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My Experiences with President–Attorney General Relationships

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As I flew to Washington in late November 1963 to join the Civil Rights Division of the Department of Justice ("DOJ") midway through what I thought was President John F. Kennedy's first term, I gave little thought to the different roles of the President and the Attorney General—his brother, Robert F. Kennedy. That world had changed by the time I stepped off the plane. A tragic assassination had anointed Lyndon Johnson as President. Instead of working in the Kennedy Administration, I stood on Pennsylvania Avenue near the Department of Justice building and watched as the horse drawn caisson bearing President Kennedy's body passed by. Beyond the grief so many felt at the loss of President Kennedy—whose energy and eloquence had attracted idealistic young lawyers to the Department of Justice—I wondered what impact this son of the South would have on civil rights enforcement. This was my introduction to the theme of this symposium.

I worked under Presidents Lyndon B. Johnson, Richard Nixon, Gerald Ford, Jimmy Carter, and Ronald Reagan, and returned for six months under President Bill Clinton. Except for briefing Gerald Ford when he served in the House of Representatives, I met none of these Presidents. I knew that Presidents generally interacted with Attorneys General and, less often, with lower ranking presidential appointees, but generally not with DOJ civil servants. But what was the nature of that interaction? Over time, I saw Presidents influence the work of the Civil Rights Division in a variety of ways. I set forth below some examples of those interactions. They fall into several categories: setting priorities, setting litigation policy, and seeking to influence positions in individual cases.

The Attorney General is the chief legal officer of the United States and is also a member of the President's cabinet. Congress created the Department of Justice in 1870, placed the Attorney General in charge of it, and gave the Attorney General supervision over litigation by the United States.[1] In 1957, Congress authorized the creation of the Civil Rights Division, which has since then enforced civil rights responsibilities that a series of Civil Rights Acts conferred upon the Attorney General.[2]

Daniel Meador, a Professor at the University of Virginia who served as an Assistant Attorney General during the Carter Administration, studied the relation between the President, the Attorney General, and the Department of Justice. His

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1. Act to Establish the Department of Justice, ch. 150, 16 Stat. 162 (1870).
2. Civil Rights Act of 1957, Pub. L. No. 85–315, 71 Stat. 634 (1957).

1980 study points out that "the lawyering work in the Department of Justice will be responsive, to an extent, to the results of the most recent presidential election."[3] He found the line between proper and improper political considerations hard to draw.[4] After all, the Constitution requires the President to "take Care that the Laws be faithfully executed," and the job of the Department of Justice is to enforce the laws, which seems to parallel the President's responsibility. A reporter and former press aide at DOJ observed that the Attorney General and his principal assistants sometimes "may be impaled upon a three-horned dilemma": the purpose and intent of Congressional legislation, Supreme Court rulings, and the policies of the President.[5]

Presidents are most likely to act improperly when they interfere in individual cases. Elliot Richardson, who served as Attorney General under President Nixon until resigning during the famous "Saturday Night Massacre," observed that Presidents could legitimately express policy preferences regarding antitrust enforcement, but "cannot without undermining the integrity with which the law is enforced tell the legal officers of the government what to do or not to do in handling a particular case."[6] The Massacre refers to the resignations of Attorney General Richardson and Deputy Attorney General Ruckelshaus, who both resigned rather than comply with President Nixon's order to fire Watergate prosecutor Archibald Cox for refusing to drop his subpoena of White House tape recordings. Acting Attorney General Robert Bork then fired Cox.[7] The use of presidential orders to cover up crimes is so obviously improper that Nixon ultimately resigned to avoid impeachment.

It is tempting to say that the President sets policy and the Attorney General enforces law. But law and policy cannot be so cleanly distinguished from one another. Race discrimination in public schools highlighted this difficulty during the Johnson, Nixon, Ford, Carter, and Reagan presidencies.

In 1963, the Department of Justice had no formal authority to address racial segregation of the public schools, but President Kennedy's predecessors had turned to the Attorney General to file amicus curiae briefs in *Brown v. Board of Education* and to protect federal court orders in Little Rock.[8] President Johnson successfully lobbied Congress to enact the 1964 Civil Rights Act, which gave the Attorney General some authority to bring or intervene in school desegregation

3. DANIEL JOHN MEADOR, THE PRESIDENT, THE ATTORNEY GENERAL, AND THE DEPARTMENT OF JUSTICE 28 (Univ. of Virginia 1st ed. 1980).

4. *Id.* at 29.

5. LUTHER A. HUSTON, THE DEPARTMENT OF JUSTICE 3 (1967).

6. MEADOR, *supra* note 3, at 30.

7. KATHARINE GRAHAM, PERSONAL HISTORY 491 (1997).

8. *See, e.g.*, Brief of the United States as Amicus Curiae at 2, Brown v. Board of Education, 347 U.S. 483 (1954), 1952 WL 82045; Press Release, Dwight D. Eisenhower, Address on Little Rock (Sep. 24, 1957) (on file with the *University of the Pacific Law Review*).

cases.[9] And he met with the intransigent Governor George Wallace of Alabama, resulting in this interchange:

> *President Johnson: "Why don't you just desegregate all your schools?"*
>
> *George Wallace: "Oh, Mr. President, I can't do that. You know, the schools have got school boards. They're locally run. I haven't got the political power to do that."*
>
> *President Johnson: "Don't you shit me, George Wallace."*[10]

The following year, acting Attorney General Ramsey Clark supported a statewide school desegregation order against Wallace. The President then nominated Clark to become Attorney General in 1967; Clark's father—Justice Thomas Clark—immediately resigned from the Supreme Court, creating a vacancy that President Johnson used to place Thurgood Marshall on the Court. We don't know whether Johnson ordered the DOJ to seek statewide desegregation of Alabama, but we do know that the Attorney General's commitment of substantial litigation resources to the case carried out the President's policy. And we also know some of Johnson's top White House advisors were intimately involved with school desegregation policy at a granular level.[11] Clark initiated a Civil Rights Division effort to bring urban Northern school desegregation cases. The Kennedy–Johnson years were marked by a President and Attorney General in sync with one another on school desegregation policy, so that major litigation decisions reflected that policy consensus.

The Nixon Administration brought a seeming schism. President Nixon's Attorney General—John Mitchell—had been Nixon's campaign manager, just as President Kennedy's Attorney General—his brother, Robert F. Kennedy—had been Kennedy's campaign manager. Mitchell's Civil Rights Division initially continued litigating motions seeking desegregation in accordance with the Supreme Court's ruling in *Green v. County School Board.*[12] One high-ranking holdover from the Johnson Administration said of the first month, "I haven't seen even minor, let alone major, shifts in civil-rights policies here."[13] High-ranking White House aides discussed school desegregation policy, with one concluding that DOJ should work to complete the process.[14] However, in mid-August, the

9. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241.

10. JON MEACHAM, THE SOUL OF AMERICA: THE BATTLE FOR OUR BETTER ANGELS 239 (Random House 1st ed. 2018).

11. *See, e.g.*, F. Peter Libassi, Special Assistant to the Secretary for Civil Rights, to Douglass Cater, Joseph A. Califano, & John Doar (Apr. 6, 1967) (on file with the *University of the Pacific Law Review*).

12. 391 U.S. 430, 441–42 (1968).

13. RICHARD HARRIS, JUSTICE: THE CRISIS OF LAW, ORDER, AND FREEDOM IN AMERICA 193 (1970) (quoting Nathan Lewin).

14. Memorandum from Lamar Alexander, to Bryce Harlow, Exec. Assistant to President Nixon, on A New

Nixon Administration abruptly reversed course in Mississippi school desegregation cases. In a breach of normal protocol, the Secretary of Health, Education, and Welfare ("HEW") (rather than the lawyers for the government) sent a letter to the Chief Judge of the Fifth Circuit Court of Appeals asking the court to delay school desegregation in 23 Mississippi school districts to avoid "chaos, confusion and a catastrophic educational setback to the 135,700 children, black and white alike" in those districts.[15] Although the Department of Justice had earlier urged prompt relief, noting that no White child attended a formerly all-Black school and that segregation exceeded what was permissible under HEW's guidelines, it immediately filed a motion based on the HEW secretary's letter. The motion asked the court to delay desegregation in those districts, contradicting the division's prior position urging the court to order implementation of HEW plans in those districts.[16] When confronted with rumors that the Nixon Administration had insisted on this course of action in return for a Mississippi Senator's support of a defense-spending bill, Assistant Attorney General Jerris Leonard conceded that the delay motion had been politically motivated.[17] Lawyers in DOJ's Civil Rights Division publicly protested, and private plaintiffs took the case to the Supreme Court, which promptly and unanimously ruled that the defendant school districts must "immediately" begin to operate a unitary school system.[18] Asked at a press conference what his school desegregation policy was in light of the court's decision, Nixon responded, "To carry out what the Supreme Court has laid down."[19]

The Mississippi desegregation debacle can be viewed as a cautionary tale, a warning that political interference with law enforcement may backfire. From the President's perspective, perhaps the reprimand from the Supreme Court was a small price to pay for whatever political advantage the delay may have bought. From the perspective of Southern segregationists who sought to stop desegregation, the episode had the opposite result, as Nixon embarked on an ambitious program to complete desegregation, thereby putting the issue behind him before the next election.[20] From the standpoint of the Department of Justice, the delay request had seriously undermined its credibility with the courts, and it took several years to restore credibility. This and other actions led one scholar to label Mitchell an Attorney General with "no respect for the law." By way of

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School Desegregation Policy (on file with the *University of the Pacific Law Review*).

15. LEON PANETTA & PETER GALL, BRING US TOGETHER 253–56 (1971) (quoting letter from Robert Finch to judges of the Fifth Circuit, August 19, 1969).

16. *Id.*; *see also* Alexander v. Holmes, 396 U.S. 1218, 1218–19, 1221–22 (1969).

17. HARRIS, *supra* note 13, at 219–20; *see also* JAMES W. LOEWEN, SCHOOL DESEGREGATION IN MISSISSIPPI 55 (1973); BRUCE ACKERMAN, WE THE PEOPLE, VOL. 3: THE CIVIL RIGHTS REVOLUTION 243 (Belknap Press 1st ed. 2014).

18. Alexander v. Holmes Cnty. Bd. of Educ., 396 U.S. 19, 20 (1969).

19. Richard Nixon, The President's News Conference (Dec. 8, 1969) (on file with the *University of the Pacific Law Review*); BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN 56 (1979) (showing Nixon was reportedly "content," because the end of further delay "was the Court's fault, not his").

20. *See* ACKERMAN, *supra* note 17, at 247–52.

contrast, she called Edward Levi "the Neutral Attorney General" and Robert Kennedy "the Advocate Attorney General."[21] Lack of credibility compromises the effectiveness of any lawyer, including the Attorney General. If the President wants the Attorney General to advance administration policy objectives, the President must avoid interfering in individual cases and think twice before ordering DOJ to reverse prior litigation positions.

Gerald Ford had shown great interest in the issue of court-ordered school busing in desegregation cases when he was the Majority Leader in the House of Representatives. Ford, a Representative from Grand Rapids, Michigan, asked to be briefed on the law, and so Assistant Attorney General J. Stanley Pottinger sent me to talk with the Congressman about busing. I explained to him that the courts ordered busing only where necessary to overcome the effects of past discrimination, and that although the Supreme Court case endorsing busing arose in the South, it applied as well to Northern school systems if a court found *de jure* segregation. By the time Ford ascended the presidency after Nixon resigned from the office, school desegregation had become a hot issue in some northern school systems. A trial court found a pattern of pervasive *de jure* segregation in Boston, and a court of appeals affirmed the resultant busing order. The city was in an uproar, inflamed by rhetoric of the school board president. The board asked the Supreme Court to hear the case. However, the board's petition failed to show how the lower courts had done anything requiring Supreme Court review.

The board asked Solicitor General Robert Bork for help, and Bork decided to file a brief supporting the school board's petition, in order to promote President Ford's position of opposition to busing. Civil rights groups lobbied against the filing. As the Chief of the Appellate Section in the Civil Rights Division, I forwarded to Pottinger a strong recommendation against filing. Pottinger—having failed to persuade Bork not to file—sought a meeting with Attorney General Edward Levi. Ford had brought Levi to the Department of Justice to restore its reputation for evenhanded enforcement of the law, which had been tarnished by the Watergate scandal and the conviction of Attorneys General Mitchell and Kleindienst of related crimes. Justice Antonin Scalia worked for the Levi Justice Department. He credited Levi with bringing "the department through its worst years," noting that "there couldn't have been a tougher job in Washington where the whole executive branch was in disarray after Watergate."[22] By the time Levi convened a meeting about the Boston case, Bork had printed up copies of a brief because of a filing deadline. Attorney General Levi faced a choice: file a legally thin brief that advanced the President's anti-busing policy or overrule his Solicitor General. The discussions were heated. In the end, Levi sided with the view of the Civil Rights Division and decided the brief should not be filed. Levi had—

21. NANCY V. BAKER, CONFLICTING LOYALTIES: LAW AND POLITICS IN THE ATTORNEY GENERAL'S OFFICE, 1789–1990, at 82, 122, 140 (1992).

22. Neil A Lewis, *Edward H. Levi, Attorney General Credited with Restoring Order After Watergate, Dies at 88*, N.Y. TIMES, Mar. 8, 2000, at C25.

according to one scholar—met with President Ford about the case three times, informing the President on the third occasion that he had decided not to approve the filing, because filing would "reward those who resisted court orders."[23] Levi insisted that although "there were discussions with the President," the "Department made its own determination."[24]

President Carter chose his long-time hunting companion—Griffin Bell—as his Attorney General. Succeeding Edward Levi, Bell bowed toward the independence of his office from the President. He explained, "I always figured I was wearing three or four hats. I had a heavy responsibility to the Congress. The President was my boss, but in a sense, the American people went in there too."[25] He insisted that the Department of Justice would operate "on a non-political, non-partisan basis" and was to be a "neutral zone." He required that all communications from the White House be funneled through him to spare career staff and even presidential appointees from improper interference by the President's staff.[26] So when the Supreme Court agreed to hear a case challenging affirmative action at the University of California, Davis, Medical School, we assumed that decisions whether to file a brief amicus curiae and what to say in the brief would be made free from political pressure from the president. But just as Solicitor General Bork had been besieged from all sides as he decided whether to participate in the Boston school desegregation case, so also his successor—Solicitor General Wade H. McCree—faced pressures as he decided what course to take in *Regents of the University of California v. Bakke*.[27]

When the Court decided to hear the case, "the Department promptly solicited the view of the many federal agencies whose programs and enforcement responsibilities might be affected."[28] "The relevant legal authority was sketchy and clearly did not dictate any one choice. The choice would necessarily be influenced by one's views on matters of governmental and social policy."[29] My colleague Jessica Silver and I recommended that Assistant Attorney General Drew Days III urge the Solicitor General to file a brief supporting affirmative action. Days agreed and sent our recommendation to McCree. Days, McCree—and his assistants, Larry

23. LAWRENCE J. MCANDREWS, THE ERA OF EDUCATION: THE PRESIDENTS AND THE SCHOOLS, 1965–2001, at 77 (2006). Another version has Bork becoming convinced not to file the brief. LINCOLN CAPLAN, THE TENTH JUSTICE: THE SOLICITOR GENERAL AND THE RULE OF LAW 39 (1987).

24. MEADOR, *supra* note 3, at 85.

25. *Griffin Bell Oral History Transcript*, UNIV. OF VA. MILLER CTR., https://millercenter.org/the-presidency/presidential-oral-histories/griffin-bell-oral-history (last visited Mar. 11, 2021) (on file with the *University of the Pacific Law Review*) (noting that the interview took place on March 23, 1988) [hereinafter *Bell Oral History*].

26. Daniel J. Meador, *Griffin Bell at the Intersection of Law and Politics: The Department of Justice, 1977–1979*, 24 J.L. POL. 529, 532–533 (2008).

27. *See generally* Regents v. Bakke, 438 U.S. 265, 268–72 (1978); see also, Howard Ball, The Bakke Case: Race, Education, & Affirmative Action, 70-77.

28. Motion for Leave to File a Supplemental Brief for the United States as Amicus Curiae and Supplemental Brief for the United States as Amicus Curiae, Regents v. Bakke, 438 U.S. 265 (1978).

29. MEADOR, *supra* note 3, at 36.

Wallace and Frank Easterbrook—as well as Silver and I, met with the medical school's lawyers, former Solicitor General Archibald Cox, and UC Berkeley Law Professor Paul Mishkin, who urged that the government file a brief strongly supporting the school's affirmative action plan. However, when pressed to articulate their constitutional argument, the lawyers were surprisingly unprepared. Wallace and Easterbrook convinced McCree that while we should file in the case, the UC Davis Medical School's affirmative action plan went too far. The School took in a class of 100 each year and set aside 16 places in the class for "Blacks, Chicanos, Asians, and American Indians."[30] The Solicitor General's office and the Civil Rights Division negotiated on the contents of our brief, but McCree had the final say on what we filed. Since the issue of affirmative action affected other parts of the government, they received a copy of the draft brief. Attorney General Bell took the brief to President Carter, who thought "it was not well done."[31]

The draft was promptly leaked to the press, and a firestorm of protest from civil rights groups ensued, and some cabinet members complained to the President. Bell later recounted, "The Bakke case was one of the worst, where they all got into it."[32] As we understood what happened next, the President spoke with the Attorney General, who spoke with McCree. While Carter's Chief Domestic Policy Advisor says that he and the White House Counsel wrote a memo "to form the basis for a new brief,"[33] we never saw the memo. We were simply told to consider the objections to the brief and work out the differences between the Civil Rights Division and Solicitor General's office. However, we were never told that the President insisted on any particular argument or outcome. For several days and nights, McCree, Days, Wallace, Easterbrook, Silver, and I holed up in the Civil Rights Division conference room hammering out a brief. We literally went through the draft one sentence at a time. We filed a brief that pleased no one but that proved influential in the final outcome of the case. We argued that the use of race-consciousness in evaluating applicants was constitutional but that the Court should send the case back to the lower courts to determine how the School accounted for race and whether the program's objectives could be served equally well by less burdensome methods. The Medical School and the Congressional Black Caucus filed briefs arguing that the Court should not seek further information but should approve the affirmative action plan.[34] The Court issued a split decision, striking down the affirmative action plan because White applicants were foreclosed from

30. Regents v. Bakke, 438 U.S. 265, 265 (1978).

31. STUART E. EIZENSTAT, PRESIDENT CARTER: THE WHITE HOUSE YEARS 865 (2018).

32. *Bell Oral History*, *supra* note 25; CAPLAN, *supra* note 23, at 39–48 (recounting the story of the government and the *Bakke* case); GRIFFIN B. BELL & RONALD J. OSTROW, TAKING CARE OF THE LAW 28–32 (1982); TIMOTHY J. O'NEILL, BAKKE AND THE POLITICS OF EQUALITY: FRIENDS AND FOES IN THE CLASSROOM OF LITIGATION 179–91 (1985).

33. EIZENSTAT, *supra* note 31, at 866.

34. *See generally* Brief for Petitioner, Regents v. Bakke, 438 U.S. 265 (1978), 1977 WL 187977; *see also* Brief in Reply of Members of the Congressional Black Caucus, Members of the Congress of the United States, to Brief of the United States, Amici Curiae, Regents v. Bakke, 438 U.S. 265 (1978), 1977 WL 204785.

competing for the sixteen positions; the Court also agreed with our position, however, that race could be considered in pursuit of legitimate educational objectives. The Court said that the pursuit of diversity was such an objective.

During a discussion of the proper relation between the President and Attorney General, Levi commented, "it might be useful, looking at the *Bakke* case, to ask whether when you have a problem of affirmative action, or reverse discrimination, or quotas, is that solely a legal question." He answered his own question: "Of course the law itself involves many policy considerations." The problem, as he saw it, came from "people who are looking only at the policy aspects or result aspects which they envision mainly in terms of slogans which may not . . . usefully guide the legal issues . . . ."[35]

Ronald Reagan began his presidency with a strong deregulation push that reached to a pending Supreme Court case. As a candidate, Reagan had argued against the Internal Revenue Service rule denying tax-exempt status to private schools that discriminate based on race. Bob Jones University had lost a challenge to the IRS rule in the lower courts and had asked the Supreme Court to hear the case. When the Court agreed to hear Bob Jones' challenge to the lower court rulings, a Mississippi member of Congress urged President Reagan to repudiate the government's support for the IRS rule. Reagan agreed, and Attorney General William French Smith—Reagan's friend and personal lawyer—overruled the acting Solicitor General Lawrence Wallace, who had told the Court that the lower courts should be upheld. Wallace dutifully filed a brief, but with this unusual footnote: "This brief sets forth the position of the United States on both questions presented. The Acting Solicitor General fully subscribes to the position set forth on question number two, only." More than half the lawyers in the Civil Rights Division signed a letter protesting the change in position.[36]

The change in the government's position denied the Treasury Department a defense of its regulation. The Court then resorted to the unusual device of appointing an amicus curiae to defend the government's prior position. The Court ultimately upheld the regulation and ruled against the Reagan Administration.[37] The episode stained the Attorney General's reputation in the Court. Wallace stayed true to his high standards while presenting the administration's views, but he found himself sidelined from all civil rights cases during the remainder of the Reagan Administration.

Sherrilyn Ifill, the president and director-counsel of the NAACP Legal Defense and Educational Fund, has suggested "that the presumption that the Department of Justice will maintain an appropriate measure of independence from

35. MEADOR, *supra* note 3, at 84.

36. Edward J. Boyer, *William French Smith, 73, Dies; Reagan Adviser and Atty. Gen.*, L.A. TIMES (Oct. 30, 1990), https://www.latimes.com/archives/la-xpm-1990-10-30-me-3410-story.html (on file with the *University of the Pacific Law Review*).

37. Bob Jones Univ. v. United States, 461 U.S. 574, 605 (1983); CAPLAN, *supra* note 23, at 5–64 (describing in detail the *Bob Jones University* case).

the White House can simply no longer be left to the personal ethics of individual attorneys general." She urged, "We need a revision of the rules that govern recusal by lawyers in the Department of Justice." Daniel Meador had noted in 1980 "it is misleading to say that 'politics' should play no part in the legal work of the Attorney General and the Department of Justice. At the same time, it is equally true that certain kinds of political considerations are inappropriate in the administration of justice."[38] However, no new rules are needed to inform the President and Attorney General of the obvious: that they may not cover up criminal behavior or obstruct criminal investigations.

The Supreme Court has endorsed "the wisdom of requiring the chief law officer of the Government to exercise a sound discretion in designating the inquiries to enforce which he shall feel justified in invoking the action of the court . . . ."[39] Exercise of sound discretion respecting law enforcement requires understanding of the law, the facts, and policy. Presidents will normally lack command of the law and the facts governing individual cases even if they have command of policy. On the other hand, Attorneys General are trained in the law, and Department of Justice lawyers routinely analyze law and facts of individual cases. The specialized roles of President and Attorney General explain why Presidents should confine themselves to overall policy and abstain from interfering in individual cases. And adherence to the rule of law requires the President to abstain from politically motivated interference, such as what occurred in the Mississippi school desegregation cases in 1969.

In the end, we may have to rely on both the President and the Attorney General to exercise sound discretion in carrying out their duties. Perhaps some general standards could be helpful, but the relation between the President and Attorney General will in the end depend on the ethical and political understandings held by each of them. Misbehavior by a President and Attorney General can generally be corrected through the political process, as happened with President Nixon and his Attorneys General. Dismay at improper relations may lead us to wish for more precise rules.

Character and ability matter, and perhaps the most important step in the President–Attorney General relation is the selection. As ethicist Monroe Freedman has written, "the Attorney General should be more than a highly proficient hired gun."[40] Attorney General Robert Jackson's speech about the qualities we should seek in a federal prosecutor applies as well to qualities to seek in an Attorney General:

> The qualities of a good prosecutor are as elusive and as impossible to define as those which mark a gentleman. And those who need to be told would not understand it anyway. A sensitiveness to fair play and

38. MEADOR, *supra* note 3, at 42.

39. FTC v. Claire Furnace Co., 274 U.S. 160, 174 (1927).

40. Monroe Freedman, *Zoe Baird's Rap Sheet*, LEGAL TIMES, Feb. 1, 1993.

> sportsmanship is perhaps the best protection against the abuse of power, and the citizen's safety lies in the prosecutor who tempers zeal with human kindness, who seeks truth and not victims, who serves the law and not factional purposes, and who approaches his task with humility.[41]

Some Presidents have had close prior relations with their Attorneys General. Robert Kennedy was the President's brother; William French Smith was President Reagan's personal lawyer; Griffin Bell was President Carter's hunting companion; John Mitchell was President Nixon's law partner and campaign manager. In the cases described above, Smith and Mitchell may have allowed their relationship with the President to influence them to ignore law and normal procedures.[42] The results were damaging to the credibility of the Department of Justice. But Kennedy and Bell seem not to have allowed their relations with the President to dull their legal and ethical judgment.

Still, it would seem preferable for the President and Attorney General to stand at arm's length, with the President providing general policy guidance and leaving the Attorney General to carry out policy consistent with their legal judgment. This was the relation between President Ford and Attorney General Levi, and it resulted in restoration of both internal morale and external reputation of the Department of Justice.[43] No wonder, then, that as Merrick Garland assumed his duties as President Biden's attorney general in the wake of his predecessor's morale wrecking regime, he vowed to follow in Levi's footsteps: "The only way we can succeed and retain the trust of the American people is to adhere to the norms that have become part of the DNA of every Justice Department employee since Edward Levi's stint as the first post-Watergate Attorney General."[44]

Garland's speech was lofty. More pragmatically, President Kennedy's advisor, Theodore Sorenson, testified in the wake of Watergate, "We should expect a certain amount of partisan advocacy, not judicial judgment, from our Attorneys General as we do from ordinary lawyers. But quality members of the bar, even while serving as partisan advocates, can and should and generally do retain a

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41. Robert H. Jackson, *The Federal Prosecutor*, ROBERT H. JACKSON CTR., https://www.roberthjackson.org/speech-and-writing/the-federal-prosecutor/ (last visited Aug. 25, 2021) (on file with the *University of the Pacific Law Review*) (delivering his address at the Conference of United States Attorneys, Washington, D.C., April 1, 1940).

42. *But see* Gerald Caplan, *The Making of the Attorney General: John Mitchell and the Crimes of Watergate Reconsidered*, 41 MCGEORGE L. REV. 311, 334 (2010) ("Nixon more than once wished for an Attorney General who was more accommodating . . . .").

43. Neil A. Lewis, *Edward H. Levi, Attorney General Credited With Restoring Order After Watergate, Dies at 88*, N.Y. TIMES, Mar. 8, 2000, at C25 (on file with the *University of the Pacific Law Review*) (indicating that Senator Edward M. Kennedy, a Democrat, praised him when Levi left the department of justice, saying he "entered office under the most difficult and trying circumstances, yet he leaves a department once again characterized by integrity, intellectual honesty and commitment to equal justice").

44. *U.S. Attorney General Merrick Garland's Remarks to Department of Justice*, U.S. DEP'T OF JUST. (Mar. 11, 2021), https://www.justice.gov/opa/speech/attorney-general-merrick-garland-addresses-115000-employees-department-justice-his-first (on file with the *University of the Pacific Law Review*).

certain and necessary degree of independence from their clients; and the same should be true of the Attorney General. . . ."[45]

45. *Removing Politics from the Administration of Justice: Hearings on S. 2803 and S. 2978 Before the Subcomm. on Separation of Powers of the S. Comm. on the Judiciary, 93d Cong., 2d Sess. 16* (1974) (including statement of Theodore Sorensen, Former Special Counsel to President Kennedy).