

Remarks at the American Bar Foundation Fellows Awards Dinner

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As I said earlier in the program, I am deeply honored by this award, because service — pro bono legal service, government service and non-profit service — has been at the core of my career. When Ellen called about this award months ago, one of the reasons that I was happy to accept it and give these remarks is that I thought that it might be a good time to talk about government service, particularly by lawyers. Who knew how timely this topic would be!

Usually, when lawyers talk about service, their minds go to pro bono service. That is the way in which the vast majority of us acquit our obligations to society. This is a critically important kind of service. We lawyers hold the keys to the courthouse doors for our fellow citizens,

most of whom cannot afford to hire us. We are the only profession that mandates and elevates this kind of service. We don't demand this of accountants or plumbers, whose services may be needed just as much by those without means. We demand it of lawyers – and rightly so.

But the kind of service so many of us have been discussing this week – public service, in government at every level, whether as a prosecutor, civil litigator, counsel to or in an agency, at a high level or in the middle of a bureaucracy – is also critical to the functioning of a civil society. As you have heard, I have moved in and out of government, among private practice and three different agencies -- Justice, Defense (twice) and Energy, as well as on commissions and boards that range from the well-known and intense experience of the 9/11 Commission, to the largely hidden but impactful CIA Advisory Board, and many others. So I know government well. And I suspect that many of you do too.

Let me ask you to raise your hand if you too have ever served in the government either in a civilian or military capacity. I hope that my remarks will have special resonance for you.

In each of my government jobs, and in private practice — and as a citizen — I have had lots of opportunities to see public servants, including especially lawyers, in action. I have watched them act with their public responsibilities uppermost in their minds. I have seen some of them struggle, on occasion, with having to abide by the choices being made by an administration with which they might disagree – including ones in which I was serving.

One cannot live in our current times and fail to appreciate how important our public servants are to the functioning of our society. They take an oath, in one form or another, to protect and help all of us by doing their jobs – and resisting pressures that are inconsistent with those responsibilities, whether they come from politicians, critics in the media, advocacy organizations or otherwise.

This week's events at the Department of Justice reflect how important it is that we have career public servants — especially lawyers — who are committed to the rule of law and who take their oaths very seriously.

What is the obligation of lawyers in public service? There is actually a Code of Ethics for Government Service that answers this question. Passed by Congress in 1958, it stands up well even today. It is not often cited — because its tenets are thought to be so obvious: It says things like public servants should give a full day’s labor for a full day’s pay. But it also lays out some serious obligations of those who work in our government.

The theme is “public office is a public trust.” The Code says that any person in government service should put loyalty to the highest moral principles and to country over loyalty to persons, party, or government departments. It says that people in government service should uphold the Constitution, our laws, and regulations and never be a party to evasion. It says that public servants should not dispense special favors or privileges to anyone. And, lastly, it says that public servants should expose corruption wherever it is discovered. No one could have predicted the current challenges to these principles or the form that they would take, but our history is full of examples of public servants who

resist improper pressure and instead choose very simply to ‘do the right thing’ — to use the words of Janet Reno when she was my boss at Justice, addressing both career and political appointees.

Just a few examples give a sense of these long-standing obligations: Benny Max Parrish was a social worker in California in the 1960s. He was discharged for refusing to participate in Operation Bed Check — mass midnight raids on the homes of welfare recipients to see if unauthorized men were staying in those homes. Parrish fought his discharge for five years — with excellent pro bono assistance, I might note. He was unsuccessful until he reached the California Supreme Court which finally ordered his reinstatement - because he had indeed done the right thing. Parrish established the principle that refusing to follow an order that was contrary to the law and the Constitution cannot be the basis for a discharge from public service.

The 1960s also gave us Frances Oldham Kelsey, a medical officer at the Food and Drug Administration, where her job was to review new drug applications. One of the first applications she was assigned was for

a drug whose name you may remember – thalidomide. It was already available in several other countries, as a treatment for pregnant women experiencing morning sickness and anxiety.

Dr. Kelsey repeatedly demanded that the manufacturer provide evidence of the drug’s safety before it could go on the market. Repeatedly, she found that the company’s safety submission was not scientifically reliable. The manufacturer sought approval six times and generated loud demands for the approval of the drug. Six times, Kelsey said no. In the next year, across Europe, pregnant women treated with the drug gave birth to babies with horrible physical deformities. American patients – except for the relatively few who took the drug in the manufacturer’s drug trials – were spared.

The story of Dr. Kelsey’s resistance resulted in changes to our Food and Drug laws that shored up the authority of medical officers to insist upon safety testing. And they resulted in Dr. Kelsey’s example being held up as a model for her agency and others.

Fast forward to today: The testimony in the House impeachment hearings by individuals at State, the National Security Council and the Office of Management and Budget was extraordinary. They responded to duly authorized congressional subpoenas only to have the President call them traitors and scum. We do not know whether our traditional whistleblower protections will indeed protect these people.

In the legal profession, there are plenty of examples of public servants doing their jobs in the face of tremendous pressure. That courage is found in both political appointees and career lawyers. Perhaps the most well-known example was in the Nixon Administration, during the Special Prosecutor's investigation of the President. The President wanted Special Prosecutor Archibald Cox fired and his investigation terminated. Both Attorney General Elliott Richardson and Deputy Attorney General William French Smith refused to fire Cox. He remained in his job until Solicitor General Robert Bork was named Acting Attorney General and he fired Cox.

At the same time, many on Cox's staff — both specially appointed and career DOJ lawyers — fearing the destruction of the evidence they had gathered — took their files home to protect them from any attempt to seize them, an attempt that indeed was made. The event itself — the Saturday Night Massacre — caused such a political uproar that Leon Jaworski was soon appointed to take up where Cox had left off. And, with the files preserved, the investigation continued until Nixon resigned, under threat of impeachment.

In recent years, we have seen career lawyers in the Solicitor General's Office refuse to sign Supreme Court briefs because the position asserted was unsupported by the law. Justice Department Civil Division lawyers declined to participate in cases assigned to them — not because they disagreed with the policy positions being advanced — but because of concerns about the validity of the legal position being advanced.

One has to believe that military and civilian lawyers at DOD made sure that the Department — indeed the Secretary — stated clearly and

quickly that our military does not attack an adversary's cultural sites. That is prohibited by an international convention that we adopted and have respected since 1954.

In the litigation over whether the Commerce Department could add a citizenship question to the Census, the entire Federal Programs Branch of the Civil Division was removed from the briefs because they were told to make an argument that the Branch lawyers found untenable.

In the litigation over the Affordable Care Act, three career attorneys withdrew from the case to avoid signing a brief that many considered to be legally unsupportable.

I want to make clear that senior political appointees are within their rights to advance the policy prerogatives of their administration. Career lawyers do not get to make those choices. But career lawyers do have an obligation to the Department and to the courts to present the Department's position consistent with the law.

Today, we see public servants doing what we have long asked of them: To put loyalty to the Constitution and our laws over loyalty to a person. I can tell you that it takes a lot to get a career public servant to buck the directions of whatever administration is in office. They are trained to carry out the laws while implementing the policy preferences of the person who controls the executive branch. They do not make policy, they implement it. And they know they are not to subvert the legitimate policy initiatives of elected officials. Indeed, between administrations, we often see wide swings in the enforcement of civil rights cases, in challenges to mergers, and in the initiation of environmental suits. This is expected and understood. We train our career public servants — as we train our military — to salute the chain of command. So the circumstances need to be extraordinary for lawyers to execute “noisy resignations” from a case.

In addition to the Code of Ethics for Government Servants, the Model Code of Professional Responsibility set out special responsibilities for lawyers who serve in government: They must refrain

from instituting or continuing litigation that is obviously unfair. They must seek justice and develop a full and fair record in their cases. They have an obligation to advise their superiors when a position the government is being urged to take lacks legal merit. And they may not use the power of the government to harass or to bring about unjust results. This is consistent with provisions of today's Model Rules of Professional Conduct.

Attorney General Barr's own statement – that an Attorney General should not execute a demand by the President to investigate someone who is a political opponent – illustrates that these views of the responsibilities of a prosecutor are universally held.

If the original sentencing memo filed by the four prosecutors in the Stone case was in accordance with normal prosecutorial processes and, if, as it appears, the substitute memo was the result of direction from political appointees, one has to ask whether that direction was the result of policy or politics. If it was the latter – whether or not it was at the direction of the President – the prosecutors were right to resist the order

to change that memo and, consistent with their ethical responsibilities, they were right to resign from the case.

I want to pivot for a moment – but I assure you that I will come back to the point. I am reading a book by Shakespeare scholar Stephen Greenblatt. It is called “Tyrant.” It focuses on Shakespeare’s plays about tyrants. I mention it because it describes the circumstances that allow tyranny to reign. And it has something to say about the centrality of lawyers and public servants to the stability of governments and societies.

Professor Greenblatt explores how Shakespeare addressed - in the era of Elizabeth I - the fears he had of the populist movement and uprising that was unsettling England. Because Shakespeare could have been jailed or hanged for criticizing the Queen or even imagining the death of the Queen, he wrote plays, including The Wars of the Roses Trilogy – set a full century before, in the era of the tyrannical Richard III — to illustrate the dangers of populist movements and those who cynically stir up such movements in order to grab power. As Greenblatt

notes “Late Elizabethan England knew in its heart that the whole order of things was utterly fragile.” Opposing parties did not just disagree. They loathed each other. Greenblatt observed, about this setting, centuries ago: “Party warfare cynically makes use of class warfare. The goal is to create chaos, which will set the stage for the tyrant’s seizure of power.”

Shakespeare dissects the mechanisms used to foment such populism – in ways that are pertinent here. The demagogue stirs the crowd to attack the laws and contracts that undergird society. Indeed, it is at the end of one of the demagogue’s tirades, that someone in the crowd famously shouts: “The first thing we do, let’s kill all the lawyers.” Greenblatt observes: That line “releases the current of aggression that swirls around the whole enterprise of the law” directed at “all the agents of the vast social apparatus that compels the honoring of contracts, the payment of debts, the fulfillment of obligations” that we have to one another. The crowd is similarly urged to turn on those who can read,

those who are educated and the bureaucrats that keep the government going. Why? To leave the tyrant unfettered.

The lesson I draw from this book is that there are - and have long been - two critical ballasts keeping our society on an even keel: lawyers and public servants. They are not the only ones, but they are darn important.

The lawyers preserve our sacred tenets: They are trained to observe the law and preserve, in our case, the Constitution. While they may be imperfect, they aspire to putting their own political values aside to serve the institution that they have pledged to uphold.

Public servants preserve the institutions that serve us every day – whether it be our military, those who dispense benefits to people in need, those who conduct our foreign policy, those who provide us with the intelligence to protect our national security – they provide the structure and the strength of our nation.

Public servant lawyers carry a dual obligation – to maintain our system of justice and to administer that system with fairness and without regard to politics.

Shakespeare would tell us that the first tool of the tyrant is to attack, demean, and threaten those very people. And Shakespeare would tell us that if we do not want to descend into chaos, we must protect the public servants and the lawyers who protect us. You, the Fellows, have always been protectors of the rule of law, which is why I chose this topic tonight.

Thank you for all that you do.