zealously advocated. Sampson told us that McNulty was irritated by McKay's August 30, 2006, letter urging McNulty to adopt LInX as the Department's sole information-sharing program. McKay's letter was signed by 17 U.S. Attorneys in addition to McKay and was disseminated both inside and outside the Department.

However, McNulty told us that he did not instruct Sampson to put McKay on the removal list and that he was prepared to work with McKay to resolve the information-sharing issue. While McNulty said he did not initiate McKay's removal, he also stated that he did not object when he saw McKay's name on the removal list because he had questions about McKay's judgment in light of the way McKay handled the LInX matter.

With regard to Arizona U.S. Attorney Paul Charlton, we found no evidence, as some speculated, that Charlton was removed because of his office's investigation and prosecution of an Arizona Congressman. Rather, we found that the Department was displeased with Charlton's implementation of a policy in his district that required that interrogations be tape recorded. Charlton's unilateral action in implementing the policy, without consulting Department leaders and in direct opposition to the FBI's policies, was counterproductive and inappropriate. Yet, the Deputy Attorney General's Office and Charlton agreed to address the issue by considering a pilot taping

program. Moreover, after the dispute about the taping policy, which occurred in February 2006, Charlton was not included on Sampson's next removal list.

We concluded that the most significant factor in Charlton's removal was his actions in a death penalty case. Charlton persistently opposed the Department's decision to seek the death penalty in a homicide case, and he irritated Department leaders by seeking a meeting with the Attorney General to urge him to reconsider his decision. We are troubled that Department officials considered Charlton's actions in the death penalty case, including requesting a meeting with the Attorney General, to be inappropriate. We do not believe his actions were insubordinate or that they justified his removal.

With regard to Carol Lam, the U.S. Attorney for the Southern District of California, we also found no evidence to support speculation that Lam was removed in retaliation for her prosecution of certain public corruption cases. Rather, she was placed on the removal lists because of the Department's concerns about the low number of gun and immigration prosecutions undertaken by her office. These concerns were raised in the EARS evaluation of Lam's office in 2004, and Department officials expressed these concerns to her. In response, Lam argued to the Department that the low number of gun prosecutions resulted from various factors in her district, including strong state gun laws and effective state and local law enforcement of gun laws. With regard to immigration cases, Lam explained that her office decided to prosecute the more serious offenders with charges bringing longer sentences, and that it took more resources to investigate and prosecute these types of cases.

These explanations did not persuade Department leaders or assuage their concerns about her prosecutorial priorities. It is the President's and the Department's prerogative to remove a U.S. Attorney who they believe is not adhering to their priorities or not adequately pursuing the types of prosecutions that the Department chooses to emphasize. This is true for any U.S. Attorney, even one such as Lam who was described by Margolis as otherwise "outstanding," "tough," and "honest," and who was described in the EARS evaluation as "an effective manager . . . respected by the judiciary, law enforcement agencies, and the USAO staff."

However, what we found troubling about Lam's case was that no one examined her response to the concerns about her prosecution of immigration and gun cases, and the Department removed her without implementing the plan outlined by Sampson, at the direction of the Attorney General, to address the Department's concerns about Lam's prosecutorial priorities. The plan called for the Deputy Attorney General (or his staff) having "a heart-to-heart" talk with Lam about the urgent need to improve immigration enforcement; working with her to develop a plan to address the problem; and removing her if she "balk[ed]" or otherwise did not perform in a measurable way. Yet, we found no evidence that anyone in the Deputy Attorney General's office took any of the

steps outlined in the plan, or that anyone in the Attorney General's Office inquired about the outcome of the plan before Lam was removed.

With regard to the remaining two U.S. Attorneys – Margaret Chiara from the Western District of Michigan and Kevin Ryan from the Northern District of California – we found that the Department had reasonable concerns about their performance and management, and that they were removed for those reasons. We concluded that, contrary to Chiara's claim, she was not removed because of rumors concerning an alleged sexual relationship with a subordinate Assistant U.S. Attorney.

The evidence was clear that Ryan was removed because of concerns about his performance and the two EARS evaluations that severely criticized his management of the office. In contrast to the process the Department used to decide whether to remove the other U.S. Attorneys, the Department sought an objective evaluation of concerns about Ryan's performance, and Ryan was given an opportunity to respond to those concerns. At the end of the process, the Department considered the evaluations and his responses, concluded that Ryan's office needed a change of leadership, and implemented that change. We found nothing inappropriate with that decision.

#### **D. Notification to the U.S. Attorneys**

We also concluded that the way the U.S. Attorneys were told to resign was poorly handled. EOUSA Director Battle was instructed to inform the U.S. Attorneys to submit their resignations without providing them the reasons for their removals.

According to Sampson, at the November 27, 2006, meeting at which the removal plan was approved, the group discussed whether McNulty should notify the U.S. Attorneys in person while they were in Washington, D.C., for a conference. McNulty said that he did not recall being asked to notify the U.S. Attorneys and said having Battle make the calls was consistent with the notion of keeping the removals "in a lower key."

We believe a better practice would have been for the Attorney General or the Deputy Attorney General, who was the U.S. Attorneys' direct supervisor, to personally inform the U.S. Attorneys of their removal. Several of the U.S. Attorneys said they were stunned by Battle's call and were confused about why they were asked to resign. Moreover, the U.S. Attorneys were told that they were being removed because the Administration wanted to give someone else a chance to serve. That was not true, except in the case of Cummins. Moreover, we found no evidence that the Department had other candidates in mind to replace most of those who were removed. And when some U.S. Attorneys inquired about the reason they were being removed, they received no other response.

The decision not to disclose to the U.S. Attorneys why they were being removed led to speculation by them, and eventually by others, about the true reasons they were being removed, including speculation in some cases that they were removed for improper political reasons. Further, no one adequately considered what would happen once it became known that multiple U.S. Attorneys had been asked to resign at the same time without being told why. McNulty indicated that the working assumption was that the U.S. Attorneys would see it in their best interest to deal with their removals quietly because they would not want to admit they had been fired. However, that assumption failed to account for speculation about the real reasons for their removal, particularly when it became known, as it inevitably would, that seven U.S. Attorneys were removed on the same day. In addition, in light of what Battle told them about the Administration wanting to give someone else a chance to serve, the U.S. Attorneys were understandably angry when Gonzales and McNulty later testified that the removals were based on performance.

It is within the President's power to remove U.S. Attorneys for any reason or for no reason as long as the removal is not for improper or illegal purposes. However, we believe the better practice would be to ask each of the U.S. Attorneys to address the concerns or complaints related to them and, after evaluating their responses and other information, inform them in a straightforward and professional manner why they were being asked to resign.

## **II. White House Involvement in the Removal Process**

While our investigation could not fully determine the role of White House officials in the removals of the U.S. Attorneys, for at least three of the removals, the evidence indicates the White House was more involved than merely approving the removal of Presidential appointees, as Department officials initially stated.

First, with regard to Cummins the evidence shows that the White House sought to give former White House official Griffin a chance to serve as U.S. Attorney, and that both Rove and Miers supported Griffin's appointment.

Second, as discussed above, we found evidence that the White House may have directed Graves's removal because of conflicts with Senator Bond's staff that were unrelated to Graves's duties as U.S. Attorney. However, no one at the Department questioned the basis for Graves's removal or attempted to ensure that it was not undertaken for an improper political purpose.

Third, we found evidence that complaints to Rove and others at the White House and the Department by New Mexico Republican political officials and party activists about how Iglesias was handling voter fraud cases and a public corruption case led to Iglesias's removal.

We recognize that some White House involvement in the removals is not remarkable because U.S. Attorneys are Presidential appointees. However, because Miers, Rove, Deputy White House Counsel Kelley, and Associate White House Counsel Klingler refused to cooperate with our investigation, and because the White House declined to provide internal documents to us, we were unable to determine the role the White House played in these removals.

Nevertheless, the evidence we found shows that Gonzales, McNulty, and other Department officials acquiesced in the replacement of Iglesias and several other U.S. Attorneys without scrutinizing or even questioning the basis for their removals. Moreover, the Department failed to ensure that the removals were not undertaken for an improper political purpose. Instead, after the removals, Gonzales, McNulty, and others simply asserted that the removals were performance-based, which the evidence showed was inaccurate and misleading with regard to several of the U.S. Attorneys.

### **III. The Attorney General's Interim Appointment Authority**

Another allegation we examined was whether the Department intended to avoid the formal Senate confirmation process by appointing Interim U.S. Attorneys to the vacant positions for an indefinite period of time. A provision contained in the Patriot Reauthorization Act that took effect in March 2006 authorized the Attorney General to appoint an Interim U.S. Attorney until the vacancy was filled by a confirmed presidential appointee. Previously, the Attorney General could appoint an Interim U.S. Attorney for only 120 days.

In mid-September 2006, Sampson e-mailed Miers with a list of "U.S. [Attorneys] We Now Should Consider Pushing Out," and recommended that the Administration use the Attorney General's authority to make Interim U.S. Attorney appointments to fill the resulting vacancies in lieu of going through the formal nomination and Senate confirmation process. Sampson wrote: "By not going the PAS [Presidentially Appointed, Senate Confirmed] route, we can give far less deference to home-State Senators and thereby get (1) our preferred person appointed and (2) do it far faster and more efficiently, at less political cost to the White House." We found no record of Miers's response to this e-mail, and she declined our requests for an interview.

Both Sampson and Gonzales told us that Gonzales opposed Sampson's idea to bypass the Senate confirmation process using the interim appointment authority, and the evidence shows that Sampson abandoned the idea as a general matter. On November 7, 2006, Sampson forwarded to Elston and McNulty a copy of his proposed plan for the U.S. Attorney removals, and Step 4 of that plan stated that the Department and the White House would "obtain recommendations from Senators and other state political leadership," and

“have [the] President make nominations and work to secure confirmation of U.S. Attorney nominees.”

However, when faced with Arkansas Senator Mark Pryor’s continued opposition to Griffin’s nomination after Cummins resigned in mid-December 2006, Sampson again advocated using the Attorney General’s interim appointment authority to place Griffin in the position indefinitely without Senate confirmation. He wrote in a December 19 e-mail to the White House, “I think we should gum this to death,” and suggested in his e-mail that if either of the Democratic senators from Arkansas would not agree to support Griffin’s nomination the Department could “run out the clock” to the end of the Bush Administration while appearing to act in good faith by asking the Senators for recommendations, interviewing other candidates, and pledging to “desire” a Senate-confirmed U.S. Attorney. Sampson’s e-mail also stated that “our guy [Griffin] is in there so the status quo is good for us.”

When questioned about this e-mail during his congressional testimony, Sampson characterized his discussion of using the interim appointment authority to bypass Senate confirmation as a “bad idea at the staff level.” Gonzales told us he could not recall whether he discussed use of the interim appointment authority in Griffin’s case with Sampson at that time, but said he thought it was a “dumb idea” as a general matter. We found no evidence that Gonzales ever supported this idea, and in fact he pledged to Senator Pryor in a telephone conversation that he would not recommend that the President nominate Griffin if Pryor could not support the nomination. Eventually, Griffin withdrew from consideration for the permanent U.S. Attorney position, and the Department nominated another candidate.

In sum, the evidence shows that Sampson, on his own initiative, advocated using the Attorney General’s authority to appoint an Interim U.S. Attorney to bypass the formal Senate confirmation process, an admittedly “bad idea” that was not supported by Gonzales. However, we believe that Sampson’s suggestion was not simply a “bad idea,” it was a bad faith recommendation to keep Griffin in the position without Senate confirmation.

#### **IV. The Conduct of Senior Department Officials**

In this section, we assess the actions of each of the Department’s senior leaders who were most involved in the U.S. Attorney removal process, and we also examine the accuracy of their public statements about the removals.

##### **A. Alberto Gonzales**

We believe that Attorney General Gonzales bears primary responsibility for the flawed U.S. Attorney removal process and the resulting turmoil that it created. This was not a simple personnel matter that should be delegated to

subordinate officials – it was an unprecedented removal of a group of high-level Department officials that was certain to raise concerns if not handled properly. Such an undertaking warranted close supervision by the Attorney General, as well as the Deputy Attorney General. Gonzales did not provide such supervision, nor did he ensure that the Deputy Attorney General provided the necessary oversight.

Gonzales described himself as a delegator and said it was not in his nature to micromanage the “good people” to whom he delegated responsibility. According to Gonzales, he told Sampson to consult with the senior leadership of the Department, obtain a consensus recommendation as to which U.S. Attorneys should be removed, and coordinate with the White House on the removal process. Yet, Gonzales acknowledged that he did not discuss with Sampson how to evaluate the U.S. Attorneys or what factors to consider. According to Gonzales, while Sampson provided him “periodic” and “very brief updates” about the U.S. Attorney removal plan over time, they had no discussion of “substance” in terms of the reasons underlying the proposed removals, and Gonzales said he did not know who was “going on and off the list.”

Gonzales also stated that while it was his decision to approve the removals, he did so based on Sampson’s recommendations and what he thought was the consensus of Department leaders. Yet, he said that he never asked Sampson or anyone else how they arrived at their recommendations or why each particular U.S. Attorney warranted removal. Instead, he said he “assumed” that Sampson engaged in an “evaluation process,” that the recommendations were based on performance issues, and that they reflected a consensus of senior Department managers.

Even after the removals, Gonzales said he still did not know why certain of the U.S. Attorneys had been removed. For example, Gonzales told us that he had no recollection of being consulted about Graves’s removal. Gonzales also told us he did not recall having any discussions with Sampson about Griffin replacing Cummins, who was the second U.S. Attorney told to resign.

Most remarkably, Gonzales told us he had “no recollection” of the November 27, 2006, meeting in his conference room during which he approved the plan to request the resignations of the U.S. Attorneys on December 7. At the meeting, the other participants discussed the steps necessary to implement the plan. Gonzales was present, received a copy of the 3-page implementation plan, and gave his approval to proceed. Yet, only a few months later Gonzales stated that he did not remember this critical meeting.

While delegation in many matters is understandable given the wide range of matters demanding an Attorney General’s attention, we believe that Gonzales failed to exercise appropriate leadership and supervision throughout this entire

process. While he described himself as a delegator who does not micromanage, he allowed a subordinate who had little prosecutorial or managerial experience to design the plan and select for removal Presidentially appointed Department officials with virtually no supervision, oversight, or accountability.

Gonzales failed to take action even in the case of Iglesias where he had notice that partisan politics might be involved in the requests for his removal. Gonzales received three telephone calls from 2005 to 2006 from Senator Domenici raising concerns about Iglesias. During the fall of 2006, Gonzales also discussed with Rove and with the President allegations of voter fraud in New Mexico. Gonzales said he asked Sampson to look into Senator Domenici's complaints, but he never inquired about the outcome of any review or ensured that the complaints were fairly assessed. Gonzales told us that he would have expected that someone would have looked into the complaints. According to Gonzales, "you can't have, you know, a member of Congress calling and making an allegation and not checking it out and seeing whether or not there's anything there to it." But that is exactly what happened with Domenici's complaints, and Gonzales failed to ensure that the allegations were examined before Iglesias was removed.

Gonzales also made a series of statements after the removals that we concluded were inaccurate and misleading, as we discuss in the following sections.

### **1. Gonzales's Statements at the March 13 Press Conference**

On March 13, 2007, Gonzales held a brief press conference concerning the U.S. Attorney removals, partly in an attempt to respond to the perception that the Department was withholding information about the removals. During this press conference, Gonzales made several statements about his own role in the removal process, including that he "was not involved in seeing any memos, was not involved in any discussions about what was going on." Gonzales also stated, "I never saw documents. We never had a discussion about where things stood."

As the facts described in Chapter Three demonstrate, these statements were inaccurate and misleading. Sampson had periodically briefed Gonzales about the status of the removal process as it progressed. Moreover, at the meeting in his conference room on November 27, 2006, Gonzales received a copy of the 3-page implementation plan and approved the removal plan. Even if he did not recall the November 27 meeting, it is unclear why Gonzales would claim that he "never had a discussion about where things stood" since he had been briefed by Sampson periodically.

While it is clear that several of Gonzales's statements at the press conference were untrue, it is difficult to determine whether Gonzales

deliberately provided false information. Gonzales stated that prior to the press conference he had not gone back to look at his calendars or other documents to prepare, that the press conference was a hurried reaction to the controversy, and that he simply did not remember the November 27 meeting at which he approved the final removal plan. As noted, we found his alleged failure of memory about a key meeting in his office to remove a group of Presidential appointees extraordinary, no matter how hurriedly the press conference was arranged. More importantly, such inaccurate statements from the Attorney General significantly damaged his credibility and the Department's credibility in its response to this controversy.

As a general matter, Gonzales repeatedly testified that the removals were not undertaken for an improper or illegal purpose. However, he could not have known whether that was true because he did not ask Sampson why the U. S. Attorneys were being removed. Although it is understandable that the Attorney General would rely on the representations of others in important matters he had delegated to them, in this situation he was aware that political concerns may have motivated at least one of the removals. Political leaders in New Mexico had expressed concerns to him directly about Iglesias regarding his handling of voter fraud and public corruption matters. Yet, he did not question whether improper political considerations had resulted in Iglesias's or any other U.S. Attorney's removal.

## **2. Gonzales's Conversation with Goodling**

Another serious allegation regarding the Attorney General's statements after the removals concerned a conversation he had with Monica Goodling in his office on March 15, 2007. The conversation took place after Congress had indicated to Gonzales that it proposed to subpoena Goodling and others to testify about the removals, and after Gonzales had directed the Department's Office of Professional Responsibility to investigate the circumstances of the removals. In congressional testimony in April and May 2007, Gonzales repeatedly asserted that out of deference to the ongoing internal investigation he had not discussed the facts of the removals with anyone in the Department.

This turned out to be untrue. When Goodling testified before the House Judiciary Committee on May 23, 2007, pursuant to a grant of immunity, she disclosed her March 15 conversation with Gonzales. Goodling testified that the conversation with Gonzales had made her uncomfortable because she was concerned at the time that she and Gonzales might have to testify about the U.S. Attorney removals at some point. Goodling testified that she was distraught and went to the Attorney General to seek a transfer to another component of the Department. Goodling said that after that part of the conversation, Gonzales was "just trying to chat" and said "let me tell you what I can remember." According to Goodling, Gonzales laid out his general recollection of some of the events concerning the U.S. Attorney removals, and

then asked her if she had any reaction to what he said. Goodling said that Gonzales also mentioned that he thought that everybody who was on the removal list was there for performance-related reasons, and Gonzales said he had been upset with McNulty because he thought McNulty wrongly testified that Cummins was removed only to give Griffin a chance to serve. Goodling said that while there was more to her discussion with Gonzales, she could not recall anything further. Goodling also said she did not believe that Gonzales was trying to shape her recollection of events. As noted above, we were not able to interview Goodling about this or other matters.

Gonzales emphatically denied to us that he had tried to influence Goodling's testimony. He said that Goodling came to his office in an extremely distraught state, saying that she was paralyzed and could not do her work. Gonzales said he asked her why and she said something about having had the same information that Sampson had (referring to information that the White House was involved with the removal process earlier than had been disclosed by the Department). Gonzales said he tried to console Goodling and said that no one intentionally had done anything wrong. He said he wanted to reassure her and began to tell her what he knew about what had happened with regard to the U.S. Attorney removals, although he said he did not remember specifically what he told Goodling about the removals. Gonzales told us he could not recall discussing McNulty and Cummins with Goodling, but did not deny that he did.

Gonzales said that Goodling asked for a transfer to another component in the Department, and he told her he would consider her request and assured her that they would get through the current situation. Gonzales said it seemed that Goodling felt better when she left his office.

We do not believe the evidence is sufficient to conclude that Gonzales attempted to influence the recollection of a witness in a pending investigation. Goodling testified that she did not believe Gonzales was trying to shape her recollection of events. Moreover, Gonzales did not seek out Goodling to relay his version of events; rather, she came to see him because she was distraught. In addition, several witnesses confirmed Goodling's distraught state of mind at the time of her conversation with Gonzales. When we asked Gonzales whether he considered that it might have been inappropriate for him to discuss his recollections with Goodling, he told us that he did not give it any thought at the time because he was just trying to help Goodling.

We believe that Gonzales was, in fact, trying to console Goodling during this meeting. However, even in his attempt to console her, he should not have recounted his recollection of the substantive facts of the matter to Goodling. Regardless of his motive, we question Gonzales's judgment in recounting what he believed the facts to be with someone whom he knew to be a prospective witness in both a Congressional investigation and an internal Department

investigation. We also question why he stated to Congress that he had never discussed the facts of the removals with anyone in the Department, which was not true.

## **B. Paul McNulty**

As noted above, we found that Deputy Attorney General McNulty had little involvement in the removal process despite his role as the immediate supervisor of U.S. Attorneys. McNulty was not even informed about the removal plan until mid to late October 2006. McNulty said he was surprised when he learned about the plan, but he did not object to it. McNulty stated that the removal process was an initiative of the Office of the Attorney General related to a “personnel matter” that was within the province of the Attorney General, and therefore he deferred to the Office of the Attorney General in the matter.

Yet, like Gonzales, McNulty did not ask questions as to how Sampson came up with the names on the removal list. McNulty told congressional investigators that even though he was aware of concerns about each of the U.S. Attorneys targeted for removal, he was “a softie” when it came to addressing such concerns with the U.S. Attorneys directly, and said the removal plan was contrary to the way he would have addressed such concerns. However, McNulty said he did not express his reservations about the plan to Sampson or the Attorney General.

We believe the Deputy Attorney General, the second in command of the Department of Justice and the immediate supervisor of the U.S. Attorneys, should have raised his objections forcefully and not been so deferential about such a significant personnel action involving U.S. Attorneys under his supervision.

This is especially true with regard to Iglesias’s removal. As discussed in Chapter Six, Senator Domenici called McNulty in October 2006 to criticize Iglesias’s handling of public corruption cases and told McNulty that Iglesias was “in over his head.” McNulty said he had no specific recollection of discussing Senator Domenici’s telephone call with Gonzales or Sampson, but told us that it is the type of contact he would have passed along to them.

However, like Gonzales, McNulty never investigated the accuracy of Senator Domenici’s complaints, or the possibility that these complaints could be related to partisan political considerations and that Iglesias could have been handling these cases appropriately and in accord with Department policy, the law, and the evidence. Instead, McNulty distanced himself from the decision to remove Iglesias, labeling it a “personnel” matter which he considered outside his “bailiwick.”

Moreover, we also believe McNulty should have disclosed Senator Domenici's call during his congressional briefing. McNulty said that he did not want to raise Senator Domenici's involvement because he was "concerned about . . . putting the Senator in a bad light or in a difficult position" and that he wanted to keep the conversation between Domenici and him about Iglesias "confidential . . . [I]t was just a courtesy." McNulty defended his action by noting that he had disclosed in his briefing generic "congressional concerns" about Iglesias. We disagree and do not believe that Senator Domenici's calls should have been kept confidential or that the Department owed the Senator any "courtesy" with regard to his complaints about Iglesias, which had led to Iglesias's removal. Rather, McNulty owed Congress and the public full and accurate testimony regarding the matter, and McNulty failed to provide such testimony as a result of his misguided attempt to shield Senator Domenici from criticism.

We also examined the claim raised by Goodling in her congressional testimony that she believed McNulty had greater knowledge about the history of the White House's involvement in the removal than McNulty had told Congress. Goodling said she had briefed McNulty in the summer of 2006 about the White House's involvement in Griffin's appointment.

McNulty testified to the Senate Judiciary Committee on February 6, 2007, that while he was aware in the summer of 2006 that Griffin was scheduled to replace Cummins, he did not know how Griffin came to the Department's attention.<sup>201</sup> He also stated in his closed briefing of the Senate Judiciary Committee on February 14, 2007, that the removal process began within the Department in September or October 2006. McNulty also said at the briefing that the Department had sent the list to the White House Counsel's Office in October 2006 and asked if they had any objection to the names, and the White House voiced no objections. In fact, as discussed above, this was not an accurate description of the timing of the removal process or the White House's role in the process.

Because Goodling declined our request for an interview, we were unable to question her concerning what she told McNulty regarding Griffin or the White House's involvement in the removal process. However, we concluded that McNulty did not intentionally mislead Congress in his testimony. At the

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<sup>201</sup> McNulty later clarified this statement in his testimony before the House Subcommittee on the Judiciary on June 21, 2007. He stated that he had known for months that "Cummins was asked to move over so that Mr. Griffin would have a chance." However, he stated that he did not know exactly how Griffin came to the Department's attention, and he noted that Goodling said she was not even particularly aware of how he came to the Department's attention. McNulty said, "I just didn't know the specifics of how he came to be recommended to us. We later learned that Ms. Miers contacted Kyle Sampson, and that's the way."

time he testified in February 2007, he was unaware of the White House's earlier involvement in the removals. He stated what he believed about the process at the time: that the Department came up with the names in the fall of 2006 and the White House did not object. While that was not correct, McNulty did not know that at the time.

We also noted that while Goodling was supposed to accompany McNulty to the closed briefing, McNulty instructed her to remain outside the room because he was concerned that her status as the Department's White House Liaison would raise questions by the Senators. Goodling testified that she believed McNulty had done so in order to discourage the Senators from asking questions about the White House's role in the removals. McNulty said his concern at the time was that Goodling's presence would make the removal process seem "more political" given the fact that Goodling's position at the Department was uniquely associated with the Department's political appointments. We believe the decision to exclude Goodling was troubling and reflected an inappropriate focus on appearances. Besides Sampson, Goodling was the only other person who had in-depth knowledge about the removals and the level of the White House's involvement in the process. Had Goodling been present, it is likely that McNulty would not have provided misleading information to the Senate about the timing and substance of the White House's involvement.

Moreover, although we determined that McNulty did not intentionally mislead Congress, he stated in his testimony to the Senate Judiciary Committee that "we never have and never will" seek to remove a U.S. Attorney to interfere with an ongoing investigation or in retaliation for prosecution. However, McNulty did not question Sampson concerning the basis for the removal recommendations. Especially with respect to Iglesias's removal, McNulty should have inquired about the reasons for the removals to ensure that they were not improper before providing testimony to Congress implying that he had done so.

### **C. Kyle Sampson**

As discussed above, Sampson was the person most responsible for creating the removal plan, selecting the U.S. Attorneys to be removed, and implementing the plan. Yet, after the controversy over the removals erupted, Sampson attempted to downplay his role, describing himself as the "aggregator" and denying responsibility for placing several of the U.S. Attorneys on the list.

We concluded that from start to finish Sampson mishandled the removal process. And, as discussed above, he inappropriately advocated bypassing the Senate confirmation process for replacing U.S. Attorneys through a strategy of

“gum[ming] this to death” and “run[ning] out the clock” while appearing to act in good faith.

We were also troubled by Sampson’s claims that he did not recall the reasons for many of the removals or who had recommended that certain U.S. Attorneys be removed. For example, while Sampson said he did not place Iglesias on the list at the request of the White House, his recollection on this issue was varying and vague. We question why Sampson could not recall the precise reason why he placed Iglesias on the removal list, given the relatively short passage of time since the incident, and the fact that Iglesias’s name alone was added, for the first time, to the November 2006 list. Moreover, other misleading after-the-fact explanations for why Iglesias was placed on the list caused us to further doubt the candor of Sampson’s explanations. In the end, we question whether Sampson provided us the full story about Iglesias’s placement on the list, as well as the reasons for other U.S. Attorney removals.

As discussed in the sections that follow, we also concluded that Sampson made various misleading statements about the U.S. Attorney removals to the White House, Congress, and other Department officials.

### **1. Misleading Statements to the White House**

Sampson’s misleading statements about the U.S. Attorney removals began as the selection process was unfolding. He misrepresented to the White House how the selections occurred. In an e-mail to Harriet Miers in January 2006 forwarding a list of names to the White House, Sampson wrote, “I list these folks based on my review” of the EARS evaluations, and “my interviews with officials in the Office of the Attorney General, Office of the Deputy Attorney General, and the Criminal Division.” Sampson thus created the general impression that the EARS evaluations and his “interviews” of senior Department officials, including officials in the Criminal Division, formed the basis of his identification of specific U.S. Attorneys for removal.

However, Sampson admitted to us that he did not remember speaking to anyone in the Criminal Division about the performance of U.S. Attorneys, except “only in the most general terms.” He also acknowledged that he never reviewed any EARS evaluations. He told us that it would have been better if he had stated in the e-mail to Miers that it was based on his understanding of somebody else’s understanding of the reviews of the offices.<sup>202</sup> We believe that Sampson’s misleading statements to Miers gave the impression that the

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<sup>202</sup> However, even that would have been inaccurate because, as we noted in each of the U.S. Attorney chapters, with the exception of Ryan’s March 2006 EARS evaluation (which had not yet taken place), each of the EARS evaluations of the removed U.S. Attorneys was largely positive.

Department had engaged in a far more systematic and structured evaluation process to determine which U.S. Attorneys should be removed.

## **2. Misleading Statements to Congress**

Sampson similarly misled congressional staff in his January 12, 2007, briefing that the removals were based on EARS evaluations. At this meeting, Sampson and Acting Assistant Attorney General for the Office of Legislative Affairs Richard Hertling briefed staff for Senators Patrick Leahy and Dianne Feinstein about the removals. Sampson told the Senators' staffs that the Department had been engaged in a process to identify underperforming U.S. Attorneys and that the process included a review of the EARS evaluations. The two staff members for the Senators told us that Sampson initially explained that the terminations were based on the EARS evaluations, but backtracked when Feinstein's counsel pressed him for copies. According to both staff members, Sampson then explained that some of the removals were based on EARS evaluations, and some on other factors such as caseloads and responsiveness to Department policy initiatives.

According to Hertling, who said he knew little about the controversy at the time, Sampson attempted to impress upon the congressional staff that the removals were the result of a process the Department undertook to identify U.S. Attorneys who were the "weakest performers," and that the process included a review of EARS evaluations. Hertling told us that one of the things that stuck in his mind was Sampson's "specific reference" to EARS evaluations as a basis for identifying these particular U.S. Attorneys for termination.

However, Sampson claimed to us that he mentioned the EARS evaluations only in connection with Ryan's removal. He said that he doubted he would have suggested that the other removals were based on the EARS evaluations because "that wouldn't have been accurate." Yet, based upon the recollection of the other witnesses at the briefing, including Hertling, we believe that Sampson misled the congressional staff that EARS evaluations played a more significant role in the Department's decision-making process than they actually did.

Second, Sampson included misleading statements in the Department's response to a February 8, 2007, letter from several Senators asking for information about the circumstances of Cummins's resignation and Griffin's appointment. Sampson, who drafted the response and circulated it in the Department and the White House for comment, had the final sign-off on the language in the response.

The response, which was sent on February 23, 2007, contained three misleading statements. The first was the statement that "it was well-known, as early as December 2004, that Mr. Cummins intended to leave . . . ." As we

noted in Chapter Five, we found evidence that in drafting the response Sampson discovered a small news item in a free weekly Arkansas tabloid reporting that Cummins might begin exploring career options before the expiration of President Bush's second term. However, Cummins told us he did not intend to resign at that time and was not looking for other employment. We also found no evidence that anyone at the Department was aware of the article until February 2007.

The second misleading statement in the Department's response was that "the decision to have Mr. Griffin replace Mr. Cummins was first contemplated in spring or summer of 2006 [and] the final decision to appoint Mr. Griffin . . . was made on or about December 15 . . ." This statement is directly contradicted by the January 9, 2006, e-mail Sampson sent to Miers in which Griffin is listed as a replacement for Cummins. The second part of the statement, that the final decision to appoint Griffin was made around December 15, is also misleading. As noted in Chapter Five, Sampson informed Goodling on August 18, 2006, that the Attorney General would appoint Griffin Interim U.S. Attorney following Griffin's return to the Department.

The third misleading statement in the Department's response was that "The Department is not aware of Karl Rove playing any role in the decision to appoint Mr. Griffin." This statement is contradicted by Sampson's e-mail on December 19, 2006, to Associate White House Counsel Christopher Oprison in which Sampson wrote, "I'm not 100 percent sure that Tim was the guy on which to test drive this authority, but know that getting him appointed was important to Harriet, Karl, etc." While Sampson later explained this e-mail by stating that he "assumed" but did not know that Rove was involved in the decision to appoint Griffin, we found this explanation unpersuasive and belied by the evidence.

### **3. Misleading Department Officials**

Sampson also misled Department officials and allowed them to mislead others about several aspects of the U.S. Attorney removals.

First, in mid-December 2006 after media reports began questioning the circumstances of Griffin's appointment, Sampson drafted talking points for the Department's Office of Public Affairs to use to respond to media inquiries. In these talking points, Sampson wrote that "Griffin was appointed Interim U.S. Attorney because of the timing of Cummins's resignation."

In fact, as Sampson knew, Cummins had been removed so that Griffin could take his place. The Department's talking points left the misleading impression that Griffin was appointed as Interim U.S. Attorney because of the unexpected timing of Cummins's resignation, when in fact Cummins was told to resign to create a position for Griffin.

Second and more important, Sampson's failure to disclose what he knew about the White House's involvement in the removals caused McNulty and Principal Associate Deputy Attorney General William Moschella to provide inaccurate testimony to Congress. Both McNulty and Moschella testified that based on what they knew at the time, the White House was not involved in the removals until October 2006 and at that point became involved only to sign off on the process.

Sampson was present at staff preparation sessions before both McNulty's and Moschella's congressional testimony where the group discussed what they should say in their testimony. Several other participants told us that the question about the White House's involvement was raised during at least one of McNulty's preparation sessions, and McNulty indicated that he would tell Congress that the White House was involved to sign off on the process because U.S. Attorneys are Presidential appointments. This was a misleading statement about the extent and timing of the White House's role, which Sampson knew. However, Sampson did not correct McNulty's mistaken belief or inform him of the full extent of the White House's involvement.

Consequently, in a closed briefing session on February 14, 2007, McNulty told members of the Senate Judiciary Committee that the U.S. Attorney removal process began within the Department in September or October of 2006, and that the Department sent a list to the White House Counsel's office in October and asked if they objected to the names. Similarly, Moschella testified incorrectly before a House Judiciary Subcommittee on March 6, 2007, based on what he had learned during the preparation sessions and from McNulty's testimony, that the process to remove the U.S. Attorneys began in early October 2006 and that the White House eventually became involved in the removals, but only to sign off on the proposal because the U.S. Attorneys were Presidential appointees.

When we interviewed Sampson, he rationalized his not correcting the misimpression left at the preparation sessions by arguing that there were two separate phases of the process – the earlier “thinking” phase and the later “action” phase, and he said he was focused on the later action phase during the preparation sessions. We found Sampson's testimony on this point not credible. Sampson sent three separate lists of U.S. Attorneys for removal to the White House for consideration before the fall of 2006. We believe that Sampson should have been more forthcoming at the preparation sessions about the White House's involvement to ensure that McNulty and Moschella were aware of the facts and did not mislead Congress. Sampson's failure to do so resulted in inaccurate and misleading testimony about a critical aspect of the controversy.

We concluded that Sampson engaged in misconduct by making misleading statements and failing to disclose important information to the

White House, members of Congress, congressional staff, and Department officials concerning the reasons for the removals of the U.S. Attorneys and the extent of White House involvement in the removal process.

#### **D. Monica Goodling**

Because Goodling refused to be interviewed by us, there are potential gaps in our investigation of the reasons for the removal of certain U.S. Attorneys. As the Department's White House Liaison, Goodling had significant contact with White House officials about Department personnel matters, and Goodling was involved to some extent in the selection of the U.S. Attorneys for removal. For example, it appears that Goodling instructed EOUSA Director Battle to call Graves and direct him to resign. As noted above, she said she did so based on Sampson's instruction, a claim Sampson denied. Consequently, we were unable to determine how Goodling came to order Graves's removal, or determine the White House's role in Graves's forced resignation.

Based on our investigation, we also found that, like Sampson, Goodling's failure to fully disclose what she knew about the White House's involvement in the removals contributed to McNulty's and Moschella's inaccurate statements to Congress. Goodling was present for at least part of McNulty's preparation sessions and his Senate testimony, as well as Moschella's preparation session where the issue of the White House's involvement was raised. Both McNulty and Moschella told us that no one at the preparation sessions provided them with all the facts about the White House's involvement with the removal plan. Like Sampson, Goodling never corrected their misimpressions, and consequently McNulty and Moschella both led Congress to believe the White House was involved later in the process and only to sign off on a list of names, which was not true. However, Goodling did not inform them, or anyone else, that their testimony was incorrect until Sampson's e-mails surfaced.

In addition, the evidence shows that Goodling was aware that she had been less than forthcoming in failing to disclose the White House's involvement to other Department officials. For example, when she learned that the Department planned to provide Sampson's documents to Congress that showed earlier and more substantive involvement by the White House in the removals than Moschella and McNulty had testified to, she became distraught and told Margolis that her career was over because she had the same information as Sampson. As noted above, Goodling also met with Gonzales and, according to Gonzales, indicated that she had the same information that Sampson had, referring to the information about the timing of the White House's involvement.

We also concluded that Goodling was partly responsible for creating the false impression that Griffin was chosen to replace Cummins because the USAO's First Assistant was unavailable because she was on maternity leave. This information was provided to Senator Pryor's office and to Brian

Roehrkasse, a Department of Justice spokesperson. Sampson told us that Goodling told Gonzales in December 2006 about the First Assistant being on maternity leave. However, Goodling clearly knew that the First Assistant's maternity leave had nothing to do with Griffin's appointment as Interim U.S. Attorney, but she did not correct this misimpression, which was conveyed by the Department to Senator Pryor.

We concluded that Goodling engaged in misconduct by failing to disclose important information and to correct Department officials who were providing what she knew was misleading information to Congress and the public concerning the extent of the White House's involvement in the U.S. Attorney removal process, and for providing misleading information to Congress and the Department concerning Griffin's appointment as Interim U.S. Attorney.

#### **E. David Margolis**

We found that Associate Deputy Attorney General Margolis had little involvement in the selection of which U.S. Attorneys to remove, despite his position, experience, and knowledge about many U.S. Attorneys.

In early 2005, Sampson informed Margolis about Miers's suggestion to replace all U.S. Attorneys, an idea that both Margolis and Sampson considered unwise. Margolis endorsed the idea of replacing weak or mediocre U.S. Attorneys, noting to us that in the past U.S. Attorneys were generally removed only for misconduct or gross incompetence tantamount to misconduct.

At that time, Sampson asked Margolis for his opinion concerning the weakest U.S. Attorneys. Margolis told us that two U.S. Attorneys should be removed on performance grounds – Ryan and Lampton. In addition, Margolis said that at that time he also either recommended Chiara for removal or endorsed her removal. Margolis also gave Sampson the names of approximately eight additional U.S. Attorneys who warranted a closer look, either because of general performance, specific conduct, or both.<sup>203</sup>

After discussions in 2005, Margolis was not consulted again on which U.S. Attorneys should be removed until November 2006, just before the removal plan was finalized and approved. Margolis was not asked, and did not follow up with Sampson, about what criteria should be considered in determining who should be removed or the evaluation process that should lead to the selections. In addition, although Sampson later claimed that he understood that Margolis regularly reviewed EARS evaluations, Sampson never discussed with Margolis what the evaluations revealed about any of the U.S. Attorneys, except Ryan.

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<sup>203</sup> However, none of these eight was among the ones directed to resign in 2006.

In November 2006, when Sampson advised Margolis about the impending removals, he either showed Margolis a list or read from a list of six U.S. Attorneys that Sampson indicated were to be removed. Margolis told us that he was struck more by the names Sampson did not mention than the ones he did. Margolis asked Sampson why Ryan and Lampton were not on the removal list, and Sampson responded that he would look into it. Based on Margolis's and McNulty's suggestion, Ryan was subsequently added to the list.

However, Margolis told us that he did not think to question Sampson about the six U.S. Attorneys who were on Sampson's list. Margolis said he was more focused on the names that were omitted and assumed Sampson had valid reasons for the six slated for removal.

Margolis is the senior career attorney in the Department and someone who had significant knowledge about U.S. Attorneys and their performance. He was involved in panel interviews for the selection of most U.S. Attorneys, and as part of his duties handles misconduct allegations involving U.S. Attorneys. He is highly respected within the Department, and his opinion was valued because of his experience and stature.

Yet, prior to the removals, he never questioned Sampson concerning why the specific U.S. Attorneys slated for removal were chosen or what process was used to select them. We believe that under these circumstances – an unprecedented dismissal of a group of U.S. Attorneys at one time allegedly for performance reasons – Margolis should have raised questions about the list and the process used to identify the names to ensure there were no improper reasons and that the Department was following a defensible process for the removals. But Margolis never raised those issues, and instead focused solely on seeking to ensure that Ryan was added to the removal list.

It is noteworthy that while Margolis had endorsed the idea of removing weak U.S. Attorneys, by his own testimony he was struck by the fact that two weak performing U.S. Attorneys he had recommended for removal on performance grounds were not on Sampson's November 2006 list. Moreover, none of the other eight U.S. Attorneys who he had originally suggested warranted a closer look were included on the list. Instead, Sampson's removal list contained the names of six other U.S. Attorneys and Margolis did not know the reasons why as to five of them.

We recognize that the decision to remove the U.S. Attorneys was not Margolis's to make. But given his position, we believe he should have asked Sampson, McNulty, or other senior Department leaders about the removal process. This is particularly true given that this removal of U.S. Attorneys was unprecedented, and it did not appear from the names on Sampson's list that the U.S. Attorneys Margolis thought were weak had been included.

In his testimony to congressional investigators, Margolis acknowledged that he should have taken additional steps when he learned about the removal plan. Margolis stated:

I should say that I am a bit exasperated by my role here because I'm the only one of all the people involved who knows how to fire a United States Attorney or a Marshal based on experience. And I was not aggressive enough or vigilant enough, and I should have done a number of things, I should have inserted myself. I was too passive, and I'd like to, I think—and I hold myself accountable for this—that if I had stepped in and said something, that maybe this would have been - we would have handled this better . . . . And I'd like to think that I know how far a career guy should go and when he should defer to the political appointees. But in this case, ironically, I think my tentativeness and lack of aggressiveness – which I'm not known for lack of aggressiveness. I think it did my masters a disservice, and I accept that. That does not mean that I'm excluding everybody else from their own responsibility. That's a different issue.

Margolis added that he had become side-tracked by ensuring that certain U.S. Attorneys such as Ryan were on the removal list, and that he was not vigilant enough in ensuring that no one was removed for an improper reason. Moreover, Margolis said he should have asked for the reasons why each of the U.S. Attorneys was being removed.

We agree. We believe that given Margolis's experience, position, and stature he was too deferential to others on this important and unprecedented removal of U.S. Attorneys. Had he raised questions, as he acknowledged he should have, the damage to the Department by the fundamentally flawed removal process might have been mitigated.<sup>204</sup>

#### **F. Michael Elston**

One of the most serious allegations stemming from the controversy was that Michael Elston, the Chief of Staff to Deputy Attorney General McNulty, attempted to threaten and intimidate three of the fired U.S. Attorneys in order to keep them from publicly discussing their removals.

As discussed in more detail in Chapter Three, on January 17, 2007, the day preceding Attorney General Gonzales's testimony before the Senate Judiciary Committee, Elston telephoned McKay and Charlton. According to

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<sup>204</sup> We also recognize, however, that Margolis could not have done anything about the first two removals – Graves and Cummins – because he was neither asked for his opinion nor informed of the removals at the time.

Elston, McNulty asked him to make the call to let McKay and Charlton know that the Attorney General was not going to testify about who had been removed or the basis for the removals.

According to McKay, Elston began the conversation by stating that people in the Department were surprised they had not seen any “incendiary comments” from McKay in the press. McKay said that Elston then stated that the Attorney General would make only general statements in his Senate testimony about the resignations, would not state that the U.S. Attorneys had been fired, and would not disclose the reasons for their removal. McKay told us that he believed that Elston was offering him a *quid pro quo*: “You keep quiet, we won’t say anything.” McKay said he replied to Elston that he would stay quiet not because the Attorney General would not disclose why he had been fired, but rather because he believed it was his duty to do so.

Charlton told us that he viewed a similar phone call from Elston as a veiled threat. Charlton said that Elston told him that the Department’s senior management had noticed that he had not been commenting in the media, and he wanted Charlton to know that the Attorney General was not going to comment on why Charlton had been asked to resign.

Elston denied calling McKay and Charlton in an attempt to threaten them to remain silent, and denied offering them any *quid pro quo* in exchange for their silence.

Approximately 1 month later, after a Washington Post article quoted Cummins as criticizing the Department for stating that the removals of the U.S. Attorneys were based on their performance, Elston called Cummins. According to Cummins, Elston expressed dismay that the U.S. Attorneys might appear before Congress to testify about their removals, which would force the Department to publicly disclose the reasons for the removals. Cummins subsequently sent an e-mail describing this conversation with Elston to McKay, Charlton, Lam, Bogden, and Iglesias, characterizing it as a threatening call.

Elston disputed Cummins’s characterization of the call. Elston told congressional investigators he believed that Cummins had misinterpreted his remarks, which Elston said were more along the lines of saying that it was a shame that the reasons for the U.S. Attorneys’ removals were being discussed in the media because it was tarnishing the Department as well as the reputations of the individual U.S. Attorneys. Elston said he never intended to send Cummins or anyone else a threatening message.

While we understand why McKay, Charlton, and Cummins may have interpreted Elston’s phone calls as a threat, we do not have sufficient evidence to conclude that Elston intended to threaten them. In an interview with a reporter the day before he testified before Congress, and his congressional

testimony, Cummins did not characterize Elston's call as a threat. Elston's comments appear close to the line, and we do not believe it unreasonable for McKay, Charlton, and Cummins to have reached the conclusions they did. Nevertheless, we do not believe the evidence is sufficient to show that his intent was to threaten or intimidate the three U.S. Attorneys.

### **G. William Moschella**

Moschella testified before the House Judiciary Committee in March 2007 about the reasons for the removal of each U.S. Attorney. He did not become Principal Associate Deputy Attorney General until October 2006, and we found no evidence that he was consulted about the removals prior to the November 27, 2006, meeting at which the Attorney General approved the removal plan.

As we discuss above, Moschella's congressional testimony misstated both the timing and the nature of the White House involvement in the removal process.<sup>205</sup> However, Moschella did not know that his testimony about the timing or the extent of the White House's involvement was inaccurate. Moschella only reiterated publicly what he had been told about these issues and what McNulty had previously told the Senate Judiciary Committee. No one at the Department – in particular Sampson and Goodling – informed Moschella that what McNulty said was incorrect. When Moschella subsequently learned about the inaccuracies in his testimony, after Sampson retrieved his e-mails and showed them to Moschella and other Department officials, Moschella was understandably upset and recognized the need to correct the inaccuracies. Under these circumstances, we concluded that Moschella's inaccurate testimony was not his fault and that he should not be criticized for it.

## **V. Conclusion**

In sum, we believe that the process used to remove the nine U.S. Attorneys in 2006 was fundamentally flawed. While Presidential appointees can be removed for any reason or for no reason, as long as it is not an illegal or

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<sup>205</sup> In his testimony before the House Judiciary Subcommittee, Moschella inaccurately testified that Iglesias's EARS evaluation had criticized him for "delegating to his First Assistant the overall running of the office." However, as previously noted, Moschella obtained this misimpression from the chart prepared by Goodling for McNulty's closed briefing of the Senate Judiciary Committee on February 14, 2006, which contained after-the-fact rationalizations for many of the removals. In Iglesias's case, it contained the notation that Iglesias was "an absentee landlord." However, the EARS evaluation does not criticize Iglesias; rather it states that the "First Assistant appropriately oversees the day to day work of the USAO's senior management team . . . ." We concluded that this was an honest mistake by Moschella, attributing the criticism to the EARS report when it was actually contained on the Goodling chart.

improper reason, Department officials publicly justified the removals as the result of an evaluation that sought to replace underperforming U.S. Attorneys. In fact, we determined that the process implemented largely by Kyle Sampson, Chief of Staff to the Attorney General, was unsystematic and arbitrary, with little oversight by the Attorney General, the Deputy Attorney General, or any other senior Department official. In choosing which U.S. Attorneys to remove, Sampson did not adequately consult with the Department officials most knowledgeable about their performance, or even examine formal evaluations of each U.S. Attorney's Office, despite his representations to the contrary.

We also determined that the U.S. Attorneys were not given an opportunity to address concerns about their performance or provided the reasons for their removal, which led to widespread speculation about the true reasons for their removal, including that they were removed for improper partisan political reasons. And to make matters worse, after the removals became public the statements and congressional testimony provided by the Attorney General, the Deputy Attorney General, Sampson, and other Department officials about the reasons for the removals were inconsistent, misleading, and inaccurate in many respects.

We believe the primary responsibility for these serious failures rest with senior Department leaders – Attorney General Alberto Gonzales and Deputy Attorney General Paul McNulty – who abdicated their responsibility to adequately oversee the process and to ensure that the reasons for removal of each U.S. Attorney were supportable and not improper. These removals were not a minor personnel matter – they were an unprecedented removal of a group of high-level Department officials that was certain to raise concerns if not handled properly. Yet, neither the Attorney General nor the Deputy Attorney General provided adequate oversight or supervision of this process. We also concluded that Sampson bears significant responsibility for the flawed and arbitrary removal process. Moreover, they and other Department officials are responsible for failing to provide accurate and truthful statements about the removals and their role in the process.

We believe our investigation was able to uncover most of the facts relating to the reasons for the removal of most of the U.S. Attorneys. However, as described in this report, there are gaps in our investigation because of the refusal of certain key witnesses to be interviewed by us, including former White House officials Karl Rove, Harriet Miers, and William Kelley, former Department of Justice White House Liaison Monica Goodling, Senator Pete Domenici, and his Chief of Staff. In addition, the White House would not provide us internal documents related to the removals of the U.S. Attorneys.

The most serious allegation that we were not able to fully investigate related to the removal of David Iglesias, the U.S. Attorney for New Mexico, and the allegation that he was removed to influence voter fraud and public

corruption prosecutions. We recommend that a counsel specially appointed by the Attorney General assess the facts we have uncovered, work with us to conduct further investigation, and ultimately determine whether the evidence demonstrates that any criminal offense was committed with regard to the removal of Iglesias or any other U.S. Attorney, or the testimony of any witness related to the U.S. Attorney removals.

The Department's removal of the U.S. Attorneys and the controversy it created severely damaged the credibility of the Department and raised doubts about the integrity of Department prosecutive decisions. We believe that this investigation, and final resolution of the issues raised in this report, can help restore confidence in the Department by fully describing the serious failures in the process used to remove the U.S. Attorneys and by providing lessons for the Department in how to avoid such failures in the future.

# **APPENDIX A**

**THE WHITE HOUSE**  
WASHINGTON

September 18, 2008

Dear Messrs. Jarrett and Fine:

I am writing to follow-up on our discussions of the last several months. Your offices (the Department of Justice's ("DOJ" or "the Department") Office of the Inspector General (OIG) and Office of Professional Responsibility (OPR)) have requested documents from the White House for use in the U.S. Attorneys inquiry you are conducting jointly. The White House has provided some of the requested materials and has declined to provide others. Thank you for the opportunity to set forth the White House rationale and position on the question of why we have not thought it appropriate to provide your offices with certain of the materials you requested.

Your inquiry, as we have always understood it from our discussions, is not directed to the White House (over which your agencies do not have jurisdiction) but as a factual matter involves the White House to the extent that the factual scope of your inquiry includes communications to and from the White House. Your office has sought to interview a number of former White House employees and the White House has encouraged all the identified employees to cooperate with your inquiry. Additionally, as discussed below, the White House has been willing to make certain kinds of documents available to your inquiry, but has declined to provide your offices with unqualified access to all White House U.S. Attorneys-related materials you have requested.

**I. Documents in Possession of the White House**

The White House provided to OIG/OPR copies of email communications between the White House and the Department relating to the Department's decision to seek the resignations of certain U.S. Attorneys. The White House also provided copies of email communications between the White House and non-DOJ third parties on the subject of the U.S. Attorneys resignations.

The White House has declined to provide internal documents relating to the U.S. Attorneys resignations. Those materials, by their very nature, implicate White House confidentiality interests of a very high order, and such interests are well-established in law. The President needs confidential advice from those who advise and assist him in the performance of his duties. Their communications must be candid, and confidentiality is necessary to preserve that candor. Without it, the advising and decisionmaking processes of the White House must be expected to suffer. *See In re Sealed Case*, 121 F.3d 729, 750, 762 (D.C. Cir. 1997) (discussing "critical role that confidentiality plays" in the advice of presidential advisors and noting "public and constitutional interest in preserving the efficacy and quality of presidential decisionmaking"). Such concerns are only heightened where, as here, the subject of the inquiry – the removal and

nomination of U.S. Attorneys – is committed by the Constitution to the discretion of the President. U.S. Const. Art. II, § 2; *Myers v. United States*, 272 U.S. 52, 163-64 (1926).

It is important to note that, in declining to make White House internal documents available, the White House did not assert executive privilege against OIG and OPR (which are components of DOJ, an executive branch agency). However, the White House internal communications not provided to OIG/OPR are, in our judgment, covered by the deliberative process and/or presidential communications components of executive privilege in the event of a demand for them by Congress.

## **II. White House Review Chronology**

In the course of your investigation, OIG/OPR became aware that the Office of Counsel to the President had created a draft chronology of the events relating to the U.S. Attorney resignations. That chronology developed as a series of drafts in the period beginning March 9, 2007 and ending March 16, 2007. OIG/OPR asked the White House to provide a complete copy of the draft chronology for its investigation.

The White House declined to make the complete draft chronology available to OIG/OPR. The draft chronology was prepared immediately after the U.S. Attorneys matter became a major news story, in order to try to gather, on a preliminary basis, facts and information surrounding the matter. It was prepared by the Counsel's office for the purpose of assisting and advising senior White House officials of the facts as we knew them and about how to respond to the controversy. The draft chronology reflected both preliminary factual information obtained by the Counsel's office in the course of its review and preliminary judgments by members of the Counsel's office concerning the relative significance of the gathered information.

Again, although the White House believed (in light of prior DOJ published guidance in a somewhat comparable setting) that the draft chronology would be covered by the presidential communications, deliberative process, attorney-client and work-product components of executive privilege in a dispute with Congress, *see Assertion of Executive Privilege Regarding White House Counsel's Office Documents*, 20 Op. O.L.C. 2, 3 (1996), the White House did not assert executive privilege against OIG/OPR as a basis for not providing the draft chronology. Rather, the White House position on the draft chronology was as follows: the White House recognized and maintained a very strong confidentiality interest in not releasing the draft chronology. That interest was anchored in the confidentiality concerns noted in Part I above: those who assist and advise the President must be able to communicate confidentially on subjects falling within the scope of that service. Additionally, the draft chronology was prepared by members of the Counsel's office for the express purpose of providing advice about the U.S. Attorneys controversy as part of the Office's function of advising and assisting in response to a public, ongoing, and significant controversy.

In our view, to make available to OIG/OPR a draft chronology of this sort, prepared under the circumstances described above, would threaten a very significant chilling effect for counsel and White House officials, and complete disclosure would have an adverse impact on the effective provision of legal advice within the White House. That impact, as we perceived it, was not outweighed by OIG/OPR's stated need for the information, at least not to the extent we

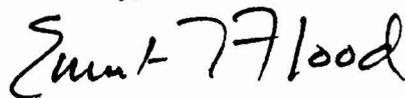
understood that need as articulated in our discussions with your offices. Accordingly, we did not make the draft chronology available *in its entirety*.

At the same time, the White House recognized that OIG and OPR – which are components of an executive branch agency – had a genuine, and potentially significant, interest in reviewing those factual portions of the draft chronology for which OIG/OPR had a substantial need and no other available source. With these competing interests in mind, the White House attempted to strike a balance respectful of both concerns. In view of the draft chronology's origins and purpose, we viewed the situation as in some sense analogous to civil discovery efforts to obtain an opponent's attorney work-product material. *See Hickman v. Taylor*, 329 U.S. 495 (1947); Fed. R. Civ. P. 26(b)(3). Accordingly, after several meetings with OIG/OPR to discuss the question of our respective offices' interests in this matter, the White House provided for OIG/OPR review a redacted copy of the draft chronology. The unredacted portions made available to OIG/OPR contained factual information for which the White House understood OIG/OPR to have expressed a substantial need and for which OIG/OPR had no alternative available source that could provide the same or equivalent information. As to portions not made available, the decision not to provide them resulted from our not receiving from OIG/OPR a focused showing of substantial need for the non-disclosed portions and an understanding that the undisclosed material (or its equivalent) was unavailable from another source.

In this partial disclosure, as noted above, we sought to balance the needs of your investigation with the White House's confidentiality interests. Our disclosure was necessarily partial because, in our judgment, total, unqualified disclosure of all factual portions of the entire draft chronology would have an adverse impact on the effective provision of legal advice within the White House. That impact, as we perceived it, was not outweighed by OIG/OPR's need for the undisclosed information, at least to the extent we understood that need as articulated in our discussions with your office.

Thank you again for the opportunity to state our position on this matter. In the event your final report discusses the White House position on document disclosures, I respectfully request that you include this letter in its entirety as an attachment to the final report.

Sincerely,

A handwritten signature in black ink that reads "Emmet T. Flood". The signature is written in a cursive, slightly slanted style.

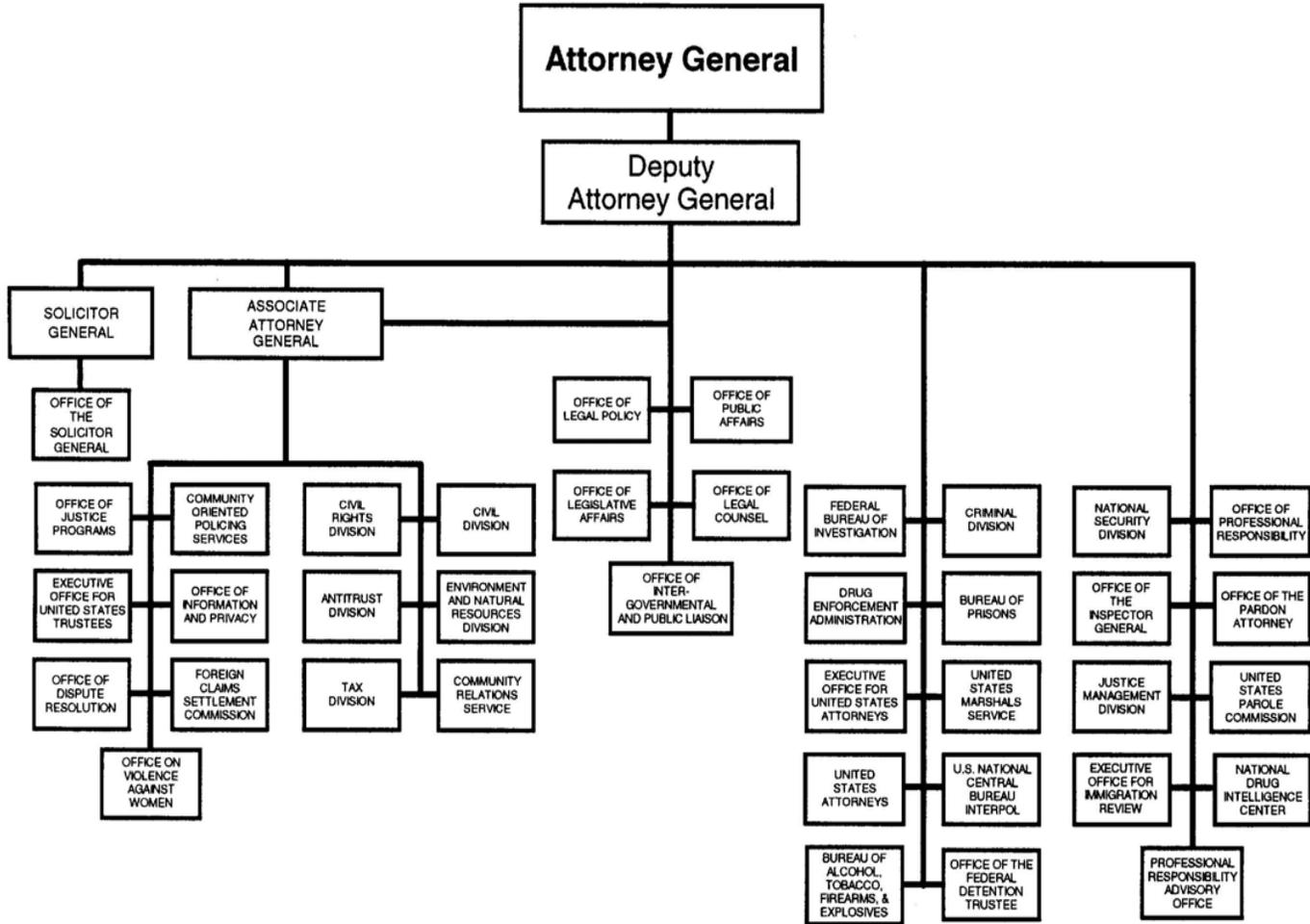
Emmet T. Flood  
Deputy Counsel to the President

The Honorable Glenn A. Fine  
Inspector General  
U.S. Department of Justice  
950 Pennsylvania Avenue, NW  
Washington, DC 20530

The Honorable H. Marshall Jarrett  
Counsel, Office of Professional Responsibility  
U.S. Department of Justice  
950 Pennsylvania Avenue, NW  
Washington, DC 20530

# **APPENDIX B**

# U.S. DEPARTMENT OF JUSTICE



Approved by:

*[Handwritten Signature]*  
 ALBERT R. GONZALES  
 Attorney General

Date:

**3-13-06**

# **APPENDIX C**

**Department of Justice Management  
January 2003 - December 2007**

Year	2003												2004												2005												2006												2007											
Month	J	F	M	A	M	J	J	A	S	O	N	D	J	F	M	A	M	J	J	A	S	O	N	D	J	F	M	A	M	J	J	A	S	O	N	D	J	F	M	A	M	J	J	A	S	O	N	D	J	F	M	A	M	J	J	A	S	O	N	D

Attorney General	<b>John Ashcroft</b> Feb 2001 - Feb 2005																								<b>Alberto Gonzales</b> Feb 2005 - Sept 2007																							
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Kyle Sampson	<b>Counselor to the Attorney General</b> Aug 2003 - Feb 2005												<b>Dep. Chief of Staff</b> Feb 05 - Sept 05						<b>Chief of Staff</b> Sept 2005 - Mar 2007											
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Monica Goodling	<b>DOJ Press Office</b> Feb 2002 - Aug 2004												<b>Special Assistant</b> USAO East. Dist. VA Sept 04 - Mar 05						<b>Deputy Director</b> EOUSA Mar 05 - Oct 05						<b>Counsel to the AG</b> Oct 05 - Apr 06						<b>White House Liaison and Counsel to the AG</b> April 2006 - April 2007					
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Deputy Attorney General	<b>James Comey</b> Dec 2003 - Aug 2005												<b>Paul McNulty</b> Acting Nov 05 Confirmed Mar 06 - Apr 07											
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Deputy Attorney General Chief of Staff	<b>Michael Elston</b> Nov 2005 - Jun 2007																							
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Associate Deputy Attorney General	<b>David Margolis</b> May 1993 -																																															
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Principal Associate Deputy Attorney General	<b>William Mercer</b> Jun 05 - Jul 06												<b>William Moschella</b> Oct 2006 -											
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Director of EOUSA	<b>Mary Beth Buchanan</b> Jun 2004 - Jun 2005												<b>Michael Battle</b> Jun 2005 - Mar 2007											
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