

September 2008

The Most Dangerous Power of the Prosecutor

Bennett L. Gershman

Pace University School of Law, bgershman@law.pace.edu

Follow this and additional works at: <https://digitalcommons.pace.edu/plr>



Part of the [Criminal Procedure Commons](#)

Recommended Citation

Bennett L. Gershman, *The Most Dangerous Power of the Prosecutor*, 29 Pace L. Rev. 1 (2008)

Available at: <https://digitalcommons.pace.edu/plr/vol29/iss1/1>

This Article is brought to you for free and open access by the School of Law at DigitalCommons@Pace. It has been accepted for inclusion in Pace Law Review by an authorized administrator of DigitalCommons@Pace. For more information, please contact dheller2@law.pace.edu.

PACE LAW REVIEW

Volume 29

Fall 2008

Number 1

The James D. Hopkins Memorial Lecture Pace Law School, October 25, 2008

The Most Dangerous Power of the Prosecutor

Bennett L. Gershman*

I. Introduction

A. *Judge James D. Hopkins*

This is the James D. Hopkins Memorial Lecture in honor of Judge Hopkins, who was the Dean of Pace Law School from 1982 to 1983 and earlier served with great distinction on the New York Appellate Division's Second Judicial Department. Judge Hopkins served on that court when I worked in the special prosecutor's office, and as head of the appeals bureau, I argued several cases in Judge Hopkins' court. One case stands out, the case of *Salvatore Nigrone v. Murtagh*.¹ It was an extensive undercover investigation. My office used informants, wiretaps, and a sham arrest to expose corrupt attempts to influence criminal cases.² As a result, a grand jury indicted three judges and two lawyers for perjury before the grand jury.³ On a motion

* Professor of Law and James D. Hopkins Chair, Pace University School of Law. B.A., Princeton University; J.D., New York University School of Law. I would like to thank Dean Michelle Simon for conferring on me the Hopkins Chair. I would also like to express much gratitude to my colleagues, Professors Michael Mushlin, Donald Doernberg, and Lissa Griffin, for their support and encouragement.

1. 362 N.Y.S.2d 513 (App. Div. 1974).

2. *Id.* at 514-15.

3. *Id.* at 516.

to dismiss the indictments, the appellate division upheld the perjury charges but condemned my office's investigation as "intolerable," "illegal," "outrageous," "overzealous," "pernicious," and a "corruption and manipulation of the criminal justice system."⁴

After Judge Hopkins and I found ourselves together in the same law school, we talked about that case and about the justice system in which we both served in different ways. James Hopkins was a brilliant man, a sort of a renaissance scholar. I dedicated one of my early articles in the Yale Law Journal, about overzealous government conduct, to Judge Hopkins.⁵ It was a tribute to his wisdom, encouragement, and inspiration; and I remember him as I deliver this lecture in his name.

B. *Justice Robert Jackson*

Another judge stands out. He is a critical presence in this lecture, as well as in my career as a prosecutor and occasional critic of prosecutorial conduct and ethics. Robert H. Jackson was a lawyer from upstate New York—Jamesville, I believe—who became an Associate Justice of the U.S. Supreme Court from 1941 to 1954. He never graduated from law school. He was probably the most able lawyer and writer ever to have served on the Supreme Court. He was responsible for some of the most famous opinions, ones that are familiar to every law student—*Michelson v. United States*,⁶ *Wickard v. Filburn*,⁷ *Hickman v. Taylor*,⁸ *Youngstown Sheet & Tube Co. v. Sawyer*,⁹ *Korematsu v. United States*,¹⁰ *West Virginia State Board of Education v. Barnette*.¹¹ He also invented several famous aphorisms, such as, "We are not final because we are infallible, but we are infallible only because we are final;"¹² and that the con-

4. *Id.* at 516-17.

5. See Bennett L. Gershman, *Abscam, the Judiciary, and the Ethics of Entrapment*, 91 YALE L.J. 1565 (1982).

6. 335 U.S. 469 (1948).

7. 317 U.S. 111 (1942).

8. 329 U.S. 495 (1947) (concurring opinion).

9. 343 U.S. 579 (1952) (concurring opinion).

10. 323 U.S. 214 (1944) (dissenting opinion).

11. 319 U.S. 624 (1943).

12. *Brown v. Allen*, 344 U.S. 443, 540 (1953).

2008] *DANGEROUS POWER OF THE PROSECUTOR* 3

stitution is not a “suicide pact.”¹³ However, he may be best remembered not for what he wrote on the Court, but for his courageous and controversial decision to leave the Supreme Court temporarily to serve as Chief Prosecutor in the Nuremberg War Crimes Trials in 1945-46. His opening and closing arguments at those trials are said to be the finest courtroom oratory ever. It has also been said that Jackson virtually invented the modern law of war crimes and trials for war crimes.

C. Justice Jackson’s Speech and My Title

As this lecture is about prosecutors, and, as you will learn momentarily, about federal prosecutors and recent federal criminal prosecutions, it is also noteworthy that Jackson, before he was appointed by President Franklin Delano Roosevelt to the Supreme Court, served as the Attorney General of the United States. In that capacity, Jackson gave a memorable speech in 1940 at the Second Annual Conference of United States Attorneys.¹⁴ I’ve read that speech many times. As a young assistant district attorney in the Manhattan District Attorney’s Office, I can remember the impact his speech had on me, and how his remarks helped shape my understanding and appreciation of the awesome role of a prosecutor in the legal system. A passage from that speech provides the title to my lecture.

II. Recent Prosecutorial Abuses

In preparing for this lecture, I reviewed some of my other lectures and writings over the past eight years. I wanted to see if the cases I will be discussing today were isolated events or part of a larger picture, to try to place the cases in some conceptual framework. I have concluded that these cases are not aberrations. They are not isolated deviations, disconnected from the legal and political abuses that have engulfed our nation these past eight years, particularly the abuses by the Executive Branch of our federal government, the erosion of the rule of law, and the threats to our civil liberties. There is a connection be-

13. *Terminiello v. Chicago*, 337 U.S. 1, 37 (1949).

14. See Robert H. Jackson, *The Federal Prosecutor*, 31 J. AM. INST. CRIM. L. & CRIMINOLOGY 3 (1940-1941).

tween these abuses and the specific topic I have assigned for my talk.

Here's the connection. The post-9/11 legal and political climate of hysteria, panic, and fear has allowed the Executive Branch to engage in the most odious and despicable conduct, where the highest and most powerful government officials believe and teach that anything goes and the truth doesn't matter, as long as you can get away with it. "Just trust me," they say. We are experiencing a dark period in our history in which the rule of law is cynically manipulated to serve the government's partisan and political interests, and moral and ethical norms of conduct are flaunted. In such a climate, is there any question that some prosecutors, whose moral code, aggressive law enforcement mentality, and political self-interest might be in sync with the Department of Justice and the White House, might get the message that they can prosecute as hard as they want, overreach as far as they are able, prosecute as dirty as they need to, and there is nothing to stop them—not Congress, not the courts, certainly not the Attorney General, the Justice Department or other high executive branch officials?

A. *What Kind of Climate am I Talking About?*

1. Recall the post-9/11 roundup and detention of immigrants. Some twelve hundred people were arrested, mostly foreigners with immigration problems, with wartime urgency and uncommon secrecy, on the pretextual charges of being "material witnesses." Seven hundred and sixty-two non-citizens were detained and abused physically and mentally.¹⁵ Many were held for months in detention facilities without being told why they were being detained.¹⁶ These people effectively "disappeared." Most were deported, and none were charged with terrorist crimes.¹⁷

2. Recall the abuses under the odious USA Patriot Act. These abuses are exemplified by "sneak and peek searches" that

15. See OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, THE SEPTEMBER 11 DETAINEES: A REVIEW OF THE TREATMENT OF ALIENS HELD ON IMMIGRATION CHARGES IN CONNECTION WITH THE INVESTIGATION OF THE SEPTEMBER 11 ATTACKS 2 (April 2003), available at <http://www.usdoj.gov/oig/special/0306/full.pdf>.

16. See *id.* at 35-36, 195.

17. See *id.* at 1-2, 52, 70, 88, 104.

2008] *DANGEROUS POWER OF THE PROSECUTOR* 5

violate the privacy of our most sacred sanctuaries; FBI access to personal records without a warrant simply on the basis of a self-proclaimed need for the information, with virtually no requirement of factual support; and unregulated surveillance of religious, civic and political organizations. Several provisions have been declared unconstitutional (e.g., use of “national security letters,” prohibition on recipients from disclosing the requests, dispensing with knowledge and intent requirements for serious felonies).¹⁸

3. Recall the horrible images from the Abu Ghraib prison. One commentator has described these images as some of the most despicable examples of “official American sadism.”¹⁹

4. Recall the use of torture as a permissible method of interrogation, with not only the endorsement of the Justice Department, but the Orwellian definition of torture conjured up to justify its use.

5. Recall the transportation of suspects to foreign countries where, with our knowledge and consent, they were horribly tortured.

6. Recall the Guantanamo gulag. This is the notorious detention center where persons, including some U.S. citizens, denominated as “enemy combatants,” were detained indefinitely—possibly forever—in unspeakably harsh conditions without access to courts, lawyers, or family, and without formal criminal charges or reliable evidence of wrongdoing.

7. Recall the Military Commission Act²⁰ abolishing habeas corpus and employing military tribunals to try enemy combatants on often secret and unreliable evidence.

8. Recall the use of warrantless electronic eavesdropping, endorsed by the Department of Justice.

9. Recall the intrusions into privileged communications between lawyers and their clients, endorsed by the Department of Justice.

10. Recall the widespread INS raids on undocumented aliens in the name of fighting terrorism, where husbands and

18. See, e.g., Humanitarian Law Project v. U. S. Dep’t of Justice, 352 F.3d 382 (9th Cir. 2003); Doe v. Ashcroft, 334 F. Supp. 2d 471 (S.D.N.Y. 2004).

19. See Anthony Lewis, *Official American Sadism*, N.Y. REV. OF BOOKS, Sept. 25, 2008, available at <http://www.nybooks.com/articles/21794>.

20. 10 U.S.C. §§ 948a-e (2006).

wives, and parents and children were separated, without any demonstrable contribution to fighting terrorism.

But there is another, more direct and more insidious connection to the cases I will be discussing. The last eight years have seen what I will call the politicization of the rule of law. From the standpoint of some federal prosecutors, there is no one rule of law but rather one rule of law for Republicans and a different rule of law for Democrats.

B. *Consider the U.S. Attorney Firings*

The discharge of eight U.S. Attorneys in late 2006—referred to as the “U.S. Attorneys Scandal”²¹—involved allegations that the Department of Justice influenced—directed is a more apt word—U.S. Attorneys’ Offices to follow President Bush’s partisan political agenda by encouraging the inexorable pursuit of voting rights cases and government corruption cases against Democrats and discharging those U.S. Attorneys who resisted. The firings have been seen as proof of the Justice Department’s eagerness to serve White House political interests in derogation of the Department’s traditional commitment to the rule of law and the cause of justice.

Last week, a report by the Inspector General of the Justice Department concluded that “there was significant evidence that political partisan considerations were an important factor” in the U.S. attorney firings.²² This report caused Attorney General Michael Mukasey to appoint a special prosecutor to investigate the scandal and determine whether certain individuals, including former Attorney General Alberto Gonzales, may have committed criminal acts in connection with the firings. Among the allegations to be investigated are claims that:

1. Carol Lam of San Diego was fired because she secured the conviction of Republican Congressman Randy Cunningham and was in hot pursuit of defense contractors with close ties to the administration.²³

21. Bruce A. Green & Fred C. Zacharias, “*The U.S. Attorneys Scandal*” and *the Allocation of Prosecutorial Power*, 69 OHIO ST. L.J. 187, 188 (2008).

22. OFFICE OF THE INSPECTOR GEN., U. S. DEP’T OF JUSTICE, AN INVESTIGATION INTO THE REMOVAL OF NINE U.S. ATTORNEYS IN 2006 (2008), *available at* <http://www.usdoj.gov/oig/special/s0809a/final.pdf>.

23. *See id.* at 271.

2008] *DANGEROUS POWER OF THE PROSECUTOR* 7

2. Nevada prosecutor Daniel Bogden was fired for investigating a Republican governor.²⁴

3. Arkansas prosecutor H.E. Cummins was fired for investigating the Republican governor of Missouri.²⁵

4. Arizona prosecutor Paul Charlton was fired for failing to bring charges against Democratic Congressman Rick Renzi just before the November 2006 election.²⁶

5. New Mexico prosecutor David Iglesias was fired because he would not succumb to Republican political pressure to bring charges against certain Democrats when he lacked sufficient proof of guilt.²⁷

6. Lastly, New Jersey U.S Attorney Christopher Christy escaped being fired because he publicly investigated Democratic Senator Robert Menendez just before the New Jersey senatorial election, which Menendez narrowly won.²⁸

In addition to the firing scandal, we have the hiring scandal, which further demonstrates the politicization of the rule of law and the Justice Department's utter contempt for government. There is no precedent in our history for how the Bush Administration systematically politicized the Justice Department throughout the bureaucracy. Two recent reports from the Inspector General conclude that there was a partisan litmus test for Justice Department hirings, in violation of federal civil service law as well as Justice Department guidelines.²⁹ Among the findings are the following:

24. *See id.* at 201.

25. *See id.* at 115.

26. *See id.* at 219.

27. *See id.* at 149; *see also* David Iglesias, *Why I Was Fired*, N.Y. TIMES, Mar. 21, 2007, at A21, available at <http://www.nytimes.com/2007/03/21/opinion/21iglesias.html>.

28. Green & Zacharias, *supra* note 21, at 205 n.85.

29. OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, AN INVESTIGATION OF ALLEGATIONS OF POLITICIZED HIRING IN THE DEPARTMENT OF JUSTICE HONORS PROGRAM AND SUMMER LAW INTERN PROGRAM 98-102 (2008), available at <http://www.usdoj.gov/oig/special/s0806/final.pdf> [hereinafter U.S. DEP'T OF JUSTICE, HONORS PROGRAM]; OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, AN INVESTIGATION OF ALLEGATIONS OF POLITICIZED HIRING BY MONICA GOODLING AND OTHER STAFF IN THE OFFICE OF THE ATTORNEY GENERAL 135-40 (2008), available at <http://www.usdoj.gov/oig/special/s0807/final.pdf> [hereinafter U.S. DEP'T OF JUSTICE, MONICA GOODLING].

1. Priority in hiring was given to persons who had loyally served the President—the so-called loyal “Bushies.” Applicants were vetted aggressively. According to the Inspector General’s Report, hiring decisions were “so irrational that they [were] motivated by politics”³⁰

2. Applicants with Democratic affiliations were rejected at a substantially higher rate than those with Republican, conservative, or neutral credentials. For example, dozens of honors applicants with membership in the American Constitution Society were rejected, but virtually all applicants with ties to the Federalist Society were accepted.

3. As stated by the White house liaison to the Justice Department in an email message, “We pledge 7 slots within 40 days and 40 nights. Let the games begin!”³¹

4. When Bradley Schlozman, the U.S. Attorney in Kansas City, Missouri, wanted to hire a new prosecutor, the Justice Department’s liaison with the White House, Monica Goodling, who had so much power and so little experience—and whom one commentator has characterized as an inexperienced punk—brazenly replied, “Tell Brad he can hire one more good American”³² (Goodling’s code word for Republican).

5. Republican lawyers received high marks in their job interviews because they were found to be sufficiently conservative on the core issues of “god, guns + gays.”³³ After an interview Goodling typically would write in her forwarding messages things like “pro-God” and “pro-marriage, anti-civil union.”³⁴

Goodling’s political influence generated complaints from some U.S. Attorneys. She tried to prevent the hiring of a prosecutor in the U.S. Attorneys Office in Washington D.C., because she was concerned he was a “liberal democrat.”³⁵ In another case, Goodling actually blocked the appointment of a female prosecutor in Michigan because Goodling believed the woman was having a lesbian relationship.³⁶ Goodling’s objections may

30. U.S. DEP’T OF JUSTICE, HONORS PROGRAM, *supra* note 29, at 48.

31. U.S. DEP’T OF JUSTICE; MONICA GOODLING, *supra* note 29, at 94.

32. *Id.* at 31.

33. *Id.* at 104.

34. *Id.* at 38.

35. *Id.* at 135.

36. *Id.* at 128.

2008] *DANGEROUS POWER OF THE PROSECUTOR* 9

now explain the dismissal of the U.S. Attorney—one of the U.S. Attorneys fired for reasons that have never been explained—in that office.

Given these occurrences, the cases that I am about to describe seem to be almost inevitable byproducts of this partisan and corrupt system.

C. *Consider the Case of Georgia Thompson*

The prosecution of Georgia Thompson defies reason.³⁷ Thompson was a Wisconsin state procurement section chief and career civil servant. In 2006, she was convicted of misapplication of federal funds and mail fraud.³⁸ These convictions were based on charges that she improperly steered a large contract to a travel agency whose principals had donated to Wisconsin Democratic governor Jim Doyle's campaign.³⁹

Last year, the Seventh Circuit overturned Thompson's conviction.⁴⁰ The court found that no crime had been committed and that the prosecution's legal theory was "preposterous."⁴¹ The evidence used to charge Thompson was beyond thin.⁴² Indeed, on the day of oral argument, the court issued a remarkable, and possibly unprecedented, order to the prosecutors to release Thompson from prison before the close of business that very day.⁴³ An official in the Justice Department's Public Integrity section wrote an email message to a colleague asking, "[H]ow in the heck did this case ever get brought?"⁴⁴

As the Seventh Circuit observed in its decision declaring Thompson "innocent,"⁴⁵ (1) the travel agency had in fact submitted the lowest bid,⁴⁶ (2) "there [was] not so much as a whiff of a

37. See H. COMM. OF THE JUDICIARY, 110TH CONG., ALLEGATIONS OF SELECTIVE PROSECUTION: THE EROSION OF PUBLIC CONFIDENCE IN OUR FEDERAL CRIMINAL JUSTICE SYSTEM 19-23 (Comm. Print 2007) [hereinafter H. COMM. OF THE JUDICIARY], available at <http://judiciary.house.gov/hearings/pdf/SelProsReport080417.pdf>.

38. See *United States v. Thompson*, 484 F.3d 877, 878 (7th Cir. 2007).

39. *Id.*

40. *Id.*

41. *Id.* at 883.

42. See H. COMM. OF THE JUDICIARY, *supra* note 37, at 25.

43. *United States v. Thompson*, 484 F.3d 877 (7th Cir. 2007) (No.06-3676) (order releasing Thompson, Apr. 5, 2007).

44. H. COMM. OF THE JUDICIARY, *supra* note 37, at 20.

45. *Thompson*, 484 F.3d at 878.

46. *Id.*

kickback or any similar impropriety,”⁴⁷ and (3) there was no evidence or even a contention by the prosecution that Thompson either knew or cared about the winning bidder’s contributions.⁴⁸ Although Thompson told other members of the bid-evaluation committee that the winning bidder had to be selected for “political reasons,”⁴⁹ the Seventh Circuit observed that not all political reasons are wrongful. Such a comment could have meant that awarding a contract to the cheapest bidder was good politics because it showed fiscal responsibility—a political but not a wrongful reason.⁵⁰ Or Thompson may have meant that the bid should go to a Wisconsin company—a good political reason but hardly an unlawful one.⁵¹

But note how important the Thompson prosecution was to Wisconsin Republicans. The prosecution became a powerful political weapon for Doyle’s Republican opponent. Remember, he was trying to unseat an incumbent Democratic governor. Sure enough, given the timing of the prosecution—the summer before the election—the Republicans spent millions of dollars running a barrage of attack ads tying Thompson’s corruption to Governor Doyle.

During its investigation into political profiling by the Bush Justice Department, the Judiciary Committee discovered several unusual facts about the Thompson investigation. First, the name of the U.S. Attorney who prosecuted Thompson—Steven Biskupic—appeared on a March 2005 list of U.S. Attorneys to be considered for firing that was compiled by Kyle Sampson.⁵² Sampson was the chief-of-staff to Attorney General Alberto Gonzales just before the Thompson investigation took off. It appears that Biskupic was targeted for firing because of Karl Rove’s concern about Biskupic’s dismal record in bringing “vote fraud” cases against Democrats.⁵³ Documents show that Rove personally reviewed Biskupic’s performance on such cases and noted on a document discussing alleged vote-fraud activity in

47. *Id.* at 879.

48. *Id.*

49. *Id.* at 878.

50. *Id.* at 879-80.

51. *Id.* at 880.

52. H. COMM. OF THE JUDICIARY, *supra* note 37, at 21.

53. *Id.*

2008] *DANGEROUS POWER OF THE PROSECUTOR* 11

Biskupic's district, "Discuss w/Harriet."⁵⁴ (Harriet, of course, is Harriet Miers, counsel to Bush). In January 2006, the same month that Biskupic indicted Thompson, Kyle Sampson created a new draft of the firing list with Biskupic's name now removed.⁵⁵

D. *Consider Next the Case of Don Siegelman*⁵⁶

Don Siegelman was the most powerful Democrat in Alabama. He was governor of Alabama from 1998-2002, previously held many state offices, and was a major political force in the state. He lost his bid for re-election in 2002 to Republican Bob Riley by a few thousand votes and was expected to run again in 2006. Early polls indicated he would win a rematch against the Republican.

In May 2004, Siegelman was indicted by the U.S. Attorney for the Northern District of Alabama, Alice Martin, on conspiracy charges related to bid-rigging of state contracts. Those charges were dismissed after the prosecution failed to produce evidence to support the allegations. Several months later, a new indictment was brought by the U.S. Attorney for the Middle District of Alabama, Leura Canary.⁵⁷ This new indictment charged Siegelman and Richard Scrushy, an Alabama businessman who had also been charged in the earlier dismissed bid-rigging case, with bribery. According to the indictment, Scrushy had made a \$500,000 contribution to a state lottery campaign favored by Siegelman in exchange for his appointment by Siegelman to a state medical board.⁵⁸

Trial was held in mid-2006. After eleven days of deliberations, with the jury twice reporting that it was deadlocked, Siegelman and Scrushy were acquitted of twenty-five of the thirty-two counts submitted to the jury, but were convicted of the bribery charge.⁵⁹ Siegelman was sentenced to seven years and four months in prison⁶⁰ (prosecutors had requested thirty years) and

54. *Id.*

55. *Id.*

56. See H. COMM. OF THE JUDICIARY, *supra* note 37, at 7-19.

57. See *United States v. Siegelman*, No. 2:05-cr-119, 2008 WL 45531, at *1 (M.D. Ala. Jan. 2, 2008).

58. *Siegelman*, 2008 WL 45531, at *1.

59. *Id.* at *7.

60. *Id.*

Scrushy to six years and ten months.⁶¹ The district judge denied Siegelman's motion to remain at liberty pending appeal.⁶² Last March, the Eleventh Circuit ordered Siegelman released from prison, stating that his appeal raised "substantial questions of law or fact likely to result in a reversal," one of the essential requirements for release pending appeal.⁶³ The appeal is scheduled to be argued later this month.

Serious allegations have been made that Siegelman was targeted for prosecution to further the interests of the Alabama Republican Party. Indeed, forty-four former state attorneys general, of both political parties, have petitioned the House Judiciary Committee to commence an inquiry into the Siegelman case.⁶⁴ One of them, a former Republican state Attorney General, stated, "This was a Republican state and [Siegelman] was the one Democrat they could never get rid of."⁶⁵

Did politics play a role in Siegelman's prosecution? In May 2007, a Republican attorney from Northern Alabama, Jill Simpson, swore in an affidavit that in November 2002, a prominent Alabama Republican operative, Bill Canary, told her that Karl Rove had contacted the Justice Department about bringing a prosecution against Don Siegelman. Canary, by the way, is married to the same U.S. Attorney for the Middle District of Alabama, Leura Canary, who, despite her recusal, appears to have been heavily involved in the Siegelman case. Simpson stated in her affidavit that Canary also told her that "his girls would take care of Siegelman." When Simpson asked Canary who "his girls" were, Canary replied they were his wife and Alice Martin, the U.S. Attorney for the Northern District of Alabama, the same prosecutor who had previously brought the charges against Siegelman that were dismissed.

61. *United States v. Scrushy*, No. 2:05-cr-119, 2007 WL 3231788, at *1 (M.D. Ala. Nov. 1, 2007).

62. *Siegelman*, 2008 WL 45531 at *7.

63. *United States v. Siegelman*, No. 07-13163B (11th Cir. Mar. 27, 2008) (order releasing Siegelman pending appeal), available at <http://graphics8.nytimes.com/packages/pdf/national/20080328-ALABAMA.pdf>.

64. H. COMM. OF THE JUDICIARY, *supra* note 37, at 8.

65. *Did Ex-Alabama Governor Get A Raw Deal?*, CBSNEWS.COM, Feb. 24, 2008, <http://www.cbsnews.com/stories/2008/02/21/60minutes/main3859830.shtml> (quoting Grant Woods, former (Republican) Attorney General of Arizona).

2008] *DANGEROUS POWER OF THE PROSECUTOR* 13

In a later sworn interview with the Judiciary Committee, Simpson further stated that Republican Governor Riley's son Rob, an attorney, colleague, and friend of Simpson, told her that his father and Canary had spoken to Karl Rove. Thereafter, she continued, Rove communicated with the head of the Justice Department's Public Integrity Section about mobilizing additional resources to bring a second indictment against Siegelman after the first case in Birmingham had been dismissed. Riley also told Simpson that the new case would be before Chief Judge Mark Fuller, a judge who Riley said could be trusted to "hang Don Siegelman."⁶⁶

Canary and Riley have denied the allegations, although both have refused to be interviewed under oath. Rove has made a curiously ambiguous comment to the media ("I know nothing about any phone call"⁶⁷), but never addressed the underlying allegations. There is evidence to corroborate Simpson's statements:

1. Simpson's cell phone records reflect an eleven minute call to Riley's number on the morning she says she spoke to him about Siegelman.⁶⁸

2. When first confronted about the Simpson allegations, Riley stated that Simpson was a distant acquaintance whom he had not seen in thirteen or fourteen years.⁶⁹ However, records show that over the past ten years, there was extensive joint legal work and client referral between Simpson and Riley.⁷⁰

3. Further, although Riley stated that Rove "has no idea who [I am],"⁷¹ *Time* magazine reported that one of Simpson and Riley's joint clients recalls "Rob Riley mention[ing] Karl Rove about four or five times as someone he was getting in touch with to help settle our business in Washington."⁷²

4. Finally, at the time of the charges, Riley was involved in a huge civil lawsuit against Scrusby's company, and other counsel in that case had commented that the existence of a criminal

66. H. COMM. OF THE JUDICIARY, *supra* note 37, at 9.

67. *Id.* at 10.

68. *Id.* at 11.

69. *Id.*

70. *Id.*

71. *See id.* citing Adam Zagorin, *Rove Linked to Alabama Case*, *TIME*, Oct. 10, 2007, available at <http://www.time.com/time/nation/0,8599,1669990,00.html>.

72. *Id.*

indictment against Scrushy “obviously helped” the civil case.⁷³ The case settled for \$445 million, yielding a substantial fee to Riley and further corroborating Simpson’s testimony that Riley had been discussing Scrushy’s status in late 2004 into 2005.⁷⁴

Further evidence reveals that high-level Washington officials may have been driving the prosecution effort against Siegelman. Doug Jones, a former U.S. Attorney in Alabama who had previously represented Siegelman, gave sworn testimony before the Judiciary Committee that government investigators stated that they “hoped” their work would implicate Siegelman, and that other prosecutors told him that despite significant weaknesses in the case, Washington officials had directed them to go back and review the case from top to bottom.⁷⁵ Witnesses who did not know each other testified that at the time Karl Rove was pressing Justice Department leadership to indict Siegelman, the highest officials in the Justice Department informed line prosecutors working on the case, who had expressed serious doubts about the evidence and opposed the prosecution, to go back over the entire matter.⁷⁶ Indeed, these prosecutors did in fact launch an aggressive new effort to find indictable charges against Siegelman. As Jones testified, “[I]t appeared that agents were not investigating any allegations of a crime, but were fishing around for anything they could find against an individual.”⁷⁷

The aggressive theory of bribery relied on by the prosecution supports Jones’s observation. The investigation against Siegelman was unusually long and far-ranging, cycling and recycling multiple theories and allegations for over five years before an indictment was brought, then dismissed, and another brought.⁷⁸ Scrushy’s payment was neither to Siegelman nor to his campaign. Siegelman personally received nothing. Scrushy previously had been appointed to the exact same medical board by Republican governors.⁷⁹ Moreover, criminalizing campaign donations because the giver later receives a benefit is not only

73. H. COMM. OF THE JUDICIARY, *supra* note 37, at 11.

74. *Id.*

75. *Id.* at 12.

76. *Id.* at 13.

77. *Id.*

78. *Id.* at 17.

79. *Id.*

2008] *DANGEROUS POWER OF THE PROSECUTOR* 15

unusual, it runs directly counter to a 1991 Supreme Court decision, *McCormick v. United States*,⁸⁰ that requires an explicit quid pro quo, or link, between a campaign or issue-advocacy contribution and an official act.⁸¹

Consider this: If Siegelman is guilty, then every President who has appointed a campaign contributor as an Ambassador and every Senator who has put forward a nominee for a federal judgeship after such person contributed to the Senator's campaign would be chargeable at the whim of prosecutors. The criminal law cannot be so malleable. Allowing prosecutors such wide opportunities for charging invites prosecutorial tyranny. People should be allowed to stay within the accepted bounds of the law without fearing prosecution from some unscrupulous prosecutor. I am reminded of Sir Thomas More's statement, as recounted by Robert Bolt in his play *A Man for All Seasons*: "The law is a causeway upon which, so long as he keeps to it, a citizen may walk safely."⁸²

To be free of prosecutorial selectiveness—of prosecutorial tyranny—the causeway's edges need to be clearly marked. The *McCormick* case marks the boundaries of the legal causeway insofar as bribery charges may be prosecuted. Indeed, the U.S. Attorney's bribery prosecution of Siegelman, predicated on issue-advocacy campaign contributions, may be the first such case ever brought by a federal prosecutor.

Was Siegelman a victim of prosecutorial tyranny based on his prominent political status? Did the prosecution apply a double standard? A key witness against Siegelman told investigators that he had made payments and provided free campaign items to Republican politicians in Alabama exactly like those to Siegelman. Many of these Republicans were close friends of Bill Canary, whose wife Leura, as previously noted, was the U.S. Attorney for the Middle District of Alabama at the time. None of these allegations against Republicans were ever investigated at all, much less for over five years. In fact, *Time* magazine reported that although substantial allegations of corruption were made against Republican Senator Jeff Sessions of Alabama, no

80. 500 U.S. 257 (1991).

81. *Id.* at 273-74.

82. ROBERT BOLT, *A MAN FOR ALL SEASONS* 153 (Vintage International 1990) (1960).

one ever contacted the Senator's office to investigate these allegations.⁸³

E. *Finally, Consider the Case of Dr. Cyril Wecht*

My third example of charging abuse by federal prosecutors involves Pennsylvania U.S. Attorney Mary Beth Buchanan's decision to prosecute Dr. Cyril Wecht.⁸⁴ Wecht, then the coroner in Allegheny County, Pennsylvania, was a prominent 76-year-old Democrat, frequently a candidate and holder of elective public office, and an outspoken critic of Republican candidates, officeholders, and policies.⁸⁵

Like the prosecutions against Siegelman and Thompson, the charge against Wecht was predicated on an extraordinary and arguably unprecedented legal theory. Wecht was alleged to have misused his office and personally enriched himself by a deal with a local university to trade unclaimed cadavers for university lab space.⁸⁶ Why was this a federal prosecution? It has been contended that Buchanan expanded the mail fraud statute so far into state government that it could be used to regulate the taking of pencils from the office supply cabinet.⁸⁷ Legal experts examining the charges concluded that Buchanan "improperly crafted a federal case out of alleged violations of Home Rule Charters, County Codes and State Ethics Provisions"⁸⁸

Moreover, despite ample evidence of Republican corruption in her jurisdiction, Buchanan, since beginning her tenure as U.S. Attorney for the Western District of Pennsylvania in 2001, has never brought a corruption charge against any Republican official and has only prosecuted officeholders who are Democrats.⁸⁹ In addition to Wecht, Buchanan conducted highly visible grand jury investigations during the run up to the 2006 elections against the former Democratic Mayor of Pittsburgh and the former Democratic Sheriff of Allegheny County.⁹⁰ She

83. See Adam Zagorin, *Selective Justice in Alabama?*, TIME, October 4, 2007, available at <http://www.time.com/time/nation/article/0,8599,1668220,00.html>.

84. See H. COMM. OF THE JUDICIARY, *supra* note 37, at 23-26.

85. See *id.* at 23.

86. *Id.* at 24.

87. *Id.*

88. *Id.*

89. *Id.* at 23.

90. *Id.*

2008] *DANGEROUS POWER OF THE PROSECUTOR* 17

declined to prosecute former Republican Senator Rick Santorum for allegedly defrauding a local community by claiming a false residence.⁹¹ In the one instance where a Republican, Jeff Habay, was prosecuted for using paid staffers for political campaigning, Buchanan took no action and let the local prosecutor handle the case instead.⁹²

In addition to the charges against Wecht, Buchanan's tactics in the case were outrageous. For example, claiming that Wecht posed a risk of flight to Israel, Buchanan advised defense lawyers that she would immediately arrest Wecht and subject him to a "perp walk" in front of the media. Only after one of Wecht's lawyers interceded with Deputy Attorney General McNulty in Washington, D.C. did Buchanan agree to allow Wecht to surrender in lieu of arrest and not to subject him to the "perp walk."⁹³

The two-month trial ended with the government putting on over forty witnesses and the defense resting without calling any witnesses. After ten days of deliberation the jury reported it was deadlocked and the judge declared a mistrial. The prosecution announced it would retry the case.⁹⁴ Subsequently, a member of the jury revealed that a majority of the jurors thought Wecht was innocent.⁹⁵ As noted in news reports, several jurors were concerned that the case was politically driven. Local concerns were heightened by news that the prosecution had dispatched FBI agents to visit members of the jury. Finally, a bipartisan group of Republican and Democratic citizens of the Western District of Pennsylvania have written to Attorney General Mukasey urging that the decision to retry Wecht be reconsidered.⁹⁶

F. *What Can We Say About These Cases?*

All of these cases share some common elements.

91. *Id.*

92. *Id.* at 23 n.131.

93. *Id.* at 24.

94. *Id.* at 25-26.

95. *Id.* at 26.

96. *Id.*

1. Each of these prosecutions occurred roughly at the same time period—during the tenure of Attorney General Gonzales—when the politicization of the Department of Justice was at its highest, overlapping the U.S. Attorney firing scandal. That time period was close enough to the 2006 elections to have a political impact.

2. Every one of these prosecutions involved prominent, strategically placed, or outspoken Democrats whose prosecution had the potential to severely cripple the Democratic Party.

3. In every district in which these cases were prosecuted, there was demonstrable and equally culpable conduct by Republican officials that was not investigated or prosecuted.

4. In each of these cases, the prosecutor used a strained and sometimes unprecedented legal theory for prosecution.

5. In each of these cases, the factual predicate for charging was weak or nonexistent.

6. In each of these cases, there were leaks to the media by the prosecution alerting the public to the investigation, the presentation of evidence to the grand jury, and the subpoenaing of witnesses to maximize the political damage to Democrats, not to mention the threatened “perp walk” of Wecht.

7. Consider one final point. In each of these cases there is reason to believe that the prosecutors didn’t care whether they won a conviction or not. Yes, prosecutors want to win. But if you’ve taken out your enemy, forced him to expend considerable resources to defend, destroyed his reputation, and produced an avalanche of publicity that impaired his and his party’s chances of winning an upcoming election, is it plausible that some prosecutors might consider that a win?

I need to digress for a moment. Juries convicted these defendants, you might say, so how can I disparage the factual basis for the prosecutor’s decision to bring charges?

Juries make mistakes. We know that all too well. Just consider the hundreds of recent DNA exonerations and many other non-DNA exonerations: all of those defendants were found guilty by juries. The Wecht jurors resisted; the Thompson and Siegelman jurors succumbed.

Why? As anyone familiar with criminal trials knows, one major reason is that the prosecutor, in his or her role as representative of the government, has a unique power to affect the

2008] *DANGEROUS POWER OF THE PROSECUTOR* 19

evaluation of the facts by the jury. The jury sees the prosecutor as a special guardian and thus warrantor of the facts—an expert who can be trusted to use the facts responsibly. A jury views the prosecutor not simply as an advocate but as a federal official duty-bound to see that justice is done (and prosecutors, by the way, typically make that point explicitly to a jury). Thus, given the enormous respect jurors have for the prosecutor, it may be difficult for a jury to ignore the prosecutor’s arguments, however biased and baseless they may in fact be, or to acknowledge that the government would prosecute someone who wasn’t guilty.

III. Scope and Limitations on Prosecutorial Discretion

Robert Jackson told his audience of U.S. attorneys that a prosecutor “has more control over life, liberty, and reputation than any other person in America.”⁹⁷ With such enormous power one would think there would be some significant control over a prosecutor’s decision-making. But ironically, a prosecutor’s decision to institute criminal charges is the broadest and least regulated power in U.S. law. The prosecutor—and only the prosecutor—decides whom to charge, what charges to bring, and whether a defendant will stand trial, plead guilty, receive immunity, or enter a correctional program in lieu of charges.

The prosecutor’s authority over these critical decisions is absolute. A prosecutor cannot be forced to bring charges he doesn’t want to or forced to terminate them. The tone in the courts’ decisions is less judicial restraint than judicial withdrawal, treating the prosecutor as such an integral and expert part of the executive branch that he may not be interfered with by the judiciary. As the Supreme Court forcefully stated in *United States v. Armstrong*,⁹⁸ “so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.”⁹⁹ Moreover, probable cause, as many

97. Jackson, *supra* note 14, at 3.

98. 517 U.S. 456 (1996).

99. *Id.* at 464 (quoting *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978)).

of you are aware, is a far lesser standard than proof beyond a reasonable doubt.

A. *Dangers of Unchecked Discretion*

There is a certain irony, and some nostalgia, in rereading Justice Jackson's speech in which he describes the constitutional and ethical obligations of prosecutors to an audience composed of the most powerful prosecutors in the United States, persons holding the same office as those who were involved in the prosecutions described above. Justice Jackson recognized that law enforcement is not automatic; it isn't blind. The pursuit of justice requires independence, impartiality, and a spirit of fair play and decency. You should be "diligent, strict, and vigorous in law enforcement," he said, but "you can also afford to be just. Although the government technically loses its case, it has really won if justice has been done."¹⁰⁰ He went on:

One of the greatest difficulties of the position of prosecutor is that he must pick his cases, because no prosecutor can investigate all of the cases in which he receives complaints. . . . What every prosecutor is practically required to do is to select the cases for prosecution and to select those in which the offense is the most flagrant, the public harm the greatest, and the proof the most certain.

If the prosecutor is obliged to choose his cases, it follows that he can choose his defendants. Therein is the most dangerous power of the prosecutor: that he will pick people that he thinks he should get, rather than pick cases that need to be prosecuted. . . . It is here that law enforcement becomes personal, and the real crime becomes that of being unpopular with the predominant or governing group, being attached to the wrong political views, or being personally obnoxious to or in the way of the prosecutor himself.¹⁰¹

100. Jackson, *supra* note 14, at 4.

101. *Id.* at 5.

2008] *DANGEROUS POWER OF THE PROSECUTOR* 21

B. *What are the Limits or Controls on a Prosecutor's Charging Discretion?*

I would suggest that there are both internal and external constraints to prosecutorial discretion.

1. Internal Controls

These constraints assume prosecutorial good faith and no improper motivation.

i. Legal considerations: These include the prosecutor's evaluation of the strength of the case, the credibility of witnesses, the existence of corroborating evidence, and the nature and strength of the defense.

ii. Policy considerations: These include an assessment of the harm caused by the offense, availability of investigative and litigation resources, existence of non-criminal alternatives, and alertness to relevant social and community concerns.

iii. Experiential considerations: These include the prosecutor's background, training, experience, judgment, intuition, sense of fair play, and decency.

iv. Ethical considerations: Stated briefly, the prosecutor must ask whether the ends of justice would be served by this criminal prosecution.

2. External Controls

There are two kinds of external controls. The first category is the sanctions against prosecutors for abuse and misconduct in bringing a prosecution. The second is the constitutional limits in bringing charges.

i. Disqualification and superseding of prosecutors: Courts and attorneys general have the power to remove or disqualify a prosecutor on grounds of misconduct or a conflict of interest. The most recent example of a prosecutor being removed is the Duke Lacrosse case, in which District Attorney Michael Nifong was removed and replaced by the North Carolina Attorney General.

ii. Civil damage action against a prosecutor: The key question here is whether a prosecutor is acting as an investigator or advocate. When acting as an advocate—and charging

and prosecuting a crime typically embraces the advocacy function—a prosecutor enjoys absolute immunity from civil liability.

iii. Monetary sanctions under the so-called Hyde Amendment: If a defendant who has prevailed either through dismissal of charges or acquittal can demonstrate that the prosecutor's conduct was "vexatious, frivolous, or in bad faith," the defendant can recover attorneys fees and other litigation expenses.¹⁰²

iv. Discipline by the legal profession: This happens too rarely to be an effective sanction. Nifong was disbarred, not for bringing spurious charges, but for misconduct in making improper statements to the media and hiding exculpatory evidence.

v. Criminal prosecution: This hardly ever happens. Criminal charges were brought recently against prosecutors in Dupage, Illinois and Detroit, Michigan for using false evidence at trial. All of those prosecutors were acquitted after trial.

If a prosecutor charges with an improper motivation, constitutional and other legal checks are theoretically available but, as we shall see, provide extremely limited protection.

1. Vindictive and Retaliatory Charging

Two Supreme Court decisions—*North Carolina v. Pearce*¹⁰³ and *Blackledge v. Perry*¹⁰⁴—are the foundation for the doctrine, grounded in due process, that forbids a prosecutor from retaliating against a defendant by bringing new or enhanced charges after a defendant has exercised legal rights. The theory is that a defendant should be free to invoke constitutional or statutory rights without the fear that a prosecutor will retaliate against him.¹⁰⁵

The vindictiveness doctrine has been raised in a variety of procedural contexts with very limited success. Indeed, it has been held to be unavailable in the pre-trial context.¹⁰⁶ Thus, for

102. 18 U.S.C. § 3006A (1997).

103. 395 U.S. 711 (1969).

104. 417 U.S. 21 (1974).

105. BENNETT L. GERSHMAN, PROSECUTORIAL MISCONDUCT § 4:34-37 (2d ed. 2008) (quoting *Pearce*, 395 U.S. at 724).

106. *See id.* § 4:39-49.

2008] *DANGEROUS POWER OF THE PROSECUTOR* 23

a defendant who refuses to plead guilty and thereby invokes his constitutional right to a trial, the vindictiveness doctrine does not apply.¹⁰⁷ There are very few cases where courts have actually sustained the defense, usually because the prosecutor is able to establish that his charging decision was motivated, not by a retaliatory purpose, but on evidentiary or other permissible considerations.¹⁰⁸

In the cases above, there is no claim that vindictiveness motivated the prosecutors' charging decisions. To be sure, for some of these prosecutors, or administration officials who may have incited these prosecutions, there may have been a desire for political retribution. However, under the elements of the vindictiveness doctrine, there is no evidence that these defendants were charged with a crime after they invoked any of their legal rights, the key requirement under the doctrine.

2. Demagogic Charging

Prosecutors sometimes bring charges for personal reasons. I have labeled these prosecutions "demagogic" because they reflect illegitimate personal considerations as opposed to proper law enforcement objectives. Tell-tale signs of this practice often include the appearance of personal vendettas, witch hunts, and political crusades. In *Younger v. Harris*,¹⁰⁹ the Supreme Court referred to such prosecutions as "official lawlessness"¹¹⁰ and authorized federal courts to enjoin them.¹¹¹ Injunctions of this sort are hardly ever granted and always involve state prosecutions. It is possible that the notorious Duke Lacrosse case may be an example of a prosecution brought for personal reasons that could have been enjoined.

A better example is the case of *Shaw v. Garrison*,¹¹² captured most inaccurately in the film *JFK*, where Jim Garrison, the District Attorney of New Orleans, began investigating the assassination of President Kennedy ostensibly because Lee Harvey Oswald had spent the summer of 1963 in New Orleans.

107. *See id.* § 4:42.

108. *See id.* § 4:40-67.

109. 401 U.S. 37 (1971).

110. *Id.* at 56 (Stewart, J., concurring).

111. *See id.* at 53-54 (majority opinion).

112. 328 F. Supp. 390 (E.D. La. 1971).

Garrison focused his investigation on a businessman, Clay Shaw, after the release of the Warren Commission Report.¹¹³ In 1967, he charged Shaw with conspiring to assassinate Kennedy.¹¹⁴ Shaw was tried and acquitted, but on the day after the acquittal, Garrison re-charged Shaw with perjury based on his testimony at the conspiracy trial.¹¹⁵ The district court enjoined this prosecution, and the Fifth Circuit affirmed.¹¹⁶ The Fifth Circuit found that the prosecution had been brought in bad faith for venal motives.¹¹⁷ One of these motives was Garrison's desire for financial gain from his forthcoming book on the Kennedy assassination, which would be promoted by the publicity surrounding the Shaw prosecutions and would help Garrison repay substantial debts incurred in his funding of the original investigation.¹¹⁸ Garrison's "relentless harassment of Shaw" and his "total disregard of Shaw's rights" placed this case squarely within the *Younger v. Harris* doctrine.¹¹⁹

Although there have been notorious political trials that seem to fit into the category of witch hunts, I have found no federal case in which a federal prosecution has been enjoined. I can recall the "Chicago Seven" trial in 1971,¹²⁰ which might be characterized as a "witch-hunt."

In the three cases discussed above, one could argue that prosecutors brought these charges for personal reasons, that is, that they would stand to gain personally by avoiding being fired and would also ingratiate themselves with the White House and Justice Department. It is plausible to characterize these cases as demagogic based on the personal and political stakes involved. However correct this characterization may be, I have found no case applying the *Younger v. Harris* doctrine to federal prosecutions.

113. *Id.* at 393-94.

114. *Id.* at 394.

115. *Id.* at 399-400.

116. 467 F.2d 113 (5th Cir. 1972).

117. *Id.* at 120.

118. *Id.* at 118.

119. *Id.* at 114, 117.

120. *See generally* United States v. Dellinger, 472 F.2d 340 (1972).

2008] *DANGEROUS POWER OF THE PROSECUTOR* 25

3. Selective Prosecution—Discriminatory Charging

This doctrine may be a better fit. The equal protection doctrine typically is applied to address claims of discriminatory charging. The label given to such claims is “selective prosecution,” and it is under this doctrine that the recent cases I have discussed may best be considered. The doctrine, or defense, of selective prosecution contains several elements familiar to equal protection jurisprudence generally.¹²¹ Three elements must be shown.

i. Arbitrary classification: The Supreme Court has stated that the conscious exercise of some selectivity is not an improper or constitutional violation (i.e., the most notorious violators or the most prominent persons who may be violating a law).¹²² Selection, however, may not be based on “an unjustifiable standard such as race, religion, or other arbitrary classification.”¹²³ An arbitrary classification would seem to mean that prosecutors are targeting persons for prosecution based on criteria that are clearly irrelevant to law enforcement purposes. Such a classification would include the exercise of protected constitutional and statutory rights and would embrace political activities, membership in a political party, and more generally the exercise of First Amendment rights.

ii. Disproportionate impact: A showing must be made that while persons in a particular class are being prosecuted, the law in question generally is not being enforced against other persons who are similarly situated or equally culpable.¹²⁴

iii. Discriminatory purpose: As in all equal protection cases, there must be proof that the selection was consciously and deliberately made based on the unjustifiable standard.¹²⁵ In other words, there must be proof that the prosecutor singled out individuals for prosecution *because of* their membership in a political party, or because of their exercise of First Amendment rights.

121. See *United States v. Armstrong*, 517 U.S. 456, 465 (1996).

122. See *Oyler v. Boles*, 368 U.S. 448, 456 (1962).

123. *Id.*

124. See *Armstrong*, 517 U.S. at 465.

125. See *id.* at 464.

4. Analysis of These Cases Under These Elements

i. Is there an arbitrary classification?

Political affiliation is a proper consideration in making political appointments. It is improper as a criterion in hiring decisions for career lawyers under federal civil service law and Justice Department guidelines. It is also an absolutely improper and illegal factor in making charging decisions. Several Supreme Court cases—*Elrod v. Burns*,¹²⁶ *Branti v. Finkel*,¹²⁷ and *Rutan v. Republican Party of Illinois*¹²⁸—stand for the principle that targeting defendants because of their political affiliation is an arbitrary selection.

ii. Is there a disproportionate impact?

We know that in the cases discussed, the prosecutors always investigated Democrats for official corruption and almost never investigated Republicans. A study by Donald Shields and John Cragan of the investigation and prosecution by U.S. Attorneys Offices between 2001-2007 of 820 elected officials (normative data: fifty percent Democrat, forty-one percent Republican, nine percent Independent) determined that during the Bush administration, seventy-seven percent of federal public corruption cases involved Democratic officeholders and only seventeen percent involved Republican officeholders.¹²⁹ Shields and Cragan also determined that during the Bush administration, eighty percent of federal investigations and/or indictments of local officials involved Democrats and a mere fourteen percent involved Republicans,¹³⁰ a number that exceeds racial profiling of African Americans in traffic stops. Shields and Cragan found that the administration's investigations of Democrats were "highly disproportionate" and stated that the odds were "less than one in 10,000" that the overrepresentation of Democrats occurred by

126. 427 U.S. 347 (1976).

127. 445 U.S. 507 (1980).

128. 497 U.S. 62 (1990).

129. Donald C. Shields, *Re-Visiting and Extending the "Political Profiling of Elected Democratic Officials,"* EPLURIBUS MEDIA, Oct. 24, 2007, http://www.epluribusmedia.org/columns/2007/20071019_political_profiling_2.html. See also Donald C. Shields & John F. Cragan, *The Political Profiling of Elected Democratic Officials: When Rhetorical Vision Participation Runs Amok*, EPLURIBUS MEDIA, Feb. 18, 2007, http://www.epluribusmedia.org/columns/2007/20070212_political_profiling.html.

130. Shields, *supra* note 129.

2008] *DANGEROUS POWER OF THE PROSECUTOR* 27

chance. They concluded that selective prosecution of Democrats must have occurred.¹³¹

iii. Is there a discriminatory purpose?

To prove a charge of selective prosecution, the defendant must show that he was chosen for prosecution because of an illegitimate factor—here, his or her political affiliation. Although there is no direct evidence of discriminatory motivation, and there rarely is in any criminal prosecution, the circumstantial evidence is compelling:

- The nature of the crime (stale, unusual, political, commonplace) reveals a mindset bent on prosecuting a person rather than a crime.

- The identity of the target suggests the prosecution of powerful and strategically placed Democrats that would have a beneficial political impact.

- The timing of the prosecutions and the leaks to the media were calculated to have a maximum partisan and political effect and do the most political damage.

- Other equally situated Republican officials were not prosecuted notwithstanding evidence of wrongdoing, again revealing a discriminatory mindset.

- Finally, in the context of the U.S. Attorney firings and the Justice Department hiring scandal, it is clear that political affiliation was a critical factor in the Justice Department's policies and practices at the time. The above study by Shields and Cragan demonstrates that the odds that the federal prosecutions of Democrats occurred by chance are one in ten thousand.

IV. Conclusion

I have used this lecture to examine the role of the prosecutor in the charging process. The cases I have discussed reveal an abuse of the prosecutor's charging power that, considered collectively, is unprecedented in U.S. criminal jurisprudence. Given the refusal of persons, who may be able to shed light on the actual motivations behind these prosecutors, to testify, the full story of these prosecutions may never be known, and there-

131. *Id.*

fore official accountability for these abuses may never be assigned to anyone.

Georgia Thompson has been exonerated, although she endured a terrible ordeal of criminal investigation, prosecution, conviction, and incarceration. Dr. Cyril Wecht faces a new trial, even though virtually every objective observer, including most of the jurors, believe that the charges were baseless and politically motivated. Don Siegelman's appeal will be heard soon. As an example of a political witch-hunt, his case may be without parallel.

As I reflect on the prosecutors and prosecutions discussed in this lecture, I would like to end where I began, with a quote from Robert Jackson's speech to the U.S. Attorneys, an office that has historically enjoyed an outstanding reputation for independence, impartiality, and the fair-minded pursuit of justice, but which, for the past eight years, has seen that reputation severely tarnished and the quality of justice stained.

We want good prosecutors; we need good prosecutors. Despite internal and external controls, the most effective control over a prosecutor's abuse of power may lie in a prosecutor's own personal integrity, his or her commitment to the cause of justice, and in a prosecutorial culture that prizes justice and fair play over winning a case.

Or, as articulated by Justice Jackson:

The qualities of a good prosecutor are as elusive and as impossible to define as those which mark a gentleman. And those who need to be told would not understand it anyway. A sensitiveness to fair play and sportsmanship is perhaps the best protection against the abuse of power, and the citizen's safety lies in the prosecutor who tempers zeal with human kindness, who seeks truth and not victims, who serves the law and not factional purposes, and who approaches his task with humility.¹³²

132. Jackson, *supra* note 14, at 6.