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No. 07-5379

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

FRANK D. WUTERICH,

Plaintiff-Appellee,

v.

JOHN MURTHA, CONGRESSMAN, and
UNITED STATES OF AMERICA,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE APPELLANTS

JEFFREY A. TAYLOR
United States Attorney

GREGORY G. KATSAS
Assistant Attorney General

R. CRAIG LAWRENCE
DARRELL C. VALDEZ
Assistant United States Attorneys

THOMAS M. BONDY
Attorney, Appellate Staff
Civil Division
Department of Justice

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REPLY BRIEF FOR THE APPELLANTS

INTRODUCTION AND SUMMARY

This is a common law defamation action against a sitting Congressman, brought on the basis of public statements the Congressman has made regarding the ongoing war in Iraq. Our opening brief demonstrated that, under the Westfall Act, Congressman Murtha is legally entitled to absolute immunity from Appellee's allegations, and, as a matter of law, the United States must be substituted as the defendant and the suit dismissed. See 28 U.S.C. §§ 2679(d), 2680(h). As we explained, the complaint itself compels the common sense conclusion that

Congressman Murtha was acting within the scope of his employment in speaking with the media about the Iraq war, one of the most significant public policy issues of our time. The District Court therefore erred in declining to grant the threshold motion of Congressman Murtha and the United States for substitution and dismissal.

Appellee's response fails to come to grips with the basic issues, as well as the controlling case law underlying this case. With respect to this Court's jurisdiction to entertain this appeal, Appellee contends that no appealable order exists because the District Court simply held the Motion to Dismiss "in abeyance" pending discovery, including ordering Congressman Murtha's deposition. The Westfall Act's protection, however, provides Congressman Murtha with a legal entitlement to absolute immunity from this lawsuit, and a core aspect of that immunity is the right to be free from unwarranted discovery. Contrary to Appellee's argument, this principle is fully applicable in the context of absolute immunity, not just qualified immunity, and subjecting Congressman Murtha to a deposition as a prerequisite to upholding his immunity from suit would irretrievably deprive him of the legal immunity right to which he is absolutely entitled. Thus, under settled principles, the District Court's

ruling is, in reality, a denial of the protection of the Act, and is immediately appealable under 28 U.S.C. § 1291.

Appellee's argument on the merits similarly misses the point. Appellee urges that the Government's formal certification that Congressman Murtha was acting within the scope of his employment is not in and of itself controlling. But we have never claimed otherwise. As our opening brief explained, the critical point is that Appellee must plead facts that, taken as true, would establish that Congressman Murtha was acting outside scope, and given the parameters of the scope inquiry as set forth by this Court in Council On American Islamic Relations v. Ballenger, 444 F.3d 659 (D.C. Cir. 1996), Appellee's complaint utterly fails to meet that burden.

ARGUMENT

A. The District Court's Denial Of Congressman Murtha's Absolute Immunity From Suit Pending Discovery Is Immediately Appealable Under 28 U.S.C. § 1291.

The District Court's denial of Congressman Murtha's absolute immunity pending discovery, including specifically the Congressman's deposition, is immediately appealable under settled principles established through 28 U.S.C. § 1291. Indeed, the immunity to which Congressman Murtha is legally entitled includes

the right to be free from unwarranted discovery, and requiring the Congressman to be deposed prior to vindication of his immunity from suit would thus destroy the very immunity right at stake. Nevertheless, Appellee's response misapprehends the nature of the immunity entitlement at issue, and hinges on a nonexistent distinction between absolute and qualified immunity.

Preliminarily, Appellee argues that an appeal is unavailable because the District Court did not issue a final "denial" of Congressman Murtha's immunity, but only a denial of immunity pending discovery, including Congressman Murtha's deposition. See Appellee's Br. 13-16. This assertion fundamentally misunderstands the nature of the immunity right at stake and the holding of the Supreme Court in Osborn v. Haley, 127 S. Ct. 881 (2007).

As our opening brief showed (at 14-16), and as the Supreme Court has repeatedly admonished, both qualified and absolute immunity reflect "an immunity from suit, rather than a mere defense to liability." Mitchell v. Forsyth, 472 U.S. 511, 526 (1985). Thus, a crucial attribute of an official's immunity is the right to be free from the litigation itself, including, as the Supreme Court has stressed, "the burdens of . . . pretrial discovery." Behrens v. Pelletier, 516 U.S. 299, 308 (1996); see

id. at 307 (“Mitchell clearly establishes that an order rejecting the defense of qualified immunity at either the dismissal stage or the summary judgment stage is a ‘final’ judgment subject to immediate appeal.”).

Appellee expressly concedes these principles, but urges that they apply only with respect to qualified immunity, and not absolute immunity. See Appellee’s Br. 16-18. Appellee’s argument not only turns logic on its head, it is wrong. As this Court has noted, “**the doctrines of qualified immunity and absolute immunity** do not just protect covered individuals from judgments; they also provide protection from ‘the risks of trial – distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service.’” Doe v. Exxon Mobil Corp., 473 F.3d 345, 350 (D.C. Cir. 2007) (emphasis added). Indeed, in holding in Mitchell that a denial of a claim of qualified immunity is immediately appealable as a collateral order under 28 U.S.C. § 1291, the Supreme Court looked in large part to established principles governing absolute immunity. See Mitchell, 472 U.S. at 526-27 (“the reasoning that underlies the immediate appealability of an order denying absolute immunity indicates to us that the denial of qualified immunity should be similarly

appealable"). Thus, Appellee's perceived asymmetry between qualified and absolute immunity gets matters exactly backwards; the qualified immunity rubric that Appellee readily endorses has its basis in the framework applicable to absolute immunity. See id. at 525-26.

Any possible doubt on this matter was dispelled by the Supreme Court's decision in Osborn v. Haley, 127 S. Ct. 881 (2007). Noting that "the Westfall Act accords federal employees absolute immunity from common-law tort claims arising out of acts they undertake in the course of their official duties," id. at 887, the Court there specifically held that a denial of Westfall Act substitution is immediately appealable as a collateral order under 28 U.S.C. § 1291. See id., at 893. In reaching that conclusion, the Supreme Court placed explicit reliance on established qualified immunity principles, including the rule that immunity - whether qualified or absolute - is to be decided at the earliest possible stage of the litigation. See id. at 901 & n.18 ("the Westfall Act grants federal employees a species of immunity, and . . . under our jurisprudence, immunity-related questions should be resolved at the earliest opportunity.").

These principles apply with full vigor in this case. The complaint on its face compels the conclusion that Congressman

Murtha is absolutely immune from Appellee's libel and slander allegations arising from Mr. Murtha's statements regarding the ongoing war in Iraq. Against that backdrop, no basis in law or logic exists for subjecting Congressman Murtha to an invasive and needless deposition prior to vindicating his immunity rights, when an intrinsic aspect of the immunity entitlement at issue is precisely the right to be free from discovery in the first place. The District Court's ruling is thus immediately appealable under 28 U.S.C. § 1291.^{1/}

^{1/} There is no merit to Appellee's suggestion that the three-part test of Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949), is somehow not satisfied here. See Appellee's Br. 18. In the immunity setting featured in this case, the Cohen test is categorically satisfied, as conclusively demonstrated by Osborn, 127 S. Ct. at 893, and Mitchell, 472 U.S. at 524-30. Appellee's reliance on Clinton v. Jones, 520 U.S. 681 (1997), is similarly misplaced. See Appellee's Br. 21 n.7. The Supreme Court held there that the Constitution does not automatically require that a damages suit brought against a sitting President, based on actions allegedly taken by the President prior to his taking office, be deferred until the end of the President's term. The question here involves specific statutory language, and is altogether different from a constitutional powers claim. Under the Westfall Act, an official whose legal claim of absolute immunity is denied pending discovery is entitled to appeal that ruling under 28 U.S.C. § 1291. Accordingly, the relevant Supreme Court decisions are Osborn v. Haley and Mitchell v. Forsyth, not Clinton v. Jones.

B. Appellee's Complaint On Its Face Compels The Conclusion That Congressman Murtha Is Absolutely Immune From This Lawsuit.

Appellee's arguments on the merits fare no better.

Congressman Murtha is legally entitled to absolute immunity because the allegations in Appellee's complaint compel the conclusion that, as a matter of law, the Congressman was acting within the scope of his employment in making the statements that form the basis for this lawsuit. See 28 U.S.C. § 2679(d). Appellee's response serves only to confirm the correctness of this position.

1. In seeking unsuccessfully to refute the showing in our opening brief, Appellee expends extensive effort undertaking to establish that the U.S. Attorney's formal certification that Mr. Murtha was acting within the scope of his employment is not dispositive of the scope-of-employment question, and should not be treated by this Court as controlling. See Appellee's Br. 24-29. We have never argued otherwise. To the contrary, as expressly set forth in our opening brief (at 11), it is settled under the Westfall Act that the certification of the Attorney General or his designee that a federal employee was acting within scope "does not conclusively establish as correct the substitution of the United States as defendant in place of the

employee.” Gutierrez de Martinez v. Lamagno, 515 U.S. 417, 434 (1995).

Equally clearly, however, the Government’s certification “does constitute *prima facie* evidence that the employee was acting within the scope of his employment,” Ballenger, 444 F.3d at 662, and a plaintiff challenging the government’s scope-of-employment certification “bears the burden of coming forward with specific facts rebutting the certification.” Stokes v. Cross, 327 F.3d 1210, 1214 (D.C. Cir. 2003). See Appellee’s Br. 28-29, 32. Thus, although the certification that Mr. Murtha was acting within scope is not in itself dispositive, it is entitled to *prima facie* weight, and Appellee “is required to plead sufficient facts that, if true, would rebut the certification.” Id. at 1216.

Appellee’s complaint falls fatally short of meeting that burden. Indeed, it borders on self-evident that Congressman Murtha’s statements regarding an ongoing war in which American troops continue to be involved fall, as a matter of law, within his core functions as a democratically elected member of our Nation’s legislature and a ranking member of the House Appropriations Subcommittee on Defense. See Opening Br. 19-33.

Appellee’s thesis to the contrary is that “[t]here have been

few reported cases involving defamation charges filed against Members of Congress in the history of the United States,” and on that basis he suggests that the contours of a Congressman’s scope of employment are for present purposes not well-defined. See Appellee’s Br. 30. Appellee can make this statement only by disregarding the uniform holdings and rationales of all relevant precedents.

In particular, this Court squarely held in Ballenger that a Congressman acted within the scope of his employment in making statements to the media regarding the state of his marriage. See Ballenger, 444 F.3d at 661, 666. Appellee fails to explain how a Congressman making statements regarding an ongoing conflict in which the armed forces of the United States continue to be implicated could conceivably be acting outside scope, when this Court has already held that a Congressman was within scope in discussing his relationship with his spouse, an issue – unlike the Iraq war – of overwhelmingly private rather than public significance.

Even beyond Ballenger, which is dispositive, the other cases are to the same effect. In Williams v. United States, 71 F.3d 502 (5th Cir. 1995), for example, the court held that a Congressman was absolutely immune from a defamation suit based on

alleged statements he made to a television reporter concerning an ongoing appropriations issue. Similarly, in Operation Rescue National v. United States, 975 F. Supp. 92 (D. Mass. 1997), aff'd, 147 F.3d 68 (1st Cir. 1998) (cited with approval in Ballenger, 444 F.3d at 664), the court held a United States Senator immune from defamation allegations based on comments the Senator made to the media following an event to raise funds for his upcoming re-election campaign. See also Chapman v. Rahall, 399 F. Supp. 2d 711 (W.D. Va. 2005) (also granting Westfall Act substitution in defamation suit against Congressman).

All of these cases reflect the principle that members of Congress "engage in a wide range of legitimate errands performed for constituents, including news releases and speeches delivered outside the Congress," United States v. Brewster, 408 U.S. 501, 512 (1972), and that "speaking to the press is [thus] a critical part of the expected and authorized conduct of a United States Congressman," Chapman, 399 F. Supp. 2d at 714. These overarching precepts, largely ignored by Appellee, dictate the conclusion that, as a matter of law, Congressman Murtha acted within the scope of his employment in making the statements pertaining to the ongoing situation in Iraq, one of the most significant public policy issues of our time.

Nor is this conclusion in any respect undermined by Appellee's claim that the scope issue cannot readily be resolved here because "there was no specific legislation pending" in connection with the statements that Congressman Murtha is alleged to have made. See Appellee's Br. 39. We are aware of no requirement, and Appellee cites none, that a Congressman's statements regarding a matter of public import must be tied to specific legislative efforts in order to fall within the scope of his employment as a member of Congress. To the contrary, this Court's holding in Ballenger reflects that no such requirement exists; there was obviously no pending legislation in Ballenger bearing upon the state of the Congressman's marriage, but this Court nevertheless held that the Congressman's statements there fell within the scope of his employment.

Even if there were such a legislative-nexus requirement, it is satisfied here. Congressman Murtha has repeatedly sponsored legislation - both before and after the statements were made in 2006 - regarding the status of U.S. military involvement in Iraq, the general topic of all of the press accounts referenced in Appellee's complaint. See Complaint at ¶¶ 26, 36 (JA 14-18, 20-25). And, contrary to Appellee's assertions, see Appellee's Br. 39 n.24, it is clear on the face of the complaint that

Congressman Murtha's particular statements regarding the killing of civilians in Haditha, Iraq, reflected the larger context of the Congressman's concerns with the war generally, and its effect, in the Congressman's view, on the morale and conduct of our troops. See, e.g., Complaint at ¶ 26 (JA 14-18). In short, the scope-of-employment inquiry imposes no requirement that Congressman Murtha's statements be tied to explicit legislative initiatives, but any such requirement would in any event be met here under the terms of Appellee's own allegations.

2. Appellee is ultimately relegated to speculation regarding various ancillary aspects of Congressman Murtha's statements, but his speculation on those points is legally insufficient to justify discovery under governing standards. Crucially, this Court has made clear that, in the Westfall Act context, "[n]ot every complaint will warrant further inquiry into the scope-of-employment issue." Stokes, 327 F.3d at 1216. Instead, "to obtain discovery and an evidentiary hearing," a plaintiff must "allege[] sufficient facts that, taken as true, would establish that the defendant's actions exceeded the scope of [his] employment." Id. at 1215. Absent such allegations, no discovery is warranted. See Rasul v. Myers, 512 F.3d 644, 662

(D.C. Cir. 2008).^{2/}

Appellee's complaint contains no such allegations, nor could it plausibly do so. The critical point, conspicuously overlooked in Appellee's brief, is that, under applicable standards articulated by this Court, conduct is outside the scope of an official's employment only if it is purely personal and wholly unconnected to the employee's official duties. See Ballenger, 444 F.3d at 665; Operation Rescue, 975 F. Supp. at 108-09; Restatement (Second) of Agency, § 228(1). As our opening brief showed (at 28), even reading the complaint generously in Appellee's favor, see Appellee's Br. 44, its factual allegations support no conceivable inference that Congressman Murtha's statements were made for purely private purposes, entirely divorced from his role as a member of the House of Representatives. Notably, Appellee does not seriously argue

^{2/} Appellee's invocation of the District Court's general discretion in discovery matters is inapposite. See, e.g., Appellee's Br. 8, 24 n.9. In the context of the Westfall Act, discovery on the scope-of-employment question is justified only if the Appellee "alleges sufficient facts that, taken as true, would establish that the defendant's actions exceeded the scope of [his] employment." Stokes, 327 F.3d at 1216; see Rasul, 512 F.3d at 662. Subjecting the official to discovery in the absence of such allegations, and thereby vitiating his immunity, is an error of law, which would a *fortiori* constitute an abuse of the District Court's discretion.

otherwise.

Instead, Appellee's presentation prominently features the following assertion: "If Mr. Murtha undertook to comment upon [Appellee] for his own personal gain outside his role as a representative for his constituents, it would remove the cloak of immunity. This is a question of fact that requires further development." Appellee's Br. 35. But, dispositively, the complaint does not remotely allege any facts that, taken as true, would establish that Congressman Murtha made the statements in question even in part, much less in whole, "for his personal gain." Id.

As we have demonstrated to the Court below and here, Congressman Murtha is a member (now Chairman) of the House Appropriations Committee's Subcommittee on Defense, and, in that capacity, is and has been a persistent critic of the current Administration's policies regarding the war in Iraq. See, e.g., Complaint at ¶ 26 ("we ought to redeploy as quickly as we can and let the Iraqis handle this themselves.") (JA 18). Expressing his views regarding the Executive's handling of an ongoing war is a fundamental and wholly legitimate part of Congressman Murtha's job, notwithstanding the vague assertions in Appellee's brief (but not in his complaint) that the Congressman's statements in

that regard may have been uttered for "personal gain."

Appellee's Br. 35.

In the end, like the District Court, Appellee missed the focus for determining scope of employment, and significantly overstates the scope of the Congressman's personal, as opposed to official, sphere. In particular, Appellee seeks to resuscitate the District Court's reasoning that discovery is warranted based on speculation that Congressman Murtha may have made his statements in order "to embarrass the Secretary of Defense." Appellee's Br. 35 n.20. But even apart from the fact that, as Appellee now concedes, see id. at 43, the complaint itself contains no such allegation, any efforts by Congressman Murtha to "embarrass the Secretary of Defense" in connection with the Congressman's ongoing policy disagreements with the Administration regarding the Iraq war are not properly the focus of what constitutes scope of employment, nor are they properly characterized as seeking "personal gain." To the contrary, Congressman Murtha's statements can only be understood as part of the Congressman's continuing advocacy of the best interests, as he sees them, of his constituents and of the public at large vis-a-vis a central and highly controversial issue currently facing our country.

First, Appellee cannot rebut the Westfall certification simply by arguing that Congressman Murtha's statements were made with bad intent. See Ramey v. Bowsher, 915 F.2d 731, 734 (D.C. Cir. 1990) (per curiam) (“[I]f the scope of an official's authority or line of duty were viewed as coextensive with the official's lawful conduct, then immunity would be available only where it is not needed”). Rather, the proper inquiry by the Court must “focus[] on the underlying dispute or controversy, not on the nature of the tort,” which is “broad enough to embrace any intentional tort arising out of a dispute that was originally undertaken on the employer's behalf.” Ballenger, 444 F.3d at 664. “The appropriate question, then, is whether that [interview]-not the allegedly defamatory sentence-was the kind of conduct [the Congressman] was employed to perform.” Id. Here, had the District Court made such inquiry, it would have found the statements to be within the Congressman's scope of employment.

Second, even assuming, as nowhere alleged in the complaint, that Congressman Murtha believed his statements might boost his stature within his party and/or his reelection prospects, see Appellee's Br. 35 n.20, those interests too are at least in substantial part official and not personal in nature. Indeed, as this Court and others have stressed, “service in the United

States Congress is not a job like any other," Ballenger, 444 F.3d at 666, and, as far as members of Congress are concerned, "personal and public motives are often closely related. It is natural for public officials to believe that their own success, and that of their political parties, is inextricably linked with the public interest." Operation Rescue, 975 F. Supp. at 108.^{3/}

In short, in the context of the allegations in Appellee's complaint, there are no facts the discovery of which would be germane to the scope-of-employment question in this case. Congressman Murtha's alleged statements relate on their face to the Congressman's well-known policy disagreements with the Executive Branch. As a matter of law, those statements reflect at least in substantial part, if not in whole, Mr. Murtha's official rather than personal interests, and therefore necessarily fall within the scope of his employment as a member of Congress. This Court has already held that such personal versus professional distinction is not a **material** issue in

^{3/} The fact that one or more of Congressman Murtha's media interviews may have been physically conducted in Pennsylvania where his Congressional district office is located is equally immaterial. See Appellee's Br. 31 n.16. As noted in our opening brief (at 29), "[i]t is customary and proper for [Congressmen] to address the merits of pending legislation, in the response to members of the media, while in their own states." Operation Rescue, 975 F. Supp. at 108; see JA 60-61.

genuine dispute, because it does not matter what other motives a defendant has for his statement because "even a partial desire to serve the master is sufficient." Ballenger, 444 F.3d at 665. Certainly, if the statement regarding Congressman Ballenger's marital separation (or even the Senator's description of Operation Rescue as being involved in firebombing and murder) was within the scope of his employment, then discovery is not required to determine if Congressman Murtha's statements about the Haditha incident and the Iraq war in general are a matter of public interest and within the scope of his employment as a Congressman and the Chair of the Subcommittee on Defense. Statements by Congressman Murtha involving the war in Iraq and the manner in which it is conducted will be of interest to his constituents, especially while his Joint Resolution regarding the removal of troops from Iraq is pending before Congress.

3. Appellee's remaining points only underscore the error of his position. Appellee suggests that discovery is needed because some of Congressman Murtha's statements to the media may have been initiated by media representatives, while others may have been initiated by Congressman Murtha. See Appellee's Br. 31 n.16, 36. This is a distinction without a difference. As we have explained, both in this reply brief and in our opening

brief, the statements at issue were made, as a matter of law, within the scope of Congressman Murtha's employment as a member of the House of Representatives. Whether a particular contact with the media was prompted by media personnel or, instead, by the Congressman or his Office, is of no legal relevance. It was indisputably within the scope of Congressman Murtha's employment as a Congressman (and as a member of the Defense Subcommittee) to talk to reporters about the war in Iraq and the pressure it is placing on our troops, and this conclusion remains equally valid regardless of who initiated any particular exchange. See Brewster, 408 U.S. at 512; Chapman, 399 F. Supp. 2d at 714.

In addition to Congressman Murtha's statements to the media that are set forth in the terms of the complaint, Appellee also speculates in his brief that Congressman Murtha may have made statements regarding the Iraq war to "family, friends, [or] donors." Appellee's Br. 37. No such statements are alleged in the complaint. But even were such statements demonstrated to exist, they would in no way alter the analysis. See Brewster, 408 U.S. at 512 (legitimate activities of members of Congress include "preparing so-called "news letters" to constituents, news releases and speeches delivered outside the Congress"); Operation Rescue, 975 F. Supp. at 107 (Statements made after fund-raising

event held to fall within a Senator's scope of employment). In the course of fulfilling his responsibilities as a Congressman, Mr. Murtha has made widely-publicized and broadly-disseminated statements to media representatives concerning the war, and his absolute immunity from common-law tort liability on the basis of such statements is not undermined by any similar statements that he may also have made to constituents or persons in the public at large who are not members of the media. As the courts have recognized, "[b]esides participating in debates and voting on the Congressional floor, a primary obligation of a Member of Congress in a representative democracy is to serve and respond to his or her constituents. That service necessarily includes informing constituents and the public at large of issues being considered by Congress." Williams, 71 F.3d at 507.

Finally, Appellee contends that a remand is warranted to allow him an opportunity to amend his complaint. See Appellee's Br. 43. Appellee apparently would add to his complaint allegations that to date he has raised only in his briefs or in his counsel's oral arguments. See id. As discussed above, however, the allegations to which Appellee alludes are legally irrelevant, and would add nothing to this case if injected as part of the complaint. Congressman Murtha was within scope as a

matter of law, and Appellee identifies no additional factual allegations that would alter that fundamental conclusion.

CONCLUSION

For the foregoing reasons, and for the reasons stated in our opening brief, the decision of the District Court should be reversed, and the matter should be remanded with instructions that the motion to substitute the United States as the defendant should be granted and that the action should then be dismissed for lack of subject matter jurisdiction.

Respectfully submitted,

JEFFREY A. TAYLOR
United States Attorney

R. CRAIG LAWRENCE
Assistant United States Attorney

DARRELL C. VALDEZ
Assistant United States Attorney

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief is in compliance with Rule 32(a)(7) of the Federal Rules of Appellate Procedure. The brief contains 4382 words, and was prepared in 12-point Courier font using Corel WordPerfect 12.0.

DARRELL C. VALDEZ
Assistant United States Attorney

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of August, 2008, I served the foregoing Reply Brief upon the United States Court of Appeals for the D.C. Circuit by hand-delivery, and upon counsel by causing two copies to be sent by U.S. mail to:

Mark S. Zaid
1250 Connecticut Ave., N.W.
Suite 200
Washington, DC 20036

DARRELL C. VALDEZ
Assistant United States Attorney