

STATEMENT OF WITNESS

(Criminal Procedure Rules, r. 27.2;

Criminal Justice Act 1967, s. 9, Magistrates' Courts Act 1980, s.5B)

STATEMENT OF ERIC L. LEWIS

Age of witness (if over 18, enter "over 18"): Over 18

This statement (consisting of 5 pages) is true to the best of my knowledge and belief and I make it knowing that, if it is tendered in evidence, I shall be liable to prosecution if I have wilfully stated in it anything which I know to be false, or do not believe to be true.

1. My name is Eric Lewis, and I am a partner in the U.S. law firm Lewis Baach Kaufmann Middlemiss pllc. I previously submitted a report in this matter on October 18, and a subsequent supplement dated December 18, 2019. I have been requested to submit a brief additional supplement to address the significant recent comment from scholars and in the media regarding the unique role played by William Barr as the current US Attorney General in both the political sphere and in asserting wholly untested theories of a "unitary executive," in which the President's powers to participate in investigations and to assert privileges to frustrate the role of coequal branches are virtually unlimited. I would note in this regard that Attorney General Barr's articulation of deeply partisan ideology and of unprecedented Presidential power is not simply a matter of normal political disagreement, but rather reflects a broad consensus that what is occurring at present is quite unprecedented and destabilizing of the Constitutional order.
2. Both law and custom dictate the independence of the DOJ and the FBI. The only explicit power of the President in respect of criminal prosecutions and investigations is the power to issue pardons. U.S. Const., art. II, § 1. Investigations are supposed to be apolitical; Congress permitted directors of the FBI to serve a term of 10 years, which is longer than anyone one President can be in power. The Office of the Attorney General has long-standing protocol that strictly limits communications with the White House concerning pending criminal or civil-enforcement matters. This protocol was developed by President Jimmy Carter after President Nixon interfered with the investigation of his own conduct, and unsuccessfully ordered the Attorney General and the Deputy Attorney General to fire the special prosecutor. In an episode called the "Saturday Night Massacre", each refused to do so and resigned instead. President Carter resolved to institute procedures and insulate the DOJ from political pressure. These policies have traditionally been reflected in memoranda from Attorneys General.
3. For instance, a 2007 Memorandum from the Attorney General to the Department of Justice recited the long-standing protocol that the Department "will advise the White House about such criminal or civil-enforcement matters only where it is important for the performance of the President's duties and where appropriate from a law enforcement perspective" in order "to ensure that there is public confidence that the laws of the United States are administered and enforced in an impartial manner."

<https://www.justice.gov/sites/default/files/ag/legacy/2008/04/15/ag-121907.pdf>. For this reason, the DOJ instructs that any communications to the White House should be directed only to Counsel or Deputy Counsel to the President. Attorney General Alberto Gonzales, who served under President George W. Bush, modified the guidelines to catastrophic effect; he resigned in disgrace after it was discovered that he had fired seven US Attorneys for failure to impede investigations of Republicans or to initiate investigations that would damage Democrats. As a sign of very different times, calls to fire Gonzales came from Democratic and Republican legislators alike.

4. Beyond severely limiting communications between the White House and the DOJ, the political independence of federal agencies is further guaranteed by laws endowing career civil servants with labor rights. These laws are intended to ensure that non-political employees are not fired for political reasons and are insulated from the political whims of the President.
5. This president has disregarded those laws. Last year, President Trump fired FBI Deputy Director Andrew McCabe; Mr. McCabe has filed a lawsuit in response. President Trump has publicly stated that he believes that he has “the absolute right to do what I want to do with the Justice Department” and the report by Special Counsel Robert Mueller identified numerous potential incidents of obstruction of justice by President Trump and his administration in connection with the investigation of Russian interference with the U.S. 2016 presidential election. President Trump has also issued three executive orders that make it easier for him to fire career civil servants.
6. William Barr’s tenure as the Attorney General also represents a stark departure from the cherished tradition of DOJ independence. I would refer to a lengthy article entitled “William Barr, Trump’s Sword and Shield,” by David Rohde in the January 20, 2020 edition of the New Yorker, which appeared on the website earlier this week. <https://www.newyorker.com/magazine/2020/01/20/william-barr-trumps-sword-and-shield>. Mr Rohde is a well-respected, mainstream journalist who is an executive editor and the online news director for the New Yorker. He won the Pulitzer Prize for International Reporting in 2009. He was also kidnapped by the Taliban in Afghanistan in 2008 and spent seven months in captivity before escaping in June 2009.
7. In the article, Rohde describes Barr’s frequent assertions in public forums that progressives are “shredding the Constitutional order,” and blamed secularism for the decline in American life, the rise of homosexual rights, drug addiction, crime and an assortment of other maladies. It is wholly unprecedented for a sitting Attorney General to participate as an aggressive ideological combatant in such partisan political and cultural disputes. It is equally unprecedented for an Attorney General whose role is to render impartial justice irrespective of political or ideological views to assert such polarizing public positions.
8. Attorney General Barr has also directed an investigation into the FBI’s conduct during the 2016 election in investigating Russian collusion with the Trump campaign, has criticized the Department of Justice Inspector General’s own conclusions that the FBI’s conduct was not ideologically motivated, has appointed a sitting

US prosecutor, John Durham of Connecticut, to conduct a parallel investigation into the same subjects and Barr has traveled the world with this prosecutor looking into a variety of widely discredited theories of Ukrainian and other interference on behalf of the Clinton campaign.

9. It is extremely unusual for an Attorney General to challenge the conclusions of his own Inspector General. Equally, it is extremely unusual for an Attorney General to appoint someone to investigate matters that effectively overlap with the Inspector General's inquiry, the Inspector General viewed as a non-political and non-partisan official with broad remit to investigate any charges of misconduct. In my 35 years of practice, I am not familiar with such events occurring.
10. William Webster, a widely respected former appellate judge, a lifelong Republican and the only person ever to serve as Director of both the CIA and the FBI, under Presidents of both parties, recently decried Attorney General Barr's undermining of the FBI's independence, writing in the New York Times, "The country can ill afford to have a chief law enforcement officer dispute the Justice Department's own independent inspector general's report and claim that an F.B.I. investigation was based on "a completely bogus narrative." Webster wrote, "This difficult moment demands the restoration of the proper place of the Department of Justice and the F.B.I. as bulwarks of law and order in America. This is not about politics. This is about the rule of law. Republicans and Democrats alike should defend it above all else."
<https://www.nytimes.com/2019/12/16/opinion/FBI-Trump-russia-investigation.html>.
11. Rohde also addresses in the New Yorker article the issue of Barr's highly unusual position with respect to executive power and the President's role in the investigatory function: "Attorney General Barr also maintains that Article II of the Constitution gives a President control of all executive-branch agencies, without restriction; in practice, this means that Trump would be within his rights to oversee an investigation into his own misconduct. (Throughout the House's impeachment inquiry, Trump dismissed subpoenas for documents and testimony from Administration officials—a step taken by no other President.)"
12. Rohde interviewed Donald Ayer, who served as Deputy Attorney General under President George H. W. Bush, when Barr was also serving, who said, "They take the position that they don't even have to show up. That's totally outrageous. It's denying the legitimacy of another branch of government in the name of executive supremacy." Ayer described Barr's ideas about Presidential power as "chilling" and "deeply disturbing."
13. To similar effect, a group of senior Republicans, many former high officeholders in the U.S. Government, including a former US Solicitor General, have formed a group called Checks and Balances. The group has stated that Barr's view of overarching executive power "has no factual basis" and that Barr has eliminated the requirement that the executive branch must act "under law."
<https://www.nytimes.com/2019/11/22/us/politics/barr-critics.html>

14. I submit this declaration not to engage this tribunal in issues regarding Department of Justice prosecutorial policy or decisions. I have worked with the Department through administrations of both parties throughout my career, including with Attorney General Barr and Robert Mueller on the BCCI matter. The issue here is quite different and those differences bear upon the prosecution in this case. We appear to have an Attorney General who demonstrates extreme personal and political loyalty and deference to the President, who has an extreme view of government secrecy prerogatives, especially in the national security area, and has an extreme view of Presidential power and how it trumps Justice Department independence and discretion. The situation has few if any historical parallels, except perhaps with John Mitchell and Richard Kleindienst who served as Attorneys General during the Nixon administration (and both later went to jail).
15. As I pointed out in my original declaration, Ms Chelsea Manning was prosecuted for appropriating government secrets and sharing them with Mr Assange; Mr Assange was not prosecuted at that time, despite the fact that the government was well aware of his alleged involvement. This reflects a prosecutorial decision not to press charges because of the precedent it would set for targeting publishers and journalists. Officials from the DOJ under the Obama Administration confirmed that their view of the law could not support a prosecution without resulting in a disparate application of the relevant statutes. Per a DOJ spokesman in 2013, explaining the decision not to prosecute Mr Assange, "if you are not going to prosecute journalists for publishing classified information, which the department is not, then there is no way to prosecute Assange." https://www.washingtonpost.com/world/national-security/julian-assange-unlikely-to-face-us-charges-over-publishing-classified-documents/2013/11/25/dd27decc-55f1-11e3-8304-caf30787c0a9_story.html.
16. That Mr Assange is now being prosecuted under President Trump's DOJ strongly suggests a political motivation; none of the applicable laws have changed between administrations. Mr Barr's own views are likely to have had and will continue to have significant impact on the treatment of Mr Assange's case and his ability to obtain a fair trial, an issue which I would be pleased to address in further detail in my testimony.

Eric L. Lewis
Lewis Baach Kaufmann Middlemiss pllc
1101 New York Avenue NW
Suite 1000
Washington DC 20005
Tel. +1 202 833 8900
Eric.lewis@lbkmlaw.com

Eric D. ...

Signed: ... _____

Date: January 17, 2020