

**Opening Statement of
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**Public Hearing of the House State Government Committee concerning the
misbehavior in office of Kathleen G. Kane, Attorney General of Pennsylvania**

Good morning. I'm Michael Bekesha, an attorney at Judicial Watch. Judicial Watch is a Washington, D.C.-based educational foundation dedicated to promoting transparency, integrity, and accountability in government and fidelity to the rule of law.

Thank you, Chairman Metcalfe, for inviting me here today. Although it is always an honor for me, on behalf of Judicial Watch, to appear before this Committee, it also comes with mixed emotions. Last time I was here, about three years ago, I testified on behalf of your "National Security Begins at Home" legislative package. At that time, it saddened me to report that the federal government had decided not to enforce immigration law. However, you and your colleagues sought to protect the citizens of this Commonwealth even though the President refused to do so. I thank you for that.

Today, I am here to testify about another public official who refuses to uphold her constitutional and statutory duties. However, this time, the federal government is not at fault. Although I could spend hours talking about how President Obama and his cabinet continue to disregard their oaths and cause "complications" – as the Commonwealth Court of Pennsylvania recently described it – I am here to discuss a public official who was directly elected by the people of Pennsylvania and who was sworn in to office a little over one year ago.

On January 15, 2013, Attorney General Kathleen Kane placed her hand on the bible and stated:

I do solemnly swear that I will support, obey and defend the
Constitution of the United States and the Constitution of this
Commonwealth and that I will discharge the duties of my office
with fidelity.

Although she placed her hand on the bible and recited this oath, she apparently did not mean it. She must have had her fingers crossed because less than 6 months later, she openly defied her most important duty as Attorney General: upholding and defending the duly enacted laws of this Commonwealth. Before I discuss how the Attorney General failed the people of Pennsylvania and harmed the Commonwealth in the process, I will briefly address the Attorney General's duties, what they mean, and why they are in place.

In full, Section 204(a)(3) of the Commonwealth Attorneys Act states:

It shall be the duty of the Attorney General to uphold and defend
the constitutionality of all statutes so as to prevent the suspension

or abrogation in the absence of a controlling decision by a court of competent jurisdiction.

What this means, in plain English, is that the Attorney General cannot decide which laws she wants to uphold and defend. She must uphold all laws enacted by the Legislature. Importantly, you do not need to take my word for it. In 1973, in *Hetherington v. McHale*, seven judges of the Commonwealth Court of Pennsylvania stated in unequivocal terms: “[T]he Attorney General is without statutory authority to implement his opinion as to constitutionality. . . . The only branch of government that has the power to declare the law unconstitutional is the Judiciary.”

The Court further stated that if the Attorney General had the power to suspend a statute by declaring it unconstitutional, “he would seriously evade and encroach upon this area of judicial responsibility and possess an effective veto over legislation greater than that enjoyed by the Governor.”

The Court therefore concluded that “the Attorney General is without power or authority, even though he is of the opinion that a statute is unconstitutional, to implement his opinion in such a manner as to effectively abrogate or suspend such statute which is presumptively constitutional until declared otherwise by the Judiciary.”

The rationale for this conclusion is the basic principle of “separation of powers,” which first appeared in Pennsylvania as early as 1776. In 1938, the Supreme Court of Pennsylvania, in *Dauphin County Grand Jury Investigation Proceedings (No. 2)*, explained:

[W]hen the constitution of 1873 was adopted, the people acted in the light of generations of experience with the operation of the doctrine of the separation of powers, and with the resulting necessity for judicial review to resolve differences of opinion between the legislative, executive or judicial departments concerning the scope and extent of the delegated powers. Not only were the people then familiar with the exercise from time to time by the court of the power to declare legislation unconstitutional, and also to restrain unauthorized executive acts, but from then until now, though the constitution has been frequently amended, no effective effort has been made to change or take away that power; it is so definitely settled that reference to precedents is unnecessary.

As James Madison warned in Federalist 47, “The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.” Attorney General Kane’s announcement on July 11, 2013 makes it clear that she believes that she has the authority to create, enforce, and interpret the law. In Attorney General Kane’s view, Pennsylvania is a tyranny of one, not a democracy.

This is because Attorney General Kane declared a duly enacted Pennsylvania law unconstitutional and announced that she would not “uphold and defend” it. Although her action in itself may not have been the suspension of the law, the result of her declaration was just that. Less than two weeks after her announcement, the Montgomery County Register of Wills Bruce Hanes stated that he was prepared to violate the law based on, in part, “the Attorney General’s belief that Pennsylvania’s marriage laws are unconstitutional.”

Now, the Attorney General and others argue that because the Office of the General Counsel is defending the law in Court, “no harm, no foul.” They are probably correct that it is better that Attorney General Kane not defend a law she, based on nothing but her own her own analysis, does not believe is constitutional. However, that viewpoint misses the forest for the trees. Kathleen Kane ran for, and was elected to, Attorney General of the Commonwealth of Pennsylvania. If she wanted to only “uphold and defend” some laws, she should not have run for Attorney General. Or, at a minimum, she should have had been transparent enough to campaign on the slogan, “I will uphold and defend the laws of this Commonwealth when I want to.” The people then could have made a choice between a candidate who would take her oath seriously and fight for Pennsylvania and a candidate who only wanted to play Attorney General on television.

To be clear, Kathleen Kane plays Attorney General on T.V. I say that because when she decided that the law was unconstitutional, she held a press conference. She created a media circus. If she sincerely believed that the Commonwealth was enforcing an unconstitutional law, she could have taken one of two permissible and legitimate actions. As the Commonwealth Court explained in 1973, “If the Attorney General in his opinion believes that a statute is unconstitutional, he has the right and indeed the duty to either cause to be initiated an action in the courts of this Commonwealth and thus obtain judicial determination of the issue or he may prepare, for submission to the General Assembly, such revision of the statute as he may deem advisable.” Surely, the Attorney General knew she had these options. Instead of doing what was right, she went on T.V.

Sadly, this is not the only time that Attorney General Kane has taken an action that diminishes her office. In January 2014, the State Ethics Commission concluded that the promotion of the Attorney General’s sister to Chief Deputy Attorney General Child Predator Section “created a perception that the promotion of [her] sister was not free from [her] influence.” Again, the Attorney General and others could argue “no harm, no foul.” But we know that is not true. The process is as important, if not more important than, the results. As lawyers and judges regularly say, just the appearance of impropriety or misbehavior damages the office. Whether it was technically illegal or unethical is irrelevant. Her actions show the people of Pennsylvania how little she thinks of them and the office they elected her to serve.

I believe that another witness will testify about the Attorney General’s attack on the people’s Second Amendment rights. I just briefly want to say that based on records received by Judicial Watch from the Office of the Mayor of New York, Attorney General Kane, shortly before taking office, received a “Gun Policy Memo” from then-Mayor Bloomberg’s *Mayors Against Illegal Guns* group. One can only wonder who and what money is influencing her decisions concerning the Second Amendment.

Then, we have Attorney General Kane's decision not to prosecute certain elected officials for allegedly accepting cash and other gifts in exchange for voting "no" on the Pennsylvania Voter ID bill that passed in 2012. I know for a fact that my colleague Christian Adams will be testifying more on how the Attorney General has ignored her prosecutorial responsibilities imposed by Section 205 of the Commonwealth Attorneys Act. However, this action is most bothersome to me personally because I was here, three years ago, testifying before this committee, in support of that bill. At the time, I had no idea that the opposition may have been receiving cash and jewelry. It is disappointing to learn that the process was corrupted. And nothing is being done about it.

Unfortunately, there is a second part to this story. And it is more troubling than the first. After the *Philadelphia Inquirer* broke the story, Attorney General Kane, in her individual capacity, hired an attorney to defend her decision not to prosecute these elected officials.

On March 22, 2014, the *Philadelphia Inquirer* reported that the Office of the Attorney General set up a meeting with the newspaper to discuss its story disclosing the corruption investigation and the Attorney General's decision to stop it. When Attorney General Kane arrived at the meeting, she was accompanied by attorneys Richard and Thomas Sprague. According to the *Inquirer*, "Sprague said he would launch an investigation into the conduct of the prosecutors who ran that sting operation." Also, Attorney General Kane indicated to the *Inquirer* that she hired Sprague to represent her in possible defamation suits arising from the *Inquirer's* story. Because the Office of the Attorney General set up the meeting and Sprague stated that he was going to investigate the conduct of the prosecutors, Judicial Watch assumed that the Attorney General, in her official capacity, had hired the attorneys. Judicial Watch therefore sent a records request to the Office of the Attorney General under the Pennsylvania's Right-to-Know Law. Just last week, we received the following response:

A search for agency agreements and/or contracts to retain the legal services of Richard A. Sprague and/or the Law Offices of Sprague & Sprague was conducted and it has been determined that written agreements and/or contracts between the Office of Attorney General and/or Attorney General Kane and Richard A. Sprague and/or the Law Offices of Sprague & Sprague do not exist as records of this agency.

The Office of Attorney General also responded:

[R]ecords of any and all communications between the Office of the Attorney General and/or Attorney General Kathleen Kane and Richard A. Sprague and/or the Law Offices of Sprague & Sprague relating to the above-referenced matter do not exist as records of this agency.

In short, Kathleen Kane hired the attorneys in her personal capacity. Yet, she is giving them access to records of the Office of the Attorney General. Apparently, Attorney General Kane has little respect for her office and the people of Pennsylvania.

I have gone on for a while now. Attorney General Kane is lawless. To quote U.S. Supreme Court Justice Felix Frankfurter, "If one man can be allowed to determine for himself what is law, every man can. That means first chaos, then tyranny."

Thank you Chairman Metcalfe and your colleagues for continuing the fight for the rule of law and for amending House Resolution 578.