

This is an article by the former Attorney General, Norman Gorsuch, which discusses the argument on both sides.

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The Alaska Attorney General: Elected or Appointed?
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The Alaska Attorney General: Elected or Appointed?

by Norman C. Gorsuch

The office of state attorneys general can either strengthen or check the executive branch. The Alaska attorney general plays a significant role in public policy-making. Currently, Alaska's governor appoints the state attorney general, and until the argument about the range of executive power is settled, the controversy about the the office's election or appointment will persist.

A History and Description of the Office of the Attorney General

The first office of the attorney general was created in 1461 when the King of England appointed a person to direct all of his representatives who appeared in the royal courts. The common law decisions of these courts defined the attorney general's duties, which, in essence, were to protect the royal property, prerogatives, and revenue, and to prosecute those persons accused of committing crimes. Examples of these duties included recovering for damages done to royal property, regulating public charities and trusts, repealing grants and patents, and prosecuting misdemeanor and felony crimes. By 1700, the attorney general was accorded membership in

Parliament to explain crown legislation. ⁽¹⁾

When the American Colonies were settled, colonial attorneys general were appointed by the royal governors and were deemed to exercise all of the common law powers inherent in the office of the attorney general of England. After the Revolutionary War, the new state courts decided that the common law powers exercised by the Attorney General of England and discussed above were an inherent part of the office of state attorney general. In addition, most states ratified this grant of powers in state constitutions or statutes. ⁽²⁾

The method of selecting state attorneys general evolved in stages. Prior to Andrew Jackson's presidency, most states provided for the appointment of the attorney general by the governor or legislature. With the advent of Andrew Jackson's presidency, the concept of sovereign democracy emerged. The people were seen as the source of sovereign power, and they exercised it through popularly elected officials. In the late nineteenth century, states began to require the election of the attorney general. Today, 44 states elect the attorney

general. Of the six states that appoint the attorney general, most provide for appointment by the governor, and some by the legislature or the state supreme court. ⁽³⁾

With the evolution of sovereign democracy, state courts decided that state attorneys general now represented the rights, prerogatives, and interests of the general public in carrying out their common law duties of office. In effect the courts substituted the public for the king as the client of the attorney general, thus giving the attorney general the power to protect public prerogatives, property and revenue. Indeed, there are several state supreme court opinions which hold that an attorney general may bring any action in court deemed necessary to enforce or protect any public right or interest and as a corollary power may exercise virtually plenary discretion in the disposition of such action. However, while state attorneys general possess these common law powers, state constitutions or statutes may limit or preclude the exercise of some or all of them. ⁽⁴⁾

Another development in the United States has been the expansion of the

powers of state attorneys general through the delegation of direct statutory grants of authority by the various state legislatures. For example, in most states, there are anti-trust and consumer protection trade regulation laws and the power to enforce them is delegated by most legislatures to the attorney general.⁽⁵⁾

Finally, the office of the state attorney general has been strengthened as an advocate for the people on a broad range of issues for reasons relating to its institutional characteristics. First, the office possesses a firm place in the tradition of English and American institutions; second, the office is a statewide one and, therefore, it has the advantages and disadvantages of statewide exposure and argument; third, the office is also closely connected to the state's political chief executive through the powers to give legal counsel to state agencies and to represent them in litigation; fourth, the office has a close connection to the judicial system; and fifth, the office is staffed by attorneys, and thus, a natural power base exists in the legal community of the state based upon the professional relationship among members of the Bar.⁽⁶⁾

The Role of State Attorneys General in Public Policy Decisions

It is practically impossible to make any public decision without knowing first, the legal parameters within which the agency or public official may act; and second, the adverse legal consequences

of proposed courses of action within those parameters. For example, actions outside the scope of a public official's statutory powers could expose the official to personal liability for any damages caused as a result of the action.

Frequently, the practical boundaries of these legal parameters are determined by political constraints. Thus, in many public decisions involving legal issues, attorneys general play a significant indirect role through furnishing legal advice to help public officials balance the adverse legal consequences of their decisions within those politically imposed parameters. An example of this balancing occurs when deciding what can constitutionally be done to ensure local Alaskan hire by out-of-state companies when the most direct way to do so through mandating it by statute is unconstitutional based on cases decided by the Alaska and U.S. supreme courts. In this area, the legislature enacted a bill allowing the Alaska commissioner of labor to designate economically distressed zones based on economic and employment characteristics and require local hire on public projects within those zones. The bill was drafted with the state attorney general's advice. It was not totally politically acceptable, but was the best legal position constitutionally permitted based upon U.S. Supreme Court opinions. Even this new one has been challenged by a contractor as unconstitutional. Therefore, this issue will once

again be reviewed by the appellate courts.

The legal advice given to state officials engaged in making these public decisions is frequently found in advisory opinions, a written memorandum from the attorney general which answers a question of law posed by any public official in the state executive or legislative branch of government. This mechanism, next to oral advice, is the most frequently utilized tool in public legal practice and plays an important role in policy decisions.

The legal status of opinions by attorneys general has been interpreted frequently by the courts. This status varies from state to state. The judiciary and the legislature generally treat them as persuasive, but not controlling on the legal issues they address. Several state courts and some state statutes provide that public officials of the executive branch are bound by them. Even where they are not recognized as binding on executive branch officials, most recipients follow them. The advantages in complying with them are, first, it can shield the official from the political consequences of a decision; and second, it allows the public official to retain official immunity from any personal liability for actions taken in reliance on the opinion.⁽⁷⁾

The Powers, Duties and Role of the Attorney General in Other States

The powers and duties of other state attorneys general range from a maxi-

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"An elected attorney general would be 'the
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mum of highly centralized, exclusive authority to provide legal counsel to the state, litigate on behalf of the state and prosecute crimes to a minimum of shared state legal authority with no statewide criminal prosecution jurisdiction. For example, state attorneys general do not possess statewide criminal prosecution jurisdiction with the exception of Delaware, Rhode Island, and Alaska. In other states criminal prosecution is conducted by elected or appointed municipal, county or city district attorneys.

In addition, attorneys general usually do not have exclusive authority to represent the state in litigation or to be the exclusive legal advisor to state agencies. In many states, the governor's office has its own general counsel and many state agencies have their own house counsel. In those states, the attorney general represents the governor or agencies only in court. Legal advice to the governor or agency prior to litigation is furnished frequently by house counsel. In most states, while the attorney general issues official opinions upon request and thus, can influence public policy decisions; frequently, the attorney general does not play a significant policy making role within the state administration because the attorney general is a competing elected official. Exceptions to this situation exist when the governor and attorney general are political allies, share the same philosophy, or are personal friends. ⁽⁹⁾

The Powers, Duties and Role of the Attorney General of Alaska

In Alaska, the attorney general is a member of the governor's cabinet. As such, the office functions as the general counsel to the governor and state officials. Thus, the attorney general plays a constant role in the development and formulation of public policy on a wide range of issues.

In addition, the Alaska Supreme Court has stated that the attorney general has the exclusive authority in the state government to make any and all decisions relating to the disposition of any state litigation and the exercise of this discretion by the attorney general within constitutional bounds is not subject to judicial review. However, in order to maintain good attorney-client relations, the attorney general rarely exercises such authority without consultation with and concurrence by the state agencies involved. In major cases, the attorney general also consults with the governor and, if necessary, the legislature. ⁽⁹⁾

The Alaska attorney general is appointed by the governor, confirmed by the legislature, and serves at the pleasure of the governor. In Sections 44.23.010-060 of the Alaska Statutes, the legislature created the Office of the Attorney General as Chief of the State Department of Law and vested that department with certain powers. Those powers are as follows:

1. Possession of authority as the ex-

clusive legal advisor to the state executive branch of government, exercising this power through the drafting or reviewing of all executive branch legal instruments and legislation, and the rendering of legal opinions;

2. Representation of the state in all civil litigation;

3. Prosecution of all violations of state criminal laws;

4. Initiation of actions to collect state revenue;

5. Recommendation to the legislature of necessary changes in the laws;

6. Promotion of uniform laws adoption;

7. Preparation of information on landlord and tenant rights;

8. Possession of exclusive authority to enforce the consumer protection and anti-trust laws; and

9. Possession of all common law powers generally inherent in the office of the attorney general. Thus, the Alaska attorney general is an example of the highly centralized exclusive legal authority model.

Arguments in Support of Electing the Attorney General

The theme in the arguments supporting the election the attorney general is a simple one focusing on the independence that direct election would give the office. An elected attorney general would be "the people's attorney" and function as an ombudsman and watchdog for them. Independent

election would mean that the attorney general was not the creature of a particular administration. As such, the attorney general would be free to render legal opinions solely on the basis of the law and not as a legal advocate for the administration. In addition, it is argued that an elected attorney general would be free to oppose policies of the state government that are considered inconsistent with the law and to investigate and prosecute apparent wrongdoing both in and out of government without fear or favor. ⁽¹⁰⁾

Also, it is argued that the attorney general is elected in 44 states and the concept appears to be working in those jurisdictions. Some also argue that the attorney general's work is in areas where the governor has little or no interest, such as consumer protection, antitrust enforcement, and criminal prosecution. Thus, much of the work does not interfere with the executive responsibilities of the governor's office so that the results of the electoral competition are not as severe as supporters of the appointment process argue. It is also argued that if a governor wants house counsel to furnish legal advice to the governor's office, most governors can appoint such staff counsel. Furthermore, proponents of election argue it is not even necessary for the attorney general to act as general counsel to the governor's office. In addition, some also argue that because of the legal power of the office, an attorney general's duties are of a higher

order, similar to that of a judge, and therefore, the attorney general should have the elected independence of a judge. ⁽¹¹⁾

Arguments in Support of Appointing the Attorney General

The arguments in opposition to the election of the attorney general and in support of appointment by the governor are more complex because of the need to discuss how an appointed attorney general impacts the structure and relationships within the executive branch of state government. The focus of the argument is based upon the need to strengthen the executive branch of government through the appointive power of the chief executive. ⁽¹²⁾

Proponents of the appointment process believe that good management requires an appointed attorney general so that the governor can have a philosophically compatible, cohesive, and unified team to carry out the responsibilities of the executive branch of government. Thus, the political accountability for actions of the executive branch and the executive responsibility for those actions are lodged in the office of the governor. It is clear where the responsibility lies and the governor is the one answerable to the public. ⁽¹³⁾

In addition, they argue that when governors are forced to deal with a competing elected attorney general, there may be some question as to whether or not the advice, no matter

how wise or legally sound, will be taken or looked upon with suspicion and hostility, thus giving rise to conflict. This is because the governor and attorney general would be bringing different policy perspectives to the same public issue. These perspectives may be rooted in different constituency bases. As both are elected, neither one can be considered a final authority to resolve the issue.

Some argue that electing the attorney general can delay the policy resolution process. They point out that in many states with an elected attorney general, governors appoint their own general counsel and, in addition, house counsel are appointed frequently by state agencies accountable to the governor. These house counsel may provide conflicting legal advice to that of the elected attorney general. The effect of this conflicting advice can be to delay resolution of those issues within the executive branch. In addition, whenever there is litigation involving state agencies, house counsel may file friend of the court briefs or otherwise intervene in court asserting a position on legal issues different from

that of the elected attorney general. Proponents of the appointment process argue that those different positions can confuse the legislature, the public, and the courts on the executive branch policy. ⁽¹⁴⁾

Advocates of appointing the attorney general also argue that electing the attorney general will increase state operating budgets. First, the governor

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will insist on a general counsel and house counsel for agencies that are responsible to the governor's office. Thus, it will be necessary to pay for an additional layer of attorneys in the executive branch. Second, in order to maximize the perceived benefits of election, the elected attorney general must have additional, duplicate, independent support staff, not answerable to the governor, to execute personnel, budget, and other administrative policy or the governor could unfairly infringe on the attorney general's independence of action.

In response to the argument that only an elected attorney general can investigate and prosecute wrongdoing in state government with the appropriate degree of independence, proponents of the appointment process argue that the attorney general is not the governor's personal lawyer but the attorney for the institution of the governor's office.

Also, they point out that as a member of the legal profession, the attorney general is affiliated with the judiciary and functions as an officer of the court. Thus the appointed attorney general possesses the prerequisite professional independence from the governor. They believe that the appointed attorney general is capable of investigating all officials of the executive branch of government, including the governor, and prosecuting wrongdoing if necessary.

This is because of constraints placed upon the holder of the office by the statutes, regulations, rules of court, and

canons of professional and prosecutorial ethics which require the attorney general to act in these criminal matters based only upon the evidence, the law, and the canons. They also believe that to make decisions in these matters based upon personal and political reasons exposes the appointed attorney general to charges of obstruction of justice and the possibility of suspension or disbarment from the legal profession.

Subsidiary arguments in support of appointing the attorney general can also be made. Some argue that appointed attorneys general do "represent the public" and the misperception that they do not is created because they have no need to generate favorable publicity by constantly calling attention to external achievements in order to create an image as "the people's attorney." It is also argued that the appointed attorney general acts just like an ombudsman through the rendering of legal advice to state officials as a member of the governor's team. This advice helps to ensure that these officials comply with the statutes and regulations governing their programs, and enforce fairness and impartiality in government dealings with the public.

Another argument in support of appointment is that an elected attorney general must allocate time to fund raising and other political activities, thus detracting from that required to manage the attorney general's office and resulting in a reduced credibility for the office

because it will be perceived to be too "political." Legal opinions issued by an appointed attorney general are likely to be more professional because there is no need to pay attention to political polls when considering legal issues.

Some argue that interpreting the law and running a large law office are essentially technical tasks and it is not necessary that the official charged with these duties be elected. Also, it is believed that highly qualified attorneys would not become attorneys general if they had to run in a statewide election.

Finally, those who argue for appointment also have some tradition on their side. They state that no one has ever seriously suggested electing the United States attorney general. They believe that the people do participate in the selection of the appointed attorney general through their legislator when the legislature conducts the confirmation process, not unlike the advice and consent of the U.S. Senate over presidential nominees for attorney general. ⁽¹⁰⁾

Conclusion

The underlying issue in these arguments is how the election of the Alaska attorney general affects the balance of power among the branches of state government and the policy-making process within the executive branch of government. In essence the argument revolves around whether one believes in a strong or weak executive branch

of government. The current strength of the Alaska executive in exercising its authority is its ability to speak with one voice. When the attorney general is elected, the ability of the executive branch to speak with one voice to the legislature, the judiciary and the public is altered and the accountability for executive branch actions is split. If one believes that the power of the executive branch should be divided or decentralized through direct electoral accountability of some of its parts, then one generally supports election of the attorney general.

An elected attorney general has specific constitutional and statutory duties of an executive nature. Those duties may include litigating civil law suits to enforce compliance with state law and to protect state interests and prosecuting violations of state criminal law. Both civil and criminal enforcement are based on the police power to protect the health, welfare and safety of society. These enforcement functions are a key element of executive authority, in essence, the power to force compliance with the law.

If the attorney general is elected, this power to enforce state law will be split between two elected officials. Those who support election believe this split serves to check potential abuses of executive power and makes the executive more responsive. Those who support appointment believe this system leads to

frustration, delay, and a lack of responsiveness by the executive branch of government. Thus, depending on one's philosophy of government, the same facts are viewed quite differently. As the discussion demonstrates, this debate is really about two different views of state government and is not new in our history. The historical development of state constitutions in the country reflects this quandary of a strong versus a weak executive. Debate over the election of the attorney general is only a part of this larger issue.

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References and Notes

(1) See generally *State v. Finch*, 280 P. 910 (Kan. 1928); A. Sill (Attorney General of New Jersey), *Common Law Powers of the Attorney General* 1-6 (1967); 7 Am. Jur. 2d *Attorney General* Sec. 9, at 7-8 (1980). In addition, the common law powers of the attorney general eventually were summarized in Blackstone. Blackstone concluded that the attorney general could investigate and prosecute actions necessary to protect the real property of the King, review lands and chattels that should be held by the King, repeal royal grants or patents, recover for damages done to royal property, possess unclaimed property, examine the basis of an individual's claim to office, franchise, or privilege, compel admission and remission of a properly appointed official to his office, ensure proper maintenance of public charities and trusts, and initiate, without prior

indictment by grand jury, misdemeanor; criminal prosecutions and, after grand jury indictment, felony prosecutions. 3 W. Blackstone, *Commentaries* 27, 257-64, 427; see A. Sills, *supra*.

(2) *People v. Kramer*, 68 N.Y. Supp. 383, 386 (1900); National Association of Attorneys General, *Powers, Duties and Operations of the State Attorneys General* 77-79 (1977). A partial listing of the common law powers found to be inherent in the office of the attorney general by several state court decisions can be summarized.

Attorneys general have the power to:

- 1) Recover damages for unlawfully removed sand and gravel from state tidewater lands;
- 2) Abate public nuisances through equitable actions;
- 3) Intervene in lawsuits over contested wills when the state has a possible interest;
- 4) Challenge a reduction of state tax assessments;
- 5) Institute actions to collect unpaid taxes and premiums for a state worker's compensation fund;
- 6) Seek removal of public officials for misconduct in office;
- 7) Proceed in equity to cancel the fraudulent registration of voters;
- 8) Enforce the restricted provisions of a deed from the state;
- 9) Enforce public and charitable trusts;
- 10) Bring suit to cancel a fraudulently procured United States patent for either land or an invention;
- 11) Intervene when the constitutionality of a state statute is attacked;
- 12) Challenge the constitutionality of a state statute;
- 13) Investigate criminal activities and appear

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before a grand jury; 14) Institute and dismiss criminal proceedings; 15) Supercede the local district attorneys in criminal prosecutions; 16) Make any bona fide disposition of these actions that in his or her judgment would be in the best interest of the public. A. Sills, *supra*, at 8-9.

(3) NAAG, *supra*, at 77-79.

(4) 7 Am. Jur. 2d *Attorney General* Sec. 9, at 7-8; Sec. 18, at 22-23. See *Public Defender Agency v. Superior Court*, 534 P.2d 947, 950-51 (Alaska 1975); *State ex rel. Shevin v. Yarborough*, 257 S.2d 891 (Fla. 1972); *State v. Finch*, 280 P. 910, 911-12 (Kan. 1929); *Board of Public Utilities Commissioners v. Lehigh Valley Railway Co.*, 149 A. 263 (N.J. 1930).

(5) See, e.g., AS 45; see generally *National Association Of Attorneys, Powers, Duties and Operations of State Attorneys General* (1977)

(6) See generally T. Morris and W. Thompson, *The Attorney General as Public Advocate* 2 (1985).

(7) *National Association of Attorneys General, Representing State Agencies* (1979); 7 AM. Jur. 2d *Attorney General* Sec. 11, at 10-12.

(8) See generally *National Association of Attorneys General, The Structure of State Legal Services* 20-38 (1977)

(9) *Public Defender Agency v. Superior Court*, 534 P.2d 947, 950-51 (Alaska 1975).

(10) Report of Maryland Attorney General Francis B. Birch to the Constitutional Convention of Maryland (Sept.

29, 1967); Position Paper by New York Attorney General Lewis J. Lefkowitz, Constitutional Convention Committee on the Executive Branch (June 1, 1967); *Attorney General Should Be Elected—Not Appointed*, Attorney General Clarence A.H. Meyer, Outline of Remarks, Nebraska Constitutional Convention. See generally *National Association of Attorneys General, Powers, Duties and Operations of State Attorneys General* (1977); transcript of testimony House State Affairs Committee on HB 456 ("an Act authorizing an advisory vote by the qualified voters of the state on the question of the election of the attorney general") (Jan. 20, 1984).

(11) See note 10, *supra*.

(12) *National Municipal League, Model State Constitution* 65-66 (6th ed. 1963).

(13) See generally letter from Attorney General Norman C. Gorsuch to Senator Patrick Rodey, Chairman of Senate Judiciary Committee, discussing SJR 9 ("Elected Attorney General") (Apr. 23, 1985); transcript of testimony, House State Affairs Committee, on HB 456 (Jan. 20, 1984).

(14) *National Governors Conference, Center for Policy, Research, and Analysis, Legal Advice for the Governor* (1976).

(15) See note 13, *supra*.

(16) *Id.* 4

Mr. Gorsuch is a visiting Associate Professor at the University of Alaska Southeast, School of Business and Public Administration.

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