ALASKA LEGISLATURE COMMITTEE FILES 1997-1998 8672

9224 HOUSE JUDICIARY

or judgment arising from the damage or loss of state property. 8/ This practice ensures effective legislative control over state finances while, at the same time, it provides for budgeting flexibility which is especially useful for programs like risk management, the needs of which are necessarily unpredictable.

We have consistently advised that an appropriation is valid if it states a public purpose, has a source, states or implies a time period, and states an amount which is ascertainable by reference to specified information. Under this view a "revolving" loan fund could be established and operated, even if both principal and interest payments on loans are considered to be revenues which may not be dedicated, as long as there is an annual appropriation to the fund of all principal and interest payments received by the fund during the fiscal year. The fund would continue to revolve as long as it was included in the budget.

8/ See, for example, Sec. 7 ch. 113, SLA 1978 which provides:

> Amounts equivalent to the amounts to be received in settlement of insurance claims for property losses are appropriated from the general fund to the affected agency for the purpose of replacing the facility or service lost as a result of the incident giving rise to the insurance claim.

Under this language, the state could undertake immediate repair or reconstruction of a school, maintenance facility, or other property damaged by fire or other cause covered by insurance without having to wait for actual settlement and payment by the insurer.

The practice of appropriating to a separate fund an amount to be ascertained by reference to receipts from a specified source during a definite period accommodates the need and desire of each legislature for budgetary flexibility without impairing the ability of future legislatures to control and dispose of public revenues. In fact, since the legislature maintains control of the appropriation by means of the budget, it could be argued that this practice does not even create a dedication in the first place since a true dedication must function to take control away from the legislature. If legislative control is present, then a dedication does not exist.

We do not think that this practice violates the dedication prohibition.

V. APPLICATION OF DEDICATION PROHIBITION TO SPECIFIC FUNDS, ACCOUNTS AND APPROPRIATIONS

We have identified the following categories of funds, accounts, and appropriations which raise dedicated funds questions.

A. Allocation of a revenue source by statute to a fund or account from which it may be withdrawn only for limited purposes by appropriation.

1. Tobacco Tax (School) Fund (AS 43.50.140). This fund existed before ratification of the Alaska

Constitution and is therefore authorized to continue under Article IX, section 7. This tax and dedication have not been changed, but the legislature has imposed an additional tax on cigarettes which is deposited in the general fund. Although we have issued several opinions on the subject, there has been no judicial review, and it remains unclear to what extent the legislature may change the dedication or the underlying revenue source within the limit of "continuing" the dedication. 9/

2. Fish and Game Fund (AS 16.05.100 et seq.). The dedication of proceeds of fishing and hunting licenses to the operation of a Department of Fish and Game is required by federal law for participation in federal programs and is therefore authorized by Article IX, section 7. See 16 U.S.C. § 669. However, as discussed earlier, it is not clear whether a dedication of interest

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9/ See Atty. Gen. Op. Nos. 7, 9, and 14; inf. memo (Alaska, March 10, 1966); Atty. Gen. Op. No. 22 (Alaska, June 2, 1978); inf. memo (June 30, 1981).

earned on investments in a fund such as that made by AS 16.05.110(5) is constitutional.

3. Reserves for Capital Outlay (AS 37.05.157) and Energy Facilities Development (AS 37.05.158).

By statute there is allocated to each of these accounts a fixed percentage of annual receipts from minerals on state land. Both of these funds appear to be unconstitutional dedications to the extent that they restrict the purpose for which money may be spent. We are informed that the Department of Administration has recorded the amounts to be allocated to each account but has not retained that money for expenditures related to capital outlay or energy facilities development. We also understand that the legislature has not made any appropriations from these two accounts. We suggest that AS 37.05.157 and AS 37.05.158 be repealed.

4. Renewable Resources Fund (AS 37.11.010-090). As we advised in our 1975 Attorney General Opinion No. 9, this statutory dedication is unconstitutional. We understand that the Department of Administration has followed our advice and has disregarded AS 37.11.010-090. We suggest that these statutes be repealed.

B. Allocation by Statute of Revenue to a Fund or Account From Which it may be Spent or Used Without Further Appropriation.

1. Public Employees Retirement System Fund (AS 39.35).

This fund receives money from employees and employers who participate in the system. State employer contributions are paid to the fund monthly. AS 39.35.280. State employee contributions are statutorily required to be withheld from wages and transferred to the funds. AS 39.39.170. Participating political subdivisions make similar contributions on behalf of their employees. Benefits are paid to members of the retirement systems according to statute AS 39.35.370 et seq. Expenses of administering the system are also paid from the fund but are specifically required by statute to be included in the annual operating budget. AS 39.35.100(b)(4). The Teacher's Retirement System is accounted for in the same manner.

Although this is clearly a dedication of money received by the state, we believe that it is permissible under the implied exception theory

discussed earlier. It is our opinion that there is an implied exception to the dedicated funds prohibition for pension fund contributions. 10/

2. International Airport Funds (AS 37.15.420, 430, 440)

The fund established under AS 37.15.420 contains money received from the sale of general obligation bonds for airport improvements and other grants or money provided for the same purpose for which the bonds were authorized. The fund established under AS 37.15.430 contains revenues received by the state from ownership and operation of its airports. The fund established under AS 37.15.440 contains interest earned on money in the section 420 fund and revenues transferred from the section 430 fund for the purpose of redeeming airport revenue bonds.

Although each fund provides for a dedication of state revenue, we believe that they are permissible under the implied exception theory discussed earlier at pp. 5 and 6. It is our opinion that there is an implied exception to the

10/ The constitutional provision for state employee retirement systems supports such an implied exception. Alaska Constitution, Article XII, section 7.

dedicated funds prohibition for revenue derived from bond issues and for revenue derived from facilities constructed with bond proceeds, at least to the extent that it is necessary to satisfy the debt obligation or maintain the facility so that it continues to generate revenues for that purpose. To the extent that revenues are dedicated for purposes which are not related to satisfying the debt or maintaining the facility 11/, we believe that dedication would

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11/ AS 37.15.430(a) authorizes use of funds dedicated to the International Airport Revenue Fund for six purposes providing, in pertinent part, as follows:

> The money in the revenue fund shall only be used for the purpose of paying or securing the payment of the principal of and interest on the bonds and of and on any other revenue bonds issued by authorization of the legislature to provide funds to acquire, equip, construct and install additions and improvements to, and extensions of and facilities for, the airports and to be payable out of the revenue fund, the purpose of paying the normal and necessary costs of maintaining and operating the airports and all of the improvements and facilities of them, the purpose of paying the costs of renewals, replacements and extraordinary repairs to the airports and all of the improvements and facilities of them, the purpose of redeeming before their fixed maturies any and all revenue bonds issued for the purposes of the airports, the purpose of providing funds to acquire, construct and install necessary additions and improvements to and extensions of and facilities for the airports and all of their facilities, and the purpose of providing funds to pay any and all other costs relating to the ownership, use and operation of the airports.

violate Article IX, section 7 unless it either existed prior to ratification of our Constitution or is required by federal law. 12/

3. Continuing Debt Service Appropriation (AS 37.15-.012)

This statute purports to create a continuing annual appropriation from the general fund of the amount necessary to pay debt service on all outstanding general obligation bonds. This may be a dedication of revenues for a specific purpose. 13/ Even if it is, it is our opinion that there would be an implied exception to the dedicated fund prohibition for bond obligations.

4. Rural Electrification Revolving Loan Fund (AS 44-.83.361)

This fund received an initial appropriation from which the Alaska Power Authority is authorized to make loans. Principal and interest

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12/ A dedication of airport revenues did exist prior to ratification. § 32-3A-15 ACLA 1949. However, it was repealed in 1968 by § 2 ch. 14, SLA 1968. On the other hand, it may be that 49 U.S.C. § 1718, adopted in 1970 and amended in 1982 by Section 511 of the Tax Equity and Fiscal Responsibility Act of 1982, P.L. 97-760, would be interpreted to require dedication of all airport revenues to construction, maintenance and operation of airports.

13/ Our uncertainty on this point arises from the fact that the statute does not purport to dedicate a particular revenue source.

payments on loans made from the fund are required by law to return to the fund. As we pointed out above, at n. 1, the questions of whether the principal and/or interest payments are revenues which may not be dedicated in this manner is now a matter in litigation in a suit filed by the Trustees for Alaska.

We will be defending the legislature's action in making both those dedications. In doing so, we will present in more detail a number of the arguments discussed above in support of the legislature's action. In addition, we will discuss the presumption of constitutionality of statutes and the deference due to the administrative and legislative interpretation of the dedicated funds prohibition. As indicated above, we believe that the return of principal payments to a loan fund does not offend the Constitution and that the return of interest payments to the loan fund may be permissible. However, we cannot predict with certainty the position that the court will adopt.

C. Appropriation of an amount from a specific revenue source (e.g., program receipts).

From time to time the legislature, by means of an annual operating budget appropriation, authorizes an agency to spend money that is generated out of one of the agency's programs. The appropriation also sets an upper limit on the amount that can be spent. Although program receipts are clearly state revenues which may not be dedicated, the practice of identifying program receipts as an appropriation source does not in any way limit legislative control over the expenditure of revenues because the legislature maintains control of the appropriation by means of the budget. Therefore, we believe that this practice is not affected by the dedicated funds prohibition.

D. Appropriation of an amount which is ascertainable only by reference to specified information.

Appropriations are regularly made to the risk management division, Department of Administration, of all proceeds during a fiscal year from claims, settlements or judgments arising from damage to or loss of state property. As pointed out above, at 18, this permits the state to repair or replace damaged property without specific appropriations, which would probably be either more or less than the actual property damage in any fiscal year.

The only difference between this and a typical appropriation is in the determination of the amount appropriated. When a fixed amount is appropriated, obligations incurred against it may be honored as long as there is cash available in the treasury. When an appropriation is made for an amount to be received from a certain source during a specific period, obligations may be honored only if a sufficient amount of money has been received from that source and there is cash available in the treasury. However, the amount of the appropriation remains determinable. Consequently, it is our opinion that these kinds of appropriations do not violate the dedicated fund prohibition. 14/

14/ The pending litigation discussed earlier (Trustees for Alaska v. State, supra) also includes a claim that an appropriation to the Alaska Power Authority of the interest to be received on money separately appropriated to the Power Development Fund violates the dedicated funds prohibition. § 1 ch. 90, SLA 1980, as reenacted by § 69 ch. 92, SLA 1981 and amended by § 236 ch. 141, SLA 1982. The questioned appropriation does not state a specific time period during which the interest is to be accrued. Consideration by the court of this particular question might not occur since, by informal memo dated April 19, 1982, we advised the Treasury Division of the Department of Revenue that the interest must be returned to the general fund because of a specific statutory requirement, AS 44.83.388(b). We are informed that no interest has accrued to the Power Development Fund.

E. Other Miscellaneous Dedications

1. Appropriations to the Permanent Fund. Since the constitution (Article IX, section 15) specifically authorizes dedications to the Permanent Fund of "at least" 25 percent of certain revenues, we believe any additional dedication to the fund by statute 15/ or by appropriation is also permissible.

2. Rainy day account. AS 37.05 179 creates a reserve fund to which money is appropriated and authorizes it to be spent for certain necessary emergency operating expenses at some future time. It is our opinion that this practice is permissible under the theory discussed above beginning at p. 12 that money once it is appropriated loses its character as revenue for purposes of the dedicated funds prohibition. A contrary view would severely restrict flexibility in state budgeting and accounting, and we doubt that such a view would be adopted by the courts.

15/ In 1980, the legislature increased the percentage dedication applicable to most new mineral leases to 50 percent. AS 37.13.010(a)(2).

We hope you find this analysis helpful in determining the nature of the problems presented by the dedicated fund prohibition and the various statutory programs which may or may not run afoul of it. We expect to be able to advise you with greater certainty on some of these questions at the conclusion of the pending litigation described above.

Sincerely,

Wilson L. Condon
Attorney General

WLC:jf

cc: Ron Lehr, Director
Division of Budget and Management

Jay Hogan, Director
Division of Legislative Finance
Legislative Affairs Agency

Section 9.7 - DEDICATED FUNDS.

The proceeds of any state tax or license shall not be dedicated to any special purpose, except as provided in section 15 of this article or when required by the federal government for state participation in federal programs. This provision shall not prohibit the continuance of any dedication for special purposes existing upon the date of ratification of this section by the people of Alaska.

Cross References -

For an exception to the prohibition against dedicated funds, see Sec. 15 of this article which establishes the permanent fund.

Amendment Notes -

The amendment effective February 21, 1977 (9th Legislature's SCS CSSSHJR 39 (Res) am S (1976)) inserted "as provided in section 15 of this article or" in the first sentence.

AG Opinions -

Among the reasons such a prohibition, as is found in this section, was recommended are the following: (1) flexibility of budgeting; (2) financial control; and (3) lack of relationship between the tax and purpose. 1959 Op. Att'y Gen. No. 7.

Delegates to the constitutional convention were desirous of eliminating dedications so that the legislature would have the greatest flexibility in allocating tax revenues on a basis of need. 1959 Op. Att'y Gen. No. 7.

A dedication encompasses (1) proceeds or part of the proceeds of a tax or license (2) set aside at a certain rate (3) for a particular purpose. 1959 Op. Att'y Gen. No. 7.

As a matter of compromise, a grandfather clause was included in this section to permit all dedications existing on the date of ratification of the constitution (April 24, 1956) to continue. 1959 Op. Att'y Gen. No. 7.

The intent of the drafters of the state constitution was to permit the continuance of existing dedications at the then existing rates until the legislature saw fit to exercise the only power retained in relation to them: That is, the power to repeal. 1959 Op. Att'y Gen. No. 7.

This section had two interrelated purposes: (1) to prevent any future dedication of revenues for special purposes, and (2) to prevent the creation of new special funds separate from the general fund. May 2, 1975 Op. Att'y Gen.

This section of the state constitution can be given its intended effect and serve its repeatedly expressed purpose only if the words "proceeds of any tax or license" are interpreted to mean what their framers clearly intended, i.e., the sources of any public revenues. May 2, 1975, Op. Att'y Gen.

The dedication of any source of public revenue: tax, license, rental, sale, bonus-royalty, royalty, or whatever, is limited by the state constitution to those existing when the constitution was ratified or required for participation in federal programs. May 2, 1975 Op. Att'y Gen.

The real concern at the constitutional convention was about earmarked funds, not taxes or licenses, but funds. May 2, 1975 Op. Att'y Gen.

Dedication of the revenues from the lease or sale of state natural resources offends the state constitutional prohibition against dedicated funds. May 2, 1975 Op. Att'y Gen.

The practice of appropriating to a separate fund an amount to be ascertained by reference

to receipts from a specified source does not violate the dedication prohibition of the constitution. November 30, 1982 Op. Att'y Gen.

Language of this section prohibiting dedication of proceeds of any state tax or license must be read as embodying certain implied exceptions, specifically, pension contributions, proceeds from bond issues, sinking fund receipts, revolving fund receipts, contributions from local government units for state-local cooperative programs, and tax receipts which the state might collect on behalf of local government units. November 30, 1982 Op. Att'y Gen.

There is no unlawful dedication involved in the return to a revolving loan fund of principal payments on loans. The initial appropriation would suffice to authorize the use of that money for other loans until the legislature reappropriates the unobligated assets of the fund or abolishes the fund. November 30, 1982 Op. Att'y Gen.

For discussion of issues involved in question of whether dedication prohibition applies to interest or other income earned by money appropriated to revolving funds and other funds and accounts, see November 30, 1982 Op. Att'y Gen.

If the moneys in the general fund must be applied in a particular way and the amount to be applied is determined by a set formula, rather than by each legislature's judgment, the intent of this section has been thwarted. The legislature's hands are tied as effectively as in the case where the proceeds of a particular tax are dedicated. 1969 Op. Att'y Gen. No. 5, overruled in part on other grounds, May 2, 1975 Op. Att'y Gen.

As to constitutionality of requiring a portion of the general fund to be allocated to local governments each year in accordance with a fixed formula, see 1969 Op. Att'y Gen. No. 5, overruled in part on other grounds, May 2, 1975 Op. Att'y Gen.

The prohibition of this section is against new dedications, i.e., those dedications of revenues which did not exist on April 24, 1956, the date of the constitution's ratification. June 2, 1978 Op. Att'y Gen.

Existing dedications may be continued but may not be revised upward or downward by means of altering the tax, the rate of dedication or the purpose for which the dedication will be used. 1959 Op. Att'y Gen., No. 9; 1959 Op. Att'y Gen. No. 7; 1959 Op. Att'y Gen. No. 14.

No action of the legislature is permissible which would (1) tend to increase or decrease the percentage of the total tax and license proceeds which are dedicated, or (2) which would tend to increase or decrease the amount of proceeds which are dedicated. 1959 Op. Att'y Gen. No. 7; 1959 Op. Att'y Gen. No. 14.

Reducing a dedication makes it different from that which existed, i.e., and existing dedication is not continued when it is reduced any more than it is when it is increased. June 2, 1978 Op. Att'y Gen.

Any attempted alteration short of repeal is a nullity. 1959 Op. Att'y Gen., No. 7.

Legislation developed to eliminate the double fee paid by commercial fishermen who are also holders of limited entry permits, which in effect, exempted permit holders from license fees and provided for payment into the fishermen's fund from moneys collected for permit fees of an amount equal to the amount which would have been paid into the fund from collections for commercial fishing licenses offends this section since it did not continue an existing dedication. June 2, 1978, Op. Att'y Gen.

The 1957 amendment to AS 43.40.010, which reduced the tax on motor fuel used in commercial fishing crafts for purposes of commercial fishing from five cents to two cents per gallon, effected no change in the dedication inasmuch as the reduction in the tax is coupled with an exemption from the refund of three cents per gallon formerly allowed to users of fuel in

commercial fishing craft for commercial purposes. Nothing has been done which increases or decreases the dedication. 1959 Op. Att'y Gen. No. 14.

When the tax is lowered the entire dedication falls and all tax proceeds are covered into the general fund. This result is compelled by a realization that the lowering of the tax irretrievably lowers the dedication because insufficient revenues are available to maintain the present rate of the dedication. Since the only power retained by the legislature with respect to a dedication (other than administrative alterations in the management of the dedication) is the power of repeal, such irretrievable action is tantamount to a repeal of the dedication. 1959 Op. Att'y Gen., No. 14.

When the legislature raises the tax, the excess tax simply goes into the general fund. 1959 Op. Att'y Gen. No. 14.

A dedication is not repealed in its entirety by the partial elimination of its source but rather that it is reduced to provide for a dedication solely from all that is left of the source. June 2, 1978 Op. Att'y Gen.

The prohibition against dedications should be read in conjunction with Alaska Const., art. XI, Sec. 7, which deals with restrictions on the initiative and referendum. Therein it is stated that the initiative and referendum shall not be used to create or apply to dedications of "revenue." 1959 Op. Att'y Gen., No. 7.

Pre-existing dedications of revenue established by statute to satisfy trust obligations imposed by federal law are excluded from the reach of Alaska Const., art. IX, Sec. 17. That section applies to proceeds net of dedications otherwise permitted under this section, which permits dedications that are required for participation in a federal program. 1993 Op. Att'y Gen. No. 1.

Any attempted dedication of funds after April 26, 1956, which was not absolutely required for participation in federal programs, had to be covered into the general fund, any statute notwithstanding. 1959 Op. Att'y Gen. No. 7, issued prior to the 1977 amendment of this section.

Although fourth class cities may now be incorporated cities within the intent of AS 43.70.080, they would not be entitled to any refunds under such section, since if this were the case, the effect of ch. 79, SLA 1959 would be to make a new dedication of a state tax or license for a special purpose. Any such dedication would be invalid under the provisions of this section. 1960 Op. Att'y Gen., No. 5.

Any repeal or repeal and re-enactment of a dedication during the 1957 session takes the dedication from under the protection of the grandfather clause, and a re-enactment either in 1957 or later is a nullity unless the dedication is required by the federal government for participation in federal programs. 1959 Op. Att'y Gen., No. 7, issued prior to the 1977 amendment of this section.

Employees' retirement system and emoluments of office for all commissioners, heads of state agencies and the members of the judiciary and legislature are authorized by the Alaska Constitution and are implied exceptions to the prohibition of this section. 1969 Op. Att'y Gen., No. 5 overruled in part on other grounds, May 2, 1975 Op. Att'y Gen.

The Violent Crimes Compensation Board is authorized by statute to recover, receive, and collect receipts; however, under the Alaska Constitution, all receipts must revert to the general fund. September 25, 1980 Op. Att'y Gen.

The provisions of AS 16.43.310 and 16.43.320, which authorize the Commercial Fisheries Entry Commission to establish and administer a buy-back program, offend the state constitutional prohibition against dedicated funds. May 23, 1985 Op. Att'y Gen.

Decisions -

This clause prohibiting dedicated funds seeks to - preserve an annual appropriation model which assumes that not only will the legislature remain free to appropriate all funds for any purpose on an annual basis, but that government departments will not be restricted in requesting funds from all sources. Sonneman v. Hickel, 836 P.2d 936 (Alaska 1992).

Assessments authorized by former AS 16.10.530 were "proceeds of a state tax or license." - Since the constitution prohibits the dedication of any source of revenue, including both "taxes" and "special assessments," the assessments authorized by former AS 16.10.530 were "proceeds of a state tax or license," within the meaning of this section, whether or not the salmon assessments fit the definition of "special assessments." State v. Alex, 646 P.2d 203 (Alaska 1982).

Coastal protection fund held invalid. - As provided for in ch. 266, SLA 1976, the coastal protection fund in former AS 30.25, which regulated the transfer of crude oil, refined petroleum products, or by-products of oil terminal facilities, was a dedication of the proceeds of a tax or license and invalid under this section. Chevron U.S.A., Inc. v. Hammond (A77-195 Civil), F. Supp. (D. Alaska 1978).

Risk charges for each classification of certificate issued under former AS 30.25, which were deposited in the coastal protection fund, were the proceeds of a license or tax within the meaning of this section, which prohibits the dedication of any state tax or license to any special purpose with certain exceptions. Chevron U.S.A., Inc. v. Hammond (A77-195 Civil), F. Supp. (D. Alaska 1978).

Attorney general could not save provisions of former AS 30.25 from unconstitutionality under this section by directing promulgation of regulations inconsistent with statute. - See Chevron U.S.A., Inc. v. Hammond (A77-195 Civil), F. Supp. (D. Alaska 1978).

Deposit of Alaska Power Authority revenues into state general fund. - Net proceeds from the Alaska Power Authority's operations in excess of actual debt payments are deposited into the state general fund, the Authority receiving money for maintenance and operation of its facilities from legislative appropriations. M-K Eng'g Co. v. Alaska Power Auth., 662 F. Supp. 303 (D. Alaska 1986).

Based upon this article, funds left over from Alaska Power Authority projects are lapsed into the state's general fund for later reappropriation. M-K Eng'g Co. v. Alaska Power Auth., 662 F. Supp. 303 (D. Alaska 1986).

Cited in State v. Anthony, 810 P.2d 155 (Alaska 1991).

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Representative Ivan M. Ivan

SPONSOR STATEMENT
COMMITTEE SUBSTITUTE for HOUSE JOINT RESOLUTION 18 (STA)

This resolution proposes an amendment to Article IX, Section 7 of the state constitution. The current article allows for the dedication of funds for a specific purpose as long as it existed by April 24, 1956. This resolution would allow a changing of a rate of a tax or license of which the proceeds are dedicated to a special purpose. This proposed amendment would be placed before the voters at the next general election, if approved by the Legislature.

I introduced this resolution because of the differing opinions represented by the attorney general's office and Legal Services in regards to the dedication of a tax increment to a specified purpose. In order to avoid litigation, especially if the proceeds of the tobacco tax are to be placed into the school fund or if the legislature changes any other tax rate or license fee, into which proceeds are to be placed into a dedicated fund, this resolution could be a solution to resolve that potential problem.

In the House State Affairs Committee, an amendment was adopted to make the amendment retroactive to October 1, 1997. This retroactivity coincides with the effective date of the tobacco tax as proposed in CSHB 1 (STA).

HJR

19

FISCAL NOTE

STATE OF ALASKA
1997 LEGISLATIVE SESSION

BILL NO. HJR19

Revision Date
Title: Const. Amdt.: Election of the Attorney General
Sponsor: Representative Green
Requester: House Judiciary

Dept. Affected: Office of the Governor
BRU: Elective Operations
Component: General and Primary Elections
Component Serial No.: #22

Expenditures/Revenues (Thousands of Dollars)

OPERATING EXPENDITURES	FY 98	FY 99	FY 00	FY 01	FY 02	FY 03
Personal Services						
Travel						
Contractual		3.0				
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	3.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES [ ]						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF		3.0				
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other						
TOTAL	0.0	3.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY97) cost: none

POSITIONS

Full-time		0				
Part-time		0				
Temporary		0				

ANALYSIS: *(Attach a separate page if necessary)*

This figure includes the cost of providing information about this issue in the Official Election Pamphlet as required by AS 15.58, and the programming costs for counting votes cast on the measure. However, only four measures can be printed on a single ballot card. If this measure requires printing an additional ballot card, the costs will increase by $56.0.

Prepared by: Dana LaTour — Phone: 465-5347
Division: Division of Elections — Date: 4/14/97
Approved by Co Agency: Lt. Governor Fran Ulmer — Date: 4/14/97
Office of the Lieutenant Governor

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FISCAL NOTE

STATE OF ALASKA **BILL NO.** HJR 19
1997 LEGISLATIVE SESSION

Revision Date:
Title: "Proposing Amendments to the Constitution ... relating to the election and duties of the attorney general."
Sponsor: Representatives Green, Barnes
Requester: House Judiciary

Dept. Affected: Office of the Governor
BRU: Executive Operations
Component: Executive Office
COMPONENT SERIAL NO. 6

Expenditures/Revenues (Thousands of Dollars)

OPERATING EXPENDITURES	FY 98	FY 99	FY 00	FY 01	FY 02	FY 03
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	******
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						******
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other						
TOTAL	0.0	0.0	0.0	0.0	0.0	******

Estimate of any current year (FY97) cost: $ 0.0

POSITIONS

FULL-TIME						3
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

This analysis emulates the organizational structure of the states of Washington, Oregon and Arizona. Each of these states has an elected attorney general, and each Governor has on-staff counsel to respond to general legal questions, public policy issues, internal matters, open meeting laws, ethics laws, revocation of appointments, handle extraditions and petitions, prepare administrative orders, deeds relating to the state's natural resources, etc., and to carry-out the constitutional requirements of the Governor (i.e., executive clemency, messages to the Legislature, executive orders)

The contitutional amendment proposed by this resolution would be on the ballot in 1998. If approved by the voters, the first election of an attorney general would be with the next gubernatorial election in November, 2002. Fiscal impact to Office of the Governor would begin in FY03. The fiscal analysis is attached.

Prepared by: Michael A. Nizich, Administrative Director Phone: 465 3876
Division: Administrative Services Date: 4/11/97

Approved by Commissioner: Jim Ayers, Chief of Staff Date:
Agency: Office of the Governor

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HJR 19 fiscal anaysis:

This fiscal impact in below is for **illustration purposes only** and is based on 1997 costs and salaries. The fiscal impact associated with an elected attorney general would not be realized until FY03, and accurate costs will need to be identified then. Additionally, if the voters approve the constitutional amendment calling for an elected attorney general, the functions and duties of the attorney general will need to be defined which may result in further fiscal impact.

This note assumes an increase in Governor's staff by three positions -- an attorney, rg. 26, a paralegal, rg. 19, and an executive secretary, rg. 14. Fiscal note further assumes existing state-owned office space would be available and does not include lease costs.

Personal services:	three PFTs	199.5
Contractual:	comm., phones, postage, tolls courier svcs., subscripts, etc.	18.6
Supplies:	office/library supplies	9.6
Equipment:	office furniture, DP and communication equipment	39.2 *
	Total first year costs:	266.9

* 39.2 first year set-up costs only and not required in subsequent years.

FISCAL NOTE

STATE OF ALASKA
1997 LEGISLATIVE SESSION

BILL NO. HJR 19

Revision Date:
Title: "Proposing amendments to the Constitution . . . relating to the election and the duties of the attorney general."
Sponsor: Representative Green
Requester: House Judiciary Committee

Dept. Affected: Department of Law
BRU: Criminal Division/Civil Division
Component: All
COMPONENT SERIAL NO. 2085-2092

Expenditures/Revenues (Thousands of Dollars)

OPERATING EXPENDITURES	FY 98	FY 99	FY 00	FY 01	FY 02	FY 03
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0.0	*******	*******	*******	*******	*******
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1006 GF/MHTIA						
Other						
TOTAL	0.0	*******	*******	*******	*******	*******

Estimate of any current year (FY97) cost: $ 0.0

POSITIONS

FULL-TIME	0.0	*******	*******	*******	*******	*******
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

HJR 19 proposes an amendment to the Constitution of the State of Alaska making the attorney general an elected office. Further, the proposed amendment describes the duties of the attorney general, and prohibits the governor from making a change in organization or function of a unit of the executive branch headed by the attorney general. Assuming this constitutional amendment were approved by the voters of the State of Alaska in the November 1998 general election, the first elected attorney general would take office in January 2003, FY 03. However, it appears that changes in the duties of the attorney general would take place upon passage of the amendment, as early as January 1999.

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Prepared by: Joan M. Kasson
Division: Administrative Services Division
Phone: 465-5370
Date: 4/17/97

Approved by Commissioner: Bruce M. Botelho, Attorney General
Agency: Department of Law
Date: 4/17/97

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ANALYSIS CONTINUATION:

states with elected attorneys general, agency counsel have been employed to give department heads a "second" opinion in controversial matters. These counsel usually do not have the authority to litigate, but they provide legal advice to department heads and submit amicus briefs in litigation affecting their department's programs. It is not unusual in these states to see four or five separate briefs filed in a single matter, in addition to the attorney general's brief, representing the varying viewpoints of different agencies. Costs for a single special counsel, including secretarial assistance, total approximately $150,000 per year in 1997 dollars. Although it is highly speculative at this time to accurately say how extensive the use of in-house counsel will be if there is an elected attorney general, over time, it could easily exceed $1,500,000 per fiscal year.

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It is anticipated that the Department of Law would continue to use centrally provided services such as accounting, purchasing, leasing and supply, professional services contracting, information management, and duplicating services on a "service bureau" basis and still maintain the attorney general's functions free from the governor's supervision. Personnel administration, however, is more problematic. To use the Department of Administration's classification system would retain an element of control by the governor over the Department of Law in terms of imposing functional changes in position descriptions and duties. The department assumes it would have to do its own classifications, create and maintain position eligibility lists, and maintain a more in-depth records system for personnel than it now does. The department estimates it would require 2 new PFT Personnel Assistant I (R12) positions, and 1 PFT Administrative Clerk III (R10)

ANALYSIS CONTINUATION:

position, at an estimated cost of $217,000 per year to perform these functions (using FY 98 salaries for illustration purposes).

As discussed in the narrative above, outside counsel costs for the University can vary widely and actual transfer of these legal service responsibilities to the Attorney General would require a more detailed analysis to identify specific costs and/or savings from the transfer. The following summarizes the potential fiscal impact to the Department of Law that we can identify at this time using the department's 1997 standard attorney cost schedule for a full-time equivalent attorney position, including standard overheads (clerical support, communications, space, supplies, data processing, *etc.*), and 1997 salaries and costs for non-cost schedule positions.

ARRC Legal Services Transfer (beginning mid-FY99)	
3 FTE Attorneys @ $127.0	$381.0
Direct case costs @ $5.0 per attorney	$15.0
1.5 PFT Legal Secretary position authorizations	$0.0
One-time equipment purchases for new positions @ $6.5	$32.5
Contract outside counsel/experts @ estimated $200.0	$200.0
	$628.5
University of Alaska Legal Services Transfer (beginning mid-FY99)	
4 FTE Attorneys @ $127.0	$508.0
Direct case costs @ $5.0 per attorney	$20.0
2 PFT Legal Secretary position authorizations	$0.0
One-time equipment purchases for new positions @ $6.5	$39.0
Contract outside counsel/experts @ estimated $500.0 to $1,500.0	$500.0
	$1,067.0
Administration & Support Personnel Classification System (beginning mid-FY03)	
2 Personnel Assistant I @ $49.6	$99.1
1 Administrative Clerk III @ $45.5	$45.5
One-time equipment purchases for new positions @ $6.5	$19.5
	$164.2
Total, Including One Time Equipment Purchases	$1,859.7
Less One-time items	($91.0)
Department of Law Estimated Minimum Annual Cost	$1,768.7

FISCAL NOTE

STATE OF ALASKA
1997 LEGISLATIVE SESSION

BILL NO. HJR 19

Revision Date:
Dept. Affected: Department of Law
Title: "Proposing amendments to the Constitution . . . relating to the election and the duties of the attorney general."
BRU: Criminal Division/Civil Division
Component: All
Sponsor: Representative Green
Requester: House Judiciary Committee
COMPONENT SERIAL NO. 2085-2092

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Legislative Research Agency

ska State Legislature

130 Seward Street, Suite 218
Juneau, Alaska 99801-2196

Phone: (907) 465-3991
Fax: (907) 463-3351

March 14, 1995

MEMORANDUM

TO: Representative Gail Phillips

FROM: Linda Brooks
Legislative Analyst

RE: **Comparing the Duties of Elected and Appointed Attorney Generals**
Research Request 95.128

You asked how the duties of an elected attorney general differ from those of an attorney general who is appointed by and serves at the pleasure of the governor. In particular, you asked us to compare state statutes that define the powers and duties of attorneys general for states with elected and appointed attorneys general. Attachment A lists some duties of the appointed attorney general in four states and in seven states with elected attorneys general. In reviewing the statutory duties of elected and appointed attorneys general, we found no stark differences. Indeed, the National Association of Attorneys General states that:

> There is no correlation between the selection process and the extent of the attorney general's actual powers. For example, the attorney general is elected in Delaware and appointed in Alaska, but in both jurisdictions the attorney general has control over all legal and prosecutorial functions. A "strong" department of justice can be developed under either system of selection.[1]

However, we assume that you are interested in learning whether the method used to select the attorney general has any bearing on the attorney general's independence from the governor, and that your inquiry is about the responsiveness of the attorney general to the governor rather than the power he or she wields. The statutory structure of an attorney general's office alone does not reveal the degree of independence an attorney general has from a governor. The relationship between a governor and an attorney general depends on each state's constitution, statutes, and

---

[1]Lynne M. Ross, *State Attorneys General: Power and Responsibilities*, National Association of Attorneys General, 1990, p. 20.

matters?" In the remainder of this memorandum we describe the following:

- methods used by the fifty states to select their attorneys general;
- universal duties of all state attorneys general;
- practice of hiring "in-house" counsel by state agencies, departments, boards, and commissions;
- common methods used by attorneys general to cope with competing state interests; and
- attorneys general's relationships with their governors and legislatures.

Following the overview of the offices of state attorneys general, we present public policy arguments about whether or not a state attorney general should be elected.

Methods Used by the Fifty States to Select Their Attorneys General

Forty-three states popularly elect their attorneys general. The governor appoints the attorney general in only five states: Alaska, Hawaii, New Jersey, New Hampshire, and Wyoming. The legislature or judicial council must approve of the governor's appointee in all states except Wyoming. In Wyoming the governor may appoint an attorney general without any confirmation proceedings. Of all the states, however, Maine and Tennessee are the most unusual. In Maine the legislature elects the attorney general, and in Tennessee the justices of the highest court select the attorney general. We include a table that presents each state's method of selecting the attorney general as Attachment B.

Universal Duties of All State Attorneys General

All state attorneys general share some common responsibilities. In all states the attorney general defends state law when challenged on federal constitutional grounds, prosecutes actions against another state in the U.S. Supreme Court, and conducts litigation on behalf of the state in federal court.[10] All attorneys general issue legal advice to administrative agencies except in New York.[11] Attorneys general in every state also interpret statutes or regulations and conduct litigation on behalf of executive agencies.[12]

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[10]*Book of the States, 1994-1995*, The Council of State Governments, p. 93.

[11]Ibid.

[12]Ibid.

CORRECTION

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The ruling of the California Supreme Court may not represent how other state courts would resolve a similar conflict. We found several court cases where an attorney general filed suit against a governor alleging the governor's use of the line item veto, grant of clemency or other conduct was unlawful or an abuse of authority. There do not appear to be as many cases that address conflict between a governor and attorney general over policy issues clearly within the boundaries of lawful conduct. More plentiful are cases where state executive officials other than the governor and the attorney general have come into conflict. In *Feeney v. Commonwealth*, the Massachusetts Supreme Court ruled that the attorney general could prosecute an appeal to the U.S. Supreme Court over the objections of state officials represented by the attorney general.[6] Similarly, in *State of Florida ex. rel. Shevin v. Exxon Corp.*, the court upheld the Florida attorney general's power to bring an antitrust action against major oil companies on behalf of state agencies and political subdivisions without the express consent of those entities.[7] The Kentucky Court of Appeals also rejected the contention that the attorney general's duties are limited to representing state officials and permitted the attorney general to question the constitutionality of a state law in *Commonwealth ex. rel Hancock v. Paxton*. The Kentucky Court of Appeals expressed the view that an attorney general's foremost duty is to represent the "public interest" as opposed to specific state officers:

> It is true that at common law the duty of the Attorney General was to represent the King (of England), he being the embodiment of the state. But under the democratic form of government now prevailing the people are King, so the Attorney General's duties are to that sovereign (the people) rather than to the machinery of government.[8]

Therefore, the interpretation of an attorney general's common law powers appears to play a much bigger role in determining the independence an attorney general has to act than do the actual statutes of a state. Indeed, the National Association of Attorneys General describes the common law as the "fountainhead" of an attorney general's authority to represent, defend, and enforce the legal interest of state government and the public. Not all state courts, however, have interpreted the powers of their attorneys general as including common law powers. In *Gilles v. Schmidt* (556 P.2d 82) the Colorado court ruled that the attorney general does not have powers beyond those

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[6]*Feeney v. Commonwealth*,. 373 Mass. 359, 366 N.E.2d 1262 (1977), as cited in Ross, p. 38.

[7]*State of Fla. ex rel. Shevin v. Exxon Corp.*, 526 F.2d 266 (5th Cir. 1976), as cited in Matheson, p. 4.

[8]*Commonwealth ex rel. Hancock v. Paxton*, 516 S.W.2d 865 (Ky. 1974) as cited in Ross, p. 36.

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- methods used by the fifty states to select their attorneys general;
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[11] Ibid.

[12] Ibid.

Common Methods Used by Attorneys General to Cope with Competing State Interests

Consolidation of state legal services in the office of the attorney general promotes uniformity in a state's legal policies. However, governments with their many responsibilities inevitably must deal with internal conflicts. One agency's efforts to promote economic development may collide with another agency's efforts to protect the environment. At times state attorneys general may find themselves in the middle of these conflicts, expected to provide legal counsel to opposing state agencies. In other cases the attorney general must simultaneously represent a state board and a state agency appearing before it. The National Association of Attorneys General report that:

> When the conflicts of representation are ultimately unavoidable and irreconcilable, representation is generally provided either by attorneys working for the attorney general whose independent legal judgment is guaranteed by some administrative insulating barrier or "wall," by attorneys hired or authorized but not directly supervised by the attorney general, or by attorneys entirely outside the control for the attorney general. Several attorneys general, including those of Arizona, Colorado, Minnesota, Nevada, and West Virginia, have developed internal guidelines for handling such conflict issues. In addition, the vast majority of jurisdictions occasionally employ outside counsel in irreconcilable conflict situations.[16]

Some states also provide mechanisms for conflict resolution through their statutes. For example, whenever the attorney general of Colorado is unable or has failed or refused to provide legal services to an agency of state government, as determined by the governor if the agency is in the executive branch or by the chief justice if the agency is in the judicial branch, the agency may employ counsel of its own choosing to provide such legal services, [Colorado statute 24-31-101(e)]. Oregon statute 180.060(8) states that the attorney general *cannot* appear on behalf of any state officer, department, agency, board or commission without its consent. Furthermore, while the attorney general in Oregon must assign an attorney to each agency, the chief administrator of the agency must approve the assignment. The chief administrator may also withdraw his or her approval of the attorney assigned to the agency at any time, forcing the attorney general to assign a replacement attorney [Oregon statute 180.060(7)].

Attorneys Generals' Relationships with their Governors and State Legislatures

Unlike other executive officers, attorneys general have relationships with both the governor and the legislature. As members of the executive branch, attorneys general usually interact more with the governor than the legislature. More contact with the governor's office, however, does not

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[16]Ibid., p. 49.

legislation. An elected attorney general, on the other hand, would be free to act as the "people's attorney" and to operate as a watchdog and ombudsmen for them.[19]

Nevertheless, switching to an elected attorney general may further politicize, rather than depoliticize, the office. An elected attorney general would be subject to interest group electoral politics and all the potentially compromising influences that entails, including reliance on financial support to be elected and re-elected to office.[20] The fact that an elected attorney general may represent an opposing political party or be using the office as a stepping stone to the governorship could hinder cooperation between the attorney general's and governor's offices and handicap the efficiency of executive branch of government. The governor and commissioners of other executive agencies will likely refrain from seeking legal advice from an "independent" attorney general. In lieu of consulting the attorney general, they will probably seek to hire their own "in-house" counsel, and this extra layer of attorneys would not only cost a state more money but also further impair the efficiency of the executive branch.

An appointed attorney general permits a governor to have "a philosophically compatible, cohesive, and unified team to carry out the responsibilities of the executive branch of government."[21] With the governor as the undisputed head of the executive branch, he or she cannot blame others such as an elected attorney general for the failures of the administration. As such, the public may more easily hold the governor accountable for actions of the executive branch. Granting power to an independently elected attorney general may in fact reduce accountability to the public. Certainly, in states with elected attorneys general, voters almost always know more about an incumbent governor than an incumbent attorney general. The public closely scrutinizes a governor but may know little about what an attorney general has done. Thus, the paradox is created where the appointment of an attorney general by the governor may in fact achieve greater accountability to the public than would a popular election.

Proponents of an appointed attorney general also note that appointed attorneys general are usually more competent. A study of elected and appointed attorneys general found that appointed attorneys general had slightly stronger educational records, more experience in law practice and

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[19]Norm Gorsuch, "The Alaska Attorney General: Elected or Appointed?" *The Alaska Public Affairs Journal*, Spring 1988, p. 39. (Norm Gorsuch served as attorney general under the Sheffield Administration.)

[20]Matheson, p.23.

[21]Gorsuch, p. 40.

ATTACHMENT A

Some Duties of Attorneys General who are appointed by the Governor

Some Duties of Attorneys General Who Are Popularly Elected

Colorado
Serves as legal counsel and advisor of each department, division, board, bureau, and agency of state government other than the legislative branch.
Prosecutes and defends all actions and proceedings, civil and criminal, in which the state is a party or interested *when required to do so by the governor.*
Prosecutes and defends for the state all causes in the appellate courts in which the state is a party or is interested when required.
At the request of the governor, the secretary of state, the state treasurer, the executive director of the department of revenue, or the commissioner of education, prosecutes and defends all suits relating to matters connected with their departments.
Prepares legal opinions when requested by the legislature, the governor, lieutenant governor, secretary of state, executive director of the department of revenue, state treasurer, state auditor, or commissioner of education.
Prepares drafts for contracts, forms, and other writings which may be required for the use of the state.

Idaho
Attends the supreme court and prosecutes and defends all causes to which the state or any officer thereof, in his official capacity, is a party.
Prosecutes and defends all causes to which any county may be a party, unless the interest of the county is adverse to the state.
Prosecutes and defends any causes to which the state, its officers, or political subdivisions are parties in the United States courts.
Exercises supervisory powers over prosecuting attorneys.
Prepares legal opinions for the legislature, governor, secretary of state, treasurer, state controller, and the trustees or commissioners of state institutions.
Supervises nonprofit corporations, corporation, charitable or benevolent societies, persons or persons holding property subject to any public or charitable trust.

Indiana
Consults with and advises the several prosecuting attorneys of the state.
Has concurrent jurisdiction with prosecuting attorneys in certain types of crimes.
Prosecutes and defends all suits that may be instituted by or against the state of Indiana, the prosecution and defense of which is not otherwise provided by law.
Represents the state in all criminal cases in the Supreme Court.
Defends all suits brought against state officers in their official relations, except suits brought against them by the state.
Prepares legal opinions for the governor, state officers, either house of the legislature, or to any legislative agency.
Has charge of and directs the prosecution of all civil actions that are brought in the name of the state or any state agency.
Must give written consent before any agency, except as provided by law, may hire an attorney to perform any legal service on behalf of the agency and the state.

Prepared by Legislative Research Agency, March 1995 (95.128)

ATTACHMENT B

Some Duties of Attorneys General who are Popularly Elected

THE FOLLOWING PAGES MAY
NOT FILM LEGIBLY BECAUSE OF
THE POOR QUALITY OF THE ORIGINAL

ATTACHMENT C

"Attorneys General: Prosecutorial and Advisory Duties", *The Book of the States, 1994-95*

"The Alaska Attorney General: Elected or Appointed", by Norman Gorsuch, *The Alaska Public Affairs Journal,* Spring 1988

"Constitutional Status and Role of the State Attorney General", by Scott Matheson, Jr. *University of Florida, Journal of Law and Public Policy,* Volume 6, 1993

Table 2.20
ATTORNEYS GENERAL: DUTIES TO ADMINISTRATIVE AGENCIES AND OTHER RESPONSIBILITIES

State or other jurisdiction	Serves as counsel for state	Appears for state in criminal appeals	Duties to administrative agencies: Issues official advice	Interprets statutes or regulations	Conducts litigation: On behalf of agency	Conducts litigation: Against agency	Prepares or reviews legal documents	Represents the public before the agency	Involved in rule-making	Reviews rules for legality	Antitrust duties
Alabama	A,B,C	★ (a)	★	★	★	★	★	(b)	(b)	★	A,B
Alaska	A,B,C	★	★	★	★	★	★	...	★	★	B,C
Arizona	A,B,C	(c,d)	★	★	★	★	★	...	★	★	A,B,D
Arkansas	A,B,C	★ (a)	★	★	★	(b)	★	★	★	★	B,C
California	A,B,C	★ (a)	★	★	★	★	★	...	...	...	A,B,C,D (e)
Colorado	A,B,C	(b)	★	★	★	★	★	(c)	★	★	B,C
Connecticut	A,B,C	(b)	★	★	★	★	★	(b)	★	★	A,B,C,D
Delaware	A,B,C	★ (a)	★	★	★	★	★	★	★	★	D
Florida	A,B,C	★ (a)	★	★	★	...	★	★	★	...	A,B,C,D
Georgia	A,B,C	(b,c)	★	★	★	★	★	...	★	★	B,D
Hawaii	A,B,C	(b,c)	★	★	★	★	★	★	★	★	A,B,C,D
Idaho	A,B,C	★ (a)	★	★	★	★	★	...	★	★	A,B,C,D
Illinois	A,B,C	(b,c,f)	★	★	★	★	★	★	...	...	A,B,D
Indiana	A,B,C	★ (a)	★	★	★	...	★	...	★	★	A,B,C,D
Iowa	A,B,C	★ (a)	★	★	★	★	★	...	...	★	A,B,C
Kansas	A,B,C	★ (a)	★	★	★	★	★	...	...	★ (a)	B,C,D
Kentucky	A,B*,C	★	★	★	★	★	★	(a)	(b)	(b)	A,B,C,D
Louisiana	A,B,C	(c)	★	★	★	★	★	...	★	★	A,B,C,D
Maine	A,B,C	(d)	★	★	★	(b)	★	(b)	★	★	B,C,D
Maryland	A,B,C	★	★	★	★	(b)	★	★	★	★	A,B,C,D
Massachusetts	A,B,C	(b,c,d)	★	★	★	★	★	★	★	★	A,B,C,D
Michigan	A,B,C	(b,c,d)	★	★	★	★	★	★	...	★	A,B,C,D
Minnesota	A,B,C	(c,d)	★	★	(a)	★	★	★	★	★	A,B,C (h),D
Mississippi	A,B,C	★	★	★	★	★	★	★	★	★	A,B,C,D
Missouri	A,B,C	★	★	★	★	...	★	...	★	★	B,C,D
Montana	A,B,C	★	★	★	★	...	★	...	★	★	A,B,C,D
Nebraska	A,B,C	★	★	★	★	★	★	...	...	★	...
Nevada	A,B,C	★ (d)	★	★	★	...	★	★	★	★	...
New Hampshire	A,B,C	★ (a)	★	★	★	...	★	★	★	★	...
New Jersey	A,B,C	★ (d)	★	★	★	★	★	...	★	★	A,B,C,D
New Mexico	A,B,C	★ (a)	★	★	★	★	★	★	★	★	A,B,D
New York	A,B,C	(b)	...	★	★	(b)	★	(b)	...	...	A,B,C,D
North Carolina	A,B,C	★	★	★	★	★	★	(b)	★	★	B,D
North Dakota	A,B,C	(b)	★	★	★	...	★	...	★	★	A,B,C,D
Ohio	A,B,C	(b)	★	★	★	★	★	★	★	...	A (i),B (j),C,D
Oklahoma	A,B,C	(b)	★	★	★	(b)	★	(b)	★	★	A,B,C,D
Oregon	A,B,C	★	(a)	★	★	...	★	...	★	★	A,B,C,D
Pennsylvania	A,B,C	★	★	★	★	★	★	...	★	★	A,B,C,D
Rhode Island	A,B,C	★ (a)	★	★	★	★	★	★	★	★	A,B,D
South Carolina	A,B,C	★ (d)	★	★	★	...	★	...	★	★	\ (k),B,C,D (k)
South Dakota	A,B,C	★ (a)	★	★	★	...	★	...	...	...	A,B,C
Tennessee	A,B,C	★ (a)	★	★	★	...	★	...	...	★	A,B,C,D
Texas	A,B,C	(c)	★	★	★	★	★	...	★	★	A,B,D
Utah	A,B,C	★ (a)	★	★	★	★	★	(b)	★	★	A,B,D
Vermont	A,B,C	★	★	★	★	★	★	★	★	★	B,C
Virginia	A,B,C	★ (a)	★	★	★	★	★	★ (g)	★	★	...
Washington	A,B,C	(c,g)	★	★	★	★	★	★	★	★	...
West Virginia	A,B,C	★ (a)	★	★	★	(g)	★	★	★	...	A,B,C,D
Wisconsin	A,B,C	★	★	★	★	(b)	(b)	(b)	(b)	(b)	B,C,D
Wyoming	A,B,C	★ (a)	★	★	★	...	★	...	★	★	A,B,C
American Samoa	A,B,C	★ (a)	★	★	★	...	★	...	★	★	B (m),C
Guam	A,B	★	★	★	(b)	...	(b)	...	★	★	
No. Mariana Islands	A,B,C	★	★	★	★	...	★	...	★	★	
Puerto Rico	A,B,C	★	★	★	★	...	★	...	★	★	
U.S. Virgin Islands	A,B,C (h)	★	★	★	★	★	★	...	★	★	

Source: The Council of State Governments' survey, February 1994.

Key:
A — Defend state law when challenged on federal constitutional grounds.
B — Conduct litigation on behalf of state in federal and other states' courts.
C — Prosecute actions against another state in U.S. Supreme Court.
* — Only in federal courts.
★ — Has authority in area.
. . . — Does not have authority in area.

(a) Attorney general has exclusive jurisdiction.
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(c) When assisting local prosecutor in the appeal.
(d) Can appear on own discretion.
(e) Public Service Commission only.
(f) In certain courts only.
(g) If authorized by the governor.
(h) Except in cases in which the U.S. Attorney is representing the Government of the U.S. Virgin Islands.

CORRECTION

THE FOLLOWING DOCUMENT(S)
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State of Alaska

Rev. 6/98

ATTACHMENT C

"Attorneys General: Prosecutorial and Advisory Duties", *The Book of the States, 1994-95*

"The Alaska Attorney General: Elected or Appointed", by Norman Gorsuch, *The Alaska Public Affairs Journal,* Spring 1988

"Constitutional Status and Role of the State Attorney General", by Scott Matheson, Jr. *University of Florida, Journal of Law and Public Policy,* Volume 6, 1993

Table 2.18
ATTORNEYS GENERAL: PROSECUTORIAL AND ADVISORY DUTIES

State or other jurisdiction	Method of selection to office	Authority in local prosecutions: Authority to initiate local prosecutions	May intervene in local prosecutions	May assist local prosecutor	May supersede local prosecutor	Issues advisory opinions: To state executive officials	To legislators	To local prosecutors	On the interpretation of statutes	On the constitutionality of bills or ordinances	Reviews legislation: Prior to passage	Before signing
Alabama	E	A	A,D	A,D	A	*	*	*	*	*	*	*
Alaska	A	(a)	(a)	(a)	(a)	*	*	...	*	*	*	...
Arizona	E	A,B,C,D,F	B,D	B,D	B	*	*	*	*	*	*	...
Arkansas	E	...	D	D	...	*	*	*	*	*	...	...
California	E	A,B,D,E,F	A,B,D,E	A,B,D,E	A,B,D,E	*	*	*	*	*	*	*
Colorado	E	B,F	B	D,F (b)	B	*	*	*	*	*	*	*
Connecticut	A	...	...	...	...	*	(c)	...	*	*	*	*
Delaware	E	(a)	(a)	(a)	(a)	*	*	(a)	*	*	*	*
Florida	E	F (b,d)	D (b,d)	D	...	*	*	*	*	...	*	*
Georgia	E	A,B,F	A,B,D,G	A,B,D,F	B	*	(e)	*	*	...	*	*
Hawaii	E	E	A,D,G	A,D	A,G	*	*	*	*	*	*	*
Idaho	E	A,D,F	A	A,D	A	*	*	*	*	...	*	*
Illinois	E	D,F	D,F	D,F	F	*	* (f)	*	*	*	(g)	(g)
Indiana	E	F (b)	...	A,D,E	G	*	*	*	*	*	...	*
Iowa	(e)	D,F	D	D	...	*	*	*	*	*	*	*
Kansas	E	A,B,C,D,F	A,D	D	A,F	*	*	*	*	*	(g)	(g)
Kentucky	E	A,B,D,E,F,G	B,D,G	B,D,F	G	*	*	*	*	*	*	...
Louisiana	E	G	G	D	G	*	*	*	*	*	*	*
Maine	E	A	A	A	A	*	*	...	*	*	*	*
Maryland	E	B,C,F	B,C,D	B,C,D	B,C	*	*	*	*	*	*	*
Massachusetts	E	A	A	A,D	A	*	* (b)	*	*	*	(g)	(g)
Michigan	E	A	A	D	A	*	*	*	*	*	*	*
Minnesota	E	B	B,D,G	A,B,D	B	*	* (h)	*	*	...	...	(g)
Mississippi	E	B,D,E,F	D	B,D,F	E	*	*	*	*	*	(g)	*
Missouri	E	?	G	B	...	*	*	*	*	...	*	*
Montana	E	B,C,D,E,F	A,B,C,D,E	A,B,C,D,E,F	A,B,E,F	*	* (c)	*	*	...	*	*
Nebraska	E	A	A	A,D	A	*	*	*	*	*	...	...
Nevada	E	D,F,G (d)	D (d)	(d,j)	*	*	...	*	*	* (j)	...	...
New Hampshire	E	A	A	A	A	*	...	...	*	*	*	*
New Jersey	E	A	A,B,D,G	A,D	A,B,D,G	*	*	*	*	*	*	*
New Mexico	E	A,B,D,E,F	...	D	...	*	*	*	*	*	*	*
New York	E	B,F	B	D	B	*	* (h)	...	*	...	...	*
North Carolina	E	...	D	D	...	*	*	*	*	*	(f)	...
North Dakota	E	A,G	A,D	A,D	A	*	*	*	*	...	(f)	(g)
Ohio	E	B,C,F	B,F	F	B,C	*	* (k)	*	*	...	...	...
Oklahoma	E	B,C,F	B,C	B,C	...	*	*	*	*	* (l)	* (a)	* (a)
Oregon	E	B,F	B,D	B,D	B	*	*	*	*	*	(g)	(g)
Pennsylvania	E	A,D,F,G	D,G	D	G	*	...	...	*	...	*	*
Rhode Island	E	A	A	A	...	*	*	...	*	*	...	...
South Carolina	(i)	A,D (b)	A,D	A,D	...	*	*	*	*	*	*	*
South Dakota	E	A (m)	A,D	A,D	A,E	*	*	*	*	...	...	...
Tennessee	E	D,F,G (b)	D,G (b)	D	...	*	*	*	*	*	(g)	(g)
Texas	E	F	...	D	...	*	*	*	*	*	*	*
Utah	E	A,B,D,E,F,G	E,G	D,E	E	*	* (n)	*	*	*	(g)	(g)
Vermont	E	A	A	A	...	*	*	*	*	*	*	*
Virginia	E	B,F	A,B,D,F	B,D,F	B	*	*	*	*	*	*	*
Washington	E	B,D,G	B,D,G	D	B	*	*	*	*	*	*	*
West Virginia	E	...	...	D	...	*	(c)	*	*	*	(g)	(g)
Wisconsin	E	B,C,F	B,C,D	D	B	*	*	*	*	* (l)	(g)	(g)
Wyoming	E	B,D (d),F	B,D	B,D	...	*	*	*	*	...	*	*
American Samoa	A	A,E	A,E	A,E	A,E	*	*	...	*	*	*	*
Guam	A	A	...	...	...	*	*	...	*	*	(g)	B
No. Mariana Islands	A	A	...	...	...	*	*	...	*	*	*	*
Puerto Rico	E	A,B,E	A,B,E	A,E	A,B,E	*	*	...	*	*	*	*
U.S. Virgin Islands	A	A (o)	(o)	(o)	(o)	*	*	...	*	*	...	*

Source: The Council of State Governments' survey, February 1994.

Key:
A — On own initiative.
B — On request of governor.
C — On request of legislature.
D — On request of local prosecutor.
E — When in state's interest.
F — Under certain statutes for specific crimes.
G — On authorization of court or other body.
* — Has authority in area.
. . . — Does not have authority in area.
(a) Local prosecutors serve at pleasure of attorney general.
(b) Certain statutes provide for concurrent jurisdiction with local prosecutors.
(c) To legislative leadership.
(d) In connection with grand jury cases.
(e) No legal authority, but sometimes informally reviews laws at request of legislature.
(f) Opinion may be issued to officers of either branch of General Assembly or to chairman or minority spokesmen of committees or commissions thereof.
(g) Only when requested by governor or legislature.
(h) To legislature as a whole not individual legislators.
(i) Will prosecute as a matter of practice when requested.
(j) On the constitutionality of legislation.
(k) To either house of legislature, not individual legislators.
(l) Bills, not ordinances.
(m) Has concurrent jurisdiction with states' attorneys.
(n) Only when requested by legislature.
(o) The attorney general functions as the local prosecutor.

Table 2.20
ATTORNEYS GENERAL: DUTIES TO ADMINISTRATIVE AGENCIES AND OTHER RESPONSIBILITIES

State or other jurisdiction	Serves as counsel for state	Appears for state in criminal appeals	Duties to administrative agencies: Issues official advice	Interprets statutes or regulations	Conducts litigation: On behalf of agency	Conducts litigation: Against agency	Prepares or reviews legal documents	Represents the public before the agency	Involved in rule-making	Reviews rules for legality	Antitrust duties
Alabama	A,B,C	★ (a)	★	★	★	★	★	(b)	(b)	★	A,B
Alaska	A,B,C	★	★	★	★	★	★	...	★	★	B,C
Arizona	A,B,C	(c,d)	★	★	★	★	★	...	★	★	A,B,D
Arkansas	A,B,C	★ (a)	★	★	★	(b)	★	★	★	★	B,C
California	A,B,C	★ (a)	★	★	★	★	★	...	...	...	A,B,C,D (c)
Colorado	A,B,C	(b)	★	★	★	★	★	(c)	★	★	A,B,C,D
Connecticut	A,B,C	(b)	★	★	★	(b)	★	(b)	★	★	A,B,D
Delaware	A,B,C	★ (a)	★	★	★	★	★	★	★	★	A,B,C
Florida	A,B,C	★ (a)	★	★	★	...	★	★	★	...	A,B,C,D (e)
Georgia	A,B,C	(b,c)	★	★	★	★	★	...	★	★	B,C
Hawaii	A,B,C	(b,c)	★	★	★	★	★	★	★	★	A,B,C,D
Idaho	A,B,C	★ (a)	★	★	★	★	★	...	★	★	D
Illinois	A,B,C	(b,c,f)	★	★	★	★	★	★	...	...	A,B,C,D
Indiana	A,B,C	★ (a)	★	★	★	...	★	...	★	★	A,B,D
Iowa	A,B,C	★ (a)	★	★	★	★	★	...	...	★	A,B,C,D
Kansas	A,B,C	★ (a)	★	★	★	★	★	...	...	★ (a)	A,B,C
Kentucky	A,B*,C	★	★	★	★	★	★	(c)	(b)	(b)	B,C,D
Louisiana	A,B,C	(c)	★	★	★	★	★	...	★	★	A,B,C,D
Maine	A,B,C	(d)	★	★	★	(b)	★	(b)	★	★	B,C,D
Maryland	A,B,C	★	★	★	★	(b)	★	★	★	★	A,B,C,D
Massachusetts	A,B,C	(b,c,d)	★	★	★	★	★	★	★	★	A,B,C,D
Michigan	A,B,C	(b,c,d)	★	★	★	★	★	★	...	★	A,B,C (h),D
Minnesota	A,B,C	(c,d)	★	★	(a)	★	★	★	★	★	A,B,C,D
Mississippi	A,B,C	★	★	★	★	★	★	★	★	★	B,C,D
Missouri	A,B,C	★	★	★	★	...	★	...	★	★	A,B,C,D
Montana	A,B,C	★	★	★	★	...	★	...	★	★	[illegible]D
Nebraska	A,B,C	★	★	★	★	★	★	...	...	★	[illegible]D
Nevada	A,B,C	★ (d)	★	★	★	...	★	★	★	★	[illegible]C,D
New Hampshire	A,B,C	★ (a)	★	★	★	★	★	★	★	★	A,B,D
New Jersey	A,B,C	★ (d)	★	★	★	★	★	...	★	★	A,B,C,D
New Mexico	A,B,C	★ (a)	★	★	★	★	★	★	★	★	B,D
New York	A,B,C	(b)	...	★	★	(b)	★	(b)	...	...	A,B,C,D
North Carolina	A,B,C	★	★	★	★	★	★	(b)	★	★	A (i),B (j),C,D
North Dakota	A,B,C	(b)	★	★	★	...	★	...	★	★	A,B,C,D
Ohio	A,B,C	(b)	★	★	★	★	★	★	★	...	A,B,C,D
Oklahoma	A,B,C	(b)	★	★	★	(b)	★	(b)	★	★	A,B,C,D
Oregon	A,B,C	★	(a)	★	★	...	★	...	★	★	A,B,C,D
Pennsylvania	A,B,C	★	★	★	★	★	★	...	★	★	A,B,D
Rhode Island	A,B,C	★ (a)	★	★	★	★	★	★	★	★	\ (k),B,C,D (k)
South Carolina	A,B,C	★ (d)	★	★	★	...	★	...	★	★	A,B,C
South Dakota	A,B,C	★ (a)	★	★	★	...	★	...	...	...	A,B,C,D
Tennessee	A,B,C	★ (a)	★	★	★	...	★	...	...	★	A,B,D
Texas	A,B,C	(c)	★	★	★	★	★	...	★	★	A,B,D
Utah	A,B,C	★ (a)	★	★	★	★	★	(b)	★	★	B,C
Vermont	A,B,C	★	★	★	★	★	★	★	★	★	...
Virginia	A,B,C	★ (a)	★	★	★	★	★	★ (g)	★	★	...
Washington	A,B,C	(c,g)	★	★	★	★	★	★	★	★	A,B,C,D
West Virginia	A,B,C	★ (a)	★	★	★	(g)	★	★	★	...	B,C,D
Wisconsin	A,B,C	★	★	★	★	(b)	(b)	(b)	(b)	(b)	A,B,C
Wyoming	A,B,C	★ (a)	★	★	★	...	★	...	★	★	B (m),C
American Samoa	A,B,C	★ (a)	★	★	★	...	★	...	★	★	
Guam	A,B	★	★	★	(b)	...	(b)	...	★	★	
No. Mariana Islands	A,B,C	★	★	★	★	...	★	...	★	★	
Puerto Rico	A,B,C	★	★	★	★	...	★	...	★	★	
U.S. Virgin Islands	A,B,C (h)	★	★	★	★	★	★	...	★	★	

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(h) Except in cases in which the U.S. Attorney is representing the Government of the U.S. Virgin Islands.

ıate attorney.
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ımmerce or by a

dents.
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ın district court.

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

In Support of Election:
"An elected attorney general would be 'the people's attorney' and function as an ombudsman and watchdog for them."

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 governor and attorney general are political allies, share the same philosophy, or are personal friends. [8]

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 exclusive 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 omsbudsman and watchdog for them. Independent

In Support of Appointment:
"Good management requires an appointed attorney general so that the governor can have a philosophically compatible, cohesive and unified team . . ."

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 omsbudsman 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. [16]

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

"In essence the argument revolves around whether one believes in a strong or weak executive branch of government."

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* S. 7, 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 Agenies* (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

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CONSTITUTIONAL STATUS AND ROLE OF THE STATE ATTORNEY GENERAL

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al.[6] State attorneys general represent the diverse interests of numerous agencies and departments, mediate conflicts among them, and attempt to achieve coordination and consistency in litigating the positions of their states.[7]

As noted previously, the powers and duties of state attorneys general are defined in state constitutions, statutes, and common law. In many states the common law supplies authority for the attorney general to represent the state and the public.[8] For example, in *Florida ex rel. Shevin v. Exxon Corp.*,[9] the court upheld the Florida attorney general's power to bring an antitrust action against major oil companies on behalf of state agencies and political subdivisions without express consent of those public entities. In the absence of legislative restriction to the contrary, the attorney general "may exercise all such authority as the public interest requires," including initiation of the antitrust litigation in federal court, if he determines that the public interest so required.[10] Courts have recognized the authority of state attorneys general to assume primary responsibility to represent the state in litigation.[11] Many state constitutional provisions and statutes concerning the attorney general simply restate common law principles.[12] It is well-established in most states that the legislature may restrict or withdraw common law authority vested in the attorney general.[13]

Even this brief summary underscores the breadth and complexity of state attorney general activities. Some of those activities, such as decisions about criminal investigation and prosecution, call for independent judgment free of political influence from the governor. Other duties, such as advising a state agency on implementation of a major policy initiative, may call for close

6. NAAG, *supra* note 2, at 40.

7. *See* Roger C. Cramton, *On the Sturdiness and Courage of Government Lawyers*, 23 JOHN MARSHALL L. REV. 165, 165 (1989) (describing similar functions for the federal attorney general).

8. The position of attorney general in ten states expressly lacks common law authority. *See* NAAG, *supra* note 2, at 38. *See, e.g.*, Manchin v. Browning, 296 S.E.2d 909, 915 (W. Va. 1982) (West Virginia attorney general does not possess common law powers).

9. 526 F.2d 266 (5th Cir. 1976).

10. *Id.* at 268-74. Many cases recognize the common law powers of state attorneys general. *See* NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, COMMON LAW POWERS OF THE STATE ATTORNEYS GENERAL (rev. ed. 1980) [hereinafter COMMON LAW POWERS].

11. *See, e.g.*, Feeney v. Commonwealth, 366 N.E.2d 1262 (Mass. 1977); *see also* Michael B. Holmes, Comment, *The Constitutional Powers of the Governor and Attorney General: Which Officer Properly Controls Litigation Strategy When the Constitutionality of a State Law Is Challenged?*, 38 LA. L. REV. 209 (1992) (arguing that attorney general properly controls litigation strategy for the state).

12. COMMON LAW POWERS, *supra* note 10, at 4. Courts have recognized common law powers to represent and defend the state and its agencies, Martin v. Thornburg, 359 S.E.2d 472, 479 (N.C. 1987), to control litigation and appeals involving the state, Memorial Hosp. Ass'n v. Knutson, 722 P.2d 1093 (Kan. 1986), to intervene in legal proceedings on behalf of the public interest, State *ex rel.* Allain v. Mississippi Pub. Serv. Comm'n, 418 So. 2d 779 (Miss. 1982), to determine the state's legal policy, Feeney v. Commonwealth, 366 N.E.2d 1262 (Mass. 1977), and State v. Poulsen, 589 P.2d 707 (Utah 1978). *See* NAAG, *supra* note 2, at 37-38.

13. *See, e.g.*, Johnson v. Commonwealth, 165 S.W.2d 820 (Ky. 1942).

collaboration and accommodation with the governor and agency officials to serve the public interest. This essay attempts to frame the constitutional structure and role issues to advance the debate on how this complex set of responsibilities and relationships should be reconciled in the state constitutional scheme.

B. *Unitary versus Divided Executive Power*

Most states have adopted a constitutional structure for the executive branch that differs significantly from the federal constitution. The distinguishing feature of the federal model is the unitary executive.[14] The President is politically accountable for the executive branch.[15] No other executive branch government official represents a constituency that could remove that person from office.[16] The office of United States Attorney General was created by statute and is filled through presidential appointment with the advice and consent of the Senate.[17]

14. "The executive power shall be vested in a President." U.S. CONST. art. II, § 1, cl. 2 (emphasis added); *see* Saikrishna B. Prakash, Note, *Hail to the Chief Administrator: The Framers and the President's Administrative Powers*, 102 YALE L.J. 991, 994-99 (1993). However, the federal executive branch is not strictly unitary since Congress has the power to establish independent agencies that are insulated from presidential control, *see* Humphrey's Executor v. United States, 295 U.S. 602 (1935); Weiner v. United States, 357 U.S. 349 (1958), and to provide for an independent counsel to investigate and, if appropriate, prosecute certain high ranking executive branch officials for violations of federal criminal laws, Morrison v. Olson, 487 U.S. 654 (1988). The debate over the scope of legislative control over the executive branch, especially as it affects intra-executive checks and balances, efficiency, and accountability, is relevant though not central to the focus here on the selection of, role of, and control over principal executive branch officials. In this sense, the federal executive does serve as a unitary model, where a single electorally accountable official—the President—appoints and directs the activities of executive branch officers in carrying out executive functions. For analysis of the issue of presidential resistance or removal authority over executive branch agencies and individuals, see Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1155 (1992).

15. The federal executive branch also is arguably not entirely unitary in the sense of political accountability because the Constitution calls for election of a Vice-President as well as a President. Indeed, recent scholarship concludes that nothing in the text or history of the presidential and vice-presidential selection process of Article II or the Twelfth Amendment requires members of the electoral college or the voters who elect them to vote for a President and a Vice-President of the same party. *See* Akhil R. Amar & Vikram Amar, *President Quayle?*, 78 VA. L. REV. 913, 918-24 (1992). However, as Professors Amar and Amar point out, the Constitution bestows little authority on the Vice-President, *Id.* at 930, and "the voters know that the *President*, and not his Vice, is ultimately responsible for all executive policy," *Id.* at 941.

16. Congress established the office of United States Attorney General in the Judiciary Act of 1789, Act of Sept. 24, 1789, ch. 20, § 35, 1 Stat. 92. The Attorney General is not mentioned in the United States Constitution. But to say that the federal Attorney General's power and control of that power is in the hands of Congress is an overstatement. *See* Robert E. Palmer, Note, *The Confirmation of the Legislative and Executive Branches: An Examination of the Constitutional Balance of Powers and the Role of the Attorney General*, 11 PEPPERDINE L. REV. 731, 748 (1984). The President's appointment and removal authority and the constitutional directive to "take care that the laws be faithfully executed," U.S. CONST. art. II, § 3, establish independent executive power for a President with respect to an Attorney General.

17. Judiciary Act of September 24, 1789, ch. 20, § 35, 1 Stat. 93. Though not mentioned in the United States Constitution, the federal Attorney General has been a cabinet officer in American constitutional government from the beginning of the republic. Article III of the Constitution contemplates an Attorney

an executive branch official; and many state constitutions classify the position in this way. For example, the Utah Constitution provides that "[t]he elective constitutional officers of the Executive Department shall consist of Governor, Lieutenant Governor, State Auditor, State Treasurer, and Attorney General."[30] However, even though generally regarded as an executive branch official, the attorney general is a member of the governor's cabinet in only six states.[31]

Although considered mainly executive officials, state attorneys general perform some legislative and judicial functions. Having a significant administrative official exercise quasi-legislative and quasi-judicial duties has implications for separation of powers considerations. To the extent the attorney general is responsible to the legislature for certain functions and to the extent her judicial-like functions call for judicial-like insulation, the argument for gubernatorial control weakens because the attorney general is performing other than pure executive tasks. Gubernatorial control of such legislative and judicial functions may undermine the constitutional balance contemplated in a system of separation of powers. The United States Supreme Court recognized this principle when, for example, it relied on an FTC commissioner's having independent responsibilities as the basis to uphold congressional limitations on the President's power of removal.[32] In this sense the functional role of the attorney general is important in assessing the degree of independence she should have from gubernatorial influence.

The traditional separation of powers is not strictly followed in many states where the attorney general is called upon to provide legal advice for the legislature and the judiciary.[33] To the extent the attorney general advises the legislature and the legislators rely on that advice, and in many states they do,[34] the separation principle is blurred.[35] In states where the attorney general has responsibility to review legislation either before passage or prior to signing, this can have an impact on the governor's role in achieving a legislative agenda.[36]

All state attorneys general render advisory opinions to the governor and

30. UTAH CONST. art. VII, § 1.

31. NAAG, *supra* note 2, at 46.

32. Humphrey's Executor v. United States, 295 U.S. 602 (1935) (President prohibited from removal of FTC Commissioner before end of statutory term set by Congress). The President's unrestricted power to remove postmasters recognized in Myers v. United States, 272 U.S. 52 (1926), was limited to "purely executive officers." 295 U.S. at 631-32.

33. *See* Thornburg, *supra* note 2, at 356-57. Until it was rewritten in 1974, the Louisiana Constitution placed the attorney general in the judicial branch. *See* Nelson, *supra* note 11, at 211, 214.

34. Morris, *supra* note 5, at 135. This role is diminishing as most legislatures now have their own legal staffs. NAAG, *supra* note 2, at 55.

35. "[The attorney general] occupies a unique position. A part of neither the executive nor the legislative branch, he is legal advisor to both." Arlen C. Christenson, *The State Attorney General*, 1970 WIS. L. REV. 282, 300.

36. *See* Winder, *supra* note 4, at 75-76, 87.

executive departments, and many issue such opinions to the legislature and local prosecutors.[37] Their opinions can shape policy and development of the law, in part because they may be the only guidance on state constitutional and statutory issues that are infrequently or never litigated.[38] Some have discerned, including attorneys general, that the attorney general performs a judicial function in this role of opinion rendorer, which again clouds the separation principle.[39] Certainly it is quasi-judicial if the advisory opinion serves as an expeditious alternative to securing a declaratory judgment.[40] "[T]he attorney general tends to act where there is a need for explanation of a particular area of the law, where judicial review is absent, and where no legislative provision has been made for defining proper state practice."[41]

Although the trend has been away from early court decisions holding attorney general opinions as binding on the recipients,[42] as a practical matter the opinions work a prescriptive effect on state government administration and therefore carry legal force comparable to a court decision.[43] Some courts hold that good faith reliance on an attorney general's opinion may be a defense in a suit against a public official.[44] In most states the attorney general serves as counsel for judges who are sued in their official capacity and in some represents the court system.[45] Unlike state counterparts having strong ties to the judicial and legislative branches, the federal attorney gener-

35. *See* William A. Saxbe, *Functions of the Office of Attorney General of Ohio*, 6 CLEV.-MARSHALL L. REV. 331, 333 (1957).

36. Morris, *supra* note 5, at 133-35 (1987); William N. Thompson et al., *Conflicts of Interest and the State Attorneys General*, 15 WASHBURN L.J. 15, 16 (1976). A doctoral study of the Michigan Attorney General's use of advisory opinions concluded that this process afforded the attorney general substantial potential to influence state public policy. James E. Jordan, *The State Attorney General's Use of Legal Opinions to Influence Public Policy: An Empirical Analysis of the Politics of Legal Advice in the State of Michigan* (1975) (unpublished Ph.D. dissertation, University of Michigan).

37. Abernathy, *supra* note 18, at 41-42; Henry J. Abraham & Robert B. Benedict, *The State Attorney General: A Friend of the Court?*, 117 U. PA. L. REV. 795, 797-98 (1969); Morris, *supra* note 5, at 139. The Florida Supreme Court declared in 1925 that "the office of attorney general is in many respects judicial in character." *State ex rel.* Landis v. S.H. Kress & Co., 135 So. 833 (Fla. 1925). The quasi-judicial character of this role is rendered more problematic because the persons mailing in these advisory opinions have little resemblance to judicial procedure. No legal briefs are required, no adversary proceedings are conducted, and there is no avenue for appeal outside the office. Morris, *supra* note 5, at 136; Thompson, *supra* note 18, at 34-35.

38. *See* Dan A. Alexander, *The Advisory Opinion Function of the Attorney General*, 38 KY. L.J. 561, 571 (1950).

39. Abraham & Benedict, *supra* note 37, at 805.

40. Morris, *supra* note 5, at 140-41.

41. *Id.* at 140-42; Jordan, *supra* note 36, at 12-13, 157-58; Thompson, *supra* note 18, at 34-35. Attorney general advisory opinions "are customarily regarded as having the force of law unless and until tested in court." Abraham & Benedict, *supra* note 37, at 798-99.

42. *See, e.g.*, State v. Spring City, 280 P.2d 527 (Utah 1955).

43. NAAG, *supra* note 2, at 58.

B. *Representative of the People or of the State*

A distinction is sometimes drawn as to whether the attorney general, as a lawyer, represents the people or state government; and it is drawn more sharply when the attorney general achieves office as a state-wide elected representative of the people.[55] This issue is conceptually more subtle than the simple distinction suggests, and guidance initially should be sought through notions of sovereignty and representation.

1. Representation and Delegated Sovereign Power

The office of attorney general is rooted in seven hundred years of Anglo-American history. Since the mid-thirteenth century, specially appointed lawyers have represented the sovereign's legal interests.[56] In England the role of the attorney general to the present day is based upon representation of the sovereign, which is the principle supporting the attorney general as representative of the public interest.[57] American constitutional developments during the revolutionary period shifted sovereignty to the people, who select their representatives to exercise delegated sovereign authority.[58]

Accordingly, when an attorney general provides legal services to a state officer or agency, she does so to facilitate the officer or agency in exercising delegated sovereign power. When an attorney general enforces consumer, environmental, or health legislation, she does so to implement public policy adopted pursuant to the delegated sovereign authority of the legislature. In both instances, the attorney general is representing the public interest. As one attorney general put it, "[I]t is imperative that the Attorney General simultaneously represent both the state agency and the public interest."[59]

2. Representation and Multiple Roles

The attorney general's office must play several roles and serve multiple interests. As Professor and former Assistant United States Attorney General for the Civil Division Barbara Babcock describes it, the government lawyer represents the client agency, she further represents the state as a litigant in court, and she must take account of the public.[60] Perhaps a more workable dichotomy than representation of the state or the public is to view the attorney general's role as combining loyalty to the executive with loyalty to the law. The attorney general, appointed or elected, fulfills responsibilities to the executive and the public by maintaining the obligation to respect and follow the law.[61]

In areas such as antitrust or consumer protection, the attorney general typically is authorized to assume the role of advocate for the state and represent the public interest consistent with the scope of discretion the legislative mandate allows. The attorney general appears in such litigation as a result of enforcement discretion and acts as the legal representative of the state and the public interest. The role can be different when the attorney general is advising or representing a state official or agency. In litigation on behalf of a state agency or official, the attorney general does not appear as a party to the action.[62] In this context of agency representation, the representative role tension can become most acute.

The problem arises, of course, when the attorney general has a different conception of the public interest than the governor or the state agency and claims that her primary responsibility is to the people (her view of the public interest) and not to an agency (the governor's or the agency's view of the public interest).[63] The problem is resolved if the attorney general confines her role to that of a lawyer providing legal services to a client agency. The client's view of the public interest, if not in violation of state law, would prevail.[64] This resolution is more easily achieved when accountability for executive branch performance is clear. At the federal level, the presumption is that the President is acting in the public interest, and government lawyers are expected to support that position subject to adherence to law and professional bounds of honesty and advocacy.[65]

Even when the attorney general is elected, resolution is possible if the authority of the office is understood to extend only to serving in a lawyer's role to those delegated sovereign powers of the executive branch.[66] However-

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53. *See* Holmes, *supra* note 11, at 214 n.25.
54. NAAG, *supra* note 2, at 3-9; Thornburg, *supra* note 2, at 346.
55. NAAG, *supra* note 2, at 30.
56. GORDON S. WOOD, CREATION OF THE AMERICAN REPUBLIC, 1776-1787, at 372-83 (1969).
57. Thornburg, *supra* note 2, at 335; *see* Stube, *supra* note 33, at 334.
58. Barbara A. Babcock, *Defending the Government: Justice and the Civil Division*, 23 JOHN MARSHALL L. REV. 19 (1990).

59. *See* PHILIP B. HEYMANN, THE POLITICS OF PUBLIC MANAGEMENT 83-86 (1987).
60. *See* Manchin v. Browning, 296 S.E.2d 909, 918-19 (W. Va. 1982).
61. *See McChesney*, *supra* note 46, at 316-17. The pressure on the attorney general-state agency relationship "is especially so when the Attorney General and the agency-client are headed by policy makers of different partisan persuasions." Thornburg, *supra* note 2, at 358.
62. "The Attorney General's role and duty is to exercise his skill as the state's chief lawyer to zealously advocate and defend the policy position of the officer or agency in litigation." *Manchin*, 296 S.E.2d at 920.
63. *See* Thomas E. Kauper, *Politics and the Justice Department: A View from the Trenches*, 9 J.L. & POL. 257, 265 (1993).
64. When Pennsylvania voters decided in 1978 to convert from an appointed to an elected attorney general, the commission charged with making recommendations to implement this change declared: "The elected Attorney General is not to function as a policymaker. Instead, the Attorney General's role is intended to encompass only the traditional role of lawyers in society. . . ." JOINT STATE GOVERNMENT COMMISSION, GENERAL ASSEMBLY OF THE COMMONWEALTH OF PENNSYLVANIA, OFFICE OF ELECTED ATTORNEY GENERAL—FINAL REPORT 5 (1978).

As one commentator put it with respect to federal government attorneys, "Ultimately, however, the

particularly discriminating when it comes time to assign the blame for inaction. Other elected officials may well have caused the foot-dragging, but as the "head" of state government the governor must bear the consequences."[80]

A multi-headed executive branch contains a built-in tension between the attorney general's role as counsel for the state and the attorney general's independent electoral accountability. The conventional arrangement is that the governor appoints cabinet or department officials to administer state agencies. The attorney general serves as the lawyer for the governor and the agencies, and therefore owes a duty of loyalty to these clients. However, when the attorney general is elected independently of the governor, the governor cannot remove the attorney general from office on grounds of disloyalty or poor performance. And if the attorney general's actions cause poor performance from an executive branch agency or interference with implementation of the governor's policy objectives, the governor may nonetheless be held politically accountable as the leading political figure in the executive branch. "The fact is that people look to the *governor* to get the job done."[81] That would be more appropriate if the governor or her appointed agency officials were responsible for the hiring and supervision of legal advisors, but that is not the system in most states.

The result is that "[e]very official accused of incompetence places the blame at another's door. . . . Officers will not cooperate, and there is no way of compelling them to do so."[82] The critical question is: who is in charge, or where is accountability placed?[83] That question must be answered if the constitutional theory underlying separation of powers is to be realized.[84] The principle at stake is that the person who is ultimately held responsible for the operation of the executive branch should be able to count on the cooperation of advisors, including legal advisors.[85] Or, to put it in terms of well-established government organization theory, authority must be commensurate with responsibility.[86] This has been a problem with state government organization generally.

78. SARATO, *supra* note 24, at 63.

79. *Id.* (quoting former Governor Reubin Askew of Florida).

80. AUSTIN F. MACDONALD, AMERICAN STATE GOVERNMENT AND ADMINISTRATION 357-58 (1960). "In Michigan, it has become impossible as a practical matter to unequivocally charge the Governor with full responsibility for his administration. If projects fail, it is simple to 'pass the buck,' whereas, a focusing of accountability on a single chief executive results in greater accomplishment." Morris M. Kaufman, *Should the Governor Appoint the Secretary of State and Attorney General? Yes!*, 27 PROB. ST. B.J. 73 (1981).

81. Boyle, *supra* note 67, at 192.

82. *See* text at notes 44-47, *supra*.

83. As one commentator puts it:

> If the governor is to be held responsible for the handling of all the state's business . . . it follows almost inescapably that he must have control over the staff service of providing legal aid and advice to his other subordinates, as well as control over the line function of prosecuting collection against the state laws and representing the state in all other litigation. . . . The popular election of the attorney general with his responsibility being directly to the people produces a division and a diffusion of the basic responsibility of the governor to see that the laws are fairly executed, and flies in the face of accepted principles of good administrative organization.

Abernathy, *supra* note 18, at 44-45. Or, more simply, Al Smith asserted: "The attorney general is the state's lawyer, and the governor should select the lawyer. He is responsible." A.E. BUCK, REORGANIZATION OF STATE GOVERNMENTS 23 (1938) (quoting a speech by Alfred E. Smith).

84. HAROLD SEIDMAN, POLITICS, POSITION, AND POWER 5 (1970); *State Government Reorganization: The End of the Beginning*, PAR ANALYST, Oct. 1978, at 7.

85. PHILLIPS, *supra* note 18, at 205-11.

86. *Id.* at 212-13; Abernathy, *supra* note 18, at 33-34.

87. Billing, *supra* note 75, at 251.

88. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 65 (Max Farrand ed., 1966) (emphasis added).

89. THE FEDERALIST No. 70, at 427-28 (Alexander Hamilton) (Clinton L. Rossiter ed., 1961).

2. Unity, Plurality, and Accountability

Especially before World War I, the long ballot for state elected officials rendered it very difficult for governors to coordinate and direct administration. The state government reorganization movement that has been ongoing for much of the last seventy-five years has called for strengthening the governor's control over administration by shortening the ballot, including appointment of the attorney general.[87] The widely accepted principle of administrative organization supporting this prescription is the need for clear lines of authority and responsibility.[88] "Concentration of authority in the hands of the governor would enhance accountability because the voters would know who to blame for administrative failures, as the governor became chief executive in fact and not just name."[89]

At the Philadelphia Constitutional Convention in 1787, Pennsylvania delegate James Wilson stressed that a single executive would provide the "most energy dispatch and *responsibility* to the office."[90] Alexander Hamilton stressed the accountability problem of a plural executive in *The Federalist Papers*. He contended that

> one of the weightiest objections to a plurality in the Executive . . . is that it tends to conceal faults and destroy responsibility. . . . It often becomes impossible, amidst mutual accusations, to determine on whom the blame or the punishment of a pernicious measure, or series of pernicious measures, ought really to fall.[91]

In sum,

> [T]he plurality of the Executive tends to deprive the people of the two greatest securities they can have for the faithful exercise of

tract the plans and operation of those whom they divide, . . . [and] they might impede or frustrate the most important measures of the government [and] split the community into the most violent and irreconcilable factions. . . ."[105] Multiple executive authorities "serve to embarrass and weaken the execution of the plan or measure to which they relate, . . . [and] counteract those qualities in the Executive which are the most necessary ingredients in its composition, vigor and expedition. . . ."[106]

As a modern commentator explained,

> [S]ome of our state governments' most interesting legal and political infighting has been between the governor as the chief executive officer of the state and the attorney general as the chief legal officer. It is clear that these two offices do have the potential for built-in conflict at several levels, from politics to policy to administration. . . . And not the least of these is over conflicting ambitions.[107]

As another commentator concluded: "A government of inaction is not a responsible government. A governor without power is not a responsible governor."[108] The fragmented executive hampers the governor from shaping and directing executive branch policies. Although the number of statewide elected officials has diminished slightly during the last thirty years, this area of governor-attorney general relations is where progress toward effective gubernatorial leadership has been the slowest.[109]

C. *Divided Loyalty*

The basic attributes of the attorney-client relationship—client employs the attorney and the attorney serves as representative and agent of the client—are reversed with many elected state attorneys general. The attorney general in many states assigns a lawyer to a state agency client and can provide or withhold services. The client agency, unlike other clients, cannot discharge the attorney without the cooperation and support of the attorney general or extraordinary relief from the legislature. The traditional rule giving the client the final decision in all important aspects of representation and

105. *Id.* at 426.
106. *Id.* at 427.
107. Bayle, *supra* note 97, at 192. As one governor told Professor Sabato: "I have had some problems with my attorney general. . . . My perception is that the attorney general essentially serves as counsel to the governor, and his perception is that he is an autonomously elected public official and solely represents the interests of the public, and the office of governor when he has adequate time and staff." SABATO, *supra* note 24, at 64-65.
108. RANSONE, *supra* note 98, at 402.
109. SABATO, *supra* note 24, at 63.

litigation is compromised. Perhaps the biggest problem is the need for the client to have total confidence in counsel. A governor cannot have that confidence in a person she did not select and who not only is a political rival of the governor but may even have designs on her job.

A divided loyalty problem permeates the representation of state agencies, especially when the attorney general is independently elected. If a deputy or assistant attorney general is assigned to provide legal counsel to a state agency, that attorney's duty of loyalty should be exclusively to that agency. However, if the attorney general disagrees with the policies of the agency, the subordinate attorney faces the dilemma of adhering to the lawyer's duty of loyalty to a client versus furthering the policy preferences of his employer, the attorney general. The tension between legal policy and program policy is not easily resolved with appeals for cooperation and, where applicable, bipartisan support to make the system work or through reliance on the governor to calm executive branch disputes.[110] On the other hand, it has been suggested that an independent attorney general may provide more objective advice.[111]

One outgrowth of the divided loyalty problem is the temptation of state agencies to hire law-trained people who are accountable to the agency head.[112] This practice is prevalent in governors' offices, where in-house counsel commonly are employed.[113] Whether these law-trained individuals are hired as lawyers or not, agency staff may rely on and have more confidence in them than in attorneys assigned by the elected attorney general.[114]

The in-house attorneys may have both centralizing and decentralizing tendencies on the legal policy of the state. On the one hand, the agency-hired lawyers are accountable to the agency head and ultimately to the governor, largely eliminating the potential conflict between policy implementation and legal counseling functions. On the other hand, the "closet attorney" phenomenon exacerbates the potential for conflicting legal advice and undermining

110. *See* Dave Frohnmayer, *Representing the State: Public Interest Comes First*, 41 J. ST. GOV'T 91, 93 (1981).
111. *See* N.Y. CONSTITUTIONAL CONVENTION, *supra* note 1, at 96.
112. In North Carolina, for example,

> [t]he practice of having a legal advisor or in-house legal counsel within the agency-client represented by the Attorney General has become widespread. This fact has complicated the role of the Attorney General as much as, or more so, than any other one factor during the evolutionary process of this office over the past twenty years.

Thornburg, *supra* note 2, at 338 (footnote omitted).
113. NAAG, *supra* note 2, at 44; RANSONE, *supra* note 98, at 332-33; N.Y. CONSTITUTIONAL CONVENTION, *supra* note 1, at 96.
114. A survey of public institutions of higher education regarding delivery of legal services revealed some interesting responses in this regard. Of the 18 major research universities responding to the survey, six relied upon "quasi-representation," defined as "legal advice given by an employee who is an attorney but who is not in a legal position." It is "unavoidable" not to receive such advice, according to one respondent. UTAH SYSTEM OF HIGHER EDUCATION, STATE BOARD OF REGENTS, RESPONSE TO LEGAL SERVICES QUESTIONNAIRE, Aug. 30, 1990, at 1 (on file with author).

an example.[126]

E. *Counseling versus Prosecution*

Perhaps the problems discussed in this section are the price states are willing to pay for the benefits of an independently elected attorney general serving a check and balance watchdog role in the executive branch. However, there is another aspect to the tension between structure and role that cannot be balanced in this way. Although the duty is shared in a variety of ways with local government prosecutors, most state attorneys general have as one of their responsibilities the investigation and prosecution of state criminal offenses.[127] The conflict arises when the attorney general can both counsel state agencies and prosecute them for criminal wrongdoing. The attorney-client relationship is built on trust, loyalty, and confidentiality. That foundation is precarious if not impossible when the attorney general is both advocate and potential adversary.

This role conflict creates both the risk of ineffective legal counseling for the agency due to agency caution or distrust and ineffective investigation and prosecution due to attorney loyalty to the agency. For some, the answer may be that agency wrongdoing should be handled by an independent prosecution team separated by "walls" within the attorney general's office or referred to an outside local or federal prosecutor. In many states, the majority of criminal investigation and prosecution through trial is carried out at the local government level with the state attorney general's office handling most of the criminal appeals. At the federal level, Congress created the office of independent counsel because it was concerned about conflicts that could develop when the executive branch is called to investigate its high-ranking officers.[128]

F. *Rogue Agency*

An attorney general should not interfere with an agency's policy choice as long as the policy is legal.[129] However, whether a policy decision is legal is not always clear. When it is unclear, an independently elected attorney general could unnecessarily frustrate public policy. When it is clear, however, and the agency is intent on acting illegally, the attorney general, elected or appointed, faces a practical challenge.

Two commentators who have confronted this problem advise that "the attorney general can use persuasion, seek support through the media, apply political pressure, and, as a last resort, litigate."[130] It would not be uncommon in such a conflict situation for the attorney general to withdraw as counsel for the state agency client and authorize employment of special counsel.[131] The problem with the attorney general suing the agency is that the agency officials will protest that a suit for failure to follow the attorney general's advice is a betrayal because the attorney general is the agency's lawyer.[132] Indeed, the California Supreme Court held that the state attorney general could not withdraw from representation of state officers and agencies and then take a position opposed to those same clients.[133] Cases in other jurisdictions allow their attorneys general to sue state officers or agencies.[134] Nonetheless, the problem of the rogue agency is a pronounced example of the conflict of loyalty and counseling versus prosecution issues discussed previously.

G. *Resources and Management*

One of the problems in assessing these issues is the difficulty of separating constitutional structure and role from management efficiency and availability of resources. In other words, if there are deficiencies in legal representation of the executive branch generally or certain agencies particularly, they may stem from lack of sufficient lawyer personnel in the attorney general's office or failure of that office and the state agencies to manage available attorneys as productively as possible. Indeed, although not correlated, resource and management issues may be as critical to the quality of executive branch legal representation as questions involving constitutional structure and role. Fulfilling the promise of the desired constitutional structure and role requires adequate resources and organization to facilitate the attorney general's responsibilities.

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126. *See, e.g.*, Cranston, *supra* note 7, at 171-74 (describing how Attorney General Richard Kleindienst could have effectively investigated and prosecuted the Watergate burglary but for his personal loyalty to and trust in President Nixon and former Attorney General John Mitchell).

127. The attorney general "is the most visible and influential state official in the fight against crime." Ewing, *supra* note 2, at 378.

128. *See* Morrison v. Olson, 487 U.S. 654, 677 (1988) (upholding independent counsel provisions in Ethics in Government Act of 1978); Beth Nolan, *Reserving Conflicts from the Administration of Justice: Conflicts of Interest and Independent Counsels Under the Ethics in Government Act*, 79 GEO. L.J. 1, 1 (1990).

129. *See* Fishkoff, *supra* note 110, at 52.

130. Charles M. Oberly III & Fred S. Silverman, *When Worlds Collide: Avoiding Public Showdowns*, 61 J. ST. GOV'T 94, 95 (1988).

131. *See* People *ex rel.* Deukmejian v. Brown, 634 P.2d 1208, 1207 (Cal. 1981).

132. Oberly & Silverman, *supra* note 130, at 95.

133. *See* People *ex rel.* Deukmejian v. Brown, 634 P.2d 1208, 1209 (Cal. 1981).

134. *See, e.g.*, Connecticut Comm'n on Special Revenue v. Connecticut Freedom of Info. Comm'n, 387 A.2d 533 (Conn. 1978); Feeney v. Commonwealth, 366 N.E.2d 1262 (Mass. 1977); R.F.A. v. Pollution Control Bd., 372 N.E.2d 50 (Ill. 1977). In Superintendent of Ins. v. Attorney General, 538 A.2d 1197 (Me. 1987), the court held that the Maine Attorney General who disagrees with a state agency is not disqualified from participation in litigation "affecting the public interest merely because members of his staff had previously provided representation to the agency at the administrative stage of the proceeding." *Id.* at 1204.

Between 1965 and 1987, the "golden era of state reorganization," gubernatorial appointment power was expanded in each of the twenty-two states where the executive branch was overhauled.[143]

This arrangement would diminish the problems of constitutional stalemate, accountability, and divided loyalty. However, it would not eliminate and may aggravate the counseling versus prosecution problem because the attorney general would be beholden to the governor and perhaps less likely to take seriously the investigation and prosecution of state agencies or officials for criminal violations. This problem at the federal level has led to the appointment of independent counsel to investigate and prosecute alleged wrongdoing on the part of high level executive branch officials. It has further led to the development of offices of Inspector General, situated throughout the federal government, to audit and investigate their respective agencies.[144]

A strong barrier to reform in this direction is the historical experience and popular expectation of electing state attorneys general.[145] Opposition comes from elected attorneys general, legislators who do not wish to strengthen the governor's hand over state agencies, agency heads who see a threat to established legislative and client group relationships, and interest groups with a stake in the status quo.[146] Most proposals to shorten the statewide elected official ballot meet with public resistance.[147] No state has changed from election to executive appointment of the attorney general.[148] It appears unlikely that, apart from the experts on state executive branch reform, any movement will develop in this direction.

143. *Id.* at 194-95.

144. *See* PAUL C. LIGHT, MONITORING GOVERNMENT, INSPECTORS GENERAL AND THE SEARCH FOR ACCOUNTABILITY (1993).

145. A West Virginia poll resulted in 24% in favor and 63% opposed to abolishing the state elected office of attorney general. THE GALLUP OPINION INDEX: POLITICAL, SOCIAL AND ECONOMIC TRENDS (reporting the West Virginia Poll of March 1989, poll information no. WVA31989). *See generally* JAMES L. GARRETT, REORGANIZING STATE GOVERNMENT: THE EXECUTIVE BRANCH 51 (1969).

146. Elling, *supra* note 76, at 253-53. Some fear giving the governor too much power. *See* Emmanuel B. Rocco, *Should the Governor Appoint the Secretary of State and Attorney General? No!*, 27 MICH. ST. B.J. 33 (1948).

147. Voters resist appointment because they think direct election is more democratic. CHARLES R. ADRIAN, STATE AND LOCAL GOVERNMENTS 262 (1976); SABATO, *supra* note 24, at 56.

148. *Id.* at 66; Thompson, *supra* note 18, at 18. Since New York changed from an appointed to an elected attorney general in 1946, numerous attempts have been made to go back to an appointed attorney general, but none has succeeded. *See* N.Y. CONSTITUTIONAL CONVENTION, *supra* note 1, at 195-96. Several factors have been identified that impede administrative reorganization, including opposition of vested interests within the organization, special interest groups supportive of the status quo, the difficulty of effectuating constitutional change, the persistence of Jacksonian theories of popular democracy, and the need for compromise. Phillips, *supra* note 18, at 219. Indiana in the early 1940s and Pennsylvania in 1980 changed from executive appointment to popular election. NAAG, *supra* note 2, at 20.

C. *Elected Prosecutor/Public Advocate Attorney General*

The public, whether accurately or not, generally considers the attorney general to be primarily the prosecutor for the state.[149] If the elected attorney general were limited in authority to criminal investigation and prosecution in certain specified areas, some of the problems with structure and role would be alleviated.[150] This would continue to be the case if the role were defined broadly as one of law enforcement. In addition to criminal law enforcement, the elected attorney general's authority could also embrace, for example, civil enforcement of antitrust, civil rights, consumer, and environmental laws. The governor would appoint a separate counsel for the state who would be responsible for providing legal services to state agencies, or the state agencies themselves would employ attorneys on their staffs.

Under this system, the attorney general/prosecutor-public advocate, as an independently elected official, would have some insulation from gubernatorial overreaching. Moreover, the checking or watchdog function of the attorney general would be preserved with respect to criminal wrongdoing in the executive branch. The power to investigate may concentrate on "government misconduct, malfeasance, or individual criminal activity."[151] Indeed, the watchdog role may be enhanced because the conflict between the advising and prosecuting functions carried out by the same office would be substantially eliminated.

With a gubernatorially-appointed counsel for state agencies, the accountability of executive branch agencies would not be confused with the quality of performance of attorneys loyal to an independently elected employer. Moreover, the lawyers themselves would not face the tension between agency direction and attorney general policy agendas, thereby alleviating the stalemate and divided loyalty problems discussed earlier. The governor or agency head would have the authority to act as legal employer in this context and would not be constrained to rely on the independently elected attorney general to do so. Although potential remains for conflict in policy objectives insofar as law enforcement decisions carry policy implications, the risk of gridlock would be lessened.

This approach receives support by analogy from the view among public administration experts that the state auditor responsible for post audits and

149. NAAG, *supra* note 2, at 13.

150. A recent article on the federal Attorney General argues that "The Attorney General's role as the nation's chief law enforcement officer has the potential for clashing with the Attorney General's White House role as the President's legal advisor." Mitchell Rogovin & Wendy M. Rogovin, *The Office of Attorney General: Not Properly Political*, 9 J.L. & POL. 317, 318 (1993). The Rogovins conclude that "a President must select two people to fulfill these positions." *Id.* at 323; *see also* Whitney N. Seymour, Jr., *United States Attorney: An Inside View of "Justice,"* in AMERICA UNDER THE NIXON ADMINISTRATION 229-32 (1973) (proposing to divide functions between a presidential advisor and a chief prosecutor).

151. NAAG, *supra* note 2, at 14.

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March 9, 1995

MEMORANDUM

TO:

FROM: Gordon S. Harrison, Director gsh

RE: **Issue of An Elected Attorney General In Alaska**
Research Request 95.150

You asked for background information on the issue of electing the attorney general in Alaska, in contrast to the present practice of the governor appointing the attorney general. This memorandum briefly discusses the existing constitutional structure of the executive branch and the attorney general as an appointed department head; past efforts to change this constitutional scheme; a summary of the case for and against an elected attorney general; and the current controversy of the role of the attorney general in the recent withdrawal of the state's appeal in the *Babbitt* lawsuit against the federal government.

Constitutional Structure of the Executive Branch, and the Appointed Attorney General

Article III, Section 24 of the Alaska Constitution states, in full:

> Each principal department shall be under the supervision of the governor.

Article III, Section 25 states, in pertinent part:

> The head of each principal department shall be a single executive unless otherwise provided by law. He shall be appointed by the governor, subject to confirmation by a majority of the members of the legislature in joint session, and shall serve at the pleasure of the governor . . . .

These two brief constitutional provisions create in Alaska a unified executive branch of government. Unlike the situation in most other states, in Alaska the heads of major executive

branch agencies are appointed and serve at the governor's pleasure: only the governor and lieutenant governor are popularly elected.[1]

The constitution gives to the legislature the power to determine the number of principal departments and the duties of each. It established the Department of Law as one of 16 principal departments in the executive branch, including the Office of the Governor (AS 44.17.005). The attorney general is the head of the Department of Law (AS 44.23.010), and therefore, the person serving in that position is appointed by the governor and serves at the governor's pleasure as do the other department heads.[2] The state constitution would have to be amended to select the attorney general by popular election.

This constitutional scheme was adopted by the delegates to the constitutional convention to avoid the fragmentation of executive authority that results from independently elected department heads. They wanted the executive branch to be *efficient* in its operation and the governor to be *accountable* to the voters for the performance of the executive agencies. They gave the governor the power necessary to manage the administrative agencies, and they expected the governor to answer for his or her management. The delegates were firmly committed to the principle of a strong and accountable governor, and they rebuffed several efforts to weaken the governor's control over the attorney general, including proposals to elect the attorney general. Speaking on the floor of the convention against such a proposal, delegate McLaughlin stated:

> If we yield in one respect, we might as well elect our commissioner of welfare, our commissioner of education, and having provided those, I feel that we should go right down the list and completely dissipate the theory [of the strong executive]. . . .[3]

Delegate Ralph Rivers, who said he was initially inclined to support the idea of an elected attorney general, argued strenuously against it. He said he came to realize that:

> . . . if you are going to let the governor's administration be held responsible for the conduct of that administration, you have got to at least give the governor an attorney general of his own choice. Under [the proposal for an elected

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[1]The lieutenant governor has no constitutional powers and few statutory powers.

[2]The Department of Education is an exception to this scheme. Under the grant of authority in Article III, Section 25, to determine *by law* whether the head of each department shall be a single executive or otherwise, the legislature has decided to place a board at the head of this department. The method of selecting the executive officer of this department is provided in Article III, Section 26.

[3]*Proceedings of the Alaska Constitutional Convention*, p. 2196. Both Delegate Rivers and McLaughlin were attorneys.

> attorney general] he might get an attorney of the opposite political faith. He might get one of his own party who is either inadequate or who is hostile to him. . . .In either case, the governor could say at the end of his term, if things haven't gone well, "We had a good program but that attorney general you foisted upon me wrecked our program."[4]

This proposal for an elected attorney general, which took the form of an amendment to the committee recommendation for appointed department heads, was defeated on the floor of the convention by a vote of 40 to 12. A subsequent proposal to have the judicial council screen candidates for the post of attorney general was defeated by a vote of 36 to 18. The delegates clearly wanted the state attorney general to be appointed by, and serve at the pleasure of, the governor.

Proposed Constitutional Amendments Creating an Elected Attorney General

Although the matter was settled in the constitution, it was not settled in the minds of some people, and support for an elected attorney has lingered. A resolution was introduced in the first state legislature to amend Article III of the constitution to elect the attorney general, and some 26 resolutions have been introduced over the years to the same end.[5] However, none of these measures has received the necessary two-thirds majority vote to be placed on the ballot for ratification.

Arguments For and Against An Elected Attorney General

Proponents of an elected attorney general believe that the independent legal judgment of an appointed attorney general is compromised by his or her political ties to the governor. Accordingly, an elected attorney general is thought to bring an objective legal perspective to the office. There are at least two sources of "political" pressures to which the appointed attorney general is susceptible. These are the pressures (tacit if not expressed) to treat favorably campaign contributors, special interests aligned with the governor, and various electoral allies, and the less insidious but more pervasive pressures to provide contrived legal support for the governor's

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[4]*Proceedings*, p. 2198

[5]The most recent resolution proposing an elected attorney general was Senate Joint Resolution 12, 14th legislature (1985-86). At least one bill was introduced to hold a statewide advisory vote on the question of electing the attorney general (House Bill 456, 13th legislature, 1983-84). Resolutions have also been introduced from time to time to provide for the election of district attorneys.

programs, policies, and legislation. It should be noted that sensitivity of legislators to these concerns was far more acute in earlier years when the legislature did not have its own counsel and relied exclusively on the attorney general for legal advice. In this situation, when questioning the legality of a bill proposed by the governor, or when seeking defense of a legislator's bill that the governor alleges is illegal, legislators would have preferred to hear from an elected attorney general rather than a lawyer from the governor's cabinet. With their own legal staff to turn to, legislators today are no longer dependent upon legal advice from a source that has conflicting interests.

Defenders of the constitutional status quo point out that an elected attorney general would not be free from political influences but merely substitute his or her own for those of the governor. An elected attorney general is a politician no less than the governor, and must raise campaign funds for a statewide contest and cultivate electoral favor wherever it can be found. Furthermore, experience shows in states with an elected attorney general that the office is often a stepping stone for the governor's office. Thus, the elected attorney general is very likely to be an ambitious politician, and it is not unusual for an attorney general to run against the governor in whose administration he serves. Under these circumstances there is no reason to expect more objective and independent legal judgment from an elected attorney general than from an appointed one.

Defenders of the status quo also see wisdom in the original constitutional design of the executive branch, which does in fact result in efficient administration and political accountability. Under the current system, when things go awry the governor cannot dodge responsibility by blaming others. Finally, advocates of an appointed attorney general argue that the state is more likely to be served by a person of legal competence and talent if that person is appointed rather than elected.

An Elected Attorney General and the *Babbitt* Lawsuit

We presume that the current interest in the role of the attorney general in Alaska has been generated by the decision of Governor Knowles to withdraw the state's appeal in the lawsuit *Alaska v. Babbitt*. Questions arose about the duties and responsibilities of the attorney general in this case because the same person, Bruce Botelho, both filed the suit as attorney general for Governor Hickel and withdrew it as attorney general for Governor Knowles. It has been suggested by people who ~~reed~~ with the decision to drop the appeal that an elected attorney general would have bee~~ ~~pelled~~ to defend the state's vital interest and continue the appeal, notwithstanding the governor's desires. This proposition deserves some discussion, even though a definitive response is not possible. It is conceivable that an elected attorney general would have acted differently from Attorney General Botelho in the *Babbitt* suit, but there are strong reasons to think he might not have. The outcome in any particular hypothetical case would, of course, depend on many factors, including the political values of the elected attorney general as well as the precise terms of the constitutional and statutory provisions that established the elected office of attorney general in Alaska. Generally speaking, however, it is understood that elected attorneys

general defend the positions of executive officers and agencies if those positions are reasonable and formulated by a defensible process. In matters of public policy, where the best interests of the state are at issue rather than the legality of a position, the attorney general is usually expected to defer to the governor:

> There is no reason to assume that the attorney general can ascertain the public interest better than the governor, who is elected in the same statewide election but indisputably attracts more interest and attention than the attorney general.[6]

The California Supreme Court, in *The People ex rel. George Deukmejian v. Brown*, 624 P 2nd. 1206 (1981), held that, under state constitutional provisions similar to those in Alaska regarding the governor's supervisory powers over the executive branch:

> . . . if a conflict between the Governor and the Attorney General develops over the faithful execution of the laws of this state, the Governor retains the "supreme executive power" to determine the public interest; the Attorney General may act only "subject to the powers" of the Governor.

The court's decision in this case is attached. The majority decision and the dissent, although presented in the context of California constitutional law, are suggestive of the broader issue of the extent of the common law powers of attorneys general to safeguard the public interest.

One must bear in mind that governors and elected attorneys general have a mutual interest in avoiding public spats. Therefore, as a practical matter, potential for conflict over the *Babbitt* appeal would doubtless have been perceived by the governor and the elected attorney general and a contest between them avoided by negotiation (tacit or overt). Thus, the outcome in the *Babbitt* controversy under our hypothetical situation could have gone either way--appeal or not appeal--on the basis of political judgments by the two key players.

Questions concerning the powers and duties of elected attorneys general, and the advantages and disadvantages of an elected position versus an appointed position, are very complex, and they are treated only in cursory fashion in this memorandum. If you would like additional information, or additional reading material on the subject, please let us know.

Attachments

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[6]Scott M. Matheson, Jr., "Constitutional Status and Role of the State Attorney General," *University of Florida Journal of Law and Public Policy*, Fall, 1993, p. 15.

172 Cal.Rptr. 478

The PEOPLE ex rel. George DEUKMEJIAN, as Attorney General, etc., Petitioner,

v.

Edmund G. BROWN, Jr., as Governor, etc., et al., Respondents;

California State Employees' Association et al., Interveners.

S.F. 24252.

Supreme Court of California, In Bank.

March 12, 1981.

Rehearing Denied April 22, 1981.

Attorney General sought peremptory writ of mandate to compel State Personnel Board, Public Employment Relations Board, Governor, and Controller to perform their statutory and constitutional duties with regard to recently enacted State Employer-Employee Relations Act. The Supreme Court, Mosk, J., held that Attorney General could not seek judicial determination of legality of State Employer-Employee Relations Act which was purportedly in derogation of California Constitution where Attorney General had represented state clients, given them legal advice with regard to pending litigation, and then withdrawn and sued same clients on next day on cause of action arising out of identical controversy.

Petition dismissed.

Richardson, J., dissented and filed an opinion.

See also Cal., 172 Cal.Rptr. 487, 624 P.2d 1215.

1. Attorney General ⇐6

Attorney General could not seek judicial determination of legality of State Employer-Employee Relations Act which was purportedly in derogation of California Constitution where Attorney General had represented state clients, given them legal advice with regard to pending litigation, and then withdrawn and sued same clients on next day on cause of action arising out of identical controversy. West's Ann.Gov. Code, § 3512 et seq.

2. Attorney General ⇐6

Attorney General cannot be compelled to represent state officers or agencies if Attorney General believes them to be acting contrary to law, and may withdraw from statutorily imposed duty to act as their counsel, but may not take position adverse to those same clients. West's Ann. Gov.Code, §§ 11040, 12512.

3. Attorney General ⇐6

Where a conflict between Governor and Attorney General develops over faithful execution of laws of the state, Governor retains supreme executive power to determine public interest: Attorney General may act only subject to powers of the Governor. West's Ann.Const. Art. 5, §§ 1, 13.

4. Attorney General ⇐6

Governor could raise issue of violation of rule of professional conduct by motion in case before court to enjoin adverse representation of Attorney General; overruling *People v. Johnson*, 6 Cal. 499.

George Deukmejian, Atty. Gen., Willard A. Shank and N. Eugene Hill, Chief Asst. Attys. Gen., L. Stephen Porter and Richard D. Martland, Asst. Attys. Gen., Talmadge R. Jones, George J. Roth, Robert Burton, Paul H. Dobson and M. Anthony Soares, Deputy Attys. Gen., for petitioner.

John C. Wakefield, Los Angeles, Larry C. Larsen, Gilles Attia, A. J. Weiglein, Sacramento, A. Roger Jeanson, Haas & Najarian, San Francisco, Thomas A. Farr and Rex H. Reed, Springfield, Va., as amici curiae on behalf of petitioner.

Tuttle & Taylor, Raymond C. Fisher, Barbara L. Stocker, Jeffery M. Hamerling, Los Angeles, J. Anthony Kline, San Francisco, Byron S. Georgiou, San Diego, Barbara T. Stuart, Sacramento, Jerome B. Falk, Jr., Steven L. Mayer, Howard, Prim, Rice, Nemerovski, Canady & Pollak, San Francisco, Barry Winograd, Salinas, Kristin Jensen, Robert Miller, William P. Smith, Terry

Filliman, Sacramento, Gerald Becker, Martinez, and Ronald Blubaugh, Sacramento, for respondents.

Loren E. McMaster, Bernard L. Allamano, Gary P. Reynolds, Sacramento, Richard Lobel, Van Bourg, Allen, Weinberg & Roger, Stewart Weinberg and Robert J. Bezemek, San Francisco, for intervenors.

Reich, Adell, Crost & Perry, Hirsch Adell, Charles P. Scully, Donald C. Carroll, Charles P. Skully, II, Donald H. Wollett, Ronald Yank, Franklin Silver, Carroll, Burdick & McDonough, Bodkin, McCarthy, Sargent & Smith, Timothy J. Sargent, Kevin W. Horan, Los Angeles, Gillin, Jacobson & Wilson, Ralph L. Jacobson and Cynthia T. Podren, Berkeley, as amicus curiae on behalf of intervenors.

MOSK, Justice.

Before reaching the merits of this litigation in either this case or the companion case of *Pacific Legal Foundation v. Brown*, 29 Cal.3d 168, 172 Cal.Rptr. 487, 624 P.2d 1215, we address a motion of the Governor to dismiss the petition of the Attorney General herein.

The chronology of events is significant. The 1977 Legislature adopted a State Employer-Employee Relations Act (SEERA). (Gov. Code, §§ 3512-3524.) While the Governor had the measure under consideration the then-Attorney General wrote to him under date of September 20, 1977, urging him to sign what he described as "a standard, well-accepted, existing method of resolving labor/management disputes ... a good step forward." Ten days later the Governor signed the measure into law, and it became effective on July 1, 1978.

On January 23, 1979, the Pacific Legal Foundation and the Public Employees Service Association filed in the Court of Appeal an original petition for a writ of mandate to compel the Governor, the Controller, the Public Employment Relations Board, and the State Personnel Board to perform their constitutional and statutory duties without regard to provisions of SEERA, contending the legislation was unconstitutional.

On January 30, 1979, the present Attorney General, acting through two deputies, met with members of the State Personnel Board, which had been served with summons in the Pacific Legal Foundation suit. At the conference the Attorney General, as counsel to the board, outlined the legal posture of the board and described four legal options available to it. This was a classic attorney-client scenario.

At all times up to that point, the Attorney General was by law the designated attorney for the Governor and the State Personnel Board, as well as for the other state officers and agencies involved herein. Government Code section 12511 provides that the "Attorney General has charge, as attorney, of all legal matters in which the State is interested ...." Section 12512 provides that the "Attorney General shall ... prosecute or defend all causes to which the State, or any State officer is a party in his official capacity; ..." (See also Gov. Code, § 18656.)

On February 7, 1979, however, the Attorney General initiated the present proceeding by filing an independent petition for writ of mandate in the Court of Appeal against the Governor and other state agencies, asking for relief comparable to that sought by Pacific Legal Foundation.

[1] There is no question that at such time as he believed a potential conflict existed, the Attorney General could, as he did, properly withdraw as counsel for his state clients and authorize them to employ special counsel. (Gov. Code, § 11040; *D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 15, 112 Cal.Rptr. 786.) The issue then becomes whether the Attorney General may represent clients one day, give them legal advice with regard to pending litigation, withdraw, and then sue the same clients the next day on a purported cause of action arising out of the identical controversy. We can find no constitutional, statutory, or ethical authority for such conduct by the Attorney General.

The rules of professional conduct to guide attorneys in their relationship with clients

and former clients are well established and generally understood by all attorneys in this state. Rule 5–102 of the State Bar Rules of Professional Conduct (3B West's Ann. Bus. & Prof. Code (1974 ed., 1980 cum. supp.) foll. § 6076, at p. 92) requires that before an attorney may represent interests adverse to a client, he must obtain his client's consent in writing. For violation of this principle with regard to a *former* client, an attorney has been disciplined by the State Bar. (*Galbraith v. State Bar* (1933) 218 Cal. 329, 23 P.2d 291.) This court declared in *Galbraith* that "the subsequent representation of another against a former client is forbidden not merely when the attorney *will* be called upon to use confidential information obtained in the course of the former employment, but in every case when, by reason of such subsequent employment, he *may* be called upon to use such confidential information." (Italics in original; *id.* at pp. 332–333, 23 P.2d 291.)

We took similar disciplinary action in *Hawkins v. State Bar* (1979) 23 Cal.3d 622, 629, 153 Cal.Rptr. 234, 591 P.2d 524, despite the attorney's claim that his conflicting relationship with another person arose subsequently to the initial legal consultation with his client. The relationships, we found, "arose contemporaneously"; this is comparable in time span to the chronology here between the Attorney General's legal consultation with the Personnel Board and his filing of a lawsuit against the same board.

Conduct of attorneys has also been discussed in contexts other than State Bar discipline. In *Wutchumna Water Co. v. Bailey* (1932) 216 Cal. 564, 573–574, 15 P.2d 505, this court declared that "an attorney is forbidden to do *either* of two things after severing his relationship with a former client. He may not do anything which will injuriously affect his former client in any manner in which he formerly represented him nor may he at any time use against his former client knowledge or information acquired by virtue of the previous relationship." (Italics added.) While the record here does not reveal whether the Attorney General acquired any knowledge or information from his clients, the prohibition is in the disjunctive: he may not use information *or* "do anything which will injuriously affect his former client." Unquestionably the Attorney General is now acting adversely to the position of his statutory clients, one of which consulted him regarding this specific matter.

In *Grove v. Grove Valve & Regulator Co.* (1963) 213 Cal.App.2d 646, 653, 29 Cal.Rptr. 150, the court enjoined an attorney from appearing against his former clients because "there can be no reasonable doubt that Flehr's present employment as attorney for appellant in this action is adverse to the interests of his former clients, since appellant is suing them over matters which are related to and which Flehr became conversant with during the period in which he represented respondents as their attorney." Here, too, the Attorney General is suing former clients over matters that arose during the period when by law he was counsel for those same clients.

To the same effect is *Earl Scheib, Inc. v. Superior Court* (1967) 253 Cal.App.2d 703, 706, 61 Cal.Rptr. 396, in which the court declared "The rules which underlie our decision have long been written in the books so that he who runs might read. 'It is the duty of an attorney: . . . (e) To maintain inviolate the confidence, and at every peril to himself to preserve the secrets, of his client.' (Bus. & Prof. Code, § 6068.) 'A member of the State Bar shall not accept employment adverse to a client or former client, without the consent of the client or former client, relating to a matter in reference to which he has obtained confidential information by reason of or in the course of his employment by such client or former client.'" (See also *Anderson v. Eaton* (1930) 211 Cal. 113, 116, 293 P. 788.)

In *State of Ark. v. Dean Foods Products Co., Inc.* (8th Cir. 1979) 605 F.2d 380, 384, it was held that the "attorney-client relationship raises an irrefutable presumption that confidences were disclosed." Disqualification of the Attorney General was upheld because of his prior representation of a litigant; whether he "did in fact receive

confidential information is irrelevant, the policy considerations of the Code precluding that inquiry." (*Id.*, p. 386.) The same doctrine was enunciated in *General Motors Corporation v. City of New York* (2d Cir. 1974) 501 F.2d 639, 648, and *Emle Industries, Inc. v. Patentex, Inc.* (2d Cir. 1973) 478 F.2d 562, 571. Also see Kramer, *Appearance of Impropriety* (1980) 65 Minn.L. Rev. 243, 255.

[2] But, contends the Attorney General, he is not bound by the rules that control the conduct of other attorneys in the state because he is a protector of the public interest. We have acknowledged "the Attorney General's dual role as representative of a state agency and guardian of the public interest." (*D'Amico v. Board of Medical Examiners*, supra, 11 Cal.3d at p. 15, 112 Cal.Rptr. 786.) The Legislature has impliedly recognized that a conflict might arise because of that duality by giving the Attorney General the right to withdraw from representation of his statutory clients and to permit them to engage private counsel. (Gov. Code, § 11040.) We find nothing in that circumstance, however, to justify relaxation of the prevailing rules governing an attorney's right to assume a position adverse to his clients or former clients, particularly in litigation that arose during the period of the attorney-client relationship. In short, the Attorney General cannot be compelled to represent state officers or agencies if he believes them to be acting contrary to law, and he may withdraw from his statutorily imposed duty to act as their counsel, but he may not take a position adverse to those same clients.[1]

The Attorney General insists nevertheless that he has a common law right, undefined and unrestrained, to sue in his role as "the People's legal counsel" the Governor and other public officials and agencies. This claim presupposes that the Attorney General may determine, contrary to the views of the Governor, wherein lies the public interest. While there is no question that we may consider common law practices, we may do so only if they are not superseded by or in conflict with constitutional or statutory provisions. (*People v. Nev. Penn Mines, Inc.* (1963) 212 Cal.App.2d 667, 28 Cal.Rptr. 337.) In this instance the Constitution—the highest indicator of the public interest—is both apposite and unambiguous.

[3] Article V, section 1, of the California Constitution provides that "The supreme executive power of this State is vested in the Governor. The Governor shall see that the law is faithfully executed." Article V, section 13, defines the powers of the Attorney General inter alia in this manner: "Subject to the powers and duties of the Governor, the Attorney General shall be the chief law officer of the State." The constitutional pattern is crystal clear: if a conflict between the Governor and the Attorney General develops over the faithful execution of the laws of this state, the Governor retains the "supreme executive power" to determine the public interest; the Attorney General may act only "subject to the powers" of the Governor.

Consistent with the Constitution, Government Code section 12010 provides: "The Governor shall supervise the official conduct of all executive and ministerial officers." (*Spear v. Reeves* (1906) 148 Cal. 501, 504, 83 P. 432.) The Attorney General is an executive officer who "shall report to the Governor the condition of the affairs of his office" (Gov. Code, § 12522).

We recognize there are cases in other jurisdictions that permit their attorneys general to sue any state officer or agency, presumably without restriction. Such opinions arise, however, under the peculiarities of the prevailing law in those several states, and are not persuasive here. (See, e. g., *Conn. Com'n. v. Conn. Freedom of Information* (1978) 174 Conn. 308, 387 A.2d 533); *Feeney v. Commonwealth* (1977) 373 Mass.

1. *Ward v. Superior Court* (1977) 70 Cal.App.3d 23, 138 Cal.Rptr. 532, is not to the contrary. There the lawsuit was brought by the assessor but not as a public official; he sued the county supervisors "individually and as a taxpayer." (*Id.* at p. 27, 138 Cal.Rptr. 532.) Therefore the court held the county counsel could represent the supervisors in defending the lawsuit.

359, 366 N.E.2d 1262; *E.P.A. v. Pollution Control Bd.* (1977) 69 Ill.2d 394, 14 Ill.Dec. 245, 372 N.E.2d 50; *Commonwealth ex rel. Hancock v. Paxton* (Ky.1974) 516 S.W.2d 865.)

On the other hand, several jurisdictions have prevented the attorney general from acting without constitutional or statutory authority. A federal court found it incongruous for an attorney general, purporting to act for the people, to mount "an attack by the State upon the validity of an enactment of its own legislature." (*Baxley v. Rutland* (D.Ala.1976) 409 F.Supp. 1249, 1257; see also *Hill v. Texas Water Quality Bd.* (Tex.Civ.App.1978) 568 S.W.2d 738; *Motor Club of Iowa v. Dept. of Transp.* (Iowa 1977) 251 N.W.2d 510, 515; *People ex rel. Witcher v. District Court, etc.* (1976) 190 Colo. 483, 549 P.2d 778; *Garcia v. Laughlin* (1955) 155 Tex. 261, 285 S.W.2d 191, 194; *State v. Hagan* (1919) 44 N.D. 306, 175 N.W. 372, 374; *State v. Huston* (1908) 21 Okl. 782, 97 P. 982, 989.)

Arizona, the constitution of which, like ours, declares that its governor "shall take care that the laws be faithfully executed" (Ariz.Const., art. V, § 4), reached the same conclusion as we do herein. In *Arizona State Land Department v. McFate* (1960) 87 Ariz. 139, 348 P.2d 912, 918, the supreme court of that state declared in an unanimous opinion, "Significantly, these powers are not vested in the Attorney General. Thus, the Governor alone, and not the Attorney General, is responsible for the supervision of the executive department and is obligated and empowered to protect the interests of the people and the State by taking care that the laws are faithfully executed."

The Arizona court further observed, with regard to a suit by the attorney general against a state agency: "Two propositions flow generally from this conception, embodied in our statutes, of the basic role of the Attorney General as 'legal advisor of the departments of the state' who shall 'render such legal services as the departments require' [citation]: the assertion by the Attorney General in a judicial proceeding of a position in conflict with a State department is inconsistent with his duty as its legal advisor; and the initiation of litigation by the Attorney General in furtherance of interests of the public generally, as distinguished from policies or practices of a particular department, is not a concomitant function of this role." (*Id.* 348 P.2d at p. 915)

We are not unmindful that the Attorney General may have injected himself into the litigation initiated by Pacific Legal Foundation with the public interest in mind as he perceives it. We discussed a comparable circumstance in *Anderson v. Eaton*, supra, 211 Cal. at page 116, 293 P. 788: "Nor does it matter that the intention and motives of the attorney are honest. The rule is designed not alone to prevent the dishonest practitioner from fraudulent conduct, but as well to preclude the honest practitioner from putting himself in a position where he may be required to choose between conflicting duties, or be led to an attempt to reconcile conflicting interests, rather than to enforce to their full extent the rights of the interest which he should alone represent."

[4] Finally, we conclude that Governor has chosen a proper remedy. It has been held that one way "in which the issue of a violation of the rule [of professional conduct] may be raised is by a motion by the former client in the case before the court to enjoin the adverse representation." (*Big Bear Mun. Water Dist. v. Superior Court* (1969) 269 Cal.App.2d 919, 927, 75 Cal.Rptr. 580, and cases cited.) To the extent *People v. Johnson* (1856) 6 Cal. 499, permitted the Attorney General to sue the Governor, it is disapproved.

For the reasons stated, we enjoin the Attorney General from proceeding in this matter and order that the alternative writ be discharged and the petition be dismissed.

BIRD, C. J., and TOBRINER and NEWMAN, JJ., concur.

RICHARDSON, Justice, dissenting.

I respectfully dissent, and regret today's majority opinion. It may well serve to de-

prive the office of the Attorney General of its traditional authority to initiate judicial proceedings which challenge the constitutional basis for procedures which are undertaken or threatened to be undertaken by public officials, including the Governor, when the Attorney General reasonably and in good faith believes such procedures to be defective. The Attorney General's traditional watch-dog function and his power to challenge questionable official conduct are important and necessary tools to assure the continued integrity of our system of government. Their loss would deprive the people of a first line of protection against improper executive conduct in appropriate cases. I trust that courts, including ours, will in the future narrowly limit the applicability of today's decision.

In the consolidated proceedings presently before us, petitioners have challenged the constitutional basis for the State Employer-Employee Relations Act (SEERA). (Gov. Code, § 3513.) In the instant cause—one of the consolidated proceedings—the Attorney General appears as petitioner on behalf of the People of the State of California. The majority do not reach in their opinion the substantive merits of the Attorney General's petition, but examine only a motion by respondent Governor to dismiss the petition on the ground that Attorney General is disqualified from filing it. Only that [illegible] limited issue is addressed in this dissenting opinion. After the relief sought by petitioners in the consolidated cases was ordered by the Court of Appeal, the Governor petitioned this court for hearing and simultaneously moved "to have the Court ... dismiss the Attorney General's petition and to disqualify the Attorney General from any further participation in those proceedings." This issue was argued before the court in conjunction with argument on the substantive merits.

SEERA purports to provide for collective bargaining for state civil service employees as to wages, hours and other terms and conditions of state employment. However, it is also provided in California Constitution, article VII (formerly art. XXIV) that the State Personnel Board (SPB) shall administer a civil service system of appointments and promotions, the fixing of probationary periods and classifications, the adoption of rules authorized by statute, and the review of disciplinary actions affecting employees of the state. The substantive question thus at issue but not here examined is whether the constitutional role of the SPB preempts the setting of salaries of civil service employees and, if so, whether SEERA infringes on such constitutionally vested authority. It is the Attorney General's position that the jurisdiction of the SPB to prescribe classifications for civil service positions is so integrally bound up with the setting of salaries that the legislative attempt through SEERA to subject the salary-setting function to the bargaining process conflicts with article VII.

We have said recently that, "The Attorney General ... is the chief law officer of the State (Cal.Const., art. V, § 13). As such he possesses not only extensive statutory powers but also broad powers derived from the common law relative to the protection of the public interest. [Citations omitted.] '[H]e represents the interest of the people in a matter of public concern.' [Citation omitted.] Thus, 'in the absence of any legislative restriction, [he] has the power to file any civil action or proceeding directly involving the rights and interests of the state, or which he deems necessary for the enforcement of the laws of the state, the preservation of order, and the protection of public rights and interest.' [Citation omitted.] Conversely, he has the duty to defend all cases in which the state or one of its officers is a party. (Gov.Code, § 12512.) In the course of discharging this duty he is often called upon to make legal determinations both in his capacity as a representative of the public interest and as statutory counsel for the state or one of its agencies or officers." (*D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 14–15, 112 Cal.Rptr. 786.)

In view of our foregoing description of the Attorney General's unique representative capacities which clearly distinguishes him from attorneys generally, no claim is

now made by anyone that the Attorney General cannot seek a judicial declaration of the invalidity of SEERA on constitutional or other grounds. In fact, the Attorney General not only has the right but an obligation to present what he deems to be in the public interest in the face of potential conflicts with state agencies which he nominally represents. "In the exceptional case the Attorney General, *recognizing that his paramount duty to represent the public interest cannot be discharged without conflict may consent to the employment of special counsel by a state agency or officer.* (See Gov.Code, § 11040.)" (*D'Amico, supra*, at p. 15, 112 Cal.Rptr. 786, italics added.) Nor can there be any question but that the Governor is the chief executive officer of the state and that in the performance of the Governor's executive function the Attorney General is his subordinate.

However, a state Attorney General is more than a mere appendage to a Governor's office. As our description in *D'Amico* makes abundantly clear, the Attorney General is an independent constitutional officer vested with very broad powers derived from both common law and statutory origins. He is far more than a tail on the Governor's kite. It would be a serious breach on the part of an Attorney General if he or she failed to challenge a legislative enactment which he or she believed with good cause to lack constitutional basis, even though the enactment was then actively supported by a Governor. Such a challenge is not an act of insubordination proscribed by the language of article V, section 13 of the Constitution providing that as "chief law officer of the state" the Attorney General is "[s]ubject to the powers and duties of the Governor." All powers and duties, including those of the executive, are limited by the lawful exercise thereof, and the Attorney General cannot be constrained in seeking a judicial pronouncement of the lawfulness of legislation which the Governor would implement. If the Governor could impose such limitations on the Attorney General—as in this case by precluding a constitutional challenge to SEERA—then the Attorney General would not be able to test or challenge any enactment without executive approval, and the system of checks and balances envisioned by the Constitution would fail. Such a conceptual paralysis is unthinkable, of course, and the majority, fortunately, do not urge this position.

Notwithstanding the foregoing, the majority concludes that in the particular circumstances of this case the Attorney General has conducted his office in a manner which disqualifies him, thus leaving the public interest without any representation in these proceedings. The disqualifying conduct is said to deny respondents a fair opportunity to litigate issues on the merits because of advantages gained by the Attorney General through his relationships to some or all of respondents. The challenged conduct consists of (1) a letter sent by the Attorney General on September 20, 1977, to the Governor urging him to sign the legislation (Sen. Bill No. 839) enacting SEERA into law, (2) a conference between deputy attorneys general and representatives of the SPB on January 30, 1979, at which the deputies urged the invalidity of SEERA and sought SPB support in seeking a judicial declaration thereof, and (3) utilization of those same deputies who had previously represented SPB to prosecute the instant proceedings.

The letter is of little significance. Although former Attorney General Younger urged the Governor to sign Senate Bill No. 839, it is clear that because the Governor had been active in procuring the legislation he would sign it independently of the Attorney General's recommendation. The content of the letter deals with continuing efforts by public employees to gain some participation in the determination of their working conditions and compensation, noting that "some public employees tend to believe their only effective tool to get proper attention is to strike." While the letter does not address constitutional or other legal issues, it concludes that the "bill will assist greatly in resolving [existing] grievances."

The letter may well be viewed as an effort finally to confront issues which must

be resolved in the event that collective bargaining by state employees is implemented. These proceedings are a step in such resolution. The Attorney General's letter seeks to move these long-standing issues toward a final resolution without addressing the issue of constitutional infirmities, if any, in the legislation.

The Attorney General-SPB conference of January 30, 1979, was called by the Attorney General's office following commencement by Pacific Legal Foundation (PLF) of the proceedings now consolidated with the instant cause. Present at the meeting were members of SPB and its executive officers. The Attorney General was represented by Deputies Talmadge Jones and Stephen Porter. Mr. Jones noted the PLF action in which SPB was named a respondent, and stated SPB had four options in response thereto: (1) to join PLF in urging the unconstitutionality of SEERA, (2) to remain a respondent but to agree nonetheless that SEERA is unconstitutional, (3) to remain a respondent but to take a "noncommittal" position as to the constitutionality of SEERA, or (4) to defend the constitutionality of SEERA. The deputies recommended the first option. They asserted this was the unanimous view of those in the Attorney General's office who had considered the matter, and that SPB's concurrence would add weight to that view in court proceedings because of SPB's administrative expertise in concerned areas.

SPB deliberated the matter in executive session. It unanimously concluded to remain a respondent and to continue to assert the constitutionality of SEERA. When so advised, the deputies suggested the Attorney General might initiate an independent action challenging the constitutionality of SEERA. While representatives of the Attorney General's office did not meet with other respondents, within a few days of the meeting with SPB the Attorney General informed by letters to the Governor, the Controller and the SPB that in the Attorney General's view SEERA was unconstitutional and that he would commence an independent action for a judicial declaration. The Attorney General consented in the letters to the use of other counsel by the addressees. (Gov.Code, § 11040.)

There was no impropriety in the conduct of representatives of the Attorney General in meeting with SPB. The representatives did no more than inform SPB of the Attorney General's opinion concerning the constitutional invalidity of SEERA, seek the support of SPB and advise of the possibility of an independent action by the Attorney General. Indeed, the Attorney General acted well within his duties and responsibilities in asserting an opinion that SEERA was unconstitutional. His nonjudicial opinions are "accorded great respect by the courts." (*Wenke v. Hitchcock* (1972) 6 Cal.3d 746, 752, 493 P.2d 1154.) The most relevant court decision then appeared to support his conclusion. (See *Fair Political Practices Com. v. State Personnel Bd.* (1978) 77 Cal. App.3d 52, 56, 143 Cal.Rptr. 393.) The merits of the constitutional issue were neither stated nor discussed. The Attorney General sought no information from, and none was given by, SPB other than its status as a party in the action or actions. The Attorney General forthrightly stated his position and reasons for approaching SPB. He gained no advantage and SPB suffered no disadvantage or prejudice. This has been conceded by all parties to the action.

The final claim of misconduct is likewise wholly without significance. The fact that deputies who had earlier represented SPB are active in prosecuting the Attorney General's action against SPB and others raises no issue of a breach of confidence. The Attorney General's position on the merits in these proceedings was made clear at the outset and we are referred to neither specific advantage gained nor confidence breached. Again, this has been conceded by the parties.

In asserting disqualification the Governor relies on rules 4-101 and 5-102(B), Rules of Professional Conduct. Rule 4-101 provides: "A member of the State Bar shall not accept employment adverse to a client or former client, without the informed and written consent of the client or former client,

relating to a matter in reference to which he has obtained confidential information by reason of or in the course of his employment by such client or former client." Certainly no one can claim in good faith that the Attorney General obtained confidential information by directing his September 20, 1977, letter to the Governor. In requesting and attending the January 30, 1979, conference with SPB, and in utilizing the deputies who had participated in that conference to conduct these proceedings, the Attorney General neither sought to gain nor gained, directly or indirectly, any confidential information.

The reason for the foregoing meeting becomes clear from a communication to the Court of Appeal by the Attorney General four days before the meeting with SPB. In seeking an extension of time to respond to the PLF petition, the Attorney General stated that the petition raised potential conflicts of interest among the various respondents, and that neither these conflicts nor representations by the Attorney General of the various respondents, had been resolved. The SPB meeting was essential to the Attorney General's determination of which, if any, agencies and offices he could represent. The office of the Attorney General approached SPB first as most likely to agree with PLF because SPB had only one year earlier forcefully argued its exclusive constitutional right to deal with the fixing of salaries for state employees. (See *Fair Political Practices Com. v. State Personnel Bd.*, supra, 77 Cal.App.3d at p. 56, 143 Cal. Rptr. 393.) The Attorney General thus had sound reason to believe SPB would join him in rejecting SEERA.

I find it significant that SPB itself raises no claim that—because of the conference or the prior representation by certain deputies—a confidence has been breached or that there is any impropriety in the Attorney General's conduct and participation in these proceedings. The Governor's reliance on cases dealing with disqualification of private attorneys pursuant to rule 4-101, is misplaced. When a public attorney is required by law to fulfill his legal duty of representing public officials or agencies in exercising exclusive control of civil litigation, the usual attorney-client relationship does not prevail within the reasonable meaning of rule 4-101. (*Ward v. Superior Court* (1977) 70 Cal.App.3d 23, 34, 138 Cal. Rptr. 532.) In similar fashion it has been held that a county counsel was not disqualified from representing in their official capacities county officials sued by the county assessor—whom the county counsel had previously represented—for defamation and violation of civil rights. (*Ward v. Superior Court*, supra, at p. 34, 138 Cal.Rptr. 532.)

As an *alternative ground* for the holding in *Ward* that "no attorney-client relationship existed between the county counsel and [the county assessor] within the meaning of rule 4-101," the court further observed: "The purpose of rule 4-101 forbidding an attorney from accepting employment adverse to a former client is to protect the former confidential relationship. Thus the rule does not apply where an attorney accepts employment adverse to a former client if the matter bears no relationship to confidential information acquired by the attorney as a result of the former attorney-client relationship." (*Id.*, at p. 34, 138 Cal.Rptr. 532.) Accordingly, the Governor's complete failure to establish that any confidences obtained by the Attorney General in his former attorney-client relationships bear on the merits in these proceedings is thus fatal to the motion for disqualification pursuant to rule 4-101. In fact, the issues raised on the merits of these proceedings are pure issues of law, the only question being whether a legislative enactment infringes on a constitutional proscription. There is no "confidential information" in the possession of respondents which—whether or not conveyed to the Attorney General—might have any bearing on resolution of these constitutional issues.

For reasons similar to those which render inapplicable rule 4-101 in the circumstances of these proceedings, rule 5-102(B) is also not controlling. This latter rule provides that a "member of the State Bar shall not represent conflicting interests, except with the written consent of all parties con-

cerned." The Attorney General is not, of course, representing conflicting interests in these proceedings. While it is true that he has represented or now represents clients whose interests are in conflict with those of the Attorney General as representative of the public interest, such conflicts are inherent in the applicable law pursuant to which the Attorney General must conduct himself. In his "dual role as representative of the state agency and guardian of the public interest" (*D'Amico v. Board of Medical Examiners*, supra, 11 Cal.3d 1, at p. 15, 112 Cal.Rptr. 786), he may be called upon to make determinations and decisions which, while consistent with the interests of one "client," are in conflict with those of another. In such a case he must serve "his paramount duty to represent the public interest," withdraw from his other representations and consent to their employment of special counsel. (*Id.*) The Attorney General has conducted himself accordingly. Indeed, it is difficult to chart a course of conduct more consistent with legal requirements than that engaged in by the Attorney General whom the Governor seeks to disqualify.

The Governor's assertion that rule 5–102(B) is applicable to the Attorney General in these circumstances, if correct, would result in the disqualification of the Attorney General in every instance where he had—prior to taking action against a public official or agency guilty of some mal- or misfeasance—represented or counseled that official or agency on an independent matter. It is manifest that rule 5–102(B) is not intended to so handcuff the official who is constitutionally described as the "chief law enforcement officer of the state" and who frequently is the sole representative of the public interest. The Attorney General's role, being grounded in the common law (*D'Amico v. Board of Medical Examiners*, supra, 11 Cal.3d, at p. 14, 112 Cal.Rptr. 786), is thus similar to that role fully recognized in sister states. Thus, the Supreme Court of Massachusetts has held that the Attorney General, in exercising his "'common law duty to represent the public interest'" in a manner contrary to dictates of a public agency he normally represents, is not to be "constrained by the parameters of the traditional attorney-client relationship." (*Feeney v. Com.* (1977) 373 Mass. 359, 366 N.E.2d 1262, 1266; see also *Conn. Com'n v. Conn. Freedom of Information* (1978), 174 Conn. 308, 387 A.2d 533, 537 ["This special status of the attorney general—where the people of the state are his clients—cannot be disregarded in considering the application of the provisions of the code of professional responsibility to the conduct of his office."]; *E. P. A. v. Pollution Control Bd.* (1977), 69 Ill.2d 394, 14 Ill.Dec. 245, 372 N.E.2d 50; *Commonwealth ex rel. Hancock v. Paxton* (Ky.1974) 516 S.W.2d 865.)

The record establishes that the Attorney General has conducted himself with the professionalism required of his office, particularly in view of the usual difficulties attending a transition which occurred in that elective office in January 1979. No cause appears for his disqualification, which would thereby deprive the people of any legal representation in these important proceedings.

The Governor's motion should be denied.

Rehearing denied; RICHARDSON, J., dissenting.

172 Cal.Rptr. 487

PACIFIC LEGAL FOUNDATION et al., Petitioners,

v.

Edmund G. BROWN, Jr., as Governor, etc., et al., Respondents;

California State Employees' Association et al., Interveners.

S.F. 24168.

Supreme Court of California, In Bank.

March 12, 1981.

Rehearing Denied April 22, 1981.

Public interest law organization and employee organization sought peremptory

Alaska State Legislature

Representative Joe Green
District 19

Sponsor Statement

HJR 19 - Election of the Attorney General

HJR 19 proposes to amend the Alaska Constitution to elect the state attorney general.

The notion of electing, rather than appointing, the state's chief legal officer is not new. Presently, 44 other states elect their attorney general. Several resolutions proposing to do so have been introduced in preceeding Alaska legislatures. In fact, the subject was considered by the Alaska Constitutional Convention. Fairbanks delegate Frank Barr proposed a resolution to the convention that would have allowed Alaskans to elect their attorney general, but was voted down.

My arguements for direct selection of the attorney general by the voters are: Election provides for greater autonomy for the attorney general and the department of law; election provides for freedom from political manipulation; and, election provides for a stronger link between the attorney general and his or her real clients -- the people of Alaska.

Current law defines the attorney general as "the legal advisor of the governor and other state officers" (AS 44.23.020). By definition, the relationship between the governor and his attorney precludes autonomous, independent action. Under the current arrangement, the attorney general, as a political appointee and member of the governor's cabinet, is obligated to take into account the same political considerations as other cabinet officers. While the attorney general may not necessarily interpret the law to satisfy the political needs of the governor, it is difficult to imagine that he would not take potential political consequences into consideration during his deliberations.

In summary, the question is: should the attorney general of Alaska represent the governor or be the chief legal officer representing the people of Alaska? If you believe, like I do, that the attorney general should represent the people, then I urge your support of HJR 19.

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

TONY KNOWLES, GOVERNOR

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April 17, 1997

Honorable Joe Green
Representative
Alaska State Legislature
State Capitol Room 118
Juneau, Alaska 99801-1182

Re: HJR 19 - Proposing a constitutional amendment to elect the attorney general

Dear Representative Green:

I am sending this memorandum for the record to accompany my testimony on HJR 19 (proposing a constitutional amendment to elect the attorney general).

In order in ensure that all of the debate at the constitutional convention is before the Judiciary Committee, I have attached a copy of the debate for the committee files. The debate includes discussion of whether to have elected officers other than the governor and lieutenant governor (then secretary of state), and specifically whether to elect an attorney general. Two strong points were made in favor of the concept of an appointed attorney general. The first point concerned the nature of the office of attorney general. Those in favor of an elected attorney general characterized the office as the "attorney for the people." In that connection, it was argued that the attorney general needed a franchise to office granted by the people rather than by the governor. This concept was strongly refuted by delegate McLaughlin when he said:

> The blunt fact is that there is a general misconception as to the function of the attorney general. The attorney general is a lawyer and his opinion is the equivalent of any other lawyer's. It can be attacked. Any recommendation he makes, if acted upon, can always be attacked in the courts by private citizens. His opinion is worth the paper it is written upon. It's impressive upon the state and the officials are bound by it until some irate taxpayer attacks it and the actions taken under the authority of it, and the courts can promptly overrule it.

Minutes of the Alaska Constitution Convention at 2196.

The attorney general is the governor's chief legal advisor. In this capacity, he advises not only the executive, but the principal department heads and state agencies under the governor's

supervision. By enjoying the confidence of the governor, the public interest is benefited by a consolidated law office that is both efficient and economical.

The second point made related to accountability of the government to the people. Convention delegates were prepared to make drastic changes from the diffused form of government provided through the Territory of Alaska. You will recall that many basic state responsibilities were under federal agency jurisdiction. The governor, collector of customs, adjutant general, U.S. marshal, judges, district attorneys, and other officials were federal appointees. To dilute the authority of these federally appointed officials, the territorial legislature provided for a number of locally elected officials including the attorney general, treasurer, highway engineer, and commissioner of labor. As a result of this fragmentation of authority, no single officer was accountable for the performance of government. The rationale for a minimum number of elected officials was expressed by Delegate Lundborg as follows:

> We in our committee felt that it would be the wishes of the majority of the Convention to have a strong executive. By that we did not mean a dictator, one who would get into power and be the absolute power in the state, but one who through appointive powers would be able to select his co-workers down through the various offices so that when the state's functions would be successful, we could say that we had a good governor, and when they would not be successful we would know who to blame and could vote accordingly at the next election.

Minutes of the Constitutional Convention at 2217. I submit that these reasons have continued viability over 40 years after they were expressed. I have also enclosed a copy of a transcript of testimony on a senate resolution on this subject, and a copy of an article that appeared on the Opinion Page of the Anchorage Daily News.

I offer the following comments concerning specific provisions of the resolution:

(1) The Judiciary Committee should carefully consider sec. 2, which prohibits the governor from reorganizing the Office of the Attorney General. This would leave organization of the office entirely up to the attorney general and to a lesser degree, the legislature, which can influence organization by prescribing certain duties by law. This insulation of the attorney general may be desirable to preserve independence, but it may also create a wall between the governor and his lawyer that cannot be crossed. This could cause the governor to establish separate counsel within the Office of Governor and other principal departments.

(2) Section 5 of the resolution provides that the legislature may prescribe additional qualifications for the Office of the Attorney General. Proposed sec. 28(a). This provision is exceedingly broad, and tends to hand to the legislature a power that is not given for other statewide

officeholders. This provision needs some discussion in committee to develop the intent of the sponsor.

(3) Section 5 also contains a provision that will fundamentally alter the responsibilities of the attorney general. In proposed sec. 28(c), the attorney general is required to defend the state, state agencies, public corporations, or a state public enterprise. No mention is made of the power of the attorney general to bring suits on behalf of the state. This omission should be remedied. If the legislature fails to prescribe other non-litigation related duties for the attorney general, the office will devolve into an agency exclusively engaged in litigation on behalf of public agencies. This would be similar to the U.S. Department of Justice, which may have the unintended effect of hastening the establishment of agency counsel in the various principal departments who would be responsible for general advice to agencies not involving litigation.

(4) The resolution may have the unintended effect of expanding the powers of the attorney general concerning representation of public entities in civil matters. The list of entities to be represented by the elected attorney general mentioned in sec. 28 (c) could be interpreted to include state special service areas, and state chartered corporations not currently represented in litigation by the Office of the Attorney General. For example, the Alaska Railroad Corporation and the University of Alaska are typically represented by separate counsel.

(5) The requirement to defend violations of state criminal law including infractions and violations may have the unintended effect of shifting to the attorney general the burden of prosecuting motor vehicle, traffic and other minor offenses charged by municipal peace officers. This would have a significant fiscal effect on the budget of the Office of the Attorney General.

The department has prepared and will separately submit a fiscal note outlining the increased appropriations needed to implement the resolutions.

Thank -you for the opportunity to comment on the resolution.

Very truly yours,

BRUCE M. BOTELHO
ATTORNEY GENERAL

By: James L. Baldwin
James L. Baldwin
Assistant Attorney General

JLB:clh
Enclosures

COPY

File: Attorney General
Anchorage Daily News - March 14, 1997
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AN ELECTED ATTORNEY GENERAL IS A BAD IDEA

By HERB BERKOWITZ

The framers of the Alaska Constitution, with the benefit of 150 years of American experience, provided for an attorney general appointed by the governor. This choice comes under periodic attack from those who, like The Voice of The Times, believe that an elected attorney general would better "represent the people."

That definitely has a nice ring to it, but actually how would the state's chief lawyer go about representing the people?

When you talk about any lawyer "representing" any client you are using a term of art which describes a relationship of absolute loyalty. Lawyers worry a lot about "conflicts of interest" because they face significant professional and legal sanctions if they find themselves attempting to simultaneously represent interests which cannot be reconciled. For example, a lawyer who attempts to represent both the husband and wife in a divorce action is begging for trouble and deserves it when it comes.

It may be too much to expect your lawyer to give you the right answer 100 percent of the time, but you have the absolute right to expect your lawyer to be loyal 100 percent of the time.

Now consider again an elected attorney general who supposedly represents the people. What people?

Use of that word is very stylish (as in People's Republic) but it denotes an abstraction which does not really exist. The "people" in Alaska are several hundred thousand individuals whose interests sharply conflict. Some are pro-life and some are pro-choice. Some lean toward economic development and some toward environmental protection. Some benefit from big government and some benefit from small government.

It is impossible for the attorney general to represent all those people since no one can be loyal to all those conflicting interests. An elected attorney general who theoretically represents everyone actually represents no one.

Under our current system it is crystal clear who the attorney general represents, namely, the executive branch of state government. When the attorney general takes a public stance on a legal issue it reflects the views of the incumbent governor. When a new governor takes over and, as now, retains the same highly competent attorney general, the attorney general has a new client and is duty-bound to reflect the new client's views.

No one should expect the attorney general to be "neutral" since it is not a lawyer's job to neutral. If you don't agree with what emanates from the attorney general's office the solution is not a different lawyer, but a different governor.

I am not saying that lawyers cannot be neutral, only that they cannot be neutral when representing a client. When we need a neutral legal opinion we turn to the judicial branch. Just as it is a lawyer's job to take sides, it is a judge's job not to.

If you disagree with the attorney general's legal opinion the proper way to overturn that view is either wait for the next gubernatorial election or take the matter to court. Those who whine about the attorney general not representing the people really mean that the governor is not representing them. When they agree with the governor then the attorney general seems to represent the people just fine.

The drafters of the Alaska Constitution knew what they were doing. They saw that in states with an elected attorney general you get a politician with a law degree rather than a competent practicing attorney.

Experience shows that with an elected attorney general you face pointless conflict in the conduct of government with the attorney general spending as much time posturing (and often looking to be the next governor) as lawyering.

What is most surprising to me as a conservative is that The Voice of The Times is one of the major proponents of an elected attorney general. It is liberals who love to hide behind amorphous concepts like the "public" (e.g. Alaska Public Interest Research Group) to further their own agenda. A conservative who talks about Alaska's wonderfully diverse population as the people gives aid and comfort to those who believe in group rights rather than individual rights.

Finally, one of the most important conservative credos is that if something ain't broke don't fix it. Alaska's method of choosing an attorney general ain't broke. So let's not fix it.

Herb Berkowitz is a lawyer in Anchorage.

COPY

1979

ALASKA CONSTITUTIONAL CONVENTION

January 13, 1956

FIFTY-SECOND DAY

been the function of all secretaries of state and that is the implication of the title. It is a broad general policy-making situation and also a program-arranging situation, and it is second in command to the governor. Now I think that you could either make that office as effective or as ineffective as the legislature and the governor desire it to be, but in the concept of the strong executive, we had the concept of a strong efficient second-in-command.

BUCKALL.W: One more question. Don't you feel that you would get a better secretary of state if the governor was allowed to appoint the secretary of state subject to approval by the senate?

V. RIVERS: Well, Mr. President, there we come back again to that problem of just how strong should a strong executive be. Theory and the ideal say that the strong executive should be a governor elected with the appointive power of all other officials. That has, we believed in the Committee or some of us did, there are exceptions, that that had a disadvantage in that there was no particular individual known to the people who had been exposed to the elective process being prepared to succeed to the governor, and we also felt that the people wanted an expression in the matter of just more than one individual as their elected representative. We also felt that an elected representative would make a better second-in-command in the absence or the death of the governor, that he would have then been elected by the popular will. So whether I believe or not that the lieutenant governor should be appointed -- personally, my stand was against just the one single elective head of government, the governor.