

1 ROBERT M. AMPARÁN, SBN 172132
SHARI L. GREENBERGER, SBN 180438
2 OMAR FIGUEROA, SBN 196650
506 Broadway
3 San Francisco CA 94133
415/986-5591

4 Attorneys for Defendant
5 EDWARD ROSENTHAL

6

7

8

UNITED STATES DISTRICT COURT

9

NORTHERN DISTRICT OF CALIFORNIA

10

11 UNITED STATES OF AMERICA,

CR 02-0053 CRB

12 Plaintiff,

NOTICE OF MOTION AND MOTION TO
DECLARE U.S. ATTORNEY'S

13 v.

APPOINTMENT UNCONSTITUTIONAL
OR IN VIOLATION OF 28 U.S.C.

14 EDWARD ROSENTHAL,

541(c) OR BOTH; SUPPORTING
MEMORANDUM OF POINTS AND

15 Defendant.

AUTHORITIES

16

Date: March 2, 2007

Time: 2:00 p.m.

17

Defendant moves, pursuant to the All Writs Act and the

18

declaratory judgment statute, to declare the United States

19

Attorney General Alberto Gonzalez's appointment of Scott Schools

20

("Schools") as United States Attorney for the Northern District

21

of California unconstitutional under U.S. Const., Art. II, § 2,

22

cl. 2-3, or violating 28 U.S.C. § 541(a-b), or both. In

23

addition, the U.S. Attorney is a Presidential appointment, not

24

an Attorney General's appointment.

25

Schools is the United States Attorney for the Northern

26

District of California, and his name has not been, and likely

27

will never be, submitted to the United States Senate for "advice

28

and consent" as required by Art. II, § 2, cl. 2 (with cl. 3,

LAW OFFICES

506 BROADWAY
SAN FRANCISCO
(415) 986-5591
Fax: (415) 421-1331

1 collectively the "Presidential Appointments Clauses", quoted in
2 ¶ 20, *infra*). Therefore, his appointment by the Attorney
3 General, albeit under 28 U.S.C. § 546(c), as amended in March
4 2006, still does not obviate application of 28 U.S.C. § 541(a),
5 and it violates the Presidential Appointments Clause of Art. II
6 of the Constitution. Therefore, he cannot hold the office of
7 U.S. Attorney.

8 Defendant takes three related approaches: First, even
9 considering § 546(c) as an attempted "end run" around the
10 Presidential Appointments Clauses, defendant submits that
11 § 541(c) must still control to prevent an obvious absurdity
12 enabled by the law,¹ and Mr. Schools's name still has to be
13 submitted to the Senate. Second, the failure or refusal to
14 submit his name means he holds his office in violation of the
15 Presidential Appointments Clauses. Third, under the Consti-
16 tution, only the President can appoint a U.S. Attorney, not the
17 Attorney General, so this appointment is void.

18 I. JURISDICTION AND SUMMARY

19 1. The defendant is charged in this case with violating
20 21 U.S.C. § 846 [Conspiracy to Manufacture Marijuana]; 21 U.S.C.
21 § 841(a)(1) [Manufacture of Marijuana]; 21 U.S.C. § 856(a)(1)
22 [Maintaining Place for Manufacturing Marijuana]. The super-
23 seding indictment alleging 21 U.S.C. §§ 846, 856(a)(1)
24 [Conspiracy to Use Place for Manufacture of Marijuana and
25 Distribution of Marijuana]; 21 U.S.C. § 856(a)(1) [Use of Place
26 for Manufacture of Marijuana and Distribution of Marijuana]; 21
27 U.S.C. §§ 846, 841(a)(1) [Conspiracy to Manufacture Marijuana,

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

1 Possess Marijuana for Distribution and Distribution of
2 Marijuana]; 21 U.S.C. § 841(a)(1) [Manufacture of Marijuana,
3 Possession of Marijuana With Intent to Distribute, and
4 Distribution of Marijuana]; 18 U.S.C. § 1956(h) [Conspiracy to
5 Launder Money from Unlawful Sale of Marijuana]; 18 U.S.C. §§
6 1956(a)(1)(A) and (B) [Laundering Money from Unlawful Sale of
7 Marijuana for Promotion and to Conceal Nature and Source of
8 Money]; 26 U.S.C. § 7206(1) [Filing False Federal Income Tax
9 Returns]; 26 U.S.C. § 7203 [Failure to File Federal Income Tax
10 Returns]; was filed on October 12, 2006.

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

12 (a) The Supreme Court and all courts
13 established by Act of Congress may issue all
14 writs necessary or appropriate in aid of
15 their respective jurisdictions and agreeable
16 to the usages and principles of law.

17 (b) An alternative writ or rule nisi may
18 be issued by a justice or judge of a court
19 which has jurisdiction.

20 Pennsylvania Bureau of Correction v. U.S. Marshals Service,
21 474 U.S. 34, 43 (1985), states:

22 The All Writs Act is a residual source of
23 authority to issue writs that are not
24 otherwise covered by statute. Where a
25 statute specifically addresses the par-
26 ticular issue at hand, it is that authority,
27 and not the All Writs Act, that is
28 controlling.

29 3. Defendant also submits there is jurisdiction under the
30 declaratory judgment statute, 28 U.S.C. § 2201(a) because it is
31 expressly not limited to civil cases.²

32 ² 28 U.S.C. § 2201(a) states:

33 In a case of actual controversy within its
34 jurisdiction, [with inapplicable
35 exceptions], any court of the United States,
36 upon the filing of an appropriate pleading,

1 4. There is no other statutory authority for defendant to
2 bring this issue before the court. Indeed, the government will
3 presumably argue that defendant even lacks Art. III standing.
4 If this defendant does not have standing to raise this issue,
5 then no one does. The government would necessarily have to
6 argue that no person in the world can challenge the possible
7 lack of constitutional or statutory authority of the U.S.
8 Attorney for the Northern District of California (Standing is
9 discussed in Part V, *infra*.)

10 **II. THE U.S. ATTORNEY FOR THE NORTHERN DISTRICT OF**
11 **CALIFORNIA**

12 5. On December 20, 2006, U.S. Attorney Kevin Ryan
13 apparently was told to resign from office by United States
14 Attorney General Alberto Gonzalez.

15 6. On February 14, 2007, Scott Schools was appointed by
16 the Attorney General Gonzalez to replace Ryan as U.S. Attorney.

17 7. According to the Library of Congress website,³
18 Schools's name has not been submitted to the Senate for
19 confirmation. From the news stories about his appointment,⁴ it

21 may declare the rights and other legal
22 relations of any interested party seeking
23 such declaration, whether or not further
24 relief is or could be sought. Any such
25 declaration shall have the force and effect
26 of a final judgment or decree and shall be
27 reviewable as such. (bracketed material
28 added)

³ <http://www.thomas.gov/home/nomis.html>
enter name and dates.

⁴ [http://www.sfgate.com/cgi-bin/article.cgi?f=
/c/a/2007/02/16/BAGNT061BJ1.DTL&hw=Kevin+Ryan&sn=001&sc=400](http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2007/02/16/BAGNT061BJ1.DTL&hw=Kevin+Ryan&sn=001&sc=400)

[http://www.sfgate.com/cgi-bin/article.cgi?f=
/state/n162511S22.DTL&hw=Kevin+Ryan&sn=002&sc=404](http://www.sfgate.com/cgi-bin/article.cgi?f=/n/a/2007/02/15/state/n162511S22.DTL&hw=Kevin+Ryan&sn=002&sc=404)

1 is apparent that it never will be. It also appears that there
2 are six other U.S. Attorneys in other districts similarly purged
3 and replaced⁵.

4 III. THE ROLE OF THE U.S. ATTORNEY IN CRIMINAL PROSECUTIONS

5 8. U.S. Attorneys are responsible for criminal
6 prosecutions in the 93 federal districts under U.S. Attorney's
7 Manual § 3-4.140:

8 3-2.130 Authority

9 Although the Attorney General has
10 supervision over all litigation to which the
11 United States or any agency thereof is a
12 party, and has direction of all United
13 States Attorneys, and their assistants, in
14 the discharge of their respective duties (28
15 U.S.C. Secs. 514, 515, 519), each United
16 States Attorney, within his/her district,
17 has the responsibility and authority to: (a)
18 prosecute for all offenses against the
19 United States; ... (e) make such reports as
20 the Attorney General shall direct. 28
21 U.S.C. Sec. 547.

22 By virtue of this grant of statutory
23 authority and the practical realities of
24 representing the United States throughout
25 the country, United States Attorneys conduct
26 most of the trial work in which the United
27 States is a party. They are the principal
28 federal law enforcement officers in their
judicial districts. In the exercise of
their prosecutorial discretion, United
States Attorneys construe and implement the

23 <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2007/01/19/BAGE1NLGHJ1.DTL&hw=Kevin+Ryan&sn=014&sc=1000>

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

27 The San Diego and San Francisco U.S. Attorneys were at
28 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/20080116-1631-bn16lam.html>.

1 policy of the Department of Justice. Their
2 professional abilities and the need for
3 their impartiality in administering justice
4 directly affect the public's perception of
5 federal law enforcement. (emphasis added)

6 See also U.S. Attorney's Manual § 1-2.500.

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

9 (a) The President shall appoint, by and
10 with the advice and consent of the Senate, a
11 United States Attorney for each judicial
12 district.

13 (b) Each United States Attorney shall be
14 appointed for a term of four years. On the
15 expiration of his term, a United States
16 Attorney shall continue to perform the
17 duties of his office until his successor is
18 appointed and qualifies.

19 (c) Each United States Attorney is subject
20 to removal by the President.

21 10. The renewal of the USA PATRIOT Act, Public Law 109-
22 177, 120 Stat. 246, Title V, § 502 (March 9, 2006), included the
23 provision at issue here: 28 U.S.C. § 546(c). The whole statute
24 for context provides:

25 (a) Except as provided in subsection (b),
26 the Attorney General may appoint a United
27 States Attorney for the district in which
28 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--

(1) the qualification of a United

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

States Attorney for such district appointed by the President under section 541 of this title; or (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. SCHOOLS'S APPOINTMENT

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

11. 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, § 2, cl. 2: "advice and consent" of the Senate.

12. The first issue is whether there is any potential inconsistency between §§ 541(a) and 545(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. Schools 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 Schools's appointment under the statute.

13. 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

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).

1 (albeit subject to removal at any time, § 541(c)), and "[o]n the
2 expiration of his term, a United States Attorney shall continue
3 to perform the duties of his office until his successor is
4 appointed and qualifies."

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

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

20 16. An example, one that might be called extreme but is
21 not the slightest bit implausible, is this: The President
22 appoints a qualified "strawman" (or woman) as a United States
23 Attorney that the President knows will be confirmed by the
24 Senate at the beginning of the President's term of office. The
25 Senate advises and consents to the appointment, and the U.S.
26 Attorney is sworn in. Shortly after that, the Attorney General
27 removes the U.S. Attorney and appoints a replacement who never
28 has to face the Senate, and it turns out that the replacement

1 U.S. Attorney is inexperienced or unqualified for the job or a
2 blatantly political appointment that no one can understand would
3 qualify as "the principal federal law enforcement officers in
4 their judicial districts."⁷ Conceivably, under the Attorney
5 General's interpretation of his appointment power in § 546(c),
6 an incompetent or a blatantly politically appointed U.S.
7 Attorney could hold office like this for seven and a half years,
8 or even longer, assuming the President is re-elected, without
9 ever facing Senate confirmation over his or her qualifications.

10 17. Some members of the Senate who have spoken to this
11 issue apparently agree with the construction we put forth here.
12 On Senator Mark Pryor's (D-Ark) website home page is this press
13 release from January 11th: "Senators Feinstein, Leahy, Pryor to
14 Fight Administration's Effort to Circumvent Senate Confirmation
15 Process for U.S. Attorneys."⁸

16 18. Reading these sections together, as is the basic rule
17
18

19
20 ⁷ U.S. Attorney's Manual § 3-2.140, quoted in ¶ 8, *supra*.

21 ⁸ <http://pryor.senate.gov/newsroom/details.cfm?id=267495&:>

22 U.S. Senators Dianne Feinstein (D-Calif.), Patrick
23 Leahy (D-Vt.), and Mark Pryor (D-Ark.) today
24 introduced legislation to prevent circumvention of the
Senate's constitutional prerogative to confirm U.S.
Attorneys.

25 "It has come to our attention that the Bush
26 Administration is pushing out U.S. Attorneys from
27 across the country under the cloak of secrecy and then
28 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.

1 of statutory construction,⁹ the permanent replacement who forced
2 out Kevin Ryan, Scott Schools, still has to face "advice and
3 consent" before the United States Senate because § 541(a) must
4 still control. No other construction is possible. Scott
5 Schools is not an "interim U.S. Attorney;" he is Kevin Ryan's
6 permanent replacement until January of 2009. And, theoreti-
7 cally, if a Republican is elected President in 2008 and 2012,
8 Mr. Schools could hold office throughout those terms as well,
9 until 2013, and never have to face the U.S. Senate for "advice
10 and consent" because of Attorney General Gonzalez's inter-
11 pretation of § 546(c).

12 19. Therefore, his name must be submitted to the Senate
13 for confirmation under § 541(a). Since his name has not and
14 will not be submitted, he cannot legally hold the office of U.S.
15 Attorney for the Northern District of California.

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

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

26 21. As Alexander Hamilton explained for us in Federalist
27

28 ⁹ 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)

1 Papers No. 66 (1788):

2 It will be the office of the President to
3 NOMINATE, and, with the advice and consent
4 of the Senate, to APPOINT. There will, of
5 course, be no exertion of CHOICE on the part
6 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.

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

9 To what purpose then require the co-
10 operation of the Senate? I answer, that the
11 necessity of their concurrence would have a
12 powerful, though, in general, a silent
13 operation. It would be an excellent check
14 upon a spirit of favoritism in the
15 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.

16 Defendant submits this addresses just such appointments as
17 this one,¹⁰ and Alexander Hamilton and the Constitutional
18 Convention would not approve because Mr. Schools's appointment
19 violates the genius of the "advice and consent" requirement, the
20 law for the last 217 years.

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

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

27 24. Therefore, Mr. Schools's appointment violates the

¹⁰ See discussion accompanying note 8, *supra*.

1 Presidential Appointments Clause. He has not been submitted to
2 the Senate for confirmation and he apparently never will be. By
3 § 541(a), he has to go before the Senate, because all U.S.
4 Attorneys are subject to "advice and consent" under Art. II.
5 § 2.

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

12 26. It is submitted that § 546(c) was proposed by the Bush
13 Administration to Congress to avoid failed recess appointments
14 for United States Attorneys, and that was about the only place
15 that this could be done. Congress, however, did not know what
16 it was really getting into, and it proposes to remedy this for
17 the future. See ¶ 20 & n. 9, *supra*. Whether that has any
18 effect on any of the other current U.S. Attorney appointees
19 currently in violation of the Presidential Appointments Clause
20 is irrelevant to defendant.

21 C. ONLY THE PRESIDENT MAY APPOINT A U.S. ATTORNEY, NOT THE
22 U.S. ATTORNEY GENERAL.

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

26 28. Because § 546(c) permits the Attorney General to
27 appoint a U.S. Attorney, it is unconstitutional under Art. II,
28 § 2, cl. 2.

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

4 **V. Standing**

5 30. Defendant has Art. III standing to raise this issue
6 because there is a "case or controversy" in this case. An
7 illegally appointed U.S. Attorney is seeking to take his
8 freedom. Indeed, if defendant has no standing, then nobody
9 does; not in this case nor in the cases of the six other purged
10 U.S. Attorneys.

11 31. The Supreme Court summarized its Art. III standing
12 caselaw in Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61
13 (1992):

14 Over the years, our cases have established
15 that the irreducible constitutional minimum
16 of standing contains three elements. First,
17 the plaintiff must have suffered an "injury
18 in fact"-an invasion of a legally protected
19 interest which is (a) concrete and particu-
20 larized, see *id.*, at 756; Warth v. Seldin,
21 422 U.S. 490, 508 (1975); Sierra Club v.
22 Morton, 405 U.S. 727, 740-741, n. 16
23 (1972);¹ and (b) "actual or imminent, not
24 'conjectural' or 'hypothetical,'" Whitmore,
25 *supra*, 495 U.S., at 155 (quoting Los Angeles
26 v. Lyons, 461 U.S. 95, 102 (1983)). Second,
27 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)

1 32. In City of Los Angeles v. Lyons, 461 U.S. 95, 100-01
2 (1983), relied on in Lujan:

3 It goes without saying that those who seek
4 to invoke the jurisdiction of the federal
5 courts must satisfy the threshold require-
6 ment imposed by Article III of the
7 Constitution by alleging an actual case or
8 controversy. Flast v. Cohen, 392 U.S. 83,
9 94-101 (1968); Jenkins v. McKeithen, 395
10 U.S. 411, 421-425 (1969) (opinion of
11 MARSHALL J.). Plaintiffs must demonstrate a
12 "personal stake in the outcome" in order to
13 "assure that concrete adverseness which
14 sharpens the presentation of issues"
15 necessary for the proper resolution of
16 constitutional questions. Baker v. Carr,
17 369 U.S. 186, 204 (1962). Abstract injury
18 is not enough. The plaintiff must show that
19 he "has sustained or is immediately in
20 danger of sustaining some direct injury" as
21 the result of the challenged official
22 conduct and the injury or threat of injury
23 must be both "real and immediate," not
24 "conjectural" or "hypothetical." See, e.g.,
25 Golden v. Zwickler, 394 U.S. 103, 109-110
26 (1969); United Public Workers v. Mitchell,
27 330 U.S. 75, 89-91 (1947); Maryland Casualty
28 Co. v. Pacific Coal & Oil Co., 312, U.S.
270, 273 (1941); Massachusetts v. Mellon,
262 U.S. 447, 488 (1923).

18 33. Has defendant a "personal stake in the outcome" that
19 is "'real and immediate' and not 'conjectural' or 'hypo-
20 thetical?'" Can he show a "'personal stake in the outcome' in
21 order to 'assure that concrete adverseness which sharpens the
22 presentation of issues' necessary for the proper resolution of
23 constitutional question?" Stated in terms of Lujan, is
24 defendant's interest (a) "concrete and particularized," (b)
25 "actual or imminent," and (c) "likely, not hypothetical?" As to
26 him, as to this case, it certainly is. So, he has standing.
27 If, for example, he were challenging another U.S. Attorney's
28 appointment in another district, he would not have standing. It
really is just that simple.

