

State Attorneys General Powers and Responsibilities

Edited by
Emily Myers
National Association of Attorneys General

FOURTH EDITION
NATIONAL ASSOCIATION OF ATTORNEYS GENERAL

Courtesy Chapter

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*This book is dedicated to Attorneys General
and the men and women who work for them in the
56 jurisdictions. They continue to make an important
contribution to state government and the American legal
system. Without them, there would be no book to write.*

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Caitlin Calder
Bob Carlson
Chris Coppin
Karen Cordry
Adam Eisenstein
Amie Ely
Micheline N. Fairbank
Denise Fjordbeck
Ed Hamrick
Michael Hering
David Jacobs
Zachary T. Knepper
Hedda Litwin
Stephen R. McAllister

Judith McKee
A. Valerie Mirko
Ann Mines-Bailey
Salini Nandipati
Joe Panesko
Chalia Stallings-Ala'ilima
Dan Schweitzer
Abigail Stempson
Clive Strong
Marjorie Tharp
Sean Towles
Chris Toth
Barbara Zelner

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CHAPTER 1

Origin and Development of the Office

By Emily Myers, Antitrust Chief Counsel, NAAG

The position of attorney general in state government is firmly rooted in seven hundred years of Anglo-American history. Since at least the mid-thirteenth century, specially designated lawyers have represented the legal interest of the King of England in that country's courts of law.

The king's need for legal services expanded to include the advice of the chief law officer on developing political and constitutional issues. As political and constitutional developments transferred the powers exercised by the king personally to his ministers under constitutional forms of government, the attorney general of England emerged as the foremost legal advisor to all departments of government and the principal representative of the government's interests in litigation.

The evolution of the office of attorney general continued in the American colonies that became the United States of America. Most colonial attorneys general served as delegates of the attorney general of England, and some offices of colonial attorneys general were influenced by other European counterparts. After the Revolutionary War, however, these colonial officials were replaced by state chief law officers with constitutional, statutory, and common law authority to exercise powers "usually appertaining" to the office of attorney general.

The new federal government of the United States followed this model when, by statute, it created the executive branch office of the attorney general to exercise control over the legal affairs of the national government and its various instrumentalities. Development of the office also includes the Confederacy's creation during the Civil War of an office of attorney general with wide-ranging legal authority.

Dramatic political, economic, and technological developments in the last 50 years have continued to reshape the traditional office of state attorney general. While the modern office of attorney general continues to perform its traditional

role of providing legal advice and legal representation in matters affecting the state's interests, those state interests now include an infinitely broader range of social and economic policies. This development results from the attorney general's representation of the diverse public interest of the sovereign people of a state or territory of the United States, rather than the private interests of a monarch.

HISTORICAL DEVELOPMENT

English History

English legal historians trace the origin of the attorney general of England to the appointment of a particular lawyer, Lawrence del Brok, to represent the king's interest in English courts in 1243.¹ His appointment was necessary because the sovereign could not appear in court to plead his cause in a case affecting his interests.² The duties of the first "King's Attorney" reportedly included "initiating actions to recover rents and lands, proceeding against those who pronounced a sentence of excommunication against a royal servant, guarding the King's right to present to churches, investigating homicides to hear and determine what pertained to the Crown, and on one occasion, engaging in a special mission to discover the marriages, wards, reliefs, and other royal rights which had been conceded or alienated within a particular township since the time of King John's coronation."³ Thus, the lawyer who might lay claim to being the first attorney general was authorized to take legal action to protect state property, employees, and exercises of official discretion; to prosecute serious criminal cases; and to commence special investigations at the direction of state executive authority.

In the late 1200s, the English kings appointed a number of attorneys and "sergeants" for the sole purpose of representing regal interests in the courts, but without restricting the types of courts in which they could appear on the king's behalf.⁴ During the next century, king's attorneys were appointed to represent the sovereign in particular courts, for example, the King's Bench and the Court

1 Edwards, *THE LAW OFFICERS OF THE CROWN* 14-16 (1964).

2 King, *The Attorney General, Politics and the Judiciary*, 29 W.A.L.REV. 155, 156 (October 2000).

3 *Id.* at 16.

4 *Id.* at 25.

of Common Pleas; but by 1400, a king's attorney was authorized to appear in all courts on a particular matter.⁵

The year 1461 marks the most significant development toward the attorney general's unqualified recognition as the leading officer in the legal department of the state.⁶ In that year, the Crown authorized the king's attorney to appoint subordinates to carry out the attorney's responsibilities; appointed a king's attorney to a life tenure position; and described the king's attorney, John Herbert, as the "Attorney General of England."⁷ In that same year, Herbert was asked to provide advice to the House of Lord on legal matters.⁸ Another two hundred years would pass before the attorney general of England established his role as advisor to Parliament.

In the early 1500s during the reign of Henry III, the attorney general's responsibilities included acting as a liaison between the House of Lords and the House of Commons.⁹ The attorney general, who served the Lords, in effect as an assistant, "[carried] bills and messages from the Lords to the Commons, and [drafted] or [amended] government bills before and during their passage through Parliament."¹⁰ Since he was an assistant to the Lords, the attorney general was not treated by the House of Commons as the valuable legal and parliamentary resource he is today. Two events in the early 1670s had a substantial impact on the attorney general's role with Commons. First, in 1670, a Member of Commons, Sir Heneage Finch, was permitted to retain his seat in Commons following his promotion from Solicitor General to attorney general, and as a Member of Commons, played an active role in presenting Commons' cases to the Lords. Second, in 1671, Commons called upon the attorney general to resolve successfully, in Commons' favor, an issue of the authority of the House of Lords to amend a spending bill unanimously passed by the House of Commons.¹¹ Thus, by the early 1700s, the attorney general's role had evolved from an assistant to the Lords to an advocate for Commons as an elected Member of Parliament.¹²

During the constitutional struggle between Parliament and the king, a solution began to evolve, increasing reliance by the king upon his ministers and increasing control of Parliament by those ministers. The attorney general

5 *Id.* at 35-26.

6 *Id.* at 27.

7 *Id.* at 26-27.

8 *Id.* at 33.

9 *Id.* at 34.

10 *Id.*

11 *Id.* at 34-35, 37.

12 *Id.* at 38.

emerged as one of those ministers who increasingly with other such ministers formed the “government,” the ministerial group able to govern because it had the king’s confidence and the ability to control Parliament. It was during this pre-American Revolutionary War period that the English attorney general “emerged as legal advisor to the Crown”¹³ and “appeared on behalf of the Crown in the courts,” but also “gave legal advice to all departments of state and appeared for them if they wished to take action in the courts.”¹⁴ The attorney general thereby, over time, became less the “King’s lawyer” and more a public official responsible for justice. This trend in eighteenth century England continued to develop in the American colonies.¹⁵

Colonial History

The first recorded appointment of an attorney general in the New World was that of Richard Lee in Virginia in 1643.¹⁶ The colonial attorneys general enjoyed powers and duties similar to those of the Old World attorneys general in whose position they acted. However, they were not always able to discharge their responsibilities as successfully as their European counterparts. In part, this was due to the lack of willing and qualified appointees for the low-paying position in the colonies. They were also hampered by the limited resources and poorly specified duties of the position.¹⁷ Sketchy statutes left the definition of the job to the common law and interpreters of that common law were far away in England. One early Massachusetts attorney general complained of the lack of direction, noting that he “never Could know what was my duty, –What I Should doe. . . . All other officers know their power duty & dues by the law, but Relating to the King’s Attorney the law is Silent.”¹⁸ Nor were colonial governors attentive to the advice of their attorneys general, calling on them for advice infrequently or disregarding their opinions.¹⁹

The wide variety of duties undertaken by colonial attorneys general resulted in different development of the office from colony to colony. In most of

13 Cooley, *Predecessors of the Federal Attorney General: The Attorney General in England and the American Colonies*, 2 AM. J. LEGAL HIST. 304, 311 (1958).

14 *Id.* at 304, 309, *see* Chapter 3.

15 *Id.* at 309.

16 Key, *The Legal Work of the Government*, 25 VA. L. REV. 165, 169-173 (1938).

17 *Id.*

18 XXX Mass. Hist. Soc. Proc. (1895-1896) (2d ser. 1896) 285-88 *et seq.*, *quoted in* Hammonds, *THE ATTORNEY GENERAL IN THE AMERICAN COLONIES* 6 (1 Anglo-American Legal History Series no. 2 1939).

19 Cooley, *supra* note 13 at 310.

the colonies, the office probably existed for some time before it was mentioned in official records. Maryland, for example, was first settled in 1634, but 1658 was the first year in which a printed record referred to an attorney general. A commission by the Lord Proprietor of Maryland to the attorney general in 1660 said that the attorney general should act “in all Causes as well Criminall as Civill to sue pour-sue prosecute and Implead and in our name on Suits against us Commenced to answere as fully and amply as an Attorney Generall may doe.”²⁰

The colonial archives reveal that the Maryland attorney general was engaged in a wide range of activities, such as preparing indictments on charges of murder, theft, mutiny, sedition, and piracy, appearing before the grand jury, and acting against individuals for disturbing a minister in a divine service. He worked closely with the courts and made recommendations to the Council of State, even suggesting the creation of new courts and appointing attorneys for the county courts.

The Rhode Island attorney general was first created in May 1650. Since its creation, the office has been an elected position, except for a brief period from 1740 to 1742 when the charter allowed for the appointment of a King’s attorney for each county.²¹

New York was settled by the Dutch and did not come under English control until 1674. The first mention of an attorney general seems to have occurred in 1684, as the result of a royal order to the governor to appoint an attorney general. The appointee apparently was not satisfactory. The governor complained to the Council of Trade and Plantations that the attorney general had been “bred to a trade,” not to “learning nor the law” and, as a consequence, many of the seizures of ships and lawful goods were lost by the “lameness of the informations he draws up.”²² The colonial attorney general in New York fulfilled a broader function than his English counterpart. For example, he handled land transactions and prepared letters patent for corporations, duties which were performed by a different officer in England.²³

An attorney general was appointed in 1697 for the whole of the Carolinas and subsequent attorneys general served both Carolinas until the colony divided in 1710. An act in the North Carolina Council in 1732 provided for

20 Hammonds, *THE ATTORNEY GENERAL IN THE AMERICAN COLONIES* 3-4 (1 Anglo-American Legal History Series no. 2 1939).

21 Website of the Secretary of State of Rhode Island, <http://www.sec.state.ri.us/library/riinfo/attorneys-general>.

22 Cooley, *supra* note 11 at 311.

23 Hammonds, *supra* note 20 at 11.

payment of fees to the attorney general for indictments and informations in the general courts. Other duties can be inferred from a table of fees, which included the supervision of “all details of the King’s cases from beginning to end.”²⁴ The attorney general of the colony had “all the powers, authority, and trust that the Attorney and Solicitor of England had in that kingdom.”²⁵ Further, he provided opinions when requested by the governor, the council, or the judges of the courts. In turn, the council gave him instructions concerning prosecutions of individuals as well as public officials. The North Carolina attorney general seems to have spent a great deal of time riding circuit, rather than limiting his activities to the capital city.

Some of the most specific instructions to come out of the Colonial period are those by the Lord Proprietors to their appointees as attorney general of South Carolina. In 1708, the duties of the South Carolina attorney general were thus specified:

[T]o Act, Plead, Implead, Sue and Prosecute all and every Person & Persons whatsoever, for all Debts, Fines, Amerciaments, Forfeitures, Escheats Claims and Demands whatsoever which now is or may or Shall be Due and in Arrears to Us upon any Account whatsoever whither Rents, Revenues or otherwise howsoever. And to Prosecute all Matters Criminall as well as Civill Giving and hereby Granting unto You full Power and authority and the Premises therein to Deal Doe Execute and Performe in as large and Ample manner to all Intents and Purposes as to the Said office of Attorney Generall doth in any way Appertaine & bellong.²⁶

In addition to these responsibilities, the attorney general kept the proprietors informed on the general welfare of the colony, the conduct of public officials, and matters relating to disposition of land titles.

The early history of the attorney general’s office in Pennsylvania was influenced by a number of factors which reflected the diversity of the colony’s population. These included the statutory laws of Sweden and the Netherlands, Roman law, Delaware Indian law, colonial and proprietary laws, the laws of the Duke of York, the egalitarian principles of the Quakers, and traditional English common law. Early attorneys general recognized their role as attorney for, and

24 North Carolina Colonial Records 1765-68 at 486, cited at Hammonds, *supra* note 16, at 12.

25 *Id.*

26 Hammonds *supra* note 20, at 18.

appointee of, the governor, but they also opposed the governor on numerous occasions on behalf of the citizens of the colony. Their advice to the appointed governor and other appointed officials tended to restrict rather than expand those officials' powers or privileges and to confine them to the wishes of the people's elected representatives. Thus, the office of attorney general in colonial Pennsylvania became not only the advocate for the royal or executive interest, as it had been in England, but also the legal defender of the public interest and the rights of individual citizens.²⁷

As these examples demonstrate, there were substantial differences among colonial attorneys general as to the powers they exercised and the scope of the duties they performed. While much of their authority was derived from the English common law, they were often influenced by the laws of other nations. Their duties generally were not well defined, nor was their relationship to the executive, and these duties and relationships therefore developed quite differently in the various colonies.

STATE DEVELOPMENT

Thirty-four of the 50 states either created or continued the office of attorney general in their first state constitution. Eight other states established the office by law at the time of statehood. Eight states did not have attorneys general at the time they became states.²⁸ A number of states abolished the office for some period of their history, only to restore it later. Today, all 50 states and the six jurisdictions of the District of Columbia, American Samoa, Guam, the Northern Mariana Islands, Puerto Rico, and the Virgin Islands provide for an office of attorney general.

Some states initially divided the functions of attorney general among several officers. Arkansas' first constitution provided for an attorney general in each judicial district. The office was unified in 1843 by legislative act, and the unified office was made constitutional in 1912. In Georgia, a judicial act passed pursuant to the first state constitution placed the law officer functions in the hands of two attorneys general and one Solicitor General. Later, legal business was conducted

27 Management Planning Div., Pa. Dep't of Justice, *A HISTORY OF THE ATTORNEY GENERAL IN PENNSYLVANIA* 1-15 (1972).

28 See Morse, *Historical Outlines and Bibliography of Attorneys General Report and Opinions*, 30 LAW LIBR. J. 39, 236 (1937).

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by two Solicitors General and one attorney general. It was not until the Constitution of 1868 that the single office of attorney general as it had existed in colonial days was recreated in Georgia.

Iowa statutes created the office in 1853, seven years after statehood. It became a constitutional office in 1856. In Oregon, the office was not created until 1889, 30 years after statehood, and was then established by statute. Ohio's legislature created the office in 1846, 43 years after statehood. The office was made constitutional in 1851. Connecticut did not authorize the office until 1897. Similarly, Vermont became a state in 1791. Although its Constitution of 1793 mentioned the office of attorney general, actual creation of a functioning office awaited legislative action until 1904, an interval of 111 years.

Once the office was established in a state, it was not always permanent. The office was discontinued in a few states, to be reestablished at a later time. Indiana statutes provided for the office in 1821, five years after statehood, but the office was soon abolished. There was no attorney general from 1836 to 1855, when the office was recreated. The Maryland attorney general's office was made constitutional in 1777, abolished by the Constitution of 1851, and then reestablished by the Constitution of 1864.²⁹ Illinois did not have an attorney general between 1848 and 1867.³⁰

In Massachusetts, the first attorney general vested with broad common law powers was appointed in 1686. From 1686 to 1780 the office was filled 17 times by election of the general court (with consent of the chief executive), and nine times by executive appointment.³¹ The offices of district and county attorney were created in 1807, under the attorney general. In 1843, however, the office of attorney general was abolished as an economy measure, and its functions transferred to the local prosecutors. The attorney general's office was reestablished in 1849, and in 1855 the Seventeenth Amendment to the Massachusetts Constitution established the office of attorney general as a true constitutional office, providing for popular election to the post.³²

The attorney general played a prominent role in the Confederate government. The cabinet of the Confederate States of America consisted of six department heads. The attorney general headed the Department of Justice, a

29 68 Op. Atty. Gen.48 (Md. 1983).

30 *Fergus v. Russell*, 270 Ill. 304, 110 N.E. 130 (1915).

31 Goodell, *A Complete List of the Attorneys -General and Solicitors-General of Massachusetts, 1686-1780*, reprinted from PROCEEDINGS OF THE MASSACHUSETTS HISTORICAL SOCIETY (June 1895).

32 MASS CONST. Art. LXIV. § 1.

department that the U.S. government did not establish until 1870. The duties of the Confederate Department of Justice included prosecuting and conducting all suits in the Supreme Court about which the Confederate government should be concerned, advising the President and heads of departments on questions of law, organizing and supervising the courts, supervising the Bureaus of Printing and Patents, defending the government before the Board of Sequestration Commissioners, and administering claims against the Confederate States.³³ The confederate Constitution, which closely follows that of the United States, provided for “one Supreme Court.” The Confederate Congress, however, never passed legislation to implement this provision. In the absence of a Supreme Court, the attorney general’s opinions represented the only legal authority entitled to nationwide consideration.³⁴

Confederate attorneys general rendered opinions declaring some state laws unconstitutional, but declined to pass upon the constitutionality of national acts. In an attempt to reconcile the conflict inherent in their executive and judicial roles, the confederate attorneys general, as members of the President’s cabinet, would not counter their earlier decision on the constitutionality of an act once the President had signed that act. There was a rapid turnover in the office, with four attorneys general in five years,³⁵ although the turnover is partly explained by movements among cabinet departments.

THE ATTORNEY GENERAL OF THE UNITED STATES

The U.S. government, unlike that of the states, was not the natural successor of another government. The office of the U.S. Attorney General was created by statute.³⁶ The U.S. Constitution does not specifically mention the Attorney General.

The first bill introduced in the U.S. Congress provided that the Supreme Court should appoint an Attorney General; the bill was enacted but with the important change that the President make the appointment. The first Attorney General, Edmund Randolph, attended cabinet meetings as President

33 Robinson, Jr., *JUSTICE IN GREY: A HISTORY OF THE JUDICIAL SYSTEM OF THE CONFEDERATE STATES OF AMERICA* 27-28, 32-33 (1941).

34 *Id.* at 510, 517, 519.

35 *Id.* at 510, 518-19.

36 Judiciary Act of September 24, 1789, ch. 20, § 35, Stat. 93.

Washington's legal advisor, but he had neither staff nor office space and his official duties were limited to representing the United States before the Supreme Court and providing legal opinions upon request.³⁷ The Judiciary Act of 1789 also provided for presidential appointment of independent federal district attorneys who conducted federal litigation in the district courts unsupervised by the Attorney General. It was not until 1861 that the Attorney General was given control over the U.S. Attorneys and Marshals.³⁸ It was another decade before the Attorney General was made the head of a federal legal department, when the present Department of Justice was created by Congress on June 22, 1870.³⁹

The modern U.S. Attorney General's duties have evolved over two centuries from those exercised by a single part-time official to those exercised by the head of a major federal department. The Attorney General is required to supervise and direct the administration and operation of the Department of Justice, including the offices of U.S. Attorneys and Marshals, the Bureau of Prisons, the Drug Enforcement Administration, and the Federal Bureau of Investigation. The Attorney General also represents the United States in legal matters generally, and furnishes to the President and to the heads of the executive departments and agencies of the government advice and opinions, formal and informal, on legal matters.

In many respects, the U.S. Attorney General's role is unlike that of a state Attorney General. The U.S. Attorney General is clearly a member of the executive branch, while his counterparts at the state level may have strong ties to the judicial and legislative branches.⁴⁰ The U.S. Attorney General, like his colonial predecessors, is appointed by the chief executive. State attorneys general are usually, although not always, elected by the citizens of the state. The federal Attorney General has administrative authority over all U.S. Attorneys, while the state attorneys general typically have no administrative authority over local prosecutors in their states. Department of Justice jurisdiction over government attorneys is not complete, as other agencies frequently are authorized to employ their own permanent counsel. By contrast, many state attorneys general are responsible for all of their state's legal services.

37 Huston, *History of the Office of the Attorney General* in ROLES OF THE ATTORNEY GENERAL 4, 7 (1968).

38 Act of August 2, 1861, ch. 37, 12 Stat. 285.

39 Act of June 22, 1870, ch. 150 16 Stat. 162.

40 Of course, the Congress can always obtain the Attorney General's opinion by requesting him to testify at hearings. See Huston, *supra* note 33, at 6.

THE MODERN OFFICE OF STATE ATTORNEY GENERAL

New state and federal legislation as well as new conceptions of the office have dramatically expanded the powers and duties of state attorneys general. There is a wide variety among the states, commonwealths, and territories in the constitutional or statutory structures conferring powers and responsibilities upon the attorney general. Each office of attorney general has a relationship with the state legislature and governor, and unique power and restrictions have resulted from court decisions of each state.

The national trend is toward the centralization and consolidation of state legal services within the office of attorney general.⁴¹ That trend has been accompanied by an increased delegation of authority and new powers to the attorney general by legislative assemblies in the states. The attorney general is no longer just the “chief lawyer of state X.” As the legislatures have adopted new laws and programs in response to perceived needs identified by the legislatures, attorneys general have become active to a degree never before envisioned in the areas of consumer protection, antitrust, toxic waste, child support enforcement, organized crime, and services to the elderly.

The specific functions of the office of attorney general vary greatly from state to state, as do the priorities of attorneys general. The most common and most important functions identified with the office of attorney general include a number of functions discussed in the following chapters: control of litigation concerning the state; acting as the chief legal officer of the state; providing formal opinions to clarify the law; public advocacy; criminal law enforcement, primarily on the appellate level; law reform and legislative advocacy; and investigative authority.

41 See Chapter 4.