

Before the Subcommittee on  
Crime, Terrorism & the Homeland Security

**and**

the Subcommittee on Commercial & Administration Law of the  
Committee on Judiciary, U.S. House of Representatives

Testimony of  
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**“Allegations of Selective Prosecution: The Erosion of  
Public Confidence in our Federal Judicial System”**

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Thank you Mr. Chairman.

I am Doug Jones, a partner in the Birmingham office, of the law firm of Whatley, Drake & Kallas. I am a former staff counsel for the Senate Judiciary Committee, where I worked for the late Senator Howell Heflin of Alabama. I was Assistant United States Attorney in Birmingham from 1980-1984 and from 1997-2001 I was the United States Attorney for the Northern District of Alabama. I had the honor of testifying before this Committee earlier this summer about our work in prosecuting the two former members of the Ku Klux Klan for the 1963 bombing of the 16<sup>th</sup> Street Baptist Church in Birmingham and the importance of passing the Emmett Till Bill that will provide funding to investigate and prosecute unsolved crimes of the Civil Rights Era.

I am here today, however, on a more disturbing topic that has significantly damaged the credibility of the Department of Justice- the role of partisan politics in the recent criminal investigations. It goes without saying, Mr. Chairman, that the criminal justice system should be blind to the political affiliations of the party in power or of those who may be the subject or target of criminal investigations. Unfortunately, recent revelations about the firings of certain U.S. Attorneys by the Administration, and media reports about a number of cases across the country have heightened concern that partisan politics have played a significant role in decisions of the Department of Justice, unlike at any other times in the Department's history. For those who have been in any position of responsibility at the Department, it is a disturbing trend.

I have been asked to testify today about my knowledge of the facts surrounding the investigation, indictment and conviction of former Alabama Governor Don Siegelman, a Democrat who held the office of Governor from January of 1999 to January of 2003. Governor Siegelman had been a major political force in Alabama for over 2 decades, having lost only one

statewide primary election since his first election as Secretary of State in 1978. I had been his friend and supporter for many years, but first became his lawyer in the spring of 2003 following the untimely death of his previous attorney earlier that year.

My knowledge of a criminal investigation where Gov. Siegelman was targeted goes back to the spring of 1999 when I was the U.S. Attorney in Birmingham. It seemed that no sooner had the ink dried on his oath of office, investigators and certain lawyers with the Alabama Attorney General's office targeted Gov. Siegelman for investigation. The investigation began with allegations that a Siegelman supporter from Tuscaloosa, Dr. Phillip Bobo, had committed Medicaid fraud by attempting to rig a bid for a state contract for the delivery of health care services. When my office was contacted about jointly investigating these allegations, as we had done in other cases with the Attorney General, we assumed that it was because Tuscaloosa is in the Northern District of Alabama, rather than the Middle District of Alabama that included the state capitol of Montgomery. In a meeting with my assistants, however, it became obvious that these Assistant Attorneys General did not see this as simply a Medicaid fraud case, but one of public corruption in Montgomery that they "hoped"—their words not mine—would reach the highest level of the Siegelman administration, even though there was no evidence to suggest that at that point. They also made it clear they were coming to the Northern District because they did not trust my friend and colleague, Redding Pitt, the U.S. Attorney in the Middle District, because a decade earlier he had worked for Don Siegelman as an Assistant Attorney General. The suggestion was both insulting and unprofessional and I refused to be a party to such an end run on what clearly should be focused in Montgomery.

Attorney General Bill Pryor, a Republican who had been appointed Attorney General when Jeff Sessions was elected to the Senate, and won election in 1998, the year Don Siegelman

was elected governor, personally came to Birmingham to discuss my decision and to ask that I reconsider. Now a judge on the 11<sup>th</sup> Circuit Court of Appeals, Bill Pryor had taken office only a few months before I had and in the short time that we worked together on various matters he became a trusted colleague and friend and it was that reason and that reason alone that he thought that our two offices should work together on the Bobo investigation. He did not in any way condone what had been represented by his assistants and we both agreed that the investigation should follow the facts as they were developed, no matter where they might lead. I explained, however, that I simply could not overlook his assistants' stated purpose and therefore we declined to be involved and a joint federal-state investigation begun in the Middle District.

I would also like to say at this point that the statements made to me by Attorney General Pryor were entirely consistent with every experience I had with him. Despite the fact that he somehow seems to be touched with the broad brush of allegations of partisanship in this matter, the fact is that Bill Pryor has never advocated an investigation for any reason other than that which the law requires, the investigation of criminal activity without regard to political affiliation. He never shied away from tough public corruption cases, but I never saw him pursue any criminal matter for partisan political purposes. Had I seen any evidence of that in the years we worked together, I would have never supported his nomination to the 11<sup>th</sup> Circuit Court of Appeals as I was proud to do.

My office had no further involvement in this matter until early in 2001, over 2 years later, and after the Presidential elections. It was at that time that my colleague in the Middle District called and asked for a meeting about the Bobo matter. He explained that not only had the investigation failed to reach the highest levels of the Siegelman administration, but that there was no suggestion of public corruption at all, leaving only what appeared to be allegations of

Medicaid fraud committed in the Northern District, not in the Middle District. He therefore requested the opportunity to have his assistants and the assistants in the Attorney General's office present the case to a Northern District grand jury. I certainly was not going to turn down such a request, but told him that his personnel must handle the case from start to finish because my office had other matters pending, including the upcoming church bombing cases, and our resources were too thin to take on the Bobo matter. Dr. Bobo was indicted and convicted later that year, but his case was overturned on appeal. It is my understanding that at no time during the course of the trial was Governor Siegelman ever mentioned, much less designated, as a co-conspirator with Dr. Bobo.

I left office in June 2001 following the first of the church bombing prosecutions. It was not long thereafter, following a series of newspaper reports about a state warehouse contract involving an individual named Lanny Young, that it became widely known that Governor Siegelman was again in the cross-hairs of criminal investigators. Recent media reports have detailed interviews with Mr. Young as early as the summer and fall of 2001. The investigation was once again being conducted by the same attorneys and investigators from the Attorney General's office with new personnel from the U.S. Attorney's office in the Middle District. I followed that investigation only as it played out in the media leading up to the 2002 gubernatorial election. There was a series of what appeared to be grand leaks that prompted Governor Siegelman's attorneys to call for the recusal of the new U.S. Attorney in Montgomery, whose husband was active in Republican politics. The U.S. Attorney, Ms. Canary, ultimately recused herself from the investigation.

Clearly, the investigation in Montgomery had uncovered serious criminal conduct between Mr. Young and Mr. Bailey that ultimately resulted in guilty pleas by both men to

various federal charges. It was equally clear that both men hoped to minimize their prison time by providing information that would assist investigators in bringing criminal charges against Gov. Siegelman. Allegations of improper payments toward the purchase of a motorcycle and four-wheeler ATV kept surfacing in the media.

Governor Siegelman narrowly lost the 2002 elections to his Republican opponent Bob Riley. Less than 7 or 8000 votes separated the 2 candidates and I frankly believe that the investigative leaks leading up to November cost Governor Siegelman his re-election bid.

In January 2003, Governor Siegelman's lawyer, David Cromwell Johnson, died unexpectedly. A couple of months later Governor Siegelman hired me as his lead counsel.

Aside from assembling the files from the Governor's former attorney, and beginning my investigation, the first order of business was set up a meeting with prosecutors in Montgomery. I called my friend, the Attorney General Bill Pryor, and told him that I was now representing Governor Siegelman and that my partner and I would like to come down to discuss the case, not in detail, but more as a courtesy to meet others involved and to let them know of our representation. By this time, the First Assistant in the U.S. Attorney's office, Ms. Weller, has been designated Acting U.S. Attorney. The Public Integrity Section of our Department of Justice had also assigned an attorney, John Scott, to work the case and it was requested that our meeting take place when he could be in Montgomery.

My partner, Jack Drake, and I traveled to Montgomery in the spring of 2003 and met in the Attorney General's office with Attorney General Pryor, one of his assistants, Ms. Weller and Mr. Scott. Again, this was a courtesy meeting and very little substance was discussed. I did, however, make a point of telling them that I did not believe the Governor had done anything wrong, but that as a former prosecutor I understood that some time was needed to sort through

the evidence. I also told them that it was not my intention to hit the media with allegations of politics as had been raised by the Governor's previous attorney because I had too much respect for Attorney General Bill Pryor and the Department of Justice. I did state, however, that the investigation had already gone through one election, and that it needed to be resolved as quickly as possible. I also said, however, that if the investigation continued to play out in the media through the next election, and beyond, then it would, in my opinion, raise the specter that partisan politics was at play. We were assured by everyone that politics had no role and that they would move expeditiously. I was then, and still am today, comfortable that those were true statements.

For the next year, the investigation continued. During this time we were attempting to do our own work, learn the facts and to keep up as to where we thought the investigation was headed. We had little contact with prosecutors in Montgomery during this time and my friend Bill Pryor leaves office in February following his appoint to the Court of Appeals. Then in late May, early June of 2004, I get a call from a friend who tells me that the U.S. Attorney in Birmingham, not Montgomery, is about to announce a major public corruption indictment and that he thought it was Governor Siegelman. I initially shrugged it off as erroneous because there had never been any indication whatsoever that the Governor was being investigated in Birmingham. I was wrong. We learned for the first time at the press conference that Governor Siegelman had been indicted along with his former Chief of Staff and Dr. Phillip Bobo. This news was a complete shock and I had to stop the Governor before he boarded a plane to New York to give him the news. The case against Dr. Bobo that had started in 1999 now, for the first time, included Governor Siegelman. Moreover, the former Assistant Attorney General who told

my staff that he hoped the Bobo investigation would go to the highest levels of the Siegelman administration was now the Assistant U.S. Attorney in Birmingham handling the 2004 case.

Other than an initial contact with the Government to make sure that they were not going to seek arrest and perp walk the Governor, I had nothing to do with the defense of the Birmingham case. The Government made it clear from the outset that they were going to seek to have me recused because of my involvement in allowing the case to go forward against Dr. Bobo when I was U. S. Attorney. While I disagreed with that position, the Court ultimately held that I was precluded from representing the Governor in that particular matter.

The matters in Montgomery were a different matter, and during the summer of 2004, we learned that a new team from the U.S. Attorney's office was now in place to handle the Siegelman investigation and for the first time the Government was calling us with a request to discuss the case. There was also some sense of urgency because it was believed that the statute of limitations was about to run on a matter involving Richard Scrushy and Healthsouth, an issue which was being brought up for the first time.

In early July 2004, my partner, Jack Drake, and I, along with another Siegelman attorney, Bobby Segall, met with the prosecutors to discuss the case. Included in the meeting was John Gibbs from the Attorney General's office, Louis Franklin, the Criminal Chief in the U.S. Attorney's office who was now, after Ms. Weller left the office, the Acting U.S. Attorney in the case, and Assistant U.S. Attorney Steve Feaga, an experienced white-collar prosecutor. Mr. Feaga explained that he and Mr. Franklin had been assigned to the case a few months earlier and that they had been working to get up to speed. He told us that they had "written off" the matters involving the motorcycle and the four-wheeler as just being too trivial to bring as federal charges against a former governor. He advised that they had narrowed their focus to three areas: the

appointment of Richard Scrushy to the Alabama Certificate of Need Board (the “CON Board”) and the \$250,000 contribution to the Lottery Foundation; a tax change by the Siegelman Revenue Department that favored a waste management company and who paid Lanny Young \$500,000 to get it done; and some disbursement of tobacco litigation money that went from Governor Siegelman’s former law firm to the Governor while he was in office. From our standpoint, we know enough about the latter two areas to feel comfortable that nothing improper or illegal had occurred and that witnesses would support that. Even the prosecutors expressed skepticism about these two areas. From their perspective, however, the Scrushy case was a different matter.

Mr. Feaga stated that the circumstantial evidence surrounding the contribution of \$250,000 to the Lottery Foundation and Mr. Scrushy’s appointment to the CON board was compelling evidence that a Hobbs Act violation, extortion under color of law, had been committed. On the other hand, he also acknowledged that the defense to such a charge, both legally and factually, was also compelling and that there were serious gaps in the evidence that appeared to preclude bringing a charge. For instance: Richard Scrushy or someone from Healthsouth had been appointed to the CON Board by the previous three governors and had a presence on the Board since 1986; that like so many business leaders, Richard Scrushy and Healthsouth made significant political contributions hoping to have access to political leaders; that even though Mr. Scrushy had contributed heavily to Governor Siegelman’s opponent, who in 1998 was the incumbent Governor, Healthsouth was one of the largest health care providers in the state and country and that it was only natural for him to want to assist in an endeavor that would gain favor with the new governor, the Education Lottery initiative. The biggest hurdles for the Government, however, were the facts: the only way that they could prove a specific *quid*

*pro quo* as required by the Hobbs Act, was through the testimony of a former Siegelman aide, Nick Bailey, who had already admitted to taking over a \$100,000 worth of bribes from Lanny Young. Mr. Bailey had told the investigators that Mr. Scrusby came to Montgomery in the summer of 1999 and had a private meeting with Governor Siegelman. He said that immediately following that meeting Governor Siegelman showed him the \$250,000 check to the Lottery Foundation and indicated that in exchange Mr. Scrusby wanted a seat on the CON Board. But Mr. Bailey's statement had a fatal flaw in that it was inconsistent with the documented, objective evidence that the \$250,000 check had not been issued until a week or so after the Siegelman/Scrusby meeting. Mr. Bailey's credibility was significantly damaged anyway with his admissions of crimes with Lanny Young and cutting a deal with prosecutors for a lenient sentence. This inconsistency was damning and it was clear that the prosecution knew it. They had no evidence that the Governor had even seen the check and no evidence about the check's delivery from Healthsouth to Montgomery. They knew that the check had been "Fed-Exed" to Healthsouth but no one knew how it got from there to Montgomery. No matter how compelling the circumstantial evidence appeared to be, it was clear that Government prosecutors in Montgomery were not comfortable bringing charges against a former governor where the credibility of their star witness was so damaged, the witnesses' statement was so inconsistent with known facts and there were such gaping holes in the evidence.

We also discussed the fact that this investigation needed to come to a conclusion as soon as possible. There was a concern from the prosecutors that the five year statute of limitations was about to expire with regard to the appointment of Mr. Scrusby to the CON Board, which had occurred in late July, 1999. The Government wanted more time to try and fill in the evidentiary holes in the case and asked us if Governor Siegelman would sign a tolling agreement extending

the statute of limitations for an additional 30 days. Because we were convinced from our conversations that the other matters had either been written off and/or were such that we did not believe any crime had occurred, we agreed to have the Governor sign the tolling agreement. We firmly believed that additional investigation would only help. Right or wrong, we left the meeting convinced that the investigation in Montgomery would soon be coming to a close without any charges being brought, leaving only the indictment in Birmingham to worry about.

As the 30 day period was about to expire I had telephone discussions with the Assistant U.S. Attorneys. I can't recall all of the specifics, but I know that we were asked to extend the statute of limitations for another 30 day period. I responded that Governor Siegelman would not do that, that the investigation had dragged out long enough, that the evidence was not going to get any better, that Nick Bailey's credibility was not going to get any better and that it was time, as we say down South, for the prosecution to fish or cut bait. I was told that despite earlier concerns, the lawyers in Washington did not believe there was a statute of limitations problem, but that in any event they would make a decision within the month. These conversations would have been in early to mid-August, 2004. I remained convinced that the investigation was going to come to a close.

A month came and went. I started to call the U.S. Attorney's office, but could not get any response. Two months, then three months went by with no substantive conversations with prosecutors. However, in October of 2004, a day or two after the trial started in Birmingham, the Government moved to dismiss all charges against Governor Siegelman after the Court made an adverse evidentiary ruling. Although I did not think so at the time because of my prior conversations with the prosecutors in Montgomery, the dismissal of the Birmingham case now appears to have been a turning point in the Montgomery investigation

It was just about a month later, in late November or December, 2004, that my partner and I were able to have the first substantive conversation with prosecutors about the Montgomery investigation since our meeting in Montgomery in July. It was on a phone call that Assistant U.S. Attorney Feaga first apologized for not giving us a definitive answer any earlier as he told us he would do back in the summer. "But," he said "we had a meeting in Washington and we were told to go back and look at everything again from top to bottom." My reaction to that statement was mixed. On the one hand, in a case in which they would likely be criticized regardless of the decision that was made, it would not have been unusual for the Public Integrity Section to want to make sure that all of the "i's" were dotted and all of the "t's" were crossed. On the other hand, I was concerned that having failed in Birmingham, the Government would now re-double their efforts to bring charges against Governor Siegelman in Montgomery. Unfortunately, it was that fear that thereafter came to pass.

What we saw beginning in early 2005 was much more than simply a top to bottom review. Instead it was as if the investigation had new life from top to bottom and beyond. Whereas in the past it had appeared that the investigation was being driven by investigators in the Attorney General's office, the FBI and the feds now seem to be taking control and they were casting a wider net than ever before. The charges that we were told had been "written off" were obviously now back on the table and for the first time it appeared that agents were not investigating any allegations of a crime, but were now fishing around for anything they could find against an individual. New subpoenas were being issued for documents and witnesses. Anyone that was a major financial backer of Don Siegelman or who had done business with the state during his administration began receiving visits by investigators and subpoenas by prosecutors. Every bank record, every financial record, every investment record of the

Governor, his wife, his campaign and his brother were being subpoenaed. All of this was done in a very public way. Every month there was a parade of new witnesses called to appear at the grand jury in Montgomery, all in front of the ever-present eyes of the Alabama media who chronicled each witness in every newspaper and every television station across the state.

With each passing month and grand jury session, it became more and more evident that despite what we had been told earlier, the investigation was moving toward formal charges. While my point of contact with prosecutors was with the U.S. Attorney's office in Montgomery, it was clear that the Public Integrity Section at the Department of Justice was playing a major role in every decision being made. We were told specifically that Noel Hilman, the head of the Public Integrity Section, was taking an active role in the investigation and that nothing would go forward without his approval. In fact, as we continued to press for meetings in an attempt to dissuade prosecutors from bringing charges, we were told that any meetings would have to take place in Washington because Mr. Hilman's schedule did not allow time for travel to Montgomery. That summer, the summer of 2005, at least two meetings were held in Washington, DC at the Department of Justice. Because of a trial and other scheduling conflicts, I did not attend either of those meetings. Quite frankly, it was my opinion that further discussions were a waste of time given that the attitude of the prosecutors has changed direction 180° from the previous summer. Some on our team, however, remained optimistic that the door was still open for us to convince prosecutors to close the investigation without charges and we felt it our duty to our client to keep trying. So we pressed on with additional discussions in Montgomery as late as September and October. What we didn't know was that the die had been cast and a decision made earlier in the spring to seek an indictment against Gov. Siegelman and Richard Scrushy, and that, in fact, a sealed indictment had already been returned. While I appreciate the

dialogue and candor of our 2004 discussions, I do not believe that discussions that took place over a series of months while sitting on a sealed indictment were in good faith. There is simply no way in my view that the Government would seek the dismissal of a sealed grand jury indictment.

When a superseding indictment was finally returned and made public in October, 2005, it simply confirmed that we had not only been wasting our time, but that it was clear that prosecutors wanted to throw every conceivable charge against the Governor in hopes that something would stick. Over 30 counts of racketeering, bribery, extortion and obstruction of justice were included. It was a stunning turnaround from the attitude of the previous summer.

Because of a trial conflict in the spring of 2006, and the Governor's insistence on a speedy trial before June 2006 primary, I had no real choice but to withdraw as lead counsel. However, facing incredible challenges in sifting through mountains of discovery in a short period of time, Gov. Siegelman was the beneficiary of exceptional legal talent lead by attorneys Vince Kilborn, David McDonald and Redding Pitt. But at the end of the day, despite acquittals on an overwhelming number of the charges, matters involving Mr. Scrusby and one obstruction of justice count did stick, and Gov. Siegelman was convicted. As you are aware, following sentencing, an appeal bond was denied and he was shackled and taken into custody from the courtroom.

Recently allegations of improper influence by the White House into decisions at the Department of Justice have been front and center with this Committee and the public. In what appears to be an effort to deflect attention away from Washington's role in the decisions regarding Gov. Siegelman, it has been widely reported in the media that the decision to seek an indictment rested solely with the Acting U.S. Attorney in Montgomery. Those statements, Mr.

Chairman, are totally contrary to my experience as a United States Attorney. The Public Integrity Section acted more than in just an advisory capacity. They were an integral part of this effort. Moreover, the U.S. Attorney's manual and Department of Justice guidelines give supervisory power to Public Integrity in cases such as these.

Finally, Mr. Chairman, and meaning no disrespect to Mr. Franklin at all, it is my opinion that the Department of Justice would not, and should not, give sole decision making authority in a high profile public corruption case to an "Acting" U.S. Attorney. Oversight in such a case is critical and statements to the contrary, as we have seen here, only highlight concerns that partisan politics played a significant, if not dominant role, in how this investigation proceeded.

Mr. Chairman, many may take note of the fact that it was a jury that convicted Gov. Siegelman, not the Department of Justice, and suggest that the Department should devote whatever resources to ferret out public corruption. Certainly investigating and prosecuting public corruption cases should be a top priority of any Administration. But prosecutors wield enormous power and the proper use of that power is fundamental to our system of justice. Targeting individuals, rather than crimes, taints that entire process and gives investigators and prosecutors an "ends justify the means" license to abuse the public's trust. It turns the presumption of innocence and due process of law upside down and calls into question the actual validity of any jury verdict. Remember Mr. Chairman that, while our jury system is the greatest in the world, it is not infallible. Innocent people are often sent to prison and guilty people are often set free. The issue of selective prosecution is important for the Committee's consideration because, as Dr. King stated: "Injustice anywhere is a threat to justice everywhere."