IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS

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| UNITED STATES OF AMERICA | ) | |
| | ) | |
| v. | ) | No. 4:06CR00041 GTE |
| | ) | |
| ANTOINE DEMETRIS BAKER | ) | |

**DEFENDANT'S MOTION TO DECLARE U.S. ATTORNEY'S APPOINTMENT UNCONSTITUTIONAL OR IN VIOLATION OF 28 U.S.C. § 541(c) OR BOTH AND MEMORANDUM IN SUPPORT**

Defendant moves, pursuant to the All Writs Act and the declaratory judgment statute, to declare the United States Attorney General Alberto Gonzalez's appointment of Tim Griffin as United States Attorney for the Eastern District of Arkansas unconstitutional under U.S. Const., Art. II, § 2, cl. 2-3, or violating 28 U.S.C. § 541(a-b), or both. In addition, the U.S. Attorney is a Presidential appointment not an Attorney General's appointment.

Griffin is the United States Attorney for the Eastern District of Arkansas, and his name has not been, and likely will never be, submitted to the United States Senate for "advice and consent" as required by Art. II, § 2, cl. 2 (with cl. 3, collectively the "Presidential Appointments Clauses", quoted in ¶ 22, *infra*). Therefore, his appointment by the Attorney General, albeit under 28 U.S.C. § 546(c), as amended in March 2006, still does not obviate application of 28 U.S.C. § 541(a), and it violates the Presidential Appointments Clause of Art. II of the Constitution. Therefore, he cannot hold the office of U.S. Attorney.

Defendant takes three related approaches: First, even considering § 546(c) as an attempted "end run" around the Presidential Appointments Clauses, defendant submits that § 541(c) must

still control to prevent an obvious absurdity enabled by the law,[1] and Mr. Griffin's name still has to be submitted to the Senate. Second, the failure or refusal to submit his name means he holds his office in violation of the Presidential Appointments Clauses. Third, under the Constitution, only the President can appoint a U.S. Attorney, not the Attorney General, so this appointment is void.

## I. JURISDICTION AND SUMMARY

1. The defendant is charged in this case with federal capital murder. The superseding indictment alleging a capital crime with an allegation of aggravating circumstances was filed on August 9, 2006. (Doc. 25, page 6 ("Notice of Special Findings"))

2. Defendant is informed by the Assistant U.S. Attorney that a superseding indictment will be sought against the defendant in February. Presumably, this superseding indictment will allege an additional aggravating circumstance for the death penalty.

3. This superseding indictment will be presented by the Assistant U.S. Attorney but necessarily in the name and by the authority of Mr. Griffin, U.S. Attorney, a person defendant contends is acting and holding office without constitution or statutory authority.

4. The All Writs Act, 28 U.S.C. § 1651, provides:

> (a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.
> (b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

*Pennsylvania Bureau of Correction v. U.S. Marshals Service,* 474 U.S. 34, 43 (1985), states:

> The All Writs Act is a residual source of authority to issue writs that are not otherwise covered by statute. Where a statute specifically addresses the particular issue at hand, it is that authority, and not the All Writs Act, that is controlling.

5. Defendant also submits there is jurisdiction under the declaratory judgment statute,

[1] This example is given in ¶ 18, *infra.*

28 U.S.C. § 2201(a) because it is expressly not limited to civil cases.[2]

6. There is no other statutory authority for defendant to bring this issue before the court. Indeed, the government will presumably argue that defendant even lacks Art. III standing. If this death penalty defendant does not have standing to raise this issue, then nobody does. Then, the government would necessarily have to argue that no person in the world can challenge the possible lack of constitutional or statutory authority of the U.S. Attorney for the Eastern District of Arkansas. (Standing is discussed in Part VI, *infra*.)

## II. THE U.S. ATTORNEY FOR THE EASTERN DISTRICT OF ARKANSAS

7. On December 20, 2006, U.S. Attorney Bud Cummins apparently was told he had been removed from office by United States Attorney General Alberto Gonzalez under 28 U.S.C. § 541(c).

8. That same day, Tim Griffin was appointed by the Attorney General Gonzalez to replace Cummins as U.S. Attorney. Griffin was sworn in on or about December 20th.

9. According to the Library of Congress website,[3] Griffin's name has not been submitted to the Senate for confirmation. From the news stories about his appointment,[4] it is apparent that it never will be. It also appears that there are six other U.S. Attorneys in other districts

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[2] 28 U.S.C. § 2201(a) states:

> In a case of actual controversy within its jurisdiction, [with inapplicable exceptions], any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such. (bracketed material added)

[3] http://www.thomas.gov/home/nomis.html, enter name and dates.

[4] *See* Linda Satter, "Was asked to quit, U.S. Attorney says / Cummins, others told to make way," Arkansas Democrat-Gazette (Jan. 13, 2007) 1A, 9A.

similarly purged and replaced.[5] If this issue is not dealt with here, it will come up in some other court.

## III. THE ROLE OF THE U.S. ATTORNEY'S IN CRIMINAL PROSECUTIONS

10. U.S. Attorneys are responsible for criminal prosecutions in the 93 federal districts under U.S. Attorney's Manual § 3-2.140:

> **3-2.140 Authority**
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> Although the Attorney General has supervision over all litigation to which the United States or any agency thereof is a party, and has direction of all United States Attorneys, and their assistants, in the discharge of their respective duties (28 U.S.C. Secs. 514, 515, 519), each United States Attorney, within his/her district, has the responsibility and authority to: (a) prosecute for all offenses against the United States; . . . (e) make such reports as the Attorney General shall direct. 28 U.S.C. Sec. 547.
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> By virtue of this grant of statutory authority and the practical realities of representing the United States throughout the country, United States Attorneys conduct most of the trial work in which the United States is a party. *They are the principal federal law enforcement officers in their judicial districts.* In the exercise of their prosecutorial discretion, United States Attorneys construe and implement the policy of the Department of Justice. Their professional abilities and the need for their impartiality in administering justice directly affect the public's perception of federal law enforcement. (emphasis added)

*See also* U.S. Attorney's Manual § 1-2.500. As to the U.S. Attorney's role in the federal death penalty protocol, *see* Part V, *infra*.

11. The office of United States Attorney is provided for by statute: 28 U.S.C. § 541:

> (a) The President shall appoint, by and with the advice and consent of the Senate, a United States attorney for each judicial district.
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> (b) Each United States attorney shall be appointed for a term of four years. On the expiration of his term, a United States attorney shall continue to

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[5] *See* David Johnston, "Justice Dept. Names New Prosecutors, Forcing Some Out," New York Times (January 17, 2007), http://www.nytimes.com/2007/01/17/washington/17justice.html; MSNBC's Countdown (transcript, January 17, 2007), http://www.msnbc.msn.com/id/16689439/.

The San Diego and San Francisco U.S. Attorneys were at least given until February 15th, according to the San Diego Union-Tribune of January 16, 2007: "U.S. Attorney Lam announces resignation." http://www.signonsandiego.com/news/metro/20070116-1631-bn16lam.html.

perform the duties of his office until his successor is appointed and qualifies.

(c) Each United States attorney is subject to removal by the President.

12. The renewal of the USA PATRIOT Act, Public Law 109-177, 120 Stat. 246, Title V, § 502 (March 9, 2006), included the provision at issue here: 28 U.S.C. § 546(c). The whole statute for context provides:

> (a) Except as provided in subsection (b), the Attorney General may appoint a United States attorney for the district in which the office of United States attorney is vacant.
>
> (b) The Attorney General shall not appoint as United States attorney a person to whose appointment by the President to that office the Senate refused to give advice and consent.
>
> (c) A person appointed as United States attorney under this section may serve until the qualification of a United States Attorney for such district appointed by the President under section 541 of this title.

Subsection (c-d) formerly read:

> (c) A person appointed as United States attorney under this section may serve until the earlier of—
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> (1) the qualification of a United States attorney for such district appointed by the President under section 541 of this title; or
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> (2) the expiration of 120 days after appointment by the Attorney General under this section.
>
> (d) If an appointment expires under subsection (c)(2), the district court for such district may appoint a United States attorney to serve until the vacancy is filled. The order of appointment by the court shall be filed with the clerk of the court.

## IV. THE GROUNDS OF INVALIDITY OF MR. GRIFFIN'S APPOINTMENT

### A. VIOLATION OF 28 U.S.C. § 541(a); NO "ADVICE AND CONSENT"

13. Because of the familiar rule that constitutional questions be avoided if possible,[6] we start with statutory construction. Statutory construction here, of necessity, implicates the constitutional questions as well because 28 U.S.C. § 541(a) uses the same words as U.S. Const., Art. II,

[6] *See, e.g., Raygor v. Regents of University of Minnesota,* 534 U.S. 533, 549 (2002); *Vermont Agency of Natural Resources v. United States ex rel. Stevens,* 529 U.S. 765, 787 (2000).

§ 2, cl. 2: "advice and consent" of the Senate.

14. The first issue is whether there is any potential inconsistency between §§ 541(a) and 546(c) (as amended), or whether they can be read together. Defendant submits that they can be read together. When one does, § 541(a) still requires Mr. Griffin to go before the U.S. Senate for "advice and consent" to his appointment. The Attorney General's or the President's refusal to make him do so voids Griffin's appointment under the statute.

15. In § 541(a), it is clear that U.S. Attorneys must be appointed with the "advice and consent of the Senate." In § 541(b), U.S. Attorneys are appointed for four year terms (albeit subject to removal at any time, § 541(c)), and "[o]n the expiration of his term, a United States attorney shall continue to perform the duties of his office until his successor is appointed and qualifies."

16. Under § 546(a), the Attorney General may appoint a U.S. Attorney where there is a vacancy. Under § 546(c), however, "[a] person appointed as United States attorney under this section may serve until the qualification of a United States Attorney for such district appointed by the President under section 541 of this title."

17. The United States Attorney General here apparently construes §§ 541 & 546 as allowing the President to remove a U.S. Attorney and then replace him or her without ever submitting that replacement's name to the Senate for "advice and consent" by ignoring § 541(a). If no name is submitted, by mere inaction or design, the appointee carries on and continues to hold the office indefinitely. And, does this appointment even qualify as a recess appointment under U.S. Const., Art. II, § 3? Apparently the Attorney General does not think so.

18. An example, one that might be called extreme but is not the slightest bit implausible, is this: The President appoints a qualified "strawman" (or woman) as a United States Attorney

that the President knows will be confirmed by the Senate at the beginning of the President's term of office. The Senate advises and consents to the appointment, and the U.S. Attorney is sworn in. Shortly after that, the Attorney General removes the U.S. Attorney and appoints a replacement who never has to face the Senate, and it turns out that the replacement U.S. Attorney is inexperienced or unqualified for the job or a blatantly political appointment that no one can understand would qualify as "the principal federal law enforcement officers in their judicial districts."[7] Conceivably, under the Attorney General's interpretation of his appointment power in § 546(c), an incompetent or a blatantly politically appointed[8] U.S. Attorney could hold office like this for seven and a half years, or even longer, assuming the President is re-elected, without *ever* facing Senate confirmation over his or her qualifications.

19. Some members of the Senate to have spoken to this issue apparently agree with the construction we put forth here. On Senator Mark Pryor's (D-Ark) website home page is this press release from January 11th: "Senators Feinstein, Leahy, Pryor to Fight Administration's Effort to Circumvent Senate Confirmation Process for U.S. Attorneys."[9]

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[7] U.S. Attorney's Manual § 3-2.140, quoted in ¶ 10, *supra.*

[8] As has been suggested here because of Mr. Griffin's connection to Karl Rove and the President's 2000 Florida recount case that assured his election. *See* Satter, note 4, *supra.*

[9] http://pryor.senate.gov/newsroom/details.cfm?id=267495&:

> U.S. Senators Dianne Feinstein (D-Calif.), Patrick Leahy (D-Vt.), and Mark Pryor (D-Ark.) today introduced legislation to prevent circumvention of the Senate's constitutional prerogative to confirm U.S. Attorneys.
>
> "It has come to our attention that the Bush Administration is pushing out U.S. Attorneys from across the country under the cloak of secrecy and then appointing indefinite replacements without Senate confirmation. We know that this is not an isolated occurrence, but we don't know how many U.S. Attorneys have been asked to resign – it could be two, it could be ten, it could be more. No one knows," Senator Feinstein said.

20. Reading these sections together, as is the basic rule of statutory construction,[10] the permanent replacement to forced out Bud Cummins, Tim Griffin, still has to face "advice and consent" before the United States Senate because § 541(a) must still control. No other construction is possible. Tim Griffin is not an "interim U.S. Attorney"; he is Bud Cummins' permanent replacement until January 20, 2009. And, theoretically, if a Republican is elected President in 2008 and 2012, Mr. Griffin could hold office throughout those terms as well, until January 20, 2013, and never have to face the U.S. Senate for "advice and consent" because of Attorney General Gonzalez's interpretation of § 546(c).

21. Therefore, his name must be submitted to the Senate for confirmation under § 541 (a). Since his name has not and will not be submitted, he cannot legally hold the office of U.S. Attorney for the Eastern District of Arkansas.

### B. THIS APPOINTMENT BY THE ATTORNEY GENERAL VIOLATES THE PRESIDENTIAL APPOINTMENTS CLAUSE

22. The Presidential Appointments Clause of the Constitution, U.S. Const., Art. II, § 2, cl. 2 provides that "[t]he President shall . . . [¶] . . . nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: . . . ."

23. As Alexander Hamilton explained for us in Federalist Papers No. 66 (1788):

> It will be the office of the President to NOMINATE, and, with the advice and consent of the Senate, to APPOINT. There will, of course, be no exertion of CHOICE on the part of the Senate. They may defeat one choice of the Executive, and oblige him to make another; but they cannot themselves CHOOSE, they can only ratify or reject the choice of the President.

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[10] *See, e.g., Allied Chemical Workers v. Pittsburgh Plate Glass Co.,* 404 U.S. 157, 185 (1971); *Davis v. Michigan Dept. of Treasury,* 489 U.S. 803, 809 (1989).

He also noted this at greater length in Federalist Papers No. 76 (1788), and added:

> To what purpose then require the co-operation of the Senate? I answer, that the necessity of their concurrence would have a powerful, though, in general, a silent operation. It would be an excellent check upon a spirit of favoritism in the President, and would tend greatly to prevent the appointment of unfit characters from State prejudice, from family connection, from personal attachment, or from a view to popularity. In addition to this, it would be an efficacious source of stability in the administration.

Defendant submits this addresses just such appointments as this one,[11] and Alexander Hamilton and the Constitutional Convention would not approve because Mr. Griffin's appointment violates the genius of the "advice and consent" requirement, the law for the last 217 years.

24. Art. II, § 2, cl. 3 further provides that "The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session."

25. Defendant submits that §§ 541(a) & 546(c) must also be read in conjunction with these sections of the Constitution.

26. Therefore, Mr. Griffin's appointment violates the Presidential Appointments Clause. He has not been submitted to the Senate for confirmation and he apparently never will be. By § 541(a), he has to go before the Senate, because all U.S. Attorneys are subject to "advice and consent" under Art. II. § 2.

27. The evident intention of the 2006 amendment, however, was to exempt some U.S. Attorneys from Senate confirmation without their even being recess appointments under Art. II, § 2, cl. 3 and then the appointment is by the Attorney General and not the President. If so, § 546 (c) violates Art. II, § 2, cl. 3.

28. At first blush, it appeared that Mr. Griffin was a recess appointment because he was

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[11] See discussion accompanying note 8, *supra.*

appointed December 20th and the Senate recessed December 8th at the end of the Second Session of the 109th Congress.[12] If he was a recess appointment, that means that, if not confirmed by the Senate (as in the case of former U.N. Ambassador John Bolton and former federal district and Fifth Circuit appellate judge Charles Pickering,[13] both of whom were not confirmed after a 2005 recess appointment), he would hold office until the Senate goes out of session at the end of the First Session of the 110th Congress under Art. II, § 2, cl. 3, which would be in November or December 2007.

29. It is submitted that § 546(c) was proposed by the Bush Administration to Congress to avoid failed recess appointments for United States Attorneys, and that was about the only place that this could be done. Congress, however, did not know what it was really getting into, and it proposes to remedy this for the future. *See* ¶ 22 & n. 9, *supra.* Whether that has any effect on any of the other current U.S. Attorney appointees currently in violation of the Presidential Appointments Clause is irrelevant to defendant.

### C. Only the President May Appoint a U.S. Attorney, Not the U.S. Attorney General

30. Considering § 541(a) in conjunction with Art. II, § 2, cl. 2, Mr. Griffin's appointment can only come from the President of the United States, not from the Attorney General.

31. Because § 546(c) permits the Attorney General to appoint a U.S. Attorney is unconstitutional under Art. II, § 2, cl. 2.

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[12] http://thomas.loc.gov/home/ds/s1092.html.

[13] On former federal judge Charles Pickering's recess appointment to the Fifth Circuit and his retirement when not confirmed, *see* CNN.com: "Pickering appointment angers Democrats," http://www.cnn.com/2004/ALLPOLITICS/01/17/bush.pickering/ and NYTimes.com: "Judge Appointed by Bush After Impasse in Senate Retires," http://select.nytimes.com/gst/abstract.html?res=FA071FFC3A550C738DDDAB0994DC404482.

32. In this regard, § 546(c) is inconsistent with § 541(a), but the latter must control because it implements the language of Art. II, § 2, cl. 2 on "advice and consent."

## V. U.S. ATTORNEY'S ROLE IN CAPITAL CASES

33. As previously stated, the U.S. Attorney is the principal law enforcement officer in his or her district. U.S. Attorney's Manual § 3-2.140, quoted *supra* in ¶ 10. Under the federal death penalty statutes, the "attorney for the government" "shall, a reasonable time before the trial or before acceptance of a plea of guilty, sign and file with the court and serve upon the defendant, a notice" that a sentence of death will be sought and setting forth the aggravating circumstances justifying the death penalty. 18 U.S.C. § 3593(a). The U.S. Attorney's role in the death penalty protocol is related in ¶ 35, *infra.*

34. Because Mr. Griffin is unlawfully holding the office of U.S. Attorney, he cannot issue a death notification under § 3593(a) and neither he nor his assistants can appear before a grand jury in this district and seek a superseding indictment with a new aggravating circumstance for the death penalty.

35. In addition, under the U.S. Attorney's Manual, the defendant has an opportunity to submit to the U.S. Attorney, presumably after discovery, why the defendant should not be a candidate for the death penalty. The U.S. Attorney then presents a request to the Attorney General's Capital Case Unit. U.S. Attorney's Manual §§ 9-10.020-.040[14]:

> **9-10.020 Authorization and Consultation in Capital Cases**
>
> The death penalty shall not be sought without the prior written authorization of the Attorney General. The Deputy Attorney General may authorize the United States to seek the death penalty when the Attorney General is unavailable.

[14] http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/10mcrm.htm#9-10.020.

Prior to seeking an indictment for an offense subject to the death penalty (other than an offense under 18 U.S.C. § 1959), the *United States Attorney* is encouraged, but not required, to consult with the Capital Case Unit and other appropriate sections of the Criminal Division or the Criminal Section of the Civil Rights Division. All indictments that charge Section 1959 must be submitted for review to the Criminal Division. For further discussion regarding consultation, see the Criminal Resource Manual at 70.

In any case in which the Attorney General has authorized the filing of a notice of intention to seek the death penalty, the *United States Attorney* shall not file or amend the notice until the Capital Case Unit of the Criminal Division has approved the notice or the proposed amendment.

The *United States Attorney* should, whenever possible, make a preliminary decision whether to request authorization to seek the death penalty before obtaining an indictment charging a capital offense. In any case in which the defendant is charged with an offense carrying the death penalty (and the indictment includes language sufficient to trigger the death penalty), the *United States Attorney* should promptly inform the district court if the Department decides not to seek the death penalty, so that the district court is aware that appointment of counsel under 18 U.S.C. § 3005 is not required or is no longer required.

**9-10.030 Notice of Intention to Seek the Death Penalty**

In any case in which a *United States Attorney's Office* is considering whether to request approval to seek the death penalty, the *United States Attorney* shall give counsel for the defendant a reasonable opportunity to present any facts, including any mitigating factors, to the *United States Attorney* for consideration.

**9-10.040 Submissions to the Department of Justice in Death Penalty Cases**

In all cases in which the *United States Attorney* intends to recommend filing a notice of intention to seek the death penalty, the *United States Attorney* shall prepare a "Death Penalty Evaluation" form and a prosecution memorandum in a form specified by the Department. The Death Penalty Evaluation form is intended primarily to be used as a guideline and worksheet for the internal decision making process and as a source for statistical information concerning death penalty eligible cases. This form and other internal memoranda concerning the decision to seek the death penalty are not subject to discovery to the defendant or his attorney.

The *United States Attorney* shall send to the Assistant Attorney General for the Criminal Division the above-described documents, copies of all existing, proposed, and superseding indictments, a draft notice of intention to seek the death penalty, any information concerning the impact on the victim's family, and any written material submitted by counsel for the defendant in opposition to the government's seeking the death penalty for the defendant. In no event should these docu-

> ments be received by the Criminal Division later than 45 days prior to the date on which the Government is required, by an order of the court or otherwise, to file notice that it intends to seek the death penalty.
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> In every case in which a *United States Attorney* has obtained an indictment charging an offense that is punishable by death or conduct that could be charged as an offense punishable by death, but in which the *United States Attorney* does not intend to request authorization to seek the death penalty, the *United States Attorney* shall complete and send to the Assistant Attorney General for the Criminal Division a Death Penalty Evaluation form that contains a brief statement of the reason the *United States Attorney* decided not to seek the death penalty or charge a capital offense. This form should be completed and forwarded to the Criminal Division before or as soon as possible after indictment. (emphasis added)

36. The U.S. Attorney's Manual, however, is not binding on the government and it creates no rights for the accused—it is just its protocol. U.S. Attorney's Manual § 1-1.100:

> **1-1.100 Purpose**
>
> . . .
>
> The Manual provides only internal Department of Justice guidance. It is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal. Nor are any limitations hereby placed on otherwise lawful litigative prerogatives of the Department of Justice.

37. Defendant well knows that the Eighth Circuit held in *United States v. Lee*, 274 F.3d 485, 492-93, 190 A.L.R. Fed. 657 (8th Cir. 2001), *cert. denied,* 537 U.S. 1000 (2002), that an accused has no enforceable rights in the Department of Justice death penalty protocol. *Accord: United States v. Fernandez,* 231 F.3d 1240 (9th Cir. 2000); *Nichols v. Reno,* 124 F.3d 1376 (10th Cir. 1997).

38. That, however, is not the issue. Defendant is not seeking any enforceable rights under the death penalty protocol. Rather, it is shown here as an example of the power of prosecutorial discretion in death penalty cases exercised by a U.S. Attorney under § 541 as the "principal law enforcement officer" in his or her district, and it is an example of why the U.S. Attorney must

be subject to "advice and consent" by the United States Senate.

**VI. Standing**

39. Defendant has Art. III standing to raise this issue because there is a "case or controversy" in this case. The federal government is seeking to take his life, and an illegally appointed U.S. Attorney is seeking to amend the indictment and will be involved in this case. Indeed, if defendant has no standing, then nobody does; not in this case nor in the cases of the six other purged U.S. Attorneys.

40. The Supreme Court summarized its Art. III standing caselaw in *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61 (1992):

> Over the years, our cases have established that the irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an "injury in fact"-an invasion of a legally protected interest which is (a) concrete and particularized, *see id.,* at 756; *Warth v. Seldin,* 422 U.S. 490, 508 (1975); *Sierra Club v. Morton,* 405 U.S. 727, 740-741, n. 16 (1972);[1] and (b) "actual or imminent, not 'conjectural' or 'hypothetical,'" *Whitmore, supra,* 495 U.S., at 155 (quoting *Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983)). Second, there must be a causal connection between the injury and the conduct complained of-the injury has to be "fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court." *Simon v. Eastern Ky. Welfare Rights Organization,* 426 U.S. 26, 41-42 (1976). Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision." *Id.,* at 38, 43.
>
> 1. By particularized, we mean that the injury must affect the plaintiff in a personal and individual way.

(footnote in original)

41. In *City of Los Angeles v. Lyons,* 461 U.S. 95, 100-01 (1983), relied on in *Lujan*:

> It goes without saying that those who seek to invoke the jurisdiction of the federal courts must satisfy the threshhold requirement imposed by Article III of the Constitution by alleging an actual case or controversy. *Flast v. Cohen,* 392 U.S. 83, 94-101 (1968); *Jenkins v. McKeithen,* 395 U.S. 411, 421-425 (1969) (opinion of MARSHALL, J.). Plaintiffs must demonstrate a "personal stake in the outcome" in order to "assure that concrete adverseness which sharpens the presentation of issues" necessary for the proper resolution of constitutional questions. *Baker v.*

> *Carr,* 369 U.S. 186, 204 (1962). Abstract injury is not enough. The plaintiff must show that he "has sustained or is immediately in danger of sustaining some direct injury" as the result of the challenged official conduct and the injury or threat of injury must be both "real and immediate," not "conjectural" or "hypothetical." *See, e.g., Golden v. Zwickler,* 394 U.S. 103, 109-110 (1969); *United Public Workers v. Mitchell,* 330 U.S. 75, 89-91 (1947); *Maryland Casualty Co. v. Pacific Coal & Oil Co.,* 312 U.S. 270, 273 (1941); *Massachusetts v. Mellon,* 262 U.S. 447, 488 (1923).

42. Has defendant a "personal stake in the outcome" that is "'real and immediate' and not 'conjectural' or 'hypothetical'"? Can he show a "'personal stake in the outcome' in order to 'assure that concrete adverseness which sharpens the presentation of issues' necessary for the proper resolution of constitutional questions"?[15] Stated in terms of *Lujan*, is defendant's interest (a) "concrete and particularized," (b) "actual or imminent," and (c) likely, not hypothetical? As to him, as to this case, it certainly is, so he has standing. If, for example, he were challenging another U.S. Attorney's appointment in another district, he would not have standing. It really is just that simple.

43. This is a death penalty case. Defendant alleges his chief prosecutor unlawfully (both statutorily and constitutionally) holds office, and his prosecutor will be asking a grand jury to add an aggravator and will be asking a jury to sentence him to death. If this is not an actual "case or controversy" for Art. III standing then nothing is.

**CONCLUSION**

Mr. Griffin's appointment as U.S. Attorney by Attorney General Gonzalez and not the President should be held unlawful for lack of "advice and consent" of the U.S. Senate under 28 U.S.C. § 541(a) or Art. II, § 2, cl. 2-3, or both.

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[15] A federal death penalty case is about as concretely adverse as it gets.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, John Wesley Hall, Jr., certify that this document was e-filed and e-served through the court's electronic filing system.

*/s/ John Wesley Hall, Jr.*
John Wesley Hall, Jr.