

PUBLIC INTEREST

— LEGAL FOUNDATION —

May 7, 2021

The Hon. Karen Fann
President
Arizona State Senate
1700 West Washington Street, Room 205
Phoenix, AZ 85007

RE: DOJ Concerns for Maricopa County Audit

Dear Senate President Fann:

We write today regarding a recent letter from Principal Deputy Assistant Attorney General Pamela S. Karlan. We represent the Board and staff of the Public Interest Legal Foundation with more than 30-years' experience working as attorneys for the Civil Rights Division for the U.S. Department of Justice. We offer detailed insights into the author of the letter and the actual powers of the office she holds. The Public Interest Legal Foundation (PILF) is a nonprofit law firm exclusively dedicated to election integrity that also promotes common-sense reforms that preserve the Constitutional framework of American elections.

Put simply, Pam Karlan is an ideological extremist with a long history of partisan enforcement of civil rights laws as well as rank scholarly dishonesty.

The May 5 letter¹ wants you to believe the Justice Department is engaging in a normal exercise of federal power under federal voting law. It is not.

First to Principal Deputy Assistant Attorney General Karlan's history of ideological extremism and partisan enforcement of the law.

For starters, Karlan has played a central role in the censorship of conservatives during her time on the Facebook "oversight board."² The business of the board was to purportedly throttle speech that contained falsehoods but in practice was a body that censored speech and hid from public view genuine vulnerabilities in our election system.

This may remind you that it was actually Karlan who drew public ire from First Lady Melania Trump after Karlan made an insensitive and tasteless joke about the name of President Donald Trump's adolescent son while acting as a witness for the first impeachment effort against President Donald J. Trump.³

¹ <https://assets.documentcloud.org/documents/20698904/doj-letter-to-fann-5-5-21.pdf>

² <https://oversightboard.com/>

³ *New York Post*; Facebook's new oversight board member made joke about Barron Trump during impeachment (May 7, 2020), <https://nypost.com/2020/05/07/facebook-board-member-pamela-karlan-joked-about-barron-trump-at-impeachment/>

Karlan has published false scholarship, and for the last decade, has refused to correct it. In the *Duke Journal of Constitutional Law and Public Policy* she falsely published that “for five of the eight years of the Bush Administration, [they] brought no Voting Rights Act cases of its own except for one case protecting white voters.”⁴ Karlan’s scholarship was false. Karlan claimed that no cases were brought by the Bush DOJ under the Voting Rights Act to protect racial minorities in five of eight years (except of course to protect those undeserving whites).

Yet the record shows that numerous cases were brought under the Voting Rights Act to protect non-white racial minorities in *all eight years* of the Bush administration. You can learn more details of her false scholarship detailing the seventeen lawsuits brought by the Bush DOJ under the Voting Rights Act to protect racial minorities at:

- <https://pjmedia.com/jchristianadams/2019/12/04/dishonest-witness-pam-karlan-latest-act-at-impeachment-circus-n124187>.

This false scholarship was even brought to the attention of Congress in testimony provided to the House of Representatives. Editors of the Duke University publication said it was incumbent on Karlan to retract her false scholarship, something she has not done. Karlan also did her best to try to overturn the voter fraud convictions of individuals who tried to defraud black voters in an election in Greene County, Alabama in 1994, as outlined in *U.S. v. Smith*, 231 F.3d 800 (11th Cir. 2000). Fortunately for the minority voters of Greene County, she was unsuccessful.

Karlan’s propensity to exaggerate is now affecting Arizona.

Second, her letter to you is completely wrong on the law.

Her May 5 letter exercises a non-existent federal authority to conduct oversight over the audit process outlined and directed by the Arizona courts. The letter further wrongly suggests the Maricopa Recorder’s Office simply surrendered all pertinent election records to a private party without proper retention and archiving procedures in place. In reality, the Superior Court of Arizona found the legislative subpoenas governing the handling of the election document in question were proper and lawful.⁵

The May 5 letter further exaggerates the reach of 52 U.S.C. §§ 20701-20706. She says that if proper safeguards are not being deployed for the records, the Justice Department can assert federal power over Arizona. Wrong. The purpose of 52 U.S.C. §§ 20701-20706, (former 42 USCS §§ 1974 et seq). is investigatory in nature. *See eg., Kennedy v. Lynd*, 306 F.2d 222 (5th Cir. 1962), *cert. denied*, 371 U. S. 952 It exists to help the Attorney General in determining the advisability of commencing possible investigations of federal election offenses. If there is no underlying potential voting rights violation, any exercise of this power is not authorized and is a brazen abuse of power.

Conducting an audit of a past election does not violate the Voting Rights Act or any other federal election law. In fact, the Justice Department has never – in the entire history of the existence of the Civil Rights Division – interfered in or investigated an election audit because its past leadership has understood it has no legal authority to do so.

⁴ Pamela S. Karlan, “Lessons Learned: Voting Rights and the Bush Administration,” 4 Duke J. Const. L. & Pub. Pol’y 17 (2009).

⁵ <https://assets.documentcloud.org/documents/20492775/maricopa-county-v-fann-superior-court-ruling-2-26-21.pdf>

In the event that your office responds to Karlan's inappropriate and unjustified letter, you might ask Karlan if an actual investigation exists beyond her perusals of the *Arizona Daily Star* and CBS-Phoenix reports.

Karlan's inference that Section 11(b) of the Voting Rights Act is implicated is also wrong. Section 11(b) prohibits the direct intimidation, threat or coercion of voters. Here, the voters have long since voted – the act of voting was months ago. It is not possible that Section 11(b) can be implicated by the audit. Karlan is offering an absurd and implausible interpretation of Section 11(b) of the Voting Rights Act – one intended to intimidate you – that no court could possibly uphold as correct.

What Karlan also knows, and does not include in her letter, is that the weight of authority is overwhelmingly against applying Section 11(b) to Arizona's audit. The Department does not have a successful track record in attempts to bring Section 11(b) claims. The Department even lost a case under Section 11(b) when the election official was threatening voters with arrest if they attempted to vote and published their names in the newspaper. *U.S. v. Ike Brown*, 494 F.Supp. 440, 476 (S.D. Miss. 2007). In another case, the Justice Department during the Obama administration (when she also served in the Department) dismissed Section 11(b) claims against the New Black Panther Party even when armed and uniformed members stalked a polling place.

It is against this backdrop of failure and ideological law enforcement that Karlan now threatens you.

The bottom line is this: Principal Deputy Assistant Attorney General Pam Karlan is doing the bidding of, and acting as a surrogate for, the Democratic Party, not as an objective law enforcement officials and representative of the U.S. Department of Justice. She is engaging in a partisan abuse of power well outside the traditions of the Department as well as the delegation of power under federal statutes and the controlling legal authority governing those statutes.

We urge you to resist and oppose this abuse of power and we stand ready to discuss this matter further and share additional insights as to how Arizona is being unfairly targeted by the Biden Justice Department in a partisan, politically-motivated abuse of its law enforcement powers.

Sincerely,



J. Christian Adams
President and General Counsel
Public Interest Legal Foundation



Maureen Riordan, PILF Litigation Counsel

CC: Glenn McCormick, Acting United States Attorney for the District of Arizona
Mark Brnovich, Arizona Attorney General
Katie Hobbs, Arizona Secretary of State
Stephen Richer, Maricopa County Recorder