Institute for
Constitutional Advocacy and Protection
GEORGETOWN LAW

Hearing before the Senate Judiciary Committee

The Nomination of the Honorable Pamela Jo Bondi
to be the Attorney General of the United States

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Distinguished members of the Committee, thank you for inviting me to testify about the importance of the independence of the Attorney General, and the Department of Justice, when making investigative and prosecutorial decisions.

I am currently the Executive Director of the non-partisan Institute for Constitutional Advocacy and Protection (ICAP) and a Visiting Professor of Law at Georgetown Law. In this role, I lead a team that uses strategic legal advocacy to defend constitutional rights and values while working to restore confidence in the integrity of our governmental institutions. Through litigation, public education, and policy work, ICAP seeks to safeguard rights to free expression, assembly, and democratic participation; combat threats of political violence; fight against criminal justice system overreach; defend the rights of young people and marginalized communities; and preserve fundamental separation-of-powers principles. ICAP's work includes representing former law enforcement and national security officials across the political spectrum, as well as providing advice to current government officials from both sides of the aisle on how to protect public safety while preserving constitutional rights.

Before launching ICAP in mid-2017, I spent nearly 25 years in the Executive Branch, most of it in the Department of Justice. I was an Assistant United States Attorney in the District of Columbia from 1994 through 2014, serving under both Republican and Democratic administrations. In 2014, I moved to the Department headquarters, known as "Main Justice," where I served in a career capacity as the Principal Deputy Assistant Attorney General for National Security before becoming the Acting Assistant Attorney General for National Security in 2016. I served through transition into the Trump Administration before leaving in May of 2017.

Introduction

In my more than two decades at the Department of Justice, both at the U.S. Attorney's Office in D.C. and at the National Security Division at Main Justice, I rarely knew the political party affiliations of my attorney and law enforcement colleagues, and I believe this to be true of the vast majority of DOJ employees. Aside from public integrity cases where abuse of political office was the very thing being investigated, politics was irrelevant to our mission of upholding the rule of law, keeping the country safe, and protecting civil rights, all without prejudice or improper influence.

Although respect for the Department of Justice has ebbed and flowed ever since it was established in 1870, the political polarization of recent years and the rhetoric around the weaponization of the Department has elevated the concern about impartial adherence to the rule of law.

When I talk about the rule of law, I am referring to several core features of the legal system on which a liberal democracy is based. First, it means a system of laws that both the governed and the government agree to abide. Second, it requires transparency in the enactment and enforcement of the law so that there is predictability and stability. Third, it requires a fair legal system in which rights

and responsibilities are evenly adjudicated. And finally, it requires diverse, competent, and independent lawyers and judges.

The lawyers and law enforcement officials that comprise the Department of Justice, whether at Main Justice, the U.S. Attorneys' offices, the FBI, or other component law enforcement agencies, are critical to preventing the weaponization of the Department and preserving impartial adherence to the rule of law. For the Attorney General, this means taking seriously their oath of office, which is to the Constitution, not the President. It means recusal if their impartiality regarding any particular investigation or case could reasonably be questioned. And it means reaffirming longstanding policies limiting contacts between the Department and the White House on specific investigations and cases, in order to ensure the independence of the Department from improper political influence.

The Oath is to the Constitution, not a Person

The Oath of Office taken by the Attorney General requires the person so appointed to solemnly swear or affirm that:

> I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter.

The oath to the Constitution means that if and when there is inconsistency between what the President may ask or direct the Attorney General to do and what the Constitution requires, the Attorney General must choose the latter. Although she is a political appointee and member of the President's cabinet, and therefore obligated and expected to implement the President's policy priorities, that obligation is limited by the Constitution. That means, among many other things, not targeting people or organizations for investigation, prosecution, or retaliation based on protected speech or association; not executing searches without a warrant

and not seeking warrants without probable cause; and not denying due process of law, and the equal protection of the law, to all people within the United States' jurisdiction.

It also means that any prior role as part of the President's legal defense team is over once the oath of office is taken. The Attorney General is not the President's personal attorney; she is the attorney for the United States. When President Ronald Reagan nominated William French Smith, his former personal attorney, to be the Attorney General, Smith was asked during his confirmation hearing how he "propose[d] to insure that [his] former relationship will not compromise [his] independence." Smith responded, "I would have to be, very conscious of situations where it could appear that because of that relationship a problem might be created. Certainly, if a situation arises involving the President or a member of his family or others in a sensitive situation, I would recuse myself from participating or handling any aspect which might develop out of that situation." When asked how he would "insulate the Department of Justice from White House interference in general," he answered that he would review the White House contacts policies of previous Attorneys General and continue them if they appeared to be effective.

Recusal Where Impartiality Could Reasonably Be Questioned

Smith recognized the legitimate concerns that members of Congress and the public might have about his independence as the Attorney General after having served as Ronald Reagan's personal lawyer. He acknowledged the different role he would be playing going forward, and the importance of being "very conscious where it could appear" that his prior relationship might add to that concern. As relevant to the confirmation of President Trump's nominee for Attorney General, Ms. Bondi's prior work as part of the President's legal defense team during the first impeachment proceedings could create at the very least the appearance of a

lack of independence if she were to open investigations into those who had brought the articles of impeachment or prosecuted the matter. Similarly, given some public statements Ms. Bondi made, prior to her nomination, about the potential investigation and prosecution of attorneys and FBI agents involved in the criminal cases against President Trump, the initiation of such investigations or prosecutions could again, at the very least, create an appearance of a lack of independence and improper political influence. Further, in light of her prior personal representation of President Trump, any involvement by Ms. Bondi in civil litigation involving Donald Trump in his personal capacity, such as a suit against the Department of Justice and the FBI for over $100 million related to the court-authorized search of Mar-a-Lago, about which his private attorneys gave notice last year, could also create at least the appearance of impartiality.

The attorneys and law enforcement officials at the Department of Justice, as well as the public, deserve to know whether Ms. Bondi would recuse herself from such a situation where independence and adherence to the rule of law might reasonably be questioned.

Reaffirming White House Contacts Policies to Help Insulate the Department from Political Influence

In 1978, four years after Richard Nixon resigned from the presidency in the wake of the Watergate scandal, Attorney General Griffin Bell gave an address to Department of Justice lawyers in the Great Hall of the Main Justice building in Washington, D.C. Attorney General Bell called it "Independence of the Department of Justice." In this address, he established the first of what has become known as the Department's "White House Contacts Policy," and which has been reaffirmed by Attorneys General under both Republican and Democratic presidents ever since.

Attorney General Bell noted that "the partisan activities of some Attorneys General in this century, combined with the unfortunate legacy of Watergate, have given rise to an understandable public concern that some decisions at Justice may be the products of favor, or pressure, or politics." He explained the constitutional impediment to complete institutional independence of the Justice Department from the President, as the Department is of course part of the Executive Branch led by the President. But he nevertheless emphasized that "the President is best served if the Attorney General and the lawyers who assist him are free to exercise their professional judgment." And "just as important, they must be perceived by the American people as being free to do so."

To implement this objective, Attorney General Bell announced the establishment of procedures and principles to "insure, to the extent possible, that improper considerations will not enter into our legal judgments." Chief among these procedures and principles was the policy that all communications about particular cases from the White House or Congress must be referred to the Attorney General, Deputy Attorney General, or Associate Attorney General. In Attorney General Bell's view, "it is improper for any Member of Congress, any member of the White House staff, or anyone else, to attempt to influence anyone in the Justice Department with respect to a particular litigation decision, except by legal argument or the provision of relevant facts." Indeed, he explained, "[o]ur notions of fairness must not change from case to case; they must not be influenced by partisanship, or the privileged social, political or interest-group position of either the individuals involved in particular cases, or those who may seek to intervene against them or on their behalf."

This policy was memorialized in writing a year later by Attorney General Benjamin Civiletti. Subsequent Attorneys General have reissued The White House Contacts policy by memo, or left in place the memos of previous Attorneys

General. The White House itself has also issued its own contacts policy throughout post-Watergate administrations, governing not only contacts with the Department of Justice, but also with other departments and agencies.

The rationale for these policies has been consistent since 1978. For example, the memo issued by Attorney General Merrick Garland on July 21, 2021, begins with: "The success of the Department of Justice depends upon the trust of the American people. That trust must be earned every day. And we can do so only through our adherence to the longstanding Departmental norms of independence from inappropriate influences, the principled exercise of discretion, and the treatment of like cases alike."

The DOJ policy recognizes the tension between protecting "the norms of Departmental independence and integrity in making decisions regarding criminal and civil law enforcement while at the same time preserving the President's ability to perform his constitutional obligation to 'take care that the laws be faithfully executed.'" This is the constitutional impediment to complete institutional independence referred to by Attorney General Bell more than four decades ago. The policy thus seeks to achieve its goal by prohibiting the Department from advising the White House about pending or contemplated enforcement actions, subject to limited exceptions, while specifically permitting communications between the Department and the White House regarding the advancement of the Administration's policies and intergovernmental relations, so long as they do not relate to pending or contemplated law enforcement investigations or cases. Just as in Bell's time, in order to insulate those who initiate and supervise law enforcement investigations, such as U.S. Attorneys and Assistant Attorneys General and those who work for them, communications with the White House about pending or contemplated investigations and cases must involve only the

Attorney General or Deputy Attorney General at the Department, and the Counsel or Deputy Counsel to the President or Vice President at the White House.

The parallel White House policy, memorialized by Counsels to the President over multiple administrations and directed to all White House staff, is similarly grounded in balancing the need "to ensure the integrity of government decision making and public confidence that decisions by government officials are made based on appropriate considerations" with "the President's constitutional obligation to take care that the laws be faithfully executed." Although this policy contains provisions that restrict contacts with all departments and agencies about specific matters involving named parties, it places even more extensive restrictions on contacts with the Department of Justice, consistent with the memos of Attorneys General over successive administrations since Watergate. Specifically, the policy says that "White House personnel may never engage in any communication with DOJ regarding a particular contemplated or pending investigation with the intent to improperly influence the Department of Justice."

The incoming Attorney General would be well advised to continue to adhere to the White House Contacts policy, and to urge the White House Counsel to do the same. Attorneys General and White House Counsel of both political parties, including the Attorneys General and White House Counsel in President Trump's first administration, have recognized the importance of this policy to ensuring that the public can have confidence that decisions about law enforcement investigations and prosecutions are being made based on the facts and the law, and not improper political influence.

CONCLUSION

Public respect for the Department of Justice and the work of its attorneys and law enforcement officials begins with public respect for the Attorney General. That respect comes from impartial adherence to the rule of law, free from improper political influence. The Senate should ensure that the next Attorney General is committed to taking the steps to earn that respect.