Written Testimony of Senator Jeff Sessions
Submitted for the Record

Hearing before the House of Representatives
Natural Resources Committee

June 19, 2012

Mr. Chairman, Ranking Member Markey, and other members of this Committee:

I am honored to be with you today to discuss an issue that is critical to the rule of law in America. The situation arises when a litigant or advocacy group sues the government and demands some sort of policy relief. You are rightly focusing on the large number of cases under the Endangered Species Act, but the problem is pervasive.

From the days years ago when I was an Assistant U. S. Attorney and U. S. Attorney, the principle to be followed by the government attorneys was to vigorously defend the duly enacted rule or law of the United States no matter what the lawyer or the presidential administration then in power, and for whom you worked, publicly or privately thought about it.

The regulation or law being duly enacted became the law of the United States until it was changed. The government attorney's clear duty in such cases was to defend it against all efforts to alter or weaken it. The lawyers defended it dutifully because it is your job and there was no one else.

As you can imagine, this principle is non-partisan. Some days it may work to the benefit of one party, one special interest, one ideology and another day, against. But, this is the core idea of a lawful society.

Now in recent decades, a dangerous trend has emerged. Advocacy lawsuits have more and more been used as a tool to advance an agenda. This abuse of law is particularly insidious when government attorneys, for political or policy reasons, fail to do their duty.

Let me give you a dramatic example. A lawsuit was filed by certain civil rights groups supported by certain plaintiff lawyer interests against the method of selecting Alabama Supreme Court justices. Our Justices are elected. They contended the system was discriminatory in results. The Attorney General then in office agreed to settle the case. The settlement called for adding two justices to the Alabama Supreme Court, and he agreed that the new justices would, in effect, be selected by a committee of the plaintiffs, and not elected. All of this was in violation of the Alabama constitution, and Alabama law, and all without appropriations from the legislature to pay for the new justices. The settlement was approved by the Federal District

Judge. I was elected Attorney General later that year, appealed the case, defended Alabama law, and won it in the Court of Appeals.

During this period, a series of education lawsuits, referred to as "equity funding" cases arose. Advocates for more education funding and taxes, attacked the unequal results of local education taxes. Supported by powerful education interests, the cases resulted in "settlements" all over the country, changing the duly enacted funding policies of many states. Many of these cases were an overreach. Often the attorneys representing the states caved to political pressure rather than defending the law of the state.

A Democratic Attorney General in Tennessee fought the lawsuit in Tennessee, as was his duty, and won. But many other Attorneys General cut a deal and, I believe, improperly undermined the legislature and law of their state. Some of these lawsuits were not adversarial as the system contemplates—but collusive.

Now, it works like this in environmental law cases. An agency, state or federal, desirous of more stringent laws, more funding, and more power, has their wishes rebuffed by the legislature. Then a lawsuit is filed demanding the Agency take the action favored by the Agency. Then the case is "settled" by the state or federal attorneys to the benefit of the plaintiff and to the satisfaction of the Agency or the President. The judge, after being informed that the United States or the State agree with the settlement, normally approves the settlement. The result is that law and regulations are expanded, altered, and violated, often far beyond their intent or plain meaning.

Thus, the power to legislate—that is given in our system to the elected legislative branch—is defeated and altered in a way that is not obvious to the people. This unhealthy process is further advanced by the requirement that, in certain cases, the U.S. government must pay the private attorneys if they win. From 2001 to 2010, the Interior Department made over 230 attorney fee payments "as a result of Endangered Species Act litigation", totaling more than $21 million. This practice appears to be accelerating. GAO has found that the number of Interior Department attorney fee and cost payments increased by 76% from 2008 to 2010 (from 21 to 37 payments). GAO even identified one payment in 2010 that exceeded $5.6 million.

Unfortunately, the Interior Department does not seem to have a good grasp of the full costs. Due to discrepancies in how the agency tracks the information, GAO found that "the data may not be complete over the identified timeframe" and that Interior Department "officials were not sure that they had provided the complete universe of cases." Senator Inhofe and I wrote the Administration, once in November and again last month, asking for copies of correspondence between the agency and the plaintiffs related to two of these settlements. To date, the Administration has refused to provide the requested documents on the basis that they are protected from disclosure because they relate to "mediation."

Please remember that, while the Department of Interior can urge their legal views to the Department of Justice, ultimately it is the Justice Department attorneys who represent the United States in court and who are responsible for defending the rule of law. I am frankly worried that they have not fulfilled their duties faithfully.

I am a strong believer in protecting endangered species. Only California and Hawaii have more threatened or endangered species than our beautiful and environmentally diverse state. Just this weekend, I hiked to the Walls of Jericho preserve where the river and streams are brimming with life.

But, lawyers, courts and bureaucrats do not get to make policy in this country. In the long run, we will all be better served if the nation's governing principles are followed. Indeed, disaster will result if we depart from our great heritage of law.

Your hearing, Mr. Chairman, is very important. I believe there is too much secrecy in these settlements. There is too often collusion. There is too much politics. The "sue and settle" actions can quickly become anti-democratic, leaving the American people unable to fix responsibility for policies being imposed with which they disagree.

Dig into this situation. It is important. History and the Constitution will salute you for it.