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INTERVIEW OF: MICHAEL JAMES ELSTON

March 30, 2007

Washington, D.C.

The interview in the above matter was held at 2138
Rayburn House Office Building, commencing at 11:00 a.m.

Appearances:

For MICHAEL JAMES ELSTON:

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SENATE, COMMITTEE ON THE JUDICIARY

Mr. Mincberg. We will start now with the interview of Michael Elston of the Department of Justice.

Before we get into substance, we have a number of procedural things that we want to go over and put on the record of the interview.

To start with, we will talk about the issue of the confidentiality of these proceedings. We will put into the record as Elston Documents 1 and 2, two letters. The first document, 1, will be a letter from Richard Hertling to the Honorable John Conyers and the Honorable Patrick Leahy dated March 29, 2007.

[Elston Document No. 1
was marked for identification.]

Mr. Mincberg. Number 2 will be a letter from
Chairman Conyers to Mr. Hertling also dated March 29th,
2007.

[Elston Document No. 2
was marked for identification.]

Mr. Mincberg. For purposes of this proceeding -- although this proceeding, as I will explain a little further later, is a House proceeding -- we have several people from the Senate who are with us.

The confidentiality provisions are that the interview transcript and the content of this interview will be kept confidential and will not be disclosed except pursuant to Chairman Conyers' decision after consultation with the Department of Justice and the ranking member, Mr. Smith.

The Department of Justice will be responsible for ensuring that information concerning the substance of the interview or the transcript is not disclosed to other Department interviewees who have not yet been interviewed. If information relating to the substance of the interview is publicly disclosed, all of the parties reserve the right to disclose relevant portions of the transcript to correct any misinformation.

Our colleagues from the Senate are not agreeing to any other provisions in Documents 1 and 2, but they have agreed to the confidentiality provisions as I have just read them, and I will now have them put that agreement on the record.

Gentlemen and lady?

Mr. Kim. Agreed.

Mr. Miner. For Senator Specter, Senate Judiciary, agreed.

Mr. Paris. Jeremy Paris for Senator Leahy of the Judiciary Committee, agreed.

Mr. Bharara. Preet Bharara for Senator Schumer of the Senate Judiciary, agreed.

Ms. Duck. Jennifer Duck for Senator Feinstein on the Judiciary Committee, agreed.

Mr. Mincberg. There will be a limited number of people that will have speaking roles today, myself and Mr. McLaughlin. We should, however, probably have the attorneys here for Mr. Elston identify themselves for the record because I think one of you is personal counsel, and we should get that distinction.

Mr. Hunt. I'm Jody Hunt from the Department of Justice.

Ms. Burton. I am Kate Burton from the Department of Justice.

Mr. Driscoll. Bob Driscoll of the Alston & Bird law firm, representing Mike personally.

Mr. Mincberg. Now Mr. Elston, before we go forward, two or three other, shorter, preliminary things.

First, if either Mr. McLaughlin or myself asks you any questions that you don't understand or you would like

us to clarify, please let us know. Otherwise, we will assume that you do understand our questions; is that okay?

Mr. Elston. It is.

Mr. Mincberg. And second of all, if you want to take a break for any reason, just let whoever is questioning you know. We will try to get to the end of that line, and we will be happy to accommodate you.

Mr. Elston. Okay.

Mr. Mincberg. And finally, as I referred to before, your testimony today is being taken as part of an authorized investigation under the jurisdiction of the Judiciary Committee of the United States House of Representatives.

Do you understand that any knowing and willful misstatement that you provide in your testimony, including any omission of material information that renders any statement misleading, would be a violation of Section 1001 of Title XVIII of the United States Code, which is a felony and could be prosecuted in Federal court?

Mr. Elston. Yes.

Mr. Mincberg. Great.

EXAMINATION

BY MR. MINCBERG:

Q Mr. Elston, will you state your full name for the record?

A Michael James Elston.

Q And your address?

A I live in the metro D.C. area.

Q And give us at least your business address.

A 950 Pennsylvania Avenue, Northwest, room 4210, Washington, D.C. 20530.

Q And that is the Department of Justice?

A It is.

Q Can you tell us what your current position is at the Department of Justice?

A I serve as Counselor and Chief of Staff to the Deputy Attorney General.

Q And that Deputy General right now is Paul McNulty?

A Correct.

Q Now when did you actually start in that position?

A I believe it was November 7th, 2005. It was shortly after the Deputy Attorney General became the Acting Deputy Attorney General in November of 2005.

Q I want to take a minute to go over your background.

As I understand, you got your J.D. degree in about 1994; is that correct?

A That is right.

Q And then you clerked for Judge Pasco Bowman of the Eighth Circuit?

A Correct.

Q And then you went to work for a law firm?

A I worked for two law firms: Sidley & Austin in Chicago and Shughart Thomson & Kilroy, P.C., in Kansas City.

Q And then at some point you joined public service with the U.S. Attorney's Office in Illinois. Is it the Northern District of Illinois?

A Correct.

Q And when did that begin?

A August, 1999.

Q And how long were you in that position?

A Until April, 2002.

Q You were with the Northern District of Illinois until April of 2002?

A Correct. I was Assistant U.S. Attorney in the Northern District of Illinois until April of 2002, roughly. That is about correct.

Then I transferred to the U.S. Attorney's Office in the Eastern District of Virginia.

Q Were you physically based in the Northern District of Illinois?

A Rockford, Illinois, a branch office.

Q During that entire time until April of 2002?

A I did a detail in the Office of Legal Policy in 2001.

Q Okay. When, during what period of 2001?

A It was approximately 6 months. I think it started in July.

Q So you had, depending on how one looks at it, the fortune or misfortune to be here in Washington during the 9/11 period?

A Yes.

It was actually kind of a strange detail because, at the time, the Office of Legal Policy didn't have the budget to pay for travel and lodging expenses. So I would come to Washington maybe 3 or 4 days every 2 weeks and otherwise do work out of the Rockford U.S. Attorneys Office. I happened to be here the week of September 11th.

Q And how was -- what led to that detail being arranged?

A I knew some of Senator Ashcroft's staff members from Missouri when I lived in Kansas City; and I volunteered to help after the change of the

administration, if there was anything that they needed, and ultimately I was asked to come and do that detail for a short period.

Q And as I understand it, when you were doing that detail, which lasted, I think you said, until about the end of 2001 --

A That is my recollection. I think it was about 6 months.

Q As I understand it, you worked some on what later became the PATRIOT Act; is that correct?

A I did not -- I worked on the PATRIOT Act for approximately 1 day immediately after September 11th. Viet Dinh was the Assistant Attorney General for the Office of Legal Policy at the time, and immediately after 9/11 there was a large scramble to try to bring together a legislative response. And I recall calling around and trying to find if there were ideas that were -- that already existed that could be incorporated in sort of a first draft. But I didn't have any further involvement.

I actually had an oral argument in the Seventh Circuit, I want to say, on the 13th of September, which I ended up having to do by phone because the court would not postpone it; and of course, I couldn't get back to Illinois because there were no -- there were no planes available.

So, ultimately, on the night of the 13th, I drove back to Illinois with another AUSA from Northern Illinois, who was on another detail from Main Justice; and that was the entire involvement that I had in the PATRIOT Act.

Q Once you came later --

A It wasn't even called the PATRIOT Act then.

Q Not then. I think that is right.

Once you came back to Main Justice -- I am skipping forward here a little bit -- did you work at all on the reauthorization of the PATRIOT Act which would have occurred, I think, after you were at Main Justice?

A You would have to say what you mean by "work on it."

Yes, I was aware, of course, that that was going on, but I didn't have any direct role in it. I attended meetings where the Deputy Attorney General was briefed on it, but I didn't have any role in the PATRIOT Act reauthorization that I recall.

Q Did you have any discussion or any knowledge of what became of the provision in the PATRIOT Act that changed the way U.S. attorneys can be appointed by the Attorney General?

A I am not sure that I knew that was in there before it was passed. I am not sure of that.

Q Do you remember talking about it with Mr. Moschella?

A I don't recall having any conversation with Mr. Moschella about that.

Q Now, back again to the period of when you were on detail at the Office of Legal Policy, did you do any work there that related at all to U.S. attorneys?

A No. In fact, my supervisor at the time thought it was -- it would have been inappropriate for me to do anything with it because I was an Assistant U.S. Attorney. So I think that was part of the terms of the details.

Q Makes perfect sense.

Now, I think you said that you then -- after the detail, you went back for a few months to Rockford?

A Right.

Q And then at some point in 2002 you moved more permanently to the Washington area; is that correct?

A I believe it was April of 2002. I had met people in Washington who worked in Alexandria, and they asked me to consider coming to the U.S. Attorneys Office in Alexandria, which I did. I believe I interviewed in November of 2001.

And, again, I want to be perfectly clear so there is no misunderstanding: I ultimately spent very little time in Washington from July to December. It was --

Q July to December of --

A Of 2001.

Q Um-hmm.

A There were roughly 3-day stints every couple of weeks. It was not -- I wasn't living in Washington, so to speak, during that time period.

But in April, I moved -- April, 2002, I moved to the Washington area.

Q To assume your new position as an Assistant U.S. Attorney for the Eastern District of Virginia?

A Correct.

Q And how long were you in that position?

A I remained an Assistant United States Attorney until sometime in April of 2006 for the Eastern District of Virginia.

Q If I am getting the chronology, you were still an AUSA when you took your position with the Deputy Attorney General's Office?

A Correct.

Q And can you explain to us how that worked?

A Sure. This was actually a very complicated period in my life.

Q Sounds that way.

A In October 2005, I was detailed to Main Justice, Criminal Division, to serve as Counselor to the Assistant Attorney General, and part of that job was being the ex officio representative of the Department to the U.S. Sentencing Commission. And it was -- I was in the Criminal Division for about 1 month when Paul McNulty was named the Acting Deputy Attorney General.

When I started that detail, nobody knew that was going to happen. There was a -- I can't remember all of the details, but there was somebody else that was nominated, and he withdrew his name and then they made Paul McNulty the Acting Deputy Attorney General.

Because of the Sentencing Commission role, I continued to serve -- so my details at Main Justice changed character roughly November 7th, about a month after I got there, and I was serving as Paul's Chief of Staff. I was still detailed from the Eastern District of Virginia.

The Department believed that it was important to continue the continuity of representation with respect to the Sentencing Commission, and I ultimately stayed in that position for a year. So in addition to being detailed to the Deputy Attorney General's Office, I served as a Senior Counsel to the Assistant Attorney

General of the Criminal Division and continued to serve as the ex officio to the Sentencing Commission.

Paul McNulty was not confirmed to be Deputy Attorney General until sometime in March 2006, I believe, and it was at that point that I had a discussion with the First Assistant U.S. Attorney in the Eastern District of Virginia, who wanted me off the roll at some point. He did not want to continue paying me; he wanted me to work something out. And ultimately I made the decision to be converted to a Senior Executive Service position, which ultimately was approved. And in, I think sometime in April, I was no longer an Assistant U.S. Attorney. I was just Counselor and Chief of Staff to the Attorney General. It is complicated, but --

Q I think we have got it. I will, of course, ask at least one or two small clarification questions.

A Sure.

Q How was it that the detail to work as Mr. McNulty's aide, whether it was in the Criminal Division or, as it turned out, as Deputy, how did that come about? Did you know Mr. McNulty or --

A He was the U.S. Attorney in the Eastern District of Virginia. He hired me in 2002 to be an Assistant U.S. Attorney.

Q Got it.

So he basically wanted you to come with him, in essence?

A Right.

Q Makes sense.

By the way, while you were at the U.S. Attorney's Office in the Eastern District of Virginia, did you overlap with Monica Goodling?

A She was a Special Assistant U.S. Attorney while I was there.

Q So you met her while you were there?

A Yes. During her time period, however, I was the coach of another Special Assistant U.S. Attorney. Every Special Assistant U.S. Attorney has a coach during their time there, and I was not her coach.

Q Are you a member of any professional associations -- ABA, Federalists -- a society, that kind of thing?

A I am a member of Four Bars, but that is not what you are asking.

Q More voluntary associations.

A Right. I am a member of the Federalist Society, I think. I think that is correct.

Q Now, can you describe your responsibilities as Chief of Staff to Mr. -- to the Deputy Attorney General who I may call DAG occasionally, for short, D-A-G?

A As Chief of Staff, I have two primary areas of responsibility. One is to manage the staff of the Office of the Deputy Attorney General, which consists of approximately 21 mostly lawyers and 10 support staff, so I think it is a total of 31. And that relates to everything from office space -- a lot of it is pretty mundane.

I sign time slips, leave slips, those kinds of things. I interview people who want to work in the Deputy Attorney General's Office. I deal with the personnel issues that come up in the Office of the Deputy Attorney General.

I also am responsible for the Deputy Attorney General's schedule, and I often accompany him to meetings and other things. As a matter of course, I am put on virtually every meeting that the Deputy Attorney General has. I don't attend all of them, but I oftentimes will accompany him to meetings, mainly as a communication link; if something is going on and someone needs to get hold of the Deputy Attorney General, there needs to be somebody who is around and, that is usually me.

And the schedule is a major part of my responsibilities, making sure that meetings, speaking engagements, all of those things are correctly calendared and not resulting in conflicts oftentimes, that are

overlapping meetings, making sure I know which meeting that the Deputy Attorney General wants to do. When he is invited to give a speech, we talk about whether he should do it, who should draft the speech, those kinds of things.

Those are -- those are the primary functions of my job as Chief of Staff.

Q And you also mentioned Counselor. I assume there are more substantive responsibilities that go with that.

A I don't --

Q You don't distinguish between?

A I don't distinguish.

Q Tell me a little bit about your substantive responsibilities.

A I think that as issues come up -- as issues come up, I do provide my advice. He sometimes will ask it. Sometimes I provide it without being asked on a wide variety of issues.

I will say, just to be clear, that my job responsibilities have changed over time.

In July, 2006, the Principal Associate Deputy Attorney General, or PADAG, Bill Mercer, left that position.

Q To become Associate Attorney General?

A He went back originally and did eventually come back, yes. So for a period of 3 months there was no PADAG, and I essentially did both jobs. And then when Will Moschella came, in October of 2006, I believe, I went back to largely being Chief of Staff, although I kept a number of other responsibilities at Paul's request, including managing the capital case processing within the Deputy Attorney General's Office and the Executive Office for U.S. Attorneys.

I also -- I also have a role in the pardon process within the office. And so maybe those things are more Counselor-like than Chief of Staff-like.

Q And your last answer actually got into my next question, which is, can you describe your responsibilities and the responsibilities of the Deputy Attorney General's Office with respect the U.S. Attorneys?

A The Deputy Attorney General is the direct supervisor of the 93 United States Attorneys. As a result -- as well as being the direct supervisor of the Director of the Executive Office for the United States Attorneys. As a result, there is a constant flow of information and communication between U.S. Attorneys Offices, EOUSA, and the Deputy Attorney General's Office.

Probably beginning in July, 2005, I became the point person for those communications and issues. I share that responsibility with David Margolis, who also has a role in U.S. Attorney issues in the office, and he always has.

Q And he is in the Deputy Office?

A Correct. I guess I said 2005. July of 2005, is that what I said?

I wasn't in the Deputy Attorney General's Office. I meant July of 2006.

Q Right.

A Because I was not there in -- until November. July of 2006 was when Mr. Mercer left, that these additional responsibilities came my way.

Q I am trying to get a little bit of an understanding of -- and this will be a little longer question than usual, so you understand where I am trying to come from -- of differences. And there may not be that many differences; it may be more collaborative between the functions that the DAG Office has and the functions that EOUSA has with respect to U.S. Attorneys, the Web site of EOUSA, their having responsibility for policy for U.S. Attorneys and evaluating performance and things like that.

Can you -- with that confusion in my mind, can you try to explain to us the relationship between the DAG

Office and EOUSA and their respective responsibilities with respect to U.S. Attorneys?

A I will try.

Obviously, there are large numbers of Assistant U.S. Attorneys that work in the field. And the Executive Office of U.S. Attorneys, I would say, has a very big role and responsibility with respect to the day-to-day management and work of the U.S. Attorneys Offices, making sure that the U.S. Attorney Offices are staying within their budgets, addressing employment issues with the respect to USADA that come up or support staff that come up; it is a -- it's more of the day-to-day assistance to the U.S. Attorneys Office.

It is complicated because United States Attorneys, of course, are appointed by the President and confirmed by the Senate. They are the chief law enforcement officer of their district.

Q Right.

A The Director of EOUSA is not a Presidential/Senate confirmed person. So while the Deputy Attorney General is the direct supervisor of the United States Attorneys, the Director of EOUSA is not their direct supervisor. And --

Q Although, obviously, they have interaction with the U.S. Attorneys themselves and participate in evaluation and policy and things of that nature.

A I have not worked in EOUSA, but I assume they have daily contact with numerous U.S. Attorneys Offices.

Q So -- that is actually very helpful, but let me put a couple of specific examples and see kind of where things would flow.

Let us say that there is, as there have been, an important public corruption probe that a U.S. Attorneys Office is handling. Who at Main Justice, would they kind of be kept apprised of how things were going?

A Well, I think it's possible that it would be a number of different ways. So I can't -- I can't give you one specific way.

Q That is okay. You are giving me a better understanding of how the system works.

A One of the ways that I get information about U.S. Attorneys Offices is the reports that are generated in EOUSA. There is something called the EOUSA Overnight, and there are also Urgent Reports that come out of the Executive Office. Oftentimes, a development, a significant development in a case, be it a public corruption case or any other kind of case, will be reported through the Urgent Report; and those are in the

format of a report to the Attorney General and the Deputy Attorney General from the U.S. Attorney, are routed through.

Q Through EOUSA. So they go U.S. Attorney -- by U.S. Attorney as opposed to being summarized by --

A The Overnights are different from the Urgent Reports. I don't know how they are prepared, but my understanding of the Urgent Report is that it is drafted at least by the U.S. Attorneys Office and sent through the Executive Office.

The Criminal Division's Public Integrity Section is often involved in public corruption cases, and that is the type of case that you mentioned. So I'll stick with that.

And so oftentimes our information will come from the Criminal Division because these are either jointly prosecuting with U.S. Attorneys Office or doing it themselves.

Information can also come from the FBI. The Deputy Attorney General is the direct supervisor of the Director of the FBI. So we often get information regarding cases, whatever their nature, directly from the FBI and the Federal law enforcement agencies.

So there are a variety of ways information about a particular case can come into the Attorney General's Office.

Q Is there some kind of systematic attempt somewhere in the Deputy Attorney General's Office to decide who is going to watch for particular kinds of cases, or cases from a particular U.S. Attorneys Office; or is information just generally circulated and then, when action needs to be taken, it is taken.

A Well, the -- the roughly 21 professional staff of the Office of the Attorney General have portfolios, so to speak, areas of responsibility. And the Criminal Division and the FBI are in Ron Tenpas's portfolio. He is an Associate Deputy Attorney General.

So oftentimes within the Deputy Attorney General's Office, information will come from Ron due to his contacts with the Criminal Division or the FBI.

Q And then in other particular areas there might be a different person in the DAG Office, the assigned --

A Depending on where the information is coming from.

Q Let me ask about one other area that will come up a little later. I am going to mention two other areas, one issue related to vote fraud.

Is there a person in the DAG Office responsible for that area in particular?

A My sense is that many -- I guess I would have to say "no."

Q Okay.

A Not that I can think of.

Q No. That makes perfect sense. And what about Immigration?

A In Immigration, we have two staff members, Dan Fridman and Lee Otis, who work on immigration issues.

Q And this is Lee Lieberman Otis?

A Yes.

Q Okay. That is very helpful.

Let me move now for a little bit, and I think we can probably get through -- at least I hope -- the next line before we break for lunch. I want to move to at least a general discussion of the issue of the terminations that we are here to talk about.

Focusing on the period after Bush's reelection in November of 2004, when did you first learn about or begin participating in a plan, or an idea or a proposal, to consider terminating multiple U.S. Attorneys?

A The answer is, I believe the fall of 2006. I cannot date it with precision, but it was sometime in

late September or early October to the best of my recollection.

Q And how did you become aware of that?

A Kyle Sampson approached me, indicated that the Department -- at least in my recollection it was the Department; he might have said "we," he might have said something else. Certainly as I have looked back on this conversation, I have tried to figure out precisely what he meant.

But there was a plan or an intention to ask weak performers, or U.S. Attorneys who are not supporting the administration's priorities, or otherwise, or where there were other issues, to resign. And he asked for my help in trying to identify, in particular, the weak performers. And at the time, I believe he asked me if I could put together a list for him.

I want to qualify all of this by saying that from the spring of 2006 on, there were running conversations about individual U.S. Attorneys and issues that were arising with those U.S. Attorneys; but I understood your question to be about a plan to ask a group of U.S. Attorneys to resign.

Q No. I think you interpreted it exactly right.

I mean, I assume that issues arise with individual attorneys all the time?

A Correct.

Q And I assume issues have arisen with some U.S. Attorneys that haven't been asked to resign?

A Certainly.

Q Okay.

A With -- I am reasonably certain that that conversation was sometime late September or early October.

Q Okay. Now in your answering, you referred to -- I think I have this right -- "or other issues at one point."

Could -- do you recall more specifically what Mr. Sampson said, if anything, about that?

A I don't recall specifically what he said, but my sense of it, and my sense of it throughout this process to December 7th, was that we were looking for -- we were looking for districts that were being underserved in some way by the incumbent U.S. Attorneys or where there were management issues or a failure to vigorously pursue the administration's prosecution priorities.

I do not recall with any specificity what he said to me that day, but it was -- in my mind, the issue was weak performers, problem U.S. Attorneys.

Q Got it.

And when you refer to prosecution priorities, was that discussed a little more explicitly between the two of you at that time, or was that just a general term that he used?

A I think that was a term he used. But I think that there was a frame of reference there for both of us.

The Department has specific priorities. In fact, Mr. Sampson had a weekly priorities coordination meeting where we discussed -- where he discussed those priorities, where we discussed things that were happening in those areas within the Department and the Attorney General's speaking schedule and how it fit in with the Department.

So there was a frame of reference for the concept of priorities. And it meant to me the public priorities of the Department of Justice, obviously, terrorism is number one and then there are about five others.

Q Can you recall what the other five were?

A Public corruption/corporate fraud is one. The war on drugs is another, with methamphetamine being the number one priority in that area. And you are putting me on the spot here which -- this is not something I have thought through lately.

Let's see. Immigration is a priority and protecting our children, which ultimately became the Project Safe Childhood; and then there is the violent crime priority, which is a combination of Project Safe Neighborhoods, the President's antigun initiative which he began in 2001, as I understand it, and gangs, fighting gangs, part of that priority.

So I guess if I had to put it out, I would say terrorism, violent crime, drugs, corporate fraud and public corruption being one, and immigration.

Was there something I missed in what I have already said? I think that is --

Q I think you got them all, but I confess, I wasn't taking notes as quickly as you were talking.

A I understand.

As I sit here right now, without the chart in front of me, those are the priorities.

Q I think that is fine. I think that is fine.

When Mr. Sampson had this conversation with you, did he indicate who else was involved in this? By "this," I mean the project of identifying U.S. Attorneys for possible termination.

A He did not.

Q Did you subsequently learn of other people that were involved in this, or was it just you and he that worked on this?

A Well, obviously I had a discussion with the Deputy Attorney General about it. So if you -- I guess I am not sure what you mean by "involved."

Q Well, I will get -- I do want to get back to the discussion about the Deputy in a minute, but by "involved" I guess what I am talking about is the process of compiling a list, if you will.

A I don't believe he told me who else was involved. I either assumed, or at some point became aware, that Monica Goodling was involved in a sense. She had EOUSA as part of her portfolio and was the White House liaison. I don't know if there were -- I got the sense that Kyle was consulting a number of people, but I don't know that.

Q Okay.

Now, you mentioned that you had a conversation with Mr. McNulty about this, I assume, early on, when Mr. Sampson first approached you.

A Yes. I would say that typically it is my responsibility to provide important information to the Deputy Attorney General. That is one of my functions, and as the direct supervisor of the United States

Attorneys, it would certainly be something that I would tell him.

My recollection is that I did tell him. I can't tell you when, I can't tell you precisely what I told him. And I am as near certain as I can be that I did, because when I first went over the list with him in October, the first list that came my way, he said, Are we really doing this? I said, I guess so.

Something that -- something that you have to understand is that we were deferential to the 5th floor regarding personnel issues.

Q By the 5th floor, you mean?

A The AG's office. We cannot [hire|higher] people in the Deputy Attorney General's Office, our staff, without the permission of the AG's office. So with respect to personnel matters, both in ODAG and generally, we paid a great deal of deference to the Attorney General's Office.

Q So at least up until October, when you presented Mr. McNulty the first list, basically he was receiving information from you about the project rather than contributing his own information about who should or shouldn't be on the list?

A I need to correct one premise just so that we are absolutely clear.

I didn't present the list to him. My recollection is that I read that e-mail on a BlackBerry and that I was with the Deputy Attorney General, and I read him the names that were on that e-mail.

Q Got it.

A So I didn't take a piece of paper to him and say, Here is the list.

I just want to be perfectly clear about that.

Q No. I appreciate that. I think we will get into that e-mail a little bit later.

But with that correction, at least up until the point that you read him those names, was it -- did he have any involvement that you are aware of in putting together that list of names that you read him, up until that point?

A I am not aware of any involvement. That is not to say Kyle and the Deputy Attorney General did not have a conversation. I don't know about, but I am not aware of any.

Q Right.

What was his reaction to -- actually, let us wait on that. Wait until we get to the documents to ask about specifics of names.

Describe to us more generally, then, beginning with the time that Mr. Sampson first approached you until

the -- until December 7th, the day that a number of them were called, how this process worked.

A December 7th. I am not sure that I can answer that question.

Q Well, just describe to us as best you can remember, everything you did, saw, learned between then and December 7th relating to the termination of the U.S. Attorneys.

A When Kyle asked me to give him his thoughts, give him a draft list, I said, Sure. I didn't actually do it. I was very busy. And I just -- it just didn't seem like a priority in terms of the other things that I was doing; and ultimately he sent me that e-mail. I remember thinking he might have been a little ticked that I hadn't gotten around to giving him sort of my list at that point.

And from that point on, I think there were -- I would say infrequent and intermittent discussions about particular people on the list between individual people. I don't recall a meeting between the October 17th -- I think it was October 17th -- e-mail and November 27th, when there was a meeting.

I don't recall any particular meeting. But I do recall discussions regarding -- it mainly centered on

whether people should be added to the list or taken off of the original list that Kyle prepared.

Q And with whom were those discussions?

A I recall having discussions with the Deputy Attorney General about a couple of the names on the list. I recall having discussions with him about adding one person to the list. I certainly communicated with Kyle regarding those discussions.

Q And anybody else that you participated in these discussions with during that period up until November 27th, which I think was a good place to -- a good time mark?

A As I sit here today, I don't recall anything other than perhaps David Margolis with respect to Kevin Ryan.

Q Um-hmm.

A There was a conversation -- there was a conversation that occurred in early November regarding Margaret Chiara, and I know --

Q For the record, that is spelled C-h-i-a-r-a.

A And that conversation would have involved Kyle, Monica Goodling, the Deputy Attorney General, me, and I believe, possibly, Will Moschella, although I am not clear on that.

And the purpose of that conversation was to discuss an offer that she had received to become the Interim Dean of the Michigan State Law School and how -- and what we should do in response to that.

I definitely had conversations with Dave Margolis, not one conversation, but -- not that conversation, but a different conversation which was, what is the Department's policy on leaves of absence for Presidentially appointed and Senate confirmed individuals.

But I believe the conversation about what to do with respect to that was the -- the ones I am sure of were the Deputy Attorney General, Monica, Kyle, and me.

Q Is there anybody else you can think of during that period up until November 27th, that you were involved in discussions with on this topic?

A No. No. I mainly kept the Deputy Attorney General informed of what I knew. And I responded to inquiries from Kyle, and then had discussions about specific people about whether they should go on or off the list.

Q During that period up until November 27th, did you become aware directly or indirectly of discussions that other people were having either inside Justice, or outside, about this topic?

A I need to -- can I go back to your last question, first, as I am sort of thinking this through?

Q Sure.

A There was a point in time where I was asked to -- I was asked to check with others to see if there were individuals that we had missed or there were problems that we weren't aware of. So I did do that.

Q And who did you wind up consulting with?

A And by and large the conversations were not about, "hey, we are going to fire a bunch of U.S. Attorneys; is there anyone you want added to the list?"

These -- my question was -- my question was, are there any problems with any -- a particular U.S. Attorney or issues regarding a particular U.S. attorney. I just was doing more of a fact-finding mission as opposed to -- as opposed to checking to see if anyone wanted to add anybody to this list.

I didn't feel like -- my sense from Kyle was this was a fairly closely held process, and I didn't feel like it was something that I was supposed to discuss broadly.

I assumed, and I don't know why I assumed this, as I sit here right now; I can't recall a specific conversation, but I was under the impression that Kyle was consulting with other people in the Department regarding U.S. Attorneys.

Q What other people did you assume he was consulting with?

A Kyle has been at Main Justice for many, many years, 4 years or something like that. And I assume he consulted with a broad [range|rage] of people. I don't know who precisely he would have talked to.

Q Okay. But again based on what your assumption was, who were the people that would be in there? Would that include the Attorney General?

A I would have to assume that, like me, Kyle Sampson was keeping the Attorney General apprised; that is the role of the Chief of Staff.

I certainly assumed that, but I have no knowledge of any conversation.

Q I am going back to your own mental processes then. Are there other people, other than the Attorney General, that you assumed that he would have been consulting?

A I imagine that he was -- I really can't say. I am a little bit -- my sense is that Kyle could have consulted with any of the Assistant Attorney Generals. He could have consulted with any of the appointees in the Department to see if there were -- if there were issues.

But that was my sense. He didn't tell me. I consulted with other people. My sense, though, was he

was consulting with others on this issue. That was my sense.

Q Okay. Did you get any sense or indication that he was consulting with people outside of Justice, like the White House, for example?

A I would -- I did not have that sense. I knew that any -- I knew that he would have to consult with the White House regarding any decision that was going to be made. These were Presidential appointees. I knew that from my perspective and, of course, now I have seen a lot more e-mails, as you all have, than I saw back then; but from my perspective, I viewed his communication with the White House as asking permission to go ahead with this plan. And that is what I thought was happening; and it had made perfect sense to me because we couldn't ask a presidentially appointed/Senate confirmed attorney to resign without the permission of somebody at the White House. I don't know who.

I mean, that is -- it is not my job, but I assumed that that was -- something that would have had to have happened.

Q And you don't know to what extent conversations went one way or the other, whether people at the White House might have been responding to? Who might should have been added or subtracted from the list?

A I don't have any knowledge about those conversations.

Q One of the things that you alluded to. You said one of the things you were doing was to talk to other people to find other U.S. Attorneys who were problems. Who are those people that you consulted with?

A I took this as a fairly narrow mandate, and I checked with other people in the Office of the Deputy General. I talked with people in the Criminal Division, I talked with some one in the Tax Division. These would have been -- there is a variety of people that I engaged in conversations with.

Q Can you recall who they were?

A I don't really recall with any specificity who I talked to.

I mean, I did what I was asked to do. I reported back, and that was it; it didn't result in anybody being added to the list.

Q Was Mr. Moschella a consultant on this when he came on board in October?

A I believe he was aware of it, but I am not sure he was consulted. He had just started as Principal Associate Deputy Attorney General. He had been the Assistant Attorney General for the Office of Legislative Affairs, and my sense was that he really didn't have

anything that he wanted to add to that conversation because he wasn't working directly with U.S. Attorneys in his prior position.

And he just started in the Deputy Attorney General's Office in October, so I don't recall him adding to the conversation. He was certainly aware of it when he became PADAG at some point. At some point after he became PADAG, he would have become aware of it.

Q What about Mr. Battle, head of EOUSA? Was he consulted in this process?

A Not by me.

I don't know the answer to that question as far as anybody else.

Q But -- you don't know whether Mr. Sampson or someone else did, but you did not consult Mr. Battle with anybody at EOUSA?

A Right.

Q Even though they have a lot of responsibilities relating to evaluations of U.S. Attorneys?

A If you want to talk about evaluations, I will be happy to talk about it. But I did not see that as my responsibility to consult with EOUSA. Monica Goodling has direct contact with folks in EOUSA.

Q So she might have?

A Kyle Sampson can pick up the phone and talk to Michael Battle. I was never assigned to talk to EOUSA about these issues.

Q Let me now take you forward in the period beginning with that November 27th meeting that you referred to; and this was -- by now, it has been discussed somewhat in the public. This was a meeting that was the Attorney General -- which the Attorney General attended in relation to the termination plan?

A That is my understanding.

Q As I understand, you didn't wind up going to that meeting because you had a personal issue; is that correct?

A Correct.

Q What were you told about what happened at that meeting and by whom?

A Well, I knew in advance that the purpose of the meeting was to approve the plan, I think what was either the final, or the precursor to the final iteration of that document, which I am sure you have seen.

Q And eventually I'll find.

A That indicates the steps. But that was my understanding of the purpose of the meeting.

When I came back to the Department later that morning, I asked somebody -- I can't remember whether it

was the Deputy Attorney General or Will Moschella -- what the outcome of the meeting was; and they told me the plan was approved.

Q As it was going in, essentially?

Let me ask that a different way. Were there any changes made in the plan, to your knowledge, at that November 27th meeting?

A I don't know. But I would say that this was a quick conversation in passing where we did not get into details.

There may have been changes; I just don't know. But, in essence, a plan was approved. I don't know if it was the plan going in or if it was something else, but we didn't have that detailed a conversation about it.

Q And when was, to your knowledge -- you may not know. When was Mr. Battle told that he was going to be the one who was going to have to make the phone calls to terminate the U.S. Attorneys?

A I don't know.

Q In any event, it wasn't you?

A No, sir.

Q And we will go over, and I do have some of the documents, and we will go over them in just a minute in terms of what your role was there. It turns out my documents were not in the order I thought they were in.

And it is now 5 to 12:00. It occurs to me we might think about taking a slightly early lunch break, if that makes sense, and that will allow me to organize these, and we can come back.

Does that make sense?

[Whereupon, the interview was recessed, to reconvene at 1:00 p.m. the same day.]

RPTS BINGHAM

DCMN MAGMER

[1:04 p.m.]

Mr. Mincberg. Okay, we will go back on the record.

Obviously Mr. Elston, all those cautions and things we talked about at the beginning still apply now.

Mr. Elston. Certainly.

BY MR. MINCBERG:

Q I assume, by the way, that you chatted some with your Counsel and Justice Department Counsel while we are at lunch. Did you talk with anybody else about your testimony or your interview today?

A There was a reporter that came up and tried to talk to me, but I didn't talk to him about the testimony.

Q And how about our friends here on the Republican side?

A Not with -- not about any substance.

Mr. Mincberg. I want to actually start out with some documents this afternoon. What -- the first one actually is not the e-mail, which we will get to in a minute, but another one that may help refresh your recollection about one issue. This will be Document Number 3.

I have got copies for your Counsel and for -- and I have two more if Senate people would like to share them. I will leave that to you guys.

[Elston Document No. 3

Was marked for identification.]

BY MR. MINCBERG:

Q And this is an e-mail from you to Kyle Sampson.

A No, it is not.

Mr. McLaughlin. This is from Kyle Sampson to Bill Mercer.

Mr. Mincberg. Wait a minute. Let's go off the record for a minute.

[Discussion off the record.]

BY MR. MINCBERG:

Q Exhibit or Document 3 is an e-mail from Kyle Sampson to Bill Mercer entitled "Heads up, and it is dated December 5, 2006.

Do you recall whether you happen to have seen this one before? This document?

A I have tried to review documents since they were produced by the Department, and I may have seen this document. It is not an e-mail that I received in December of 2006.

Q Right. What I want to direct your attention -- and in this document essentially Mr. Sampson is trying to

give Mr. Mercer a heads up to the impending launch of the termination plan, is that correct?

A My understanding was that Kyle and others believed that Bill Mercer might be someone that the U.S. attorneys who were asked to resign might call. And I believe that -- I was under the impression that Kyle was going to give them, as this says, a heads up.

Q What I want to ask you about in particular is the first sentence where Mr. Sampson says, "Administration is determined to ask some underperforming USAs to move on, paren, you'll remember I beat back a much broader, like across the board, plan that WHCO were pushing after 2004," close paren. Do you recall that phrase?

A I do.

Q And generally we assume WHCO refers to White House Counsel?

A That would be my assumption in that sentence.

Q Right. Looking at that phrase, do you recall any discussions at all with Mr. Mercer, with Mr. Sampson, with anybody else about a broader plan to ask U.S. Attorneys to leave after the 2004 election?

A It would be helpful to me if you could restrict that in some date form. I have had a conversation with Bill Mercer regarding this after March 8th of this year.

But I don't recall any conversation with him or with anybody else about this prior to March 8th of this year.

Q Okay. So prior to that conversation with Mr. Mercer, you don't recall any conversations -- let's put it back in the 2006 time frame -- about what Mr. Sampson refers to as a broader plan that White House Counsel is pushing with respect to termination of U.S. Attorneys?

A I do not recall any such conversation.

Mr. Mincberg. Now I think we are pretty much done with Number 3. And why don't I just take that back from you and give it to the reporter so she can have it, and someone has helpfully put number 3 on it already for her.

I want to ask you now to look at what I think is a copy, at least in part, of one of the e-mails that you got before, you got from Mr. Sampson; and this will be number 4 in our list.

[Elston Document No. 4

Was marked for identification.]

Mr. Mincberg. It starts out at the top, just for identification purposes, as an e-mail from you to Kyle Sampson re U.S -- United States Attorneys, dated October 17th, 2006.

While you are taking a look at that, just for the record, these are Bates numbers DAG 546 to 547.

Mr. Hunt. Do you have a copy for me?

Mr. Mincberg. Yes, here is one more.

Mr. McLaughlin. Do you have a copy for me?

Mr. Mincberg. I thought I handed you one. I apologize.

BY MR. MINCBERG:

Q Now let's start on this one, with the second message in the chain listed as an e-mail from Mr. Sampson to you of October 17th that starts, "See" below for my list of U.S. Attorneys which we should continue replacing. Does it match up with yours?"

Is this the e-mail you referred to earlier today that you recall looking at your BlackBerry from Mr. Sampson indicating the names of U.S. Attorneys that were on his list to terminate?

A It is.

Q Now, the list itself is in what appears to be the third message on this chain, right below the sentence I just read. That is an e-mail -- or actually should be the fourth -- that is an e-mail from Kyle Sampson to Harriet Miers re United States attorneys. Do you see that?

A I do.

Q So, in order to get to the list of the U.S. Attorneys, you would have needed to scroll down through the e-mails back and forth between Mr. Sampson and Harriet Miers at the White House, is that correct?

A Yes, that is what Kyle asked me to do. "See below for my list of U.S. Attorneys."

Q So, having received this e-mail, were you then not aware of the fact that there was communication as early as September, at least between Mr. Sampson and the White House, about the list of U.S. Attorneys to terminate?

A Well, as I said before, I was aware that the Department would need the White House's permission to ask U.S. Attorneys to resign. And my view of this was that, for example, if -- and I can't tell you because I don't have personal knowledge about where this plan started. But, from my perspective, my seat in the Department, it looked to me as though this was started as an effort within the Department of Justice; and it would have made no sense to me that we would have gone very far without at least getting some signal from the White House, Office of Presidential Personnel, White House Counsel, somebody, that they were amenable to doing something like this.

So, to me, this didn't seem out of the ordinary, that there would be communication about this before it got very far.

Q So then you were aware, at least as of the time you got this e-mail on October 17th, that there was some form of communication with the White House about the plan to terminate U.S. Attorneys, is that correct?

A Absolutely. I received this e-mail.

Q Okay. And from what you testified this morning, this is the first actual list of perspective U.S. Attorneys to be terminated that you saw?

A This is the first list of U.S. Attorneys that were going to be asked to -- that we were considering asking to resign that I recall.

Q Okay. Now, I would like to move down to the e-mail from Mr. Sampson to Ms. Miers of September 1st that actually contains the list.

A Mm-hmm.

Q Do you see where I am going?

A Yes.

Q You have several categories, several of which are blank: U.S. Attorneys who will be nominated for other things, U.S. Attorneys who rumor has it will be leaving in coming months. I take it there were names in

there, but, at least for the moment, they have been redacted, is that your understanding?

A I don't remember if it was names or districts, something that would indicate which district or which U.S. Attorney, that is my recollection.

Q Okay. Now in the category underneath U.S. Attorneys who -- well, I am sorry. Let me go back for a minute. Under III, U.S. Attorneys who rumor has it will be leaving in coming months, my interpretation of that is we are talking about there are people who are preparing totally voluntarily to depart?

A Correct.

Q Is that your understanding?

A That is my understanding of that category III, yes.

Q Now then, IV says, U.S. Attorneys in the process of being pushed out.

A Mm-hmm.

Q Obviously, that suggests something that was not entirely voluntary. Is that a correct characterization?

A It makes sense to me, but I don't know what precisely Kyle meant when he wrote that.

Q But certainly you interpreted it that way?

A That is how I would interpret that.

Q And the person listed there was Bud Cummins?

A Yes.

Q And then the next category V is U.S. Attorneys we should now consider pushing out, and that --

A Can I say one thing?

Q Sure.

A So I don't a create a misimpression for you, I didn't focus on category IV with this e-mail. That is not what I was asked to look at.

Q Right.

A And with respect to Bud Cummins, as I remember what I knew about Bud Cummins and his situation, which in my mind still today is totally different from the other seven, I believe that most of 2006 I was under the impression that Bud had decided to leave by the end of the year anyway.

Q That is not what this e-mail suggests, though, is it?

A It is not what this e-mail suggests, and all I can tell you is that I didn't focus on that, and I was later by Bud himself disabused of the impression that I had that he was leaving on his own. And I may well have thought what this meant is he decided to leave but he wasn't leaving fast enough. I remember some concern that he was taking his time with the departure.

Q Do you recall from whom you got the impression that he was leaving voluntarily?

A I recall conversation, the same one where I had the impression that he was taking his time, was of Monica Goodling where -- that is where my impression was formed that he was planning to leave anyway and -- but he just wasn't leaving quickly.

Q And when was it that you were disabused of this impression that you had?

A I was totally disabused of it when Bud told me that it was his strategy to let people know that he was planning to leave by the end of the year anyway but only after he was asked to resign. That was something he told me in -- I believe in January or February.

Q Of 2007?

A Of 2007.

Q And were you partially disabused before then?

A I would say that I had questions before then, yes.

Q Okay. Well, I will want to get back to this subject a little bit later on, but let's stay more or less with this time frame right now.

Now focusing then on V, U.S. Attorneys we should consider pushing out, you see there a list that appears to have several names that are redacted?

A Mm-hmm.

Q Is that your understanding?

A Yes. It looks like -- although it is hard to tell, it looks like there might be as many as three that are redacted.

Q Mm-hmm, mm-hmm. Again, I am not going to ask you right now, pursuant to our understanding with Justice, anything specific about those names, but, again, as we have made clear, we do believe we are entitled to that information, and we may need to come back to you to ask you a little bit about that -- some of those people.

A Certainly.

Q But the ones that are on the list include Mr. Charlton, Ms. Lam, Ms. Chiara, Mr. Bogden and Mr. McKay, is that correct?

A That is what the document says.

Q Obviously, the names that have been redacted were on the list but, in fact, were not pushed out ultimately?

A That is correct. And as I sit here today I know of two people who are not on the list, who were on this e-mail who were not on the list, and I know in general the reasons where why they were not on the list, but I --

Q You mean why they were not ultimately pushed out?

A Yes, actually, now I think I know why all -- well, I know why two of them were. Because the Deputy Attorney General's Office was directly involved in that. I am not sure about the third.

Q I would be more than willing for you to talk about it now, but I think the Department of Justice would rather defer on that until we actually get the names, and I am willing to do that as long as it is understood that Mr. Elston will at least come back for that.

A If I could -- and they will tell me if I can't -- but if I could, I would like to at least give you a general sense of why those two came off the list.

Mr. Hunt. Provided we don't talk about specific individual names.

Mr. Mincberg. Not today.

Mr. Hunt. Or anything that would tend to reveal specific individual's names for the reasons you well know during the course of the discussions.

Mr. Mincberg. Again, I am fine with that for now -- as long as it is understood that that is today. Because we do believe we will want to get into that in more detail at some other point, but it certainly can wait until Mr. Elston's leave is over.

Mr. Elston. You may or may not want to do that, and I will do my best to tell you the reasons. One of the

names on the list -- at some point between October 17th when I received this e-mail and a later list, I became aware of extenuating family circumstances relating to that U.S. Attorney that in many ways explained the concerns -- at least in my mind explained the concerns that I had regarding that particular U.S. Attorney; and I thought that it was appropriate to recommend to the Deputy Attorney General that name be removed so we could work with that U.S. Attorney to try to overcome the issues, based on what I had learned regarding those circumstances.

The Deputy Attorney General agreed with me. I don't know who -- which of us had a conversation with Kyle. It might have been me, it might have been the Deputy Attorney General himself, but that is my understanding of why that name came off the list.

With respect to the second -- and I think there was an e-mail that gives you some window into this. We had actually visited the US Attorney's Office within several months of this process and got a very good sense of that office, that it was running reasonably well. In addition, however, and I think this was the principal reason why the second name came off the list, there was a rumor related to something that would be much more in the misconduct area, as opposed to the issues that resulted

in most of these people being asked to resign; and that misconduct issue was of sufficient concern that, ultimately, there was an internal investigation, which I believe is still ongoing but nearing completion. I think it was wise, and I think this was either my recommendation or Mr. Margolis' recommendation. I think we both just agreed that this was the right thing to do, was to allow that internal investigation to run its course, as opposed to taking action at that time.

BY MR. MINCBERG:

Q And what about the third one?

A The third one I was not directly involved in, but I have a sense that a decision was made that it was unlikely that -- I am not sure I can discuss that one without getting into something that would identify it, so --

Q Why don't we -- again, I am perfectly willing for now to leave that, realizing we are going to want to come back to it at some point.

A And I was not directly involved in that. I just have a sense of what other people may have been thinking, so I am not sure I can give you with any certainty the reasons why that name came off the list.

Q Mm-hmm. Now, underneath the list, there is a segment of the e-mail that Mr. Sampson sent to Ms. Miers

about the execution of the plan where he says, among other things, that he recommends utilizing the new statutory provisions that authorize the Attorney General to make U.S. Attorney appointments in which he says that they can give, quote, far less deference to home-State Senators, end quote, for various reasons. Do you see that segment?

A I do.

Q Do you recall looking at the time or at a later time?

A I believe that the first time I read this was March 8th, 2007. I don't believe I read it back in October. And I am reasonably certain about that; and, if I may, I would like to explain why I am reasonably certain about that.

First of all, as you can see from the e-mail, I was asked to comment on the list. I looked at the list. I commented on the list. I wasn't asked to look at any other part of the e-mail. I was on my BlackBerry, and BlackBerry users know you scroll down to that.

But, more importantly, on March 8, when I reviewed -- started reviewing my e-mails regarding U.S. Attorney issues, I immediately recognized the importance of this paragraph. And had I read it in October, I think

I would have immediately brought it to the attention of the Deputy Attorney General, and here is why.

There was a -- I don't want to characterize it as a fight or dispute, but there was a running debate between the Deputy Attorney General and the Attorney General's Office regarding interim appointments of U.S. Attorneys in general. And to sort of state it as simply as I can, the Attorney General's Office was of the view that Interim U.S. Attorney appointments were an opportunity to credential political appointees in the Department, to send them out there for a short period of time to give them experience.

The Deputy Attorney General was not enamored of that idea. His view was that an interim should be from the Office. Either the First Assistant should succeed as the Acting U.S. Attorney or some other person in the Office should be the Interim United States Attorney unless -- unless there was a specific reason that warranted somebody coming from Washington out to the district, a problem or something like that. And I will give you a couple of examples. I will give you one example because it relates to this.

Of the seven U.S. Attorneys that were asked to resign on December 7th, I believe the only interim who was sent out from Washington, was Scott Schools, who was

the Interim United States Attorney in San Francisco. And San Francisco, as you know from the documents and everything else, was much more like a typical situation where there was a big problem; and it was concluded the U.S. Attorney had to go in order to solve that problem.

So in terms of internal management of that office -- and Scott Schools had been an Interim United States Attorney. He had been General Counsel of the Executive Office of U.S. Attorneys, and it was determined that that office was in sufficient disarray that it was appropriate to have somebody from Washington in there. As I understand it, that is the tradition in the Department of Justice, that if there is a problem -- and I can think only one other time since I have been around Main Justice that -- at least one other time, where this has been the case. It was send someone out, fresh start, have the interim period be a cooling off period until the President nominates and the Senate confirms a successor.

So that was the Deputy Attorney General's view. That was consistent with the tradition of the Department of Justice.

Again this was kind of a running discussion. Because every time a vacancy occurred, the question arises, who is going to be the Interim or Acting U.S. Attorney and --

Q So your point is it would have caught your attention because this was an issue that you and the Attorney General's Office were sometimes in disagreement about?

A Correct. I knew this was something that was very important on the Deputy Attorney General, and that is why I am reasonably certain that in October I didn't read this. As you know, every other iteration of the plan that came out after this, at least as far as I have seen, does not include this but specifically contemplates nominating and seeking Senate confirmation of the successor.

Q And when you say that there was a disagreement with the Attorney General's Office, you mean there, obviously, Mr. Sampson. Would that also include the Attorney General himself or were there other people in the Office that were in that camp, if you will?

A It is hard for me to answer that question, because Kyle Sampson and Monica Goodling I viewed them as speaking for the Attorney General.

Q For the Attorney General. Okay.

A So it didn't really matter to me which one was talking to me. I treated what they were telling me as what the Office of the Attorney General believed or thought.

Q And those were the two sources of the conflicting policy you are referring to where they would have in mind putting people from outside the districts in as interim U.S. Attorneys?

A I would say that that was mostly -- if I had to identify a particular person, I would say that that was something that Monica Goodling I know was directly involved in because she was the White House liaison. She had Executive Office for U.S. Attorneys in her portfolio in the Attorney General's Office, and when the time would come to discuss an interim to ask to consult with the Deputy Attorney General's Office she was typically the person to do that.

Q Person to do it. And, for example, we will discuss later the obvious example on our situation would be in Arkansas where she was involved in having Mr. Griffin coming in.

A My knowledge of that is less than the other seven, so I'm not sure.

Q There is a few documents. We will get to them. I promise we will get to them.

Now at the very top of Document 4, you say that you may have made some additions when you got back to your desk. I think we might have found the document that

refers to that, but let me point -- pull it out, just to be sure.

A Sure.

Mr. Mincberg. This will be -- why don't I -- I don't think we will need that again, so why don't I get you to give that to the reporter so she can hang on to the official copies.

And I will give you -- we will mark as Document 5, which is an e-mail from you to Mr. Sampson, actually dated November 1st, a few days after that, saying "Other Possibilities."

[Elston Document No. 5

Was marked for identification.]

Mr. Elston. It is about 2 weeks after the e-mail from Mr. Sampson.

BY MR. MINCBERG:

Q This is the only one I can find. Is this the only e-mail in that time period where you were suggesting other possibilities? Or did we miss one that happened earlier?

A I don't believe that I responded to Kyle's question by e-mail. I believe that I talked to him after.

Q Ah.

A This e-mail is not connected to the October 17th e-mail.

Q Got it.

A This e-mail is connected to what I previously described as my assignment to check with other people to see if there were any issues or problems that we were missing, and none of the people that came up in that exercise ultimately ended up on the list.

Q Okay. So then let's dispose of this document before I go back to your conversation. But there were other names then on Document 5 which have been redacted, but --

A Yes.

Q But there were other possibilities for pushing out, but none of these people in fact wound up getting pushed out?

A Yes. After I sent this e-mail, I don't remember where I was or what I was doing, but I was not around Kyle, for whatever reason. I sent him this to let him know that I was done doing what he asked me to do, and then we had a face-to-face conversation about this. And I explained, you know, what the issues were with the people that were on this list; and I recommended that none of them be added because I didn't think any of the

issues were that serious or sufficient. He agreed, and that was as far as it went.

Q Okay. Well, again, we will reserve anything specific for the moment, pursuant to our agreement with Justice.

But now let me go backward to what you referred to a minute ago, which was your oral response to Document Number 4 where you suggested -- you said orally, additional names. Mr. Sampson?

A Well, I think you are mischaracterizing what I said. I said that, after I got back to my desk, I did have a further conversation with Kyle.

Q Right.

A That is all I said.

Q Well, then let me make clear, did you in that further conversation suggest any additional names to be added to the list?

A My recollection is that I did not.

Q Okay.

A When I got back to my desk and thought about it --

Q You really didn't have anybody else to add?

A I really didn't have anybody else to add. I think that is correct.

Q And, again, just so we are clear, several people who wound up getting pushed out were actually on that list, particularly Mr. Iglesias and Mr. Ryan?

A Correct.

Q So that would have been, as of October 17th, those two were not on the list?

A That is what the document says.

Mr. Mincberg. Now let me ask you about another e-mail in this approximate time frame, also related to the subject of the who is and isn't on the list; and this will be Document Number 6. And it is -- I am sorry. I forgot what I promised to do before. This is Bates numbers 556 -- DAG 556 to 557, and it is headed by an e-mail from you to Mr. Sampson about the U.S. Attorney replacement plan.

[Elston Document No. 6

Was marked for identification.]

Mr. Elston. Yes. Kyle sent this e-mail to me. It looks like November 7th. And this is the e-mail to which I referred earlier regarding one of the U.S. Attorneys who ultimately ended up not being on the list who was on the list that I received on October 17th. My response relates to that.

BY MR. MINCBERG:

Q Right, and I'm going to get to your response in a minute. Actually, I want to work from the bottom up on this, if I can. I want to start with Mr. Sampson's e-mail to you on November 7th where he gives you, by e-mail, the plan for replacing U.S. Attorneys. Now there is a slightly different list here than what we looked at before. On this list of November 7th, Mr. Iglesias is added as one of the U.S. Attorneys to be replaced, is that correct?

A Yes.

Q And, as far as you know, was this the first time he was on such a list?

A You know, I have thought about this, obviously, since the time; and without looking at the documents my recollection was that he was on the first list, the October 17th list, but, obviously, he wasn't. As far as I can tell from the document, this is the first time I saw his name on a list. But if you were to ask me without looking, you know, a couple of weeks ago, where I hadn't looked at any documents, I would say, no, I think David was on the first list. But it does appear from the document this is the first time he is on a list.

Q Fair enough. I am not focusing too much on the individual attorneys right now. I am still going through the general process at this point. And, obviously, I do

now want to go now to that e-mail of yours to which you refer, where you are suggesting that one of the U.S. Attorneys who are on the list, whose name is redacted for the moment, not be on the list?

A Mm-hmm. Yes, that's right.

Q And without getting to the individual's name, you say that Mr. McNulty asked that this U.S. Attorney not be on the list because, quote, he does seem to be running things well, paren, if somewhat independent of DOJ, end quote.

Now what did you mean "if somewhat independent of DOJ"?

A Well, independence is a word that has taken on great meaning in this matter, as you know; and I guess I would like to start by telling you my theory of independence and U.S. Attorneys. Would that be all right?

Q It is okay with me. I do want to get to what you meant at the time by it, but feel free.

A It will explain what I meant at the time.

Q Okay.

A United States Attorneys must be independent in exercising their charging decisions as United States Attorneys with respect to a specific case. They -- when a case is brought to them, Assistant United States

Attorneys and United States Attorneys must exercise their independent judgment and decide whether charges are warranted under -- applying all the policies of the Department of Justice that relate to that. And there are many.

I was Assistant United States Attorney for -- actively, for 5 and a half years; and when I made a charging decision, it was based on the policies of the Department of Justice, the facts and the law. And that is an expectation that we have for the Assistant United States Attorney and United States Attorney. That independence is appropriate.

Q Mm-hmm. Mm-hmm.

A On the other hand, United States Attorneys are not independent from the Department of Justice in everything. I think that that is one of the difficulties with the concept of independence, is that the United States Attorney reports to the Attorney General. It is a political appointee, serves at the pleasure of the President, is obligated to pursue the priority, priorities set forth by the administration.

And we also have high expectations for United States Attorneys in terms of their communication with the Department of Justice. One of the most important things that a U.S. Attorney must do is keep the Department of

Justice informed and coordinate with the Department of Justice on a wide variety of issues.

We expect our United States Attorneys to manage by the Department's priorities. We expect them to communicate with us regarding issues in their district. We expect them to communicate with us regarding significant cases. We expect them to communicate with us regarding contacts with legislators. There are a wide variety of expectations that we have of the United States Attorneys.

They don't swear their oath of office and then go off and do whatever they want to without ever checking back into Main Justice. That is not what I mean by independence. That is what I meant in this e-mail, though.

This particular United States Attorney was not that communicative, was not that connected to Main Justice. That is what I meant, that type of independence from DOJ which I don't think is appropriate and in our system of government.

Q I hear you. But what you were saying was, even though this U.S. Attorney was somewhat independent in that sense, you were not recommending that person's termination, correct?

A That is correct, at that time.

Q Right.

A As I said, we, you know, had actually met most of the Assistant United States Attorneys, got a very good sense of, you know, of that being an office that was running on a day-to-day basis relatively well. And I think --

But I also think that the second issue was a part of my recommendation as well, which is that there was a misconduct issue --

Q Mm-hmm.

A -- potential misconduct issue that I thought needed to be explored.

Mr. Minberg. Good. All right. I am going to ask you to hang on to this document for a minute, because I am going to ask you to compare it in at least one respect with the next iteration of the plan that I am going to ask you to take a look at right now.

This will be Number 7. Here is yours, and here is a couple more. And this again for the record is DAG 571 to 575, which is an e-mail from Mr. Sampson to Mr. McNulty with a copy to you and others on U.S.A. replacement plan.

[Elston Document No. 7

Was marked for identification.]

Mr. Elston. Correct.

BY MR. MINCBERG:

Q I take it you recall receiving this e-mail?

A You know, funny you should ask.

Q Okay.

A I did receive this e-mail. Do I recall it? I have to say specifically I don't recall. I don't recall receiving any particular e-mail. I got at this time probably somewhere in the range of 150 to 200 e-mails a day. I had at times as many as 300 or 400 unread e-mails in my e-box. And I was going to save this for the end, but I will thank you now. Because, as a result of all this, I hardly ever get any e-mails any more. And so --

Q If you can do that for me, I would be very appreciative.

A At this time, I was getting a lot of e-mail. And remembering a specific e-mail, getting it, when I read it, I can't do that. But I simply ultimately remember looking at the attached documents and all that.

Q Before I get to the potential document, I just want to ask you about one small aspect of the -- I think it is the third e-mail down, the one from Mr. Sampson to Mr. Kelley in the White House Counsel's Office.

A Would that be the third one?

Q Right, starts with "great".

A Yes, I see it.

Q And the suggestion by Mr. Sampson is they would like to execute this on Thursday, December 7th, paren, 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 disbursed, to reduce chatter, close paren.

A Yes.

Q What was meant by "reducing chatter"?

A My recollection of that was that the Department's intention was to tell these United States Attorneys individually that their resignations were being requested. And the hope was -- it does seem naive now, I recognize, but the hope was that each individual U.S. Attorney would make their own arrangements, announce their resignations and go on to another job.

This is fairly typical of a personnel situation with a Presidential appointee, allow them to resign without comment from the Department as to the reasons. I have been involved in a couple of other things not relating to U.S. Attorneys, and that is typically how it works.

Q So, essentially, by waiting until they get home, you would be reducing chatter in part among themselves about what was happening?

A Right. Exactly. And I think there was a sense that there was a risk, and I am not sure who decided.

In hindsight, this -- as I have said before, this was a stupid plan, to ask seven U.S. Attorneys to resign on the same day. I don't know what else to say about that, except it was not a good plan.

But the hope was -- the idea was that there wouldn't be a large discussion among the U.S. Attorney's community because we thought it would be bad for morale. People would be wondering, you know, where the next phone call was going to land or something like that. And I think for those reasons we wanted to try to allow these U.S. Attorneys to do their own thing without a broad discussion in the U.S. Attorney's community about the Department asking several people to resign. That is the best I can explain that. I do remember conversations along those lines.

Q Mm-hmm.

Now I am going to ask you to turn to Page DAG 573 in Exhibit 7, and I am going to be asking you to compare it in a few ways with Exhibit Document 6. The first page there which is DAG 556, so let me give you a moment to get both of those in front of you.

A I have them in front of me.

Q Terrific. Starting with DAG 573, on this page we have what appears to be the final list of the U.S. Attorneys who were asked to leave, is that correct?

A That is what the document says.

Q On December 7th?

A Yes.

Q So in this list, as compared with the one on November 7th, we have Mr. Ryan added?

A Right. Three people are gone, and one has been added.

Q And, again, we will get to those three at another time, but we are focusing on the ones that have been added.

A Certainly.

Q So it is fair to say that Mr. Ryan was added after November 7th and certainly by December 4th?

A Yes.

Q Now up at the top of Page 573 --

A Do you want me to explain why?

Q Not right now. As I said before, what I am going to try to do is go through the process a little bit, and then I am going to go through -- back through some of the facts on the individual U.S. Attorneys. I think it will make the record clearer if we do it that way.

A I understand.

Q Going up to the top of 573, Step 1 is now Senator calls. Whereas back on 556 that was Step 2.

But, in any event, they were both supposed to happen around the same time, notifying the Senators and notifying the U.S. Attorneys, is that correct?

A It looks like he reversed Step 1 and Step 2 between these two iterations of the plan. I think that is fair.

Q Okay. Now, going back to DAG 556 and staying with Step 2 -- actually, we go on to 557. We have the statement as of November 7th of what each of the Senators is to be informed.

A Yes.

Q And it starts out by saying -- and this seems to be quite parallel to DAG 573 -- that the Senator is to be -- said that the administration is determined to give someone else the opportunity to serve as U.S. Attorney in a relevant district for the final 2 years of the administration. That much seems to be identical, correct?

A Mm-hmm.

Q But in the earlier version on December 7th, it says, in brackets, if pushed, this determination is based on a thorough review of the U.S. Attorney's performance. And that phrase doesn't seem to be any there anymore in DAG 573, is that correct?

A That appears -- based on the document, that appears to be the case.

Q Do you have any information, knowledge, recollection, as to how that change wound up being made?

A I do not. I don't recall any discussion that I participated in relating to Senator calls or any of this. This is not something I would have been involved in. I am not a leg affairs person. I am not a public affairs person. I don't recall having any discussions about these things.

Q Okay. Moving to page DAG 574, there is what appears to be a new Step 3 added called, Prepare to Withstand Political Upheaval. Do you see that?

A I do.

Q And I think I have got this correct. That whole step isn't there at all in the November 7th version of the plan, is that correct?

A Based on the document, that appears to be correct.

Q Do you recall any discussion or any information about how it was that Step 3 got added?

A No, I don't recall any discussion with -- let me just explain my understanding is that Kyle Sampson was the drafter of these two documents; and I don't recall having a discussion with Kyle regarding the details of

the plan between October or November 1st or whenever, November 7th, whenever that first one came -- let me look to make sure. November 7th and December 4th, I don't recall having a discussion with Kyle about the details of the plan.

Q In seeing this new Step 3, did you have any discussion on around that time about the implementation of Step 3?

A Again, although this appears naive in hindsight, my recollection is that I kind of discounted Step 3 because I didn't see why it would be in any of the seven U.S. Attorneys' interests to make the fact that their resignation was requested public. And that -- that was my view at the time. I don't think I gave this a lot of thought, Step 3.

Q Mm-hmm. And --

A I did give some thought to -- no, I am sorry. I don't have anything to add to my answer on that.

Q Was it -- I am sorry. Was there something else that you gave thought to relating to the plan?

A I gave some thought to the question on extensions at the bottom. But I can't say that it was as a result of this or precisely when I gave some thought to that. It might have been later. But the issue of extensions, I guess at some point -- I cannot say with

certainty it was at this time, but at some point I thought granting extensions was actually a good idea when asked for and for good reason.

Q And, in fact, there are some documents which we will get to later involving your involvement in some of these extensions. So we will -- I promise we will come back to that.

A Right.

Q But other than your assumption that Mr. Sampson must have added this, you have no recollection of anything relating to the addition of this new Step 3?

A No, sir.

Q And that, of course, as we know, several days after this the plan was implemented?

A That is correct. I believe, although I was not a participant in any of these -- but I believe that Mike Battle from the Executive Office for U.S. Attorneys made the call on December 7th. I don't know if that was the plan. I don't know what the impression is, but that is what happened.

Q All right. I want to now turn a little bit to some of what I promised before about some of the specific -- some of the particular individuals who were asked to leave. Before I do that, I want to talk a little bit more generally about a subject that has come up relating

to some of the terminations, and that is the subject of pursuing vote fraud cases. What was your understanding of the significance of vote fraud as a priority of U.S. Attorneys?

A I think that in the area of -- I don't know that there was a specific priority regarding voter fraud. I would say that that could come into the public corruption, corporate fraud priority as an issue. But I don't -- in terms of being separated out as a specific priority, I don't think so. I think it would have been included in the public corruption. Obviously, corrupting the election system would fit within public corruption.

Q So there wasn't any, as you recall, general communication to U.S. Attorneys, you all need to be concentrating on vote fraud, per se?

A There may have been. But as I sit here today I don't recall.

Again, a lot of the vote fraud issues that I have seen and read about centered on the 2004 Presidential election, a year before I arrived at Main Justice.

Q Did you -- did DOJ and in particular the DAG's Office ever seek the U.S. Attorney's report information on vote fraud prosecutions?

A I don't recall that. And it may have happened, again, before I was there.

Q Well, there is reporting that happens on particular categories like gun cases, for example. That kind of reporting does occur routinely, is that correct?

A Yes. And I don't know -- and there is reporting pretty much on every case, to EOUSA, and we can pull up statistics on any different type of class of cases. But as I sit here right now I don't know whether that is a particular class of case we keep records on, voter fraud cases. I don't know.

Q You are not aware of any efforts to keep track?

A No, I am not.

Q Now let's talk about one of -- again, we are going to -- I may not do all nine of them, but I am going to begin now talking about one by one.

A You say nine? I am sorry.

Q I am sorry. I said that wrong. I meant eight.

A And, again, I am going to be insistent on this. We will just agree to disagree, but to me there is Bud Cummins and a group of seven.

Q Okay. That's fine. We'll try -- at least for purposes of this interview, we will -- I will try to see if we can't work on that. So let's focus -- Mr. Cummins is on my list.

A Sure.

Q But let's focus initially on one of the seven, Mr. Charlton --

A Mm-hmm.

Q -- who was the U.S. Attorney in Arizona. Give us your understanding of how he got on the list, when he got put on the list, by whom and why.

A Let me just start by saying that I cannot answer that question because I don't know why Kyle Sampson put them on the list originally. The only thing I can really tell you is why I was comfortable with them being on the list.

In other words, he sends me a list. I say, yeah, that is about right. And I don't recall any conversation with Kyle regarding my specific reasons.

Q That is actually a very important point. So, in other words, regardless of what you tell us about your own thinking about why it would have been appropriate, you don't know why, in fact, Mr. Charlton was put on the list?

A Correct. And I don't know -- you know, I want to be very clear about this. I don't know why. I think it is pretty clear from what has come out that the Attorney General ultimately approved this list, in some form or another. I don't know why he did. I never had a conversation with the Attorney General about his reasons,

and he was the decision maker, at least as far as I could tell.

I don't know. I just did not have a conversation with Kyle or with Monica or with Will Moschella or with anyone prior to this time to know what their reasons were for agreeing to this list.

Q Okay. And we will keep this more quickly as we get on the other ones. But this is a good one to start it out with. So what you are telling us is, as we go down the individual U.S. Attorneys, at least for the ones that were on that initial list that you got back in October, you don't know why, in fact, they were put on the list.

A Correct.

Q Okay.

A I can tell you why I was comfortable with that person being on the list.

Q Why don't we answer that question for Mr. Charlton?

A For Mr. Charlton -- and you will have to recall that there are 93 United States Attorneys, and I get information every day about what is going on in the United States Attorneys' Offices. Paul Charlton came up on my radar screen, for lack of a better term, in a

negative way -- two negative ways -- in significant negative ways on two occasions.

The first was with respect to his decision unilaterally to adopt a policy regarding the recording of target interviews in the district of Arizona. This came to my attention I believe when the FBI contacted the Deputy Attorney General's Office and complained strenuously about this policy. It was a few days, I believe, before it was set to go into effect; and we had to do a mad scramble to figure out whether we were going to allow that policy to go into effect. Lots of conversations, quick, try to figure out what we were going to do.

I had several conversations with Paul Charlton regarding that, the Deputy Attorney General had conversations with him regarding that, and, ultimately, we did not allow the policy to go into effect.

This policy affected not only DOJ law enforcement agencies but non-DOJ law enforcement agencies that operate in the District of Arizona. It had not been vetted with the Department of Justice. He hadn't bothered to let anyone know that he was going to adopt this policy. He hadn't gotten the concurrence of the law enforcement agencies. They all opposed this plan. The DOJ law enforcement agencies all opposed the plan.

That, in my view, was a significant instance of poor judgment to not have that vetted and to unilaterally demand that the law enforcement agencies in the District of Arizona follow that policy. And it was a significant problem.

That alone caused me to question his judgment in that circumstance. And I know of no other situation like it. I don't know of a United States Attorney adopting a policy like that, that has a significant impact on the operations of other Federal law enforcement agencies, without full consultation and getting their, at least, acquiescence.

A policy like this could not possibly work well if the Federal law enforcement agencies disagreed with it and didn't support it, because they are the ones who would have had to implement it. It is not the AUSAs who are doing the recording of the conversations. It is the Special Agents in the field. And so this was a significant problem.

I don't have a problem with the policy as a policy. I actually have some sympathy toward it. Because I was an AUSA in Illinois where the State has a similar policy to what Paul Charlton was proposing. But the manner in which he went about it caused significant problems, alienated the Special Agents in charge in that district.

As we considered his request later to have a pilot program, one of the things that we learned was that Arizona was not a great place probably to do this pilot program because of what he had done in terms of unilateral -- he sort of poisoned the well on the policy by doing that. I don't know if someday the Department will do a pilot program somewhere, but that -- you know, that was the problem at the time.

RPTS THOMAS

DCMN SECKMAN

[2:15 p.m.]

A The second time was with respect to a capital case, and what happens is that there is a lengthy process that starts with the capital case unit in the criminal division that ultimately ends up with the Attorney General making a decision to seek the death penalty or not seek the death penalty. And by statute, that is reserved to the Attorney General. The Assistant Attorney or Assistant U.S. Attorney cannot decide whether to seek a death penalty in a particular capital case.

In this case, as in many cases, unfortunately, the decision had been made ultimately I think the day on which the court had established a deadline for a decision on whether to seek the death penalty. But the Attorney General made the decision, the district was contacted, and the letter went out authorizing the U.S. Attorney to seek the death penalty in that case.

The district of Arizona did not file its notice of intent to file the death penalty that day. Instead, they filed a motion for additional time asking for -- stating that they were still in dialogue with the Department of Justice regarding whether to seek the death penalty or not.

It is unclear to me whether that was filed before they received the Attorney General's authorization or after, but it was on the same day. And, in fact, the dialogue was over. The Attorney General had decided to seek the death penalty.

What happened next was that Paul Charlton immediately sought reconsideration of the decision to seek the death penalty. That process took some period of months. When the decision was looking like it was coming out the same, he asked to speak personally to the Deputy Attorney General. The Deputy Attorney General did so. He asked to speak to the Attorney General. I advised him that I thought it was a bad idea because I knew what the Attorney General was going to say, and I didn't think it was worth him wasting political capital with the Attorney General to talk about this case.

He asked for it anyway, that request was denied, and ultimately they did file a notice to -- of intent to seek the death penalty.

Here's the problem. The capital case unit, the people who are in -- the career officials in the capital case unit tells me that this -- that's never happened before. They cannot think of an instance where a United States attorney refused to file the notice of intent to seek the death penalty. U.S. Attorneys often times seek

reconsideration of a death penalty decision, but it is after there has been a change in circumstances. Some evidence goes bad or the witness recants, or there is something that has happened in the case, some time has passed and there is a problem with continuing to seek the death penalty. That happens all the time. But there was no change in facts in this case. It was simply, he disagreed with the Attorney General's decision which, by statute, is reserved to the Attorney General.

And I also question why, after he was given authorization to seek the death penalty, he didn't go back to court or have his assistants go back to court and file something to clarify the previous filing in which he sought more time because there was still a dialogue going on with the Department of Justice.

So both of these instances, in terms of what was going on, were unique, I am not aware of any other instance like it. The people who have been at the Main Justice longer than I have weren't aware of anything quite like it in any of these situations. And they caused me to question, in a significant way, his judgment.

Q Let me go back through this a little more specifically. Let's start with the second one about the death penalty.

As you just pointed out, he did, in fact, once his last appeal was denied, he did in fact file the death penalty?

A My recollection was about 3 and a half months after he had been authorized, directed to file it.

Q Right.

Now you indicated to us before that the very fact that a U.S. attorney is in some respects independent in that second situation you mentioned, didn't necessarily mean they would necessarily have to be recommended for termination.

A Absolutely.

Q So are you trying to suggest to us that this death penalty instance alone where he did attempt to simply get reconsideration from the Attorney General would have caused them to be terminated, or was it really in combination with the situation involving the confession report?

A I respect --

Q Or interview recording?

A I respect Paul's judgment. He and I had a long conversation about this death penalty case. And I am not going to tell you whether I agreed with Paul Charlton or with the Attorney General.

Q And I am not going to ask you.

A But this is not a decision that a United States attorney can make. This is a situation where he is clearly not independent of Main Justice. By statute, this is a decision that is reserved to the Attorney General. The Attorney General had made the decision. No one in the capital case unit is aware of a situation where a United States attorney has refused to file the notice of intent to seek the death penalty after the Attorney General has made that decision.

So it is not about -- it is not about his judgment about the case. I want to be very clear about that. It is about the manner in which he went about meeting his obligations to the Attorney General once he was authorized to seek the death penalty.

Q Well, when you say "authorized," as you understand it, does "authorized" mean "directed"? That is to say, the U.S. attorney has no choice once it has been authorized?

A You are in Congress so you can figure out how it works. But it is a statute. And my understanding of how that statute works is that a United States attorney cannot either seek or not seek the death penalty without authorization from the Attorney General. So they can't do anything.

Q Right.

A And by the Department of Justice's policy, they have to preserve the -- it is a capital case, they have to preserve the Department's ability to seek the death penalty.

Q Which Mr. Charlton ultimately did.

A Ultimately. But sometimes the decision isn't made in time, and they have to file a protective notice to seek the death penalty.

Q Right.

A So the answer is, the U.S. attorney has to follow the direction of the Attorney General either not to seek or to seek. The letter says you are hereby authorized to seek or authorized not to seek. And that is why I speak that way because that is the way the letter works. But until they have an authorization of one kind or the other, they can't.

Q But you have gotten to my question. If it says you are authorized to seek, I don't want to talk about Mr. Charlton particularly. Let's talk more generally.

A U.S. attorney gets the word that he is authorized to seek the death penalty. And he believes, not necessarily based on new information but on other information, conscientiously, that that really is a mistake, and that the Attorney General ought to be taking

a look at it, are you saying that it is wrong for that U.S. attorney to just try to get reconsideration of that?

A I am not sure that I accept the premises that are behind your question.

Q Okay.

A The United States attorney has already had a full process on this decision. The United States attorney submits a lengthy memo that details the case, that makes his or her recommendation regarding whether to seek the death penalty. They have extensive engagement with the capital case unit on whether the capital case unit should recommend the death penalty -- there is an entire process that takes oftentimes months, 2, 3, 4 months in which all of these things are aired and vetted and discussed regarding the particular case.

At the end of the day, the Attorney General makes a decision based on all of that process. And I think what I said was it is entirely appropriate for a United States attorney to seek reconsideration if there's been a change of circumstances: If the evidence has deteriorated or if there is some other basis to call into question the original decision to seek the death penalty.

But here, Mr. Charlton had already made his view on the case known extensively, and the Attorney General disagreed with him.

Q Well, is there a policy that says that U.S. Attorneys aren't allowed to seek reconsideration if they -- if they think that perhaps something has been overlooked in the presentation on this issue?

A That was not this case.

Q No. But answer my question. Is there a policy that says if you, the U.S. attorney --

A My recollection is that there is a death penalty protocol that indicates reconsideration is disfavored and that it should be done only when there has been a change in circumstances. I don't have it in front of me. If you want me to go find it, I will. But all I can tell you is that in the career officials in the Department of Justice, their view is that this was inappropriate and it had never happened before.

Q Certainly you are aware of the fact the Justice Department often seeks reconsideration of court rulings even when there isn't an actual change in circumstances?

A That is a totally different situation.

Q I understand that -- your testimony on that.

I guess what I am having trouble with, and we may simply have a difference of opinion here, is, given that, Mr. -- well, let me put it this way. Mr. Charlton certainly did what he was ordered to do. That is,

preserve the ability to seek the death penalty and then ultimately ask for it ultimately?

A Actually, I disagree with it.

Q Tell me why you do.

A Because in my view, notice of intent to seek the death penalty should have been filed on the day that it was due. Instead, he filed a motion for additional time. He did not file a protective death penalty notice. It is entirely possible that the motion for an extension of time could have been denied.

Q But it wasn't.

A It wasn't, but it could have been, and if it had been, the Department's notice to seek the death penalty could have been untimely.

Q I understand that could have happened. But Mr. Charlton does have a little more familiarity with what the local courts in Arizona are likely to do?

A I would hope so, but we happen to have that problem in other districts around.

Q In other districts. I understand that. But we do know that he filed a piece of paper which ultimately did in fact allow the Justice Department to seek the death penalty, correct?

A Correct.

Q And your disagreement with him is that he sought reconsideration of the decision from the Attorney General when in your view he should not have; is that correct?

A I have already told you what my problems were with this entire process.

Q Okay.

A I don't think that he should have filed a motion for additional time stating that he was still in dialogue with the Department of Justice when the Attorney General had made his -- the decision. There was no further dialogue at that time. And everything that went on -- my disagreement with this situation is in the entire manner in which it was handled, and I am telling you that, as far as I know, this is a unique circumstance in the annals of capital case review as far as anybody who is a career person can remember.

And I am happy to stipulate to you that you are not going to think my reasons for agreeing with this list are sufficient. But you have to understand that when this list was under consideration, the bar was not a high bar. This was not about a civil servant and a performance, you know, a performance improvement plan and giving someone a second chance to do a better job. This was about a political appointee, a person appointed by the President and confirmed by the Senate, and the bar is

not that high. They are at will. They serve at the pleasure of the President. And my view was that the United States attorney who did those two things that we have discussed, that caused significant problems in their different circles was a problem. And that was in a relatively short period of time, remember. I was not in the Deputy Attorney General's Office the entire time that Paul Charlton was a U.S. attorney. I think one of these things happened in February, and the other one happened in May. And the vast majority of the 93 United States Attorneys had no issues like this, were out there doing their jobs and prosecuting cases and reporting things back to the Department and coordinating with the Department of Justice on these issues, whatever their issues were in their particular district.

But this United States attorney, two of these issues occurred in a relatively short period of time.

And to answer your question, I was comfortable with Paul Charlton being on a list, and the reason why I questioned his judgment and the basis for my questioning his judgment was those two incidents.

Mr. McLaughlin. If you are going to argue with Mr. Elston for why each U.S. attorney should not have been fired, you are going to be in the maternity room with him on Monday.

Mr. Mincberg. Mr. Elston felt pretty strongly about this issue, and I didn't want to interrupt him.

Mr. McLaughlin. I think you are going to go back and forth with him about why these U.S. Attorneys should not have been fired.

Mr. Mincberg. I am not going to do that in this much detail.

Mr. Elston. I think it is important that we focus on what really the question, as I understand it, is here.

The question is whether these individuals were asked to resign for improper reasons. I think that everybody agrees that the President can ask a United States Attorney to resign for any reason or no reason.

BY MR. MINCBERG:

Q But you don't know, of course, as you said before that -- let me back up.

A That is what I'm suggesting. You asked me whether I know of any other reason that might be improper with respect to these things. I don't want to take over your examination.

Q I hear that. But what I am trying to make sure I understand is what you have just described is why you thought it was an okay thing to have him on the list, but

as you said to us before, you don't know whether there were two factors that were, in your mind, were the factors that were in Mr. Sampson's mind or Ms. Miers' mind or anybody else's mind who ultimately made the decision.

A That is absolutely correct. I will say, however, that with respect to the death penalty issue, Kyle Sampson was absolutely aware of it, and with respect to the other, the Deputy Attorney General and Bill Mercer were absolutely aware of it. I don't remember whether we discussed that with the Attorney General's Office, but others were aware of these issues.

Q And, in fact, I do want to get into because there are a few documents on that first issue that you mentioned, the issue of the interview policy, but I want to ask you about this.

I take it you are familiar with Mr. Charlton's testimony on that interview policy issue?

A I am not.

Q Do you recall generally that -- either hearing it directly or from others that he testified that he felt very strongly about the interview policy early in 2006, felt so strongly about it, that he offered to resign over it and that the Deputy Attorney General asked him not to but instead to develop a pilot project on the subject.

A That would be news to me. I don't recall him suggesting that he should resign over it. He didn't suggest that to me.

Q Might have been between him and Mr. McNulty?

A May have been, and I don't recall any discussion about that.

Q And in fact it is true, is it not, that you wrote him an e-mail in late February urging him to be an advocate for the proposed policy?

Mr. Hunt. If you have a copy of it --

Mr. Elston. I'll take a look at it first just to make sure that I am remembering the e-mail that you are talking about.

Don't want to jump ahead of the documents.

BY MR. MINCBURG:

Q I have not kept track of what number we are on. This is number 8.

A Let me tell you what -

[Elston Document No. 8.

was marked for identification.]

BY MR. MINCBURG:

Q Let me have just submitted to be sure that I will just have copies of this, and we identify it for the record. We are talking about Exhibit 8, DAG 424.

A The Deputy Attorney General made his decision some time on the evening of Tuesday, February 28th, on this, not while he was on the phone with Paul Charlton. As you can see, I am writing this e-mail at 10:05 p.m. This was the day before the policy was supposed to go into effect. March 1st, 2006, was, as I recall, the date this policy was supposed to go into effect. The Deputy Attorney General asked me to communicate to Paul Charlton his decision. That is something that is fairly routine that the Deputy Attorney General would ask me to communicate a decision on a policy issue to a United States attorney. It has happened before. It has happened since. I did so.

I recall being in the HOV lane and talking to Paul on my cell phone, and I communicated the decision. He was unhappy with that decision. And I stressed the Deputy Attorney General's decision to ask Paul to submit a pilot program, and Mr. Charlton asked me to quote what I had said to him in writing when I had a chance.

I went home. I wrote this e-mail. That is why it says, "at your request I am writing." This is an account of a conversation I had with him at the direction of the Deputy Attorney General. This is February 2006. So he was the Acting Deputy Attorney General at the time. But that is what this e-mail is.

Q And the e-mail recounts the fact that Mr. Charlton and your boss, Mr. McNulty, had a discussion of this in Orlando the day before, February 27th.

A I see that. I guess that is right. There was a United States Attorneys' conference in Orlando in February 2006, and I assume that is what that refers to.

Q And obviously you don't know the details of that discussion and whether Mr. McNulty and Mr. Charlton talked about Mr. Charlton's strong feeling and Mr. Charlton's willingness to resign. Just you don't know about that one way or the other?

A I was in Orlando with the Deputy Attorney General, but I don't recall being a part of that conversation.

Q And at the end of the e-mail, at Mr. McNulty's instruction, you urge Mr. Charlton to -- you describe him as the best advocate for the proposed policy and that Mr. McNulty hopes he will play a significant role in the Department's review in the interagency review process of this proposal; is that correct?

A Yes.

Q Okay. And, in fact, the process went forward, back and forth, and I am not going to go into detail about all of the memos that occurred there. But, in fact, isn't it correct that, in August, with some

modifications, that Mr. Charlton's proposed pilot project was approved?

A No.

Q Okay. Then let me ask you to look at the control sheet which I thought said that, and you can explain it to me.

[Elston Document No. 9
was marked for identification.]

BY MR. MINCBERG:

Q This will be document number 9. And again, for the record, it is DAG 1586?

A This control sheet indicates that, on August 3rd, 2006, I recommended approval of the Arizona pilot program as modified by Mythili. She is a counsel in the Deputy Attorney General's office. She wrote a memo in July, or I think it was July, recommending against adopting the pilot program. There were further discussions within the office of the Deputy Attorney General.

She wrote another memo, revised the memo substantially recommending a narrow pilot program. I recommended it to the Deputy Attorney General.

Q Okay. So I should have rephrased my question and let me do it now with the document in front of me.

It is in fact true that, on August 3rd, you recommended approval of the Arizona pilot project, pilot program as narrowed, slash, modified as by this memo; is that correct?

A Yes.

Q And --

Mr. McLaughlin. If you are going into this detail with this, we are going to be here all night. We are not going to be able to finish this.

Mr. Mincberg. I am just about done with this line of questioning.

Mr. McLaughlin. And Mr. Elston has testified he didn't think it was good judgment to not let -- whether or not he agrees or not with the policy, he has already testified --

Mr. Mincberg. I don't believe this is the time to argue this point. I think I am entitled to ask these questions. I think you are entitled to clarify it.

I am perfectly comfortable to stay all night if I have to.

Mr. McLaughlin. I am not, and I would hope you would not continue over the objections with Mr. Smith without a representative of his office here. We will make as many accommodations to you as we can, but we will -- are not going to stay here through Monday morning.

Mr. Mincberg. But I want to make clear that taking time with what is clear to me appears to be, objections are not the way to go. I think I am entitled to clarify it.

You are entitled to clarify to your heart's content when I am done. So let me go forward.

BY MR. MINCBERG:

Q In fact, it is also true that, in January, in light of Mr. Charlton's departure, the question that Mr. McNulty asked was whether the issue should go forward; is that correct?

A January 22nd of 2007, that is correct. That is what this control sheet reflects.

Q So, in your judgment you, notwithstanding the facts that we just developed, you do believe that the situation that occurred here from your personal knowledge not having been present at Mr. McNulty's conversation with Mr. Charlton, you believe that this showed the kind of judgment that allowed you to agree that Mr. Charlton's name should be on the termination list; is that right?

Mr. Hunt. Can you clarify what the "this" is?

Mr. Mincberg. Okay.

BY MR. MINCBERG:

Q Your belief is notwithstanding what we now all know about the history of the development of this pilot

project that Mr. Charlton's doing so as directed by Mr. McNulty, your belief is, nonetheless, that his overall behavior on this interview program was an example of judgment that in your view justified him being removed?

A I will say again that Paul Charlton, as the chief law enforcement officer of the district of Arizona, should have known that a program like this could not possibly work, could not possibly be successful without the support of the special agent in charge of the DOJ law enforcement agencies, meaning DEA, ATF, FBI, Marshals Service, as well as non-DOJ law enforcement agencies that work with the U.S. Attorney's office. Including in a border district, the Customs, the border CBP, Customs and Border Patrol, the Immigration and Customs Enforcement Agency and the Postal Inspection Service. Probably there are others.

And the fact that he unilaterally imposed that policy not only without getting to buy in, but over the strenuous objection of that, is, in my view, not the way to make a policy change.

It was also very problematic that he didn't discuss the policy issue like this with anyone at the Department of Justice at all prior to promulgating that policy. I think those judgements were poor.

Others agreed with me.

Q Anything else you would like to add?

A I think I have said all I can say about this.

Q Okay. Just want to be sure that you have the opportunity to say everything that you would like.

Now let me ask you this question: Were you aware that, prior to Mr. Charlton's dismissal, he had begun a probe of land deals by Representative Renzi?

Mr. Hunt. Let me caution here. I don't know what you're referring to is a pending law enforcement investigation or not, but I will say my understanding of the ground rules for this interview is that we won't discuss any pending investigation.

Mr. Mincberg. Except in so far as it relates to reasons for termination and there is public information reported in the media referring to the probe.

I am not asking for the details. I am simply asking for Mr. Charlton's awareness that, prior to his dismissal, he had, according to media reports, let us put it that way, become a probe of land deals by Representative Renzi.

BY MR. MINCBERG:

Q Is that right?

A I don't believe that I am authorized to confirm the existence of a pending law enforcement investigation.

Q Were you aware of media reports of that prior to --

A I was aware of media reports to that effect.

Q Was there any discussion of that issue that came up that you are aware of -- and I realize you weren't party to him being put on the list originally -- of that fact?

Mr. Hunt. He really can't answer questions about any pending law enforcement investigations.

Mr. Elston. I think I can answer that question.

Mr. Hunt. If you can answer that without revealing --

Ms. Burton. Without confirming.

Mr. Elston. Could you tell me what the question was? Could you read back the question?

[Whereupon, the record was read.]

Mr. Elston. I am not aware of any discussion regarding a pending investigation of any type in the District of Arizona in connection with the decision to ask him to resign, and it was not a reason that ever occurred to me in terms of why I would have Paul Charlton on the list.

BY MR. MINCBERG:

Q To you yes, but again, you don't know one way or the other whether that was a factor that others thought about?

A I think I have said that multiple times this afternoon. But I wanted to be clear that I don't recall the discussion about any pending case in the District of Arizona in connection with the request to ask for his resignation of any kind. And as far as my reasons, that was not part of my thinking.

And let me go on and say one other thing because I think this is important, and I would say this with respect to all of these things. The notion that the media has that the dismissal of the United States Attorney in any way, shape or form affects a pending investigation or case is silly. I have been through the transition of a United States Attorney in the district -- Northern District of Illinois. And I was an Assistant United States Attorney, and I had pending investigations and pending cases at the time. And it affected my cases in the following way: I changed the name of the United States Attorney on my letterhead and pleadings.

Q As long as you raised it, and I wasn't planning to ask this, but you have raised it. Let me ask you a follow-up relating to that.

Putting aside the effect on the progress of a particular investigation, have you also seen a concern, not that the dismissals will impede the progress of a particular investigation but will serve as a punishment or a message to other U.S. Attorneys about the wisdom of pursuing such investigations?

A I don't think that that -- I have seen nothing that would suggest that. It doesn't make sense to me, having spent several years in the United States Attorneys' offices. I don't think that there is any message sent by the resignation of a United States Attorney.

Q No. Not by the resignation. But, again, I understand that you will not agree with the premise of my question. But you have raised it, so I need to explain what we are concerned about.

If you assume for the moment that a factor in listing a number of these people on the list, one that you may not have known about, was that they were either too aggressive in pursuing investigations relating to Republicans or not aggressive enough with respect to Democrats and that someone -- not you necessarily -- had the objective of essentially punishing people that were going against the political objectives and therefore sending a message to others, other U.S. Attorneys, I

assume you would agree with me, that you would not think that would be proper?

A Except I am not going to accept your premise. And I don't know anything that would support your premise that I can think of.

But I don't think I would agree with you because I know most of the United States Attorneys around the country, and they are -- they are outstanding lawyers. They are dedicated public servants. They are committed to their job, and I think that most of them, and -- all of them. I think most of them would pursue a case where the evidence leads them. And I would hope that is -- that is what they would do with respect to anything to Washington.

Q I think you are missing my question. And I would not have raised this if you would not have raised this issue.

Mr. Hunt. I don't know what you mean by that.

Mr. Mincberg. Let me try to clarify.

Mr. Elston. You did raise this issue when you asked me whether I was aware of a particular case and whether that was a reason.

Mr. Mincberg. Let me go forward?

BY MR. MINCBERG:

Q If you make the assumption, and I realize you don't, but let us call it a hypothetical question, that someone --

Mr. McLaughlin. Don't answer.

Ms. Burton. Can we go off the record?

[Discussion off the record.]

Mr. Mincberg. As requested by some of your colleagues from the Justice Department, Mr. Elston, we will agree to disagree with this on the time being and just move on.

Q I am not going to go into detail in each of the individual other U.S. Attorneys, but I do want to ask about a couple of things relating to a few of them.

There was one document with your name on it that I didn't quite understand that I wanted to ask you about.

A Certainly.

Q That relates in part, I believe, to Mr. McKay. And this is DAG 566 to 568. And it will be Exhibit Number 9, I think, or 10. I am sorry.

[Elston Document No. 10

was marked for identification.]

BY MR. MINCBERG:

Q And what the document set appears to be is a routing slip from Mr. Mercer to yourself and Mr. Scudder

enclosing an article about judicial nominations involving Mr. McKay. Do you see that?

A Yes.

Q And then there is a reference at the bottom to a part that has been bracketed and underlined to a discussion of the possibility that Mr. McKay might be considered for a bench position in Washington. Do you see that?

A I will let the document speak for itself. I see where there are brackets and underlining.

Q Right. Can you -- what can you describe to us about this document? How did it come to be sent to you? Was there a discussion that occurred about it?

A No. At this time, Bill Mercer was the Acting Associate Attorney General, not in the Deputy Attorney General's office. He sent this to me and to Mike Scudder, I assume, because he thought it would be interesting to us. And I think what he thought was interesting to us was that -- it would be interesting to us -- was that the bipartisan panel of local attorneys screening applicants didn't pick John McKay as one of the three people to forward to the White House.

Q And do you recall any discussion about that?

A I recall -- I don't know if it's in some article or if Mercer said something to me about it later. But my

understanding is that John McKay's brother is on the bipartisan panel. I assume he recused himself from this particular decision. But in any event, I think we all thought this was remarkable.

Q Got it.

Now, speaking of Mr. McKay, I take it you are aware, generally, of concerns that were raised by some in Washington about the 2004 election and questions about whether he pursued allegations related to vote fraud?

A I was not aware of that until, I believe, he testified about it.

Q Okay.

A In March.

Q So you have no information at all about whether there were any communications from people in Washington to people in Justice or in the White House about Mr. McKay's conduct in pursuing or not pursuing any of that?

A I do not. And, again, just to -- just to remind you, I did not arrive at Main Justice until late 2005. And I don't recall, since I have been at Main Justice, a conversation about vote fraud in Washington during the 2004 Presidential Election which occurred nearly a year before I was at Main Justice.

Q Now, I want to ask you some questions, if I could, and I don't think I have very many documents related to this. About Mr. Iglesias. And I think we established before that he was not on the list until some time between the middle of October and the 7th of November?

A That is what the documents indicate.

Q Okay. Do you recall -- do you recall any discussion at all between you and anybody else at the time in 2006, not later on, about why Mr. Iglesias was added to the list?

A I do not recall any conversation like that relating to why Iglesias was added to the list.

Q Did you have any discussion with anybody later about why Mr. Iglesias was added to the list, not about your own feelings about why he should or shouldn't be, but why he was, in fact, added?

A I think prior to the Deputy Attorney General's briefing to Senators, which I think occurred on February 14th, I think we were all trying to make sure that we understood what the reasons were, and certainly during that time I would have had conversations with people regarding that.

Q Those people would have been Mr. Sampson, I assume?

A Mr. Sampson, Ms. Goodling, the Deputy Attorney General, others.

Q Okay. Based on those discussions or any other discussions, do you have any information as to who it was that added Mr. Iglesias' name to the list?

A I do not. Do you want to know what I think or --

Q Sure. Why don't you tell us that?

A The Deputy Attorney General received a phone call some time early October, maybe the 3rd or the 4th, from Senator Domenici. I was not on that phone call. Obviously it was a phone call between the Attorney General and Senator Domenici. And my recollection of the Deputy Attorney General's reaction to that phone call was that it was very significant, that Senator Domenici was articulating serious problems with David Iglesias' performance. Specifically, the thing that sticks in my mind, is that the Deputy Attorney General told me that Senator Domenici told him he simply wasn't up to the job, that is my -- that is as close to a quote as I can get.

Q Do you remember anything more specific than that? It is a pretty general statement, obviously.

A You would have to ask the Deputy Attorney General about that conversation.

My sort of after-the-fact understanding is that he was more specific, that he didn't mention any particular case or cases in that conversation, but that he did have specific complaints about the performance.

And the reason, of course, that that is significant is that the job of U.S. attorney is not won by merit selection. It is done by Senators. This is the Senator that put David Iglesias into office, recommended him. The President obviously appointed him. The Senate confirmed him. But a U.S. Attorney becomes a U.S. Attorney at the start by the recommendation of the Senators from the President's party in that State. So I think the DAG felt this was a very significant thing where the Senator who put David Iglesias into the job no longer had confidence in him.

Now I was just anticipating a couple of other questions.

I think that that phone call may well have been looked at quite differently had we known about the phone conversations that David Iglesias had apparently with Senator Domenici and Senator -- and Representative Wilson. And there has been a lot of discussion about that. And I think that had David Iglesias followed Department policy and reported those legislative contacts, I think the outcome here may have been very

different for him. Because at the very least, there would have been a concern about the appearance. More likely, I think, there would have been a tendency to discount Senator Domenici's phone call and his complaints and look at it much more critically than it was.

Q And again, we will have an opportunity to talk to Mr. McNulty, but I take it you don't have any recollection of the specifics of why, according to this phone call, Senator Domenici expressed that Mr. Iglesias was not up to the job?

A No. Except that I know the Deputy Attorney General thought it was significant, and I am not sure whether I told Kyle about it or he told Kyle about it, but in the ordinary course of the way the fourth and the fifth floor worked together, this was a significant phone call, that I think our routine practice would have been to let the fifth floor know about that phone call.

So I don't know whether that is the reason, but I know that that was -- that that was a significant phone call.

Q Now, putting aside this specific context of this period when you were compiling the list --

A I wasn't compiling the list.

Q When you at large, when you at Justice were compiling the list. I apologize for that. If a call

comes in from a Senator in a particular State complaining about conduct of a U.S. Attorney, I assume the Justice wouldn't simply accept the Senator's word for it. They would look into it and see what the situation was before they took action; is that generally a correct statement?

A I would say that is a generally correct statement. And with respect to this, it was, in fact, consistent with the observations in the EARS report regarding David Iglesias' management style.

Q And you are referring there to what has been described, and I won't take the time to go into detail, as him delegating tasks to other people; is that what you are referring to?

A I wouldn't characterize it that way. I would characterize -- my understanding of that portion of -- I don't know if I am -- if I am supposed to be talking about the EARS report. I just want to make sure, and I don't know if I looked at a final or preliminary, but my recollection and understanding was that it wasn't an issue of delegation. It was an issue of not running the office, allowing his first assistant, essentially, to run the office on a day-to-day basis and not being engaged on a day-to-day basis with the management of the office. And so that was, in some ways, consistent with what I

understood to be the complaint that Senator Domenici was making.

But, again, all of this is speculation on my part as to how David Iglesias got on the list. But I know that those things were in people's minds at the time. People were aware of that phone call.

Q Aware of the phone call from Senator Domenici?

A Right. And it was deemed significant.

Q Now, obviously, there are other U.S. Attorneys that literally aren't physically on the job. For example, Mr. Mercer, who's technically the U.S. Attorney for Montana; is that correct?

A Yes, but he is engaged in the day-to-day business of running that office. And I saw this firsthand when I was -- when I was chief of staff and he was Principal Associate Deputy Attorney General. He carried two BlackBerrys. He had computers that were hooked up to both the ODAG system and one to the U.S. Attorney system, and he was reviewing plea agreements. He was actively engaged.

Q And do you know whether Mr. Iglesias was doing that?

A All reports are that he was not.

Q According to?

A Even --

Q You are referring to the EARS report as you interpret --

A I am referring to that and to a conversation that others had with the first Assistant U.S. Attorney in that district.

Q Now, in addition to the call from Senator Domenici, at least according to this morning's Washington Post, Mr. Sampson testified yesterday that there had been a call from Karl Rove in October about problems with pursuing vote fraud cases in, among other places, New Mexico. Were you aware of that call?

Mr. Hunt. A call to whom?

Mr. Mincberg. I believe it was to Mr. Sampson. I am told by those who were present that the answer to that is yes. I am sorry. To the Attorney General. I apologize.

Q To the Attorney General?

A I am not aware of that, and there is no particular reason I would be aware of that.

Q So you don't know to what extent, if any, that played a role in putting him on the list?

A I do not.

Q Now, yesterday, Mr. Sampson said, knowing everything that he knows now, he believes that in fact Mr. Iglesias should not have been dismissed.

Do you feel the same way?

A Well, let me say this. That was towards the end of his testimony that he said that, and I didn't really watch most of his testimony, but I did catch the very end, and I don't recall the specific question and answer, but I remember thinking how I would answer that question and I would answer the question this way: Knowing what I know now, I wish I would have stood up and said, let's not do this at all. Let's not do this at all. Knowing what I know now in retrospect. It is hard, in hindsight, to assess what you would do, you know, given additional information. I think it is a very difficult thing to do.

And I don't want to speculate, but I do think that it was appropriate for the Department, with 2 years left in the administration, to look at the United States Attorneys, particularly those who had served full 4-year terms, and assess whether their service should be continued or whether we should try to get a U.S. Attorney who had more energy, more drive, to take that office through the last 2 years of the administration. And, you know, whether we made mistakes in the process of executing that plan or whatever, I still think it was good management to make an assessment of whether we had U.S. Attorneys that should be asked to resign.

I can't tell you, based on additional information, or other things that I know now, whether I would or would not have approved of somebody on the list. That is a very hard thing for me to put myself back in to where I was in November and December.

Q Now, were you aware, again focusing on Mr. Iglesias, about some of the controversies that were occurring relating to pursuing corruption cases and other cases during the course of the 2006 campaign?

A I cannot say that I was. That doesn't ring a bell to me. I understand now apparently there was a hotly contested congressional race in New Mexico at the time, but it is not something that I was either interested in or focused on.

Q Now there was a statement made by Dan Bartlett, Bush's communications director, March 13th, referring to Mr. Iglesias claiming that the Justice Department, quote, took into consideration the complaints they were fielding from local officials about the labeling of the prosecution of cases and the fact that he had lost a high profile case when, I think, 24 or 25 counts were thrown out by a jury against the government, end quote.

I think what he is referring to there is the Vigil case.

Do you have any knowledge of that?

A I recall that I think he tried that case twice. I don't know if he did it or his AUSAs. I think the first one resulted in a hung jury. The second one resulted in acquittals on virtually every count. And I was aware of that case in general. I was aware that he had essentially lost it once or had a hung jury and then only got a conviction on one count later.

But as far as my reasons for not objecting to David Iglesias on the list, it did not play into that, I don't know if it did or for others.

And you asked me about two things. I can't remember what the first one was. But it didn't sound familiar to me.

What was before this case? He said there were two things.

Q Again, I was just quoting from Mr. Bartlett, but it said complaints that they were fielding from local officials about the lack of prosecution of cases.

A I don't know anything about that. That doesn't ring a bell to me.

Q So at least in terms of the extent to which you were involved in consultations at the Justice Department, you know nothing about the factors that Mr. Bartlett was referring to?

A I don't know anything about the first that you referred to.

The second one, I was aware of the case, but there are lots of reasons why you might get a hung jury and then acquittals, and there is nothing in my recollection that suggests that it was David Iglesias' fault for losing that. It may have been, it may not have been. I don't know. It didn't form any part of my view on whether David Iglesias should be on the list or not. You haven't really asked me what my view on that is. You have asked me about a number of things.

Q Well, to be honest, because I am concerned about what was raised by my colleague here, I am trying to avoid getting into great detail about each of these individual U.S. Attorneys in your view.

You have told us, frankly, in our view, the most important thing about Mr. Iglesias and how he apparently, at least one factor, on how he got on the list.

A And I think that is, again, a little bit of speculation on my part, but it is the only thing I can really think of that was significant.

My view of David Iglesias was that there was simply nothing particularly going on in the district of New Mexico. I look at the Urgent Reports. I look at the U.S.A.O. Overnights. I didn't sense there was any energy

in that district. I would put Mr. Iglesias and Mr. Bogden largely together in a sense that they didn't really do anything wrong, but they didn't -- they weren't doing anything great. They weren't exercising inspired leadership. There wasn't a lot coming out of those districts in terms of significant cases. There wasn't a sense that there was leadership energy in those places.

And those are my senses of those two districts.

Q So it was for those two reasons that you didn't object to them being on the list?

A Right.

Q But you didn't -- you weren't affirmatively urging that they be put on the list, I take it?

A Certainly not.

Mr. Hunt. If you are about to wind down or soon will be with respect to Mr. Iglesias, maybe this would be a good place for a break.

Mr. Mincberg. I only have one question about Mr. Bogden, and then I think a break would be a very good idea.

BY MR. MINCBERG:

Q With respect to Mr. Bogden, were you aware that media reports state that he asked the FBI to join in a complaint against Representative Jon Porter before he was dismissed?

Mr. Hunt. Be careful.

Mr. Mincberg. I said, "media."

Mr. Hunt. He can't confirm or deny.

Mr. Mincberg. I am only asking him whether he is aware that there were media reports stating that he, Mr. Bogden, had asked the FBI to join him in an action or in a complaint against Representative Porter.

Mr. Hunt. If he can answer that without confirming or denying.

Mr. Elston. I am not aware of media reports. I could not confirm or deny that investigation because, if there is one, I don't know about it. And if there isn't one, I don't know about it. It doesn't ring any bells. That doesn't sound familiar to me at all.

Mr. Mincberg. Why don't we take 10 minutes?

[Recess.]

RPTS BINGHAM

DCMN BURRELL

[3:12 p.m.]

Mr. Mincberg. We are back on the record?

BY MR. MINCBERG:

Q One very small thing to complete I think the questioning on Mr. Iglesias. You mentioned your knowledge through Mr. McNulty of the call that Senator Domenici made to him. Do you have any knowledge of any calls Senator Domenici may not have made to others, the President, Karl Rove, Harriet Miers, the Attorney General, that could have been communicated in some way into the decision making?

A I don't believe so.

Q So you just don't know one way or the other?

A Right.

Q I am not going to -- in part in the interest of time I am not going to go into detail of your understanding of the rationale for why people were put on the list, in part because you have told us -- I think quite honestly -- that while you know why you think it was okay for them to be put on the list, you don't know -- and let me be sure I am right about this -- why the individuals were originally put on the list?

A With the exception of Kevin Ryan, that is correct.

Q Okay.

A And, well, yeah, with the exception of Kevin Ryan, that is correct.

Q I have one very small question about Carol Lam. And I am not getting into the rationale issue. You mentioned, I think the phrase is, urgent gram or urgent alert?

A Urgent report.

Q Did that come from U.S. Attorneys on various issues?

A Yes.

Q I assume there would have been urgent reports from Ms. Lam relating to the Cunningham investigation, is that correct?

A I would think so. And as I sit here right now I don't recall whether there were, but that is the type of case where an urgent report -- it is actually -- it is actually the type of case where we are going to know about things that are happening and it is well in advance of the urgent report. The urgent report usually comes a day or 2 days before a significant event. Cunningham was as significant a public corruption case as the Department

does. And that is something we knew about and got regular updates on.

Q Great detail.

A In much more detail than the typical case.

Q And were you involved in that or was it mainly others within DAG or Criminal or other places there were involved in doing whatever Main Justice did on that issue?

Ms. Burton. On what issue?

BY MR. MINCBERG:

Q By that issue I mean the Cunningham Case?

A I've had extensive involvement in the Cunningham case from before I went to Main Justice to basically present. And if you want me to talk about that I am happy to.

Q Well, let me take a moment to consult with one of my colleagues about that and see how much we need to. Let me just take a minute.

[Discussion off the record.]

BY MR. MINCBERG:

Q Back on the record. The only thing I want to ask you about that is, without getting into content, which I think will also make the Justice Department happier --

A Well, Representative Cunningham was convicted and put in prison.

Q That is true. And although there are aspects of the investigation that, according to the media, and I am not asking you to confirm or deny, have continued in various ways. But my question is, other than you, who else within the Department would be getting information routinely on what was happening in that case and what is still happening, if anything?

A Alice Fisher, who is the Assistant Attorney General for the Criminal Division and her folks. There is coordination with the Public Integrity Section. At various times the PADAG, which was Bill Mercer during part of the time; me essentially on an acting basis for 3 months; Will Moschella; the Deputy Attorney General himself; Ron Tenpas, Associate Deputy Attorney General in our office, Joan Meyer, who works with him also, Counsel from the Deputy Attorney General's Office. And we would report as a matter of course certain information regarding the Cunningham case to the Attorney General's Office when it was significant enough to warrant that.

Q Which would be people like Mr. Sampson and Ms. Goodling or those other people?

A I would think that this would be something that we report typically at the 8:30 senior management

meeting, which is a meeting that is held daily. There are about maybe 15 people around the table, includes Public Affairs, Leg Affairs, the Associate Attorney General's Office, other members of the Attorney General's staff, unlike a personnel matter which is handled largely outside of meetings because, as you discovered from what we are talking about here, that would be something that would be discussed in the regular meetings.

Q And I take it Mr. Sampson would attend those meetings as the Attorney General's Chief of Staff?

A As a matter of course that is correct. He was not at every meeting or every particular meeting.

Q How would that work with Ms. Goodling? Would she have attended those?

A Yes. I actually would like to say a little bit more on the Cunningham case if I could, if you don't mind.

Q I don't promise you that it won't produce more questions, but feel free.

A This is -- and I am doing this because this is something that has been central to the question about Carol Lam, is the Cunningham case. And I can assure you that I did not hear anything in the Department that would lead me to believe that the Cunningham case had anything to do with the request to ask her to resign. I think the

Cunningham case and outgrowths of the case are very good. I think it is as I have said, it is an incredibly significant case. My involvement started with it when I was an Assistant U.S. Attorney in the Eastern District of Virginia, and I obtained a search warrant for the business that Mr. Wilkes had. There was a coordinated effort to search the California and Virginia offices of that business as well as Mr. Wilkes' home on the same day, and I was the Assistant United States Attorney assigned to obtaining a search warrant. And I did do that. A search warrant is a matter of public record and sets out what an incredible case the Cunningham case was and how very blatant the bribery was, and it goes on and on and on in detail.

And I have been a supporter of that case from that day to the present. And this includes the debate between the District of Columbia and the Southern District of California as to who would prosecute Cunningham. There was a dispute. It was raised to the Deputy Attorney General's level. I weighed in and believed -- and I still believe -- the right decision was to have him prosecuted in southern California. I have worked with the prosecutors in southern California to obtain information and documents at various points in time. And I think that I would have been outraged had anyone

suggested to me that there was a problem with that case that merited anything, whether it was a request for resignation or anything else, because I had probably among the leadership of the Department the most intimate knowledge of that case and how good that case was of anybody else.

Q And so -- and people obviously knew about your strong feelings about that case in the Department of Justice?

A I don't know that. I don't know that. Nobody asked me. I don't think most people knew that I got a search warrant in that case. I am not sure about that. But when issues arose over time -- and as we talked all these things happened -- I remember one issue coming up in July of 2006 only because I was on vacation when it came up and I spent a lot of time on my cell phone. But when they came up the prosecutors, the people who were actually prosecuting the case, have from time to time come to me to help them. And I have tried to give them as much assistance as I can.

Q And again I probably would not be asking this if you hadn't said this so --

A I think it is important for you to know that.

Q And your knowledge and your dedication to that I think is admirable, and I mean that quite sincerely but

we are not here to talk about that issue. We are really here to talk about what happened, at least in part, with respect to the forced resignations of U.S. Attorneys. And from what you've said before I take it it would be true that you would not know one way or the other whether there were calls from Karl Rove --

A Of course not.

Q Let me finish the question first.

A You asked this question multiple times. But I think that with respect to Carol Lam the issue has been raised regarding whether this employment action was a result of or a retaliation for the Cunningham case. And I just can tell you with absolute certainty with respect to my role it had nothing to do with that.

Q And I want to make clear that I am not questioning that. But I do want to get my full question out for the record. You do not know one way or the other whether there were calls from Karl Rove or anybody else in the White House or from anybody else within Justice, not including yourself, that as to which the Cunningham case was a factor in the decision to put Ms. Lam on the list?

A I cannot say what other people considered when they went to that list with respect to Carol Lam.

Q Or how she got there.

A Or how she got there.

Q Fair enough. Okay. I want to actually move forward for a little bit.

A Well --

Q On the period after, after the dismissals. If there was something you wanted to add, I don't want to preclude you from adding it.

A I just want to be perfectly clear that my understanding of what you want to know from me today is not -- not -- why I was comfortable with Carol Lam or the others being on that. You don't want to know that.

Q That is not what I am asking today, no.

A All right. That is fine.

Q And again I want to make clear, this is not because I don't have respect for you as a public servant, but as you yourself have said you weren't the decision maker on all of this.

A Right.

Q You were asked to say do you have a problem with people on the list, but you weren't the one who put them on the list to begin with?

A No. And I now understand --

Q Is that correct?

A I now understand what you are asking me and I just have to say I had a different conception of what I would be asked today, and that is fine.

Q But what I said is correct?

A Yes.

Q Okay.

A I believe. What did you say? I am sorry.

Q Your counsel is fine with it.

Mr. Driscoll. With respect to Don Rumsfeld we all stipulate going forward that you don't know what you don't know?

Mr. Elston. I don't know what I don't know.

BY MR MINCBERG:

Q All right, I want to focus on the time period after the dismissals. And I am going to try to do some of this reasonably quickly, but again if we need to take more time we can.

You mentioned before the issue of extensions of time. As I have looked at the documents, it appears to me that what happened was that some people did get extensions of time in terms of how quickly they have to submit their resignations. I believe Ms. Chiara was one, is that correct?

A Yes.

Q There was, however, resistance for Ms. Lam getting additional time. She sent the e-mails, is that a correct statement?

A She ultimately did get additional time but not as much as others.

Q Okay. Now there were a couple of references in the documents to a couple of calls that you had in the immediate post termination period with some of the by then former U.S. Attorneys, and I just want to find out if you remembered anything about the content of them.

There is a document from you to Mr. Mercer about Mr. Cummins on the 17th of January where you say he says you do not need to call him back. Any memory of that specific call?

Mr. Hunt. Can we see the e-mail?

Mr. Mincberg. Sure. Let's just do it. I was trying to avoid it. But you are absolutely right, we need to be careful even though we are trying to accommodate people's time situation. So let's do that. I have not kept track of what number we are on now.

Mr. Driscoll. It would be 11?

[Elston Document No. 11

was marked for identification.]

BY MR. MINCBERG:

Q I will ask you to take a look at what will be Document No. 11, which is DAG 588, described as I just did a minute ago.

A It is very short. It doesn't -- there is nothing in here that refreshes my recollection as to what this is related to.

Q So you don't recall anything about the phone call that you had with Mr. Cummins on that date?

A No. No. I do recall --

Q Okay.

A -- what my phone conversations with the Cummins were in mid-January. I think I had one or two of them at that time. It was largely him complaining about being lumped in with the other seven.

Q Oh. Mmh-hmm. Mmh-hmm. We will talk a little bit later about some of the conversations in February.

A I don't know what this -- I don't know why I am e-mailing Bill and saying you don't need to call him back. That doesn't ring a bell.

Q Doesn't ring a bell. Fair enough. There is another which I thought I had here. Here we go, about an e-mail you sent to Mr. Charlton right around that same period. This will be No. 12. DAG 589.

[Elston Document No. 12
was marked for identification.]

Mr. Elston. I don't recall the specific date of the Attorney General's testimony. What I believe this relates to is that I was assigned to call Paul Charlton, John McKay and Kevin Ryan to advise them that despite the media reports that were going around regarding U.S. Attorneys, the Attorney General when he testified, I believe it was the 18th, I am not sure --

BY MR. MINCBERG:

Q I think that is right. I think that might -- that is my memory as well.

A But I was assigned to call them and to tell them that the Attorney General was not going to name names in terms of who had been asked to resign or discuss the reasons U.S. Attorneys were asked to resign.

Q What led to that assignment?

A I believe that the Deputy Attorney General was picking up, as he would put it, a certain amount of angst in the U.S. Attorney community and he wanted to have these U.S. Attorneys reassured that what we told them in December was what we were going to do when the Attorney General testified in mid-January 2007.

Q And I want to focus specifically on the conversation with Mr. Charlton right now. Tell us what you remember about that conversation.

A It was very brief. And I simply told him what I was told to tell him, which is when the Attorney General testifies tomorrow he is not going to say which Attorneys were asked to resign and/nor is he going to discuss the reasons U.S. Attorneys were asked to resign.

Q And do you recall what he said back to you?

A Thanks.

Q And that was it?

A Yes.

Q Okay. And in fact you raised a point that at around this time the Attorney General did in fact testify at, I think it was, a general oversight hearing in front of the Senate Judiciary Committee, is that correct?

A That is correct.

Q And you were involved -- I won't drag these out unless we need to -- in various preparation sessions for that?

A It would be typical for me to be involved in preparation sessions for the Attorney General before he testified, that's correct. And I believe that I was in some of the meetings in which preparation was -- you know this is a very messy process because for oversight you have to brief him on, you know, 100 different issues and I did not attend all the prep sessions. I tried to attend the ones where I thought I could be most useful.

Q Did you attend prep sessions when the U.S. Attorney issue came up?

A Yes.

Q Tell us what you remember about those.

A What I remember about those was that the Attorney General was going to testify that U.S. Attorneys serve at the pleasure of the President. They can be asked to resign for any reason or no reason, and that he was not going to get into specifics about any personnel, any particular personnel decision.

Q And do you recall discussing about what -- well, let me -- let me just pull an e-mail out of this one rather than beating around the bush on that.

Let me have marked as the next document No. 13, what will be OAG 239. It appears to be an e-mail that you wrote to Mr. Sampson and various others with the subject of "Without Cause".

[Elston Document No. 13
was marked for identification.]

Mr. Elston. Yes. You're going to expose the glamour of being the Chief of Staff of the Deputy Attorney General with those e-mails.

BY MR. MINCBERG:

Q Well, go ahead. Expose away.

A I was taking dictation from the Deputy Attorney General. This is his recommendation on how to address questions relating to without cause.

Q That is the notion that a U.S. Attorney could be fired without cause?

A Yes. You asked for these -- you asked for these resignations without any cause whatsoever. It was sort of the mock or the moot question that was being asked: How do you respond to that question? And this is the Deputy Attorney General's --

Q Recommendation?

A Yes.

Q And so it appears as though then from this that it was Mr. McNulty who suggested the phrase that Mr. Gonzalez said that he would never, never consent to the removal of a U.S. Attorney for political reasons, is that correct?

A Well, I think that that is a jump.

Q Okay.

A Because, again, this is Wednesday night at 10:07 p.m., the night before the hearing, and there have been extensive discussions. These things were said, you know, in sort of one form or another prior to this. And I can't tell you with specificity which one of these sentences was a DAG original, and, you know --

Q Fair enough.

A -- what had been said in prior meetings. But this was sort of his synthesis of a variety of conversations about how to answer that question.

Q Fair enough.

A And again I was literally just typing what he was saying on the phone.

Q Now realizing that you were typing what he was saying, what was your understanding of what was meant by the phrase "for political reasons"?

A I think at that time, and in hindsight, I think this word choice has caused a lot of problems. But I think at that time we were thinking of political reasons as shorthand for trying to interfere with a case for political reasons.

Q With a particular case?

A Right. I mean to a certain extent any hiring decision -- any hiring decision or -- any hiring decision relating to U.S. Attorneys is in one sense political because they are political appointees so, and that is why I think it was ultimately a bad choice. Although I think the second paragraph tries to flesh that out a little bit, or second sentence of that paragraph tries to flesh that out a little bit to suggest that a U.S. Attorney was removed to influence a case for political reasons is

irresponsible, reckless and harmful to the justice system. I think that is trying to explain what was meant by removal of a U.S. Attorney for political reasons, if that makes any sense.

Q That is very helpful and I appreciate that.

Now after the Attorney General's appearance, a time came when your boss actually had to make an appearance at a hearing relating to the U.S. Attorney issue in February, is that correct?

A Yes.

Q And I assume as Chief of Staff you were very much involved in putting together his statements and preparing him for testimony, et cetera, et cetera?

A I think the answer to that is no.

Q Okay. Well, then please explain. My assumption is wrong. Please explain.

A His testimony was drafted in EOUSA was my recollection and -- his prepared statement. And his prepared statement was provided to me -- I think I was complaining all afternoon about why I didn't have his prepared statement. I think it was provided to me with an hour or less before the OMB deadline. We have to send those over to the Office of Management and Budget and have it cleared before we can send it up to the Hill.

And when I got it, I did as quick a read as I could. I tried to make some changes that made sense. I had to get it back to OLA within a relatively short period of time. So I was involved in the tail-end of preparing his prepared statement. But it was under a big time crunch that was very annoying to me, which is not atypical at the Department of Justice. But with respect to his hearing prep, I was in his prep session, I think, most of the time. When the Deputy Attorney General is at a meeting, I am generally with him, but oftentimes things come up that require me to step out and deal with so he can continue the meeting.

Obviously the point of this meeting was to prepare him, not me, so as things would come up, I think it was a 90-minute meeting, there were occasions when I had to step out and had to deal with one thing or another. But I do recall being in it for most of the time.

Q I want to ask you about one specific statement in a somewhat longer document that I think is one of those versions that you are referring to of the draft testimony. And I should say for the record that -- and we will go over this with Justice later on, but as I have been getting ready for this interview we are finding that in some instances we have the e-mails but the attachments to the e-mails aren't there, and this may be part of some

of the questions we will need to ask relating to the document production. But we won't take Mr. Elston's time with that today.

I will ask to be marked as the next Document No. 15 -- 14 I am sorry -- DAG 965 to 972.

[Elston Document No. 14
was marked for identification.]

Mr. Elston. Yes.

BY MR. MINCBERG:

Q Is this document one of the e-mails, one of the drafts of your boss's testimony that you were referring to?

A Yes. But this is not one that I would have looked at. This is one that was circulated initially for comment to other components of the Department of Justice. And I rarely look at things like this, because it hasn't been through the comments for the rest of the Department of Justice. What I was referring to was the very last draft, after everybody else in the Department has looked at it, commented, and changes have been made. That is when I would look at something like this. This would have been a preliminary draft that I wouldn't have bothered looking at.

Q Well, because it will take me a very long time to try to find that later draft, I am going to turn to a

phrase in here that I think was probably in some of the later ones --

A Sure. Sure.

Q And see if we can use that and talk about. I am going to ask you to turn to page DAG 970, towards the end of the first paragraph.

A Yes.

Q The statement that says, "However, U.S. Attorneys are never removed or asked to or encouraged to resign in an effort to retaliate against them or interfere with or inappropriately influence a particular investigation, criminal prosecution or civil case."

Do you see that sentence?

A I do.

Q I think that sentence has appeared in various other testimony on this.

A It is kind of similar to some of the language in 13.

Q Yes. Yes. I take it you agree with that sentence.

A I have no reason to believe that that is not a true statement. I am not aware of any situation where a U.S. Attorney was asked or removed or asked or encouraged to resign under those circumstances.

Q And you also, I assume, the converse of that then you would agree that it would be wrong for a U.S. Attorney to be removed or asked to or encouraged to resign in an effort to retaliate against them?

A I mean I think that -- I think that there could be a circumstance where a particular case was so poorly handled by a United States Attorney's office that caused such great problems that that would be a factor that one could consider. But, in general, I agree that -- I agree with that statement. But I can't rule out the possibility that there would be something so poorly done or so mishandled in a particular case that it wouldn't be a factor. It is a hard question you are asking me. But I agree in general with the principles that are stated in that sentence.

Q And the principle that not only it is not done but that it would be wrong to do those things?

A Yeah, inappropriately influence a particular investigation, criminal prosecution or civil case, I think that the word "inappropriately" is key. Because I think that it is appropriate oftentimes for there to be a back and forth, give and take about cases with the field. But to do it for -- for example, if a Senator called up Main Justice and said I want X person prosecuted or I don't want X person prosecuted, that is

totally inappropriate and a U.S. Attorney's refusal to accede to a request like that I think would not be grounds in any way, shape or form to be asked to -- to ask to resign.

Q And similarly, using again the words of this sentence, you think it would be inappropriate to retaliate against a U.S. Attorney for prosecuting or not prosecuting somebody, is that correct?

Mr. Driscoll. That is not the words of the sentence, but you can ask him if he agrees with the statement.

BY MR. MINCBERG:

Q Okay.

A Again, I agree with the statement that is in that paragraph. But for example, your question could include the refusal to prosecute immigration cases.

Q I hear you. I hear you. Let me phrase it a little more precisely. You agree with the principle that it would be wrong to do what that sentence describes?

A Yes.

Q Okay. That is fine. Now I want to talk for a couple of minutes --

A One more clarification.

Q Sure.

A I'm not sure that the Office of Legal Counsel of the Department of Justice would agree with that as a legal matter, and so I am not giving you a legal opinion on whether there is a restriction on the President's authority to remove executive branch officials. But I am -- what I am really saying is it is wrong to do that in a moral sense. But I am not the Office of Legal Counsel. I am not giving you a legal opinion.

Q And again we are not getting into this. It may or may not be appropriate for the President to do something for any reason like that. It is a different question as to whether an adviser to the President has a retaliatory motive, whether that would be legally wrong as well as morally wrong but --

A Correct.

Q But we won't get into that today. We will leave that for another time.

Now there was some discussion actually yesterday with Mr. Sampson, and you are involved with some of these too, about the response to the letter from several Senators concerning the Cummins-Griffin case. And I want to ask you a little bit about that because again your name appears on some of the e-mails about that.

A Okay.

Mr. Mincberg. Why don't we -- I think to try to make this easier let's just mark two documents. Only one of them do I really need to talk about in any detail. These would be -- the first will be 15, which will be DAG 720 to 722. And the second will be 16, which is DAG 2274 to 2276.

[Elston Documents No. 15 and 16
was marked for identification.]

Mr. Elston. Yes, sir.

Mr. Hunt. I don't have a second one.

Mr. Mincberg. I am sorry.

BY MR. MINCBERG:

Q Document 15 is an e-mail from Mr. Sampson to a number of people, including yourself, asking for review and comment on the draft response 721 to 722 to a letter about Mr. Griffin and Mr. Cummins, do you see that?

A I do.

Q And did you in fact review this letter?

A My recollection, looking at these 2 e-mails together, is that I did not review that letter when it was sent to me on February 21st, but that the Deputy Attorney General's views on the response to the letter, which I did get on February 21st, were being solicited on the following day. And what the e-mail that is the start of 16 says to me is that I was sitting in the Deputy

Attorney General's conference room probably in another meeting, unrelated to these issues, and I asked my assistant to print it for me so that I could have it to go over the letter with the Deputy Attorney General.

Q Got it.

A But that is a little bit of speculation on my part. It seems consistent with my normal practice and with the e-mails that are here, to the best of my knowledge that is what happened.

Q That is what seemed to be the case and that makes perfect sense. Now, I am sure you are aware that there is a document production -- in fact I think you produced several of these documents from the Justice Department recently with a cover letter indicating certain inaccuracies in the letter. And I wanted to ask about a couple of aspects.

On DAG 721 claims that -- the letter states the Department of Justice -- looking at the bottom here -- is not aware of anyone lobbying either inside or outside of the administration for Griffin's appointment. Do you see that?

A Mmh-hmm.

Q Now, you had some conversation and e-mail exchanges with -- as I recall -- with Monica Goodling relating to Mr. Griffin's appointment and what to do with

him before he actually got to the U.S. Attorney's office. Do you remember that?

A I think there is an e-mail to me with his resume.

Q Oh. Right.

A I am not sure that there is anything else. I know that there are other e-mails. But I don't know that there were, I think a discussion between Kyle and her but I don't believe that I am on those e-mails. I think the e-mail you are referring to is an e-mail that simply forwards his resume to me.

Q And were you aware that Ms. Goodling was attempting to essentially work on placing Mr. Griffin?

A Yes. She was attempting to place him in the Deputy Attorney General's office. That is why she sent the resume to me.

Q Right. And in the context of that, you obviously were given to understand that he was at some point to be put in to the Eastern District of Arkansas U.S. Attorney slot?

A My understanding is that he was going to be the administration's choice for that position, that's correct, at the time that she sent me that resume.

Q You were nonetheless comfortable with the sentence at the time that the Department was not aware of

anyone lobbying you inside or outside the administration for Griffin's appointment?

A Where does this --

Q At the very bottom of DAG 721.

A I am not aware of anyone lobbying. You know as I sit here now, I am not aware of anyone lobbying for his appointment. But again I am not the person who reviewed, wrote or commented on this letter.

Q The last statement I am a little confused by. I thought you indicated that you and the DAG were looking at this together.

A Well, on the --

Q On the 22nd.

A On the 22nd they wanted the DAG's views on the letter. I was in the conference room --

Q I see.

A I assume that I brought it to his attention that they really needed his comments if he had any --

Q I see.

A And I don't remember if he did have any. If he did I probably would have communicated them back to Kyle. But I am not -- I am not aware of my personal review of it --

Q Okay.

A -- for accuracy or anything. But I am not sure that -- I mean as far as I knew, it would be helpful to actually see the e-mails to figure out the date that Monica sent me his resume but my best recollection as I sit here today was that I understood him to be the administration's choice. And what I mean by that is that, again, at the time, I understood Bud Cummins to have communicated his decision not to continue as U.S. Attorney at some point. And when a U.S. Attorney does that, the administration starts the process of selecting a successor. I am not involved in that process. I don't know entirely how it works. I don't know how it works in particular in Arkansas. In a State that has Republican Senators it is usually the Republican Senators that forward names. I don't know how it works in Arkansas.

But my sense of it was that he was the administration's choice to be U.S. Attorney at the time I got that resume. I don't know what the process was that led to that, whether there was a process. I can't -- I wasn't involved.

Q Fair enough. Flip with me, please, to the next page, DAG 722, to the last page point where the draft says, and I believe this was in the final, that "The Department is not aware of Karl Rove playing any role in the decision to appoint Griffin." Do you see that?

A Yes.

Q Obviously this has gotten a little bit of controversy since then. But do you have any recollection then in the February 22nd time frame of yourself reviewing this or talking about it with Mr. McNulty?

A No. And I don't -- I don't think that I became aware of Karl Rove playing any role in the decision until that e-mail was released that said that. And I don't remember discussing this. You know, look, when the Deputy Attorney General is reviewing this letter, that sentence is something that neither he nor I would have any knowledge of in the ordinary course of things. That is something that the AG's office would know about if it occurred, and so since the letter was drafted by Kyle, that we wouldn't have had any reason to question that statement.

Q Right. Your point is that you certainly speaking for yourself, obviously Mr. McNulty will at some point speak for himself, but certainly speaking for yourself you just would have no knowledge of that?

A Right. Now I did know that Tim Griffin had worked for Karl Rove. But I didn't know -- I couldn't answer this question at the time whether he played any role in the decision. And again, I don't really remember

personally reviewing this for accuracy and commenting on it.

Q I want to move forward to the preparation for the House hearing that occurred on this subject a little bit later in early March. Describe generally your involvement in that. I know Mr. Moschella did the actual testimony.

A Right. I was not at his prep session. And my involvement would have been limited to I probably looked at his -- I can't remember if he did a -- I assume he did a draft statement. I probably looked at it, his prepared statement. I probably looked at his prepared statement and commented on it. I do recall him -- we work, I don't know, maybe 50 feet from each other. And I do recall him coming in from time to time and asking me discrete questions about issues that arose in his personal prep leading up to his testimony. But I have looked at my calendar. I have thought about it. And I don't recall being in his actual prep session. My calendar indicates that there were a couple of other meetings going on around the same time that I do recall attending. So to the best of my recollection I was not in his prep session at all.

Q So again these may be questions that we really will need to -- well, let me ask you this. Other than

Mr. Moschella himself, do you remember who was actually involved in these prep sessions?

A I think there is a calendar entry that indicates who was invited to that meeting --

Q You actually were invited?

A Sure.

Q But I was just wondering if you knew who actually showed up.

A I wasn't in the meeting.

Q Sometimes one knows even when one isn't in the meetings themselves. But that is not a problem.

A I hope somebody went to it.

Q It is an interesting question. There were a few statements and representations he made at the hearing and in the briefing session that I just wanted to ask you whether you had any knowledge of discussions about in terms of where he got that information. And again we will certainly ask most of these question to him, but I wanted to ask you a little more particularly about just a few of them.

Most importantly, he had indicated that there was no White House involvement in this process until late in the process, late October, early November type time frame. Do you remember any discussions of that issue with him?

A I don't recall any specific discussions regarding that fact. But it is consistent with what I understood to have been the situation that the White House involvement in this process was largely getting their permission to do it.

Q Although you do recall, as we discussed much earlier, that there was this e-mail that you got a copy of that -- where you would have had to have gone through this before you got to the list of names indicating that there had been a list sent to the White House as early as September.

A Yes, but I think that is consistent with what he said there. If what -- in terms of times, September, October, you know, the fall of 2006. And his understanding was what I understood and was what the Deputy Attorney General understood and, you know, I am not sure that -- I am not sure that he got that specific piece of information from anyone. It was what we understood in the Deputy Attorney General's office to have been the case.

Q And with respect to Mr. Cummins in particular, and we alluded to this before, Mr. Moschella testified that he, Mr. Cummins, had indicated he was going to be leaving and that is what led to looking for a replacement

candidate. You indicated earlier today that you became disabused of that at some point.

A That is true. And I just saw this in the last exhibit you handed me. Apparently there was a December 2004 article in which he said it wouldn't be shocking if he left before the end of Bush's second term. So I don't -- ultimately I don't know what the truth is on that. But I know that Bud Cummins' view of it is very different from the view that is expressed in that letter, and it is going to be impossible for me to sort out what the truth is on that.

Q And I think you indicated you had that conversation with him in February where he disabused you?

A January, February, 2007, one of the two. I don't remember when precisely. It probably was February because I don't think it came up in his first conversation. It was probably in February. But again, I don't know whether Bud is telling me the truth about that or whether you know this 2004 article more accurately represents the truth. I don't know.

Q Do you recall communicating to Mr. Moschella what you learned from Mr. Cummins about his perception of being forced out versus voluntarily reassigning?

A I don't recall having a discussion with Will about that.

Q Do you know whether anybody did?

A I don't know.

Q Based on your testimony about your level of involvement, I am not going to ask you specific questions about the particular words in his testimony, and I think they will probably be more appropriately left for him in any event.

A That is fine.

Mr. Mincberg. Let's take a 5-minute break and see if I can reorganize a few documents to move us along a little bit.

[Brief recess.]

Mr. Mincberg. Let's get started. I am reasonably optimistic we will finish by 5:00, but in any event we will stop by then.

BY MR. MINCBERG:

Q Back on the record. Mr. Elston, do you recall attending a meeting in the White House to discuss the U.S. Attorney issue in early March of 2007?

A Yes. I believe that on the night before Will Moschella's testimony, which I think was on the 5th of March, we were asked to come over to the Eisenhower Executive Office Building. It wasn't actually in the White House but it was in the building next door. I

remember attending that meeting with the Deputy Attorney General and others from the Department of Justice.

Q Tell us what you remember and what was said at that meeting?

A My recollection of that meeting is not that strong. It was a relatively short meeting. I don't think it maybe lasted much more than a half hour. The main purpose of it was, as understood it, to get a sense of what Will's testimony was going to be on the following day. It was attended by people from both Leg Affairs and the Public Affairs Office of the Department. And my sense was, although I did not know all of the people in the room, that there were people from Leg Affairs and Public Affairs Offices of the Executive Office of the President as well as people from the White House Counsel's Office, in fact, Fred Fielding, that was the first time I met Fred Fielding -- the only time I met Fred Fielding. He attended that meeting along with others from the White House Counsel's office. I did know Bill Kelley, Mike Scudder, and as I understood the purpose of the meeting and my recollection of what occurred was trying to get a sense of what Will's testimony was going to be and how the White House and the Department of Justice would communicate its message regarding that testimony to Congress and to the public

through the Public Affairs Offices, to make sure, essentially, that the White House and the Department were on the same page regarding his testimony.

Q And what was the same page that you all wound up on?

A I assume it is what Will testified to. One issue that I do recall being discussed in some detail was the Department's position on the legislation. In one of the drafts that led up to this meeting, I think in the latest draft, the draft was sent over to OMB for clearance, the Department still said the Department opposed the legislation regarding U.S. Attorney appointment authority. And I remember the sense of the people from the White House was that that was untenable. They weren't going to make the Justice Department support the legislation, but it just had to come out that we were not opposed to it. The Department was going to be allowed, I guess, to take no position on the legislation. But at that point it felt strongly that the legislation ought to pass and that would be a significant step in trying to move on with the story. I do remember that part of it because it did, it was a fairly stark conversation because there were people from the Department who still wanted to oppose the legislation at that time.

Q Was there any discussion at that meeting about the reasons for termination of any of the U.S. Attorneys?

A I don't recall that. I think it was too short of a meeting to get into specifics regarding individual U.S. Attorneys.

Q Was there any discussion about the level of White House involvement in that decision?

A I don't recall that coming up at the meeting.

Q I am going to ask you to take a look at what will be marked as No. -- Document No. 17, which is DAG 1093 followed by OAG 344 to 347 and, as you will see in a minute even though the numbers aren't consecutive they all relate to each other.

A Yes, sir.

[Elston Document No. 17

was marked for identification.]

BY MR. MINCBERG:

Q Focusing first on DAG 1093, that is an e-mail exchange, is it not, about a letter that House committee wrote to Mr. Moschella the day before this hearing --

A Yes, but --

Q -- the hearing, is that correct?

A Yes. But I would note that I am only on the original distribution of the letter. The first message

down at the bottom of that page I am not -- doesn't appear that I am copied on any of the subsequent e-mails.

Q You are right about that. And frankly, I am curious about it myself, particularly since you are mentioned in the text of one of them. So that is really what I want to ask you about. Referring to the e-mail that is the one, two-thirds down from Christopher Oprison, O-P-R-I-S-O-N, do you see that?

A Yes.

Q And who is Mr. Oprison?

A He works in the White House Counsel's Office.

Q Have you dealt with him?

A Not on this issue but on others I have dealt with him.

Q Okay. And he is referring here to the specific numbered items in the letter, which is OAG 346 and 347. So you might want to have that in front of you as we go over it.

Number 4 on OAG 346 is please identify all individuals in the White House and Department of Justice who are involved in the creation of the list of U.S. Attorneys to terminate, provide any supporting materials concerning these matters. Mr. Oprison says, for number 4 can we discuss. Do you see that?

A I do.

Q Do you recall being involved in any discussions about that subject?

A I do not.

Q And then we get to where your name is taken, that, referencing the number 5, and OAG 346 asks Mr. Moschella, please detail any communications the Department may have had with the terminated U.S. Attorneys or any other U.S. Attorneys concerning their specific failures to comply with particular administration law enforcement priorities. And then it asks for documents relating to that. Do you see that?

A Yes.

Q And then it appears as though Mr. Oprison says, going back now to DAG 1093, also are there any other communications other than Mike Elston's that are potentially responsive to number 5. Do you see that?

A Yes.

Q Do you have any idea what he was referring to when he refers to communications other than Mike Elston's?

A I don't know what he was thinking when he wrote that. I don't.

Q Did you ever communicate with anybody in the White House about communications you have had with U.S. Attorneys that were terminated?

A Well, I don't think that is the question that is being asked in number 5. The question that is being asked in number 5 is communications the Department had with terminated U.S. Attorneys or other U.S. Attorneys regarding specific failures to comply with law enforcement priority. It is not about communications between the Department and the White House.

Q No. No. If I said that, I misspoke. Let me rephrase the question.

A Let me try to answer what I think the question is and we see if that does it.

Q Okay.

A There are communications between Bill Mercer and me and Carol Lam in July 2006 regarding immigration cases and the reason for the dropoff in immigration cases. Bill started that correspondence when he was PADAG. He left and she ultimately submitted a lengthy memo regarding that.

With respect to -- I am not really sure what they mean by that. That is the only thing that as I sit here today comes to mind that would fit within that category 5, but I don't -- I can't say I have given much thought to it. I don't recall getting this letter even though it looks like I must have gotten a copy of it initially.

RPTS THOMAS

DCMN MAYER

Q Very good.

Now, you referred a little bit to some of this, but were there calls that you had with some of the terminated U.S. Attorneys after the termination relating to the subject of the possibility of them testifying or speaking to the press?

A I know that John McKay has characterized my conversations with him prior to the Attorney General's testimony in that way, but again, that was not what that phone call was about.

The phone call was at the Deputy Attorney General's direction to reassure him and Paul Charlton and Kevin Ryan, who I ultimately didn't speak to, but passed the message along through his First Assistant U.S. Attorney, that the Attorney General was not going to name names at the hearing.

Q Right. And I am going to get into the specific phone call.

Were there any other --

Mr. McLaughlin. Who were the three you called?

Mr. Elston. McKay, Charlton, and Ryan?

BY MR. MINCBERG:

Q Were there any other conversations that would be responsive to my question that you can think of?

A Bud Cummins. I had a -- I am assuming you are including Bud Cummins in your group, but I would not because he had already left the Department. We had a series of conversations that began in mid-January and extended through February 20th relating to a number of subjects, and I will try to quickly explain what those conversations were.

He called me initially to complain about being lumped in with the other group of U.S. Attorneys. He didn't think it was fair. He didn't think that he was being correctly characterized at all.

The Attorney General, when he testified, did in fact say something regarding performance evaluations in his testimony in connection with this, and I think that heightened Bud's concern about being included in this group.

He also let me know that at some point during one of these conversations that people were asking him to testify, but he had declined to testify. I don't know the precise sequence. I don't know if that was in the first conversation in January or if it was in a later conversation around February 1st.

Q Well, you know, why don't we hold off on the further conversations with Mr. Cummins, because I have some documents that I think may help refresh your memory on some of that. But let us leave Mr. Cummins for a moment.

Any other of these eight U.S. Attorneys, other than those you mentioned, Mr. McKay and Mr. Cummins, and then you mentioned the three -- the other two phone calls that you had?

A And, again, those conversations I don't think -- remind me what your question was, your question about testimony. Was that the question?

Q Why don't I make the question a little broader so that it will make it easier.

Are there any of the other terminated U.S. Attorneys, other than the ones you have already mentioned, that you had conversations with in the post-termination time frame?

A Yes.

Q Okay.

A At a certain point in January, I was assigned a deal with the U.S. Attorneys regarding their extension requests. So I had conversations with Carol Lam, I had conversations with Kevin Ryan. I had many conversations,

it seemed like, with Margaret Chiara because we kept extending her.

I don't believe Mr. McKay or Mr. Charlton sought extensions. I didn't talk to David Iglesias about his extensions because the Deputy Attorney General talked to him about his extension.

Q Any other conversations, other than the ones you have described?

A That is all that comes to mind right now.

Q Okay. I want to ask you first about a couple of these conversations you had with Mr. Cummins that are reflected in one way or another in some documents.

We will start with number 18, Document number 18 which is DAG 678.

A Okay.

Mr. McLaughlin. Or DAG 682.

Mr. Mincberg. I may have handed you the wrong one. Excuse me. Let me retract back those ones that I just collected.

You have 678? Well, then, I was close. Let me get this one back.

Now we are cool. Thank you.

[Elston Document No. 18
was marked for identification.]

BY MR. MINCBERG:

Q I want to work from the bottom up on this series of e-mails.

A Sure.

Q The first is an e-mail from you to Mr. Hertling on February 1st with copies to Mr. Sampson and others referring to a call that you had with Mr. Cummins, which I infer from this e-mail occurred on February 1st.

A I believe that it did, and this was not the first phone call I had with him, but -- I believe there was an earlier phone call in January, but I think that is right that he called me again on February 1st.

Q Okay. And, well, then, just so we can straighten this out, because we didn't find any e-mail on the January phone call.

Do you recall what was covered in there, or is that one you have testified to already?

A That is the one where he initially raised complaints about being lumped in with the other U.S. Attorneys.

Q Got it.

Now referring to this, do you report -- and, again, just to save time, I will ask this in a somewhat leading way, but correct me if I have mischaracterized this. You

report that Mr. Cummins called you to let him know that he had been contacted and asked to testify on Capitol Hill, that he declined. He wanted to know if we, the Department of Justice, wanted him to testify, that he would tell the truth about the circumstances and support our view of S2-14, and then you asked for thoughts.

Is that a correct characterization?

A It is almost verbatim of what the e-mail says.

Q And then in this chain there is a response from Mr. Sampson.

Let me ask you first, do you recall getting responses from [anyone|any one] other than Mr. Sampson to your e-mail?

A I believe that I got oral responses from Will Moschella and the Deputy Attorney General.

Q And do you recall what their responses were?

A Will agreed that it was not a good idea to ask Mr. Cummins to testify on behalf of the Department.

The Deputy Attorney General, I think, concurred with that, but he also told me to be very careful when I called Bud back and to make it very clear to him that the Department of Justice had no position on whether he testified or not and that he could testify if he wanted to or not testify, it was entirely up to him.

And that conversation sticks in my mind because the Deputy Attorney General was very earnest about being very careful, and I, having no experience regarding Capitol Hill and he having two decades of experience with Capitol Hill, I took what he was saying very -- I took it seriously, and I followed his instructions.

Q And the e-mail from Mr. Sampson suggests that he, Mr. Sampson, doesn't think Mr. Cummins should testify and asks how would he answer certain questions, including whether he resigned voluntarily, whether he was told why he was being asked to resign. Do you see that?

A Yes.

Q Now that obviously indicates that he was being asked to resign rather than -- rather than voluntarily, at least as I read it. Do you take it that way?

A Well, again, and I think this goes back to lack of clarity about what actually happened, and you have to ask people who were actually involved in that. But there are some -- there are some indications that he was planning to leave, and there is some indication that he was asked to resign.

Now, could I spin a story that I have no idea whether it's true or not about how those things are consistent? I think so. And it would essentially be that Bud decided to resign at some point, but he wasn't

resigning fast enough, so they asked him to do it on a specific date.

I don't know what actually happened with Bud. I think that people are telling conflicting stories about that, and I was not involved in it.

Q Okay.

A So, you know, I think that there is some question in Kyle's mind here about what he would say about whether he was asked to resign or not. Because, remember, he was on the record saying that he was planning to leave by the end of the year anyway.

Q Or whether, quote -- whether he was, quote, told why you were being asked to resign?

A Um-hmm, right.

Q And then you indicated in response to Mr. Sampson that you agreed that Mr. Cummins should not testify from the perspective of the Department?

A Well, I think that -- I want to be very clear about this because, again, I am still following the Deputy Attorney General's injunction on this.

The question that I was asking was whether we wanted to sponsor his testimony. This is something that comes up relatively frequently when there is a congressional hearing. The Department will be asked to provide a witness, and then they will have a panel at the end where

they have people from outside of the Department and other places testify on the same subject matter. And there are some people that the Department think would be more supportive of their position than others and might encourage to testify. And so that is the conversation I know has occurred on a number of different occasions on a number of different issues.

And the question I was asking was whether we wanted to encourage him to testify, particularly about his view that the bill -- that he disagreed with the bill.

And I took Kyle's response to be in answer to that, which was, no, we shouldn't encourage him to testify.

Q Let me ask you to take a look at what we will mark as number 19, which, from a document perspective, is DAG 686 to 687.

[Elston Document No. 19
was marked for identification.]

Mr. Elston. I remember he -- around this time we had a conversation. I believe we had a conversation on the 6th. It was early in the afternoon of the 6th, and in that conversation he was effusive in his praise of the Deputy Attorney General for setting him apart from the other Attorneys.

The Deputy Attorney General had testified on the 6th that while there were performance-related reasons with respect to the seven that were asked to resign December 7th, the Bud Cummins issue was different. There were no performance issues; he was simply asked to resign to make way for another person to serve as U.S. Attorney.

And that covers what Bud was essentially telling Paul: "How much I appreciate his testimony. You guys did me a great favor today. I really always felt that I was different from these guys, and I can't tell you how much this means to me. I really appreciate it. If there is anything I can do for you -- if there is anything I can do for you, let me know. I am still willing to help out if I can, you know, any way with this legislation."

He was effusive in his praise for the Deputy Attorney General's testimony that the others were performance-related.

BY MR. MINCBERG:

Q I want to go --

A This e-mail followed --

Q I want to go to the top of the e-mail where he said he would like to put the letter we discussed on hold until it is clear whether Tim Griffin is even actually going to be nominated.

What letter is he referring to there, if you know?

A I do know, and I can't place the date of this phone conversation. It is not the February 6th phone conversation. It is another phone conversation that Tasia Scolinos and I had with Bud.

There were some thoughts -- because in prior conversations Bud had said -- he said a number of things, but one of them was, "I still want to be on the team, and I don't have any hard feelings. I would like to be a Federal judge some day, and I don't think the Democrats are going to nominate me."

He also said, "Look, Tim Griffin's a nice guy. I like him. I think he is going to do fine. I don't have any hard feelings against Tim Griffin."

And because of those kinds of statements that he was making -- regarding his statements towards Tim Griffin, there was some discussion around this time of asking him to write a letter to the editor of a newspaper in

Arkansas indicating his view that Tim Griffin was qualified to be U.S. Attorney.

You have to remember that in December and January there was a -- there was a lot of discussion in the newspapers regarding whether Tim Griffin was qualified to be U.S. Attorney. Senator Pryor, I think, had questions about that, and there were public statements about that. And the Public Affairs folks felt like this would be helpful to Tim Griffin if such a letter could be written.

And because I had been talking to Bud since the middle of January, on occasion. He and I -- she and I, Tasia Scolinos and I, called Bud Cummins and made that request. He was not sure. He said, "Well, I wouldn't have any problems doing it. My wife doesn't like Tim Griffin that much, and she would -- she wouldn't forgive me if I did something like that, but I will think about it."

That was the tenor of his initial response to it. This was his sort of more formal response to it.

Q Got it.

Was Dan Bogden one of the attorneys that you indicated you called? I don't remember hearing his name, but I may have that wrong.

A I don't believe that I called Dan Bogden. It's possible. But it may have been possible that we split up the list and others were called by somebody else. I have a vague recollection that that is possible, but I know that the three I was assigned to call were Ryan, Charlton, and McKay.

Q And who was the other person who got the other assignment?

A I don't recall. Again, I just have a vague recollection that I split up the names with somebody else.

Q You just don't remember with whom?

A I just don't remember with whom.

Q I am going to ask you to take a look at what will be Document 19. I am sorry, 20.

A Can I say one other thing about this letter?

You will see that he again reiterates his willingness to testify on the Department's behalf, and in the phone conversation that followed, this letter or somewhere around that, I reiterated what the Deputy Attorney General told me to say a second time, which was to say, the Department of Justice has no position on whether you testify. You can testify if you want to. You don't have to testify if you don't want to.

[Elston Document No. 20

was marked for identification.]

BY MR. MINCBERG:

Q Going back to number 20, this begins DAG 696 to 697, and it appears to be, again, another e-mail chain that starts with an e-mail from Margaret Chiara asking to be essentially given another job.

A Yes.

Q And Mr. McNulty, in response to that, e-mails you and asks whether you could -- whether this could be made to happen. And then your e-mail on top says, quote, "This idea may help us avoid linking this to the others. What do you think?" End quote.

Can you explain what you meant by that?

A Yes. Just very briefly. Margaret I had been talking about this since November. My early dealings with Margaret were not particularly good on an issue relating to her office, but I came to like Margaret very much, I think, as a person. My conversations with her were always very good. I think she is a lovely woman.

To a certain extent, I enjoyed talking with Margaret. I feel like we got to be friends throughout this very difficult process.

By February 9th, it was very clear that this had gone badly, that the U.S. Attorneys were in the news,

that the Department was preparing to brief Senate staffers on the precise reasons U.S. Attorneys were asked to resign. And Margaret, I think, very much wanted to stay out of that.

I certainly understood her desire to stay out of that, and while I don't -- I don't know if that was ever possible, whether it was ever really possible to separate her from the rest of the group -- she certainly wasn't, you know, on the continuum. She was much closer to the Dan Bogden end of the continuum than the Kevin Ryan/Carol Lam end of the continuum.

And I thought that if she could get another government job -- and I think that the Deputy Attorney General shared this view -- it would at least provide her with a soft landing and perhaps help her make a distinction between herself and the others when she eventually faced the media on the issue of whether she was asked to resign or not.

Q So when you said, This may help us avoid linking this to the others, you meant avoid having discussion of the fact that she was asked to resign, or that she was not asked to resign for performance-related reasons, or what, more precisely?

A I meant that if -- because at this point it was already clear. I mean, at this point, I think she was

the only U.S. Attorney that was not known. She was not known to the public.

Q As having been asked to leave?

A To resign, correct. And it was not even known that she was resigning.

Q I see.

A I don't think she had even announced her resignation.

Q So, in other words, if you were able to find her another job, then the appearance would be that she simply would switch jobs rather than being asked to resign?

A I think -- I don't know -- I think Margaret's intention was to try to avoid what the other U.S. Attorneys had fallen into by this point, this sort of maelstrom of public attention on their resignations.

And I wanted to help her with that. I think everybody wanted to help her with that because we saw what was happening.

If your question is -- I think it would have helped her and helped us to the extent we were commenting to the media regarding these things to explain that Margaret Chiara was going to continue to be employed by the Department of Justice.

If your question is -- if your question is whether we were attempting to hide it from Congress, I can answer

that question with an unequivocal "no," because we were already prepping for the Senate Judiciary briefing. And it was the Deputy Attorney General -- this was an active question, whether we were going to disclose the name of the U.S. Attorney who had not announced her resignation or whether we were simply going to say there was another one coming.

There was never an intent to not explain that there was one more U.S. Attorney; it simply wasn't public at that point.

Q So this would have avoided disclosing her identity, in essence, among other things?

A I think -- you know, I don't know that I ever thought that Margaret was going to get away with riding off into the sunset to another DOJ job without having some public scrutiny come to question.

I didn't know how she was going to answer the question whether she had been asked to resign when that question was eventually asked. But my thinking was that it would help -- help everyone avoid completely linking it to the others.

Q Um-hmm.

A But, again, I know it was the Deputy Attorney General's intention to disclose the fact that there was

one other U.S. Attorney who had been asked to resign to the Senate the following week.

Q And to give -- I won't get into the detail of this, but to give what you characterized as performance-related reasons for asking her to leave?

A I haven't characterized them, but what the Department has characterized as performance-related reasons.

Q That is fair enough. And, in fact, as I understand this -- and we won't introduce this document unless we need to -- you did communicate that Mr. McNulty did favor hiring her as -- in the Department?

A He did.

Q Did that ever happen?

A I don't believe it did.

Q Now I want to get back to Mr. Cummins for a minute.

Do you recall reading a Washington Post article in mid-February where he is quoted?

A Yes.

Q And I am just going to put that in front of us in case we need to refer to it. This would be number 21, Document 21. This does not have Bates numbers because it was not produced by the Department.

[Elston Document No. 21

was marked for identification.]

BY MR. MINCBERG:

Q But it is an article called 6 of 7 Dismissed U.S. Attorneys Had Positive Job Evaluations by Dan Eggen, dated February 18, 2007, and it goes on for 3 pages.

Is this the article that you were referring to that you recall reading?

A Yes. This is the article that I discussed with Mr. Cummins in our February 20th phone call.

Q February -- oh, yes, right.

And Mr. Cummins is quoted as saying that, quote, "If they," referring to Justice, "are trying to suggest that people have inferior performances to hide whatever their true agenda is, that is wrong," and, "They should retract those statements," end quote.

Do you see that?

A I do.

Q Was there discussion within the Department about whether you or somebody else should call Mr. Cummins?

A No.

Q You decided to call him, however?

A Two days later there was, not that statement, but the statement of the previous paragraph that stuck in my head, and that I -- I called him about.

Q And by "that statement" you mean the paraphrase where he -- where he is paraphrased as saying that Justice Department officials crossed a line by publicly criticizing the performance of his well-regarded colleagues. Is that what you are referring to?

A Correct. That was the reason I called him.

Q And why don't you explain how that reason led you to call?

A Well, as I tried to explain, Mr. Cummins and I had had a series of conversations going back to January 18th, the tenor of which was that he did not want to be included in the group of seven U.S. Attorneys asked to resign. He thought his case was different; he was protesting being lumped in.

When the Deputy Attorney General testified and said Bud Cummins is different, these seven are performance-related, Bud Cummins isn't, he was very thankful. He was very appreciative of being separated out in that manner.

He continued to ask if there were ways that he could be helpful to the Department, and I felt that I had built some rapport with Mr. Cummins during the course of these phone conversations.

I am not sure why he called me in January except that he wanted to get a message to the Deputy Attorney

General. I think that it's possible that we had one conversation or e-mail exchange while he was U.S. Attorney, but I don't remember any extensive dealings while he was U.S. Attorney. But I have seen some e-mails now that reflect, I think, some minor something -- I don't even know exactly what it was with him.

But I didn't know him well. I don't recall meeting him in person. I don't recall having conversations.

So we developed a rapport over these phone calls, and what I was concerned about, first of all, was not the quotes -- and I see that. But this is directly contrary to something he told me on February 6th, which was, thank goodness, you said the others were performance-related and separated me out.

That is how the Deputy General separated him from the other seven, which was to say that those dismissals were performance-related.

And so for lack of a better term, that sentence bugged me. And I called him and I asked him about it.

My recollection of that conversation is not great, but my recollection is that he immediately denied that he said that, that he said, Oh, no, I didn't say that. That is not in quotes. I don't know where he got that from.

And, essentially, I took him at his word when he said that because, to me, it made more sense that he

wouldn't have said that, since it was totally contrary to something he had told me 2 weeks ago. And then he went on to talk.

All of these conversations -- this is the only one that I initiated; but all of these conversations were largely Bud talking. He likes to talk about things. And I took him at his word when he went on to say, Look, these other things that I said I think are true, but look, I am not saying that you did this, but -- that the Department did this, but if you are doing that, then I think it is wrong.

And I said, Well, yeah, I agree.

And then we just -- we had a conversation like we always did about the issues of the day. I don't remember with any specificity what we talked about.

Obviously, he read something into our conversation that I never intended, that I never meant. And the only thing I can think of, as I replayed this conversation in my head 500, 1,000 times since he testified about it on March 6th, is that I said something to him which I was saying to other people, which is what I believed at the time, which is, it was a shame that all of this was coming out in the media because -- it was a shame because the Department of Justice was being tarnished. The

individual U.S. Attorneys who had been asked to resign; their reputations were being harmed.

And I did feel like that was a shame. And the Department was making big efforts to not bring forward its reasons for asking for these resignations.

On the 14th of February, the Deputy Attorney General went to a closed-door meeting with Senators and Senate staffers and tried to set forth the Department's reasons and rationale for seeking these resignations under the terms of the agreement with Senator Schumer. My understanding is that was supposed to be a closed-door session, where we weren't going to talk about these personnel issues outside of that session. But within days, my recollection is that things were leaking out about what had been said during that session. And there were little articles here, little articles there, that started to, you know, put some meat on the bones about what the reasons were.

That is my recollection, and I thought it was a shame, and I thought it was too bad.

And I recognized by the 20th of February, when I was talking to him, that the Department was likely to be put in a position of having to disclose all of its reasons, as we have been. And I may have said something like that to Bud.

But from my perspective, this was a conversation between two people who had had a number of conversations about this issue, stretching back a month. And I didn't intend to send him any message, let alone anybody else.

And let me say that with respect to that, I had no reason to believe he was in contact with any of the other U.S. Attorneys. I don't recall him ever telling me that he was talking with four or five of the other U.S. Attorneys.

He had gone to great lengths, beginning in the middle of January, to try to separate himself out from that group. And I guess what had happened is that he got back in with that group in one way or another. And I didn't know that at the time, and I certainly didn't intend to do anything that would cause him to be concerned about making public statements or, certainly, testifying.

I don't recall testimony coming up in that last conversation. Had it come up, I think I would have given him the same answer that the Deputy Attorney General instructed me to give the first time it came up, which is, Bud, the Department of Justice has no position on whether you testify. Testify if you want to. Don't testify if you don't want to.

But, obviously, as things have come out, he read something into that that I never intended. And I wish he would have clarified with me if he had any concerns what I was trying to tell him, but he didn't.

Q Well, as you probably guessed, I am going to ask you about the e-mail on that.

[Elston Document No. 22

was marked for identification.]

BY MR. MINCBERG:

Q So I'll ask you to take a look at DAG 22.

A It is very clear from this e-mail that Bud is reading something into something I said. He doesn't offer any direct quotes.

Mr. Driscoll. I want to put on the record that Bud has testified under oath on this matter, and that would be better evidence of what his recollection of the conversation was.

Mr. Mincberg. I understand all of that, but I still need to ask Mr. Elston about some of these comments on this.

Q DAG 1252 is Document 22.

One small thing, which you may or may not know. On the copy of this that Mr. Cummins gave us, the e-mail that appears right after, his name is blacked out.

Do you have any idea how the Justice Department got this one?

A I have no idea.

Q Okay. I do want to take you through a couple of points in here.

He says in this third sentence, quote, "The essence of his message" -- "his," referring to you -- "was that they feel like they are taking unnecessary flack to avoid

trashing each of us specifically or further, but if they feel like any of us intend to continue to offer quotes to the press or organize behind-the-scene congressional pressure, then they would feel forced to somehow pull their gloves off and offer public criticisms to defend their actions more fully."

Do you see that?

A I do.

Q I take it it is your testimony that you don't believe you said something to that effect?

A No. And I don't think the e-mail says that.

I think this is clearly his interpretation of what he thought was a message that I was trying to send. And he has testified that he did not take that as a threat, that it could have been friendly advice. It could have been a warning. It could have been conversation, I think is what he said. You would have to refer to the transcript.

Q I am just referring right now to the e-mail.

A Right.

Q And to the words used in the e-mail.

A And I was not intending to send any message like that.

Q I hear you.

Okay. Let me move down a little bit to I think it's the fourth line which starts with the word "he" at the end of the line. "He mentioned my quote on Sunday and I didn't apologize for it, told him it was true, and that everyone involved should agree with the truth of my statement, and pointed out to him that I stopped short of calling them liars and merely said, if they were doing as alleged, they should retract."

Do you recall that aspect of the -- that aspect -- those words or that substance coming up in the conversation?

A I have already testified to that. But what Bud is mistaken about here is that is not the part of the article that I called him about. The part of the article that I called him about was the preceding paragraph.

He went on to defend the rest of the statements in the article. I didn't ask him to. He did defend the rest of the statements in the article in a manner that was somewhat similar to that.

Q Let me ask you about the last sentence in that paragraph, third line from the bottom.

Quote, "He" -- again, referring to you, Mr. Elston -- "reacted quite a bit to the idea of anyone voluntarily testifying, and it seemed clear that they

would see that as a major escalation of the conflict meriting some kind of unspecified form of retaliation."

I take it, again, that that was not your interpretation of the conversation?

A I don't know where Bud could have gotten that from. As I said, I don't think he testified to that. I think he has testified under oath that my comments were direct to publicity and to press statements.

Q Again, that will speak for itself. I am just referring to the e-mail.

A I think it is important to note that Mr. Cummins is large -- has largely answered for this e-mail, and his under-oath testimony is not the same as what this e-mail suggests.

But what I will say is what I have already said. I don't recall the issue of testimony coming up in this phone conversation at all; and if it had, I would have given him the same answer, the same explicit answer that I gave him on the two previous occasions.

Q I have only one more document to ask you about, and we will just barely make it in by 5:00. That refers a little bit to the conversation that you had with Mr. McKay.

[Elston Document No. 23
was marked for identification.]

BY MR. MINCBERG:

Q This would be Document number 23, I believe, which is a Newsweek article dated February 28, 2007, by Michael Isikoff, 2 pages, entitled Justice Department Firings: A Cover-Up?

A I have never [read|red] this article.

Mr. Hunt. Did you say this is a published article?

Mr. Mincberg. It is at least on line.

BY MR. MINCBERG:

Q Well, I want to refer you to the fifth paragraph, referring to Mr. McKay, to the fourth line down.

A I see it.

Q That says, "After McKay was fired in December, he says he also got a phone call from a, quote, 'clearly nervous' Elston asking if he intended to go public. Quote, 'He was offering me a deal: You stay silent and the Attorney General won't say anything bad about you,'" end quote.

Then it goes on to state, "Elston says he, quote, 'can't imagine' how McKay got that impression. The call was meant to reassure McKay that the A.G. would not detail the reasons for the firings."

I take it you agree with the last part of that where it says, "Elston says he 'can't imagine' "?

A I testified to what this was. It was the phone call at the direction of the Deputy Attorney General to advise the U.S. Attorneys who had been asked to resign that when the Attorney General testified, he was not going to say which U.S. Attorneys had been asked to resign or state the reasons why they were asked to resign.

It was a very short conversation, and that is it.

Q And so you would disagree with Mr. McKay's characterization of the phone conversation?

A I would disagree with Mr. McKay's characterization of the phone conversation.

And I would also note that of the U.S. Attorneys who got Bud Cummins' e-mail, he is the only one who felt like it was a threat.

Mr. McKay, you haven't asked me why I think that it was a good idea to have him removed.

Q Well, that will take us well beyond Mr. McLaughlin's 5 o'clock deadline.

A But I will say that I have very good reason to believe that Mr. McKay is not always accurate in his statements, and this is one of those statements.

Q Well, are you aware of the fact that when Mr. Cummins testified about his conversation with you in the Senate, the Senate or White House asked questions of all four U.S. Attorneys that were there, agreed that if Mr. Cummins' version was correct, that they, as U.S. Attorneys, would, in fact, open up an inquiry into possible intimidation or obstruction?

A I would like to think that each one of those former United States Attorneys would have been good enough at their jobs that they would have done a complete interview of Mr. Cummins before making a decision like that.

Had they done so, they would have heard, I think and hope, if Bud was telling the truth, that I had on two previous occasions told him explicitly that the Department of Justice had no position on whether he testified or not voluntarily.

Q In any event -- go ahead, finish.

A And I think that they would have looked at the entirety of this situation and agreed with Mr. Cummins, who later testified that there was no case for obstruction of justice with respect to my phone conversation with him.

Mr. -- did I say Mr. McKay? I meant Mr. Cummins.

Okay. Mr. Cummins. And Mr. Cummins, under oath, has stated that there is no case for obstruction.

And Mr. Cummins is the person that I had the conversation with.

Q Well, in any event, it seems pretty clear from what we have discussed that both -- in your view, that both Mr. McKay and Mr. Cummins misinterpreted their respective phone calls with you. Is that a fair statement?

A I think Mr. McKay is not being fully truthful about the conversation we had. And I think Mr. Cummins definitely misinterpreted our phone conversation.

Q Well, let me put it this way:

If Mr. McKay is being truthful, he is also misinterpreting the conversation; is that correct?

A That is exactly right. I was not authorized to offer any deal to any of the U.S. Attorneys calling. I had the same phone conversation with Mr. Charlton and with Mr. Ryan's First Assistant. It was a very short conversation in which I was supposed to reassure them that the Attorney General would not name names, or reasons for asking for resignations, at his testimony on the 18th of January.

Q Mr. Elston, subject to what we've talked about several times before, the redacted information that we

have agreed for the moment not to ask you about, I actually have no further questions at this time.

A Could I say how much I very much appreciate your willingness to do this today? I consider it a great favor, and I am very thankful for that.

And may I also say that in addition to the obvious reason why I am here today, which is that the Attorney General has directed employees at the Department of Justice to cooperate with this inquiry, I hope that you will do a thorough inquiry into this, because this episode has done great damage to the Department of Justice.

I hope that at the end of the day, you don't find anything. But if you do, then I think that it should be followed up and prosecuted to the full extent of the law regarding whether there were improper motives; because it is only through this process, I think, that the Department can move on from this and continue the good work that thousands and thousands of employees do every day in the service of justice.

And I appreciate the seriousness in which you are taking this.

Mr. Mincberg. I appreciate that.

And I wish we could all agree to at least make that last sentence or two public, because I think it is

important; and I hope it is an attitude that is shared by all government officials at both ends of Pennsylvania Avenue.

Mr. McLaughlin. We will need to return at a later time for my questions.

Mr. Mincberg. I may have redirect and maybe by then be able to deal with the other redactions. But that is fine.

So the session is not technically adjourned, but recessed, I guess would be the right phrase, for now, although we will go ahead and get the transcript for it.

[Whereupon, at 5:10 p.m., the interview was recessed.]