

Winter 1990

The Attorney General: Political Loyalty v. Professional Responsibility - The Ethical Challenge in Serving Three Masters, 23 J. Marshall L. Rev. 229 (1990)

Paula K. Maguire

Follow this and additional works at: <https://repository.law.uic.edu/lawreview>



Part of the [Law and Politics Commons](#), [Legal Ethics and Professional Responsibility Commons](#), [Legal History Commons](#), [Legal Profession Commons](#), [Legislation Commons](#), and the [President/Executive Department Commons](#)

Recommended Citation

Paula K. Maguire, The Attorney General: Political Loyalty v. Professional Responsibility - The Ethical Challenge in Serving Three Masters, 23 J. Marshall L. Rev. 229 (1990)

<https://repository.law.uic.edu/lawreview/vol23/iss2/6>

This Comments is brought to you for free and open access by UIC Law Open Access Repository. It has been accepted for inclusion in UIC Law Review by an authorized administrator of UIC Law Open Access Repository. For more information, please contact repository@jmls.edu.

ESSAY

THE ATTORNEY GENERAL: POLITICAL LOYALTY V. PROFESSIONAL RESPONSIBILITY — THE ETHICAL CHALLENGE IN SERVING THREE MASTERS

It is not the fault of any creed, but of the complicated nature of human affairs, that rules of conduct cannot be so framed as to require no exceptions, and that hardly any kind of action can safely be laid down as either always obligatory or always condemnable. There is no ethical creed which does not temper the rigidity of its laws by giving certain latitude, under the moral responsibility of the agent, for accommodation to peculiarities of circumstances; and under every creed, at the opening thus made, self-deception and dishonest casuistry get in. There exists no moral system under which there do not arise unequivocal cases of conflicting obligation. These are the real difficulties, the knotty points both in the theory of ethics and in the conscientious guidance of personal conduct. They are overcome practically, with greater or with less success, according to the intellect and virtue of the individual; but it can hardly be presented that anyone will be less qualified for dealing with them, from possessing an ultimate standard to which conflicting rights and duties can be referred. . . . Though the application of the standard may be difficult, it is better than none at all.¹

Perhaps nowhere is the nature of human affairs more complicated than in the processes of government. By definition, governing requires a distribution of power in order to effect the government's underlying principles: to ensure order, and to achieve legitimate goals.² The real difficulties emerge with the ethical dilemmas inherent in the exercise of power. Who should be entrusted with power and whose interests should those in power serve? What ethical imperatives should guide their conduct? The conclusions to these questions have practical consequences, as well as philosophical relevance.

1. J. S. MILL, *UTILITARIANISM* 32 (1863) (emphasis supplied).

2. Webster's definition of govern includes: "to exercise authority over; rule, control, etc.; to influence the action of; guide; to determine." WEBSTER'S NEW WORLD DICTIONARY 263 (2d ed. 1984).

The American democratic system of government vests the republic's supreme power in the citizens. The people choose, directly or indirectly, representatives to exercise that power. In return, the people expect government officials (and government) to be responsive, responsible, and accountable.³ The peoples' representatives are charged with upholding the Constitution and conducting the business of government for the benefit of all.

Preventing the abuse of power is a central problem of any civilization.⁴ In our democratic society, the United States Constitution limits governmental power by dividing responsibilities in the federal system between the states and the central government and then within the central government into the Executive, Legislative, and Judicial branches.⁵ The separation of the powers of government is "to the end it may be a government of laws and not of men."⁶ Accordingly, the law is the foundation of the tripartite division of power, allowing each branch to work independently of, and in conjunction with, one another. The American people have assigned government officials the task of determining not only what the law is, but also what it should be, and vested them with the authority to make the appropriate changes.⁷

3. M. REJAI, *COMPARATIVE POLITICAL IDEOLOGIES* 89-109 (1984).

4. G. TINDER, *POLITICAL THINKING, THE PERENNIAL QUESTIONS* (1986).

5. Comment, *The Confrontation of the Legislative and Executive Branches: An Examination of the Constitutional Balance of Powers and the Role of the Attorney General*, 11 *PEPPERDINE L. REV.* 331 (1984) [hereinafter Comment, *Constitutional Balance of Powers*].

6. The idea that rulers establish institutions which then mold the rulers was expressed in Montesquieu's *SPIRIT OF LAWS* (1748) and influenced many of the framers of the Constitution. W. SAFIRE, *SAFIRE'S POLITICAL DICTIONARY* 267 (1978). John Adams, writing on the separation of powers, said:

[t]he law proceeds from the will of man, whether a monarch or people; and that this will must have a mover; and that this mover is interest—it is the public interest; and where the public interest governs, it is government of laws, and not of men: the interest of a king, or a party, is another thing—it is a private interest; and where private interest governs, it is a government of men, and not of laws.

E. RICHARDSON, *THE CREATIVE BALANCE* 2 (1976). The phrase "government of law and not of men" has become a maxim signifying the administration of justice wherein all men stand equal before the bar. W. SAFIRE, *supra* at 267. Chief Justice John Marshall declared the same view of government in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803). More recently, the phrase was used by Archibald Cox when President Nixon fired him as the Special Prosecutor to investigate the Watergate cover-up. Cox remarked, "whether ours shall continue to be a government of laws and not of men is now for the Congress and ultimately for the American people." W. SAFIRE, *supra* at 267.

7. Miller, *The Attorney General as the President's Lawyer*, in *ROLES OF THE ATTORNEY GENERAL OF THE UNITED STATES* 41, 43 (1963) [hereinafter Miller]. In 1835, De Tocqueville observed:

The American institutions are democratic, not only in their principle but in all their consequences; and the people elects its representatives directly, and for the most part annually, in order to insure their dependence. The people is therefore the real directing power; and although the form of government is

The Constitution provides that the President "shall take care that the laws be faithfully executed," however, it makes no mention of any legal officer to represent the government.⁸ The first Congress created the office of Attorney General in the Judiciary Act of 1789 to "prosecute and conduct all suits in the Supreme Court in which the United States shall be concerned."⁹ Congress failed to provide a "specific statement of the general duties of the attorney general," or to define the scope of the Attorney General's authority.¹⁰ The ambiguous nature of the office gives rise to many undetermined issues. These issues are further complicated by dictates of representative government. This essay will first briefly look at the role of the Attorney General. It will then examine the questions of whose interests the Attorney General represents and what special ethical problems the Attorney General encounters in the exercise of his¹¹ professional responsibilities.¹² The essay will conclude that a "conduct specific" code of ethics supplemented by a "broad principles" standard may properly address the Attorney General's ethical dilemma.

I. THE ROLE OF THE ATTORNEY GENERAL

The Office of the Attorney General has changed considerably since its inception.¹³ This is due partly to the growth of the nation and partly as a result of governmental activism.¹⁴ With the estab-

representative, it is evident that the opinions, the prejudices, the interests, and even the passions of the community are hindered by no durable obstacles from exercising a perpetual influence on society.

A. DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 110 (H. Reeve trans. 1945).

8. U.S. CONST. art. II, § 3.

9. Act of Sept. 24, 1789, ch. 20, § 35, 1 Stat. 93 (current version at 28 U.S.C. § 503 (1982)).

10. *United States v. San Jacinto Tin Co.*, 125 U.S. 273 (1888) (The court, noting the lack of expressed powers, analogized the Attorney General's implied powers to those common law powers of his British counterpart).

11. The masculine pronouns used throughout this essay are intended as gender-neutral pronouns, notwithstanding the statutory language creating the Office of Attorney General and the historical reality.

12. The question has most often been posed as "who is the client?" One commentator suggests that answering this question fails to clarify the unique nature of the government lawyer's professional responsibilities. Lawry, *Who is the Client of the Federal Government Lawyer? An Analysis of the Wrong Question*, 37 *FED. B.J.* 61 (1978).

13. Huston, *History of the Office of the Attorney General*, in *ROLES OF THE ATTORNEY GENERAL OF THE UNITED STATES* 1, 3 (1963) [hereinafter Huston].

14. Originally, the Attorney General's position did not demand much of his time so that he could continue in private practice when he was not needed in Washington. Huston, *supra* note 13, at 5-6. Congress kept the Attorney General's legal domain and power limited out of financial necessity and fear of too strong an Attorney General. Bell, *The Attorney General: The Federal Government's Chief Lawyer and Chief Litigator, of One Among Many?*, 46 *FORDHAM L. REV.* 1049, 1050-57 (1978). Over the years, Congress enacted laws creating numerous entities to serve various governmental functions. The administration of these entities fell piecemeal to the Attorney General causing an expansion of his domain. *Id.*

lishment of the Department of Justice in 1870, the Attorney General became the head of what was to become the most significant law office in the country.¹⁵ His role expanded beyond lawyer, advisor, and Cabinet member to include administrative and investigative duties.¹⁶ In a tripartite system of government, this amalgam of different roles results in the Attorney General serving "three masters" — the President, the Congress, and the Judiciary.¹⁷ The Attorney General is responsive to all three branches of government in fulfilling his various responsibilities.

As the chief law enforcement officer of the nation, the Attorney General enables the President to fulfill his obligation to faithfully execute the laws of the United States.¹⁸ In his role as legal counselor, he serves the President by giving advice and opinions when requested.¹⁹ Additionally, as a member of the Cabinet, he functions, to varying degrees, as the President's political confidant.²⁰

While the role the Attorney General plays with respect to Congress remains undefined, Congress has had a continuing impact on the office. In the early years of the office, the Attorney General furnished legal opinions to Congress.²¹ In more recent times, he offers his opinion on pending legislation when requested to testify before congressional committees.²² Immense statutory law relies on the Department of Justice for its administration as well as enforcement. The Attorney General must submit an annual report to Congress on the business, activities, and accomplishments of the Department of Justice.²³

15. Huston, *supra* note 13, at 1.

16. Meador, *The President, the Attorney General, and the Department of Justice*, in *THE PRESIDENT, THE ATTORNEY GENERAL, AND THE DEPARTMENT OF JUSTICE* 15-43 (1980) [hereinafter Meador].

17. Huston, *supra* note 13, at 3.

18. In legal theory, the power authorizing the Attorney General to act for the President flows from the President through the Attorney General to the various sub-officials of the Department of Justice. Miller, *supra* note 7, at 45.

19. The Act of Sept. 24, 1789, ch. 20, § 35, 1 Stat. 93 (corresponds to 28 U.S.C. §§ 511-512 (1982)).

20. Edmund Randolph, George Washington's aide-de-camp in war and attorney in private life, became the first Attorney General. Huston, *supra* note 13, at 5-6. Although not originally a member of Washington's Cabinet, Randolph first attended Cabinet meetings in 1792 and, in doing so, set a precedent for the Attorney General's participation in policy decisions. *Id.* at 7.

21. The Attorney General assumed what became the burdensome task of providing Congress with opinions on the drafting and constitutionality of proposed legislation. Huston, *supra* note 13, at 6. In 1819, Attorney General William Wirt put an end to the "courtesy" and suggested that Congress change the law if it wished to continue the custom. *Id.*

22. *Id.* The House and the Senate usually obtain legal opinions from their respective offices of legislative counsel. Comment, *Constitutional Balance of Powers*, *supra* note 5, at 350.

23. ANNUAL REPORT OF THE ATTORNEY GENERAL OF THE UNITED STATES (1870 - present).

The Attorney General serves the Judiciary primarily in his role as attorney for the government.²⁴ As an attorney, he is an officer of the court and subject to the court's direction in certain aspects of litigation.²⁵ The vast structure of the department allows him to delegate much of his lawyering activities through Assistant Attorneys General. In addition, the 1870 Act created the office of Solicitor General to assist the Attorney General as head of the government's litigation.²⁶

In serving three masters, the Attorney General naturally encounters conflicts of interest. His office is atypical because it requires the Attorney General to navigate between and within the separation of powers. He is a member of the executive department serving at the pleasure of the President. He is appointed by the President, with Senate confirmation, and can be dismissed by the President without cause.²⁷ At the same time, he is accountable to the Congress and subject to congressional legislation.²⁸ His powers flow from acts of Congress and "what Congress gives, Congress can take away."²⁹ As the link between the White House and the courts, the Attorney General's position is "quasi-judicial."³⁰ He is, in effect,

24. Comment, *Constitutional Balance of Powers*, *supra* note 5, at 350.

25. Huston, *supra* note 13, at 4.

26. Act of 1870, ch. 150, § 2, 16 Stat. 162. See Cox, *The Government in the Supreme Court*, 44 CHI. B. REC. 221 (1963) (distinction between the private appellate advocate and the role the Solicitor General plays in the Supreme Court). For the history, development, and duties of the Solicitor General see Note, *The Solicitor General and Intragovernmental Conflict*, 76 MICH. L. REV. 324 (1977) (analysis of the proper role of the Solicitor General, the common law sources of his responsibilities, and the accommodation of his competing interests); Note, *Government Litigation in the Supreme Court: The Roles of the Solicitor General*, 78 YALE L.J. 1442 (1969) (a discussion of the Solicitor General's functions in seeking certiorari, confession of error, intra-governmental conflicts, and as *amicus curiae*).

27. Biden, *Balancing Law and Politics: Senate Oversight of the Attorney General Office*, 23 J. MARSHALL L. REV. 151, 158 (1990). An example of the tenuous relationship between the President and the Attorney General is found in George H. Williams' anecdote concerning President Andrew Jackson and his Attorney General. When the Attorney General expressed his doubts as to the existence of a law that would authorize the President to designate certain banks as U. S. depositories, Jackson responded "Sir, you must find a law authorizing the act or I will appoint an Attorney General who will." Miller, *supra* note 6, at 51.

28. Biden, *supra* note 27, at 154. See *Mc Grain v. Dougherty*, 273, U.S. 135, 178 (1926) ("... the powers and duties of the Attorney General and the duties of his assistants, are all subject to regulation by congressional legislation.").

29. *Removing Politics from the Administration of Justice: Hearings on S.2803 and S.2978 Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 93d Cong., 2d Sess. (1974) [hereinafter *Hearings*] (statement of Senator Sam J. Ervin). Congress has removed cases from the Attorney General and placed them under the special counsel's control. See *Morrison v. Olson*, 108 S. Ct. 2597 (1988) (Attorney General's power to remove independent counsel restricted by the Ethics in Government Act).

30. Meador, *supra* note 16, at 26. The quasi-judicial thesis relies on the fact that the office of the Attorney General was created and remains under the Judiciary Act. *Id.* President Pierce's Attorney General, Caleb Cushing, perceived his role "not

a "political officer charged with legal duties."³¹ What sets him apart from other executive department heads is that along with attending to vast administrative burdens, the Attorney General must perform as a lawyer with the special professional obligations that attach.³² He must act consistently with the President's policies but not let political considerations or "inappropriate and improper, though not necessarily illegal" influences sway his legal judgment.³³

II. COMPETING GOVERNMENTAL INTERESTS

As Professor Babcock has noted, the interests the Attorney General represents in his lawyering function are themselves tripartite in nature.³⁴ There are the interests of the particular client, the broader interests of the United States, and the interests of the public. Frequently, these interests are in conflict with one another.³⁵ Where does the Attorney General place his loyalty when conflicts arise? To what extent does the political process shape legal policy? These simple questions reveal some of the complexities of the Office of the Attorney General.

The statute creating the Office of the Attorney General required only that its occupant be "a meet person, learned in the law."³⁶ The President appoints the Attorney General and his choice is, in a very real sense, political.³⁷ The primary qualification is that the appointee must be a person in whom the President may place total confidence.³⁸ The President wants his Attorney General "to be not

[as] counsel giving advice to the government, but as a public officer, acting judicially, under all the solemn responsibilities of conscience and legal obligation." Donahoe, *The Model Rules and the Government Lawyer, A Sword or Shield? A Response to the D.C. Bar Special Committee On Government Lawyers and The Model Rules of Professional Conduct*, 2 GEO. J. LEGAL ETHICS 987, 995 n.52 (1989) (citing Office and Duties of Attorney General, 6 Op. Att'y Gen. 326, 334 (1854)).

31. Miller, *supra* note 7, at 51.

32. Meador, *supra* note 16, at 27-49.

33. Meador, *supra* note 16, at 33.

34. Babcock, *Defending the Government: Justice and the Civil Division*, 23 J. MARSHALL L. REV. 181, 184-93 (1990).

35. *Id.* at 181. Conflicts exist at all levels of the Department of Justice. For a discussion of conflicts facing the government lawyer, see Josephson & Pearce, *To Whom Does the Government Lawyer Owe the Duty of Loyalty When Clients Are in Conflict?*, 29 HOWARD L. REV. 539 (1986) (resolution of the government lawyer's conflicts of interest based on a public interest approach and an ethical approach); Comment, *Conflicts of Interest in Inspector General, Justice Department, and Special Prosecutor Investigations of Agency Heads*, 35 STAN. L. REV. 975 (1983) (examination of conflicts of interest that arise when executive branch officials are under investigation).

36. Act of Sept. 24, 1789, *supra* note 9.

37. See Richardson, *The Building of a New Confidence*, 45 N.Y. ST. B.J. 455, 456 (1973) ("... the Attorney General has been more than a political appointee, he has frequently been-before and after he came to the Department of Justice-a political operative as well.")

38. Rosenbaum, *Choosing a Friend for Attorney General*, N.Y. Times, Dec. 28,

only a competent attorney[]], but to be politically and philosophically attuned to the policies of the administration.”³⁹ The United States Court of Appeals for the District of Columbia agreed that legal competence is not the only qualification. In *Leonard v. Douglas*, a case in which a First Assistant to an Assistant Attorney General sought to retain his position after a change in administrations, the court stated:

The [Attorney General] is not only the chief law officer of the Government of the United States for law enforcement purposes; he is a member of the Cabinet and must be available to advise the President as counsellor on matters involving policy as well as law. . . [M]ethods of law enforcement may appropriately be influenced by a choice among several possible courses of action, all of which may be deemed to be within law. Legal competence. . . is not the only qualification for one holding high office with policy making responsibility. . . [I]n his own responsibility also the Assistant Attorney General needs as his First Assistant someone in whom he can confide, and to whom he can turn with trust in his judgment as well as his legal ability.⁴⁰

It is argued that the President and the Attorney General need to have a close relationship.⁴¹ Several reasons have been cited in explanation. First, the President, vested with the authority of the electorate, has the right to see that his political agenda is carried out. Because it is ethically and politically inappropriate for the President to become involved in individual lawsuits,⁴² and because the Attorney General has broad discretion in prosecution and litigation matters,⁴³ the President must have confidence in the decisions the At-

1976, at 13, col. 4.

39. Rehnquist, *The Old Order Changeth: The Department of Justice Under John Mitchell*, 12 ARIZ. L. REV. 251, 252 (1970). See Biden, *supra* note 27, at 155 (“. . . it is only a political ally of the President who gets appointed Attorney General in the first place.”).

40. 321 F.2d 749, 751-52 (D.C. Cir. 1963).

41. Rosenbaum, *supra* note 37. See *Conference on the President, the Attorney General, and the Department of Justice*, in THE PRESIDENT, THE ATTORNEY GENERAL, AND THE DEPARTMENT OF JUSTICE 101 (1980) [hereinafter *Conference*] (Griffen Bell stated that personal contact and openness are essential elements between the President and the Attorney General); Miller, *supra* note 7, at 47 (The Attorney General requires direct and clear contact with the President).

42. Rosenbaum, *supra* note 37. The President may certainly influence prosecutorial direction as a matter of policy, but he “cannot without undermining the integrity with which the law is enforced tell the legal officers of the government what to do or not to do in a particular case.” E. RICHARDSON, THE CREATIVE BALANCE 27 (1976). President Carter became quite interested in a highly publicized case that came to his personal attention while campaigning in Texas. He urged his Attorney General, Griffen Bell, to prosecute. Bell, *Office of the Attorney General's Client Relationship*, 36 BUS. LAW. 791, 795 (1981). When Bell refused, the President was unmistakably disappointed but told a press conference that while he appoints the Attorney General, “[t]he prosecutorial discretion is vested in the [A]ttorney [G]eneral. I can remove the [A]ttorney [G]eneral, but I cannot tell him who to prosecute, I cannot tell him who not to prosecute.” *Id.*

43. Rosenbaum, *supra* note 37. See *Powell v. Katzenbach*, 359 F.2d 234 (D.C.

torney General makes in such matters.⁴⁴ Second, the legal disputes among the various agencies of which the Attorney General is the arbiter should reflect, where possible, Administration policy.⁴⁵ Third, in the politically charged atmosphere of the nation's capital, ranking within the power structure is a sensitive matter.⁴⁶ The Attorney General must know the President's mind if he is to assert his authority and function effectively as a Cabinet member.⁴⁷ As the lawyer for the President, the conduit through which the President faithfully executes the law, a close political and legal advisor to the President, and a Cabinet member, it would seem that the Attorney General's duty of loyalty is to the President.

However, others argue that the Attorney General's loyalty should rest with the government of the United States. In his capac-

Cir. 1966) (whether and when prosecution is initiated is within the Attorney General's discretion). In addition to the powers of prosecution and litigation, the Attorney General decides whether and when to deport, enjoin, commute, and settle cases. V. NAVASKY, *KENNEDY JUSTICE* xiii (1971).

44. Rosenbaum, *supra* note 37. Former Assistant Attorney General for the Criminal Division, Philip B. Heymann, remarked that it is useful social pretense for the public to perceive that the Department of Justice prosecutes a case because it *has* to and not by reason of a discretionary decision. *Conference, supra* note 41, at 94-95. In Heymann's opinion, it is hypocritical to give the impression that a decision to prosecute has been made by the Department of Justice or the Attorney General when, in fact, it was the President's decision. *Id.* Heymann believes that the President, as an elected official, should "take the heat" for his discretionary decisions. *Id.*

45. Policies affecting the use of the government's legal resources are generally set by the President and the Attorney General, but even if there is no direct Presidential involvement, the policies set by the Attorney General will reflect the Administration's political and philosophical stance. Meador, *supra* note 16, at 28. "Very few Presidents are likely to sit down and make policy on all issues. Therefore, all of these policy issues or most of them, tend to arise in the context of specific cases. . . . [P]residential intervention in a specific case . . . may be the only way in which the policy is produced." *Conference, supra* note 41, at 81 (remarks of John H. Shenefield).

46. Miller, *supra* note 7, at 47. "If the Attorney General is to serve unambiguously as the nation's chief law officer it is essential that the Attorney General, and not any other lawyer, in the White House or elsewhere, be the person to whom the President looks for advice and decisions on legal matters." Meador, *supra* note 16, at 41. The President must view the Attorney General as a strong supporter or else the President may resort to other sources of legal advice. *Id.* at 39-40. Former head of the Office of Legal Counsel, now Justice Antonin Scalia, wrote:

The White House will accept distasteful legal advice from a lawyer who is unquestionably "on the team;" it will reject it, and indeed not even seek it, from an outsider-when more permissive and congenial advice can be obtained closer to home. And it almost always can be, if not from the White House Counsel then from one of the Cabinet members who soon become advisors of any administration.

Id. at 40.

47. Miller, *supra* note 7, at 47. Unfortunately, the Attorney General may be called upon in his Cabinet role to lobby congressmen regarding matters unrelated to the Department of Justice. Meador, *supra* note 16, at 48. It has been said that the undesirable political image this activity generates is offset by the opportunity for "the voice of the law to be heard" in Cabinet meetings and the assurance that "only lawful policies will be adopted." *Id.*

ity as chief law enforcement officer, his ultimate duty demands fidelity to the Constitution and not to the President.⁴⁸ Closely related to this concept is the third position which suggests that the Attorney General owes his loyalty to the "public interest."⁴⁹ In support of this view, proponents assert that:

[T]he [Attorney General] assumes a public trust, for the government, over-all and in each of its parts, [and] is responsible to the people in our democracy with its representative form of government. Each part of the government has the obligation of carrying out, in the public interest, its assigned responsibility in a manner consistent with the Constitution, and the applicable laws. In contrast, the private practitioner represents the client's personal or private interest.⁵⁰

It has been pointed out that furthering the public interest does not mean that the public is the "client" in the traditional sense of the attorney-client relationship. Rather, the Attorney General is required to observe the public interest in the performance of his duties as head of the Department of Justice.⁵¹ In this vein, he would prioritize his responsibilities on the basis of how his performance "will affect the obligation of the *government* to serve the public interest," rather than on a determination of who the true client is.⁵²

Who decides what is in the public interest? Does the Attorney General take his cue from one of his three masters or does he detect the tone of public policy himself? Some Attorneys General have been of the opinion that the President's agenda is their agenda.⁵³ One should look to the President for a definition of the public inter-

48. Comment, *Constitutional Balance of Powers*, *supra* note 5, at 352-53. See Miller, *Government Lawyers' Ethics in a System of Checks and Balances*, 54 U. CHI. L. REV. 1293, 1298 (1987) ("... the attorney's ultimate duties run the executive branch as a whole.").

49. Donahoe, *supra* note 30, at 1000. See Moore, *Realms of Obligation and Virtue*, in PUBLIC DUTIES: THE MORAL OBLIGATIONS OF GOVERNMENT OFFICIALS 3, 9 (1981) (the public character of the responsibility imposes a higher duty on the government official and an obligation to serve the public). Former Attorney General Elliot Richardson, explaining his plan for the Department of Justice stated, "We start from the awareness that we are accountable to the people of the United States. The Department of Justice has no interests and no objectives separable from theirs." Richardson, *The Building of a New Confidence*, 45 N.Y. ST. B.J. 455, 457 (1973). *But see*, Report by the District of Columbia Bar Special Committee on Government Lawyers and The Model Rules of Professional Conduct, 3 WASH. LAW. SEPT.-OCT. 1988, at 53 (adopting the "agency as client" approach as more applicable to an ethical code than either the "public interest" or "government as client" strategies) [hereinafter *Report of the D.C. Bar*].

50. *The Government Client and Confidentiality: Opinion 73-1*, 32 FED. B.J. 71, 72 (1973).

51. *Id.*

52. Note, *Developments in the Law: Conflicts of Interest in the Legal Profession*, 94 HARV. L. REV. 1244, 1415 (1981).

53. The newly appointed Attorney General, Richard Thornburg, announced that the President's agenda was his agenda. Biden, *supra* note 27, at 155-56.

est.⁵⁴ After all, the President was elected to deal with issues the public deemed important. His policies may be expressed in the form of "proposed legislation, the issuance of rules or regulations, law enforcement strategies or priorities, or unilateral actions regarding foreign policy or national defense."⁵⁵ However, Congress could make the same claims to electoral mandate. Each member of Congress presumably represents the interests of his constituency and manifests that public interest through the legislative process.⁵⁶ The Supreme Court also plays a part in shaping public policy. Judicial decisions on issues of great public interest often have far reaching consequences.⁵⁷

While it appears that all three masters participate in defining and establishing public policy, the Attorney General lacks the authority to do the same. A creature of statute, he lacks his own constituency and, therefore, any right to speak for the public results from acquiescence on the part of Congress and the President rather than on intrinsic power belonging to the Office of the Attorney General.⁵⁸

III. POLITICAL POLICIES AND THE LEGAL PROCESS

The principles of representative democracy depend on the existence of political competition. The people must have the ability to choose leaders and programs and mandated changes must actually take place if government is to achieve its representative purpose.⁵⁹ Naturally, then, the political process translates into legal policies. This interpretation of "politics," while no doubt the outgrowth of partisan energy, is often referred to as politics in the "philosophical" sense — the concept of "society."⁶⁰ The point of departure from this

54. Babcock, *supra* note 34, at 192.

55. Fein, *Promoting the President's Policies Through Legal Advocacy: An Ethical Imperative of the Attorney General*, 30 *FED. B. NEWS & J.*, Sept-Oct. 1983, at 406, 408.

56. An argument could be made that Congress does not set public policy but reacts to public interests. Once the public need is determined, legislation responds to fill the need.

57. De Tocqueville's legendary statement that "scarcely any question arises in the United States which does not become, sooner or later, a subject of judicial debate . . ." is validated in the plethora of federal case law. *DE TOCQUEVILLE, supra* note 7, at 207. For a survey of federal litigation involving administration policy, see Fein, *supra* note 55.

58. Comment, *Constitutional Balance of Powers, supra* note 5, at 355.

59. M. REJAI, *supra* note 3.

60. Johnson, *Our Nation's Energy and Resources — Decision Making in Conflict*, 23 *J. MARSHALL L. REV.* 199-200 (1990). The etymology of politics is the Greek *polis*, meaning city-state. *Polites* is the citizen who is a free member of the *polis*. Accordingly, *politike*, or politics, is the science of the city-state and its members. Plato and Aristotle viewed the *polis* as the only form of civilized human existence, incorporating the concept of society. Therefore, politics, in the philosophical sense, is

view of politics occurs when it is perceived that the political process is manipulating the legal process and perverting it to serve strictly partisan purposes.⁶¹ As a result, the public loses confidence in the fair administration of law. An even greater recusant product of this misuse of process is the ensuing political name-calling and inter-branch power struggle.⁶²

It has often been proposed that the Department of Justice and the role of the Attorney General be "depoliticized."⁶³ Suggestions range from simpler steps such as removing functions from the Department of Justice like the judicial selection process,⁶⁴ to amending the Hatch Act⁶⁵ to include the Attorney General and other appointed officials in the Department of Justice,⁶⁶ to a complete restructuring of the department.⁶⁷ Some of the proposed solutions give rise to separation of powers problems.⁶⁸ Others evoke the unsettling prospect that an independent Department would encourage arbitrariness or elitism.⁶⁹ One commentator believes that the problem

the science of society, as well as, the science of the state. ARISTOTLE, NICOMACHEAN ETHICS 312-13 (M. Ostwald trans. 1986).

61. Richardson, *supra* note 37, at 27. See Biden, *supra* note 27, at 151 (the Attorney General and the President politicize the Department of Justice when they seek to pass the President's agenda by means other than the legislative process).

62. Compare Rehnquist, *supra* note 39, at 252 (defending the appointment of politically active lawyers to the Department of Justice); with Rogovin, *Reorganizing Politics Out of the Department of Justice*, 64 A.B.A. J. 855 (June 1978) (questioning whether the Department of Justice "should be run by lawyers who march to a drumbeat emanating from the White House"). See also Miller, *supra* note 13, at 66-70 (Congress tries to retain control over details of administration through delegation of power to congressional committees); I.N.S. v. Chadha, 462 U.S. 919, 953-54 n.1 (1983)(Congress' authority to delegate power to administrative agencies does not permit it to control the administration of the laws through congressional veto).

63. *Hearings*, *supra* note 29.

64. The judicial selection process often requires considerable negotiation between the Department of Justice and the Senate in order to secure confirmation of nominees. The nature of the process is essentially political and results in what has been termed as the "politics of *quid pro quo*." Rogovin, *supra* note 62, at 857-58.

65. Section 9 of The Hatch Act, designed to proscribe federal employees from active participation in political management or campaigns, does not apply to the legislative and judicial branches. Act of Aug. 2, 1939, ch. 410, 53 Stat. 1147 (corresponds to 5 U.S.C. §7324 (1982)). For a discussion of Hatch Act, see J. ECCLES, *THE HATCH ACT AND THE AMERICAN BUREAUCRACY* (1982).

66. Rogovin, *supra* note 62, at 857. Former Attorney General Benjamin A. Civiletti said, when interviewed shortly after taking office, "... independence with regard to case management, initiation and disposition is vital and important and rather absolute. The Hatch Act wouldn't bother me in the slightest if it were applied to people in the Justice Department." Q. and A. with the New Attorney General, 65 A.B.A. J. 1497, 1502 (Oct. 1979).

67. Meador, *supra* note 16, at 57-68. See *Conference*, *supra* note 41, at 130-149 (various former Department of Justice officials discuss the suggestions in Daniel Meador's paper).

68. Note, *Removing Politics from the Justice Department: Constitutional Problems with Institutional Reform*, 50 N.Y.U. L. REV. 336 (1975).

69. Former Attorney General Griffen Bell warned that if the Department of Justice became too confident of its own power, it may ignore higher authority. Bell,

would only be created anew because the President needs some vehicle through which to carry out his constitutional mandate to faithfully execute the law.⁷⁰

In addition to attacking the political influence problem on the department level, at least one former Department of Justice appointee recommends addressing it on an individual level.⁷¹ Presidents frequently appoint politically active lawyers to the Office of Attorney General, as well as to significant posts within the department.⁷² There is a question whether the individual with political ambitions belongs in the Department of Justice where good lawyering often requires the politically unpopular decisions likely to impede a political career. One commentator asserts:

[The Attorney General] and his department should always be in the position to render objective, reasoned legal advice. To ensure the objectivity of the advice, political party affairs should be left to the party's counsel, and the [P]resident's personal affairs should be left to personal counsel. Particularly in these areas of the [P]resident's affairs the [A]ttorney [G]eneral should stand aside.⁷³

This point of view leads to a conclusion that loyalty to the executive office obscures legal judgment to the point where legal advocacy becomes political advocacy. The implication is that private interests displace the public interest and, as such, are beyond the scope of the Attorney General's professional responsibilities.⁷⁴ The antithetical point of view is that "ethical imperatives derived from our constitutional system of representative government and separation of powers obligate the [Attorney General] to devote virtually unreservedly his legal talents and insights towards advancing the

supra note 42, at 797. His warning also embraced the need for intradepartmental control so that decisions coming from the Department of Justice would be consistent and founded on the law and not on departmental predilection. *Conference, supra* note 41, at 96. Former Attorney General Civiletti's concerns regarding an independent Department of Justice centered around the lack of Constitutional authority, problems of accountability absent a system of checks and balances, and the inefficiency of government that might result. *Q. & A. with the New Attorney General, supra* note 66.

70. *Hearings, supra* note 30, at 95 (statement of Robert G. Dixon, Jr.).

71. See Rogovin, *supra* note 62 (appointments to the offices of Attorney General and U.S. Attorney are the political spoils of successful presidential campaigns).

72. Rehnquist, *supra* note 39, at 252. Lawyers who were active on both sides of the partisan fence before appointment to the Department of Justice include Warren Burger, Ramsey Clark, Robert Kennedy, Richard Kleindienst, John Mitchell, William Rehnquist, William Ruckelshaus, and Byron White. Many former Attorneys General moved on to other appointments after leaving the Department of Justice. Huston, *supra* note 13, at 33-34.

73. Rogovin, *supra* note 62, at 856.

74. See Fleishman, *Self Interest and Political Integrity*, in PUBLIC DUTIES: THE MORAL OBLIGATIONS OF GOVERNMENT OFFICIALS 52 (1982) (examination of the ethical problems that arise when representing private interests transforms into representation of self interests).

policies of the President through legal advocacy."⁷⁶ These contrasting opinions raise the question of what "ethical imperatives" guide the Attorney General.⁷⁶

IV. SETTING ETHICAL NORMS

As the practice of law in America has changed, so have the profession's ethical standards. In the eighteenth century, professional ethics were rooted in the "code of the gentleman" so that rules of etiquette and good grace induced regulation through effective peer pressure.⁷⁷ By the twentieth century the country's population had grown immensely. The legal profession experienced a comparable growth, both in the body of developed law and in the number of legal practitioners. To complicate matters further, a larger more diverse population demanded increased legal services. It is not surprising that traditional concepts of self-regulation could not continue to restrain unethical behavior.⁷⁸ In response, the legal community endeavored to establish principles of professional conduct.

Attorneys are bound by the version of the American Bar Association's Model Code of Professional Responsibility or Model Code of Professional Conduct adopted in the jurisdictions in which they are admitted to the bar.⁷⁹ The same holds true for the government attorney. These Codes, drafted primarily to respond to the ethical issues confronting the lawyer in private practice, do not provide solutions to the problems of particular concern to a federal attorney.⁸⁰ Recognizing the deficiency in ethical guidelines, the federal bar adopted the supplemental Federal Ethical Considerations and Opinion 73-1 of the Committee on Professional Ethics of the Federal Bar

75. Fein, *supra* note 55.

76. The ethical imperatives under consideration here are distinct from those personal ethics and philosophies which contribute to the lawyer's professional conduct. However, for an interesting insight into how personal philosophy affects the Attorney General's discharge of his duties see R. KLEINDIENST, *JUSTICE* (1985); E. RICHARDSON, *THE CREATIVE BALANCE* (1976); *Conference, supra* note 41.

77. In 1758, John Adams and Samuel Quincey took the following simple oath of office which served as their code of ethics as well:

You shall do no falsehood nor consent to any being done in the court. . . . You shall delay no man for lucre or malice, but you shall use yourself in the office of an attorney within the court according to the best of your learning and discretion, and with all good fidelity as well to the court and to the client. So help you God!

C. BROWN, *JOHN ADAMS AND THE AMERICAN REVOLUTION* 182 (1950).

78. Patterson, *Legal Ethics and the Lawyer's Duty of Loyalty*, 29 *EMORY L.J.* 909, 909-10 (1980).

79. Miller, *supra* note 48, at 1293 n.1. Other departmental or agency restrictions may also apply to the individual government lawyer. *Report of the D.C. Bar, supra* note 49.

80. Poirier, *The Federal Government Lawyer and Professional Ethics*, 60 *A.B.A. J.* 1541 (1974).

Association.⁸¹ The supplemental principles correspond to the nine canons in the Code of Professional Responsibility⁸² while Opinion 73-1 addresses the difficulties involved with the government client and confidentiality.⁸³ The commendable federal bar effort, however, failed to prevent the subsequent breaches of professional ethics that cast a giant shadow on the Department of Justice.

The shockwave of the Watergate scandal prompted Congress to enact the Ethics in Government Act of 1978.⁸⁴ The Act required all government officials and employees above a specified rank to file financial disclosure statements,⁸⁵ and it set a ceiling on the amount of permissible outside income. Other provisions created the Office of Government Ethics,⁸⁶ restricted potential post employment conflicts of interest,⁸⁷ outlined the authority of the special prosecutor,⁸⁸ and established the office of Senate Legal Counsel.⁸⁹ In 1982, the Act was amended to replace the special prosecutor with an independent counsel whose powers and duties were more clearly defined.⁹⁰ The 1987 amendment reauthorized, clarified, and strengthened the independent counsel process.⁹¹

Title IV of the Act instructs the Director of the Office of Government Ethics, in consultation with the Attorney General, to develop rules and regulations that identify and resolve conflicts of interest.⁹² The President or the Office of Personnel Management is then responsible for "promulgating" the regulations.⁹³ Subsequent history has shown that the 1978 Act failed to accomplish its objectives, at least with respect to government attorneys. One may find this system of formulating ethical standards analogous to "the fox guarding the chicken coop."

How then should an ethical standard take form? On what tenets should it rely? The essence of any ethical creed is in a shared moral philosophy. One's commitment to its principles may be the consequence of a deeply rooted conviction or mere tacit agreement.

81. *Id.* The status of Opinion 73-1 is just that, and has less weight than the Ethical Considerations. *Id.* at 1543. Application of the Opinion is on a case by case basis. *Id.*

82. *Id.* at 1542-44.

83. *Id.* at 1542.

84. Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1824 (1978).

85. 2 U.S.C. § 701 (1978); 5 U.S.C. app. § 201 (1978); 28 U.S.C. app. § 301 (1978).

86. 5 U.S.C. app. § 401 (1978)

87. 18 U.S.C. § 207 (1978).

88. 28 U.S.C. § 581 (1978).

89. 2 U.S.C. § 288 (1978).

90. Ethics in Government Act of 1982, Pub. L. No. 97-409, 96 Stat. 2039 (1982) (corresponds to 28 U.S.C. § 591 *et seq.*).

91. Independent Counsel Reauthorization Act of 1987, Pub. L. No. 100-191, 101 Stat. 1293 (1987) (corresponds to 28 U.S.C. § 591 *et seq.*).

92. 5 U.S.C. app. § 402 (1978).

93. *Id.*

In either case, an ethical creed designed to guide the legal profession must address the practical elements that create a lawyer's ethical dilemma.

Perhaps the most well-known and influential precept of legal ethics is found in Canon 7 of the Model Code of Professional Responsibility: "A Lawyer Should Represent a Client Zealously Within the Bounds of the Law."⁹⁴ However, the language from which this doctrine was taken had quite a different meaning in its original context. Lord Brougham, appearing before the House of Lords in his defense of Queen Caroline, said:

[A]n advocate, by the sacred duty which he owes his client, knows in the discharge of that office, but one person in the world, *that client and none other*. To save that client at all expedient means, to protect that client at all hazards and costs to all others, and among others to himself, is the highest and most unquestioned of his duties; and he must not regard the alarm, the suffering, the torment, the destruction which he may bring upon any other.⁹⁵

Lord Brougham was not advancing a theory of legal ethics but was threatening political ruin by publicly exposing King George IV's secret marriage. He was not exhorting misconduct but, rather, was threatening to tell the truth in order to force the King to withdraw his bill for divorce.⁹⁶

Several scholars suggest that lawyers are committed to this "hired gun" doctrine not because they "want to engage in misconduct . . ." but because it provides "a convenient basis for rationalizing such conduct if the occasion should arise."⁹⁷ One commentator has gone so far as to say that "at best the lawyer's world is a simplified moral world; often it is an amoral one; and more than occasionally, perhaps, an overtly immoral one."⁹⁸

Suspicion regarding a lawyer's honesty is nothing new.⁹⁹ However, this suspicion intensifies with the public's higher expectations for those in government. Consequently, the proliferation of unethical conduct at top levels of government in recent years, has caused government attorneys as a whole to suffer at the expense of "the few." The pervasive negative sentiment toward lawyers in general, and government lawyers in particular, has fostered a wealth of dis-

94. MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 7 (1980).

95. J. DOS PASSOS, *THE AMERICAN LAWYER* 141-42 (1907).

96. Patterson, *supra* note 78, at 909-10 (1980). King George IV took Lord Brougham's threat seriously and withdrew his bill for divorce. *Id.*

97. *Id.*

98. Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 *HUM. RTS.* 1, 2 (1975). The number of lawyers involved in the Watergate scandal was offered in support of this theory. *Id.* at 2-3.

99. G. HAZARD, *ETHICS IN THE PRACTICE OF LAW* xiii (1978).

course on professional duties and obligations.¹⁰⁰ The theorists fall primarily into two groups. The first proposes a higher ethical standard for the government lawyer based on the belief that the government attorney serves some higher purpose.¹⁰¹ They do not, however, define the specific criteria of the higher standard. The second group finds existing standards adequate. Theirs is a more conventional attorney-client perspective, defining duty as it "runs to the officer having the power of decision over the issue."¹⁰²

While there may be a fine line between advancing policy and controlling litigation, the distinction must still be drawn so that political advocacy does not discredit the legal process.¹⁰³ Inevitably, some "peculiarities of circumstance" will result in conduct falling outside the ethical norm which closely parallels that which falls within it. In spite of the shortcomings, "conduct specific" (objective) standards to which conflicting rights and duties can be referred surpass "broad principles" (subjective) standards in terms of avoiding conflicts and uncertainty.¹⁰⁴

Simply stated, there is no perfect set of ethics. Attorneys, like other people, are faced with ethical challenges every day. A "conduct specific" ethical standard governs the lawyer's conduct in the predictable circumstances. However, because ethics is essentially prospective, *i.e.* "there is ethics only where there is a problem to solve,"¹⁰⁵ numerous situations giving rise to ethical considerations are as yet unknown. The "conduct specific" standard will not have addressed these problems, but that does not diminish its importance or value. What it does mean is that an ethical standard must be flexible enough to adapt to the "peculiarity" of the new circumstance. To the degree that an ethical creed must incorporate unde-

100. Numerous books, scholarly journals, and newspaper articles have addressed the problems of legal ethics. In addition to the sources cited above, *see e.g.* Cox, *The Lawyer's Public Responsibilities*, 4 *HUM. RTS.* 1 (1974) (the government lawyer's responsibilities in the aftermath of Watergate); Dam, *The Special Responsibility of Lawyers in the Executive Branch*, 55 *CHI. B. REC.* 4 (1974) (executive branch lawyers have a special responsibility to expose governmental misconduct); Fahy, *Special Problems of Counsel for the Government*, 33 *FED. B.J.* 331 (1974) (the government lawyer's responsibility is to the people).

101. Moore, *supra* note 49.

102. Josephson & Pearce, *supra* note 35; Miller, *supra* note 48.

103. Former Attorney General Griffen Bell points to the University of California Regents v. Bakke, 438 U.S. 265 (1978) as an example of the fine line between policy and controlling litigation. Bell, *supra* note 42, at 794. Lawyers at the White House rewrote the Supreme Court brief Bell had submitted to the President. *Id.* Bell had to step in to protect the Solicitor General by directing the head of the Civil Rights Division of the Justice Department to "lock themselves in a room, write the brief, and finish it." *Id.* The finished product was in line with the President's policy because Bell knew it in advance. *Id.*

104. Conduct specific standards permit the attorney to make his ethical choices knowing, or at least being able to predict, the consequences of his actions.

105. S. DE BEAUVOIR, *THE ETHICS OF AMBIGUITY* 18 (1948).

financed conduct, it is a "broad principles" standard.

The challenge for the Attorney General, the Department of Justice, and the Congress together is to develop an ethical creed that is not limited by the experience of history. It will require a new vision unhampered by historical ideas of what is "necessary," who the client is, and to whom the Attorney General owes his duty of loyalty. It must leave behind old definitions in favor of inventing new meaning for a new context. These measures are imperative if the Attorney General and the Department of Justice are to ethically discharge the administration of justice. The principles of democratic government demand as much.

CONCLUSION

It is possible for the Attorney General to serve his three masters and still maintain appropriate relationships. The Attorneys General who have successfully done so are viewed as the exception to the rule,¹⁰⁶ rather than an example of the rule in operation. A rule may apply to anyone who chooses to make use of it. But, even a "conduct specific" creed must not so bind the lawyer that adherence to it robs the creed of its meaning or the lawyer of his profession. Nor should "broad principles" provisions permit political maneuvering to vilify its purpose. The goal should not be fixed once and for all, but defined along the way which leads to the goal. A two tiered standard may not be a perfect solution to the Attorney General's ethical dilemmas, and its application may be difficult. It is, however, better than none at all.

Paula K. Maguire

106. Attorney General Edward Bates is often cited as one of the exceptions. Appointed by President Lincoln, Bates declared, "[t]he office I hold is not properly *political*, but strictly *legal*; and it is my duty, above all other ministers of State to uphold the Law and to resist all encroachments, from whatever quarter, of mere will and power." Miller, *supra* note 7, at 51. See Biden, *supra* note 27, at 156 (former Attorney General Edward Levi was one of the rare exceptions who was able to maintain his personal integrity and the independence of his office).

