

Attorneys General: Elected vs. Appointed

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In 2014, the voters of the District of Columbia will begin electing their attorney general. In New Jersey, legislation to have their attorney general elected rather than appointed has been introduced.¹ If it passes, New Jersey will join the majority of states that elect their attorneys general. In both places, no scandal or other pivotal reason seems to have driven the movement toward popular election. In New Jersey, some perceive the governor as having too much appointment power.¹ A report by the D.C. Council noted that the average tenure of their attorneys general was one and a half years.²

However, the central issue in the debate between election and appointment is independence. Concerned citizens want an attorney general who will act independently, but party loyalty, campaign contributions, and loyalty to the executive can be influential. Continuity and stability are also desired for the attorney general's office. An ideal attorney general also would assume office without election baggage, but that is not always possible.³ The term "executive" in this paper refers to the President, a state governor, a county executive, or a mayor. This discussion about the makeup of the executive branch of government in the United States appropriately begins with the Constitution.

History

During the Constitutional Convention of 1787, the power to appoint officers of the executive branch was originally delegated exclusively to the Senate but was later given to the executive branch, with Senate confirmation of the President's nominations.⁴ ⁵ After the convention, Alexander Hamilton defended the appointment process and argued that the exercise of the "power of appointment" by the people is "impracticable."⁶

In the early years of the Republic, most states did not elect their attorneys general. During the Nineteenth Century, Jacksonian populism inspired many states to begin choosing their attorneys general by popular election.⁷ Today attorneys general are elected by the people in 43 states, appointed in five, and chosen in two states by other means.

Independence and influence

Whether elected or appointed, an attorney general may be influenced by their party's platform to not enforce or defend laws that are contrary to it. New Jersey's last attorney general, Jeff Chiesa, appointed by Governor Christie in 2011, acted contrarily to public opinion by refusing to argue in favor of same-sex marriage and to defend existing gun safety laws.¹ When now-Senator John Cornyn was the attorney general of Texas, he willfully neglected to fully inform school districts about a Federal Appeals Court ruling against prayer in public schools. In doing so, he gave them tacit permission to have prayer that is limited but still in violation of the ruling, although the case was pending admission to the U.S. Supreme Court.⁸

During Cornyn's 1998 campaign for Texas attorney general, he accepted a \$5,000 contribution from Koch Industries. At that time, the state was involved in a lawsuit against Koch over massive environmental damage caused by a leaking pipeline. After he won election, Cornyn settled with Koch for much less than the maximum award allowed by law. His answer to a reporter's question about this was flippant.⁸

Loyalty to the executive can also influence the office of attorney general. This is well illustrated by the Watergate Scandal of 1972-74, which involved President Richard Nixon and much of his White House and campaign staff. Watergate can be seen also as a critical test of the power of appointment.

Because of his loyalty to the President, Richard Kleindienst, Nixon's second attorney general, did very little to investigate and prosecute the break-in and cover-up after learning about these crimes from the very people who committed them.⁹ Although the third attorney general, Eliot Richardson, had served loyally in Nixon's cabinet, he showed more loyalty to the rule of law in dealing with Watergate.

Richardson acted independently in appointing a special prosecutor, Archibald Cox, and giving him unlimited authority to investigate all aspects of Watergate. However, Nixon pressured Richardson to exercise more control over Cox and to accept a compromise that could interfere with the investigation, but the attorney general refused. Presented with an ultimatum to fire Cox, Richardson and his deputy attorney general resigned in an event known as The Saturday Night Massacre.¹⁰

Among the flurry of government reforms proposed in response to Watergate was a bill introduced in the Senate calling for an elected U.S. attorney general. An editorial in *The Washington Post* criticized this idea as having the potential to destroy the unity of the executive branch intended by the Constitution.¹¹

Stability and continuity

For other reasons, New Jersey has had a frequent turnover of attorneys general in a short period of time, six in the past ten years.¹² The two most recent were appointed to other offices, leaving the state without an attorney general for over a year now.^{12 13} The situation in New Jersey suggests that appointment does not guarantee stability or continuity in the office. Although some experts claim that an elected office brings more stability than an appointed one,^{1 14 15} an elected attorney general may resign or lose their re-election after the executive's first term. The resignation of an elected attorney general before the term ends could incur a costly special election with low turnout. This is the situation in Utah, where a special election will be held in 2014 to replace an elected attorney general who resigned before his term ended.^{16 17}

In regard to continuity, furthermore, an elected attorney general has the advantage of being able to begin work shortly after the election, after being sworn in. In contrast, the nomination and confirmation process will delay the start date for an appointed attorney general. Politics could interfere with the process, as Hamilton acknowledged,⁶ through obstructive measures by senators of an opposing party.

The effect of elections

"An elected attorney general will be a politician." said Peter Nickles in 2010, then D.C.'s attorney general.¹⁸ Indeed, electoral politics is an inextricable part of an elected attorney general's career, which includes campaigning for re-election and raising money. If violations of campaign-finance laws are discovered after winning election, the scandal will be a distraction to the elected attorney general. If the office of attorney general is subject to a recall election, as it is in 17 states,¹⁹ then the power to do so may be abused by special interests. Moreover, elections for statewide offices, including attorney general, are often held in non-Presidential-election years, when turnout is usually lower. Low turnout and voters' lack of understanding of the office could affect the outcome of an election.

The process of electing an attorney general, which often begins with the nomination of candidates in party primary elections, does not provide the deliberation that a confirmation hearing could provide in order to evaluate the nominee's experience and qualifications.

Finally, an elected attorney general who belongs to an opposing political party could undermine the executive's authority or may otherwise become embroiled in conflict.^{3 18} Such conflicts have occurred in Virginia and several other states.⁷ In contrast, an appointed attorney general is often someone in whom the executive has trust and confidence. Probably the closest relationship between an executive and an attorney general was between President John F. Kennedy and his brother, Robert F. Kennedy.

Conclusions

The resignation of any attorney general, the re-election or recall defeat of an elected one, or the reassignment of an appointed one, could disrupt the continuity of the office and incur a special election.

The election process often lacks the deliberativeness of the confirmation process in evaluating a nominee's credentials and character. Other problems with the election of an attorney general, low turnout and the influence of money, are like those for any other office. However, when campaign contributions or party loyalty exert influence on the attorney general, independence is compromised.

Moreover, although the Watergate scandal showed how an appointed attorney general could be derelict in prosecuting crimes perpetrated by the executive, an elected attorney general could just as easily betray the rule of law in favor of political allies. Attorneys general can exercise loyalty to executives, though, by working effectively with them in achieving administration goals and advancing the public interest. This seems less likely to occur with an elected attorney general from an opposing party.

The arguments presented seem insufficient to conclude that one method of selection is absolutely better than the other, but reviewing the advantages and disadvantages of each can contribute to the debate. The following table gives a best and a worst reason to appoint or elect an attorney general.

	Best Reason	Worst Reason
Appoint	Deliberative selection process, though often influenced by politics	Turnover, especially because of reassignments to other positions
Elect	Stability, though not guaranteed	Influence of campaign contributions

Endnotes

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- ¹ Friedman, Matt. "An Elected Attorney General: Lawmaker Wants to Let Voters Pick, Not Christie" *The Star-Ledger* (New Jersey), 11 March 2014.
<http://www.nj.com/politics/index.ssf/2014/03/index.html> (Viewed June 14, 2014.)
- ² Committee on Public Safety and the Judiciary, Council of the District of Columbia "Report on Bill 18-65, 'Attorney General for the District of Columbia Clarification and Elected Term Amendment Act of 2009'" December 16, 2009.
<http://dclims1.dccouncil.us/images/00001/20100409125838.pdf> (Viewed June 25, 2014.)
- ³ "CHEN: Baggage of politics unhealthy for attorney general." *Legal Monitor Worldwide*. Al Bawaba (Middle East) Ltd., 2014. (Viewed on *General OneFile*., June 11, 2014.)
- ⁴ Mee, Charles L., Jr. *The Genius of the People*. New York: Harper & Row 1987, p. 266
- ⁵ Stewart, David O. *The Summer of 1787*. New York: Simon & Schuster 2007, pp. 168, 214
- ⁶ Hamilton, Alexander. "The Appointing Power of the Executive." *The Federalist Papers*, No. 76, April 1, 1788. http://thomas.loc.gov/home/histdox/fed_76.html (Viewed June 14, 2014.)
- ⁷ Signer, Michael. "Constitutional Crisis in the Commonwealth: Resolving the Conflict Between Governors and Attorneys General" Richmond, VA: *University of Richmond Law Review* 41:1 (Nov 2006) <http://lawreview.richmond.edu/archive/issues/volume-41-issue-1> (Viewed June 13, 2014.)
- ⁸ Burka, Paul. "The Case Against John Cornyn." *Texas Monthly* June 2000: 126. (Viewed on *General OneFile*. June 11, 2014.)
- ⁹ Emery, Fred. *Watergate: The Corruption of American Politics and the Fall of Richard Nixon*. New York: Simon & Schuster, 1993. pp. 147, 251
- ¹⁰ *Ibid.*, pp. 356, 372, 387-399. As a condition of Richardson's appointment, Senate Democrats required that he appoint a special prosecutor who would have a great degree of independence.
- ¹¹ Cramton, Roger C. "Cures That Worsen The Problem: The Doubtful Cures" *The Washington Post* 28 October 1973: C1+
- ¹² Office of the Attorney General, New Jersey Dept. of Law and Public Safety. "Past Attorneys General" <http://www.nj.gov/oag/history-past-asg.htm> (Viewed June 23, 2014.)
- ¹³ Baxter, Christopher, "N.J. Attorney General Paula Dow to take position at Port Authority after stepping down, Gov. Christie says." *The Star-Ledger* (New Jersey) 12 December 2011.
<http://www.nj.com/politics/index.ssf/2011/12/index.html> (Viewed June 22, 2014.)
- ¹⁴ Lightfoot, William P. "The case for electing the D.C. attorney general" *The Washington Post* (online edition) 22 October 2010 http://voices.washingtonpost.com/local-opinions/2010/10/the_case_for_electing_the_dc_a.html (Viewed June 21, 2014.)
- ¹⁵ Data was not readily available for a comparison of average tenures of AGs between appointment states and comparable election states.
- ¹⁶ Fortin, Garrett, "Utah Attorney General Special Election 2014 Primary Preview" *Ballot News* 23 June 2014 <http://www.ballotnews.org/state-executives/utah-attorney-general-special-election-2014-primary-preview> (Viewed June 28, 2014)
- ¹⁷ Information about state attorney general offices is found in *Powers And Duties Of The Attorneys General*, 3rd ed. (Emily Myers, Editor) published by the National Assn. of Attorneys General, <http://www.naag.org>. This resource was not readily available to the author.
- ¹⁸ Nickles, Peter. "Why I oppose an elected attorney general" *The Washington Post* (online edition) 22 October 2010 http://voices.washingtonpost.com/local-opinions/2010/10/why_i_oppose_and_elected_attor.html (Viewed June 29, 2014.)
- ¹⁹ National Council of State Legislatures, "Recall of State Officials" July 2011. <http://www.ncsl.org/research/elections-and-campaigns/recall-of-state-officials.aspx> (Viewed June 28, 2014.)