

Re: House Bill 857—Office of the Attorney General--Independent Investigation Division—Authority to Prosecute

To Chair Clippinger, Vice Chair Moon, and Members of the Judiciary Committee:

I am writing in support of the pending bill that would grant prosecutive authority in serious police excessive force cases to the Independent Investigative Division in the State Attorney General's Office. My support for this bill is based on observations made in my more than three decades as a prosecutor.

For much of the 1980s, I had the privilege of working under Howard County State's Attorney William (Bill) Hymes, serving as an Assistant State's Attorney, prosecuting cases in both the District and Circuit Courts. Bill was a kind man of great integrity who, in my experience, always tried to do right by the law, as well as by the voters who repeatedly and overwhelmingly voted him into that office. He was also a close and trusted ally of local law enforcement, and he encouraged his prosecutors to work as a team with the Howard County Police. Indeed, we could not properly do our jobs as prosecutors if we didn't develop friendly relations with the local officers, as we frequently needed those officers when going to court—for interviewing witnesses, visiting crime scenes, or simply preparing the officer for her or his testimony. And, naturally, because the officers were "co-workers" in a very real sense, the contacts were not merely professional; many of colleagues frequently participated in tournaments with local police officers; there were softball games and parties; and as I was then young, my colleagues and I would see and socialize with local officers in the bars and clubs in and around Howard County. During my time in that office, two of my fellow ASAs were married to troopers from the nearby State Police barracks, a natural outcome when people work together. These close connections were inevitable and entirely positive, engendering a sense of shared mission in the pursuit of criminal justice. Though I haven't been involved in the local legal community for over thirty-five years—and am aware that the county prosecutor's office and police department are now both larger and even more professionalized—they must, for the good of the community, still operate hand in glove.

When I left my job in Howard County, I began a thirty-year career as a federal prosecutor with the Criminal Section of DOJ's Civil Rights Division. Much of the work of that Section involved the investigation and, when appropriate given the law and the evidence, the prosecution of police officers and other law enforcement officials for the use of excessive force. My colleagues and I traveled all over the country, and I prosecuted excessive force cases in over thirty states. I quickly learned that Maryland was not unique in its close working relationship between prosecutors and the police; in jurisdictions large and small, North, South, East, and West, I saw numerous examples of this interconnectedness. At times, it was apparent that these relationships colored the way local prosecutors approached excessive force situations, so that cases were declined when the law and the evidence suggested that the matter should be pursued. Often, the bias in favor of the accused officer(s) was entirely unconscious, the product of a pro-police mindset that under normal circumstances made that prosecutor effective. There was, however, sometimes the converse of this pro-police bias, where there was tension and even disdain between an elected prosecutor or assistant prosecutors and her or his local police departments. In these situations, police officers could be unfairly prosecuted when neither the law nor the facts

supported it, with calamitous results, causing harm not only to the officers charged, but to the community at large.

Our Section at DOJ was not perfect, nor unerring in our analysis of these difficult issues or in how we prosecuted these cases. But we were independent, by dint of our distance from the place where the matter occurred, the lack of any relationship with either subject or alleged victim, and a specialized focus on the relevant law. Some argue that it is better to have elected prosecutors—who are, naturally, more responsive to the community—make these prosecutive decisions. Community sentiment, whether it be pro or anti police, should not be determinative as to the merits of a police excessive force case. What is important, however, is the public perception that prosecutive decisions in police cases are made by an independent entity.

I am not suggesting that Maryland's elected county prosecutors consciously fail to make sound and ethical decisions in these cases. In fact, I believe we are lucky to have a first-rate criminal justice system, helmed by some extraordinary individuals, who, like my late boss, Bill Hymes, are committed to fairness. My view that it is better to have these cases handled by independent decision makers in the AG's Office is entirely structural rather than personal. Maryland, like most states, is a patchwork of jurisdictions, some very small, others immense, rural and urban, conservative and liberal, so that the elected officials in each county will necessarily reflect the worldview of its electorate. Whether a police officer should be charged with a crime for something that occurred while on duty should not be influenced by that region's worldview. The standards for the prosecution of police cases in Maryland must be uniform, applying the same legal and factual analysis, no matter whether the incident occurred on the Eastern Shore or in Baltimore City. Accordingly, it is preferable to have those decisions made by an independent office with statewide jurisdiction, under the supervision of an official elected by all the voters of Maryland.

Finally, there is the question of expertise. Again, while we have gifted and experienced prosecutors throughout our state, when a local prosecutor is called upon to assess whether a serious police excessive force case should be prosecuted, it may be the first time she or he has had to make that call. Thus, that person may not have had the benefit of having handled similar cases when directing the investigation and weighing the law and evidence. Police excessive force cases are simply not like other cases: they require a deep understanding of the (often complex) law, the appropriate investigative techniques (which may sometimes necessitate confrontational interviews with witness officers), and the use of expert testimony that may be the key to a successful outcome. An independent prosecutor will have the experience and the careful focus required in these difficult cases.

For the above reasons, I favor the pending bill. I hope these comments have been helpful.

Sincerely,

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