

Speech by: James Blackburn
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ON THE OFFICE OF THE ATTORNEY GENERAL

"I have lately suffered so much, both in pocket and health by my office, that I have written to the Governor desiring him to lay before the Assembly my desire of resignation. The Office of the Attorney General is undoubtedly now much more valuable than formerly, but I have yet reaped little of the fruit of it, and the fatigue and incessant application it requires is too much for me."

This was a letter written in 1731 by the North Carolina Attorney General, at that time James Iredell, to Judge John Williams, telling him of the frustrations which he was then having with the Office of Attorney General. In the early days, the Attorney General didn't have a State car as he does today; he didn't even have a State horse and buggy. He had no large staff of deputies or assistant attorneys general to assist him in his work; he had to ride hundreds of miles every year to attend the openings of courts. He complained not when he had to ride 500 miles in a single day, but when he had to ride 500 miles in a single year. So I think it's evident from these statistics and this letter that the Office of the Attorney General has grown rapidly in the last 200 years.

But in order to study the Office of the North Carolina Attorney General, I think it's essential to review history for a little bit and go back to England and see what was happening there. The ancient and honorable Office of the Attorney General is over 600 years old. The Office appears to have existed as early as 1278 AD. But prior to this time in England, prior to the Thirteenth Century, the Crown in England had appointed several attorneys to represent it in certain times in several different courts. These attorneys didn't have unlimited authority as the Attorney General in England was to have at a later time but rather a much more limited authority. The term "attorney general" was first used in 1398 on a certificate which was signed by four attorneys general and apparently, this is where the term "attorney general" came from. That same year, 1398, it's interesting to note that Parliament granted to both the Duke of Norfolk and the Duke of Herford the power to appoint attorneys who were authorized to take possession of any inheritance which might come to them during their banishment from England. It's interesting to note as a sidelight that the King later revoked this power in order to seize the Duke of Herford's estate.

By the end of the fifteenth century, really the late 1400's, the Attorney General began to have the power to appoint deputies to act in his name, because you can imagine the difficulty in those days of one Attorney General having to attend all the openings of courts. These Attorneys General served for different periods of time, depending on the age in which you look at them. For example, prior to Henry VIII, they served for periods of life or periods of good behavior, which by implication is something less than life, and they also served at the King's pleasure after the reign of Henry VIII. Any review of English history teaches you that the Crown and the Parliament did not always get along. As a matter of fact, in the 1600's, they were vying with one another for control of the government of England and the Attorney General became quite involved in this struggle for control. It became essential, for example, for the Attorney General not only to be a good attorney but to be a good politician as well. It required good lawyers, good politicians for the very reason that the Attorney General had to assist the Crown in its struggle with Parliament. He was in a sense one of the King's primary ministers.

I think it is an interesting sidelight that a great deal of pressure grew in the House of Commons for the Attorney General to have a seat in the House of Commons. The first time this occurred was, in the year 1603 when a man by the name of Francis North sat in the Commons. The next Attorney General was a man by the name of Francis Bacon, who at the time he became attorney general, was already sitting in the House of Commons; and a great deal of struggle went on between the Crown and Parliament over whether he was to retain his seat. He did so on the condition that after Bacon left office, no other attorneys general would retain their seats in the Parliament. This rule lasted for well over a half century until about 1670 when the Crown got a seat in the House of Commons for the Attorney General by matter of right. This is questionable however because history teaches us that the Crown had to pay Parliament 500 pounds in order to gain this seat.

In 1604 it is evident that the Attorney General was the only person in England who could take the initiative in legal proceedings for the Crown. This, of course, was a switch from the way it existed prior to the Thirteenth

Century when you had separate and private attorneys. He was the manager of all of the legal affairs for the Crown, both civil and criminal.

Blackstone has given this illustration of the Attorney General's power: "The object of the King's own prosecutions are properly such enormous misdemeanors as peculiarly tend to disturb or endanger his government or to molest or front him in the regular discharge of his royal functions. For offenses so high and dangerous, in the punishment or prevention of which a moment's delay would be fatal, the law has given to the Crown the power of an immediate prosecution without waiting for any previous application to any other tribunal."

As to civil powers, the following list is a good illustration of the authority which the Attorney General had in the 1600's. The power to prosecute all actions necessary for the protection and defense of the property and revenues of the Crown. The power to bring certain classes of persons accused of crime and misdemeanors to trial. The power to revoke and annul grants. The power to compare the admission of an officer duly chosen to his office. The power to enforce trusts, to prevent public nuisances and the abuse of trust powers. The authority to recover property to which the Crown may be entitled

by forfeiture for treason. As early as Henry VIII's reign, the Attorney General had begun to take a major part in legislation. Blackstone states that in some of the very first journals of the House of Lords he is not only employed to take bills from Lords to Commons, but also to amend bills and put them into shape. All through the Tudor period, it is the King's attorney who is usually consulted by the government on points of law; and it is he who conducts important state trials, not only in courts, but also in their preliminary stages.

It is evident, therefore, by this illustration of the Attorney General's power, both in legislation and in civil and criminal matters, that his powers were both extensive and well defined. About this time, of course, England was colonizing the Americas; and when the colonial governments were set up, the Office of the Attorney General quite naturally came along with it. In your proprietary colonies or in your royal colonies, often times the charter which set up the government provided for an Attorney General. In 1715, the Colonial Assembly of North Carolina recognized that the Attorney General had common law powers, insofar as they were not repealed by the Colonial Assembly and insofar as they did not injure the freedom of the colonies. Governor Tryon, in a letter during his administration, stated that the Attorney General had

the same authority as he had in England. So I think it's evident that the Attorney General in North Carolina began with common law powers.

In trying to get an understanding of the Office in North Carolina, it's interesting to go back and see what some of the people said about the Attorneys General back then, to see if it's any different from what they say about the Attorneys General today. In 1767 there were approximately 45 lawyers in North Carolina, wrote Governor Tryon, and his duties were partly criminal and partly civil. And not everybody had a high opinion of the Attorneys General back then. We read that Edward Randolph wrote that William Randolph (I don't know whether there is any relation or not) who was the Attorney General in Virginia at that time was unacquainted with the laws of England. He wrote that the Maryland Attorney General was involved in illegal trade, and he wrote that the Massachusetts Bay Attorney General was involved in both of these activities. In 1731 the Governor of North Carolina was a man by the name of Richard Everude who said of his own Attorney General that he didn't know enough law to be clerk to a justice of the peace and was besides a man of enumerable villianies.

Now both of these statements are going to have to be taken with a grain of salt because the first was made by a man who wanted to be Attorney General and was not, and the second was made by a governor who wanted to get rid of his Attorney General. Interestingly enough, the Colonial Records reveal the Attorney General in his first official act in North Carolina, upon being sworn in in 1694, preparing an indictment against John Filpot for saying, "God damn King William."

I know many members of this Office have had to write advisory opinions, and I know that you have difficulty getting them approved. But the Attorney General had difficulty with some of his opinions back then, too. You will recall the Stamp Act was passed in North Carolina around 1765. Down in Brunswick County, one day two merchant ships were coming in, and they didn't have their clearance papers stamped as required by British law. The result was that the people of Wilmington threw the crew of a British ship over in jail and jailed the captain of the ship because of the fact that he seized these two merchant ships. And nobody knew who had authority to do what. So the logical place to go was the Attorney General of North Carolina. He

tried to decide really which side was going to win and picked the wrong side. He decided the seizure by the British was perfectly legal and that the two merchant ships should be sent to Nova Scotia for the beginning of legal proceedings against them. The colonists subsequently seized the papers for the two merchant ships and let them come on into the harbor.

The office of the Attorney General at the present time is established under the North Carolina Constitution in Article III, Section 1. In the colonial periods, the Crown appointed the Attorney General as its representative. In 1776, the Constitution of North Carolina deemed that the Attorney General's Office should be elected jointly by the two houses of the General Assembly. The Constitution of 1868 is the constitution which provides that he shall be elected by the people. In the beginning he had a term in North Carolina for good behavior; he now has a renewable term for four years.

Any vacancy is to be filled by the Governor of North Carolina. He can be removed only by the action of impeachment. In this regard, there are six ways that an

Attorney General can be impeached:

(1) corruption or misconduct in official capacity; (2) being habitually drunk; (3) being drunk while in office; (4) being publicly drunk; (5) mental and physical incompetence; and (6) being convicted of a criminal matter which would bring the Office into public contempt.

The Attorney General is not by law in North Carolina required to be an attorney. There is one statute in North Carolina which has an implication that the people want him to be an attorney because G.S. 114(3) states that while the Attorney General is in office, he shall not devote his time to the private practice of law. But of course you can easily understand that one who is not an attorney would also not devote his time to the private practice of law.

The Attorneys Generals, of whom we have had 44 since 1776, have served from a period of a few months to a period of up to 17 years. Attorneys general have gone to the Superior Court Bench, and they have come from the Superior Court Bench to the Attorney General's Office. They have gone to the governorship, and they have gone to the Supreme Court. The Attorney General now runs and

supervises the Department of Justice which, of course, includes the State Bureau of Investigation.

I have not attempted to give an intensive study of North Carolina statutes, defining these powers; I have not attempted to give a technical study of English history, as well I might have tried--but really an impression of the office, as it exists in history, as shown by those who wrote about the office, as shown by the people who held it and exercised its powers--the problems they faced and what the people thought about them. Because after all, this is really the source of the authority of the Attorney General--that is the people; and I think that is what the Office is really all about.