

2002

Washington, Patton, Schwarzkopf and ... Ashcroft?

Michael Herz

Follow this and additional works at: <https://scholarship.law.umn.edu/concomm>



Part of the [Law Commons](#)

Recommended Citation

Herz, Michael, "Washington, Patton, Schwarzkopf and ... Ashcroft?" (2002). *Constitutional Commentary*. 771.
<https://scholarship.law.umn.edu/concomm/771>

This Article is brought to you for free and open access by the University of Minnesota Law School. It has been accepted for inclusion in Constitutional Commentary collection by an authorized administrator of the Scholarship Repository. For more information, please contact lenzx009@umn.edu.

WASHINGTON, PATTON, SCHWARZKOPF AND . . . ASHCROFT?

*Michael Herz**

I. INTRODUCTION—GENERALS, GENERALS EVERYWHERE

War may be too important to be left to the generals, but law, apparently, is not.

If you attend a Supreme Court argument in a case of sufficient significance to be argued by the Solicitor General (“SG”) himself, you will hear something like this:

QUESTION: That’s just part of it. It also, it also imputes nonhouseholds as households. I mean, it does a lot of things.

MR. DELLINGER: It imputes only to known addresses. Thank you.

QUESTION: Thank you, Mr. Dellinger. General Olson, we’ll hear from you.

ORAL ARGUMENT OF THEODORE B. OLSON,
SOLICITOR GENERAL, DEPARTMENT OF JUSTICE,
ON BEHALF OF THE FEDERAL APPELLEES

GENERAL OLSON: Mr. Chief Justice and may it please the Court¹

Ah yes, “General” Olson. A military man.

If you cross the street to attend, say, a congressional hearing on security issues at which Attorney General (“AG”) John Ashcroft is testifying, you may hear something like this:

* Professor of Law, Benjamin N. Cardozo School of Law, Yeshiva University. My thanks to John McGinnis, Neal Devins, and David Strauss for helpful comments on an earlier draft.

1. Transcript of Oral Argument, *Utah v. Evans*, No. 01-714 (Mar. 27, 2002) at 44.

SEN. BYRD: The committee will resume its hearings. . . . General Ashcroft, we welcome you to the Senate Appropriations Committee as we conduct our hearings on homeland security. . . . General Ashcroft, you're a key player in implementing America's homeland security strategy.²

And then, perhaps you head down Constitution Avenue to attend a Department of Justice press conference. There, Ashcroft introduces Representative Tom Delay, who says:

Thank you, general. . . . This solution is a very important step in that direction. We will strengthen the law so that it can pass constitutional review. We greatly appreciate General Ashcroft for joining with us to develop this effective solution. . . . We will be working with the Judiciary Committee and other leaders on this issue. . . . So I thank you, general.³

And so your day would go. As long as you were around the Department of Justice, you would have the sense that the military had taken over. Neither attorneys nor solicitors are in charge. Generals are.

The tendency to call the AG and the SG "General" is not new (though I will suggest that it is more comfortable after September 11), nor is it pervasive. But it is common—particularly, it seems, among government officials.⁴ As far as I know, it is not officially endorsed by DOJ; the Department's own publications and website do not use that formulation. Reportedly, Janet Reno disliked being called "General" and "abandoned" the title.⁵ When John Ashcroft became AG, he told reporters he did not care if he was called "John, General, Mr. Ashcroft, or 'Hey, you.'"⁶ "You can call me anything, just don't call me late for dinner."⁷

In this article, I argue that the practice of calling the AG and the SG "General" should be abandoned. This usage is flatly incorrect by the standards of history, grammar, lexicology, and

2. Homeland Security: Hearing Before the Senate Comm. on Appropriations, 107th Cong. (May 2, 2002).

3. DOJ News Conference, May 1, 2002, FDCH Political Transcripts.

4. The examples given above are from the Supreme Court and Congress; for a random example from the executive branch, see Remarks by President at Clinic Access Bill Signing, U.S. Newswire, May 26, 1994 ("Thank you very much, General Reno, for your leadership on this issue.").

5. Eric Lichtblau and Ronald Ostrow, *Post-Reno, White House Warmer for Ashcroft*, L.A. Times A12 (Feb. 3, 2001).

6. Jon Sawyer, *Ashcroft Launches Charm Offensive, Reaches Out to Justice Employees*, St. Louis Post-Dispatch, Feb. 3, 2001, at 5.

7. *Id.*

protocol. Of course, those standards are mutable; if everyone called John Ashcroft the same thing they call Norman Schwarzkopf or George Patton, then at some point doing so would be correct by historical, grammatical, lexical, and protocolian (?) standards. But I will make a normative argument against this usage as well. Law, also, is too important to be left to the generals.

II. THE ATTORNEY GENERAL IS A KIND OF ATTORNEY, NOT A KIND OF GENERAL

A. GRAMMAR

Notwithstanding the popularity of “come here, gorgeous,” it is grammatically incorrect to call someone by an adjective. But that is what the “general” in “Attorney General” is. That is why the plural is “Attorneys General.” Indeed, despite its flavor of annoying pedantry, the careful use of “Attorneys General” and “Solicitors General” is quite universal. In contrast, the plural of “Brigadier General” is not “Brigadiers General”; nor do we refer to “Chiefs Justice.” The noun gets the “s.” And it is the noun that denotes the title, as in “President Bush” and “Senator Clinton.”

Indeed, for the pedantic, all this is confirmed by Fowler.⁸ Under the heading “plural anomalies,” subheading “plurals of compound words,” Fowler explains that compound words “ordinarily form their plurals logically, by attaching the -s to the noun element in them.”⁹ Accordingly, “[t]he officials called *General* in civil life, e.g. *Attorney G.*, *Solicitor G.*, *Governor G.*, *Postmaster G.*, *Paymaster G.*, being special kinds of attorney, solicitor, etc., should be Attorneys General and so on.”¹⁰

Opinions would vary as to what “special kind of attorney” John Ashcroft (or, say, Ramsey Clark) is, but for present pur-

8. H.W. Fowler, *A Dictionary of Modern English Usage* (Clarendon Press, 2d ed. 1965).

9. *Id.* at 456.

10. *Id.* at 457. Fowler also observes that common usage is to the contrary for AG’s and SG’s and that the others “will no doubt eventually fall into line, following the popular tendency to disregard these niceties that has already made *court martials* and *poet laureates* sound at least as natural to us as the more correct *courts martial* and *poets laureate*.” *Id.* In fact, this comment reflects British usage, which opts for “attorney generals”; American usage has stuck with “attorneys general.” See Bryan Garner, *A Dictionary of Modern American Usage* 63, 504 (Oxford U. Press, 1998).

poses, the answer is that he is the “general” kind. Because “general” is not a noun, it cannot be his title.¹¹

B. HISTORY

Grammar alone, however, is a weak reed. The English language, and common speech, are full of grammatical quirks and exceptions. Perhaps history explains or justifies what seems an incorrect usage. In fact, the history of the AG and SG only confirms that it is indeed incorrect. As a historical matter, “general” refers not to rank or command but to the breadth of attorneyship; that is, general as opposed to specific.

1. English Roots

The first known use of the term “attorney general” occurred in 1398 in a certificate from the Duke of Norfolk’s four attorneys general.¹² These were not government officers, but simply agents of an absent principal. The “general” indicated that these agents could act for the principal on any matter. One much-cited account, after describing the early history of the use of attorneys of any sort, explains:

So far we have only considered the case of an attorney appointed *ad hoc*, i.e. to conduct a particular suit in the absence of his principal. To enlarge the scope of the writ of *dedimus potestatem* so as to allow a man to appoint an attorney to act for him in any suit in which he might be involved at any future time was but a short step. Such a writ, however, was at first only granted as a special favour or under exceptional circumstances. . . . [Over time] it became usual, especially in the case

11. Dictionaries offer little guidance, but are consistent with these conclusions. The following definition of “attorney general” is typical: “the chief law officer and legal counsel of the government of a state or the United States.” 1 *Heritage Illustrated Dictionary of the English Language* 85 (Houghton Mifflin, 1979). A “law officer” and “legal counsel” would not seem to be a “general,” but a “chief” could be, perhaps. Still, no dictionary, as far as I know, defines attorney general as, for example, “the general in charge of the Department of Justice.”

Turning to the definition of “general,” the categories of persons identified are all inapplicable. See, e.g., *Merriam-Webster’s Collegiate Dictionary* 484 (Merriam-Webster, Inc., 10th ed. 1993). This dictionary gives four definitions of “general”: “something . . . that involves or is applicable to the whole”; “superior general” (which in turn is defined as the head of a religious order or congregation, *id.* at 1182); archaically, the general public; and a “general officer” (in turn defined as any of the officers in the army, air force, or marine corps above colonel, *id.* at 485) or “a commissioned officer in the army, air force, or marine corps who ranks above a lieutenant general and whose insignia is four stars.” *Id.*

12. Hugh Bellot, *The Origin of the Attorney-General*, 25 L.Q. Rev. 400, 403 (1909).

of great landowners, to appoint attorneys to attend to all suits which might arise during a specified period during the life of the appointor, or in a particular county or court. Such an agent was known at first as a general attorney, later as an attorney general.¹³

Thus, an "attorney general" was someone who held what today we would call, not coincidentally, a "general power of attorney."

The creation in England of the governmental post of Attorney General apparently came later. In the 13th and 14th centuries, there existed a fluctuating number of "King's Attorneys" or "Attornati Regis."¹⁴ Various counsel, of various titles, represented the king. It seems a matter of debate among legal historians whether these attorneys functioned as "general attorneys," at least some of the time,¹⁵ or whether they were by definition limited to a particular court or substantive area.¹⁶ That dispute does not really matter for these purposes. Only in 1472 is there a single "Attorney General," one William Husse, and thereafter the post is held by a single person. (Note that there was still no statutory basis for the office; the King simply named Husse as his Attorney General.) Thus, the English history is that *the* "Attorney General" was singled out from among many of the king's counsel. As attorney for the king, writes Holdsworth, "[h]e could be a more general attorney than those of other men."¹⁷ The "general" indicates nothing other than a general capacity to act for the king.¹⁸

13. *Id.* at 402-03. See also 1 *Oxford English Dictionary* 772 (Clarendon Press, 2d ed. 1989) (defining "the Kings Attorney" as earlier (descriptive) designation of the legal officer now called Attorney General).

14. *Id.* at 406-10.

15. This is Bellot's position. See *id.*

16. This is Holdsworth's claim. See W.S. Holdsworth, *The Early History of the Attorney and Solicitor General*, 13 *Ill. L. Rev.* 602, 603-04 (1919).

17. *Id.* at 614. See also 1 *Oxford English Dictionary* at 772 (cited in note 13) (explaining that the title "began in England, where this officer was . . . called . . . 'the king's general attorney, to distinguish him from those appointed to act on special occasions, or in particular courts).

18. The following excerpt from Holdsworth makes this clear by taking it for granted:

We hear of a king's attorney in the thirteenth century, that is at a time when the legal profession had not yet taken its final form. Like the attorneys of other people, he is often only appointed for a particular court; like them he is sometimes formally admitted by the court; and like them he can both plead and take all the necessary steps in an action. But there are differences. The king could appoint an attorney general—an attorney to conduct any litigation that might arise—as he pleased, at a time when other persons could only do so by the express license of the king. . . . [T]he differences which, from the outset, had existed between an attorney who appeared for the king, and an ordinary attorney, enabled his office to develop on its own lines. He could be a more general attorney than those of other men. He could be commissioned to appear not only

As for the Solicitor General, that post came into existence somewhat later, but was well established by the early 16th century.¹⁹ The solicitor “served as a general assistant to the attorney in the handling of the King’s legal business.”²⁰ Again, there is no indication that the “general” in this title meant anything different from the “general” in the title of his boss.

2. American Attorneys General

By the time of the American colonial period, then, the English Attorney General and Solicitor General were established in something like their modern versions, as the chief litigators for, and legal advisors to, the crown.²¹ The colonies established, usually by executive action but sometimes legislatively, “attorneys general” with similar functions.²² Apparently “the colonies made little attempt to define or enumerate the duties of Attorney General in America. He possessed the common law powers of the English Attorney General except where they were changed by the constitution or statute. ‘He was in a sense a delegate of the Attorney General of England.’”²³

In creating the federal AG and SG, in 1789²⁴ and 1870,²⁵ respectively, Congress borrowed the titles from the English.²⁶ No

in all cases affecting the king in any one court, but also in all cases in any court in England.

Id. at 612-14. See also Rita Cooley, *Predecessors of the Federal Attorney General: The Attorney General in England and the American Colonies*, 2 Am. J. Leg. Hist. 304, 306 (1958) (“[T]he Attorney General had a general authority to represent the Crown in all tribunals.”).

19. Seth P. Waxman, “Presenting the Case of the United States as it Should Be”: *The Solicitor General in Historical Context*, 2 J. S. Ct. Hist. 3, 20 n.49 (1998).

20. Id.

21. Holdsworth, *The Early History of the Attorney and Solicitor General* at 611 (cited in note 16).

22. See generally Cooley, 2 Am. J. Leg. Hist. (cited in note 18).

23. *Nat’l Ass’n of Attorneys General, Report on the Office of Attorney General 14* (1971) (quoting Oliver W. Hammonds, *The Attorney General in the American Colonies*, Anglo-American Legal History Series V.I, no. 2 (1939)). See also Nancy V. Baker, *Conflicting Loyalties: Law and Politics in the Attorney General’s Office, 1789-1900*, at 40 (U. Press of Kansas, 1992) (noting that the colonists “sought to transplant” the English AG in the New World).

24. The final section of the Judiciary Act of 1789 provided, in relevant part:

And there shall be appointed a meet person, learned in the law, to act as attorney general for the United States . . . to prosecute and conduct all suits in the Supreme Court in which the United States shall be concerned, and to give his advice and opinion upon questions of law when required by the President of the United States, or when requested by the heads of any of the departments, touching on matters that may concern their departments.

Judiciary Act of 1789, ch. 20, § 35, 1 Stat. 73, 93.

25. Act of June 22, 1870, ch. 150, § 2, 16 Stat. 162, 162 (“[T]here shall be in said Department an officer learned in the law, to assist the Attorney-General in the performance

evidence exists that Congress was doing anything other than following the English and colonial practice, nor to suggest that the titles had anything other than the historical connotations—that these were attorneys whose representative capacity was not limited to particular matters or courts but rather extended to any matter in which the United States was interested.²⁷

3. Early American Practice

The background of the American office suggests that calling the AG “General” is historically inappropriate for one other reason. A general is, by definition, in charge of somebody. He or she is the top of the heap. In the early years of the republic, the Attorney General was surely the loneliest and most powerless general there ever was.²⁸ He was in charge of no one and nothing. He had no staff. He bought his own supplies. He provided his own office. Not only was there no Department of Justice, the AG had no responsibility for or supervision over the district attorneys.²⁹ Indeed, the Attorney General did not even have a

of his duties, to be called the solicitor-general, and who, in case of a vacancy in the office of the Attorney-General, or in his absence or disability, shall have power to exercise all the duties of that office.”)

26. See Luther Huston, *Learned in the Law: The Attorney General 1789-1870*, in U.S. Department of Justice, *200th Anniversary of the Office of the Attorney General* 2, 3 (1990), reprinted from Luther Huston, *The Department of Justice* 3, 5 (Praeger, 1967) (“The British did not have a department of justice, but they had—and still have—an attorney general. The new nation borrowed that title for the first federal law officer named by an act of Congress.”); Homer Cummings and Carl McFarland, *Federal Justice: Chapters in the History of Justice and the Federal Executive* 225 (The Macmillan Company, 1937) (noting that under the legislation that created the Department of Justice the AG “was to be aided by a Solicitor General—the title of one of the great law officers of England since the fifteenth century”).

27. In arguing for creation of the post of Solicitor General, for example, Representative Jenckes stated that the goal was to have a single person to try these cases in whatever courts they may arise. We propose to have 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.

90 Cong. Globe, 41st Cong., 2d Sess. 3035 (1870).

28. When Edmund Randolph “became attorney general in 1789, the office could not have been smaller and scarcely more poorly paid.” Luther A. Huston, *History of the Office of the Attorney General*, in Luther A. Huston et al., *Roles of the Attorney General of the United States* 1, 1 (American Enterprise Institute for Public Policy Research, 1968).

29. See Baker, *Conflicting Loyalties* at 50-51 (cited in note 23); Albert Langeluttig, *The Department of Justice of the United States* 2 (Johns Hopkins Press, 1927). The first AG, Edmund Randolph, requested that he be given some control over the district attorneys; the proposal was received with some sympathy by the President and some members of Congress, but was never enacted. Langeluttig, *supra* at 2. Only in 1861 were the district attorneys required to report to the AG. *Id.* at 8. And not until 1879 do we see the beginning of the investigatory apparatus under the AG’s control that ultimately became

clerk until 1818, writing out his opinions and correspondence in his own hand.³⁰ As late as 1853, “the Attorney General of the United States, Caleb Cushing, performed all his duties with the help of two clerks and a messenger.”³¹ In short, Congress created a “general” who was no one’s boss, was in charge of nothing, and existed within (one could not say “presided over”) a state of “near anarchy in the nation’s legal affairs.”³² He just wasn’t that sort of general.

I do not know when the practice of calling the AG “General” began. But surely it does not date back to the eighteenth century, or any time before creation of the Department of Justice, for in that period it would just have been too goofy.

C. THE “RULES” OF PROTOCOL

For what it is worth (and it’s not worth much), sources that purport to set out the correct forms of address for government officials do not endorse calling the AG or SG “General.” For example, the standard text on protocol, though silent as to the Attorney General, does give instructions as to how to refer to the Solicitor General. A letter should begin “Dear Mr. Solicitor General” or “Dear Mr. Doe” and in conversation the SG should be referred to simply as “Mr. Doe.”³³ Another work on forms of address states that a State Attorney General should be addressed as “Mr. Attorney General” or “Mr. Wilson.”³⁴ Other works agree,³⁵ and I have found no source that actually states that it is correct to call the Attorney General “general.”³⁶

the Federal Bureau of Investigation. *Id.* at 15-16.

30. *Id.* at 4; see also Cummings and McFarland, *Federal Justice* at 154-58 (cited in note 26).

31. Lawrence M. Friedman, *A History of American Law* 561 (Simon and Schuster, 1973).

32. Baker, *Conflicting Loyalties* at 49 (cited in note 23).

33. Mary Jane McCaffree and Pauline Innis, *Protocol: The Complete Handbook of Diplomatic, Official and Social Usage* 42-43 (Prentice Hall, 1985). Interestingly, both the Attorney General and the Solicitor General come before actual generals in the all-important “order of precedence.” The President is of course first; the Attorney General comes ninth, along with the rest of the cabinet; the Solicitor General is thirteenth, along with other deputy and under secretaries; five-star generals, the commandant of the Marine Corps, and the like are fourteenth. *Id.* at 6-11. Part of my point is that this ranking is just right. The AG and SG should see it as a dismaying lack of respect to be called “General.”

34. *Forms of Address: A Guide for Business and Social Use* 62 (Andrea Holberg, ed., Rice University Press, 1994).

35. See, e.g., *Webster’s II New Riverside University Dictionary* (Riverside Publishing Company) (stating that correct salutation in a letter is “Dear Mr./Madam _____” or “Dear Attorney General _____”). Various federal agencies lay down the same rule in

D. OTHER GENERALS

The AG and the SG are hardly the only non-military “generals.” DOJ itself has a third, the Inspector General;³⁷ he too is sometimes referred to as “General.” Many others are spread throughout the government. It may be worth glancing at a few.

Some federal legal officers are *real* generals. The Army’s Judge Advocate General is one. The Judge Advocate General is promoted to the rank of major general, if he is not one already, on appointment.³⁸ Accordingly, the JAG Corps website refers to the Judge Advocate General as “General Romig,”³⁹ *not* because he is the Judge Advocate “General” but because he really is a general. Indeed, one wonders whether General Romig is not a little bemused to hear reference to his counterpart over at Justice, General Ashcroft.

The Navy, too, has a Judge Advocate *General*. But he is not called “General”; that’s because, since he’s in the Navy, he is an *Admiral*. By statute, upon appointment the Navy Judge Advocate General is made a rear admiral.⁴⁰ Thus, the Navy website refers to the Judge Advocate *General* as “Rear Admiral Lohr.”⁴¹

their correspondence handbooks, including the General Services Administration, see <<http://hydra.gsa.gov/staff/c/ca/corstan.htm#exec>> (last visited June 25, 2002), the Forest Service, see <<http://www.fs.fed.us/im/directives/fsh/6209.12/31-33.txt>> (last visited June 25, 2002), and the Department of Agriculture, see <http://www.afm.ars.usda.gov/ppweb/261-2mc-6-7.htm#M_1_> (last visited June 25, 2002).

36. With one possible exception. Answering a letter to *The Atlantic Monthly*, Barbara Wallraff opined that “no civilian should be” called “general,” and that “General Ashcroft” was incorrect. Barbara Wallraff, *Word Court*, *The Atlantic Monthly* (March, 2002), available at <<http://www.theatlantic.com/issues/2002/03/wallraff.htm>> (last visited June 17, 2003). This prompted a letter pointing out that the Supreme Court of the United States, “a higher court than Word Court,” called the AG, the SG, and state AG’s “general.” Solely on the basis of this Supreme Court practice, Wallraff yielded, concluding that “jurist generals” are properly called “general,” though standing by her position that “general” is incorrect as applied to other governmental “generals,” such as the comptroller or the surgeon. Letter to the Editor from Wayne Uhl and reply by Barbara Wallraff, *The Atlantic Monthly* 13 (July/August, 2002). With all due respect to both the Supreme Court and Ms. Wallraff, this is a setting in which the Court is neither final nor infallible.

37. DOJ is only one of many agencies with an inspector general. In the Department of Health and Human Services, the inspector general is, as of this writing, one Janet Rehnquist. Does the Chief Justice, who calls the Solicitor General “General Olson,” call his daughter “General Rehnquist”?

38. 10 U.S.C. §§ 3036(b), 3037(a) (2000).

39. See <<http://www.jagcnet.army.mil/JAGCLeadership>> (last visited July 2, 2002).

40. 10 U.S.C. § 5148(b) (2000). To be precise, the new Navy Judge Advocate General comes from the Navy JAG Corps, he or she becomes a rear admiral; if, as is permitted, he or she comes from the *Marines* JAG Corps, the promotion is to major general. *Id.*

41. See <http://www.jag.navy.mil/html/body_welcome.htm> (last visited June 20, 2002).

All of this is as it should be, and is quite inconsistent with calling the Attorney General “general.”

Other “generals” of the AG sort in the federal government raise interesting questions. What about, for example, the Surgeon General?⁴² It turns out that the Surgeon General is, by statute, an *admiral*. To be precise, the SG (no, not *that* SG) holds the rank of Vice Admiral in the US Public Health Service Commissioned Corps.⁴³ The Corps is, or so it claims, “a uniformed service of the same nature as the Navy, Marines, Army, Air Force, Coast Guard, and NOAA Corps.”⁴⁴ (I’m not sure what “nature” that is, except that the members of each do wear uniforms.) The Surgeon General must also, by statutory mandate, have training or experience in public health programs,⁴⁵ which for all practical purposes means that she must be a medical doctor. So here we have a plethora of titles. Perhaps this calls for the Germanic “Herr Doktor Professor” approach, and we should refer to the Surgeon General as “Dr. Admiral General So-and-So.”

To my knowledge, no one ever calls the Surgeon General “general”—“doctor” is used instead—but doing so would make just as much sense as calling the Attorney General “General Ashcroft.” Indeed, other nonmilitary generals in the federal government do get called “general” from time to time. For example, the Comptroller General, who heads the General Accounting Office and has nothing to do with the military, sometimes gets a “general” thrown his way. So does the Postmaster General.⁴⁶ But my sense is this happens less often than with the AG and the SG. For example, at a May 2002 hearing before the International Security, Proliferation and Federal Services Subcommittee of the Senate Governmental Affairs Committee, the

42. There are actually two “Surgeons General,” if not more, in the federal government. The better known is in the Public Health Service within the Department of Health and Human Services. The other is an officer in the U.S. Army. See 10 U.S.C. § 3036(a)(2) (2000). *That* Surgeon General is also, by statute, a lieutenant general. *Id.* § 3036(b).

43. 42 U.S.C. § 207 (2000).

44. See <<http://www.surgeongeneral.gov/sg/default.htm>> (last visited June 20, 2002).

45. 10 U.S.C. § 205 (2000).

46. Though the current Postmaster General seems not to stand on ceremony. During an interview on the Today Show, host Katie Couric stumbled a little and asked him directly how he should be addressed: “Mr. Potter, do I call you Mr. Potter, do I call you General Potter, do I call you Postmaster Potter? What do I call you?” My own vote would be for the charmingly alliterative Postmaster Potter, but Potter’s answer, refreshingly, was “You can call me Jack.” *The Today Show* (NBC television broadcast, Oct. 3, 2001).

only two witnesses were none other than the Comptroller General, David Walker, and the Postmaster General, John Potter. I count no “General Walkers” and only four “General Potters” in the entire transcript.⁴⁷ In any event, to the extent other civilian “generals”—comptroller, postmaster, inspector, consul, director, etc. etc. etc.—do get the honorific, it is just as incorrect as in the case of the AG or the SG.⁴⁸

III. WHENCE “GENERAL”?

The origins of this usage are probably lost in the mists of time. We will never know when the first sycophant tried it out on the first delighted megalomaniac. But we can speculate as to what might explain, though not justify, a usage that is flatly wrong.

One possibility is that it is just sloppiness. The word “general” sounds like a title, so is used as one. Moreover, other Cabinet officers can be addressed as “Secretary.” While “Attorney General” would seem an acceptable equivalent, one can understand the impulse toward the one-word title. Surely more is at work than that, however.

In part, calling the AG and SG “general” likely stems from the irresistible pressure to inflate titles. Many have noted the proliferation in the business world of titles once held only by the top brass, such as CEO.⁴⁹ Inflating titles enhances employee satisfaction and psychic income without costing the company anything. One would expect such a tendency to be even more rampant in the government, where the opportunities for financial remuneration are more limited and so nonfinancial alternatives more attractive. As one columnist, quoting Brookings Institute scholar Paul Light, has written:

47. The Postal Service in the 21st Century: The USPS Transformational Plan: Hearing Before the Subcomm. on International Security, Proliferation and Federal Services of the Senate Comm. on Governmental Affairs, 107th Cong. (May 13, 2002).

48. My own email inquiry to the official historian of the GSA went unanswered, but an unidentified GSA spokesperson told one columnist that Comptroller General Walker should be referred to simply as “Mr. Walker.” See Wallraff, *Response* (cited in note 36).

49. See, e.g., Alexander Chancellor, *The Buck Stops Where?*, *The Guardian* 9 (Mar. 16, 2002) (“The mysterious craving for titles is as old as history itself, but never before has it been so frivolously indulged. For the rampant “uptitling” of employees, first in America and now in Britain, has created a topsy-turvy world in which everyone sounds like a boss”); Jonathan Glater, *At Title-Happy Companies, It’s a Chief per Bottle-Washer*, *N.Y. Times* A1 (Apr. 11, 2001) (describing proliferation of powerful sounding titles).

The title creep problem affects the entire government, including Congress, Light says. Even the Office of Management and Budget is not immune. The OMB had a director, a deputy director and eight assistants in 1960, Light said. But by 1992 it had a director, a principal deputy director, a deputy director for management, two executive associate directors, eight associate directors, 12 deputy associate directors, four assistant directors and three deputy assistant directors.

Now that's management.⁵⁰

A corollary to title inflation is the title ratchet: everyone is allowed to continue using the title from their highest ranking position, regardless of what they are up to now. Hence "President Clinton," "Judge Mikva," "Senator D'Amato." The idea underlying the title ratchet is that one always uses the most expansive or impressive of all plausible titles, which would also produce "General Ashcroft." This explanation is consistent with the fact that the Surgeon General gets called Doctor rather than General. "Doctor" is a pretty impressive title, especially within the U.S. Government, whereas "attorneys" are a dime a dozen. Thus, there is a need to inflate for the AG and not for the Surgeon General.⁵¹

In short, in a world, and especially a city (and particularly a chamber—namely, the Senate), in which everyone is crowned not with laurels but with titles and honorifics, it is no surprise that anyone with "General" in their title would lay claim to, or be treated to, the most grandiose possibility.

However, the misuse of "general" predates the recent uptitling epidemic, and the term is more than simply grandiose. There is no escaping its military connotations. Almost all generals are found in the Army (or Air Force, or Marines). Most people are slightly confused the first time they hear the AG or SG

50. Kamen, *Never Vacant: Office of Title Generation*, Wash. Post A21 (Oct. 23, 2000). Similarly, the number of "assistants to the President" at the White House reportedly rose from 29 in the Kennedy administration, to 45 under Nixon, 56 under Reagan, 75 under Bush I, and 141 under Clinton. *Id.*

51. Griffin Bell, whom we might call either "General Bell" or "Judge Bell" under the ratchet principle, seems to get the latter. See, e.g., *Toward an International Criminal Court? A Debate*, 14 Emory Int'l L. Rev. 159, 163-64 (2000). In fact, he was called "Judge" even while AG. See *Office of the White House Secretary, Briefing by Attorney General Griffin B. Bell, Stuart E. Eizenstat, Assistant to the President for Domestic Affairs and Policy, and John Harmon, Office of Legal Counsel*, June 21, 1978, at 4, quoted in Louis Fisher, *Constitutional Interpretation by Members of Congress*, 63 N.C. L. Rev. 707, 737 & nn. 227-28 (1985) (quoting White House advisor Stuart Eizenstat referring to then-Attorney General Bell as "the Judge" during a press briefing).

referred to as “General” precisely because the term’s primary meaning and its primary association are military. My guess is that the misuse of “general” is not only *confusing* for this reason, but *attractive*.

This cannot be proven, of course. But the military feel of the term is so strong that it is hard to believe that its appeal is independent of that feel. People are reassured, or impressed, by having a general around. The adversary system, litigation “battles,” the common understanding of litigation as a kind of warfare, all these make the idea of putting a general in charge comfortable.

This impulse might be all the stronger since the September 11 attacks and the start of a “war on terrorism” in which the Department of Justice is a central player. In fact, President Bush has half-jokingly referred to Ashcroft as a military general on more than one occasion since September 11. For example, in November 2001 Bush addressed a meeting of the U.S. Attorneys. After being introduced by the Attorney General, Bush said:

Thank you, General. I appreciate you. You’ve done a good job. . . .

Well, John, thank you very much for those kind words and I appreciate your strong leadership. It’s a principled leadership, it is a steady leadership and it’s a leadership that’s good for America. I guess we call you general.

That means you [i.e., the U.S. Attorneys in the audience] all are in the Army.

And I’m glad you are.⁵²

52. Remarks by President George W. Bush and Attorney General John Ashcroft to Conference of United States Attorneys, Federal News Service (November 29, 2001). See also Terry Eastland, *General Ashcroft: Justice Goes to War*, Weekly Standard (Dec. 17, 2001) (“Attorneys general long have been addressed as “General.” But to say that those supervised by an attorney general are ‘in the Army’ is an odd play on the title—or would be, except that the nation is at war, and the Justice Department is playing a major role.”). Bush made a similar comment to FBI employees two weeks after the attacks:

I recognize the important contribution you make, and that the FBI and the wonderful men and women who work here are an incredibly important part of the army that is going to win the war on terrorism. You’ve got some pretty good generals here, starting with General Ashcroft, who is doing a fine job as the Attorney General of America.

Remarks by President George W. Bush to Employees of the Federal Bureau of Investiga-

If indeed the appeal of “general” lies in its military connotations, one would expect its use to increase (a) after September 11, and (b) when a man followed a woman as Attorney General. This is hard to measure, but a search of the Lexis News Group file suggests that the first did not occur and the second did. From September 12, 2000 through January 20, 2001, “General Reno” appears in the LEXIS “News Group” file 27 times. Six of those hits are different newspapers reporting a single speech by President Clinton in which he thanked “General Reno”; fourteen others are from different papers quoting the President’s remarks at a memorial service for those killed aboard the U.S.S. Cole, at which he acknowledged the attendance of “General Reno.” Three others had nothing to do with Janet Reno. So that makes six separate occurrences of “General Reno.” For the period from September 12, 2001 until January 20, 2002—the same four-plus months of the calendar, but in a completely different United States—a search of the same file turns up 170 “General Ashcrofts.” Subtracting for duplicates brings the total down to 117. Finally, a search of the four-month period *prior to* September 11 produces 50 “General Ashcrofts.”

Now, comparing the 117 to the 50 to the 6, though its supports my initial hypothesis, is meaningless; much of the difference reflects not a higher *rate* of “General Ashcrofts” but simply the increasing coverage of the Attorney General in the later periods. But the disparity in “general” references is greater than the disparity in overall references. Janet Reno is mentioned 91 times in *The New York Times* from September 12, 2000 to January 11, 2001.⁵³ John Ashcroft is mentioned 373 times during the same period a year later and 155 times during the preceding four months. Thus, the ratio of *Times*’ references is about four to one in favor of Ashcroft over Reno; the ratio of “General Ashcroft” to “General Reno” in the total news group database is about twenty to one. The ratio of post-September 11 to pre-September 11 mentions of Ashcroft in the *Times* is about 2.5 to 1; the ratio of “General Ashcrofts” is similar. In short, Ashcroft apparently gets called “General” far more than Janet Reno did, but the incidence has not significantly increased since September 11.⁵⁴

tion, Federal News Service (Sep. 25, 2001).

53. Both Reno and Ashcroft show up over a thousand times in the overall database, so a total count of news hits is impossible. Appearances in a single, national paper should be a rough proxy for overall news coverage.

54. As noted, see note 5, Janet Reno may have discouraged the use of “General Reno.”

Finally, these overall numbers may hide striking individual trends. Here is one: in his daily news briefings, White House Press Secretary Ari Fleischer used the phrase "General Ashcroft" only once before September 11. From September 11 until December 17, he used it thirteen times; then in the subsequent six months the words did not pass his lips. One cannot but speculate that, like the President,⁵⁵ he found the formulation reassuring; and one cannot but wonder whether someone told him to abandon it. If so, they had the right idea.

IV. THE MILITARY AND THE RULE OF LAW

On June 10, 2002, John Ashcroft announced that the FBI had captured Abdullah Al Muhajir, "an Al Qaeda operative [who] was exploring a . . . plan to build and explode a radioactive 'dirty bomb.'"⁵⁶ He ended his statement with the following two-sentence warning and assurance:

To our enemies, I say we will continue to be vigilant against all threats, whether they come from overseas or at home in America. To our citizens, I say we will continue to respect the rule of law while doing everything in our power to prevent terrorist attacks.⁵⁷

It was not consciously intended, but these sentences seem to lay out an opposed pair. Attorney General Ashcroft does not say that we will be vigilant while still respecting the rule of law. Rather, he says we will be vigilant in one direction and restrained in the other. Indeed, taken literally, it sounds uncomfortably as if he is explaining how he spins his activities before different audiences. "Here's what I say to our enemies, and here's how I put it when I'm talking to our citizens."

In any event, the first sentence is the General speaking, the second the Attorney. Which of these is the appropriate voice for the Attorney General?

My suggestion is that the Attorney General is most importantly an attorney. In a democracy that makes "the proud boast . . . that we have 'a government of laws and not of men,'"⁵⁸

55. See note 52 and accompanying text.

56. Statement of Attorney General John Ashcroft Regarding the transfer of Abdullah Al Muhajir (Born Jose Padilla) to the Department of Defense as an Enemy Combatant, June 10, 2002 (available at <<http://www.usdoj.gov/ag/speeches/2002/061002agtranscripts.htm>>).

57. *Id.*

58. *Morrison v. Olson*, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting) (quoting

the whole point is that he is no more than that. He is a participant in the rule of law, an attorney and *not* a general, in the words of the Judiciary Act of 1789, “a meet person, learned in the law.”⁵⁹ The United States is not governed by a Generalissimo. Indeed, the attorney, or solicitor, on the one hand, and the general, on the other hand, are in opposition. The latter evokes the principle that might makes right; the former epitomize the principle that right makes might. This is why, as Justice Stevens has pointed out, Shakespeare’s famous exhortation to kill all the lawyers is in fact one of the most flattering references to the profession to be found in western literature. Dissenting in *Walters v. Radiation Survivors*,⁶⁰ Justice Stevens stressed the “function of the independent lawyer as a guardian of our freedom.”⁶¹

That function was . . . well understood by Jack Cade and his followers, characters who are often forgotten and whose most famous line is often misunderstood. Dick’s statement (“The first thing we do, let’s kill all the lawyers”) was spoken by a rebel, not a friend of liberty. See W. Shakespeare, *King Henry VI*, pt. II, Act IV, scene 2, line 72. As a careful reading of that text will reveal, Shakespeare insightfully realized that disposing of lawyers is a step in the direction of a totalitarian form of government.⁶²

Now, calling the AG “General” is hardly a major “step in the direction of a totalitarian form of government.” It will not make or break the nation’s claim to be an exemplar of the rule of law. There are many more important aspects, and more important symbols, of our commitment (or lack thereof) to that ideal. Nonetheless, the line between military and civilian authority is an important one. DOJ has come under severe criticism when it has seemed to cross it—for example, at the time of the Waco disaster.⁶³ And the insistence on such separation is re-

Mass. Const. of 1787, pt. I, art. XXX).

59. See note 24. The Attorney General is no longer statutorily required to be “learned in the law,” 28 U.S.C. § 503 (2000), although the Solicitor General is, id. § 505.

60. 473 U.S. 305 (1985).

61. *Id.* at 371.

62. *Id.* While Justice Stevens is celebrating the private lawyer, it is not too much to hope that government lawyers too might be bulwarks against totalitarianism.

63. See *Investigation into the Activities of Federal Law Enforcement Agencies Toward the Branch Davidians*, H.R. Rep. No. 104-749, 104th Cong., 2d Sess. 93 (1996) (supplemental submission of Rep. Steven Schiff (R-N.M.)) (objecting to the “militarization of law enforcement” and asserting that “we saw in the Waco tragedy one logical result of the blurring of lines between domestic law enforcement and military operations”); *Events Surrounding The Branch Davidian Cult Standoff in Waco, Texas: Hearing Before the House Comm. on the Judiciary*, 103rd Cong. 25 (1993) (comments of Rep. John Conyers

flected in the longstanding Posse Comitatus Act, which makes it a crime to use “any part of the Army or the Air Force . . . to execute the laws.”⁶⁴ Indeed, at the time Congress created the Department of Justice, the House debated whether to bring the Army Judge Advocate General into the new Department. It decided not to after the bill’s primary sponsor emphasized the separation of the military and civil spheres.⁶⁵

“General Ashcroft” should clang. A litigating and law enforcement agency would not and should not have a general at its head. Compare the United Nations. The Secretary General of the UN is never called “General Annan.” Because the UN is emphatically not military in nature—or at least because its *aspirations* are emphatically nonmilitary, notwithstanding the increased use of peace-keeping troops—that formulation never even comes to mind.

V. CONCLUSION

To call civil officials “general” because that word appears in their title is incorrect by the standards of grammar, history, and protocol. It is also a little silly. And it is at odds with important values.

An oft-repeated bit of SG’s office lore tells of a letter reaching Solicitor General Robert Jackson addressed simply to “The Celestial General, Washington, D.C.”⁶⁶ A celestial general would be worth having. But such a general is unavailable here on earth, where angels do not govern.⁶⁷ Therefore we should stick

(D-Mich.)) (calling the operation a “profound disgrace to law enforcement” justifying Attorney General Reno’s resignation and stating that the “root cause of this problem was that it was considered a military operation, and it wasn’t”).

64. 18 U.S.C. § 1385 (2000). See also 10 U.S.C. § 375 (2000) (requiring Secretary of Defense to promulgate regulations that prohibit “direct participation by a member of the Army, Navy, Air Force, or Marine Corps in a search, seizure, arrest, or other similar activity”). Adopted eight years after the creation of the Department of Justice, the original Act provided: “That from and after the passage of this act it shall not be lawful to use any part of the land or naval forces of the United States to execute the laws either as a posse comitatus or otherwise, except in such cases as may be expressly authorized by Act of Congress.” Posse Comitatus Act, ch. 263, § 15, 20 Stat. 145 (1878).

65. See 90 Cong. Globe, 41st Cong., 2d Sess. 3037 (1870) (remarks of Rep. Jenckes).

66. Lincoln Caplan, *The Tenth Justice* 171 (Knopf, 1987); Waxman, 2 J.S. Ct. Hist. at 3 (cited in note 19).

67. Federalist 51 (Madison) in Clinton Rossiter, ed., *The Federalist Papers* 322 (New American Library, 1961) (“If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary.”).

with attorneys and solicitors in the Department of Justice, and leave the generals in the army.