

Testimony of James N. Clymer at Public Hearing

Of the House State Government Committee

May 6, 2014

As the Attorney General, Kathleen Kane is charged to defend the constitutionality of the statutes and laws of this Commonwealth. Once she starts picking and choosing which laws she likes, she offends the legislators responsible for enacting those laws and the voters who elected those legislators. Her decision to let any law go undefended is an affront to her responsibilities and leaves all of our laws in jeopardy.

The Attorney General is elected to represent her client, the citizens of the Commonwealth of Pennsylvania by defending its duly enacted laws. The Commonwealth Attorney's Act compels her "to uphold and defend the constitutionality of all statutes so as to prevent their suspension or abrogation in the absence of a controlling decision by a court of competent jurisdiction." Once the Attorney General starts deciding which statutes she will defend and which she will not based on her personal political beliefs, the stability and security of legislative law in the Commonwealth are severely threatened. We cannot know what positions she will take on future cases. What if she announces tomorrow that she believes that this Commonwealth's sex offender registry is unconstitutional? In any given case, our Commonwealth runs the risk that Kathleen Kane will read a lawsuit challenging a Pennsylvania law and then decide that she agrees with the person who filed suit. This *selective service* view of her position abandons her responsibility, defeats the public trust and removes any certainty about how she will act—or *whether* she will act—in the future.

Her action would be analogous to a police officer deciding that he thinks a prostitute has a constitutional right to sell her body or that a drug smuggler has a constitutional right to

medicate his “*patients*” and refusing to make arrests in such cases or an IRS agent deciding that the income tax is unconstitutional and stop collecting taxes. Those who agree with their conclusions might applaud their actions but they’d be out of a job pretty quickly. The message should be clear to Attorney General Kane: “You had a job to do, a job you were hired to do with duties prescribed under a constitution you took an oath to uphold. You chose to defy your mandate and you need to find new work.”

Attorney General Kane has compounded her dereliction of duty by making a public statement undermining the position of her client by condemning the traditional marriage protection afforded by Pennsylvania’s DOMA by directly attacking its constitutionality. She actively took a stance in ongoing litigation against Pennsylvania’s DOMA. This is much worse than merely abstaining from involvement. She intentionally and willfully put our Commonwealth at odds with itself when it came under attack, both in the court system and in the court of public opinion. While such actions may prove politically satisfying to Attorney General Kane, they are detrimental to our Commonwealth.

Our judicial system is built upon due process which simply means fundamental fairness. Our judicial heritage determined that fundamental fairness is best achieved through the adversarial system. Having opposition in a case gives judges and the trier of fact the opportunity to fully weigh both sides before ruling. Our country considers this so important that we give the right to counsel even to the murderer who has confessed to his heinous crime. There can be no prosecution without defense—because a decision is only truly fair if both sides have an opportunity to be truly heard.

But what happens when the one charged with defending the Commonwealth refuses to do so? That is the situation before you today. Attorney General Kane has decided that her personal

opinions on the law are more important than the rule of law itself and more important than her oath of office. Her apparent goal is to weaken our Commonwealth's law when it is her duty to defend it.

The Attorney General's duty to defend our Commonwealth's laws is a bedrock principle of our jurisprudence. This duty is essential to any democracy because it makes the executive a servant rather than master of the law. We accomplish this by tasking the Attorney General to abide by the legislative judgment unless and until a controlling court makes a final determination that duly enacted legislation is unconstitutional. All attorneys know that it is their duty to represent the interests of their client, even when they may personally hold a different viewpoint.

By undermining DOMA, Attorney General Kane usurps the people's legislative authority. If the Attorney General were permitted to reconsider each and every law on the books, the results would be chaotic. The election of a new attorney general would signal the beginning of a new era as each Attorney General announces which laws he or she it will refuse to defend.

What Attorney General Kane does not seem to understand is the damage that she is doing by setting a precedent of refusing to defend or prosecute issues with which she politically disagrees. Upon the election of another Attorney General with a different political persuasion will put at risk any programs or statutes that are then part of Commonwealth public policy. Indeed, Attorney General Kane may well come to regret the door that she has opened for future Attorney Generals to usurp legislative power and advance their political careers. Attorney General Kane has opened the door, and you should shut it. Unless and until this legislative body tells Attorney General Kane, as well as future Attorney Generals, that refusal to defend a duly enacted law of the Commonwealth is unacceptable as a dereliction of duty, Attorneys General

may rely on this precedent to refuse to defend duly enacted laws, thwarting the constitutional process for enacting legislation for this Commonwealth.

Our Commonwealth's laws come under attack on a daily basis. Many of those laws passed through our legislature with bipartisan support; some do not. On a regular basis, this legislature debates whether a proposed piece of legislation is constitutional. For an Attorney General to refuse to defend laws that he or she would not have voted for has the effect of the Attorney General having de facto veto power. Can the Attorney General "horse-trade" her defense—or lack thereof—of a proposed law with legislators in exchange for their support of legislation that the Attorney General desires to see enacted? Does whoever holds the Attorney General's Office hold this Commonwealth hostage to their whims? This may be the way it works with the governor's office where the separation of powers between the executive branch and the legislative branch is properly in play but the duties of the attorney general are different. This legislature has the opportunity to put an end here and now to the politicization of the office of Attorney General.

Voters did not elect Kathleen Kane to enact laws, but to defend them. Our current Attorney General ran for and was elected to office, knowing full well what her constitutional duties and responsibilities would include. She then swore an oath to uphold the constitution and to carry out the responsibilities flowing from it. This was not involuntary servitude, but a job she sought. If the Attorney General no longer desires to fulfill the duties assigned to her position, then it's time for her to seek other employment or for the legislature to remove her from this position.