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July 14, 2013: Political Grandstanding on Gay Marriage

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Title: Political Grandstanding on Gay Marriage

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7/14/2013—This week Pennsylvania Attorney General Kathleen Kane announced that her office would not defend Pennsylvania's ban on same-sex marriage because she could not do so in good conscience. Now I believe I am as much in favor of gay marriage as Kathleen Kane—in fact I would guess that I have supported it publicly longer than she—but I do not see this decision is any kind of victory for gay rights. It seems to me a victory for hypocrisy and the misuse of public office for partisan purposes. The office of Attorney General in Pennsylvania is essentially a creature of statute. The Attorney General is independently elected but the office seems to lack any constitutional authority in terms of law enforcement. This means that to know the responsibilities of the Attorney General, you have to look at the Commonwealth Attorneys Act. That statute provides that the Attorney General shall uphold and defend the constitutionality of all statutes. There are two sort of exceptions to this rule. For one thing, no one should defend a statute that has been overturned by a court of competent jurisdiction and that is so provided in the statute. But whatever one thinks of bans on Gay marriage, such bans have clearly not been held unconstitutional in the Third Circuit or by the US Supreme Court. So this exception simply does not apply. Kane is attempting to utilize a second exception to her obligation to defend statutes. The act also provides that the Attorney General may refer a case to the Office of General Counsel, which is located in the office of the Governor, when doing so is more efficient or is otherwise in the best interest of the Commonwealth. Kane claims that this amounts to sole discretion to refer a case to the Governor's Office. But this is not so. While no court is likely to take a case because of the breath of the Attorney General's discretion, that discretion is still limited by law. In this instance, it is not in the best interest of the Commonwealth for the Attorney General to refer the case to the Office of General Counsel. It is simply in the Attorney General's best interest. What really bothers me about this situation is that criticism of the Attorney General has come from people who support the ban on gay marriage, whereas support has come from people who favor gay marriage. It is as if the process issue of faithfully carrying out the responsibilities of your public office does not matter at all. If Attorney General Kane has a crisis of conscience over defending the laws of Pennsylvania, then the honorable course would be to resign.