Statement of Judge Ken Starr (D.C. Cir.-Ret.)

in support of the nomination of Judge Merrick Garland

February 23, 2021

It is an honor and privilege to have been invited to testify today. I do so in full support of Judge Merrick Garland's nomination as the 86th Attorney General of the United States.

Since General Washington's nomination in 1789 of Governor Edmund Randolph of Virginia to serve as our nation's first Attorney General, few nominees to this vitally important office have come before the Senate with the extraordinary array of credentials as Judge Garland. His unparalleled record of distinguished service both to the Department of Justice and to the federal judiciary has sparked enthusiastic support and admiration from both bench and bar, and from Republicans and Democrats alike. Justly so.

In light of all that has been said and written, let me point to two sterling qualities of Judge Garland that warrant special mention: First, the universal respect that the Judge garnered on the D.C. Circuit during his years of service as Chief Judge, not only as a superb jurist but as a leader of the court – a leader who listened carefully to his colleagues and treated all persons in the court family with dignity and respect; second, Judge Garland's generosity of spirit reflected in his many years of selfless dedication in tutoring elementary school students in our nation's capital.

Coupled with his unquestioned integrity and powerful intellect, these leadership qualities will stand him in good stead as the nation's top lawyer and chief law enforcement officer.

History teaches us that the role he will soon be occupying, if this body sees fit to confirm his nomination, is extraordinarily difficult. My former boss, Attorney General William French Smith, likened the job to that of the captain of the javelin team who elected to receive. When asked why he was stepping down early in President Reagan's second term, the nation's 74th Attorney General replied: "Because I want to get my First Amendment rights back." And that was long before the Age of Twitter.

It's a hard job. Brickbats are inevitable. Controversy – at times bitter – goes with the territory. Two dimensions of the challenge ahead merit special mention. The

first – the integrity and wisdom of decision-making throughout the Department will continually be drawn into question. In no arena of Attorney General decision-making is this more salient than in criminal investigations and prosecutions, especially those touching on sensitive relationships at the seat of power.

Politically-sensitive investigations

Consider the example of Attorney General Janet Reno during the Clinton Administration. She was vehemently criticized for her decisions to appoint several independent counsels during President Clinton's first term. Yet, as she made clear, the law then in effect – the independent counsel provisions of the Ethics in Government Act – required no less. To her credit, Attorney General Reno was determined to follow the law. That was, as she rightly saw it, her fundamental duty as the Attorney General of the United States. Her steely determination to do the right thing was mirrored by the FBI Director at the time, Judge Louis Freeh, himself a paragon of rock-ribbed integrity.

Integrity. This bedrock requirement of life at the Justice Department is frequently described as "independence." But as Judge Garland fully understands, in our constitutional architecture, Executive power is vested in the President. How can any Attorney General be truly "independent" if he or she serves at the pleasure of the President?

Indeed, in the immediate wake of Watergate, when the integrity of the Justice Department's leadership had been severely compromised, Senator Sam Erwin of North Carolina introduced a bill that would have removed the Department from the President's control and re-constituted it as an independent agency in the nature of the Federal Reserve Board. The concept was quickly scuttled, however, as sober reflection led ineluctably to the conclusion that the Attorney General, who is of course a member of the Cabinet and thus an advisor to the President, needed to be accountable to the nation's chief executive.

The answer to the riddle – the conundrum – of independence with accountability lies in the very quality that Judge Garland displayed throughout his long tenure as a judge, and in particular his years as Chief Judge – integrity and independence of judgment, guided by the rule of law. That is, the Attorney General must be permitted to make pivotally important decisions, especially in the enforcement of the nation's criminal laws, that embody integrity and professionalism. And, at

times, the resulting decision may well be one destined to draw the ire of White House personnel, perhaps even that of the President himself.

One episode during my tenure as Chief of Staff to Attorney General Bill Smith illustrates the point. President Reagan's political advisor, Lyn Nofziger, was concerned that the Justice Department was investigating three supporters of President Reagan out in California. Lyn should never have inquired, but he did. Why are these loyal supporters being investigated? To what was at best a questionable inquiry from a senior White House official, Attorney General Smith responded this way: "Lyn, we're investigating them because we think they're a bunch of crooks." Lyn Nofziger's reply: "But, Bill, they are our crooks!"

There is no such thing. Honest government – government without fear or favor -- is what the constitutional oath demands, and what the American people deserve. Equal justice under law, without turning a blind eye because of political or relational considerations. To be fully prepared for that daunting task, few experiences are as salient as that of having served as a judge.

This commitment to integrity and professionalism was a vital source of the enduring strength of Judge Griffin Bell's contribution to the Justice Department during his justly renowned tenure as Attorney General during the Carter Administration. Although his nomination by President Carter was opposed editorially by the *Washington Post*, Judge Bell's vast judicial experience made itself manifest in the upright way in which he consistently conducted the office and made its way into the legend and lore of the Department. His aptly entitled memoir of his years at Main Justice was this: *Taking Care of the Law*.

That's the job.

The moral of the Judge Bell story: Judges tend to have the professional experience and frame of mind to be excellent, independently-minded yet accountable Attorneys General.

Religious Freedom

The second broad area likely to be rife with controversy in the coming months and years is that of religious freedom. Over the past decade, a number of voices have been raised drawing into question long-settled precepts and principles of America's first freedom, guaranteed by the majestic opening words of the First

Amendment: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof…"

Here, again, Judge Garland's distinguished service as a judge points to bright optimism about the future of religious liberty in America. His jurisprudence is one reflecting stability and predictability in the law. And thus it is with cheerful optimism that those of us who have long supported the Religious Freedom Restoration Act look ahead to Judge Garland's tenure as the nation's top lawyer.

After all, the Religious Freedom Restoration Act (RFRA) is the leading federal civil rights law that protects all Americans' religious liberty. It was championed by Senator Ted Kennedy and Senator Orrin Hatch when it passed the Senate by a 97-3 vote and unanimously passed by the House before President Clinton enthusiastically signed this historic measure into law. For nearly three decades it has protected the religious freedom of all faiths. It is crucially important that the Department of Justice not support any legislative or executive action that would dilute the protection that RFRA generously provides to Americans of all faiths.

In addition, to its great credit, the Obama Administration refused to rescind an opinion of the Office of Legal Counsel issued in 2007 affirming that a religious organization which administers a federal grant retains its right, under the 1964 Civil Rights Act and RFRA, to hire staff who agree with its religious mission. This is fundamental to the core principle of the autonomy of religious institutions guaranteed by the Free Exercise Clause. Despite considerable pressure from outside groups, the Obama Administration was steadfast in support of that well-reasoned opinion. (The opinion is entitled "Application of the Religious Freedom Restoration Act to the Award of a Grant Pursuant to the Juvenile Justice and Delinquency Prevention Act," 31 Op. O.L.C. 162 (2007)). That support should continue unabated.

In similar vein, during the Trump administration, the Justice Department issued guidance to all executive departments and agencies through a Memorandum entitled "Federal Law Protections for Religious Liberty" (82 Fed.Reg. 49668). The Memorandum examined the myriad ways in which the First Amendment and federal law protect all Americans' rights to live according to their religious beliefs. The Memorandum is an accurate, meticulous and comprehensive overview of governing law. Consistent with the values of stability and predictability that Judge Garland has championed throughout his illustrious judicial career, that Memorandum should not be rescinded.

Finally, we likewise look with optimism to the Department of Justice, under Judge Garland's stewardship, vigorously defending rules adopted by the Department of Education that protect religious student groups. 34 CFR 75.500(d) and 76.500(d). These well-reasoned rules ensure that students of all faiths feel welcome and respected at any public college or university that receives federal grants. On January 19, 2021, the rules were challenged in federal district court in Washington, D.C. They deserve an aggressive defense.

At times, the Attorney General himself may need to step in to defend America's culture of freedom. A salient example illustrates the point: The remarkable anti-liberty position embraced by the Obama Administration, including the Justice Department, in the watershed religious freedom case of *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171 (2012), tells a cautionary tale, one signaling the profound need for constant vigilance and caution. A unanimous Supreme Court in that case roundly rejected the effort by Justice Department lawyers to erode America's first freedom. May that case be dismissed as the classic "one off," the exception to the rule that our culture of liberty merits energetic defenses mounted by the Justice Department.

Conclusion

Friends of freedom are filled with optimism that, in light of his exemplary record of distinguished service to American law and our constitutional order, Judge Merrick Garland will continue to defend America's Constitution and our cherished tradition of equal justice under law. No one is above the law, and the law must be faithfully obeyed.

If confirmed, Attorney General Garland, we are confident, will preside with high professionalism and integrity, showing neither fear nor favor.

I look forward to your questions.