THE ATTORNEY GENERAL OF THE UNITED STATES. THE HISTORY OF THE OFFICE FROM THE VERY BEGINNING TO 1870

Paweł Laidler

The Attorney General of the United States heads the Department of Justice, one of the executive departments of the government's administration. He is the "chief law officer of the nation," responsible for governmental litigation, legal advising to the President and federal law enforcement. Many various legal and political powers given to the officer put him in a difficult position while exercising his duties. In this meaning, the Attorney General is a unique officer in the governmental structure – legal in nature, and political in reality. The aim of this paper is to present the formation of the office of the American Attorney General till the creation of the Department of Justice. The office – like many other institutions in the United States – has its genesis in the English Attorney General established over 600 years ago.

In the Middle Ages, the English king had attorneys, serjeants and solicitors to perform some of the functions of the modern Attorney General. Before the thirteenth century, the king appointed special attorneys to prosecute criminal cases. These counsels had only limited authority and were empowered to represent the Crown in a specified court, or for a specified period of time.[1] The actual title "attorneys general" was mentioned for the first time in 1398, in reference to general attorneys appointed by noblemen to act in all future suits in any of various English courts. Their major responsibility was to prepare legal briefs[2] and appear in court in the name of the king. During the fifteenth century kings began to appoint attorneys to serve only for the Crown, which tied them closely to the executive. An indication of the growing meaning of the office occurred in 1461, when the official title of "Attorney General for the King" was used for the first time. It was at this point that the attorney general became indispensable for the Parliament. It became his respon-

[1] B. Manning, *Federal Conflict of Interest Law*, Harvard University Press, Massachusetts 1964, p. 11.

[2] The term 'legal brief' can mean an appellate brief or student brief. An appellate brief is a written legal argument presented to an appellate court. Its purpose is to persuade the higher court to uphold or reverse the trial court's decision. Briefs of this kind are therefore geared to presenting the issues involved in the case from the perspective of one side only. A student brief is a short summary and analysis of a case prepared for use in classroom discussion. It is a set of notes, presented in order to sort out the parties, identify the issues, ascertain what was decided, and analyze the reasoning behind decisions taken by the courts. – J.R. Re, E.D. Re, *Brief Writing and Oral Argument*. Oceana Publishing Co., New York 1987.

sibility to take the bills from the House of Lords to the House of Commons and put them in workable shape.[3]

It seems that the reception of Roman law influenced the development of the English attorney general. Although the common law system, based on precedents and *stare decisis*, was the main legal system in England, the provisions of Roman law replaced some of the common law rules. Medieval common law was in some respects becoming obsolete, since it mostly concerned issues of land property and ownership.[4] This is why kings began to turn to lawyers, who were specialists in modern law, for their opinions. The role of kings' serjeants diminished and the attorney general became the main lawyer of the country. Besides serving the Crown, he became also the chief legal adviser of the government, and was very active in policy-making in the House of Commons.[5] It was at this time that a similar office began to emerge in the American colonies.

Basically, the powers and duties of an American attorney general were those of the attorney and the solicitor general of England. These officers appeared in the courts on behalf of the Crown and gave legal advice to all executive departments of the colony.[6] They not only represented their government in the tribunals of justice, as a private counsel appears for private clients, but as a practical matter they determined what criminal or civil cases should be instituted, whom to sue, and how to defend cases against the government. The main activity of the American attorney general was within the court.[7] The colonial attorney general was engaged in activities ranging from preparing indictments on charges of murder, theft, mutiny, sedition,[8] and piracy, through appearance before the grand jury, to acting against individuals for disturbing a minister in his service. He worked closely with the courts and made recommendations, suggesting the creation of new courts and appointing attorneys for the country courts.[9]

In the eighteenth century the English government took sudden interest in the colonial attorneys general. It was proposed that America would be divided into sev-

---

[3] N.V. Baker, *Conflicting Loyalties: Law and Politics in the Attorney General's Office 1789–1990*, University Press of Kansas, 1992, pp. 38–39.

[4] A.R. Hogue, *Origins of the Common Law*, Liberty Fund, Indianapolis 1985, p. 112.

[5] N.V. Baker, *Conflicting Loyalties...*, *op.cit.*, pp. 39–40.

[6] Richard Lee was the first attorney general of Virginia, appointed in 1643, and in 1650 the General Court of Rhode Island appointed an attorney general and solicitor for that colony. In 1704 the Assembly of Connecticut directed the appointment in each county of "a sober, discrete and religious person to prosecute and implead the laws." – L.A. Huston, A.S. Miller, S. Krislov, R.G. Dixon, jr., *Roles of the Attorney General of the United States*, American Enterprise Institute for Public Policy Research, Washington, D.C. 1968, p. 3.

[7] H. Cummings, C. McFarland, *Federal Justice: Chapters in the History of Justice and the Federal Executive*, DaCapo Press, New York 1970, pp. 10–12.

[8] Sedition was to become a very important issue in the first years of governing the United States. The Federalist Party controlled the national government and used its powers for partisan purposes, one of which was *The Sedition Act* – it punished those who spoke against the Federalist government. – J.E. Nowak, R.D. Rotunda, *Constitutional Law*, West Group, St. Paul Minnesota: 2000, p. 1.

[9] National Association of Attorneys General, *The Report on the Office of the Attorney General*, Government Printing Office, D.C, February, Washington 1971, p. 15.

eral districts, with an advocate general in each, appointed by the king and not by the colonial governors. The office of advocate general was to be combined with the office of attorney general, and royal interests would be served in admiralty and regular courts. But the plan wasn't fully implemented – only the provision concerning the procedure of appointment of attorneys general by the king came into life.[10]

At first colonial attorneys general were more occupied with arguing cases than giving advice to the government, but they also were legal advisers. Some of their legal advisory duties focused only on judicial issues – in Maryland the officer advised the court on technical legal questions and could influence the creation of new courts in the colony. On other occasions they were rather policy advisers who gave opinions to colonial governors, councils or legislatures. In New York, for example, the attorney general advised the governor on such topics as revenue laws or the desirability of making a town a free port.[11] It's easy to notice that these advisory duties differed, evidenced in the wide range of activities the officers were occupied with. In a few colonies the attorney general had an assistant in the solicitor general who shared his work. As the colonies increased in wealth and population and the sessions of the courts became more frequent, a new office was created – the deputy of the attorney general.[12] All of these offices were created to help the colonial legal advisers in their increasing duties.

We can say that there was a coherent system of legal officers in the colonies by the time of the Declaration of Independence. The system of attorneys general, solicitors general and local attorneys lasted in the colonies and later in particular states. These offices were established either by state constitutions or by statutes. Although the attorney general's duties were mostly undefined, we can say they were based on aspects of common law, colonial customs and legislation.[13]

Under the articles of Confederation there was no office of attorney general, though it existed in most states. The Continental Congress considered establishing the office in 1781, presenting a resolution which stated: "that an Attorney General for the United States be appointed by Congress, whose duty shall be to prosecute all suits on behalf of the United States, to give his advice on all such matters as shall be referred to him by Congress. And when any case shall arise in any of these states, where his personal attendance is rendered impracticable, he shall be authorized to appoint deputies to prosecute the said suit."[14] The resolution wasn't taken into consideration and such an office wasn't created at that time.

The Constitution of 1787 didn't mention anything about the attorney general. But there are a few provisions in the Constitution which gave a basis for the future crea-

---

[10] O.W. Hammonds, *The Attorney General in the American Colonies.* "Anglo-American Legal History, Series 5.1," New York University School of Law, no. 3, 1939, pp. 8, 21–22.

[11] N.V. Baker, *Conflicting Loyalties...*, *op.cit.*, p. 41.

[12] This office was created in New York, New Jersey, Delaware, Pennsylvania and Maryland. – H. Cummings, C. McFarland, *Federal Justice...*, *op.cit.*, pp. 12–15.

[13] R.W. Cooley, *Predecessors of the Federal Attorney General: The Attorney General In England and American Colonies.* "American Journal of Legal History," vol. 2, 1958, pp. 311–312.

[14] U.S. Congress, *Journals of the Continental Congress*, Government Printing Office, Washington, D.C. 1912, p. 155.

tion of the office. Article II, concerning the powers of the executive branches of government, mentions "principal officers of the Executive Departments, who shall give opinions to the President, upon any subject relating to the duties of their offices." It also allows the President to "appoint all officers of the United States, whose appointments are not provided for, and which shall be established by law." The Constitution, in Article III, states that "the judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as Congress may ordain and establish." The Founding Fathers were aware of the fact that the country should have an institution which would represent the federal government before the courts, and which could give legal advice to the President. This is why Congress decided to create the office of the Attorney General of the United States, which was established by its first important Act.

The Judiciary Act of 1789 created a system of federal courts and defined their jurisdiction. The federal judicial system consisted of three instances: the Supreme Court, circuit courts and district courts. Moreover, there was a part of the Act which concerned the office of the Attorney General. Section 35 stated that "there shall be appointed a meet person, learned in the law, to act as Attorney General for the United States, who shall be sworn or affirmed to a faithful execution of the office."[15] The officer was designated to:

- prosecute and conduct all suits before the Supreme Court in which the United States was concerned;
- give legal advice and opinions to the President and heads of the executive departments.

Congress created a single office of the Attorney General which became the fourth[16] cabinet member in the President's administration. From the very beginning the officer acted as a legal adviser to the heads of the executive departments, but his most important job concerned legal aid to the chief executive. The new attorney general was dependent on the President, who – besides power to appoint – could remove him from the office without a reason, whenever he wished to.

Edmund Randolph, a lawyer from Virginia, became the first Attorney General of the United States. He was chosen by President Washington because of his experience gained in the office of State Attorney General, and because of his leading role during the creation of the Constitution.[17] One of the major problems which faced Randolph in the early years of his tenure was lack of authority over district attorneys. Congress directed the Attorney General, in 1790, to recommend revisions of the Judiciary Act. Randolph's response made two basic recommendations: he asked

---

[15] *Judiciary Act 1789*, 1 Stat. 73., sec. 35.

[16] Congress has earlier established three executive departments: the Departments of State, War and Treasury. There was also the Office of the Postmaster General. – L. Fisher, *Politics of Shared Power. Congress and the Executive*. Texas A & M University, 1998, pp. 112–115.

[17] During the Constitutional Convention, Edmund Randolph submitted Virginia proposals, which included a provision that authorized the national legislature "to legislate in all cases to which the separate States are incompetent or in which the harmony of the United States may be interrupted by exercise of individual legislation." The Convention adopted this resolution while it rejected other resolutions that indicated more limited powers for the national legislature. – J.E. Nowak, R.D. Rotunda, *Constitutional Law*, *op.cit.*, p. 135.

Congress to provide funds for a clerk to transcribe his opinions and correspondence; he also recommended to grant him authority over the federal district attorneys and marshals. Congress, torn over the issue of centralizing federal legal machinery, ignored both requests.[18] In reality, Randolph's principal concern was the lack of a "fixed relation" with the district attorneys – he not only had no power to direct district attorneys in their lower court litigation, he was not even certain whether he would be aware of all litigation concerning the interest of the United States. Indeed, many observers believed that Secretary of State Jefferson had more control over the district attorneys than Randolph did.[19]

Randolph's successors didn't treat the office of the Attorney General seriously. It was more important for them to control their private law practice than to fulfill office duties. We can say that, in the beginning, the office of the Attorney General of the United States was a part-time job. Some ideas to change this situation occurred when James Madison became the President.

In 1814 Madison proposed legislation requiring the Attorney General to "keep his office at the seat of government during the sessions of Congress." At the same time, his Attorney General Charles Pinkney threatened to resign because of the residence requirement. Congress did not pass the law and Pinkney abandoned the office. His successor, Richard Rush, pledged to reside in Washington when Congress was in session.[20] Two years later, the President advocated making the position full-time, with rank and salary equal to the other department heads. But no bill was passed at that time.[21] His successor, James Monroe, pushed for greater resources in 1817, explaining to one Congressman: "The office has no apartment for business, nor clerks, nor a messenger, nor stationery, nor fuel allowed. These have been supplied by the officer himself, at his own expense." Finally the plea met some success. Congress provided funds for a clerk in 1819, and in 1820 funds for a messenger and $500 a year for expenses. Then, finally, the Attorney General was given an office. However, his salary was below that of other cabinet members till 1853.[22] William Wirt was the first Attorney General to comprehend the need for an administrative structure. He proceeded to establish a system of keeping records and filing copies of his correspondence, as well as official opinions.[23] Thanks to Wirt, all of the opinions of former Attorneys General were gathered into an official volume, called "*Official Opinions of the Attorneys General of the United States.*"[24]

---

[18] G.T. Kurian, *Historical Guide to the U.S. Government*, Oxford University Press, New York 1998, p. 349.

[19] S.L. Bloch, *The Early Role of the Attorney General In Our Constitutional Scheme: In the Beginning There Was Pragmatism*, "Duke Law Journal," no. 3, 1989, pp. 585–586.

[20] Cushing was the first to reside full-time at the seat of government. Huston, M., Krislov, D., jr., *Roles of the Attorney General of the United States, op.cit.*, p. 6.

[21] H.B. Learned, *The Attorney-General and the Cabinet.* "Political Science Quarterly," vol. 24, 1909, pp. 445–447.

[22] Wirt was the first to attend cabinet meetings regularly, because he moved the office to DC. – G.T. Kurian, *Historical Guide to the U.S. Government, op.cit.*, p. 350.

[23] N.V. Baker, *Conflicting Loyalties...*, *op.cit.*, p. 56.

[24] *Official Opinions of the Attorneys General of the United States* Government Printing Office, Washington, D.C, vol. 1–41, 1852–1982.

Andrew Jackson was the next President who wanted to set some changes in the office of Attorney General. Impressed by the failure of the Department of Treasury to make headway in recovering debts, in 1829, in his first annual message, he called the attention of Congress to the fact that the supervision of lawsuits by the accounting officer of the Treasury operated unfavorably. He recommended that these duties be transferred to the Attorney General, who would be placed on the same level as the heads of other departments, receiving the same compensation, and having such subordinate officers provided for his department as could be useful for the discharge of these additional duties. Moreover, Jackson wanted the Attorney General to be given superintendence of all federal criminal proceedings. This couldn't stand the strong opposition, led by Senator Daniel Webster who brought in a bill providing for a Solicitor of the Treasury, learned in law, to take over some of the duties assigned to the Attorney General. Shortly later, Senator McKinley of Alabama brought in an amendment making the duty of the Attorney General "to advise and direct" the proposed Solicitor of the Treasury. It passed the Senate, and the House of Representatives added the words "at the Solicitor's request," which meant that the Solicitor of the Treasury was as independent of the Attorney General as any member of the cabinet. In this form the bill became law. The act empowered the new officer to instruct district attorneys, marshals, and clerks of the lower courts in all matters and proceedings in which the United States was interested.[25] This is how duties which should have been given to one officer, were distributed among two.

It was during President Polk's tenure that Congress came up with new proposals concerning the office of the Attorney General. James Polk pointed out in 1845 that the increase in the Attorney General's duties was mainly the result of the growth of the country. He proposed establishing a new legal department. The bill focused on transferring the Census Bureau and the issuance of the commissions[26] from the State Department to the new legal department. Unfortunately, this proposition was blocked, and for the next few years the Attorney General's case remained silent.

Real changes began when Caleb Cushing joined the office in 1853. Congress increased the salary to that of other cabinet officers, which led to Cushing beginning a full-time work in the administration. He became very active, assuming responsibility for many different areas, such as legal and judicial appointments, pardons and extradition laws. These new duties made the position of Attorney General more important than ever before.[27] It forced Cushing to write a state paper to President Pierce, called "*Office and Duties of the Attorney General*," which the President transmitted to Congress. There was one great class of cases which he suggested to place under his direction by law, rather than presidential order. These were cases ultimately concerning the United States, to which the government was not formally a party of record. Such cases were likely to involve the political interests of the

---

[25] H. Cummings, C. McFarland, *Federal Justice...*, *op.cit.*, pp. 145–147.

[26] Formal confirmation of a federal judge to the office was made by delivery of sealed commission by the Secretary of State. Failure in such procedure gave rise to the most important case in the Supreme Court's history, *Marbury v. Madison*. – J.E. Nowak, R.D. Rotunda, *Constitutional Law*, *op.cit.*, pp. 2–16.

[27] C.M. Fuess, *The Life of Caleb Cushing*, Harcourt, Brace & Company, New York 1923, pp. 136–137.

country – the validity of its land patents, its title to public property, or the acts of subordinate officers in the execution of laws. Judicial accounts and the issuance and recording of commissions to law officers were to be transferred from the Interior and State Departments to the Attorney General. Lastly, Cushing proposed that the Attorney would be required to report annually to Congress, including in the report all his opinions to executive officers; a device which would lead to the official publication of opinions.[28] A year later, Senator Adams and his Committee on Retrenchment and Reform brought in a bill to establish a Department of Law. But the opposition studied its provisions for too long – Pierce was succeeded by James Buchanan, and Cushing by Jeremiah Black.

The Civil War stopped debates concerning the creation of a legal department. It is interesting to note that the office of the Attorney General played a prominent role in the Confederate Government. The Confederate States' cabinet consisted of six department heads, and the Attorney General headed the Department of Justice, which wasn't established by the United States! The Confederate Constitution provided for one Supreme Court, but the Congress never passed legislation to implement this provision. In the absence of the Court at this level, the opinions of the Attorney General represented the only legal authority entitled to nation-wide consideration.[29] Bibl. Jag.

In the mid-sixties of the nineteenth century, the office of Attorney General still remained very modest, having a slender budget. Marshals and district attorneys were referred to other departments for instructions. In April 1866 James Speed had written nearly as many opinions in one year as his predecessor had written during three years. For many months, the employees in his office had worked twice the official number of hours. At the same time, several departments requested the creation of their own law officers – Solicitor and Naval Judge Advocate General, Solicitor for the War Department, Post Office Solicitor, Solicitor for Internal Revenue, to name a few. The reaction of the Senators was very critical, evidenced in the statements made by two of them: Senator Trumbull of Illinois ("I don't believe there is a harmony within the organization of our system of Government: to have an attorney in each department of government – we should better establish an Attorney General's Department") and Senator Saulsbury of Delaware ("The law was better expounded when the departments had no solicitors, than it has been since").[30] It was a time when the creation of a new department became essential because of the increase in government litigation. The nation had to be represented in courts all across the country in different cases. The Attorney General's office was composed only of him and two assistants, who didn't have the possibility to oversee all of the government's business in the courts.[31] It forced the Congressional Joint Committee on Retrenchments to act.

The reform was initiated by the acting Attorney General Henry Stanberry, who stated in 1867: "as to the mere administrative business of the office the present force is sufficient, but as to the proper duties of the Attorney, especially in the preparation

[28] C. Cushing, *Office and Duties of the Attorney General.* "American Law Register," no. 5, December 1856.

[29] B. Manning, *Federal Conflict of Interest Law*, *op.cit.*, p. 17.

[30] H. Cummings, C. McFarland, *Federal Justice...*, *op.cit.*, pp. 219–221.

[31] N.V. Baker, *Conflicting Loyalties...*, *op.cit.*, pp. 61–62.

of argument of cases before the Supreme Court of the United States and the preparation of options on questions of law referred to him, some provision is absolutely necessary to enable him properly to discharge his duties. After much reflection it seems to me that this may be best supplied by the appointment of Solicitor General. With such an assistant, the necessity of appointing special counsel in the argument of cases in the Supreme Court would be in a great measure, if not altogether, dispensed with."[32] But the main person responsible for the creation of a new department was Senator Thomas Jenckes. During the debate in Congress, he mentioned that "there has been a most unfortunate result from the separation of law powers. We find one interpretation of the laws of the country in one department, and another interpretation in another department. It is for the purpose of having a unity of jurisprudence in the executive law of the United States, that this bill proposes that all the law officers therein provided for, shall be subordinate to one head."[33] The chief object of the act of 1870 was to make it possible to create a staff sufficiently large to transact the legal business of the government in all parts of the country.[34] This is what the bill proposed.

The new department came into existence on July 1st, 1870. The Act to Establish the Department of Justice created an executive department of the government, headed by the Attorney General, whose main job was to handle the legal business of the United States – the Act gave the Department control over all criminal prosecutions and civil suits in which the United States had an interest. In addition, it gave the Attorney General full control over federal law enforcement. Two additional offices were created in the Department to assist the Attorney General – the Office of the Solicitor General, and offices of assistant attorneys general.[35] This is how the Attorney General became head of an executive department after eighty years of acting in the administration. It meant that every single legal problem of the executive branch of government was to be examined only by him and his subordinate officers.

REFERENCES

Primary sources

A Bill to Establish a Department of Justice, 16 Stat. 162 (1870).

Judiciary Act 1789, 1 Stat. 73.

National Association of Attorneys General, *The Report on the Office of the Attorney General*, Government Printing Office, February, Washington, D.C. 1971.

Official Opinions of the Attorneys General of the United States, Government Printing Office, vol. 1–41, Washington, D.C. 1852–1982.

U.S. Congress, *Journals of the Continental Congress*, Government Printing Office, Washington, D.C. 1912.

U.S. Constitution 1787.

[32] H. Cummings, C. McFarland, *Federal Justice*..., op.cit., p. 222.

[33] G.B. Bell, *Taking Care of the Law*, Morrow, New York 1986, p. 176.

[34] H.B. Learned, *The Attorney-General and the Cabinet*, *op.cit.*, p. 462.

[35] *A Bill to Establish a Department of Justice*, 16 Stat. 162 (1870).

Secondary sources

Baker, N.V., *Conflicting Loyalties: Law and Politics in the Attorney General's Office 1789–1990*, University Press of Kansas, 1992.

Bell, G.B., *Taking Care of the Law*, Morrow, New York 1986.

Bloch, S.L., *The Early Role of the Attorney General In Our Constitutional Scheme: In the Beginning There Was Pragmatism*, "Duke Law Journal," no. 3, 1989.

Cooley, R.W., *Predecessors of the Federal Attorney General: The Attorney General In England and American Colonies*, "American Journal of Legal History," vol. 2, 1958.

Cummings, H., McFarland, C., *Federal Justice: Chapters in the History of Justice and the Federal Executive*, DaCapo Press, New York 1970.

Cushing, C., *Office and Duties of the Attorney General*, "American Law Register," no. 5, December 1856.

Fisher, L., *Politics of Shared Power. Congress and the Executive*, A & M University, Texas 1998.

Fuess, C.M., *The Life of Caleb Cushing*, Harcourt, Brace & Company, New York 1923.

Hammonds, O.W., *The Attorney General in the American Colonies*, "Anglo-American Legal History, Series 5.1," New York University School of Law, no. 3, 1939.

Hogue, A.R., *Origins of the Common Law*, Liberty Fund, Indianapolis 1985.

Huston, L.A., Miller, A.S., Krislov, S., Dixon, R.G., jr., *Roles of the Attorney General of the United States*, American Enterprise Institute for Public Policy Research, Washington, D.C. 1968.

Kurian, G.T., *Historical Guide to the U.S. Government*, Oxford University Press, New York 1998.

Learned, H.B., *The Attorney-General and the Cabinet*, "Political Science Quarterly," vol. 24, 1909.

Manning, B., *Federal Conflict of Interest Law*, Harvard University Press, Massachusetts 1964.

Nowak, J.E., Rotunda, R.D., *Constitutional Law*, West Group, St. Paul Minnesota 2000.

Re, J.R., Re, E.D, *Brief Writing and Oral Argument*, Oceana Publishing Co., New York 1987.