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PUBLIC HEARING
before
SENATE JUDICIARY COMMITTEE
on
MOMENT OF SILENCE

Held:
December 22, 1982
Room 114
State House Annex
Trenton, New Jersey

MEMBERS OF COMMITTEE PRESENT:

Senator John F. Russo (Chairman)
Senator Carmen A. Orechio
Senator John H. Dorsey
Senator John P. Gallagher
Senator James P. Vreeland, Jr.

ALSO PRESENT:

John J. Tumulty, Team Supervisor
Office of Legislative Services
Aide, Senate Judiciary Committee

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I N D E X

	<u>Page</u>
Irwin I. Kimmelman Attorney General	3 & Exhibit A

SENATOR JOHN F. RUSSO (Chairman): Okay, we will begin. This is a special meeting of the Senate Judiciary Committee, for the purpose of discussing with the Attorney General his recent decision regarding his indication of not defending the "Silence statute", so to speak. Let me just set forth a couple of parameters so that we know what we are doing here.

First of all, this is an open meeting of this Committee with the Attorney General. This is not a public meeting, in the sense that there will be no participation from any members of the public or other legislators. There have been some who asked if they could come to question the Attorney General, but, that is not our function here.

The second thing is, although anything I say-- Bear in mind that there may be other members of the Committee who have a different view, so, speaking now, I am speaking for myself.

The purpose here is the conceptual inquiry of whether or not the Attorney General has the right to, and if so, should he determine which State laws to defend. It happens to be the Moment of Silence bill which precipitated the issue, but our concern is with the broad question of whether or not Mr. Kimmelman, or any other Attorney General, should have that right. We will get into that. And, if he has the right, should he exercise it? And, if he has that right and decides to exercise it, what can we, if we so decide, as a Legislature, do about changing it if we wanted to change it?

I want to say at the outset, though, although I personally have some strong disagreement based on what I know so far with the Attorney General's decision, that I called Mr. Kimmelman on Sunday afternoon. At that time, things were looking good for the Giants. It was half-time, and then after that, everything was going downhill, Irwin, since that phone call. But, in any event, I called the Attorney General. He certainly knew from the newspapers of our position, as we knew of his, and we invited him to appear here on Monday. He advised me that he had a commitment in New Hampshire at an Attorneys General Conference.

But, I do want to say one thing, though, regardless of our different viewpoints on this issue, the Attorney General could very easily have said, "No, I decline to appear." We have subpoena powers after Senate Resolution, and all of that nonsense, and I kind of doubt it would have even been attempted, frankly. But, in defense of or in fairness to the Attorney General, I should point out that thus far, anyway -- maybe it will change after today -- every time we asked him to appear, he has appeared. He seems to be willing to take strong positions, but then just as willing to go into open forum and defend them, and at least for that, Mr. Attorney General, you are to be commended. This Committee and the Legislature very much appreciates your willingness to voluntarily come to discuss this issue before us. It is that kind of thing that though we may disagree, basically we are all trying to find the right answers to a question that, at least to my knowledge, has never really been raised, certainly not with so much notoriety in the past.

Now, what we would like to talk about first, if we may, is-- I will ask you, Mr. Kimmelman, and your staff, if you would outline to us the legal basis upon which you base your conclusion, that the Attorney General has discretion. I, at least, as one member of this Committee, am particularly interested not only in whether anybody else before you has done it, because I think

they have, and that doesn't mean they might all have been right or wrong, but rather, whether there is any legal basis for the position that the Attorney General has the right to defend a State law or refuse to defend a State law.

The second aspect that I would like to talk about, assuming that is correct, is whether or not such discretion, if it legally exists, should be exercised. I will comment on each one of these in just a moment.

And the third one, which the Committee, or the Legislature in general, can discuss is, assuming there is such discretion and assuming it should be exercised, what -- if we want to do something about it -- can we do about it? The fact of the matter is, what can we legally do to change the law, if in fact such discretion exists?

Let me make a couple of general comments, Mr. Kimmelman, so that you will know at least what is on my mind and what I am looking for answers to.

Aside from the legal question of whether or not any such discretion exists, I am very much troubled by a broad conceptual problem that has nothing to do with you as Attorney General, this Administration, or whatever, because frankly, I would find it difficult to criticize your work as Attorney General to date. We disagreed, perhaps once or twice, but, I think you are doing what you think is right for New Jersey and you are working hard at it. But, my concern is, assuming there is such discretion, I would urge you and any Attorney General that that discretion should never be exercised - the discretion not to defend a State law.

The reason I say that is this: It just happens, in this instance, to be a statute passed by the Legislature overriding the Governor. Some Attorney General down the line may have a disagreement with the Governor. It may be a statute passed by the Legislature and signed by the Governor, but refused to defend or to be defended by the Attorney General. I see it as a dangerous precedent. Here we are dealing with a statute that may well be unconstitutional. I am not going into that issue at all. But, of course, that is what we have courts for.

The future statute that the future Attorney General, the future Governor, or the future Legislature may be involved in might be something very important in New Jersey. Yet, in effect, we have an Attorney General who has the right to say, "I'm not going to defend that."

I have used the illustration, for example, "suppose you didn't believe in the death penalty." It happens to be that you do. So, we have that bill defended by the State-- It seems to me that when a law is validly passed in this State, as this one was -- or any law, whether by override or with the Governor's consent -- that the State's lawyer is the Attorney General and the Attorney General's office has an obligation to defend those laws. I analogize it to something that you and I, Mr. Attorney General, as lawyers, have faced many times. We have represented clients, for example, in criminal matters who we were sure were guilty. But, of course, what we have always been taught since law school was that every client is entitled to a defense. It is not for us to be lawyer, jury, or judge; it is for us to present the best case we can for our client -- in this case, the client being the people of the State of New Jersey, since right now this is their law until set aside by a court -- and then let a court make a determination of unconstitutionality. I think to do otherwise puts a tremendous amount of power in the hands of one man, whoever is sitting there as Attorney General, who reviews the defense.

I don't think it is an answer to say that, for example, here, the Legislature can hire its own counsel, and things of that sort. The Attorney General is the lawyer for the State of New Jersey, in my judgment, and I feel he either has a legal obligation to or certainly should exercise his discretion to defend any State law that is validly passed in this State. Regardless of whether others in the past haven't done it or have done it, I think that should be the obligation of any Attorney General. I would hope that we could prevail upon you to reconsider and adopt that view because I think the issue really isn't whether or not what you are doing here is dangerous to the system -- it may not be, it may be. It doesn't matter -- but rather, the precedent, if it establishes it, or if it continues it, if it does exist, raises a grave source of danger, in my judgment, in the future. I think we have to have a separation of powers; we have a Governor who has his functions, the Legislature has theirs, and an Attorney General has his. He is the highest law enforcement officer in the State, and, regardless of his own views of the constitutionality of the law, I think he has an obligation to give the people of the State a defense of that law as best as he can, and then let the court make its judgment, and then we all would have done our duties.

So, those are some preliminary thoughts that I have which led me to feel that we should have this discussion. I might say, we, our staff, have researched the issue. It is a little bit cloudy. There is no question about it. There is no black or white, at least as I see it, on the law that I have seen thus far. I will get into that later, but, I just wanted to set a general framework of what my thinking is so that perhaps in your comments and response you could direct your thoughts to some of those issues.

Before we do begin with Mr. Kimmelman, does anybody else on the Committee have any preliminary statement to make? (no response) If not, Mr. Kimmelman will--

SENATOR ORECHIO: Mr. Chairman?

SENATOR RUSSO: Yes, Senator Orechio.

SENATOR ORECHIO: I just have a question to ask of Mr. Kimmelman. Do you want to do that after he speaks? Is that it?

SENATOR RUSSO: Yes. I think we ought to give the Attorney General the floor first to make the presentation he wishes to make, and then we will get into all of the questioning.

SENATOR ORECHIO: Okay. I will defer to the Attorney General.

SENATOR RUSSO: Now he has to worry about what that question is all this time. Mr. Kimmelman, the floor is all yours.

I R W I N I. K I M M E L M A N: Senator, you did speak with me on Sunday, and I do appreciate the opportunity to appear before your Committee not necessarily to explain my actions or to justify my actions, but to give this Committee the reasons why I have decided to take a certain course of action. I do not think that I am constitutionally required to explain myself to the Committee, and you yourself recognized that. But, we have enjoyed a very good working relationship, so far, and I expect that working relationship to continue. That is why I am here, and that is why, as you noted, I have been here several times in the past, at your invitations.

I would like to begin my remarks by reading into the record and marking as Exhibit A my oath of office. That oath reads as follows:

"I, Irwin I. Kimmelman, do solemnly swear that I will support the Constitution of the United States and the Constitution of the State of New Jersey; that I will bear true faith and allegiance to the same and to the Governments established in the United States and in this State, under the authority of the people; and that I will faithfully, impartially and justly perform all the duties of the Office of the Attorney General of the Department of Law and Public Safety of the State of New Jersey according to the best of my ability. So help me God."

I signed that oath on January 19, 1982, and it was witnessed and subscribed to by the Chief Justice of New Jersey, Robert Wilentz. May I submit that to the Committee?

The key words of my oath, Senator, that are germane to today's proceeding are those which refer to the fact that I will support the Constitution of the United States. We all know as lawyers that the Constitution of the United States is the "supreme law of the land", and where a State law may conflict, the United States Constitution governs. Now, in New Jersey, under the statute creating the Office of the Attorney General in the Department of Law and Public Safety, Title 52, Chapter 17a and 17b, the Attorney General serves as the chief legal advisor, or, the sole -- I should not say chief -- advisor to all State departments, agencies, and instrumentalities.

The statute goes further to provide that when requested by either the Senate or the General Assembly, the Attorney General shall also render legal advice to either or both of those bodies.

The obvious intent of the laws of this State, establishing the Office of Attorney General, is that he shall act as the legal officer for everyone, and that includes the people of the State of New Jersey, who have just as much right to have the benefit of laws and constitutional precepts as do members of the Legislature, as do State cabinet officials, and as does the Governor. Everyone is the same in the eyes of the law.

The Office of Attorney General is one of historical origin, created early on in England to meet a need and carry it over into this country with all of the inherent common law powers possessed by the Attorneys General. Those powers have in no way been limited by State law, at least to date.

It has been established in this State that the Attorney General, as the chief legal officer, does have the right to refuse to defend an act of the Legislature, whether that act is signed into law by the Governor or created into law by reason of an override. And, beyond that, the Attorney General has the right, affirmatively, to go into court and seek to overturn an act of the Legislature which he, in his discretion, considers to be unconstitutional. I have not gone that far.

SENATOR RUSSO: Is that cited somewhere?

MR. KIMMELMAN: I will give it to you, Senator.

The case I rely upon and commend for review to this Committee is a case entitled, "David T. Wilentz, Attorney General of New Jersey vs. Robert C. Hendrickson, State Treasurer of New Jersey." The case arose in the Chancery Division, the old Chancery Court, in 1943. The citation is 133 New Jersey Equity, Page 447. That case dealt with a rebate of railroad taxes under the then tax provisions concerning railroads. The Attorney General at that time, David Wilentz,

conceived the law to be unconstitutional and a giveaway of State funds in violation of certain provisions of the New Jersey Constitution. But, mind you, Senator, that law did not become law because the Legislature had overridden a veto of the Governor, that law was signed - passed by the Legislature and signed by the Governor. And there, the Attorney General took the position, contrary to his Chief Executive, who appointed him, and to the Legislature, one of the Houses of which confirmed him. Who did he sue to bring up the unconstitutionality of this law? None other than the State Treasurer.

The Chancery judge, Senator Russo, was a very well known Vice Chancellor named Jayne. And, the Attorney General had as his assistant writing his brief before the Chancery Court, a gentleman by the name of Mr. Joseph Weintraub, who later became Chief Justice of this State.

During the course of that opinion--

SENATOR RUSSO: Don't forget Judge Conford. He helped him on that.

MR. KIMMELMAN: Judge Conford helped Chief Justice Weintraub in that case. We will get to the Court of Error and Appeals case in a minute. Let me just refer to you briefly some of the language adopted by Vice Chancellor Jayne.

"On September 4, 1941, the Attorney General, in his official capacity, filed in this court an information."

SENATOR RUSSO: What page are you on?

MR. KIMMELMAN: Page 450. The first full paragraph, one-third of the way down.

"On September 4, 1941, the Attorney General, in his official capacity, filed in this court an information"-- which we all know today would be called a complaint, but, in those days it was called an information-- "in which he alleged that the act"-- that is, the act of the Legislature-- "was in defiance of certain provisions of our State Constitution, and prayed for an injunction restraining the State Treasurer from pursuing the terms of the statute."

Vice Chancellor Jayne went on-- I now refer you, Senator, to Page 454. Here is the very pertinent language. The first full paragraph. "It has been suggested that the Attorney General lacked official authority to file the information. The Office of Attorney General is of ancient origin. The Attorney General in England was appointed by letters patent from the Crown, and, under the common law, he was the chief law officer and legal advisor of the Crown upon whom devolved the management of its legal affairs and the prosecution of all suits, civil and criminal, in which the Crown was interested."

I will skip the citations.

"Upon the organization of governments in this country, most if not all of the commonwealths, which derive their system of jurisprudence from England, adopted in their governments the Office of Attorney General. The governmental prerogatives are here vested in the people. There was immediately recognized a similar necessity in our governments for the creation of a public officer charged with the official authority and obligation to protect the public rights and enforce public duties by proper proceedings in the courts of justice.

"With the office came all of the common law duties and all of the power and authority appertaining to the office of the common law, insofar as they

were applicable and in harmony with our system of government.

"The common law duties, unless abridged by the Constitution or Legislative enactment of the State, are very numerous and diversified."

I now refer you to Page 456, at the very bottom.

"It has not been regarded as anomalous for the Attorney General of our State to file informations ex officio - that is, by virtue of his office - challenging the constitutionality of acts of the Legislature."

Here it is, written by Vice Chancellor Jayne in 1943. He goes on to say, after some citations on the next page, 457, "Indeed it was held by the Supreme Court of Florida, in a cited case, that if the Attorney General conceives that a statute involving the public interest is unconstitutional, it is not only his right, but his duty to institute ex officio appropriate proceedings to settle the validity of the legislative act."

That case went up on appeal, Senator. And on appeal it was heard by the Court of Errors and Appeals, which at that time, was the highest court in the State of New Jersey. The Justice-- Do you have the citation, Senator?

SENATOR RUSSO: I need that.

MR. KIMMELMAN: All right, 135, New Jersey Equity Reports, Page 244.

SENATOR RUSSO: Go ahead.

MR. KIMMELMAN: The Justice writing the opinion for the Court of Errors and Appeals in 1944 was Justice Perskie, a name which should be familiar to you, Senator.

SENATOR RUSSO: We have heard of him.

MR. KIMMELMAN: And, Justice Perskie began his opinion with these words:

"A few prefatory words as to the parties are desirable. In forum, this is a suit between two of our high State officials, the Attorney General and the State Treasurer, each appearing in a representative capacity. The status of neither is questioned. The Attorney General, acting on behalf of the people of the State, filed an information challenging the constitutionality of the two statutes; and, the State Treasurer defends their constitutionality with the aid of counsel at the expense of the State, as authorized and directed.

"In substance, the actual parties affected by this suit are the people of the State on the one side and the private railroad taxpayers on the other side.

"With this in mind, we turn to the consideration and determination of the merits of this case as submitted."

In sum, Senator, the position of Attorney General Wilentz at that time was sustained by the Court of Errors and Appeals, not only as to the unconstitutionality of the particular Railroad Taxation Act, but as his right to come into court affirmatively to challenge the constitutionality of a State statute enacted by the Legislature and signed by the Governor.

Now, if you will bear with me, I would like to refer to a later case. The name of the case is, the New Jersey Highway Authority vs. Sills, that is, Arthur J. Sills, former Attorney General, reported in the Superior Court Reports, 109 New Jersey Superior Court Reports, Page 424, Chancery Division, 1970.

The Chancery Division opinion was rendered by Judge Ward Herbert, a fine gentleman. In that case, the Legislature, Senator, passed the law providing

that all national guardsmen would be exempt from paying tolls on the Garden State Parkway while they were proceeding to and from encampment or other official functions. The law was challenged as being unconstitutional. The sole defendant in the case was Arthur J. Sills, Attorney General of the State of New Jersey.

I refer you now to Page 428 of the report in which the judge said this:

"The Attorney General in his answer to the amended complaint concedes that these statutes are unconstitutional. An affidavit filed by Philip S. Karchman, Deputy Attorney General" -- Again, parenthetically, Philip S. Karchman is now the Prosecutor of Mercer County, but, at that time, he was a Deputy Attorney General -- entrusted with the handling of his case states that, "in view of its opinion that the statutes in question are unconstitutional, the Office of the Attorney General cannot defend this action. The Court went on to decide the case in the absence of the Attorney General defending it and ruled that the statute exempting"--

Excuse me. Assistant Attorney General Cole points out to me certain other language on Page 430 of the opinion, which is important.

Judge Herbert said this:

"In this case, the Attorney General has had the opportunity to argue for constitutionality, and the making of such an argument would have been his duty, if he had considered it appropriate to do so." It would have been his duty, had he considered it appropriate to do so. "That he takes the position the statutes in question are unconstitutional, is also within the scope of his powers and duties."

The Judge held the statute unconstitutional and obviously sustained the position of the Attorney General. The case went to the New Jersey Supreme Court, 58 New Jersey, Page 432, 1971, and the case was affirmed on the opinion of Judge Herbert below.

A further case, Senator, involves another situation where the Legislature passed a pension act in 1974, placing the members of the Legislature in the PERS system, but, retroactive to 1972, two years earlier. There was a group, headed by the Chamber of Commerce in Union County, and other organizations which brought suit against the constitutionality of that enactment of the Legislature. And, there again, it was not only passed by the Legislature, but signed by the Governor. There was no veto.

The Attorney General at the time, William F. Hyland, issued a formal opinion, cited as Formal Opinion of 1974, No. 12, in which he concluded that that portion of the enactment, which gave a retroactive pension credit to members of the Legislature, was unconstitutional. He declined to defend that portion of the statute. His declination to defend was upheld by the court, and the court ruled that that portion of the statute was unconstitutional.

Finally, Senator, we come to very recent times, meaning last year, when the Legislature enacted the Legislative Oversight Act. That Act was vetoed by Governor Byrne and the Legislature overrode his veto. At the time in question, General Degnan had resigned. His successor, Mr. Zazzali, hadn't yet been appointed, and the Acting Attorney General was Judith Yaskin, now a Superior Court judge.

Acting Attorney General Yaskin rendered an opinion that the Legislative Oversight Act was unconstitutional, refused to defend it and advised the

Governor. The Governor advised all of the cabinet officers at that time not to defend the action. The case was still pending before the Supreme Court when I became Attorney General. I applied to the Supreme Court to intervene in my own right as Attorney General to argue against the statute. By intervening in my own right, it was the purpose that I represented all of the people of the State of New Jersey as their legal officer. That right to intervene was granted. I, along with Governor Byrne, who was then former Governor, argued the case in the Supreme Court, and, of course, you know what the ruling was. The Act was declared unconstitutional.

We also have a formal opinion of Attorney General Hyland which I would like to cite to this panel. That is, Formal Opinion-- Excuse me. Mike Cole tells me it was Arthur Sills.

Formal Opinion 1967, No. 3, in which the Attorney General stated: "It is not often that the Attorney General is constrained to rule that a State statute, expressive of public policy, is contrary to either the Federal or State Constitution, and therefore, invalid. The Attorney General is a constitutional officer and bound by his oath of office to support both the Constitution of this State and of the United States. In that capacity, he must also respect and abide by the decisions of the United States Supreme Court, which equally represent the supreme law of the land where Federal law controls."

Senator, in my capacity as Attorney General, I did advise the Governor some time ago that this bill -- it was only a bill at the time -- in my view, was unconstitutional. Governor's counsel advised him similarly. I believe the Governor acted upon our advice. It now appears that his veto, after acting upon our advice, was overridden. I believe you are asking to place me in an anomalous situation, to defend an enactment which I already advised the Governor was invalid. That is not a situation in which a lawyer expects to find himself. Not only is it unfair, it is untenable. I abide by my advice to the Governor.

Let's go one step further and get to, I think, some of the rationale behind the reasons why the Attorney General should be independent.

New Jersey is unlike most other states in this country with respect to the Office of Attorney General. In most of the states, the Attorney General is elected. In New Jersey, in New Hampshire, in Alaska, and, I believe there is one other far western state - it escapes me for the moment - the Attorney General is appointed. In our State, the Attorney General is appointed as a constitutional officer. His term runs concurrently with that of the Governor. But, once he is appointed for legal purposes, he is independent of the Governor, because he cannot be removed. Neither can the Secretary of State, in our State. All other cabinet officers serve at the pleasure of the Governor. This is unlike the United States Federal government. There, the Attorney General is appointed by the President and confirmed by the Senate. But, he is not a constitutional officer. His office is not provided for by the Constitution, and therefore, the Attorney General can be removed by the Governor.

Now, what happens in states where the Attorney General is elected? I don't necessarily agree with that situation, because it creates a built-in conflict, a political rivalry, if you will, between the Governor and the Attorney General. They are not always of the same party. Many times they are of different

parties. And, you will see, time and time again, that the Attorney General runs against the Governor either in a primary or in a general election, when the Governor seeks reelection for the office. Many times the Attorney General succeeds, as he did in the State of Nevada.

SENATOR RUSSO: This isn't an announcement, is it?

MR. KIMMELMAN: It is not an announcement. It is not an announcement at all.

The Attorney General in Texas was just elected Governor. The Attorney General in California was just elected Governor. I could go on and on.

I believe our system in New Jersey is the better one, because it prevents the Attorney General from being a political rival of the Governor who appoints him. But, it also guards against the Attorney General being subservient to anyone by preserving his office in all respects except where he commits an impeachable act.

We get down to cases. I indicated to the Committee that I did advise the Governor that the then pending bill was unconstitutional. I affirm my advice. What do I now do? Say that I will defend the constitutionality of an act which I already advised the Governor was not? No. I exercise my discretion, both common law and case law in the State of New Jersey, not to defend a law which I believe, as the Attorney General, to be unconstitutional.

Now, if Senator Orechio has a question, I would be happy to try to answer it.

SENATOR RUSSO: He wanted to ask you to dig out the impeachment statute. (laughter)

SENATOR DORSEY: What I want to know is, does he have any involuntary dismissal forms for you to sign? (laughter) To get it over with.

SENATOR RUSSO: Well, you know what, Senator Dorsey? You and I, and the Attorney General well know as lawyers-- I can remember when I worked with the Supreme Court. I'm sure you have been through this. Every time you read the first brief you picked up, you said, "Boy, how can you possibly ever answer this? It is irrefutable," until you have heard the other side. So, we are going to get to that yet.

SENATOR DORSEY: Good.

SENATOR RUSSO: We'll get to that. Do you want to start first before I do, Senator Orechio?

SENATOR ORECHIO: If I may. I just want to allude to the oath of office that the Attorney General repeated earlier. On the other side of the coin, for example -- I just thought I should mention for reflection -- you said that you swear to support the United States Constitution. That doesn't mean to interpret it; that is left up to the courts. Also in your oath, you are to perform all of the duties of the office, which includes the defense of a statute. One thing that I am intrigued about is the fact that at some point you had given advice to the Governor about the so-called unconstitutionality of this statute. What I would like to know is, at what stage did you give that advice? Was it after it passed the Assembly, when the bill was framed, after it passed the Senate, or between the Assembly passage and the Senate passage?

MR. KIMMELMAN: And prior to the veto.

SENATOR ORECHIO: And prior to the veto.

MR. KIMMELMAN: After the Assembly passage and the Senate passage, and prior to the veto.

SENATOR ORECHIO: Okay. Did you have input as to what the contents of that veto message should include, in terms of content?

MR. KIMMELMAN: Not at all, Senator. That was not my function. I never saw the veto message until I read the message after it was delivered.

SENATOR ORECHIO: Because the major thrust of the veto, as I remember reading it, involved remarks that were alluded to me on the day that the bill was moved by me in our House. And apparently, those remarks were taken out of context and somewhat distorted, because the remark I made had to do with a preference of having prayer come in the front door, but, I maintained throughout my presentation that day that this is meditation, introspection and not prayer. I just thought it was ironic that you had so much input with the Governor before and during certain stages of the movement of this legislation, and after it passed both Houses. I was wondering whether or not you might have had some input on the actual message itself, and whether or not you took some comfort in giving your legal advice on the remark that I eventually made.

MR. KIMMELMAN: Not so, Senator.

SENATOR ORECHIO: I am going to defer to the Chairman, General, again intruding and being obtrusive, but, I will defer to him.

SENATOR RUSSO: Mr. Kimmelman, as I referred to - when Senator Dorsey and I were just discussing-- You would certainly know this, as a judge-- Incidentally, first of all, let me commend you. What you did today was take the side of the issue which you believe in and made an excellent, excellent legal argument. Were I sitting here as a judge, I would be very impressed, weighing the other side, of course. But, that was a very, very fine job.

MR. KIMMELMAN: Thank you, Senator.

SENATOR RUSSO: But, having practiced a bit of law myself, and having done some research, I would like to refer now to the other side of the coin, because I think what the net result will be is that, typically in many questions of law -- that is why so many cases go before Appellate courts -- both sides think that what they read is on their side. Oftentimes it is, because the contexts are separate.

Let me just-- I don't think this is a place for legal discussion between two lawyers, as it would be before a court, to resolve who is right or wrong in the law, because that is not really the function of this Committee. But, I think we have to present the other side and then get to the broad policy questions, which I think we are more interested in.

First of all, you very dramatically and properly referred to your oath of office, which was submitted-- May I have it, please? Basically, Mr. Kimmelman, that oath of office you took as Attorney General is pretty substantially the oath of office that you and I took when we were admitted to the Bar, other than referring to the Office of the Attorney General, wasn't it?

MR. KIMMELMAN: Yes.

SENATOR RUSSO: And we swore, as lawyers, that we would defend and uphold the Constitution in New Jersey and the United States, didn't we?

MR. KIMMELMAN: Yes.

SENATOR RUSSO: I hope you didn't mean this -- and I don't think you did -- that having taken that oath, that we were in any way violating that

oath if we ever represented a client, and -- for example -- argued to sustain the constitutionality of a statute before a court, that we personally believed was unconstitutional.

MR. KIMMELMAN: I didn't imply that.

SENATOR RUSSO: You didn't mean that?

MR. KIMMELMAN: I found myself in those situations as a practicing attorney.

SENATOR RUSSO: Sure. You and I both have taken a position before a court for our clients that we personally may have thought was wrong, in error.

MR. KIMMELMAN: I wouldn't go that far.

SENATOR RUSSO: You wouldn't?

MR. KIMMELMAN: No, I wouldn't.

SENATOR RUSSO: Did you ever defend a guilty client that you thought was guilty?

MR. KIMMELMAN: Not-- I can't say that, Senator. I may have urged an argument on behalf of a client, which I thought legitimately had two sides to it, that there was another side which could carry water. But, nevertheless, I felt constrained on behalf of my client to present his side, even though it may have been the weaker side. But, I cannot recall an instance where I went into court knowing absolutely that my side was dead wrong, because I would have looked to settle the case.

SENATOR RUSSO: All right. If you couldn't settle it, you wouldn't have walked out on your client.

MR. KIMMELMAN: I don't know, Senator.

SENATOR RUSSO: Mr. Kimmelman, there is a lot--

MR. KIMMELMAN: I don't think I have ever walked out on a client, and nor did I walk out on the State of New Jersey in this instance.

SENATOR RUSSO: I certainly don't suggest that you did with any knowledge that you were doing so. But, you know, Mr. Kimmelman, we have a principle of law that we are talking about here, or a principle of, you might say, the ethical obligations of lawyers. There are a lot of young law students who are going to be reading about this. Let's just get it clear. You don't mean to suggest that if those young lawyers have a client walk in and a statute is involved, and they believe that the other side is right, that they shouldn't represent as best they can, ethically and honorably, the position that their client has maintained? You don't mean to suggest that?

MR. KIMMELMAN: Well, Senator, we are getting philosophical. Since we are talking about some guidance for future law students, let's take this situation, where your client comes in, he is accused of a crime, and during the course of the interview, he tells you he committed it. So, you know he is guilty. He admits it, but he wants a defense. He wants to go to court. What do you do? You see to it that he gets all the rights of due process of law that he is entitled to.

SENATOR RUSSO: Sure you do, but he is a criminal.

MR. KIMMELMAN: That's right. And you are not entitled-- As a matter of fact, you are prohibited from saying to the judge, privately, "My client is guilty." You don't, because he is entitled to the benefit of the law.

SENATOR RUSSO: Exactly. That is why we have courts and juries. Each side is entitled to the best lawyer they can get, and a jury or a judge, in the case of the constitutionality of the law, makes a decision, and then we live by it. Isn't that the system?

MR. KIMMELMAN: It is.

SENATOR RUSSO: All right. Let me ask you a couple of other things. You cited a number of cases, and I think you cited them fairly. If I thought you took any out of context, I would tell you. I don't think you did. But, we didn't talk about a couple of other ones. Let's direct our attention to those.

For example, Van Reichter vs. Jenkins. You remember him.

MR. KIMMELMAN: I certainly do. I was personally acquainted with the gentleman.

SENATOR RUSSO: Okay. Opinion of Chief Justice Brogen in 140 New Jersey Equity, 99 and thereon, where some other language is referred to. I will briefly refer to it. I'm talking about the Attorney General.

"In this instance, his was the duty to vindicate in his capacity as principal law officer of the State, the statutes under attack. Certainly the sovereign state is concerned when its laws of this character are challenged. The State has entrusted to its Attorney General the management of its legal affairs, and the validity to its statute is a matter of partial importance and interest to the state." Then they go on to England, and so forth, and refer to New York laws.

Now, there is no question in this case -- they were talking about a criminal statute. But, the language that appears in there has never been overruled, to my knowledge.

New Jersey Statute 52:17a-4, talks about the duties of the Attorney General, and that he shall: "Exclusively attend to and control all litigation and controversies to which the State is a party, or in which its right and interests are involved; and that he shall enforce the provisions of the Constitution and all other laws of this State, as well as to perform all other duties," and so forth.

Then, in Trustees at Rutgers College vs. Richmond in 41 New Jersey Super 259, in 1956, the court stated that "the Attorney General, as part of the common law duties of his office, participates in litigations to defend or attack the constitutionality of statutes."

MR. KIMMELMAN: May I just interrupt you?

SENATOR RUSSO: Hear me through, first, if I may, because--

MR. KIMMELMAN: I heard the word attack.

SENATOR RUSSO: In litigation to defend or attack. His right to participate in litigation to defend or attack. First of all, let me say this--

MR. KIMMELMAN: He was defending the attack.

SENATOR RUSSO: The issue you referred to earlier, about affirmatively filing a suit to attack the constitutionality of the law, frankly, I am more troubled with that than I am with the issue that is before us; namely, not where a law, because it hurts the State -- like that one that you referred to, the giveaway of funds -- your obligation to bring a suit to attack. I am more concerned with where we just have a law -- you have an opinion, you or any other

Attorney General. If this law is unconstitutional, you see, what I see here is, what do we do from here on? We pass laws, and you read them? You meaning the office. I don't mean you, Mr. Kimmelman. The Attorney General reads them and says, "Well, here's one I think is constitutional, so, I will defend that one." Or, "Here, I don't like it. We will put it on pile number two over here, without giving the court the right to determine those issues." But, we will come back to that.

In the question of an unfair burden being placed upon you, you raised the situation where you advised the Governor that the law was unconstitutional, both before and after the Legislature passed it. You said it is putting an unfair burden upon you to defend it. I come back, really, to the question which we talked about, every litigant has a right to have a day in court. You are the State's attorney. Why, Mr. Kimmelman -- I will rhetorically ask you, for now, because I want to finish this, and then we will come back -- is it an unfair burden to ask the Attorney General not to unilaterally make a determination as to what laws are constitutional or not, leave it to the courts, and give us his best shot any time our laws are attacked? Be it this kind of a bill, the Moment of Silence, be it the death penalty, or whatever there is, because otherwise, there are differing views on every one of these issues. There are people in government who don't like this one and who like the other one.

You talked about politics. Let me throw out this thought to you. I raised this to you in our discussion on Friday night on the phone. You have an elected official, a Governor, who vetoes a bill. We have a non-elected official, an Attorney General, appointed to the highest law enforcement office in the State. He now takes the position, "I'm not going to defend." I know you, and I know you made this judgment because you don't think this law is constitutional. But, it reflects out there to the public. Did the Governor put pressure on him since the Governor appointed him? I don't think the Governor did, incidentally. Let me say that clearly.

MR. KIMMELMAN: He did not.

SENATOR RUSSO: I'm sure of that. Nor do I think he would, because frankly, he almost invited the override, if you remember, by saying he really didn't care. He just felt he did what he had to do. But, it gives an impression out there. And, the next bill that comes up, that impression could be dramatically increased, if it is some different type of a bill, because we are letting an Attorney General pick and choose. I think that is the danger.

The issue of the right to discretion-- You referred, as an example, to Judy Yaskin's opinion, about the last Attorney General on the Oversight bill. I talked to John Degnan, incidentally. I guess he told you because he said he would be seeing you the next day, and he confirmed that to me.

I guess the first obvious question is, why didn't you say something then, you meaning me? Frankly, I really never even thought about it at the time, because it wasn't as volatile an issue, at least to the public, and it didn't come so quickly on the heels of it. But, in any event, I should have. If I believe in the principle I am maintaining, I should have. I think what we are more concerned with now is not whether Arthur Sills did it or Bill Hyland did it, but rather, whether it should be done in this case and in the future, whether that discretion should be exercised, and if so, whether we ought to try to do something about it,

because the legal position on this is all over the lot. Without referring to every opinion that has been written-- You know judges. You know how they do it. They throw in words to defend what they are writing about.

MR. KIMMELMAN: I don't agree with that statement at all.

SENATOR RUSSO: You don't agree with that?

MR. KIMMELMAN: Not at all.

SENATOR RUSSO: I found that to be true so, so many times. In any event, that is beside the point. Incidentally, I don't mean that they deliberately use words that they know won't apply to a later case. They think at the time that it makes sense. That climbs its way into an opinion and then it is cited in a totally different context.

But, here you have a lot of language on both sides of this issue which I don't really think resolves our question. I think that other than your comments and response, we ought to now get to the question of, if there is discretion, should it be exercised? And then, whether or not discretion should be allowed in the future, or whether we should do something legislatively if we can?

MR. KIMMELMAN: All right. Senator, I am trying to remember everything you said, because some of it does deserve some comment.

Number one, I acted independently in determining that I would not defend the particular statute under consideration. I did not act on instructions of the Governor, at all. This was not a matter which we discussed as to what my action might be.

Number two, had you conferred with me early on, I would not have told you what I advised the Governor. Part of the my function as the Attorney General is to render advice, and not only to prosecute or defend cases. You know the well-known saying of Abraham Lincoln, "A lawyer's stock in trade are his time and advice," and I render advice. When an attorney renders advice to a client, there is what is known as the attorney-client privilege which comes into play. I may not disclose to you the advice I rendered to my client, the Governor in this instance. I have only disclosed to this Committee the fact that I advised the Governor as to the unconstitutionality of this bill, because the Governor has permitted me to do so - free of any constraint of attorney-client advice. I do not pick and choose which statutes I will defend or oppose. I weigh every particular legislative act carefully, with the utmost scrutiny, and not only personally, but with input of our legal staff. Only after that input and careful scrutiny do we arrive at a decision. What it boils down to, Senator, is good faith. I assure you, as I hope I do not have to, that I act in good faith in discharge of the duties of my office.

I was confirmed by the Senate because the Senate believed that I would discharge the duties of my office in good faith to the best of my ability. That is all you can expect of me, that I will continue to discharge the duties of my office in good faith. I cannot tell you what my position will be next week or next year on a particular legislative enactment. I will deal with that situation when it occurs, and I will weigh it in light of the particulars present at that time.

SENATOR RUSSO: Mr. Kimmelman, I think-- You mentioned it, so I will cover it again, just so you don't misunderstand. I think you well know that there has been no suggestion publicly or privately by anybody sitting up here that you acted other than in good faith. I think you know-- You mentioned

earlier about the relationship, and we respect you.

MR. KIMMELMAN: Senator, let me interrupt you. I have known you for many years, personally, and I have a very high regard for you. I know you speak at times for your constituency, but, I must say that my constituency is somewhat different than yours. When you speak for your constituency, your remarks are reported in the press. I read newspapers like everyone else, and I saw some strong language. I didn't take it personally, but I nevertheless recognized it as strong language. That is why I am here today, to answer you in as strong and as positive and as direct language as I can.

SENATOR RUSSO: What are you referring to, Mr. Kimmelman?

MR. KIMMELMAN: Some articles I read in the paper, about the-- Well, I don't think we ought to get involved in that, Senator.

SENATOR RUSSO: Well, you brought it up, I didn't. What are you referring to?

MR. KIMMELMAN: I am referring to some of the statements you made in the press.

SENATOR RUSSO: You said that. What?

MR. KIMMELMAN: Well, I saw the word damn, d-a-m-n, in one article. I don't have the article in front of me.

SENATOR RUSSO: Yes. I'll be damned if he shouldn't defend the State's laws. Is that what you are upset about, or take it as a personal affront?

MR. KIMMELMAN: I didn't take any of this as a personal affront. I'm just saying that you used strong language. I have to come here to use equally strong language.

SENATOR RUSSO: I would welcome that, Mr. Kimmelman.

MR. KIMMELMAN: All right. That's all I'm talking about, Senator.

SENATOR RUSSO: I have always respected you for that, but, when you suggested--

MR. KIMMELMAN: That's all I'm talking about.

SENATOR RUSSO: What you said, I thought you were referring to some inappropriate statement.

MR. KIMMELMAN: Well, I said--

SENATOR RUSSO: And if that is the one, then I have no problem.

MR. KIMMELMAN: I am referring to strong statements by you.

SENATOR RUSSO: Is there something other than what has been said here today?

MR. KIMMELMAN: No, I don't have any other problems, Senator.

SENATOR RUSSO: All right. Because I think everything I have said publicly -- the clippings are all here -- is what I have said today.

Now, let's continue on. My question, actually, that prompted that response was really one of praise to you. I guess it didn't praise you enough. I was saying--

MR. KIMMELMAN: Try again.

SENATOR RUSSO: I'll try again. I was saying that no one on this Committee suggests that you acted in bad faith. However, Mr. Kimmelman, the next Attorney General, we don't know who it will be, or the one after that-- And, the issue here is a broad one. Should the Attorney General have the right to pick and choose, based upon his view of constitutionality, what State laws

he will defend? It is not a personality question. It has nothing to do with you. The next Attorney General might not even consult with his staff. He may just decide to do anything he damn well pleases. I'll throw the word in again. That is the issue. That is what I am concerned about and troubled about, whether or not that discretion exists, and if so, should it be exercised, or, might it not be better for the Attorney General, regardless of his personal opinion, to defend any State law validly passed by the elected representatives of the people? That is really the issue, not your motives.

MR. KIMMELMAN: Senator--

SENATOR DORSEY: (interrupting) Wait a minute.

SENATOR RUSSO: Just a minute. When you are recognized. If you want to be recognized, just let me know.

SENATOR DORSEY: May I be recognized?

SENATOR RUSSO: Will you defer to Senator Dorsey, Mr. Kimmelman?

MR. KIMMELMAN: Yes.

SENATOR RUSSO: Go ahead.

SENATOR DORSEY: I think there is a certain amount of unfairness in that question, because none of us know who the next Attorney General will be. None of us know what the qualifications, quality, ethical standards, and moral standards of that man will be in the community. That man has not gone through the process as did this Attorney General of being approved to be the Attorney General with the advice and consent of the Senate, a process which you went through last year, a process where I can only assume that you were totally satisfied with the presentations of this Attorney General's qualifications, ethical standards, and moral standards, etc.

I really think, Senator Russo, that the question is just too totally hypothetical, and has nothing to do with this Attorney General. I think he has defended his position legally, and I think he has done it well. I think he has had the benefit of an extraordinary amount of case law which just goes his way. I think you are now asking a totally hypothetical question that in some way I think is unfair. I'm not suggesting that the Attorney General can't answer it and answer it well, as he has answered everything else, but, I think it is really out of the context of the purpose that this inquiry was started for, and the purpose of any constitutional change that may be made in terms of the office of the Attorney General.

SENATOR RUSSO: First of all, there wasn't a question pending. It was a statement which reflected my own personal views. Secondly, Senator Dorsey, before you make any conclusions about the extraordinary amount of case law, I invite you afterwards to review the staff's memorandum on this, and the cases that are all here, if in the event you didn't have an opportunity to do so. I don't feel I should read them all out at this time.

SENATOR DORSEY: I reviewed staff's memorandum, and I will say that I am much more impressed with the General's memorandum in terms of his independence of office.

SENATOR RUSSO: That's really-- I have no problem with that. That is certainly your right. I think, though, that you might want to read the cases. As a lawyer, you will be well able to understand them. But, you see, the issue here is not this man's qualifications or credibility-- I don't want to keep

saying it over and over again. This is not a personal attack on Mr. Kimmelman; it is rather a discussion of the issue of whether or not an Attorney General should have the right to or have the discretion to make these decisions. I don't think it is a case of each one, where we have to determine their moral fitness to make these decisions; I think it is a legislative issue of whether or not we want the Attorney General, the office, to have this right. Now, maybe you do, and I may stand alone -- I have no quarrel with that -- or maybe you don't. But, let's not make Mr. Kimmelman the issue.

SENATOR DORSEY: I'm not trying to make Mr. Kimmelman the issue.

SENATOR RUSSO: Well, you talked about "I was satisfied." Well, yes, I was very satisfied. We cleared him in record time. He is a very good man and he has done a great job since. We philosophically disagree on this issue. That is all we are discussing today, not Mr. Kimmelman's fitness for office. I concede that. He is well fit for office.

MR. KIMMELMAN: Senator, I didn't think I was on trial here, either.

SENATOR RUSSO: I didn't think you were either, when I came down here.

SENATOR DORSEY: Well, I thought perhaps you were, and I think you defended yourself so well. But, I think the question, then, is a legislative question as to whether or not the Constitution should be amended in some way to limit the discretionary powers of Attorney General. If we want to discuss that, let's discuss that in the context of legislation and not in the vague kind of context that I think we arrived at here today.

SENATOR RUSSO: Well, there's room for difference of opinion, Senator Dorsey. Yours is respected. I don't concede that constitutional discretion exists. There is nothing in the Constitution that says anything about it. There are cases that say both ways. I don't think we are going to resolve that here today, except to hear both sides of that legal argument. The Constitution is silent. I think you can change this question statutorily. I don't think it need be done constitutionally.

SENATOR DORSEY: John, are you saying that, after the discussion we have had thus far, it is your legal position, which is a legislative position, that the Attorney General does not have the discretion under the Constitution, under the laws of this State, to act as he has acted, i.e., to decline to defend a particular statute? I thought we had reached the point where we had agreed. Obviously, I am wrong.

SENATOR RUSSO: You are.

SENATOR DORSEY: Then your position is, I take it, that his interpretation of the Constitution, his powers, and his discretion is not as he sees it.

SENATOR RUSSO: If that hasn't come through to you through all of this discussion and all of my comments, Senator Dorsey, then I have some difficulty with getting you to understand. I think whether or not he has the discretion is as vague as whether or not the Moment of Silence is constitutional. There just is no clear pronouncement on this issue. I haven't seen it, or I am certainly not satisfied with it. I think only until the Supreme Court of the State makes a declaration on both of those issues are they going to be resolved. But, we had to start somewhere, and the place to start is, ask the Attorney General

to give us the benefit of why he thinks he has the discretion. Those of us can make our points as to why not. We aren't going to resolve that issue today. Then, go to the second one. Should he exercise the discretion? And then, perhaps, the third one, about whether or not we want to do anything about such discretion if it exists. Now, that's all that is being done here today. This is a public hearing on a broad issue.

SENATOR ORECHIO: Mr. Chairman, may I interject for a minute? I think you have been set up by Senator Dorsey. Since you very seldom praise anybody, I think what Senator Dorsey did was praise you to confess to the world that Mr. Kimmelman is a great Attorney General.

SENATOR RUSSO: I don't find that difficult to do.

SENATOR DORSEY: Well, then it was brilliant on my part. Very good.

SENATOR RUSSO: If that was your motive, Senator, the Attorney General thanks you, and I, frankly, have no objection to that.

MR. KIMMELMAN: Senator, can I sort of interject myself? The question that you pose is, should the Attorney General have this discretion? It is a simple question. The simple answer, from my point of view, is yes. The reasons may not be so simple. Why should the Attorney General have this discretion? He should because the Attorney General cannot confine his view of representation to the Governor alone, to cabinet officers, or to the Legislature alone; but, he must confine his view of his representation as an attorney to the entire State and all of its components.

Now, should the State, or any segment of it, get bogged down in defending a law which is unconstitutional, should the State Treasury undergo the expense of that action, should the manpower be marshaled to defend something which the Attorney General, in his discretion exercised in good faith, believes to be unconstitutional. I don't think the State should become involved in that.

We have another factor to consider today with respect to the particular Moment of Silence bill. There is a Federal Civil Rights statute, known as Title 42, Section 1983. Section 1983 gives any individual affected by the action of a State official, impinging on his constitutional rights, the ability to personally sue that State official. It happens time and time again.

Let's assume this statute goes into effect. Let's assume that a teacher at the beginning of the day prescribes the Moment of Silence, and, let's further assume -- these are all reasonable and logical assumptions -- that some parents or someone on behalf of the parents brings a Civil Rights action under Section 1983 of United States Code, Title 42, against the particular State officers responsible for the imposition of that particular Moment of Silence, alleging that it is an unconstitutional act. And, let's further assume that the Attorney General defends and he loses the case. The imposition of counsel fees for the winning parents and plaintiffs are substantial, in tens of thousands of dollars, and probably more. Why should the State Treasury be subjected to that kind of expense when the Attorney General reasonably believes an act of the Legislature dealing with Civil Rights is unconstitutional? That is why the Attorney General should have this discretion.

Now, I will give you a chance, Senator, to answer me.

SENATOR RUSSO: No, that's all right. I want to give the other members a chance.

MR. KIMMELMAN: Fine. But now, the next question is, what about the future Attorneys General? Should they have this discretion? Well, you know the present Attorney General, but, you don't know who it is going to be four years from now. You don't know who the Governor is going to be four years from now. And, I think the Legislature should not do anything which would have the capacity of limiting the executive discretion of whoever the next Chief Executive is in the selection of his Attorney General. He ought to be free to select whomever he chooses, believing that person to be the right one for the job, and believing that that person will constitutionally exercise all of the powers of his office. Why would you now want to limit something on the basis of a hypothetical, not knowing how and in what context it might again occur in the future?

SENATOR RUSSO: You see -- then I am going to turn it over to the rest of the Committee -- it is not a question of limiting it without knowing what the future holds. I would not want to see this discretion given to any Attorney General, whether it be you, Degnan, or Mr. X coming in the future, because, as I have said all along, the potential for danger is there if one abuses it. But, I dominated the argument too much. I am now going--

MR. KIMMELMAN: Senator, forgive me for interrupting you. You are not left without any remedy, or without any rights. You are not foreclosed. When I say you, I mean, the Legislature of the State of New Jersey -- has not been placed in an impossible position where it cannot seek to vindicate its rights.

SENATOR RUSSO: We can hire our own counsel.

MR. KIMMELMAN: You certainly may.

SENATOR RUSSO: But as you say, if you don't feel a law is constitutional, why should you marshal the forces and put the State through all of that expense, and so forth? That expense is going to fall upon the Legislature, which is still the State. We don't have-- We have some very fine counsel, you know, one here, one there. You have the manpower to do the job. That manpower you didn't want to marshal--

Look, I don't want to belabor the point. I have taken the position and made it clear that any State statute validly passed, should have those vast forces of the Attorney General's office behind it, and if a judge says no, it is unconstitutional, that is the end of the argument. But then again, I made that point, I think, emphatically clear. Let me now turn to some of the other members of the Committee.

MR. KIMMELMAN: Senator, one more thing. Excuse me, Senator Gallagher. History shows that 99.9% of all statutes have the benefit of the vast array of forces and talent of Attorneys General and their staffs to defend the constitutionality. It is only in the rarest of instances that this occurs. I have only cited to you four or five cases over the last 44 years. But, every time it came up, the Attorney General's right was affirmed by the highest court in the State. But, it doesn't occur every day; it doesn't occur in every legislative session. So, you can see that no one has abused it to date.

SENATOR RUSSO: Mr. Kimmelman, the affirmative attack by the Attorney General, for example, in the case you referred to--

MR. KIMMELMAN: Wilentz vs. Hendrickson.

SENATOR RUSSO: Yes. For whatever it is worth, I distinguish

from an Attorney General taking the position that "any time I feel a law is unconstitutional, I have the right not to defend it." That, I think, is a different issue. Maybe it isn't. When you say the four or five times it has been affirmed by the highest court, I don't think it has ever been affirmed by the highest court, but, you know-- When two lawyers sit down, they have made their respective arguments and the court decides. Here we don't have a court, so we will hear from the rest of the Committee. Senator Gallagher.

SENATOR GALLAGHER: Thank you, Mr. Chairman. Judge, you and I go a long way back, but, I have to tell you that this one really scares me, that anyone can determine what they are going to defend and what they aren't going to defend, once it is passed by the overwhelming majority of the people who represent the general public, and even going to the point of overriding the Governor, which as you well know from serving in the Assembly, takes a little bit of effort.

I see in the paper here that it is your opinion that this particular law that we are talking about is simply a euphemism for mandated prayer in the public schools. I don't particularly read it that way, and as you probably know, maybe 10% or 15% of the school districts now have such a moment of silence. If it was unconstitutional, there was no effort by the Attorney's General office to tell those schools, such as Sayreville, to cut it out. Certainly, there probably has been no action brought by any individual in the town either, and on that basis, it appears that it is working and has not been used, as you indicate in the article, as another means of prayer.

MR. KIMMELMAN: Senator, your remarks are most significant because the State educational system, including the teachers of Sayreville, have the right today to impose a moment of silence, 20 minutes of silence, or whatever, but, they are not mandated to do so by State law. That is why the action that now takes place in Sayreville is not unconstitutional, because it is not State action telling someone what to do.

SENATOR GALLAGHER: I understand, Judge, but we mandate a hell of a lot of things to those school districts.

MR. KIMMELMAN: That's right.

SENATOR GALLAGHER: They don't have to just be voluntary in order for them to be worthwhile were it to be constitutional. I understand the case that you pointed out about the National Guard with Attorney General Sills, from having served on the Highway Authority. I can see where that one is readily apparent, I think, because of the bond resolutions and the contracts with the bondholders and everything else. This one, I think, at least in my mind, is, at best, debatable as to whether it is constitutional or not. I think the State -- when I say the State, I'm not talking about the Governor, his opinion, or the Legislature, but I'm talking about the State itself -- should have available the very best, which you are in your office, to defend itself in any of these things. I think the absence of that defense or the public comment that you choose not to because it is unconstitutional is certainly going to weaken any case that is brought by any other party. I think that all of these people who serve as judges, jurors, or whoever is going to be hearing this case, they are human and they react to people like yourself, who have this experience and serve in this position. I don't know that it is going to benefit the State's case in any way, shape or form.

I personally feel that we should have your office defend any of these, and that the constitutionality of them should be determined in the courts and not with any individual who sits in any position such as you sit at the present time. I understand your position. Again, I think you cited a lot of the things quite well, some things that I didn't know. You have gone back to some individuals who have served prominently in the position that you now hold.

I want to listen to a lot more from some of your attorneys, which I am not, to see which way I eventually will go on this. Initially, I want you to know that I am very concerned about the fact that, as you well point out, you are appointed and you are responsible, in a way, to no one as a constitutional officer. The Governor can't tell you what to do. At the whim of the Attorney General, you can say it is possibly an infringement on civil rights, it is this or that, and determine that you are not going to defend. I think that weakens the State's case.

I know you, and I know you are not going to change. But, I have to ask you to please rethink it if you would. Thank you.

MR. KIMMELMAN: Senator, I always change. That is the history of life.

SENATOR RUSSO: Senator Vreeland?

SENATOR VREELAND: The part that really intrigues me, as a layman and not being an attorney, Mr. Kimmelman, is the fact that one or two of those cases you quoted, the possibility of you as the Attorney General of this State going into court trying to prove that this law is unconstitutional, either voluntarily or maybe by subpoena, particularly in a case as you mentioned just a few minutes ago, would seem to me that that in itself would really be the end of the law, as far as any justice. I would assume that the court, if you were to go in there and testify and say that it is unconstitutional in your opinion, representing the State of New Jersey, as you do, would have a very adverse effect.

MR. KIMMELMAN: It would be bad, Senator - I appreciate the fact that you are a layman - but, they could never subpoena a lawyer to come in and give his opinion on the law, because the judge feels he knows the law. You never bring a lawyer in as an expert witness on the law itself, you see. It wouldn't happen that way.

SENATOR VREELAND: But, as the Attorney General, couldn't you be?

MR. KIMMELMAN: No, I could be subpoenaed.

SENATOR VREELAND: That's what I mean.

MR. KIMMELMAN: But not to give my opinion as to law.

SENATOR VREELAND: All right, let's take the other side of it, the voluntary.

MR. KIMMELMAN: That would not be a function of the Attorney General, to go into court and voluntarily say something. Although, in the Highway Authority vs. Sills case, an affidavit was filed by the Deputy Attorney General, on behalf of the Attorney General, saying that the Attorney General believes this statute is unconstitutional and will not defend it. But, the judge, if you read the opinion -- I didn't quote the entire opinion, because it goes on for page after page after page -- the judge really went into the case as if there was somebody defending it. In other words, the court took on the role of the defender, but nevertheless reached the same opinion as the Attorney General,

but only after a fair and exhaustive presentation of the case by the court.

SENATOR VREELAND: Thank you very much.

SENATOR RUSSO: Senator Dorsey?

SENATOR DORSEY: I would simply say at this point that I voted for Assemblyman Zangari's bill when it originally went through, I voted for Senator Orechio's motion to override. I would be most pleased if the Attorney General with his ultimate skill was defending the act. On the other hand, I absolutely understand his position here today. I think in terms of legislation, I think highly of the concept of a certain amount of independence on the part of the Attorney General. I think it is part of our system. I assume it has been part of our Constitution at least since 1947, if not from 1844.

I remember originally that the Attorney General had to be the first one confirmed by this Judiciary Committee because his position in the cabinet is different than anyone else's position in the cabinet. My understanding is, the others, except the Secretary of State, serve solely at the discretion of or at the pleasure of the Governor, and that is not his case.

I would think that the only point we might be concerned with here was if we had an Attorney General who had, during the last year, time and time again, issued a formal opinion, or issued an informal opinion, criticizing, condemning, or seeking to strike down acts of the Legislature. That is not the case. This is the first time in which, to my knowledge, he has indicated any disapproval of the act of the Legislature. I have to assume it is done based upon his best legal thinking. I might disagree with that. I think the system is probably good. It gives the Attorney General of this State the discretion to act independently of both the Governor and the Legislature, and probably works to the benefit of the State as a whole, and I would not be inclined to change, to attempt to change the part of the Constitution that would take away that discretion or seek in any way to overturn the cases which the Attorney General has read here today, giving him that discretion.

SENATOR RUSSO: Thank you, Senator Dorsey. Senator Orechio?

SENATOR ORECHIO: Mr. Chairman and members of the Committee, I think the Attorney General, by his presentation this afternoon, with the able assistance of Mr. Cole, has certainly demonstrated his knowledge of the law and his comprehensive understanding of the cases which he cited.

I also think I ought to make public the fact that even though I received numerous calls for the impeachment of the Attorney General, I want everyone to know that my confidence has been restored and that we should not consider any action on that. (laughter)

SENATOR RUSSO: Well, you got one vote against impeachment. I have one last question.

MR. KIMMELMAN: Senator, I am only concerned that someone is going to take this seriously. (laughter)

SENATOR RUSSO: Mr. Kimmelman, it's a heck of a question to ask you, but let's get the opinion of the office of the Attorney General. If it were to be the determination of the Legislature, or the Governor, that-- First of all, let me ask you this: If such discretion -- assuming you are correct and it exists -- is not of a constitutional basis, but rather a case law basis, is that right?

MR. KIMMELMAN: Correct.

SENATOR RUSSO: Okay. So, if one were to determine such discretion should not exist, the procedure is statutory and not constitutional, am I correct?

MR. KIMMELMAN: Correct.

SENATOR RUSSO: There is no question that there is nothing in the Constitution that would bar the legislative or executive -- either or both -- from determining the ambits of the Attorney General's discretion?

MR. KIMMELMAN: The Constitution does not define the powers and duties of the Attorney General. That is only defined by State statute. And, as the Court of Errors-- I guess it was just Vice Chancellor Jayne in the Chancery Court, in the Wilentz case, said, "The office of Attorney General was carried over from England upon the establishment of this State, and, he has all of the powers and duties except as may be modified by statute." Now, there is the answer to your question. Those powers and duties, with respect to the issue for today's meeting, have not been subject to modification.

Senator, one other thing. I think this is in fairness to the good relationship I have enjoyed with the Senate to date.

SENATOR RUSSO: You keep saying that. Are you expecting something? Do you have something in mind?

MR. KIMMELMAN: No. I expect it to continue. But, Senator Orechio will acknowledge that he and I did meet on Wednesday of last week, prior to the Senate vote.

SENATOR ORECHIO: That was a private meeting. I didn't disclose.

MR. KIMMELMAN: That's right. No. But, I want to say in fairness, Senator, you did know my thinking.

SENATOR ORECHIO: I did.

SENATOR RUSSO: No one accused him of having secret meetings with you and not telling us about it.

MR. KIMMELMAN: It was not a secret meeting, but it was out of my courtesy to your office and to you gentlemen, personally, that I did inform the President of the Senate of my intention.

SENATOR RUSSO: I think--

MR. KIMMELMAN: And, I would like to say that publicly.

SENATOR ORECHIO: That is a true fact. He did report to me.

SENATOR RUSSO: When you told me that, Mr. Kimmelman, I was busy and you tracked me down at an Ocean County Bar Association dinner in Atlantic City to make sure that I had the benefit of your views. I appreciated that. Of course, as I said at the beginning, we invited you here and you came. Mr. Kimmelman, I think we sort of explored the issues that we wanted to, resolved about what I thought we would, but, at least we all, I think, know what the issues are and what the different viewpoints are, and so does the public. One thing I would like to do at the conclusion of a matter of this type is to ask you -- especially since you came here voluntarily to help us -- if there is anything else you want to say. I don't want to cut you short from anything that we haven't covered.

MR. KIMMELMAN: Senator, I want to thank you for giving me this opportunity to be here today. I have the utmost faith in you, gentlemen, each and every one who is here. I do not regard what has taken place today or what was said in the newspaper, or what may be said after, as in any way personally reflecting upon me.

SENATOR RUSSO: Mr. Kimmelman, I can assure you that there won't be anything said that would reflect personally on you, and I hope there never has been. Senator Gallagher, do you have anything else?

SENATOR GALLAGHER: Just one thing to clear my mind. I assume, Judge, that you are saying to us that if you choose not to defend the State on this issue, that we are not precluded, the State, from having defense from another source? Is that what you are saying?

MR. KIMMELMAN: That is a fact.

SENATOR GALLAGHER: That is a definite fact?

MR. KIMMELMAN: Oh, yes, and it occurred with respect to the Legislative Oversight bill earlier this year.

SENATOR GALLAGHER: Okay. Thank you very much, and thank you very much for coming.

SENATOR DORSEY: Mr. Chairman, I just want to say one other thing. I suppose on Thursday evening, after a long session Thursday and a long session Monday, I was rather disturbed and annoyed that you were calling a session with an absolute mandate to be here. I want to say that when I told the judges of Morris County Court House that I had to go down to defend the Attorney General, I was excused forthwith. I want to say that I really enjoyed this today. This, I think, is the best session that we have had. I certainly want to thank the Attorney General for coming so very well prepared with his answers. I am certainly disappointed that some of my other colleagues were not here today, because I think they would have equally enjoyed it.

SENATOR RUSSO: Mr. Kimmelman, thank you very much, and thank you, gentlemen. We stand adjourned.

(Hearing Concluded)

State of New Jersey



I, IRWIN I. KIMMELMAN, do solemnly swear (or affirm) that I will support the Constitution of the United States and the Constitution of the State of New Jersey; that I will bear true faith and allegiance to the same and to the Governments established in the United States and in this State, under the authority of the people; and that I will faithfully, impartially and justly perform all the duties of the Office of the Attorney General of the Department of Law and Public Safety of the State of New Jersey according to the best of my ability. So help me God.

Irwin I. Kimmelman
 IRWIN I. KIMMELMAN

Sworn and subscribed to
 before me this 19th day of
 January, A.D. 1982

FILED
 JAN 20 1982

[Signature]
 C.V.

Jane Burgio
 SECRETARY OF STATE

