

**The successful Attorney General - an oxymoron?**  
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The office of the Attorney General in a parliamentary democracy is an unusual one. In some ways, it symbolises the difficulties inherent in the separation of powers doctrine. The Attorney General sits at the cusp of the three institutions. He or she is part of the executive, and, generally speaking<sup>1</sup>, a member of the legislature. At the same time, the Attorney General also owes certain duties to the judiciary. On occasion, these demands have collided, and led to recriminations, resignations, and even the jailing of Attorneys General.

Given these constraints, can there ever be such a thing as a “successful” Attorney General? Success in ministerial office depends upon both doing “a good job” in the relevant policy area, and upon satisfying one’s political colleagues. Yet the Attorney General is often required to put the public interest above the interests of his or her political party, and even above the interests of the government as a whole. It is rare that other ministers will be required to do the same.

### **Two models of Attorneys General**

In her study of US Attorneys General, American academic Nancy Baker<sup>2</sup> posits two archetypes – the “Advocate” and the “Neutral”. Advocates are principally interested in the political concerns of the administration. An Advocate Attorney General is, in the words of one writer, “the President’s lawyer”<sup>3</sup>. American political history is replete with examples.

- Robert Kennedy, perhaps the archetypal model of an Advocate Attorney General. He felt passionately about issues of poverty, discrimination and corruption, and maintained some involvement (albeit mostly indirect) in political activities during his term in office.
- John Mitchell, President Nixon’s first Attorney General, who played a role in the Watergate affair, and was subsequently jailed for 19 months for perjury and obstruction of justice.
- President Reagan’s Attorneys General. The first, William French Smith, begins his memoirs by referring to the “revolutionary zeal” with which he and his colleagues arrived in Washington.<sup>4</sup> The second, Edwin Meese III, was in many ways similar to Robert Kennedy. He actively sought the overruling of liberal Supreme Court decisions like *Miranda* and *Roe v Wade* – both through passionate advocacy before

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<sup>1</sup> The Irish and United States Attorneys General are not members of their respective parliaments.

<sup>2</sup> N Baker, *Conflicting Loyalties. Law and Politics in the Attorney General’s Office, 1789-1990* (University Press of Kansas, Kansas, 1992).

<sup>3</sup> L Huston et al, *Roles of the Attorney General of the United States* (American Enterprise Unit, Washington DC, 1968), p 42

<sup>4</sup> W Smith, *Law and Justice in the Reagan Administration. The Memoirs of an Attorney General* (Hoover University Press, California, 1991), p xv.

the Supreme Court, and by only appointing Federal judges who were opposed to *Roe v Wade*.<sup>5</sup>

Outside the United States, other Advocates may be identified:

- Lionel Murphy, Australian Attorney General under Gough Whitlam. He presided over new legislation in fields as diverse as family law, trade practices and anti-discrimination. His civil libertarian background, however, drew him into conflict with the Australian Security and Intelligence Organisation, culminating in his decision to raid ASIO offices in 1974, irretrievably souring relations between him and the organisation.
- Britain's first Labour Attorney General, Sir Patrick Hastings. In 1923, he instructed the Director of Public Prosecutions to commence a prosecution against the Communist *Daily Worker* for incitement to mutiny. Following a Cabinet meeting at which the Attorney General was present, however, the prosecution was withdrawn. In the aftermath, the opposition brought a successful censure motion, and the government lost office.<sup>6</sup>
- Sir Nicholas Lyell, UK Attorney General under John Major, who was strongly criticised for his role in the 1992 Matrix Churchill affair.<sup>7</sup> Most significantly, he advised government ministers that if documents were of a class to which public interest immunity attached, they had no choice but to claim the immunity. An independent report conducted in 1996 found this to have been based upon "a fundamental misconception of the law".<sup>8</sup> Nonetheless, Lyell refused to resign, despite a finding that he had been personally at fault, and a resulting loss of public confidence in him.
- Within Ireland (though probably not when compared with Attorneys General in other countries), John Murray, Attorney General during the 1980s, would also be classed as an Advocate. During the 1982 election campaign, there were calls for his resignation after he issued a statement criticising the opposition's proposals to deal with terrorism, stating that they would undermine the Irish Constitution.<sup>9</sup> The status of the Irish Attorney General as a constitutional officer might perhaps account for the ferocity of the criticism that was directed at Mr Murray. Certainly Attorneys General

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<sup>5</sup> See N Baker, *Conflicting Loyalties. Law and Politics in the Attorney General's Office, 1789-1990* (University Press of Kansas, Kansas, 1992), pp 96-100; C Clayton, *The Politics of Justice. The Attorney General and the Making of Legal Policy* (ME Sharpe Inc, New York, 1992), pp 6, 150-156; D Kmiec, *The Attorney General's Lawyer. Inside the Meese Justice Department* (Praeger, New York, 1992), pp 76-78; R Wolters, *Right Turn. William Bradford Reynolds, the Reagan Administration and Black Civil Rights* (Transaction Publishers, New Brunswick, 1996).

<sup>6</sup> See the discussion of this incident in J Edwards, *The Attorney General, Politics and the Public Interest* (Sweet & Maxwell, London, 1984), pp 310-317.

<sup>7</sup> See D Woodhouse, "The Attorney General" *Parliamentary Affairs* (1997) Vol 50, p 97 at p 105-108; F Bawdon, "Power of Attorney", *Gazette*, 93/06, 14 February 1996, p 12.

<sup>8</sup> Scott Report (1996).

<sup>9</sup> For a more detailed discussion of the incident, see J Casey, *The Irish Law Officers: Roles and Responsibilities of the Attorney General and the Director of Public Prosecutions* (Dublin, Round Hall Sweet and Maxwell, 1996), pp 181-182.

in other countries do not generally face the same barrage when they enter the political arena during an election campaign.

It is more difficult to find examples of Neutral Attorneys General. Such individuals would, at least in theory, “fulfil [their] duties ... with almost judicial discretion and independence”.<sup>10</sup> If they are more common in the United States, it is because there, the Attorney General is directly appointed by the President, and is neither a member of the legislature, nor (in most cases) of the governing political party.

The main examples of Neutral Attorney Generals are:

- Edward Levi, United States President Ford’s Attorney General. He was a non-partisan academic, appointed in an effort to restore some credibility to the administration in the wake of the Watergate affair.
- Griffin Bell, United States President Carter’s Attorney General. Appointed in a similar political atmosphere to Edward Levi, he was fiercely independent, and reportedly clashed with President Carter on several occasions, refusing to tailor his advice to the President’s views.<sup>11</sup>
- The present United States Attorney General, Janet Reno. Over the past few years, she has been criticised by both supporters and opponents of President Clinton for her handling of the Whitewater, fund-raising and Monica Lewinsky scandals.<sup>12</sup> Whilst she has largely weathered these storms so far, the various inquiries are rumoured to have irretrievably soured her relationship with the President.

Outside the United States, perhaps the only Attorney General who might be classified as a “neutral” is Robert Ellicott, Australian Attorney General from 1975 to 1977. His resignation came about following *Sankey v Whitlam and Others*,<sup>13</sup> a case brought by a private litigant against four political figures. The view of the Prime Minister was that the government should meet the legal costs of the politicians, but not those of the private citizen. Ellicott’s was that legal aid should be extended equally. They clashed, and Ellicott resigned.<sup>14</sup>

### **Advocate v Neutral**

However, it would be hasty to conclude that a Neutral Attorney General is always preferable. As Baker has pointed out, by being more removed from the political decision-making process, a Neutral Attorney General risks being bypassed. In contrast, an Advocate Attorney General is likely to be consulted more frequently, and to be more willing to provide

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<sup>10</sup> Mr WT Cosgrove, a former President of the Executive Council, quoted in J Casey, *The Irish Law Officers: Roles and Responsibilities of the Attorney General and the Director of Public Prosecutions* (Dublin, Round Hall Sweet and Maxwell, 1996), p 59.

<sup>11</sup> N Baker, *Conflicting Loyalties. Law and Politics in the Attorney General’s Office, 1789-1990* (University Press of Kansas, Kansas, 1992), p 158-161.

<sup>12</sup> “Referee Reno”, *The Economist*, Vol 343, No 8013, 19 April 1997, p 60; cf P Anderson, *Janet Reno: Doing the Right Thing* (John Wiley & Sons, New York, 1994).

<sup>13</sup> (1978) 142 CLR 1.

<sup>14</sup> “More pros than cons for Ellicott”, *The Bulletin*, 20 January 1981.

intellectually honest advice. An Advocate is also more likely to be aware of how decisions will appear to the public, and (in those countries where the Attorney General is a member of parliament) to his or her constituents – whereas a Neutral may be dangerously oblivious to such matters.<sup>15</sup> Nonetheless, it must be noted that those who have abused their office have, certainly in the United States context, been Advocates. Clearly there is a balance to be struck.

Excluding the Attorney General from Cabinet,<sup>16</sup> or selecting someone who is “outside politics”<sup>17</sup> are unlikely to solve the dilemma. After all, the role of the Attorney General has been shaped by the constitutional struggles which ensued in England in the seventeenth century. Those struggles established that Attorneys General no longer served at the monarch’s pleasure (as did Coke<sup>18</sup> and Bacon) but were advisers to the government. In broad terms, the shape of the Attorney General’s office has changed little since that time.<sup>19</sup>

Burgeoning litigation, funding squeezes, more attacks on judges (some well-informed, others hopelessly misinformed) and the increased pace and complexity of modern government will only serve to place a greater burden on Attorneys General. Ultimately, it is difficult not to have some sympathy with Sir Michael Havers, former UK Attorney General, who said in 1987, “one is sometimes put in an impossible position”.<sup>20</sup>

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<sup>15</sup> N Baker, *Conflicting Loyalties. Law and Politics in the Attorney General’s Office*, 1789-1990 (University Press of Kansas, Kansas, 1992), pp 172-173.

<sup>16</sup> A convention which has been adhered to in the United Kingdom since 1928: J Edwards, *The Attorney General, Politics and the Public Interest* (Sweet & Maxwell, London, 1984), p 73.

<sup>17</sup> For examples of such pressures, see J Edwards, “The Attorney General and the Canadian Charter of Rights” (1988) 14 *Commonwealth Law Bulletin* 1444 at 1452-1453.

<sup>18</sup> Though Coke, serving from 1594-1606, argued that the judges had a duty to ensure that the monarch did not exceed his or her powers: J Hostettler, “Sir Edward Coke – A Mere Lawyer?”, *Justice of the Peace and Local Government Law*, Vol 159, 25 March 1995, p 198.

<sup>19</sup> N Baker, *Conflicting Loyalties. Law and Politics in the Attorney General’s Office*, 1789-1990 (University Press of Kansas, Kansas, 1992), pp 38-39.

<sup>20</sup> House of Commons Debates, 12 January 1987, cited in D Woodhouse, “The Attorney General” *Parliamentary Affairs* (1997) Vol 50, p 97 at p 102.