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OF all the great offices established by Congress in 1789, that of the attorney-general was in some respects the least satisfactory in its organization. The portion of the Judiciary Act devoted to the attorney-general's place is curiously brief. Its very brevity suggests the immaturity of the administrative-judicial system of the central government. Aside from his function as federal prosecutor, the attorney-general was to be legal adviser to the President and to the heads of departments. This arrangement brought him into the range of executive control, making him, like the secretaries, a ministerial officer of the chief magistrate.[2]

When, in 1790, Edmund Randolph, first of the attorneys-general, wrote of himself as "a sort of mongrel between the State and U. S.; called an officer of some rank under the latter, and yet thrust out to get a livelihood in the former. . . ."[3] he cast no doubtful reflection on the status and relation of his position. He knew that he was head of no department, and his salary of fifteen hundred dollars[4] was so small that probably he could not have been expected to support himself by it. He was obliged to trust to legal practice to eke out a living. There is no evidence to show that he was even expected to remain at the seat of government, though he was inevitably obliged to keep in touch with the President, at least by occasional correspondence. And, should the federal business warrant it, the President might summon him to a conference with the secretaries. That he was reckoned an adviser in legal matters by Washington from the start there is no doubt.[5]

[1] For two other articles by the present writer on certain historical features of the President's cabinet, the reader is referred to the *Yale Review* for August, 1906, and to *The American Political Science Review* for August, 1909.

[2] 1 Statutes at Large, 92. September 24, 1789.

[3] Conway, Omitted Chapters, in the Life and Papers of Edmund Randolph (1888), page 135.

[4] Provided by statute of September 23, 1789. 1 Statutes at Large, 72, sec. 1.

[5] Pickering quotes from memory, declaring that Washington said of Randolph: "I

The place and functions of the attorney-general remained for many years after 1789 subjects of reflection on the part of thoughtful men. Several Presidents, beginning with James Madison, urged reform in the office, though apparently with no clear notions at first as to what measures of reform were needed. The attorneys-general themselves were helpful in the solution of the problem, none more so than William Wirt and Caleb Cushing. The problem became clearer under the stress of numerous circumstances in the growth and requirements of federal administration. By the close of the Civil War it was forced into the foreground; and Congress, in 1870, acting after long deliberation, established the office on a new footing, giving the attorney-general a place as head of the department of justice. The act of 1870, it may be added, made no change in law as to the duty of the attorney-general in giving official opinions.[1]

I

Before the outbreak of the war in 1812, Madison called attention to the accumulation of business in the various departments of the government, in particular in the war department, which was disproportionately burdened. This accumulation was due largely to the peculiar state of our foreign relations that for years had involved all the secretaries in exhausting labors. These relations had affected the entire administrative machinery of the federal government.[2] As a farewell word in his last annual message of December, 1816, Madison urged upon Congress the propriety of establishing an additional executive department, "to be charged with duties now overburdening other departments and with such as have not been annexed to any department. . ."[3] To another kindred matter he drew attention in these words:

made him . . . a member of my cabinet from the first." C. W. Upham, Life of Timothy Pickering, vol. iii, page 226.

[1] American and English Encyclopedia of Law, Compiled by Garland, McGehee and Cockcroft (2d ed. 1897), vol. iii, page 474, footnote 1.

[2] Messages and Papers of the Presidents, vol. i, page 499. Special message of April 20, 1812.

[3] *Ibid.*, vol. i, page 577, December 3.

The course of experience recommends . . . . that the provision for the station of Attorney-General, whose residence at the seat of Government, official connections with it, and the management of the public business before the judiciary preclude an extensive participation in professional emoluments, be made more adequate to his services and his relinquishments, and that, with a view to his reasonable accommodation and to a proper depository of his official opinions and proceedings, there be included in the provision the usual appurtenances to a public office. . .[1]

Such reflections coming from one of the leaders in the Philadelphia Convention, who had since had much experience in administrative work, were not easily overlooked by several of his successors in the presidency. John Quincy Adams, Jackson and Polk all harked back to Madison's suggestion as to the position of the attorney-general.

The salary of the attorney-general, starting at fifteen hundred dollars in 1789, was doubled ten years later. But Congress thereafter was slow in increasing it. And it was not until 1853 that the salary was placed on a par with that of the secretaries and of the postmaster-general. By the appropriation act of that year—so far, at any rate, as salaries could mark unity and equality of office—the five secretaries, along with the postmaster-general and the attorney-general, stood together and in equal rank.[2]

In 1814 an attempt was made to enact a residence requirement. In January of that year a resolution was introduced into the House for the express purpose of inquiring into the expediency of "making it the duty of the Attorney-General of the United States to keep his office at the seat of Government during the session of Congress. . ."[3] Apparently the House regarded the attorney-general as the proper officer to aid it at times in respect to doubtful points of law. Following this resolution, a bill was prepared, presented and, after sundry altera-

[1] Messages and Papers of the President, i, pp. 577–78.

[2] Act of March 3, 1853.

[3] Annals of Congress, 1813–1814, 13th Cong., pp. 852–3. Date of resolution, January 5, 1814.

tions, was passed by the House in April, but got no farther than a second reading in the Senate.[1]

That this bill met Madison's wishes, so far at least as its general principle was concerned, is probable.[2] But Madison was disturbed when he learned that his able attorney-general, William Pinkney of Maryland, was ready to resign because of the residence requirement likely to be enacted. Pinkney, in fact, did resign some months before the fate of the resolution was known,[3] for he was probably chiefly dependent on private practice in Baltimore, the city in which he resided. In accepting his resignation Madison wrote: "There may be instances where talents and services of peculiar value outweigh the consideration of constant residence; and I have felt all the force of this truth since I have had the pleasure of numbering you among the partners of my public trust. . ."[4]

When Pinkney's successor, Richard Rush, was appointed, Madison is said to have stipulated that during the sessions of Congress Rush should remain in Washington.[5]

II

William Wirt of Virginia accepted the post of attorney-general offered him by President Monroe late in October, 1817, with a clear understanding that there was nothing in the duties of his office to prevent him from carrying on general practice in Washington, where he took up his residence, or from attending occasional calls to Baltimore, Philadelphia or elsewhere, if time allowed.[6] He knew, however, that his first obligation was to Monroe and to the regular duties of his new position.

[1] Annals of Congress, *op. cit.*, pp. 766, 1114–5, 2023–2024. *Cf.* H. Adams, History of the United States, vol. vii, page 398.

[2] On January 29, 1814, Madison wrote to Pinkney: "On the first knowledge of the Bill, I was not unaware that the dilemma it imposes might deprive us of your associated services . . . I readily acknowledge that, in a general view, the object of the bill is not ineligible [sic] to the Executive. . ." Writings, (ed. Rives), vol. ii, page 581.

[3] January 25, 1814, according to Mosher, Executive Register, page 85.

[4] Madison's Writings, (ed. Rives), vol. ii, page 581.

[5] S. L. Southard, A Discourse on the Professional Character and Virtues of the late William Wirt (1834), page 33.

[6] J. P. Kennedy, Memoirs . . . of William Wirt, vol. ii, page 32.

On the very day of his commission, November 13, he sketched on the fly-leaf of a record-book a simple plan which revealed his purpose of keeping careful records and of obtaining from the heads of departments who might consult him copies of all documents concerning which he might be asked for opinions.[1] Some months later, under date of March 27, 1818, Wirt addressed a letter to Hugh Nelson, chairman of the judiciary committee of the House of Representatives. In this letter he set forth what he conceived to be some defects of the law of 1789, the law establishing his office, and drew attention to such improvements as he hoped that congress might be induced to make. It was an illuminating, if not a constructive statement. It probably accomplished little, if any, change, for it never reached the House directly, but was filed away with other committee material, and gained publicity only in 1849, fifteen years after Wirt's death, when it was printed at length in the *Memoirs of the Life of William Wirt*, written by Wirt's friend, John Pendleton Kennedy. Then it attracted attention, especially among the members of the legal profession. Its substance merits consideration.[2]

Wirt began with an examination of the Judiciary Act of September 24, 1789. There the duties of the attorney-general were briefly set forth. They had not been more clearly elaborated in any later enactment. Wirt next sought for the records of opinions as given by his predecessors in the office—for letter-books, official correspondence and documentary evidence, but could not find a trace of these. Accordingly he concluded that there could have been neither consistency in the opinions nor uniformity in the practices of the attorneys-general. He indicated that in various ways he had discovered that his forerunners had been called on for opinions from many sources—committees of Congress, district attorneys, collectors of customs

[1] The original record is quoted by James S. Easby-Smith, The Department of Justice: Its History and Functions (1904), page 10.

[2] Kennedy, Memoirs of . . . Wirt (1st ed., 1849), vol. ii, pp. 61-65. *The Monthly Law Reporter*, December, 1850, pp. 373-379. This article reprints from Kennedy the Wirt letter of March 27, 1818, and comments thoughtfully on Kennedy's book, but makes several erroneous statements.

and of public taxes, marshals and even courts-martial. Clearly these practices went far beyond the provisions of law. Resting on courtesy merely, they impressed Wirt as dangerous. His criticism took this form of statement:

> from the connection of the Attorney-General with the executive branch of the government . . . his advice and opinions, *given as Attorney-General*, will have an *official influence*, beyond, and independent of, whatever intrinsic merit they may possess: and whether it be sound policy to permit this officer or any other under the government, even on the application of others, to extend the influence of his office beyond the pale of law, and to cause it to be felt, where the laws have not contemplated that it should be felt, is the point which I beg leave to submit. . .[1]

The conclusions which Wirt drew may be summarized. First, and above all things, provision should be made in law for keeping the records and preserving the documents of the office. This would make for consistency of opinions and uniformity of practices. Second, there should be a depository in the office of the attorney-general for the statutes of the various states, statutes which might be needed at short notice for aid in solving legal problems. In this matter Wirt was asking simply for a special library to facilitate his work. Finally, he suggested that legal restrictions be placed on the duties of the officer for the obvious reason that one man could not find time to perform the work if he were obliged to attend to such miscellaneous calls as had been made upon the time and energy of his predecessors. The experience of several months had already shown to him that "very little time is left to the Attorney-General to aid the salary of his office by individual engagements," a fact, he thought, which might account in part for the number of resignations which had occurred among his predecessors.[2]

This letter marks a new epoch in the history of the attorney-general's office. So far as the position of attorney-general

[1] Kennedy, *op. cit.*, vol. ii, page 64.

[2] *Ibid.*, page 64.

could be vitalized and molded by Wirt, it was to be done. After his long occupancy (1817–1829) the attorney-generalship had certainly risen in importance and was considered as more closely allied to the whole executive administration than ever before. It cannot be said that Wirt's suggestions influenced directly congressional action, for there is no proof of such influence. But there was at last a man in the attorney-generalship with a few clear ideas on the subject of organization which he was ready to make effective. This, at any rate, Congress must have understood.

The details of administrative organization it is not the province of this paper to consider. It is enough to say that Wirt was provided by congress with a clerk in 1818 and a small sum of money ($500) for office-room and stationery. In response to criticism over inequalities in the salaries of the secretaries, these salaries were raised and equalized the next year (1819); and the salary of the attorney-general was increased to thirty-five hundred dollars. Other improvements of a minor character were made during his long term of service.[1]

Early in his term Wirt had intimated to the House that by the law creating his position he could not be reckoned legal counselor to that body.[2] When, in January, 1820, the House sent an order for his official opinion on a certain subject before them, he deliberately declined to give the opinion. This was his mode of reasoning:

It is true that, in this case, I should have the sanction of the House . . . and it is not less true that my respect for the House impels me strongly to obey the order. The precedent, however, would not be less dangerous on account of the purity of the motives in which it

[1] Act of April 20, 1818, sec. 6. Annals of Congress, 15th Cong., 1st sess., vol. ii, p. 2566. Lowndes complained in the House April 20, 1818, of allowing "any longer the discrimination which had heretofore existed in the salaries of the Heads of Departments." *Ibid.*, vol. ii, 1779. In the following November, the subject of salaries came up in both Senate and House. The discussion led to the Act of February 20, 1819. Annals, 15th Cong., 2d sess. (1818–1819), vol. i, pp. 21 *et seq.*, vol. ii, page 2486. Easby-Smith, The Department of Justice, page 10, gives sundry details.

[2] House Documents, No. 68, 16th Cong., 1st sess., vol. v. "Letter from the Attorney-General . . . in reply to an Order of the House of Representatives," page 2. Dated February 3, 1820.

originated. . . . I may be wrong in my view of the subject; the order may be sanctioned by former precedents; but my predecessors in office have left nothing for my guidance. . .[1]

He was no less explicit about his duty when, sought by the secretary of the navy a few months later for aid, he declared: "As my official duty is confined to the giving my opinion on questions of *law*, I consider myself as having nothing to do with the settlement of controverted questions of *fact*. . .[2]

A month after Wirt's death, on March 18, 1834, his friend, Samuel L. Southard—for some years his colleague in the cabinet—gave a public address in the hall of the House of Representatives at Washington on William Wirt's career. Speaking of Wirt's opinions as attorney-general, Southard said:

> They all relate to matters of importance in the construction of the laws. . . . They will prevent much uncertainty in that office hereafter; afford one of the best collections of materials for writing the legal and constitutional history of our country; and remain a proud monument to his industry, learning and talents. . .[3]

It was seven years after Wirt's death (1841) that the first volume of the *Official Opinions of the Attorneys-General*, authorized by Congress, was issued. Similar collections have been compiled and printed at intervals ever since, and they constitute today a well-known and useful series. They amount to official justifications of the conduct of our Presidents.[4] In the first volume Wirt's opinions occupied over five-hundred pages in a total of 1471. Not one of his predecessors was represented by

[1] House Documents, *op. cit.*

[2] Opinions of the Attorneys-General, page 254. (House Ex. Doc., 26th Cong., 2d sess., Doc't No. 123.) Date of opinion, April 3, 1820.

[3] S. L. Southard, Discourse *etc.* (1834), page 36.

[4] House Ex. Doc., 26th Cong., 2d sess., Doc't No. 123. See in this connection an article, "Contrast between the Duties of the Attorney-General of the United States and those of the Law Officers of the British Crown," 38 *American Law Review*, November-December, 1904, pp. 924–925. In England the opinions of the law officers of the Crown are always held as confidential. It is believed by some lawyers that the withholding of these opinions amounts to a serious loss to the body of English jurisprudence. The subject was discussed in the House of Commons on April 26, 1901.

much over thirty pages. The five men who came after him, occupying almost exactly eleven years (1829–1841)—equivalent in time to his single term of service—left on record 704 pages. Perhaps Wirt's admirable example of industry may have had something to do with the activity of his successors.[1]

In refusing to be led beyond the limits prescribed by law, Wirt doubtless contracted the action of his office. The restrictions thus placed upon it, however, made its relations clearer to Congress on the one hand and to the executive on the other. They tended inevitably to increase the usefulness of the attorney-general as a member of the cabinet.

III

As a result of the growth of the United States in population, of its development in commerce and wealth and of its ever-widening territory, the administrative work of the government had by 1830 increased enormously. The executive departments and the judiciary—confined, as they were for the most part, to their primitive organizations—were inadequately performing their functions. John Quincy Adams appreciated this fact, remarking on it in his first annual message.[2] Apparently, however, he could accomplish nothing toward remedying it.

[1] A comparison of the mere paging in the original volume of *Opinions, etc.*, edited by Henry D. Gilpin (Washington, 1841, Doc't No. 123), yields the following results:

1.	1789–1794: Edmund Randolph	14 pages.
2.	1794–1795: William Bradford	13 "
3.	1795–1801: Charles Lee	22 "
4.	1801–1804: Levi Lincoln	37 "
5.	1805–1807: J. Breckenridge	5 "
6.	1807–1811: C. A. Rodney	8 "
7.	1811–1814: W. Pinkney	5 "
8.	1814–1817: R. Rush	30 "
9.	1817–1829: W. Wirt	518 "
10.	1829–1831: J. M. Berrien	159 "
11.	1831–1833: R. B. Taney	86 "
12.	1833–1838: B. F. Butler	292 "
13.	1838–1839: Felix Grundy	82 "
14.	1840–1841: H. D. Gilpin	85 "

Appendix: pp. 1383–1471. Odd opinions not included in the above record.

[2] Richardson, Messages and Papers, vol. ii, pp. 314–15.

When Jackson became President and referred to the need of attending to the business of reorganizing the attorney-general's office and of placing that officer "on the same footing in all respects as the heads of the other departments," he found a Congress ready to heed his suggestions. Originally, as has been shown, the office had left its incumbent ample time for private practice. By Jackson's day it was reckoned "one of daily duty." It was important to Jackson that the attorney-general should not be called away from the seat of government. With a fair increase in salary and a residence requirement, the officer could be charged with the general superintendence of the government's legal concerns.[1]

In the spring of 1830 a bill bearing on the subject was introduced into the Senate. Its objects were to reorganize the office of the attorney-general in such a way as to erect it into an executive department; to transfer to it from the state department the work of the patent office; to give to the attorney-general the superintendence of the collection of debts due the government; and to raise the salary of the attorney-general to six thousand dollars—exactly the salary then provided for each of the four secretaries. Such arrangements, it was argued, would do away with the need, at any rate for some time to come, of organizing a home department. The plan, it was assumed, would shut out the attorney-general from practice other than what he would be called on to conduct on behalf of the government in the supreme court. But the anomalous position of an attorney-general so burdened was at once apparent. In particular the plan seemed to ignore the essential fact that the attorney-general was primarily a law officer. And so it was easily defeated.[2]

Daniel Webster opposed this bill. He had no faith in the attempt thus to forestall a home department. Moreover, he wished the attorney-general still to continue in private practice without too much restriction. The old salary ($3,500) was relatively low for the position, but not too low, it was urged,

[1] Richardson, *op. cit.*, vol. ii, pp. 453 *et seq.*, pp. 527 *et seq.*

[2] Register of Debates (1829–1830), vol. vi, pt. i, pp. 276, 322 *et seq.*, 404.

because the attorney-general "more than made up to himself the amount of compensation received by the others [*i. e.*, the heads of departments] who were confined to their offices. . ."[1] According to the views of one senator, to permit the attorney-general to engage in private practice was a legitimate and even a desirable way of aiding him in his equipment for performing well his official duties.[2]

Although the bill failed, through Webster's efforts a plan was finally matured, formulated and enacted into law whereby a new official, known as solicitor of the treasury, was created for the special purpose of aiding the attorney-general in suits pertaining to treasury claims. And for the additional responsibility involved in the new relationship, the salary of the attorney-general was raised to four thousand dollars—an amount at which it remained until 1853.[3]

That President Jackson was dissatisfied with such a compromise measure is clear enough from certain remarks in his second message of December 6, 1830. However useful in itself the provision for a solicitor of the treasury might be, it was not, according to the President,

> calculated to supersede the necessity of extending the duties and powers of the Attorney-General's Office. On the contrary, I am convinced that the public interest would be greatly promoted by giving to that officer the general superintendence of the various law agents of the Government, and of all law proceedings, whether civil or criminal, in which the United States may be interested, allowing him at the same time such a compensation as would enable him to devote his undivided attention to the public business. . .[4]

It is probable that Jackson never again expressed himself in print after 1830 regarding reform in the office of attorney-

[1] Register of Debates, *op. cit.*, p. 324.

[2] *Ibid.*, p. 323.

[3] 4 Statutes at Large, ch. cliii, sec. 10. "*And be it further enacted*, That it shall be the duty of the attorney general . . at the request of said solicitor, to advise with and direct the said solicitor as to the manner of conducting the suits, proceedings, and prosecutions aforesaid; and the attorney general shall receive in addition to his present salary, the sum of five hundred dollars per annum." May 29, 1830.

[4] Richardson, Messages and Papers, vol. ii, page 527.

general. After Jackson, no president before Polk undertook to do so.

Polk argued in a vein similar to that which Jackson had made familiar. He, too, wished to increase the duties and responsibilities of the officer, and recommended that he be placed on the same footing as the heads of departments, for "his residence and constant attention at the seat of Government are required. . ."[1] Even then Congress took no action in the matter for several years. Whatever projects of reform there may have been, they were doubtless seriously interfered with by the war with Mexico.

There is a curiously interesting paragraph in this connection occurring in a circular letter addressed by Polk, under date of February 17, 1845, to all the men to whom he extended invitations to become his cabinet associates. He wrote:

> I disapprove the practice which has sometimes prevailed, of Cabinet officers absenting themselves for long intervals of time from the seat of government, and leaving the management of their Departments to chief clerks, or other less responsible persons than themselves. I expect myself to remain constantly at Washington, unless it may be that no public duty requires my presence, when I may be occasionally absent, but then only for a short time. It is by conforming to this rule that the President and his Cabinet can have any assurance that abuses will be prevented, and that the subordinate executive officers connected with them respectively will faithfully perform their duty. . .[2]

It may be assumed that Polk exacted this significant condition from his first attorney-general, John Y. Mason of Virginia. But the attorney-generalship under Polk had two other occupants, Nathan Clifford of Maine and Isaac Toucey of Connecticut.[3] I am aware of no evidence that would make it possible to say, in respect to this office alone, how far the condition was really fulfilled. So far as Polk could establish the custom of holding his cabinet associates in Washington he doubtless did so.

[1] Richardson, *ibid.*, vol. iv, page 415.

[2] The Works of James Buchanan, ed. John Bassett Moore (1909), vol. vi, pp. 110–111.

[3] Mosher, page 138.

IV

There is ground for believing that Caleb Cushing was the first attorney-general of the United States who held himself strictly to the residence obligation and refrained from the general practice of law.

Coming into office in March, 1853, just after the salary of the attorney-general had been raised to eight thousand dollars, Cushing at the start was placed, in respect to salary, on an equality with his cabinet associates, and accordingly had no very valid reason for entering into private practice in or outside of Washington. Like the other cabinet associates of Pierce, Cushing kept his place throughout the four years' term. He left behind him a collection of official opinions that for extent alone has never, before or since his day, been equalled. They fill three in the series of volumes known as *Official Opinions*, twenty-six of which have thus far (1909) been issued.[1] It may be doubted whether Pierce had an abler associate among his advisers than Cushing, though Jefferson Davis was secretary of war and William L. Marcy was at the head of the state department. Certainly there was no more trusted man in the cabinet. Pierce held him in the highest regard. That he was of real assistance in keeping the cabinet together is a matter of authentic history.[2]

Cushing left to posterity quite the most careful considerations on the historic development of the attorney-generalship up to his time. These have been occasionally quoted since they were written. They probably did something to help establish the attorney-general as head of the department of justice in 1870. That Cushing perceived the need of some such organization is clear. Like Wirt, Cushing determined to understand the structure and functions of his office, so far as the laws and the practices of his predecessors could reveal them. Instead of presenting his conclusions—as Wirt had done—to

[1] Cushing's opinions fill vols. v, vi, vii, covering over 2000 pages.

[2] Memorial of Caleb Cushing (Newburyport, 1879), pp. 169 *et seq.* Vol. 7 Opinions of Attorneys-General, pp. 453–482. The Memorial gives various useful clues to Cushing's career. There is no biography of Cushing yet written.

the chairman of a committee of Congress, he offered them to the President. They were written under date of March 8, 1854, at the end of his first year's experience. With the technical portions of the "opinion" relating to the attorney-general and the courts, this investigation is not concerned. There are, however, some reflections which throw light on the relation of the office to the executive.[1]

According to the original theory of the office, the attorney-general was prompted if not actually authorized to engage in private practice of the law. This custom in the case of the English attorney-general—from whose office it is probable that we drew some of the features of the American office—was well established in 1789. But the English attorney-general was not then a member of the cabinet, nor is he so today.[2]

Cushing doubted the expediency of allowing the head of a department "under any circumstances" to continue in the practice of the law. That such a custom might once have been justifiable, he was willing to admit. As he expressed his thought—

> Formerly, in an age of simple manners, when the public expenditures were less, the number of places less, the population of the country less, the frequentation of the capital less, the ingenuity of self-interest less . . . . a secretary, eminent in the legal profession might, without the possibility of reproach or suspicion of evil, take charge of private suits or interests at the seat of government. He may do so now, perhaps; but that is not so clear as it formerly was; and it is not easy to perceive any distinction in this between what befits one and another head of department. . . . However all these things may be, the actual in-

[1] The considerations of Cushing were published in vol. 6 Opinions of the Attorneys-General, pp. 326–355. They appeared also in *The American Law Register* (December, 1856), vol. v, pp. 65–94. I have found the latter volume most convenient to use.

[2] *American Law Register*, vol. v. Anson, Law and Custom, pt. ii, page 92. The Crown (2d ed., 1896), pp. 201–202. In 1818 the absence of the English attorney-general from the cabinet impressed Richard Rush as strange and worthy of remark. He said that "in the complicated and daily workings of the machine of free government throughout a vast empire, I could still see room for the constant presence of the attorney-general in the cabinet." Memoranda of a Residence at the Court of London (2d ed., Phila., 1833), page 63.

cumbent of this office. . . experiences that its necessary duties are quite sufficient to task to the utmost all the faculties of one man; and he willingly regards those recent acts, which have at length placed the salary of his office on equal footing with other public offices of the same class, as intimation at least that the Government has the same precise claim on his services, in time and degree, as on those of the Secretary of State or the Secretary of the Treasury. . .[1]

From this passage it is clear that Cushing considered himself not only as the peer of his cabinet associates, but as in some sense head of a department, though he occupied what was technically known as an "office." It was to this conception of his position to which General Benjamin F. Butler of Massachusetts referred when, in 1879, Butler paid a tribute to Cushing, remarking that Caleb Cushing "raised the office of Attorney-General, and organized it to be in truth and in fact a department of the Government. . ."[2] At any rate, many of Cushing's suggestions toward a better organization of the work of the attorney-general were enacted into the laws between March, 1854—the date of his "opinion"—and June, 1870, when the attorney-general was named in the law as head of the department of justice.[3]

Cushing was clear regarding the real reason for the existence of the cabinet. It was a means of attaining unity in executive decision and action. As he remarked, this unity "cannot be obtained by means of a plurality of persons wholly independent of one another, without corporate conjunction, and released from subjection to one determining will. . ."[4] With reference to the principal officers, he wrote that—

the established sense of the subordination of all of them to the President has . . . . come to exist, partly by construction of the constitutional duty of the President to take care that the laws be faithfully

[1] *American Law Register*, vol. v, page 93.

[2] Memorial of Caleb Cushing (1879), page 169.

[3] Easby-Smith, The Department of Justice (1904), pp. 15–16.

[4] *American Law Register*, vol. v, page 81. Cushing devoted one opinion to the subject of the "Relation of the President to the Executive Departments," Aug. 31, 1855. Vol. 7 Opinions of the Attorneys-General, pp. 453–482.

executed, and his consequent necessary relation to the heads of departments, and partly by deduction from the analogies of statutes. . .[1]

Cushing's usefulness to Pierce, his talents, his learning and his persistent industry—all these matters need not make the student overlook certain weaknesses of which his contemporaries were aware. Mr. J. F. Rhodes has called attention to the fact that Lowell satirized Cushing as early as 1847 for his lack of consistency and principle in politics.[2] Rhodes likewise cites Thomas H. Benton's criticism of him in a speech of July 21, 1856. In his speech, Benton acknowledged that he was the "master-spirit" of Pierce's cabinet, but he regarded him as "unscrupulous, double-sexed, double-gendered, and hermaphroditic in politics, with a hinge in his knee, which he often crooks, that thrift may follow fawning. He governs by subserviency. . ."[3] In brief, Cushing never could win completely the trust of his fellows. Yet he proved a very useful statesman. Both Buchanan and Grant at different times sought his aid. He was among the legal experts chosen as counsel to aid in the Geneva Tribunal. Grant named him as chief justice of the supreme court, but was induced to withdraw his name from the Senate.

It seems fair to conclude that during a long life, extending from 1800 to January, 1879, in no task did Caleb Cushing prove more useful than in that of the attorney-generalship. He was the ablest organizer that the office had had since its establishment in 1789.[4]

[1] *American Law Register*, vol. v, page 71.

[2] Rhodes, History of the United States since the Compromise of 1850 (1892 *et seq.*), vol. i, page 392. Lowell's satire is quoted by Rhodes from the *Biglow Papers* as follows:

> Gineral C. is a dreffle smart man:
> He's ben on all sides thet give places or pelf;
> But consistency still wuz a part of his plan,—
> He's ben true to *one* party—an' thet is himself. . .

The Writings of James Russell Lowell (Boston, 1890), vol. viii, page 66.

[3] Quoted from Von Holst, History of the United States, vol. iv, 263, note.

[4] For the general facts of Cushing's career, I have relied somewhat on Rhodes (History, *etc.*, especially vols. i, pp. 388 *et seq.*; iii, pp. 192, 201, 521; vi, pp. 364–365; vii, pp. 27–28) and on the material in the Memorial (1879). The generalization is based upon this, taken into connection with the evidence revealed in his three volumes of Opinions heretofore cited.

V

The Civil War brought great pressure of work on the office of the attorney-general. By that period an administrative-judicial organization had grown up that proved under the new circumstances distinctly out of joint. Various legal officers in the separate departments gave opinions to the secretaries or heads that were at times inconsistent with, if not actually opposed to, those of the attorney-general. Many tasks were duplicated. In brief, there was no definite provision in law which unified and brought to one master mind the direction of the legal work of the government. As a consequence that work lacked symmetry and consistency.

The four chief law-officers in 1861—with the dates of their separate establishments—were the attorney-general (1789), the assistant attorney-general (1859), the solicitor of the court of claims (1855) and the solicitor of the treasury (1830)—the latter a rather anomalous official in the treasury department who, for certain purposes, was under the direction of the attorney-general. Subordinate to these and controlled by the attorney-general from 1861 was a corps of scattered district attorneys.[1] The whole organization was loosely knit and disjointed. As was truly said, the law business of the government during the war period "greatly outgrew the capacity of the persons authorized to transact it and the number of outside counsel . . . appointed subsequently to 1861 was greater than all the commissioned law officers of the Government in every part of the country. . ."[2]

The cost of this extra counsel was large, how large it would probably be impossible with even a fair degree of accuracy to say. Figures were brought forward in Congress to show that nearly half a million dollars ($475,190.42) could be thus accounted for during a portion of the years from 1861 to 1867. More than half that amount ($258,018.44), it was said, went

[1] These facts can be gathered from Easby-Smith, The Department of Justice, pp. 16, 28–30. They are commented upon in the debates on the plan of a new organization, 1867–1870, in Congress. See especially *Congressional Globe*, 41st Cong., 2d sess., pt. iv, p. 3035 (April 27, 1870).

[2] *Congressional Globe*, 41st Cong., 2d sess , pt. iv, page 3035.

for extra legal counsel in the two years 1868–1869. To William M. Evarts alone, fees for occasional legal aid to the government amounted, by 1867, to approximately fifty thousand dollars ($47,545.86). That the government was called on to pay a hundred thousand dollars annually during the decade 1860–1870 is a statement probably well within the range of truth. This was a significant fact, and it helped to direct attention to numerous administrative weaknesses in the federal organization.[1]

The heritage of war expenditures assumed such ominous proportions that, in 1867, with a view to economy, Congress appointed a so-called Joint Committee on Retrenchments. This committee, aided perhaps by certain recommendations concerning the reorganization of the office by Attorney-General Henry Stanbery set forth by him in December of that year, was attracted to an investigation of the legal work of the government.[2]

For more than two years following, the subject of reorganizing the law administration remained in the background of public discussion. It was lost to sight largely because of subjects of a more pressing and sensational nature. It matured slowly, however, and came up for occasional discussion or report during the sessions of the thirty-ninth, fortieth and forty-first congresses. Finally, after a vigorous effort in the spring of 1870—an effort admirably directed in the House of Representatives by Thomas A. Jenckes of Rhode Island—a measure was enacted on June 22, 1870, which President Grant approved, and which erected the office of the attorney-general into the department of justice.[3]

[1] *Congressional Globe*, 41st Cong., 2d sess., pt. iv, pp. 3035 *et seq.* Jenckes of Rhode Island, speaking of the final bill for a Department of Justice, said in the House (April 27, 1870): "The special reason why they [*i. e.*, the committee] have reported it earlier than any other relating to the organization of the Departments is the great expense the Government have been put to in the conduct of the numerous litigations involving titles to property worth millions of dollars, rights to personal liberty, and all the numerous litigations which can arise under the law of war."

[2] *Ibid.*, page 3039. Easby-Smith, *op. cit.*, page 17.

[3] The best outline of the course of Congress at various stages of the attempt to reorganize the legal work of the government is to be found in the *Congressional Globe*,

Inasmuch as the chief purpose of this article is to reveal the historic features of the attorney-generalship which throw light on the relations of the attorney-general as a more or less efficient adviser and assistant to the President and his cabinet associates, the act of 1870, apart from its more technical details, has a peculiar interest, for it was a mature and honest effort to realize an ideal with respect to the attorney-general that had been occasionally formulated since Andrew Jackson's day. It placed the attorney-general at last upon "precisely . . . the same footing as the other heads of Departments."[1] He became in fact the chief law officer of the government. The act created no new department. Much legal business in the other departments, hitherto scattered and at loose ends, was transferred, and so transformed the old office of the attorney-general into a symmetrical organization.

A chief object of the act of 1870 was to make it possible to create a staff sufficiently large to transact the law business of the government in all parts of the country. If assistant counsel were employed, these extra men were to be designated either as assistant district attorneys or as assistants to the attorney-general; and so, holding commissions as such, they could be made strictly responsible to the attorney-general for the performance of duties.[2]

During the development of administrative and legal work, law officers had been provided in the various executive departments from time to time as they were needed. As was re-

41st Cong., 2d sess., pt. iv, page 3039. The list of dates there given makes it easy for the investigator to trace back special points and proceedings to December 12, 1867, at which time Lawrence of Ohio offered a resolution looking toward a consolidation of all the law officers of the government at Washington into one department. That resolution marked the beginning of legislative effort. For the statute of June 22, 1870, see 16 Statutes at Large, pp. 162–165.

[1] *Congressional Globe*, p. 3067 (April 28, 1870). In connection with this quotation from Lawrence, his general remarks on the cabinet are worth noting. He said: "The Cabinet is the creature of usage only. But since the establishment of the office of Attorney-General the Attorney-General has been a member of the Cabinet by usage just as much as any head of a Department. He ought to be in the Cabinet. There ought not to be a Cabinet without a law officer . . . "

[2] *Ibid.*, page 3035.

marked by one of the speakers in the House of Representatives:

> Following the precedent set in the creation of the Solicitor of the Treasury by the act of 1830, we have authorized the appointment of an assistant Solicitor of the Treasury, and also a Solicitor of the Internal Revenue; and during the war we had a Solicitor of the War Department and an assistant Solicitor of the War Department . . . We also created a law officer for the Navy Department, and in the course of time a law officer has been created for the Post-Office Department . . . .[1]

Such facts revealed at once the possibilities of contradictory opinions arising from the various legal officers and the consequent confusion.

In what way this confusion might affect the attorney-general under the old régime, and so the President, may be seen from another passage in the debates of 1870. The President, it was declared, takes the opinions of the heads of departments,

> yet, as the law now stands, it is perfectly apparent that the law officers of the several Departments may advise the heads of Departments in one way upon subjects of public importance affecting their Departments and the Attorney-General may advise the President and the Cabinet, when they are assembled, in a totally different way upon the same subject. Now . . . it is utterly impossible that the President can intelligently advise Congress or act without embarrassment on affairs relating to our international rights, obligations and duties when there is a law officer in the State Department, as now, advising the head of that Department in one way while the Attorney-General may be advising the President in a different way . . . We have an officer called an examiner of claims, the law officer of the State Department, advising the Secretary of State in matters affecting our foreign relations, our duties and obligations, while the President and Cabinet are receiving advice from the Attorney-General . . . .[2]

In 1870 the various solicitors were transferred from the departments where they had been located and placed under the ultimate control of the attorney-general. Whatever official

[1] *Congressional Globe*, page 3036.

[2] *Ibid.*, page 3065.

opinions they were called upon to give must henceforth be recorded in the office of the attorney-general. There, before they could become the executive law for inferior officials, these opinions were stamped with the attorney-general's final approval. As Representative Jenckes remarked: "It is for the purpose of having a unity of decision, a unity of jurisprudence, if I may use that expression, in the executive law of the United States, that this bill proposes that all the law officers therein provided for shall be subordinate to one head. . ." [1]

The act of 1870 was, according to the characterization of James A. Garfield, "substantive legislation." [2] There was comparatively little opposition to it in congress, for it was easily seen that it placed the government's law work on an admirable working basis.

VI

After 1870 there is but one matter to be touched upon, a matter of consequence as throwing light on the recognized status of the attorney-general. By an act approved on January 19, 1886,[3] the attorney-general was definitely reckoned as fourth in the line of possible succession to the Presidency, in case of the removal, death, resignation or inability of President and Vice-President. The act was due largely to the persistent efforts of Senator George F. Hoar of Massachusetts. The occasion of these efforts was the conviction in the public mind, which had been aroused by the attempt in July, 1881, to kill President Garfield, of the grave and serious necessity of placing new safeguards about the life of the chief magistrate.[4]

The original law of March, 1792, which provided for the succession to the Presidency, had declared that, in case of

[1] *Congressional Globe*, page 3036. It may be noted that there was one new officer of large importance created by the act of 1870—the solicitor-general of the United States. It was proposed to have in this new position "a man of sufficient learning, ability and experience that he can be sent to New Orleans or to New York, or into any court wherever the Government has any interest in litigation, and there present the case of the United States as it should be presented. . ." Page 3035.

[2] *Ibid.*, page 3037.

[3] 2 Statutes at Large, 1.

[4] *Congressional Record*, 49th Cong., 1st sess., December 15, 1885, page 181.

vacancy, "the President of the Senate *pro tempore*, and in case there shall be no President of the Senate, then the Speaker of the House of Representatives, for the time being, shall act as President of the United States, until the disability be removed, or a President shall be elected."[1] Even at the epoch of its formulation, the principle underlying this language was not deemed satisfactory by such men as Madison, Gouverneur Morris, Livermore and Fitzsimons. There were suggestions at the time that it might be wiser to call on the Chief Justice or the secretary of state. But the Senate, having originated the form of statement, were unwilling to yield; and so it was at length adopted and went into the statute-book.[2]

The subject of the succession was next brought to public notice in June, 1856, by Senator John J. Crittenden of Kentucky. Crittenden had become impressed by the fact that from the fourth of March to the first of December in every second year there was no Speaker of the House. He presented a resolution to the Senate which called on the judiciary committee of that body to examine the subject and make a report. On August 5 following, a report—familiarly known as the "Butler Report," from Senator Butler of South Carolina, chairman—was read to the Senate. The Report concluded with a carefully formulated bill. The bill was never acted upon. The report, buried in a volume of Senate documents, was lost sight of and forgotten for many years.[3]

The Butler Report attempted to supplement the old law of 1792. On the assumption that there was no President of the Senate *pro tempore* or Speaker of the House, it recommended:

[1] 1 Statutes at Large, 240. The entire act is quoted by E. Stanwood, A History of the Presidency (1898), pp. 36 *et seq.*

[2] Madison and Morris objected late in the Convention of 1787 (August 27). See W. M. Meigs, The Growth of the Constitution (2d ed,. 1900), pp. 211 *et seq.* The course of the debate can be followed in the *Annals of Congress*, especially under dates of December 20, 1790, Jauuary 10, 13, October 24, November 15, 23, 30, December 1, 21, 1791, *etc.*

[3] *Congressional Globe*, 1855–1856, 1st sess., 34th Cong., pt. ii, pp. 1476, 1930–1, 2020. For Butler Report, see Senate Documents, 1855–1856, ii, no. 260, page 7. There is no reference to this matter in Mrs. Chapman Coleman, Life of John J. Crittenden *etc.* (2 vols., 1871).

"that the duties prescribed by act of Congress shall devolve on the following officers: first, on the chief justice, when he has not participated in the trial of the President; and next, on the justices of the Supreme Court, according to the date of their commissions. . . ."[1]

This was the single constructive recommendation. It is, however, noteworthy that the authors first of all stated their belief that the members of the cabinet "in some prescribed order" were

> the proper functionaries to fill the vacancy. In cases of death they would be the persons most fit for the occasion. There are other circumstances, however, which would make the cabinet officers unfit to occupy the place of the President. In case of his impeachment for high political offences, the cabinet might be implicated, as *participes criminis*, and ought not to be in position of allies . . .

Moreover, the question as to whether the cabinet could be considered official after the official functions of the President—their principal—had terminated or were suspended, was puzzling to the committee and was left unanswered.[2]

Within a week of the shooting of Garfield, the Butler Report was referred to in public discussions over the possible consequences of the tragedy. In particular Senator Beck of Kentucky wrote of it in a letter to the Louisville *Courier-Journal*.[3] In the following autumn—Garfield having died on September 19—it happened that the country was without either a President of the Senate or a Speaker of the House. Should President Arthur die, there would be no legal provision for a successor. Statesmen were alarmed. Efforts to remedy the law were begun as soon as Congress assembled in December, and they continued at intervals during three successive congresses, the forty-seventh, the forty-eighth and the forty-ninth. Senator Hoar's persistency was finally rewarded in 1886.[4]

[1] Butler Report, page 5.

[2] *Ibid.*, pp. 4–5.

[3] Beck-Murphy correspondence (July, 1881), given in *Congressional Record*, December 16, 1885.

[4] *Ibid.*, Dec. 16. See especially Senator Maxey's remarks.

Introducing the subject of succession in the last stage of his effort, Senator Hoar remarked that one of the important alterations in the existing law, that of 1792, was the substitution of—

> members of the Cabinet in the order of their official seniority—the order in which the various Departments were created, except that the head of the Department of Justice, which is the last Department created by law, is continued in his old place as Attorney-General, ranking the heads of the Departments created since the original establishment of the Cabinet . . . .[1]

Thus the attorney-general, considered as a cabinet-associate of the President from 1789, was once more acknowledged as a peer among his colleagues—a position that he had in reality held since 1853.

HENRY BARRETT LEARNED.

NEW HAVEN, CONN.

[1] The discussion of the bill may be followed in the *Congressional Record*, December 15, 1885–January 19, 1886. Senator Hoar prints the bill as enacted in his Autobiography of Seventy Years (1903), vol. ii, pp. 170–1. He there says: "I drew and introduced the existing law" (page 170). It is interesting to note that Senator Hoar got the substance of the bill from a speech made in the House of Representatives sometime between 1873–1875 by his brother, Ebenezer R. Hoar, first attorney-general under Grant (1869–1870). I have not been able to discover this speech. *Congressional Record*, December 16, 1885, p. 215.

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