History, Norms and Conflicting Loyalties in the Office of Attorney General

by Nancy Virginia Baker, Ph.D. *

I. INTRODUCTION

A sincere thank you to Patrick Longan and Mercer Law Review for organizing this timely and important symposium on ethics and professionalism in the Office of the U.S. Attorney General. It is such a fascinating office to study, at the nexus of law and politics.

I was a college undergraduate during Watergate, when I first became aware there was an office of attorney general. In graduate school, my interest in it piqued when Edwin Meese was nominated by Ronald Reagan. From then on, I have focused my research on the U.S. Attorney General, especially the duality inherent in the office. Where does or should an attorney general's loyalty lie: with the President or with the law? Can, in fact, the two be separated? After all, the Attorney General exercises power delegated by the President. Many of the Attorney General's roles are political and administrative, not simply legal. Further, in a democracy, the political process is what makes government accountable. Yet, the office is unique among executive agencies and operates under different expectations. To ensure public trust in the fair administration of justice, which is an essential attribute of a stable democracy, law officers follow certain longstanding norms of the office.

A review of historical antecedents will provide some background for understanding how the office developed and what norms developed to serve the public trust.

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II. A BRIEF HISTORY

The Attorney General is one of the institutions of American government consciously drawn from an ancient English office, evolving over the centuries in response to political and economic changes brought by trade, colonization, and the English civil war. By the time the colonies were established, the English office had assumed many of its modern attributes: it was centralized, served government as a whole—not simply the monarch—and had both legal and political responsibilities. Colonial governors appointed attorneys general early on, with the first one—in Virginia in 1643—just thirty-six years after the settlement at Jamestown. By the end of the seventeenth century, almost all of the thirteen colonies had attorneys general, and the ones that did not shared legal officers with neighboring colonies.[1]

Colonial attorneys general were not formally independent of the English Attorney General, who remained the *de jure* law officer. But because of the great distances involved, the Crown's control was nominal. In some cases, colonial law officers had broader responsibilities than their English superior. Early on, for example, colonial attorneys general handled all criminal prosecutions. This was not the case in Britain, where the Attorney General conducted only those prosecutions important to the Crown, leaving routine criminal cases up to the victims to pursue.[2]

Colonial attorneys general varied on the question of the source of their authority, whether they served the king, the Attorney General back in England, or the colonial governor. A few began to see themselves as serving a broader interest. In the colony of Maryland, for example, the Attorney General was considered to serve "the Publick" when his actions related "to the Liberty of the Inhabitants or their Possessions."[3]

This view spread as some colonists began to resent their appointed governors. An illustration of the tension between the Attorney General and the Governor occurred in the mid-eighteenth century, when Peyton Randolph, Virginia's Attorney General, quarreled with the Governor over his plan to assess a fee to certify land grants. Randolph believed the order to be unlawful; it had not been authorized by the colonial assembly. The Governor disagreed. Randolph left for London to argue the case before Crown authorities. The Governor retaliated by replacing

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[1] NANCY VIRGINIA BAKER, CONFLICTING LOYALTIES: LAW AND POLITICS IN THE ATTORNEY GENERAL'S OFFICE 1789–1990, 38–40 (1992).

[2] JOHN LL. J. EDWARDS, THE LAW OFFICERS OF THE CROWN 9 (1964).

[3] OLIVER W. HAMMONDS, *The Attorney General in the American Colonies,* 5.1 ANGLO-AM LEGAL HIST, 3–4 (New York University School of Law, 1939).

him with George Wythe. But the Governor had misread Wythe, who gave the post back to Randolph as soon as he returned. Wythe was the country's first law professor, and both he and Randolph later became active in revolutionary politics.[4]

By 1776, a fairly coherent system of law officers and courts existed in the colonies. Because of this history, the transition from colonial to state legal systems went fairly smoothly. Every state except Connecticut made express provision for an attorney general, either in their constitutions or by statute. Some states—such as New York—designated the Attorney General as the representative of the people, not the government.[5]

There was no national Attorney General at this time, although the Continental Congress considered appointing one. The proposed law officer would have had the duty of prosecuting suits and giving advice "on all such matters as shall be referred to him by Congress."[6] No action was taken on the proposal, leaving the Continental Congress to engage private attorneys to prosecute on its behalf in the state courts, generally over debts incurred during the Revolutionary War. This was fine with many legislators, who were suspicious of a national government.[7]

This suspicion began to wane by the time of the Constitutional Convention in 1787. Even so, neither in debates nor in the text of the Constitution was an attorney general for the new nation mentioned. The Constitution did pave the way for one, though. First, Article II implies a need for an attorney general to provide advice to the President, especially to ensure that the President "shall take [c]are that the [l]aws be faithfully executed."[8] Second, the division of power between the branches and between national and state governments meant that national adjudication was inevitable. For this, a lawyer representing the U.S. government in court would be needed.

The first bill introduced in the U.S. Senate proposed an office of Attorney General along with the lower federal court system. The bill was assigned to a committee on the second day of business but then it stalled. Anti-federalist members resisted nationalizing courts and legal

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[4] EDMUND RANDOLPH, HISTORY OF VIRGINIA 161–62, 183 (1970).

[5] HAMMONDS, *supra* note 3, at 10, 22.

[6] JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789 19, 155–56 (Gaillard Hunt ed., 1912).

[7] James Hightower, *From Attornatus to Department of Justice—An Historical Perspective of the Nature of the Attorney Generalship of the United States as Embodied in the Department of Justice Act of 1870*, *in* REMOVING POLITICS FROM THE ADMINISTRATION OF JUSTICE: HEARINGS BEFORE THE SUBCOMMITTEE ON SEPARATION OF POWERS OF THE COMMITTEE ON THE JUDICIARY UNITED STATES SENATE 408–409 (1974).

[8] U.S. CONST. art. II, § 3.

issues. A concurrent congressional debate on the Bill of Rights re-invigorated their commitment to state sovereignty. Finally, the Judiciary Act of 1789[9] passed, but only after the statutes creating the Departments of State, War and Treasury. The relevant part reads:

> And there shall be appointed . . . a meet person learned in the law to act as attorney for the United States . . . who shall be sworn or affirmed to a faithful execution of his office, whose duty it shall be to prosecute . . . and conduct all suits in the Supreme Court in which the United States shall be concerned, and to give his advice and opinion upon questions of law when required by the President of the United States, or when requested by the heads of any of the departments, touching any matters that may concern their departments, and shall receive such compensation for his services as shall by law be provided.[10]

The Act identifies the Attorney General's client as the United States, not the U.S. President or Executive branch. While the method of appointment is not specified, it was understood to provide for presidential nomination with the advice and consent of the Senate, as with other executive officers. Draft versions indicated the Attorney General was to be appointed by the district courts. This was not a radical proposition: state attorneys general often were associated with the judiciary. Some anti-federalist senators, however, objected to court appointment. As Senator William Maclay of Pennsylvania argued, it would "draw by degrees all law business into the Federal Courts."[11]

In important ways, the Act distinguishes the Attorney General from other executive officers, with duties distinctly legal in character. The Attorney General would be chief law officer of the nation, officer of the court, and legal adviser, as well as member of an elected administration. As one scholar explained, that made the office "a unique bridge between the executive and judicial branches."[12]

On a more mundane level, another difference existed between the law officer and other executive heads—the lack of formal structure. Unlike their cabinet peers, the earliest attorneys general were part-time and had no staff or even offices. For the first three decades, attorneys general served without transcribing clerks, filing system or desk. They even had to pay for their own heating fuel and stationery, a

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[9] An Act to Establish the Judicial Courts of the United States, ch. 20, 1 Stat. 73 (1789).

[10] *Id.* at § 35 (1789).

[11] Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 109 (1923).

[12] DANIEL J. MEADOR, THE PRESIDENT, THE ATTORNEY GENERAL AND THE DEPARTMENT OF JUSTICE 26 (1980).

situation that Congress resisted rectifying.[13] The result was that many early law officers continued their private practices in their hometowns, only occasionally traveling to the nation's capital. This made sense when there was little federal law or litigation. But things began to change as the nation grew and its law business expanded.

To place the Attorney General on par with other Executive branch officers, the issue of residency had to be resolved first. Living outside of the Capitol, the chief law officer was seldom available for cabinet meetings or legal advice, playing a limited role in White House affairs. Both Presidents James Madison and James Monroe tried to entice their attorneys general to move to D.C., with Monroe reasoning that "[t]he Attorney General has been always, since the adoption of our Government, a member of the executive council."[14] With the appointment of William Wirt in 1817, Monroe finally had success. Wirt moved to Washington and served as Attorney General for twelve years, the longest tenure to date.[15]

The office, however, remained primarily a legal one. Because attorneys general received half of the salary of other executive officers, they were expected to maintain their private law practices. Far from being seen as a conflict of interest, private practices brought important benefits, keeping attorneys general abreast of the law and sharpening their legal skills. Acting as private counsel, attorneys general argued some of the most famous early cases before the Supreme Court of the United States: *Gibbons v. Ogden*,[16] *Luther v. Borden*,[17] *Dartmouth College v. Woodward*,[18] *Barron v. Baltimore*[19] and *Chisholm v. Georgia*.[20]

This changed in 1853. As soon as his salary was increased to match that of other cabinet officers, Caleb Cushing, Franklin Pierce's new law officer, took it as a mandate to serve full-time. This brought him into closer proximity to the President and enabled him to expand his portfolio into policy areas, increasing the status and visibility of the office. Cushing had the time, as well as inclination, to become active in

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[13] Letter from Mr. Monroe to Mr. Lowndes, Chairman of the House Committee of Ways and Means, Am State Papers, 1801–1823, 417–419 (1834).

[14] *Id.* at 418.

[15] BAKER, *supra* note 1, at 56–57.

[16] 22 U.S. 1 (1824).

[17] 48 U.S. 1 (1849).

[18] 17 U.S. 518 (1819).

[19] 32 U.S. 243 (1833).

[20] 2 U.S. 419 (1793); HOMER CUMMINGS & CARL MCFARLAND, FEDERAL JUSTICE: CHAPTERS IN THE HISTORY OF JUSTICE AND THE FEDERAL EXECUTIVE 31, 62, 154–55 (The Macmillan Company, 1937).

a broad range of governmental activities, including some that had previously been handled by the Secretary of State.[21]

The creation of the Department of Justice added administrative responsibilities to the Attorney General's office. Incumbents began to refer to themselves as heading a law department even before the start of the Civil War. In reality, the "department" in the 1850s comprised an Attorney General, two clerks and a messenger. With the war came an explosion of federal litigation, to which Congress responded by adding two legal assistants and a law clerk. The post-war legal environment was even more challenging. The Attorney General did not have the resources to handle litigation around the country that addressed everything from personal rights to property titles. To meet the increased demand, the federal government hired private attorneys to represent the nation's interests. These private attorneys charged prevailing professional rates, and the costs incurred were close to half a million dollars over four years.[22] Added to this, other government attorneys who appeared in court occasionally took contradictory positions to that of the Attorney General. Some were U.S. district attorneys, over whom the Attorney General had no real supervisory power; others were counselors in other executive departments. Confusion as to the government's actual position ensued. In the *Gray Jacket*[23] case, the Supreme Court insisted that the government present a unified legal position through the Office of the Attorney General.[24]

These factors finally motivated Congress to establish the Department of Justice in 1870.[25] The statute added two more assistants, as well as a solicitor general to share the Supreme Court caseload with the Attorney General. It also expanded administrative responsibilities, consolidated more of the government's legal business, and paved the way for the DOJ's broader role in law enforcement.[26]

Through the early twentieth century, federal law began to reach into more areas, including regulation and antitrust. However, the Attorney General's duties remained somewhat limited because, with few exceptions, the presidency itself remained limited. Congress was the

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[21] CLAUDE M. FUESS, THE LIFE OF CALEB CUSHING 136–37 (Harcourt, Brace and Company, 1923).

[22] BAKER, *supra* note 1, at 60–62. Comparing private versus government salaries is instructive. When Edwin Stanton was a private attorney in 1859, he earned an annual salary of $40,000. A year later, as James Buchanan's attorney general, he earned a mere $8,000.

[23] 72 U.S. 370 (1866).

[24] *See id.*

[25] Act to Establish the Department of Justice, 16 Stat. 162 (1870).

[26] BAKER, *supra* note 1, at 63–64.

dominant actor in the U.S. system of government. Not until the inauguration of Franklin D. Roosevelt (FDR) in 1933 did the center of political power shift definitively toward the Oval Office. The deep economic depression and then world war necessitated national action, which FDR embraced.

Political scientists refer to 1933 as the start of the Modern Presidency, with the White House increasingly leading the domestic and international policy agenda. The Cold War brought new security challenges that further centralized power. Television increased media coverage of the White House. Congress itself began to expect the administration to set the legislative agenda. These developments in turn generated increased attention on the Attorney General's office, as more and more legal issues moved from state arenas to the national stage. Nowhere was this more evident than in the need to address the demands of a growing civil rights movement.

Throughout this 231-year history, the legal, political, and administrative duties of the office have grown. The majority of the eighty-four attorneys general who served as of 2020[27] have sought to uphold public faith in the fair administration of justice, regardless of their party or ideology.

III. THE FAIR ADMINISTRATION OF JUSTICE

A key means of ensuring the fair administration of justice has been abiding by professional guidelines and norms that embody the essential values that undergird the constitutional system.

A. Professional Guidelines

Over the years, attorneys general have adopted guidelines and general rules to ensure that their advisory role falls within the statutory authority granted in 1789. Many of these guidelines echo similar ones used by the judiciary:

- Attorneys general do not give advice to Congress except in their capacity as department heads called to testify. This rule has existed since 1820, when Wirt argued that the Judiciary Act made the Attorney General an executive officer, not legislative.

[27] The eighty-four appointments include two law officers who were appointed twice: John Crittenden in 1841 and 1850, and William Barr in 1991 and 2019. A few other attorneys general have stayed on in a consecutive administration and therefore are not counted as new appointments.

- Attorneys general only advise other executive department heads on questions of law, ones that pose real, not hypothetical, legal issues. Further, the request must come from the department head, not a subordinate officer.

- Attorneys general adhere to the principle of *stare decisis* when issuing opinions, generally abiding by those of predecessors in analogous cases. This principle was well expressed by the Office of Legal Counsel under Reagan's first Attorney General, William French Smith: "The Department of Justice has a duty to defend the constitutionality of an Act of Congress whenever a reasonable argument can be made in its support . . . ."[28] This rule seeks to minimize confusion or ambiguity in the law, which is crucial since many of the issues addressed by the Justice Department never end up in court.[29]

- Attorneys general avoid ruling on the constitutionality of legislation once it is enacted. The rule does not apply to pending legislation. One of FDR's law officers, Francis Biddle, explained, "[I]t is not within the [Attorney General's] province to declare an act of the Congress unconstitutional—at least where it does not involve any conflict between the prerogatives of the legislative and those of the executive departments."[30]

In some recent administrations, adherence to these guidelines has softened. For example, in 2011, Attorney General Eric Holder, Barack Obama's first law officer, announced that a section of the Defense of Marriage Act (DOMA) was unconstitutional, and the Department of Justice would no longer defend it in court.[31] The Act's supporters blasted Holder, calling his action "[a] shameful moment in politicized government lawyering . . . ."[32] After two years, the Supreme Court

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[28] Letter from William French Smith, Attorney General, to Strom Thurmond & Joseph R. Biden Jr., Senate Judiciary Comm. Chairmen (Apr. 6, 1981), https://www.justice.gov/sites/default/files/olc/opinions/1981/04/31/op-olc-v005-p0025_0.pdf.

[29] Dee Ashley Akers, *The Advisory Opinion Function of the Attorney General*, 38 KENT. L. J. 561 (1950).

[30] 40 OFFICIAL OPINIONS OF THE ATTORNEYS GENERAL 160 (United States Government Printing Office, 1949).

[31] Charlie Savage & Sheryl Gay Stolbert, *In Shift, U.S. Says Marriage Act Blocks Gay Rights*, N.Y. TIMES (Feb. 24, 2011), https://www.nytimes.com/2011/02/24/us/24marriage.html.

[32] David R. Lurie, *William Barr Obliterated the DOJ's Standard for Defending Laws Because Donald Trump Asked*, SLATE (April 12, 2019), https://slate.com/news-and-politics/2019/04/william-barr-aca-lawsuit-donald-trump-doj.html.

agreed with the Attorney General's interpretation and struck down DOMA.[33]

B. Norms of the Office

Of greater consequence than professional guidelines are the norms that have developed around the Office of the Attorney General. Norms provide the foundation on which the legitimacy of legal authority rests, and "[c]itizens who view legal authority as legitimate are generally more likely to comply with the law."[34]

Unlike the principles outlined above, norms are not self-created. They develop over time, drawn from long-standing Anglo-American traditions respecting the rule of law and notions of justice. No statutory penalties exist for violators. Instead, attorneys general who break norms, but not criminal law, at most may face congressional sanctions. Even then, the harshest sanctions may not be felt by the offending Attorney General, but by later attorneys general facing skeptical senators. Attorneys general take norms seriously not because of negative personal consequences, but negative institutional consequences. Their concern is to secure public confidence in the administration of justice. The primary norms follow.

1. Independence

The first, and probably oldest, norm is that of independence from inappropriate political intervention into legal matters. Department of Justice must be free to make its own determinations, based on the law and not political favoritism. Neither the President nor powerful members of Congress may force the department to undertake criminal investigations or bring prosecutions, especially against their political rivals. It does not mean that the Attorney General rejects all guidance from the Oval Office. Presidents are elected in part to advance their law enforcement policy agendas. Ronald Reagan's first Attorney General explained, "Simply put, consistent with the Constitution and the laws of the United States, the Department of Justice intends to play an active role in effecting the principles upon which Ronald Reagan campaigned."[35]

Since the Watergate era, specific safeguards have been adopted. A president may be briefed on nationally important cases but not given

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[33] U.S. v. Windsor, 504 U.S. 744 (2013).

[34] TOM R. TYLER, WHY PEOPLE OBEY THE LAW 62 (1990).

[35] William French Smith, Attorney General, *Remarks of the Attorney General Before the Federal Legal Counsel* (Oct. 29, 1981), https://www.justice.gov/sites/default/files/ag/legacy/2011/08/23/10-29-1981.pdf.

details about particular investigations. This is especially so when an investigation is politically sensitive.[36] Further, public announcements about an investigation should not be made until the investigation is completed and indictments are brought.

Some administrations also have sought to shield line prosecutors from political pressure. This began in 1978, when Jimmy Carter's Attorney General, Griffin Bell, established a policy that all inquiries from the White House staff or Congress could only be raised with the Attorney General, the Deputy Attorney General, or the Associate Attorney General. Requests for formal legal advice had to go to the Attorney General or Office of Legal Counsel.[37] The policy was intended to insulate assistant attorneys general, U.S. attorneys and heads of investigative agencies from politics. Bell's successor, Benjamin Civiletti, followed the same guidelines. Early in the Reagan administration, the White House Counsel put a similar policy in place, as did the administration of George H.W. Bush. Later, Bush's former Attorney General, Bill Barr, advised Alberto Gonzales, George W. Bush's White House Counsel, to adopt what he called the Reagan rules. He told Gonzales to "Start out very tight, and then as people start getting judgment and they understand what's right and what's wrong, you can loosen up a little bit."[38]

When an Attorney General is implicated in serious violations of the norm of independence, the Senate may consider legislation to enforce it. That occurred twice in the aftermath of administration scandals.

The first time was in 1924. Warren G. Harding's Attorney General, Harry Daugherty, was not directly implicated in the worst administration scandal, which involved the selling of Teapot Dome oil leases. But that scandal brought unwelcome attention to how Daugherty did business at the DOJ. Senate investigators found credible allegations of his wrongdoing: obstruction of justice, failure to prosecute illegal monopolies, fraud, and selling jobs, including judgeships. Adding to the appearance of impropriety, Daugherty had large unexplained sums of money in his bank account.[39] In response to their investigation, senators considered removing the office from politics. In the words of

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[36] Amy Gardner et al., *Barr Said to Have Told Trump About Investigation into Discarded Pennsylvania Ballots*, WASH. POST (Sept. 25, 2020), https://www.washingtonpost.com/politics/barr-trump-pennsylvania-ballots-investigation/2020/09/25/5e4990a0-ff3b-11ea-b555-4d71a9254f4b_story.html.

[37] Interview with Griffin Bell in Washington, D.C. (Oct. 21, 1987).

[38] Interview by James S. Young, Daniel J. Meador, Russell L. Riley, and Nancy V. Baker with William P. Barr in Charlottesville, Va. (Apr. 5, 2001).

[39] JAMES GIGLIO, H. M. DAUGHERTY AND THE POLITICS OF EXPEDIENCY 176, 181–93 (1978).

one senator, "[t]he Department of Justice is the one department in the [g]overnment . . . that ought to enforce the law impartially, regardless of political affiliation."[40]

The solution the senators adopted was the creation of an Assistant Attorney General to handle criminal cases, and another to handle civil. They believed that removing the Attorney General from direct control over civil and criminal cases would depoliticize the DOJ.[41]

The Watergate scandal also prompted a reexamination of the independence of the Attorney General. Watergate refers to the break-in and cover-up of Democratic campaign offices during the 1972 presidential election by Richard Nixon's campaign operatives. His Attorney General, John Mitchell, was implicated in both. As the sitting law officer, he began acting as campaign manager months before he resigned to run the campaign full-time. Mitchell was still at the DOJ when the reelection campaign's so-called "dirty tricks" were planned. In battling the President's political enemies, Mitchell later testified that his actions were justified.[42] A federal grand jury did not agree. He was indicted on six counts involving obstruction of justice and perjury and was convicted on five of them. He served nineteen months in prison.[43]

One outcome of the scandal was the creation of the Office of Professional Responsibility in the DOJ in 1975. Its primary mission "is to ensure that Department attorneys perform their duties in accordance with the highest professional standards as would be expected of the nation's principal law enforcement agency."[44] It investigates misconduct allegations brought against DOJ attorneys, prosecutors and immigration judges, but not specifically the Attorney General.[45]

Another outcome were hearings by a Senate subcommittee on two bills proposing to remove the Attorney General from presidential control. The author of one bill, Senator Sam Ervin, observed sharply that "the Department of Justice . . . all too often makes its ruling on

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[40] *Senate Hearings before the Select Committee on Investigation of Attorney General Harry M. Daugherty*, Part 9, 68th Cong. 2565 (1924).

[41] GIGLIO, *supra* note 39, at 190.

[42] *Watergate Hearings: Proceedings of the Senate Select Committee on Presidential Campaign Activities,* 366–73, 389–90, 392 (New York Times staff ed., 1973).

[43] *Watergate Special Prosecution Force Report* 52, 156 (1975); *United States v. Mitchell*, 389 F. Supp. 917 (1975); *Mitchell et al. v. Sirica*, 377 F. Supp. 1312 (1974).

[44] OFFICE OF PROFESSIONAL RESPONSIBILITY,

https://www.justice.gov/opr (last visited Feb. 11, 2021).

[45] Standards of Conduct, 1-4.300 - Reporting Attorney Professional Misconduct and Related Law Enforcement Misconduct to the Office of Professional Responsibility (OPR), U.S. DEPARTMENT OF JUSTICE (Sept. 2018), https://www.justice.gov/jm/jm-1-4000-standards-conduct.

constitutional and legal questions harmonize with the political desires of the White House . . . ."[46] Neither proposal passed.[47]

The damage that Watergate did to the credibility of the DOJ lasted for years, and constrained both of Nixon's immediate successors, Gerald Ford and Jimmy Carter. Ford described what he was looking for in an attorney general: "[S]omeone of unquestioned integrity and impeccable legal abilities and background and [who] ought to come from outside the traditional political arena."[48] He selected a renowned legal scholar and academic, Edward Levi. Carter, during his campaign, also pledged as an independent Attorney General. His nominee, Griffin Bell, a former federal judge, assured senators he and the President shared the determination that "the Justice Department would be operated on a nonpolitical basis."[49]

2. Nonpartisanship

The second important norm is nonpartisanship, because partisan activism undermines public confidence in the impartial administration of justice. Especially since the Watergate scandal, "[P]residents and attorneys general have typically sought a separation between the White House and the Justice Department to preserve the appearance that justice is meted out fairly, regardless of political affiliation."[50] As with the norm of independence, even the perception of breaking the norm can be damaging.

Attorneys general were expressly prohibited from engaging in political activity by President Grover Cleveland in 1886, and later by Attorney General John Sargent in 1926, in response to scandals that rocked the government in the early 1880s and 1920s, respectively.[51] Similarly, in the wake of Watergate, both Ford and Carter exempted their attorneys general from campaign activity. In 1977, Congress also debated barring anyone "who had served as a high-level campaign adviser to the President" from being appointed attorney or deputy

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[46] SAM ERVIN JR., THE WHOLE TRUTH: THE WATERGATE CONSPIRACY 118–19 (1980).

[47] The arguments against an attorney general removed from politics will be explored in the conclusion to this paper.

[48] Gerald R. Ford, *Attorney General Edward H. Levi*, 52 CHI. L. REV. 284 (1985).

[49] *Senate Judiciary Committee: Hearings on the Nomination of Griffin Bell to be Attorney General*, 95th Cong. 33 (1977).

[50] Katie Benner, *Barr's Approach Closes Gap Between Justice Dept. and the White House*, N.Y. TIMES (Sept. 25, 2020), https://www.nytimes.com/2020/09/25/us/politics/william-barr-justice-department.html.

[51] CUMMINGS & MCFARLAND, *supra* note 20, at 499–500.

attorney general.[52] The bill passed the Senate in 1977 but was deleted during conference committee with the House.[53]

The norm of nonpartisanship gave rise to the Department of Justice policy of avoiding action that could affect an election outcome within sixty days of the election. This was the basis for much of the criticism aimed at FBI Director James Comey after he informed Congress that the agency was reopening its investigation into Hillary Clinton's email server days before the 2016 election. A former senior DOJ official colloquially explained the rule, "[Y]ou don't publicly announce that you're conducting a criminal investigation against someone. And you especially don't do it if that person is a candidate, 11 days before an election. That's true whether it's a presidential election or an election for dog catcher."[54]

Maintaining nonpartisanship—and the appearance of nonpartisanship—can present a challenge. Many appointees have had politically active pasts. Seventeen attorneys general have been in the U.S. Senate and almost as many in the House. Several modern Presidents named either a campaign manager or national party chairman as Attorney General sometime during their administrations. That includes Franklin Roosevelt, Harry Truman, Dwight Eisenhower, John Kennedy, Richard Nixon and Ronald Reagan.[55]

Once in the DOJ, however, attorneys general are expected to adhere to partisan neutrality. The Justice Manual affirms that the DOJ's actions "must be impartial and insulated from political influence," and its prosecutorial powers "exercised free from partisan consideration."[56]

Most of those with political pasts have been sensitive to any charge that they are political tools of the President and take pains to insulate their departments from charges of partisanship. One, however, is remarkable for his seemingly cavalier attitude about the norm. John Mitchell was not only Nixon's campaign director in 1968, he began to direct the reelection effort months before he left the DOJ.[57] Mitchell may have been oblivious to the norms of politics because he had little

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[52] CONGRESSIONAL QUARTERLY ALMANAC 1977, 581 (1977).

[53] *Id.* at 581, 584 (1977).

[54] Laura Wagner, *FBI Head Under Fire for Clinton Email Scrutiny Days Before Election*, NPR (Oct. 29, 2016), https://www.npr.org/sections/thetwo-way/2016/10/29/499868601/fbi-head-under-fire-for-restarting-clinton-email-investigation-days-before-elect.

[55] BAKER, *supra* note 1, at 20–21.

[56] *DOJ Alumni Statement on the Events Surrounding the Sentencing of Roger Stone,* DOJ ALUMNI (Feb. 16, 2020), https://medium.com/@dojalumni/doj-alumni-statement-on-the-events-surrounding-the-sentencing-of-roger-stone-c2cb75ae4937.

[57] *Watergate Hearings*, *supra* note 42, at 387–88.

partisan experience except on Nixon's campaigns. Ironically, some observers have noted that the Watergate crimes may not have occurred had Nixon turned to the Republican National Committee for campaign help rather than his own close aides and associates.[58]

3. Loyalty

The third norm is loyalty to presidents in their official capacities. The President is elected; attorneys general are appointed to help them fulfill their constitutional duties. Loyalty is a majoritarian principle, ensuring that an elected President's priorities inform departmental decision-making. Yet an attorney general's loyalty can trigger distrust among other political actors. As Senator Alan Cranston observed in 1974, "even our best attorneys general have never been free from suspicions that because they are political appointees of the President, they will be loyal to him over any other call of duty."[59]

Loyalty to the President is not *per se* a corrupting influence. On the contrary, it can enable an attorney general to be a trusted adviser, able to disagree without being seen as disloyal. For example, the trust between President Eisenhower and his Attorney General, Herbert Brownell, enabled Eisenhower to sign off on the Department of Justice's effort to enforce school desegregation in New Orleans in 1960.[60] Trust also was an important factor in Robert Kennedy's decision to join the DOJ. His father urged him to accept his brother's offer of the attorney generalship, against Bobby's preference for a lower profile position at State. His father insisted that "John Kennedy needed someone in the cabinet whom he knew intimately and trusted utterly."[61] Later, Edwin Meese III was described as "Reagan's Bobby Kennedy" because he was so close to Ronald Reagan and trusted on such a broad range of issues.[62]

Without that trust, a president may sideline an attorney general on important legal matters, turning instead to the White House Counsel and or legal advisers in other departments. In rare cases, the President may opt for a more sympathetic head of the DOJ. Donald Trump, for example, replaced his first Attorney General, Jeff Sessions, after

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[58] ERVIN, *supra* note 46, at vii.

[59] *Removing Politics from the Administration of Justice: Hearings before the S. Subcomm. on Separation of Powers of the Comm. on the Judiciary on S. 2803 and S. 2978*, 93d Cong. 6 (1974).

[60] Harold R. Tyler Jr., *The Attorney General of the United States: Counsel to the President or to the Government?* 45 ALB. L. REV. 8 (1980).

[61] ARTHUR M. SCHLESINGER JR., ROBERT KENNEDY AND HIS TIMES 231 (1978).

[62] Burt Solomon, *Meese Sets Ambitious Agenda That Challenges Fundamental Legal Beliefs*, 17 NATIONAL J. 2640; John A. Jenkins, *Mr. Power: Attorney General Meese Is Reagan's Man to Lead the Conservative Charge*, N.Y. TIMES (Oct. 12, 1986), at 19.

repeatedly characterizing him as disloyal for recusing himself from overseeing the Mueller probe.[63] Sessions' recusal was the appropriate course of action, yet the President did not see it that way, calling the recusal "very unfair to the president."[64] He continued the attacks even after Sessions left office on November 17, 2018.[65]

Janet Reno's tenure as Attorney General provides a case study in how debates about loyalty may hinge on political calculations. Reno was not Clinton's first choice or his second to head the DOJ. When the first two had to withdraw from consideration, he turned to others for recommendations. Reno, Miami-Dade County's prosecutor for fifteen years, was mentioned in glowing terms. Clinton selected her, noting at the time she "[p]ossesses one quality most essential to being Attorney General—unquestioned integrity."[66]

But she was an outsider, both to the Capitol and to the Clintons, and questions about her loyalty dogged her from the start. Bernie Nussbaum, Clinton's White House Counsel, described her as "very standoffish, very self-protective, very proper."[67] She was criticized heavily for naming four independent counsel probes of the administration, leading some unnamed White House aides to charge she was insufficiently loyal to the President.[68]

Ironically, she appointed the first special prosecutor at the President's direction in 1993. The President hoped that an investigation would quickly put questions about the Whitewater land deal to rest. However, when the new independent counsel law passed, a three-judge panel of the Special Division of the United States Court of Appeals named a new Whitewater counsel, Kenneth Starr.[69] His investigation

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[63] Michael S. Schmidt & Maggie Haberman, *Trump Humiliated Sessions After Mueller Appointment*, N.Y. TIMES (Sept. 14, 2017), https://www.nytimes.com/2017/09/14/us/politics/jeff-sessions-trump.html.

[64] *Quotation of the Day: Trump Lashes Out at Russia Inquiry and Its Overseers*, N.Y. TIMES (July 19, 2017), https://www.nytimes.com/2017/07/19/todayspaper/quotation-of-the-day-trump-lashes-out-at-russia-inquiry-and-its-overseers.html.

[65] *See* Donald Trump (@realDonaldTrump), TWITTER (July 19, 2017; June 5, 2018; March 4, 2020; May 22, 2020).

[66] Federal News Service, *Announcement by President Bill Clinton of Janet Reno as Attorney General*, C-SPAN (Feb. 11, 1993), https://www.c-span.org/video/?37897-1/attorney-general-nomination.

[67] Interview by Russell L. Riley, Nancy Baker Stephen F. Knott, and

James Sterling Young with Bernard Nussbaum, Charlottesville Va. (Sept. 24, 2002).

[68] Benjamin Wittes, *The Surprising Loyalist; Janet Reno Isn't a Team Player but Her Commitment to Clinton is Strong,* LEGAL TIMES, (Dec. 23, 1996).

[69] Susan Schmidt, *Judges Replace Fiske as Whitewater Counsel*, WASH. POST (Aug. 6, 1994), https://www.washingtonpost.com/archive/politics/1994/08/06/judges-replace-fiske-as-whitewater-counsel/4ca08c66-62cd-4ef3-a44f-9835399ed0ee/.

dragged on into Clinton's second term. Then, in early 1998, Reno acceded to Starr's request to expand his mandate to include allegations regarding Paula Jones and Monica Lewinsky. Nine months later, the Starr Report was released and led to Clinton's impeachment. Clinton was not happy with his Attorney General but, for political reasons, felt he could not fire her.[70] For one thing, Reno had support among key constituencies and a higher public approval rating than he did.[71]

Others accused Reno of being too loyal to the President. She faced this charge repeatedly from congressional Republicans, in particular when allegations arose about possible Democratic fundraising violations during the 1996 election. Her resistance to naming an independent counsel in that case led to a House hearing and a subpoena for related internal DOJ documents.[72] Recognizing that congressional political pressure also could undermine public trust, she refused to turn over the documents, ensuring "public confidence in our ability to make law-enforcement decisions free of political pressure."[73] Republicans were not the only ones believing she was too deferential to the White House. Many on the left had hoped she would build on her liberal reputation in Florida, including her opposition to the death penalty and skepticism of mandatory minimum sentencing. She did institute some liberal priorities, but she disappointed civil liberty advocates by supporting the administration in the areas of national security, surveillance, and crime control.[74]

When she was accused of not being a loyal soldier, Reno remarked that the President "expressly didn't hire me to be a loyal soldier. He hired me to be a lawyer for the people."[75] Even so, she exercised loyalty in the way that she understood. A close colleague described her view, "My job is to give the very best advice I can with the very best information I can. But I don't get to decide these things, and if the president has a different view than I do, the president wins."[76]

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[70] Nussbaum, *supra* note 63.

[71] Susan Baer, *Crime-Fighter with Heart, Reno Sets Out for Reform,* BALTIMORE SUN (July 1, 1993), https://www.baltimoresun.com/news/bs-xpm-1993-07-01-1993182025-story.html.

[72] Stephen Labaton, *Tape Links Clinton to Man Tied to Crime*, N.Y. TIMES (Oct. 19, 1997), https://www.nytimes.com/1997/10/18/us/tape-links-clinton-to-man-tied-to-crime.html.

[73] David Rosenbaum, *Panel Votes to Charge Reno With Contempt of Congress*, N.Y. TIMES (Aug. 7, 1998), https://www.nytimes.com/1998/08/07/us/panel-votes-to-charge-reno-with-contempt-of-congress.html.

[74] Wittes, *supra* note 68.

[75] Baer, *supra* note 71.

[76] Wittes, *supra* note 68.

Maintaining her reputation for integrity, Reno went on to have the longest tenure at the DOJ than any Attorney General except Wirt in the early nineteenth century.[77]

4. The Importance of Appearances

Following these norms is insufficient to maintaining public trust in the administration of justice; also essential is the perception that the Attorney General is following these norms.

Robert Kennedy understood the importance of public perceptions. Kennedy knew his appointment to the Department of Justice would be controversial, both because he was the President's brother and because of his own political history, which included serving as JFK's campaign manager in 1960. To ensure that the DOJ maintained a reputation of independence and nonpartisanship, he consciously avoided any action that could be construed as overtly political. At his first staff meeting, he expressly barred DOJ staff from engaging in party activities. Kennedy also attempted to insulate the DOJ from any hint of favoritism in investigations and prosecutions. This was occasionally uncomfortable for the young Attorney General. For example, he felt he had to hand off the bribery prosecution of a State Supreme Court Justice—whose brother had been an important early supporter of John Kennedy's—to a long-time career prosecutor.[78] Even more wrenching for him, he did not intervene in the prosecution of a close friend of the Kennedys who was charged with federal tax evasion, even though he knew the accused suffered mental health issues.[79]

Attorneys general may believe they are acting in accord with the normative expectations of the office, but their actions and rhetoric can appear otherwise. As that perception of politicization spreads, it weakens public faith in the DOJ. The salience of appearances in highly partisan times is illustrated by a June 2016 incident occurring on the Phoenix airport tarmac. When the airplane of Loretta Lynch, Barack Obama's Attorney General, touched down in Phoenix, former President Bill Clinton decided to drop in for a brief visit. Hillary Clinton was under FBI investigation at the time for using a private email server when she was Secretary of State. The story of their twenty-minute

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[77] Office of the Attorney General, *Attorney General: William Wirt*, U.S. DEPARTMENT OF JUSTICE (July 7, 2017), https://www.justice.gov/ag/bio/wirt-william; Office of the Attorney General, *Attorney General: Janet Reno*, U.S. DEPARTMENT OF JUSTICE (Mar. 16, 2021), https://www.justice.gov/ag/bio/reno-janet.

[78] ROBERT KENNEDY: IN HIS OWN WORDS 359 (Edwin Guthman & Jeffrey Shulman, eds. 1988).

[79] VICTORY S. NAVASKY, KENNEDY JUSTICE 378–91 (1971).

conversation exploded on conservative news sites as an example of secret political tampering with law enforcement, even though Bill Clinton had been out of office for more than fifteen years and exercised no authority over Lynch. The appearance of impropriety was sufficient to give candidate Trump gist for a Twitter broadside, as well as fuel a book and multiple internet sites alleging a conspiracy.[80] Mainstream news outlets initially covered it as well, leading CNN Politics to note, "The meeting is raising questions about whether the independence of the Justice Department . . . might have been compromised."[81]

The appearance of independence remains critical in the current partisan environment, with several actions of Attorney General William Barr raising even more serious questions.

Unlike Kennedy, Barr has little of the political background customarily associated with the perception of partisanship. His career has alternated between private practice and government service, including years in the DOJ. Further, his prior DOJ service suggests he knows the normative expectations of the office. His remarks in his 2019 confirmation hearings and July 2020 testimony before the House Judiciary Committee confirm this. Barr noted the Attorney General "holds in trust the fair and impartial administration of justice" and must handle criminal cases "evenly, based on the facts and without regard to political and personal considerations."[82] He explicitly reassured the House that the President had not interfered in the DOJ's decisions, strongly rejecting any suggestion that he plays politics or caves in to the President's demands.[83]

Yet the perception that he does persists. Hundreds of current and former DOJ employees have joined legal scholars to point out how unprecedented his actions are, from reversing decisions made by career prosecutors and initiating investigations pushed by the White House, to echoing the President's key reelection messages, including fomenting doubt about absentee ballot integrity.[84]

Initially, the prosecutors whose judgments were reversed did not comment publicly, in keeping with established DOJ practice. However,

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[80] *See* CHRISTOPHER SIGN, SECRET ON THE TARMAC (2020). The leak about the meeting did result in an FBI probe, since it breached security protocols.

[81] Eli Watkins, *Bill Clinton Meeting Causes Headaches for Hillary*, CNN POLITICS (June 30, 2016), https://www.cnn.com/2016/06/29/politics/bill-clinton-loretta-lynch/index.html.

[82] CNN News Room, *Attorney General Bar's Opening Statement to Congress*, CNN (July 28, 2020), https://www.cnn.com/videos/politics/2020/07/28/barr-opening-statement-house-judiciary-testimony-hearing-sot-nr-vpx.cnn.

[83] *Id.*

[84] Benner, *supra* note 50.

others in the legal community did weigh in. The case of Roger Stone's sentencing is illustrative. DOJ attorneys recommended Stone serve seven to nine years in prison. Hours later, the President tweeted that the prosecution's recommendation was "horrible and very unfair."[85] Less than a day after that, the Attorney General issued an updated sentencing memo that recommended only fifteen to twenty-one months in prison. In apparent protest, four prosecutors resigned from the team and the fifth resigned from the DOJ. Several former DOJ employees immediately accused the DOJ of abandoning decades of independence to help a friend of the President.[86] Days later, more than 2,000 former DOJ employees—from both Republican and Democratic administrations—published an open letter calling on Barr to resign. The letter explained, "It is unheard of for the Department's top leaders to overrule line prosecutors, who are following established polices, in order to give preferential treatment to a close associate of the President."[87] Another open letter was posted by former DOJ employees after Barr appeared to be involved in clearing protestors from Lafayette Square in June 2020. About 1,260 called on the DOJ's Inspector General to investigate if "the Attorney General or any other DOJ employee has directly participated in actions that have deprived Americans of their constitutional rights."[88] Resignations by more prosecutors in the Fall of 2020 led to further reproach by the legal community. Two former top DOJ attorneys wrote, "A hallmark of the department . . . is its tradition of political independence, forged over decades since its creation in 1870. Neither of us ever heard of career civil servants resigning because they believed the [A]ttorney [G]eneral

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[85] John Kruzel, *DOJ Lawyers Resign En Masse Over Roger Stone Sentencing*, THE HILL (Feb. 22, 2020), https://thehill.com/regulation/court-battles/482655-doj-lawyers-resign-en-masse-over-roger-stone-sentencing.

[86] Del Quentin Wilber, *Justice Department Roiled by Resignations in Roger Stone Case,* L.A. TIMES (Feb. 12, 2020), https://www.latimes.com/politics/story/2020-02-12/justice-department-resignations-stone-case.

[87] *Former DOJ Officials Call on U.S. Attorney General Barr to Resign*, REUTERS (Feb. 16, 2020), https://www.reuters.com/article/usa-trump-russia-stone/former-doj-officials-call-on-u-s-attorney-general-barr-to-resign-idINKBN20B0AC; *see also* Laura Jarrett, *More than 2,000 Former Prosecutors and Other DOJ Officials Call on Bill Barr to Resign*, CNN POLITICS (Feb. 17, 2020), https://www.cnn.com/2020/02/16/politics/prosecutors-doj-officials-barr-resign/index.html.

[88] *DOJ Alumni Letter to Inspector General Michael Horowitz*, DOJ ALUMNI (June 10, 2020), https://medium.com/@dojalumni/doj-alumni-letter-to-inspector-general-michael-horowitz-8011bb12167b.

was acting politically."[89] When a U.S. Attorney resigned a few weeks later, he broke the customary silence to accuse the Attorney General of "slavish obedience to Donald Trump's will in his selective meddling with the criminal justice system [.]"[90] In late October 2020, twenty more former U.S. Attorneys publicly criticized the politicization of the DOJ; they had served in every Republican administration since Eisenhower.[91]

The sheer number of former DOJ employees speaking out is unprecedented, more so because of the discretion drilled into federal prosecutors. Nor can their concerns be easily dismissed as partisan attacks.

For his part, the Attorney General vociferously denies that he has acted inappropriately or politically. He sees his actions as legitimate and even necessary. In his Constitution Day remarks at Hillsdale College, for example, he said, "Line prosecutors . . . are generally part of the permanent bureaucracy. They do not have the political legitimacy to be the public face for tough decisions . . . . Nor can the public and its representatives hold civil servants accountable in the same way as appointed officials."[92] It is important to note that Barr did not comply with every directive by the President, including some that might have impacted the 2020 election in Trump's favor.[93] Yet, the Attorney

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[89] Neal K. Katyal & Joshua A. Geltzer, *Opinion, this is How Bad It's Gotten at the Justice Department,* N.Y. TIMES (Sept. 17, 2020), https://www.nytimes.com/2020/09/17/opinion/trump-barr-justice-department.html?

[90] Phillip Halpern, *Commentary, I Won't Work in Attorney General William Barr's Justice Department Any Longer,* S.D. UNION-TRIBUNE (Oct. 14, 2020),

https://www.sandiegouniontribune.com/opinion/commentary/story/2020-10-14/william-barr-department-of-justice-doj.

[91] *Statement of Former U.S. Attorneys Who Served Under Republican Presidents*, WASH POST (Oct. 27, 2020), https://www.washingtonpost.com/context/statement-of-former-u-s-attorneys-who-served-under-republican-presidents/ecd4d1ac-f10e-4ca8-a560-b2359d9b2b83/?itid=lk_interstitial_manual_9.

[92] William Barr, *Attorney General's Remarks as Delivered at Hillsdale College*, LAWFARE BLOG (Sept. 17, 2020), https://www.lawfareblog.com/transcript-attorney-generals-remarks-delivered-and-qa-hillsdale-college.

[93] Among these actions was the President's demand for an investigation and indictment of Joe and Hunter Biden; for the pre-election release of a report on the origin of the FBI's Russia probe in 2016; and for public exposure of the Obama administration's "unmasking" of Americans whose names had been redacted in intelligence reports. Katie Benner & Julian E. Barnes, *Review Finds No Irregularities in Requests for Classified Information,* N.Y. TIMES (Oct. 14, 2020), https://www.nytimes.com/2020/10/14/us/politics/barr-durham-unmasking-probe.html; Martin Pengelly & Tom McCarthy, *Trump Asks Barr to Investigate Dubious Claims Against Joe and Hunter Biden*, GUARDIAN (Oct. 20, 2020), https://www.theguardian.com/us-news/2020/oct/20/trump-barr-special-prosecutor-joe-biden-hunter-biden?CMP=Share_iOSApp_Other.

General never addressed the potential impact that perception of bias can have on the administration of justice. Regardless of the Attorney General's actual motives, the appearance that he acted improperly has undercut key norms in the DOJ.

IV. LAW & POLITICS: CONCLUDING THOUGHTS

This examination of the history and norms of the Office of the Attorney General brings us back to the duality that sparked my interest all those years ago. Former U.S. Attorney and later independent counsel, Whitney North Seymour, wrote that the Attorney General is compelled to serve two masters—the President and the law. He called it "a fundamental flaw in the original conception of the Department of Justice"[94] and proposed dividing the functions into an attorney general/presidential adviser, and a chief prosecutor.[95] That idea never caught on. Others have proposed various institutional arrangements to ensure that the Attorney General, while constitutionally obligated to serve the President, fulfills other essential obligations: to the government, to the Constitution and to the American people as well.

Archibald Cox, John Kennedy's solicitor general and the first special prosecutor in the Watergate investigation, rejected the idea that the Department of Justice should be independent of the White House, writing, "The close relationships between law and policy, and between the Attorney General as lawyer and the President as client, make [it] unwise, if not impossible, to give independent status to the Attorney General and [the] Department of Justice."[96]

Furthermore, as some have pointed out, formal institutional limits will not ensure that the Attorney General's office is truly independent and nonpartisan. An attorney general who intends to abuse the office will find a way, as Charles Cooper, former head of the Office of Legal Counsel, noted.[97] In fact, removing an attorney general from the political world would also remove the law officer from a system of accountability. A chief prosecutor who is autonomous of the President poses a different kind of threat, able to amass vast prosecutorial powers.

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[94] *Removing Politics Hearings*, *supra* note 59, at 216 (testimony of Whitney North Seymour Jr., U.S. Attorney for Southern District of New York under Nixon & independent counsel under Reagan).

[95] WHITNEY NORTH SEYMOUR JR., UNITED STATES ATTORNEY: A INSIDE VIEW OF 'JUSTICE' IN AMERICA UNDER THE NIXON ADMINISTRATION 228–32 (1975).

[96] *Removing Politics Hearings, supra* note 59, at 208 (testimony of Archibald Cox, first independent counsel in Watergate investigation).

[97] Interview with Charles Cooper, in Washington, D.C. (Oct. 19, 1987).

The office places a unique demand on attorneys general to exhibit a genuine commitment to fairness, equal justice and the rule of law. Mere words attesting to those values are not sufficient, nor is a background that suggests an attorney general will be an independent actor. Instead, the character of the individual matters. Edward Levi believed the most effective avenue for insulating law officers was "[t]heir own moral conscience and the collective morality of the Department of Justice."[98] An inescapable part of that collective morality are the norms and practices articulated here. Attorneys general ensure that the administration of justice on their watch will be perceived as legitimate when they respect—and take pains to appear to respect—the longstanding norms that have long served the public trust.

[98] *Senate Judiciary Committee: Hearings on the Nomination of Edward H. Levi to be Attorney General*, 94th Cong. 21–22 (1975).