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Holes in the Defense: Evaluating the North Carolina Attorney General's Duty to Defend and the Responses of Other Government Actors

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Holes in the Defense: Evaluating the North Carolina Attorney General’s Duty to Defend and the Responses of Other Government Actors*

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INTRODUCTION

On September 30, 2013, North Carolina Attorney General Roy Cooper had a problem. The federal government had just filed suit against the state of North Carolina, alleging that the state’s recently

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passed “Voter I.D.” law was unconstitutional.¹ The Republican-led legislature had passed the bill just two months earlier,² and as it sat pending on Republican Governor Pat McCrory’s desk, Cooper, an independently elected Democrat, had come out against it.³ After initially sending Governor McCrory a letter urging him to veto the bill,⁴ Cooper had created an online petition where members of the public could show support for a veto as well.⁵ Cooper’s office had also issued a press release, stating that the law “makes it harder for people to register and vote,” and that it would “do damage” to the state’s election process.⁶ Despite Cooper’s efforts, Governor McCrory signed the bill into law on August 12.⁷

Then came the lawsuit by the U.S. Department of Justice—and Cooper’s dilemma. The responsibility for defending the constitutionality of state laws in court fell to his office,⁸ but he had quite clearly and publicly expressed his view that the statute “would do damage” to the state.⁹ As the state’s Attorney General, was he required to defend a law that he publicly opposed? Could he decline to defend? What reasons would justify such a decision? What actions could the General Assembly and Governor McCrory take to assure a vigorous defense of the new statute that they both supported?

The law sheds some light on the answers to these inquiries but is ultimately unclear. While this ambiguity is due in part to the historical

1. See Complaint at 30–31, *United States v. North Carolina*, No. 13-cv-861 (M.D.N.C. Sept. 30, 2013), ECF No. 1, available at <http://www.justice.gov/iso/opa/resources/646201393013723793555.pdf>.

2. See Aaron Blake, *North Carolina Governor Signs Extensive Voter ID Law*, WASH. POST (Aug. 12, 2013, 2:35 PM), <http://www.washingtonpost.com/blogs/post-politics/wp/2013/08/12/north-carolina-governor-signs-extensive-voter-id-law/>.

3. Angelica Alvarez, *Cooper Urges McCrory to Veto Voter ID Bill*, *Inside Politics*, ABC 11 (Aug. 8, 2013), <http://abclocal.go.com/wtvd/story?section=news/politics&id=9200506>.

4. *Id.*

5. *Id.* For the language of the petition, see *Governor McCrory: Stop the Assault on Voting Rights*, CHANGE.ORG, <http://www.change.org/p/governor-mccrory-stop-the-assault-on-voting-rights> (last visited May 5, 2014).

6. Lucy Butcher, *Attorney General Launches Petition Asking McCrory to Veto Voting Restriction Bill*, THE CAROLINA MERCURY (Aug. 9, 2013), <http://www.carolinamercury.com/2013/08/attorney-general-launches-petition-asking-gov-to-veto-voting-restriction-bill-hb589/>.

7. Blake, *supra* note 2.

8. See Robert Morgan, *The Office of the Attorney General*, 2 N.C. CENT. L.J. 165, 167 (1970) (“[T]he logical conclusion in interpreting the common law was that the Attorney General had the duty and the exclusive right to represent . . . governments and their agencies and officers.”).

9. Butcher, *supra* note 6.

development of the office of Attorney General,¹⁰ it is also likely attributable to the Democratic Party's dominance of state government in the past century.¹¹ While political and policy conflicts inevitably occurred, these disputes generally took place within a single-party framework, and North Carolina courts were rarely forced to determine the relative rights and obligations of the Attorney General.¹² As a result, the Attorney General's duty to defend the constitutionality of state laws and the intra-government relationships involved in such a defense have received only limited treatment by state courts.¹³ Meanwhile, a changing political dynamic in North Carolina¹⁴ and a growing willingness among attorneys general in other states to decline to defend their states' laws in court¹⁵ have added renewed relevance to these important questions.¹⁶ As Attorney

10. See *infra* Part I (describing the history of the development of the office of the Attorney General in North Carolina).

11. Since the turn of the twentieth century, the Democratic Party has exercised control over all levels of state government. Between 1901 and 2013, Democrats controlled the governor's mansion for all but three terms. See *North Carolina: Past Governors Bios*, NAT'L GOVERNORS ASS'N, http://www.nga.org/cms/home/governors/past-governors-bios/page_north_carolina.html (last visited February 16, 2014). Likewise, between 1901 and 1995, Democrats maintained majority control of both chambers of the North Carolina General Assembly. While the North Carolina House of Representatives experienced some variation in control between 1994 and 2010, including a brief period of a 60-60 partisan split among House members, see *Decker Switches to Democrats, Giving House Even Split*, WRAL (Jan. 25, 2003), http://www.wral.com/news/loca/story/1089942/?comment_order=forward, Democrats maintained control of the North Carolina Senate until 2011, see Lynn Bonner & Michael Biescker, *GOP Takes the General Assembly*, NEWS & OBSERVER (Raleigh, N.C.) (Nov. 3, 2010), <http://www.newsobserver.com/2010/11/03/777711/gop-takes-the-general-assembly.html>. Republicans' century-long drought of legislative and executive control ended when Republicans secured majorities in both chambers following the 2010 elections, see *id.*, and added the Governor's office in 2012. See John Frank, *Governor: McCrory Becomes First Republican to Win Governor's Race in 20 Years*, NEWS AND OBSERVER (Raleigh, N.C.) (Nov. 3, 2010), <http://www.newsobserver.com/2012/11/07/2466550/governor-mccrory-expected-to-easily.html>.

12. Cf. *Martin v. Thornburg*, 320 N.C. 533, 359 S.E.2d 472 (1987) (discussing the relative powers and obligations of the Attorney General and the Governor). Interestingly, *Martin* is one of the only North Carolina cases discussing the respective rights and obligations of the Attorney General and other government actors in representing the state, and the case was brought by the administration of former Governor Jim Martin, one of only two Republicans elected to the governorship between 1901 and 2012. See *id.*

13. See Katherine Shaw, *Constitutional Non-Defense in the States*, 114 COLUM. L. REV. 213, 217 (2014) (claiming that her most recent article is the first national review of the discretion of state attorneys general to defend laws).

14. See *supra* note 11.

15. See Shaw, *supra* note 13, at 237 (providing four case studies of executive non-defense in the states, stating that these examples were a few "of many").

16. See *id.* at 214-15 (discussing the new relevance of the non-defense debate in light of the federal government's stance on the Defense of Marriage Act).

General Cooper's dilemma illustrates, this changing legal and political environment deserves additional exploration. This Comment seeks to engage in such exploration by sketching out the edges of the powers and obligations of the office of the North Carolina Attorney General and other government actors with respect to the defense of the state's laws. These edges are admittedly rough, but, at bottom, this analysis provides a framework for thinking through elected officials' potential responses when the State's laws are challenged.

The analysis proceeds in four parts. Part I will review the historical development of the North Carolina Attorney General, as well as set out the current sources of the office's authority and responsibilities. Part II will then examine the Attorney General's duty to defend in North Carolina, establish a framework for evaluating the availability of non-defense, and present two specific arguments that *might* justify declining to defend a state law. Finally, Part III will examine the legal options available to other government actors to assure an adequate defense of a law—both if the Attorney General defends it and if he or she chooses not to do so.

I. THE NORTH CAROLINA ATTORNEY GENERAL: AN "ANCIENT AND HONORABLE OFFICE"¹⁷

A. *Historical Development*¹⁸

The office of Attorney General originated in England sometime over the course of the late thirteenth century,¹⁹ although apparently not as an office, but rather simply as a reference to the regular employment of a personal attorney to represent the King before his courts.²⁰ By the mid-fifteenth century, however, the position had taken on an official capacity—the *attornatus generalis in Anglia*²¹—

17. Morgan, *supra* note 8, at 165.

18. Although a comprehensive review of the origins and authority of the North Carolina Attorney General is not within the purview of this article, any undertaking to investigate the office's powers and duties must begin with a basic review of the development of the office of Attorney General and its current position within the state's constitutional scheme.

19. See Morgan, *supra* note 8, at 165 (stating that the office may have come into existence as early as 1278 A.D.); see also JAMES WILLIAM NORTON-KYSHE, *THE LAW AND PRIVILEGES RELATING TO THE ATTORNEY-GENERAL AND SOLICITOR-GENERAL OF ENGLAND* 2 (photo. reprint 1979) (1897) ("[T]he first mention made of an advocate being regularly employed on behalf of the King appears in the reign of Henry III, when it is recorded that one Lawrence del Brok pleaded for the King . . . from 1253 to 1267.").

20. See NORTON-KYSHE, *supra* note 19, at 1 (stating that the term "Attorney General" or "General Attorney" likely meant only a general representative).

21. *Id.* at 3.

and by the seventeenth century, the office had assumed its modern place as “the preeminent legal representative of the Sovereign.”²²

During the seventeenth and eighteenth centuries, the office developed a dual role.²³ On the one hand, the English Attorney General served as “the law agent and adviser of the Sovereign,” a role consistent with the earliest outgrowths of the office, when the Crown was an individual political entity somewhat distinct from the concept of the “State.”²⁴ On the other hand, as English political institutions solidified, the Attorney General was understood to represent the State itself, rather than simply the Crown.²⁵ In effect, the King’s attorney became England’s attorney.²⁶ This public function ultimately formed the basis for the common law view that “the Attorney General was in possession of nearly unlimited powers to act unilaterally as the representative of the people’s legal interests.”²⁷

It was in this form that the office of the Attorney General came to the American colonies, including North Carolina.²⁸ The colonial governments appointed attorneys general on behalf of the Crown, and these officers possessed the same powers as the English Attorney General, essentially serving as his representatives abroad.²⁹ After the American Revolution, all thirteen newly formed states adopted the office of the Attorney General in one form or another.³⁰

B. *The North Carolina Attorney General*

Although the office’s particular place in the state’s constitutional scheme has shifted over time, North Carolina has included the Attorney General among its constitutional officers from the very

22. Rufus L. Edmisten, *The Common Law Powers of the Attorney General of North Carolina*, 9 N.C. CENT. L.J. 1, 4 (1977).

23. See William P. Marshall, *Break Up the Presidency? Governors, State Attorneys General, and Lessons from the Divided Executive*, 115 YALE L.J. 2446, 2449–50 (2006) (stating that during the sixteenth and seventeenth centuries, “the Attorney General established that his duty of representation extended to the public interest and not just to the ministries of government”).

24. NORTON-KYSHE, *supra* note 19, at 74–75.

25. See *id.* at 75.

26. *Id.* (“[T]he Attorney General in his public capacity [became] the representative of the nation.”).

27. Michael Signer, *Constitutional Crisis in the Commonwealth: Resolving the Conflicts Between Governors and Attorneys General*, 41 U. RICH. L. REV. 43, 55 (2006).

28. See Edmisten, *supra* note 22, at 5. The original Carolina colony was comprised of what is currently both North Carolina and South Carolina, and the colony had just one Attorney General. *Id.* By 1767, however, North Carolina had its own colonial Attorney General selected from the lawyers in the territory. *Id.*

29. See *id.*

30. See Marshall, *supra* note 23, at 2450.

beginning of its independent statehood. North Carolina's first constitution, ratified in 1776, established the office but prescribed no duties or powers.³¹ Interestingly, this first constitution placed the Attorney General within the judicial branch of government, "apparently on the theory that he was an officer of the court,"³² and directed the General Assembly to appoint the Attorney General, along with judges, to lifetime tenure.³³

The Constitution of 1868,³⁴ adopted after the Civil War, changed this scheme by placing the Attorney General within the newly created "Executive Department"³⁵ as an *ex officio* legal adviser to it.³⁶ He was to be publicly elected to four-year terms,³⁷ and the office's duties were to be "prescribed by law."³⁸ During this period, the general responsibilities and obligations of the modern North Carolina Attorney General developed as the General Assembly acted on its constitutional mandate and created a statutory framework for the office.³⁹ This involved the expansion of some powers, such as a solidified role as the legal representative of the growing state apparatus, continued expansion of the responsibility to handle all criminal appeals, and explicit recognition of the right to bring actions in certain areas of the public interest.⁴⁰ The General Assembly also diminished other responsibilities, particularly in the criminal arena, as the legislature opted for a model of district solicitors⁴¹ to manage most of the state's criminal prosecutions at the trial level.⁴²

It was within this evolving legal framework that the new Constitution of 1971, currently in force today, was constructed and ratified. Although the 1971 Constitution included some significant structural changes to various parts of state government, it left the fundamental arrangement of the Attorney General's office intact.⁴³

31. See N.C. CONST. of 1776, § 13.

32. JOHN V. ORTH, *THE NORTH CAROLINA STATE CONSTITUTION* 6 n.20 (2d ed. 2011).

33. See N.C. CONST. of 1776, § 13.

34. See N.C. CONST. of 1868, art. III, § 1.

35. *Id.*

36. *Id.* § 14.

37. *Id.* § 1.

38. *Id.* § 13.

39. See Albert Coates, *The State's Legal Business*, 16 N.C. L. REV. 119, 128 (1938).

40. See *id.* at 128-33. Examples of these actions in the "public interest" include antitrust suits and actions enforcing charitable trusts. *Id.*

41. See *id.* at 128. These solicitors were the predecessors of our modern-day District Attorneys.

42. *Id.*

43. Compare N.C. CONST. of 1868, art. III, §§ 1, 13 (placing the Attorney General within the "Executive Department" and having his or her duties prescribed by law), *with*

The Attorney General continues to be elected statewide every four years,⁴⁴ to serve as an “Officer” in the executive branch,⁴⁵ and to have his or her duties “prescribed by law.”⁴⁶ No other constitutional powers or duties are assigned to the office.⁴⁷

The constitutional direction that the Attorney General’s duties are to be “prescribed by law”⁴⁸ makes the General Statutes of North Carolina the primary basis for defining the scope of the office.⁴⁹ The “most significant statutory grouping of powers” is found in section 114 of the General Statutes,⁵⁰ which establishes a Department of Justice, headed by the Attorney General, and lays out the office’s authority and obligations.⁵¹ Importantly, the statute sets out from the beginning that the North Carolina Attorney General retains the powers of the Attorney General at common law.⁵² While the scope of these powers will be discussed in further detail,⁵³ generally “[t]he Attorney General, as primary legal officer of the state, has consistently been viewed in common law jurisdictions as possessing the power to initiate, conduct, and maintain any suits necessary for

N.C. CONST. art. III, § 7 (listing the Attorney General under the “Executive” article and having his or her duties prescribed by law). While the fundamental arrangement of the office stayed the same, there were some minor changes. Most notably, the 1971 Constitution dispensed with the language of the “Executive Department,” and instead broke out the descriptions of the offices of Governor and Lieutenant Governor, and then denoted the remaining members of the executive as “officers,” within the “Executive” article. See N.C. CONST. art. III. Other slight changes relevant to the Attorney General include (1) adding the Attorney General as an official member of the Council of State, N.C. CONST. art. III, § 8; (2) mandating that the Attorney General be a licensed attorney, N.C. CONST. art. III, § 7(7); and (3) not including the Attorney General on the State Board of Education, as he was under the 1868 Constitution, compare N.C. CONST. of 1868, art. IX, § 7 (“The Governor, Lieutenant-Governor, Secretary of State, Treasurer, Auditor, Superintendent of Public Works, Superintendent of Public Instruction and Attorney General, shall constitute a State Board of Education.”), with N.C. CONST., art. IX, § 4 (“The State Board of Education shall consist of the Lieutenant Governor, the Treasurer, and eleven members appointed by the Governor subject to confirmation by the General Assembly in joint session.”).

44. N.C. CONST. art. III, § 7.

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. See Lacy H. Thornburg, *Changes in the State’s Law Firm: The Powers, Duties, and Operations of the Office of Attorney General*, 12 CAMPBELL L. REV. 343, 346 (1990).

50. *Id.*

51. See N.C. GEN. STAT. § 114 (2013).

52. *Id.* § 114-1.1 (“The General Assembly reaffirms that the Attorney General has had and continues to be vested with those powers of the Attorney General that existed at the common law, that are not repugnant to or inconsistent with the Constitution or laws of North Carolina.”).

53. See discussion *infra* Part II.A.

enforcement of the laws of the state, preservation of order, and protection of public rights.”⁵⁴ In addition to these common law powers, the General Statutes provide other specific duties and powers at the disposal of the Attorney General.⁵⁵ Thus, one must turn to these statutes to elicit and evaluate the extent of the Attorney General’s duty to defend the constitutionality of the laws of the state.

II. TO DEFEND OR NOT TO DEFEND?

A. *The Duty to Defend in North Carolina*

The immediate and rather obvious inquiry is whether a duty to defend even exists in North Carolina. As the development of the office suggests,⁵⁶ the duty of representing both the public interest at large and individual government actors in their official capacity has historically fallen to the Attorney General.⁵⁷ But the question remains as to whether the duty to defend is legally mandated or merely a government norm.

Although the answer at the federal level and in other states is not particularly clear,⁵⁸ North Carolina’s statutory instructions provide that when the state’s laws are challenged, the Attorney General has a duty to defend the State and its statutes in court.⁵⁹ The primary legal basis for this duty is found in section 114-2(1) of the General Statutes, which states:

It shall be the duty of the Attorney General: (1) To defend all actions in the appellate division in which the State shall be interested, or a party, and to appear for the State in any other court or tribunal in any cause or matter, civil or criminal, in which the State may be a party or interested.⁶⁰

Notably, although slightly modified over time, this statute was one of the first passed by the General Assembly after the ratification of the Constitution of 1868.⁶¹ Thus, it is fair to say that once the office was cast in an executive capacity, the law has generally recognized a duty on the part of the Attorney General to defend the State in

54. Edmisten, *supra* note 22, at 10.

55. See N.C. GEN. STAT. §§ 114-2 to -8.5 (2013).

56. See *supra* Part I.

57. See generally Edmisten, *supra* note 22 (describing the historical scope of the office of the North Carolina Attorney General).

58. See Shaw, *supra* note 13, at 214–17.

59. See N.C. GEN. STAT. § 114-2(1) (2013).

60. *Id.*

61. See Coates, *supra* note 39, at 128–29.

court.⁶² Likewise, since 2001, the Attorney General has been required to submit biannual reports to the legislative leadership and staff regarding all lawsuits in which the constitutionality of a North Carolina law has been challenged.⁶³ This statute certainly indicates legislative understanding, if not intent, that defense of such suits against the State falls within the purview of the Attorney General.⁶⁴

The Supreme Court of North Carolina has also weighed in on the duty to defend the State or its agencies in all actions in which the State is a party, including, ostensibly, when the constitutionality of a law is challenged.⁶⁵ In *Martin v. Thornburg*,⁶⁶ a case later discussed in more detail,⁶⁷ the Governor argued that the Attorney General's statutory duty to appear for the State in all proceedings in which it was a party violated the state constitution because it was in derogation of the inherent executive power constitutionally vested in the Governor.⁶⁸ In rejecting this argument, the court reaffirmed the Attorney General's duty to defend.⁶⁹ Specifically, the court stated that "the duties of the Attorney General in North Carolina as prescribed by statutory and common law include the duty to appear for and to defend the State or its agencies in all actions in which the State may be a party or interested."⁷⁰

B. *Declining Defense—A Three-Pronged Framework*

Together, the language of the North Carolina statute and the authority interpreting it send a clear message: the Attorney General has a duty to defend in North Carolina.⁷¹ Nevertheless, even a rather explicit duty to defend may not rule out the option of non-defense altogether.⁷² At the federal level and across several states, executive officials have redefined the boundaries of their legal responsibilities

62. See *Martin v. Thornburg*, 320 N.C. 533, 546, 359 S.E.2d 472, 479 (1987).

63. N.C. GEN. STAT. § 114-2.6 (2013).

64. See *id.*

65. See *Martin*, 320 N.C. at 545–46, 359 S.E.2d at 479.

66. 320 N.C. 533, 359 S.E.2d 472 (1987).

67. See *infra* Part III.B.1.

68. *Martin*, 320 N.C. at 535, 359 S.E.2d at 473.

69. *Id.* at 546, 359 S.E.2d at 479.

70. *Id.*

71. See *supra* Part II.A.

72. See *Shaw*, *supra* note 13, at 257–63 (detailing the ways in which state executives may effectively avoid defending a law, even in the face of statutes expressly limiting their powers to refuse to defend).

regarding the defense of statutes, particularly when the constitutionality of the law is reasonably in question.⁷³

Is the same option of non-defense legally available to the North Carolina Attorney General? The answer is not straightforward; rather, determining whether non-defense is justified in the face of a well-defined duty to defend requires a fundamental analysis of the nuances of executive power. This Comment proposes a three-pronged conceptual framework for teasing out the potential legal bases for non-defense in North Carolina.

1. Identifying Conflicting Legal Obligations

Logically speaking, refusing to discharge a well-defined duty to defend should only be justified when some other competing legal obligation preempts it. Thus, the first prong of the non-defense framework requires determining whether the Attorney General has other legal obligations that *potentially conflict* with the duty to defend. When such potential exists, the Attorney General must decide in his or her independent judgment whether a conflict does in fact exist, and if so, whether the competing legal obligation preempts the duty to defend.⁷⁴ In short, some duties trump others, and identifying potential inconsistencies between two legitimate obligations of the office lays the logical foundation for justifying non-defense.

2. Isolating the Operative Conflict

The next prong requires isolating the *operative conflict* between potentially inconsistent duties. For instance, there may always be the *potential* for conflict between the Attorney General's duty to defend state law and a duty to uphold the U.S. Constitution;⁷⁵ however, that conflict only materializes if a challenged law is *unconstitutional*. If constitutional, the Attorney General may discharge both duties

73. See *id.* at 237–46. Shaw points to four different cases of executive non-defense in the states in recent years, including non-defense by the Attorneys General in Hawaii and California of gay marriage laws, non-defense of a campaign finance regulation in Nebraska, and non-defense of a ban on partial-birth abortion in New Jersey. *Id.*

74. See *id.* at 217 (discussing that non-defense most often arises in the context of “choos[ing] between competing obligations to defend statutes, on the one hand, and to maintain fidelity to state and federal constitutions, on the other”). Examples of these competing obligations include the duty to uphold the constitution, see *infra* Part II.C.2, and the duty to represent the public interest, see *infra* Part II.C.1. Although most often these considerations will be framed in constitutional terms, conceivably, any number of duties that create a potential conflict may leave room for discretion to decline defense.

75. See *infra* Part II.C.2 (discussing the duty to uphold the U.S. Constitution as a result of having taken the oath of office).

concurrently: there is no conflict. If unconstitutional, however, the Attorney General's duty to defend and duty to uphold the Constitution are obviously inconsistent. Thus, the operative conflict between these two competing duties is the *constitutionality* of the challenged law.

Although this is a somewhat straightforward observation, isolating the operative conflict between competing duties is important because it constrains the parameters of the Attorney General's independent judgment. In the example above, the only thing the Attorney General should be assessing to determine whether or not to defend the challenged law is its *constitutionality*. Ideally, other considerations, such as policy or political preferences, should be left out of the analysis.⁷⁶ Isolating the operative conflict therefore provides a means of narrowly evaluating the conflicting duties without resorting to extraneous and arguably unauthorized⁷⁷ justifications for non-defense.

3. Evaluating the Conflicting Legal Obligations

The final prong of the non-defense framework involves deciding whether the potentially conflicting legal obligations are *actually* inconsistent, thereby justifying non-defense. At this stage, it is tempting to treat this determination as binary. For example, if the operative conflict is the constitutionality of the challenged law, under a binary line of thought, the law is either constitutional, or it is not; the Attorney General makes this determination and proceeds.

This binary conception, however, is ill-suited to the practical realities of the Attorney General's available options. For that reason, a better conceptual framework can be derived from Justice Jackson's seminal concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*,⁷⁸ in which he describes executive power as something of a spectrum, waxing and waning as it corresponds to legislative authorization and

76. Eliminating non-legal considerations is not always warranted, such as when policy grounds form the primary justification for the conflict in duties. See *infra* Part II.C.1. Even when eliminating these considerations is required, the realities of decision-making suggest that political and policy preferences will inevitably affect the judgment of constitutionality to some degree.

77. Justifications are unauthorized under this formulation if they are not based on the logical predicate for declining defense—conflicting duties. See *supra* Part II.B.1. While an Attorney General may assert a variety of justifications for why he or she does not want to defend a law, not the least of which could be his or her disagreement on policy grounds, these justifications must be hemmed in by the actual conflict between relative duties.

78. 343 U.S. 579 (1952). Although the opinion in *Youngstown* dealt with presidential power, see *id.*, Justice Jackson's general conception of executive power is useful across the executive realm.

prohibition, respectively.⁷⁹ Similarly, one can conceive of the Attorney General's options for evaluating whether a conflict truly exists as lying on a spectrum. At one end, there is no conflict between competing duties, and the power to decline defense is non-existent. At the other end, there is a clear conflict between competing duties, and declining defense is very likely within his or her legal authority. In between, however, is the infamous "zone of twilight," in which the Attorney General's duties may not clearly conflict, but may not clearly be consistent.⁸⁰

An example is useful for understanding this fluid concept. Suppose the Attorney General has a well-defined duty to defend and a well-defined duty to uphold the United States Constitution. As discussed, the operative conflict in that situation is the constitutionality of the challenged statute. When determining whether there is a conflict between the two duties, a number of options are available along a spectrum. At one end, all the relevant case law may suggest that the law is clearly constitutional. In that case, there would be no conflict, and the Attorney General's authority to decline defense would be non-existent. At the other end of the spectrum, perhaps no plausible argument can be made in support of a law's constitutionality. At that end, there would clearly be a conflict, and the Attorney General's authority to decline defense would be at its maximum.⁸¹

However, a number of other options lie along the same spectrum. The Attorney General may decide that a plausible argument for constitutionality exists, although many courts, but not all, have rejected it. Similarly, the Attorney General may decide that a reasonable argument for constitutionality exists, but that the call is truly a toss-up. Perhaps most difficult are those constitutional questions that involve significant policy questions, such as substantive due process claims, wherein societal conceptions of "ordered liberty"

79. *Id.* at 635–40.

80. *See id.* at 637.

81. Attorney General Roy Cooper invoked this very argument, in fact, when he announced that he would no longer defend North Carolina's constitutional provision prohibiting same-sex marriage. *See* Anne Blythe & Andrew Kenney, *AG Roy Cooper Says Federal Ruling May Allow Gay Marriage in NC*, NEWS & OBSERVER (Raleigh, N.C.) (July 28, 2014), <http://www.newsobserver.com/2014/07/28/4035691/ag-roy-cooper-says-federal-decision.html>. In making the decision to no longer defend the law, Cooper stated that "it is time to stop making arguments we will lose" and that "[t]here are really no arguments left to be made." *See id.* (internal quotation marks omitted). For a discussion evaluating this decision, *see infra* note 115.

are at play.⁸² Whose policy considerations should the Attorney General use in making the constitutionality determination—his or her own, those of the “public,” or those of the legislature who passed the law?

This example highlights the difficulty of pinning down whether declining to defend falls within the legal authority of the Attorney General. Ultimately, these decisions are highly fact-specific and require an extensive exercise of the professional judgment of the Attorney General and his or her office. Nevertheless, conceptualizing the power to refuse to defend as falling along a spectrum offers a useful framework for reviewing such a decision, both prospectively and retrospectively.

C. Declining to Defend in North Carolina

This three-pronged conceptual framework for understanding non-defense also serves as a useful guide for examining specific legal arguments potentially available to the North Carolina Attorney General to decline defense. Two arguments in particular stand out as potentially available, resting on two different features of the North Carolina Attorney General: (1) the common law duty to represent the public interest; and (2) the Attorney General’s constitutional oath of office.

1. The Common Law Duty to Represent the Public Interest

North Carolina has adopted the common law of England, asserting by statute that all parts of the common law not inconsistent with state law remain in force.⁸³ This includes the common law powers of the English Attorney General that existed at the time of the signing of the Declaration of Independence,⁸⁴ a fact that the General Assembly has reaffirmed explicitly via statute.⁸⁵ Perhaps because the Attorney General’s powers are generally well defined by statute, the Supreme Court of North Carolina has not defined the scope of the supplemental duties recognized at common law. The court has stated generally, however, that “the Attorney General of [North Carolina] has the common law duty to prosecute all actions

82. *See, e.g., Danforth v. Minnesota*, 552 U.S. 264, 270 (2008).

83. N.C. GEN. STAT. § 4-1 (2013).

84. *Martin v. Thornburg*, 320 N.C. 533, 545, 359 S.E.2d 472, 479 (1987).

85. *See* N.C. GEN. STAT. § 114-1.1 (2013) (“The General Assembly reaffirms that the Attorney General has had and continues to be vested with those powers of the Attorney General that existed at the common law, that are not repugnant to or inconsistent with the Constitution or laws of North Carolina.”).

necessary for the protection and defense of the property and revenue of the sovereign people of North Carolina.”⁸⁶ As a result, courts in North Carolina have recognized that these common law powers make the Attorney General a broader legal representative of the public interest, with rights and responsibilities beyond those codified in statute.⁸⁷ This empowerment, by its nature, seems to place significant discretion in the office to decide what, in fact, the public interest entails and how to pursue it.

Thus, the first prong of the three-pronged framework is readily apparent: there is a potential conflict between the duty to defend and the Attorney General’s duty to represent the public interest.⁸⁸ On the one hand, when the constitutionality of a law is challenged, the State clearly has an interest in having its laws upheld.⁸⁹ This interest may, however, conflict with the Attorney General’s conception of the public interest and could arguably justify a non-defense decision in light of the duty to be the legal representative of the greater public.⁹⁰ Importantly, the operative conflict here is *not* the constitutionality of the law; rather, the operative conflict is the challenged law’s *consistency with the public interest*. As a result, under the third prong,⁹¹ the Attorney General’s legal authority to decline defense lies on a spectrum based on the Attorney General’s conception of the public interest. This conception produces an interesting result: the justifications for non-defense may not necessarily be purely legal.

The Voter I.D. lawsuit and the dilemma it posed for Attorney General Cooper helps illustrate the point.⁹² Recall that Attorney General Cooper publicly stated that the recently passed Voter I.D. law would “make[] it harder for people to register and vote” and would “do damage” to North Carolina’s election process.⁹³ These statements illustrate that, to some degree, he viewed the law as contrary to the public interest.⁹⁴ But are these general policy concerns alone sufficient to justify non-defense? Logically they serve as a

86. *Martin*, 320 N.C. at 546, 359 S.E.2d. at 479.

87. *See Edmisten*, *supra* note 22, at 10–13.

88. *See supra* Part II.B.1.

89. *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2664 (2013).

90. *See Edmisten*, *supra* note 22, at 10 (“[The Attorney General’s] broad authority, if interpreted generously in light of the changing legal, governmental, and social structures of our society, can be viewed as permitting the Attorney General to protect the public from many abuses of law which, from a practical standpoint, they are helpless to protect themselves.”).

91. *See supra* Part II.B.3.

92. *See supra* notes 1–9 and accompanying text.

93. *Id.*

94. *See id.*

legitimate measure of conflicting duties; one cannot be the independently elected defender of the public interest without some extra-legal conception of the public interest.⁹⁵ At the same time, the Attorney General's role is as a *legal* representative of the state.⁹⁶

A reasonable resolution of this difficult problem hearkens back to the conception of the executive power spectrum, in which the authority to decline defense grows stronger as the conflict between relevant duties grows stronger.⁹⁷ Thus, inconsistency with the public interest is at its strongest when legal arguments weigh in favor of unconstitutionality *and* when the Attorney General's policy views support that inconsistency; likewise, this is when declining defense is most justified. As legal arguments lose their power and policy differences are the only arrow left in the Attorney General's quiver, perhaps non-defense may still be justified, but it would be a much harder question.

Although such a specific annunciation of common law powers has never been invoked in North Carolina to justify the *non-defense* of a state statute,⁹⁸ there is legal authority that offers at least some support for the proposition that the Attorney General's common law powers justify an independent evaluation of state statutes.⁹⁹ Specifically, there is authority suggesting that "by virtue of the inherent authority of [the Attorney General's] office, [he] may bring an action on his own initiative to challenge the constitutionality of state statutes."¹⁰⁰ One example is a 1915 North Carolina Supreme Court case, in which the Attorney General, acting in his official capacity, challenged the constitutionality of a legislative enactment allowing women to serve as notaries public.¹⁰¹ In that case, the court explicitly acknowledged that the Attorney General brought the action as a plaintiff, exercised appellate rights, and "strenuously insisted that the act of the General Assembly [in question] was invalid"¹⁰² Nonetheless, "[t]he Supreme Court did not consider it necessary to cite any authority for the Attorney General to bring such an action, and neither the majority opinion nor the dissent discusses the

95. See Edmisten, *supra* note 22, at 10-11.

96. See *id.* at 13 (discussing representation of the public interest primarily in terms of bringing legal actions).

97. See *supra* Part II.B.3.

98. There is no specific case in North Carolina in which an Attorney General has actively declined to defend the constitutionality of a challenged state statute.

99. See Edmisten, *supra* note 22, at 14.

100. *Id.*

101. Bickett v. Knight, 169 N.C. 333, 85 S.E. 418 (1915).

102. *Id.* at 340, 85 S.E. at 422.

authority of the Attorney General to challenge the constitutionality of state laws.”¹⁰³

Such authority supports the argument that there may be conflict inherent in the Attorney General’s legal responsibilities and that independent assessments of the constitutionality of a state statute may arise from the Attorney General’s common law duty to protect the public interest. Moreover, if the Attorney General has the ability under the common law powers to *challenge* the constitutionality of a state statute outright, declining to defend—a seemingly “lesser” offense—would appear to fall within the legal parameters of his or her powers.

As a result, although this argument has its limits, one conceivable legal basis for the Attorney General declining to defend the constitutionality of a state law is the assertion that to do so would be inconsistent with the overarching common law duty, acknowledged by statute, to legally represent the public interest.

2. The Oath of Office

The North Carolina Constitution’s oath of office provides a second argument available to the Attorney General to justify declining to defend a state law in court. Article VI, section 7 of the North Carolina Constitution of 1971 requires any person elected or appointed to a state office to swear the following oath:

I . . . do solemnly swear (or affirm) that I will support and maintain the Constitution and laws of the United States, and the Constitution and laws of North Carolina not inconsistent therewith, and that I will faithfully discharge the duties of my office as [designated office], so help me God.¹⁰⁴

Although the oath is somewhat standard fare, the plain language of the oath reveals a rather obvious potential for conflict, satisfying the first prong of the non-defense framework.¹⁰⁵ Constitutional officers, including the Attorney General, must swear to support and maintain the U.S. Constitution and federal laws without qualification, while swearing to support and maintain the state’s constitution and laws only to the extent they are consistent with those of the United States.¹⁰⁶ Who gets to decide whether state laws are, in fact, consistent with federal law?

103. Edmisten, *supra* note 22, at 14.

104. N.C. CONST. art. VI, § 7.

105. *See id.*

106. *See id.*

One answer is that the oath of office gives rise to some level of independent executive constitutional evaluation, at least until the judiciary has acted as the final arbiter of the statute's constitutionality.¹⁰⁷ Under this line of thought, the executive cannot discharge his or her constitutional duties consistent with the oath of office without making some determination of the constitutionality of a law.¹⁰⁸ Otherwise, enforcing or defending a law he or she determines to be unconstitutional would violate the oath of office and, thereby, the Constitution.¹⁰⁹ The operative conflict between the duty to defend and the constitutional obligations embodied in the oath of office thus becomes clear: the constitutionality of the challenged law.¹¹⁰

As a result, the third prong of the non-defense framework requires once again examining the potential options available to the Attorney General in terms of assessing constitutionality. Although conceptually the ends of the spectrum form neat little boxes, in practical terms, very few laws whose constitutionality are facially challenged are either clearly constitutional or clearly not.¹¹¹ Thus, the majority of the "action" in the oath-of-office argument is determining at what point the lack of reasonable or plausible arguments begins to justify non-defense. Certainly, as reasonable claims of constitutionality dwindle, the case for non-defense grows stronger. But if there is a plausible—albeit farfetched—constitutional claim, is the Attorney General required to make it?

Interestingly, at the federal level, absent other categorical exceptions to defense, the Office of the Solicitor General generally draws this line at "professionally respectable" or "reasonable"

107. See Neal Devins & Saikrishna Prakash, *The Indefensible Duty to Defend*, 112 COLUM. L. REV. 507, 523–26 (2012) (discussing the oath of office as justifying executive non-defense and non-enforcement at the federal level).

108. See *id.*

109. *Id.*

110. See *supra* Part II.B.2. Interestingly, a few simple words could eliminate this argument altogether. Consider if the oath of office read as follows: "I do solemnly swear that I will support and maintain the Constitution and laws of the United States, and the Constitution and laws of North Carolina not having been determined by appropriate members of the judiciary to be inconsistent therewith"

111. It should be noted that, if the law were in fact patently unconstitutional, the duty to the U.S. Constitution is clearly superior to the state statutory duty to defend. In that case, one may reasonably state that the Attorney General has the duty not to defend the law, rather than simply an option at the Attorney General's disposal. However, conceptually, it is simpler to conceive the two conflicting duties as providing the availability of non-defense, particularly because the means of determining unconstitutionality is such a sticky issue. See *infra* notes 112–16 and accompanying text.

arguments.¹¹² This policy is rooted in a “presumption” that legislative and executive actors believed the legislation to be constitutional at the time of its passage, and thus, the Solicitor General “tr[ies] to craft a defense of the law in a manner that can best explain the basis on which the political branches’ presumed constitutional judgment must have been predicated.”¹¹³ As a result, the Solicitor General will generally defend if such reasonable arguments are available.¹¹⁴

Such a conception may be a suitable model for the North Carolina Attorney General, as it attempts to strike a balance between due deference to other branches of government while also recognizing the necessity of professional judgment given the office’s legal expertise.¹¹⁵ Alternative conceptions may move further in the

112. Seth P. Waxman, *Defending Congress*, 79 N.C. L. REV. 1073, 1078, 1084 (2001). Three exceptions to this general principle abide at the federal level. *See id.* at 1083–87. First, if “it is manifest that the [current] President has concluded that [a] statute is unconstitutional,” the Solicitor General will “occasionally” decline to “make professionally respectable arguments.” *Id.* at 1083. A second and “categorical” exception is when federal legislation “raises separation of powers concerns,” in which case the Solicitor General “ordinarily defends the President’s powers and prerogatives,” while Congress defends its own views. *Id.* at 1084. A third is “when defending the statute would require the Solicitor General to ask the Supreme Court to overrule one of its constitutional precedents.” *Id.* at 1085.

113. *Id.* at 1078.

114. *Id.*

115. *See id.* Recent action by Attorney General Roy Cooper suggests that, at least at present, North Carolina seems to be following the “balanced” model. On July 28, 2014, the Fourth Circuit Court of Appeals ruled in *Bostic v. Schaefer* that Virginia’s prohibitions on same-sex marriage were unconstitutional. *Bostic v. Schaefer*, No. 14-1167, 2014 WL 3702493 (4th Cir. July 28, 2014). Later that afternoon, Roy Cooper announced in a press conference that North Carolina would no longer be defending its own constitutional prohibition on same-sex marriage. *See Blythe & Kenney, supra* note 81. Although Cooper did not invoke his oath of office directly, he stated that he would discontinue defense because the Fourth Circuit’s decision would bind all North Carolina federal courts; given the breadth of that decision, he stated that “[t]here are really no arguments left to be made” in defense of the law. *Id.*

Cooper’s decision helps practically illustrate the spectrum of choices the Attorney General has before him when determining whether to defend. Although Cooper determined that there were no arguments to be made after the Fourth Circuit opinion, *see id.*, that was a professional judgment, not an absolute truth. There were, perhaps, more arguments to be made in favor of constitutionality, at least insofar as the *Bostic* court had not heard every plausible justification for prohibiting same-sex marriage that one might raise. *See Bostic*, 2014 WL 3702493, at *10–16 (examining five justifications for the same-sex marriage prohibition brought forth by defendants). Conversely, Cooper had made it clear prior to his decision not to defend that he was personally opposed to the prohibition on same-sex marriage, *Blythe & Kenney, supra* note 81, and could have determined months ago that there were “no arguments left to be made”; however, he directed his staff to continue to defend in spite of his objections, *see id.* By defending until a binding judicial decision eliminated what Cooper determined in his professional judgment to be the reasonable arguments in defense of the law, Cooper has taken a balanced approach to the

direction of deference, requiring defense when any *plausible* argument is available, even if inconsistent with the general direction of the constitutional jurisprudence. Likewise, alternatives may favor vesting greater independent judgment in the Attorney General, requiring defense only when the Attorney General has *personally* concluded that the law is, in fact, constitutional. While the duties of state attorneys general vary widely, at least some of those attorneys general who have refused to defend state laws would trend toward the latter interpretation.¹¹⁶

What is perhaps most important to recognize is that independent constitutional judgments in light of the oath of office are not binary; rather, they cover a wide range of available options, and the power to decline defense wanes as arguments supporting constitutionality become more readily available. Thus, provided the North Carolina Attorney General can successfully assert the lack of support for a law's constitutionality, the oath of office provides a potent argument to justify non-defense.

III. FILLING THE HOLES: THE RESPONSE OF OTHER GOVERNMENT ACTORS

Given the potential political and policy differences between the Attorney General and other government actors who support the legal defense of a statute, the Attorney General's decisions concerning the duty to defend ultimately set up a fascinating legal landscape, rife with the potential for conflict and replete with legal uncertainty. It is at once the politico's dream and the lawyer's nightmare. Nonetheless, these uncharted waters demand some cartographical commitment.

Perhaps the most immediate question concerning the role of other government actors in defending state law is what steps they may take to ensure defense when the Attorney General declines.

spectrum.

116. See Shaw, *supra* note 13, at 238, 243–44 (noting that the California and New Jersey Attorneys General both declined to defend on the basis of individual determinations of unconstitutionality). Perhaps the most relevant example of the broader conception of an Attorney General's independent constitutional judgment is that of Attorney General Mark Herring of Virginia. See Timothy Williams & Trip Gabriel, *Virginia's New Attorney General Opposes Ban on Gay Marriage*, N.Y. TIMES (Jan. 23, 2014), http://www.nytimes.com/2014/01/24/us/new-virginia-attorney-general-drops-defense-of-gay-marriage-ban.html?_r=0. After taking office, Attorney General Herring reversed the Commonwealth of Virginia's position as to a federal lawsuit challenging its ban on same-sex marriage, calling the law "unconstitutional and oppressive." *Id.* Prior to Attorney General Herring's election, the state's Attorney General had offered arguments in support of the law, which suggests that at least some reasonable arguments were available in its defense. See *id.*

However, the Attorney General and his or her staff may engage in non-defense in a number of ways, even while technically participating in the litigation.¹¹⁷ Thus, examining the legal options of other government actors when the constitutionality of a state law is challenged is actually twofold. First, if the Attorney General declines to defend, what actions can and must other government actors take to defend the law in court? Second, if the Attorney General discharges the duty to defend, but with obvious political or policy stances that conflict with the challenged law, what actions can and must other government actors take to ensure an “adequate” defense? This part examines both of these questions in turn.

A. *The Attorney General Declines to Defend*

If the Attorney General declines to defend the constitutionality of a state law based upon one of the justifications discussed above, what may other major government players do about it? The question is a simple one, but the answer is not obvious. The different branches of government have different legal options available.

1. The Governor

Should the Attorney General decline to defend the constitutionality of a state law, the government official with the clearest legal authority to take up the defense would be the Governor. The North Carolina Constitution establishes the office of the Governor, in whom “[t]he executive power of the State shall be vested.”¹¹⁸ This inherent executive power, on its own, would likely be sufficient to justify executive defense of a statute once the Attorney General has declined to participate.¹¹⁹ Thankfully, however, this is an area where statutory authority provides additional guidance, confirming the Governor’s authority to engage in legal defense of state laws.¹²⁰

Section 147-14(a) of the General Statutes states, “In any case or proceeding, civil or criminal, in or before any court or agency of this State or any other state or the United States, . . . the Governor may

117. See Shaw, *supra* note 13, at 259.

118. N.C. CONST. art. III, § 1.

119. The constitutional order clearly places the Attorney General within the executive branch. N.C. CONST. art III, § 7. Although the Supreme Court of North Carolina has stated that the Attorney General’s duty to defend is not in derogation of the Governor’s inherent executive authority under Article III’s vesting clause, see *Martin v. Thornburg*, 320 N.C. 533, 546, 359 S.E.2d 472, 480 (1987), if the Attorney General declines defense, the inherent executive power would arguably still cover legal defense of the state’s laws.

120. See N.C. GEN. STAT. § 147-17(a) (2013).

employ such special counsel as he may deem proper or necessary to represent the interest of the State.”¹²¹ The Supreme Court of North Carolina has stated that this statute “gives the Governor the unrestricted right to employ such special counsel as he may deem proper or necessary.”¹²² As a result, in the event the Attorney General declines to defend, the Governor certainly would have legal authority to retain outside counsel to defend the constitutionality of the state laws.

Legal authority to act, however, does not equate to a duty to act. Despite the power to engage outside counsel to defend the State, the question remains as to whether the Governor, as wielder of the executive power of the state, has the ultimate obligation to do so in the event the Attorney General refuses. There certainly is not the same statutory basis for the Governor’s duty to defend as exists for the Attorney General. In fact, the statutory authority to employ such special counsel in section 147-14(a) is merely permissive, not mandatory.¹²³ Likewise, the gubernatorial duties set out in the state constitution do not expressly direct the Governor to legally defend the laws of the state.¹²⁴ The Constitution does include a so-called “Take Care” clause, stating that “[t]he Governor shall take care that the laws are faithfully executed,”¹²⁵ but does this clause demand executive defense in addition to enforcement?

There is no legal authority in North Carolina that directly answers the question, and the federal government has essentially determined that the identically worded “Take Care” clause in the U.S. Constitution does not create a duty to defend.¹²⁶ Moreover, even if the clause were construed to create such a duty, the Governor would likely still be able to claim the same arguments related to the oath of office that might justify non-defense by the Attorney General in the first place.¹²⁷ In sum, in North Carolina, there does not appear to be any gubernatorial *duty* to defend. The Governor may certainly engage counsel at his or her discretion to represent the State, but the Governor does so at his or her pleasure.

121. *Id.*

122. *Martin*, 320 N.C. at 548, 359 S.E.2d at 480 (citation omitted) (internal quotation marks omitted).

123. See N.C. GEN. STAT. § 147-17(a) (2013).

124. See N.C. CONST. art. III.

125. See N.C. CONST. art. III, § 5.

126. See U.S. CONST. art. II, § 3; Shaw, *supra* note 13, at 214–16.

127. See discussion *supra* Part II.C.2.

2. The General Assembly

The potential for a complete refusal by the entire executive branch to engage in defense of a state statute places the General Assembly in a difficult position. Consider the situation that could arise when the Attorney General and the Governor are of similar political and policy persuasions, while a different political party controls the General Assembly.¹²⁸ The General Assembly passes a law that both the Attorney General and the Governor oppose. The Governor vetoes the bill, but the General Assembly passes the bill over his or her veto. A lawsuit challenges the constitutionality of the new law, and the Attorney General, asserting the common law duties to the public interest, declines to defend, while the Governor, who objects to the bill, refuses to employ counsel to represent the State. What can the legislature do?

a. Representing the General Assembly Versus Representing the State

A first possible response may be that the General Assembly, like the Governor, may simply hire outside counsel to represent the interests of the State. The legal authority to undertake such an action, however, is not clear. Unlike the statutory guidelines that direct the Attorney General to represent the state in court and allow the Governor to employ counsel to do the same, the General Assembly is granted no such explicit statutory power.¹²⁹ Likewise, the constitution seems to contemplate that the legal representation of the State's positions falls to the executive branch.¹³⁰ As a result, it would seem that the legislative power to hire outside counsel to represent the State's interest in court would be, at best, based on shaky legal footing and, at worst, in conflict with the doctrine of separation of powers.

128. This political dynamic was the very situation during the 2011–12 session of the General Assembly, when Republicans controlled majorities in the both chambers of the legislature, while the Governor and Attorney General were both Democrats. See Bonner & Biesecker, *supra* note 11. Although issues of non-defense did not arise, several laws indeed passed over the veto of the Governor during that time. See, e.g., *Lawmakers Override Perdue's Budget, Fracking Vetoes*, WRAL (July 2, 2012), <http://www.wral.com/news/state/nccapitol/story/11274537/> (last updated July 3, 2012).

129. No statute within the section on the General Assembly discusses outside employment of counsel to represent the State's interest.

130. The Supreme Court of North Carolina recognized the common law right to defend is within the purview of the Attorney General, now an executive officer. *Martin v. Thornburg*, 320 N.C. 533, 545–46, 359 S.E.2d 472, 479 (1987). Moreover, the statutory exception to this duty places the power to hire outside counsel in the Governor, also an executive official. N.C. GEN. STAT. § 147-17(a) (2013).

It is important, however, to distinguish the power to represent the State's interest in court from the power to represent the General Assembly's interest in court. Although courts have not explicitly discussed the legality of such action, it is a well-settled practice of the General Assembly to engage outside counsel to represent its own interest as a co-equal branch of government.¹³¹ As recently as January of 2013, the Supreme Court of North Carolina has made such an acknowledgment.¹³²

In that case, *Dickson v. Rucho*,¹³³ several groups challenged the constitutionality of the State's recent redistricting plans.¹³⁴ The General Assembly's legislative leadership, including the chairs of the Redistricting Committees in both chambers, engaged outside counsel to provide legal advice regarding the redistricting process.¹³⁵ When the legislative leaders claimed that their communications with these private attorneys were privileged, the Court acknowledged that these documents were subject to attorney-client privilege by nature of the engagement.¹³⁶ The authority of the General Assembly's leadership to engage outside counsel in their official capacity was never referenced or challenged.¹³⁷ In fact, the outside counsel continued to represent the legislative leaders in conjunction with the Attorney General's office throughout the litigation, signing briefs as representatives for the "legislative defendants," while the Attorney General's staff signed briefs as representatives of "all defendants."¹³⁸ Thus, although the General Assembly may not possess the power to represent the State as a party, it does have the power to engage outside counsel to represent its own interests in court. While this may be a significant power, it does not provide much assistance if the General Assembly is not named a party in the suit. Thus, if the State is a named party when the constitutionality of a law is challenged and the legislative

131. See, e.g., *Dickson v. Rucho*, 366 N.C. 332, 737 S.E.2d 362 (2013) (discussing present and past use of independent outside counsel by the General Assembly). Notably, while all other state government entities must gain the approval of the Governor and the written consent of the Attorney General to engage outside counsel, the General Assembly has explicitly exempted itself from these requirements. See N.C. GEN. STAT. § 120-32.6 ("G.S. 114-2.3 and G.S. 147-17 (a) through (c) shall not apply to the General Assembly.").

132. See *Dickson*, 366 N.C. at 334-35, 737 S.E.2d at 365.

133. 366 N.C. 332, 737 S.E.2d 362 (2013).

134. *Id.* at 335, 737 S.E.2d at 365.

135. *Id.* at 334, 737 S.E.2d at 365.

136. *Id.* at 345, 737 S.E.2d at 372.

137. See generally *Dickson*, 366 N.C. 332, 737 S.E.2d 362 (discussing the use of independent outside counsel).

138. Legislative Defendants' Brief at 46-47, *Dickson v. Rucho*, 366 N.C. 332, 737 S.E.2d 362 (2013) (No. 201PA12), 2012 WL 3043758.

leadership is not, what options does the General Assembly have to defend the law?

b. Legislative Standing

In the summer of 2013, the General Assembly provided one answer to this question by enacting a new “legislative intervention” statute.¹³⁹ Under this statute:

The Speaker of the House of Representatives and the President Pro Tempore of the Senate, as agents of the State, shall jointly have standing to intervene on behalf of the General Assembly as a party in any judicial proceeding challenging a North Carolina statute or provision of the North Carolina Constitution.¹⁴⁰

The statute requires such legislative intervention to proceed according to the North Carolina Rules of Civil Procedure.¹⁴¹ Under Rule 24(a)(1), “[u]pon timely application,” a court will permit anyone to intervene “[w]hen a statute confers an unconditional right to intervene.”¹⁴² That would appear to be the case under the new law. The language states that the legislative leadership “shall . . . have standing to intervene” in “any” case in which the constitutionality of state law is challenged.¹⁴³ Thus, this would be an “unconditional right,” under Rule 24, and a state court would be required to permit intervention *as a party*.¹⁴⁴ Accordingly, as intervening defendants, the Speaker of the House and President Pro Tempore of the Senate could engage independent counsel to defend the law.

139. Act of Aug. 23, 2013, ch. 393, § 3, 2013 N.C. Sess. Laws 1626, 1626 (to be codified at N.C. GEN. STAT. § 1-72.2).

140. N.C. GEN. STAT. § 1-72.2 (2013).

141. *Id.* The statute apparently includes a misprint, stating that Rule 29 sets out the correct procedure, which governs the taking of depositions. *See id.* Legislators have acknowledged that Rule 24 is the correct rule. *See* Laura Leslie, *Lawmakers Give Leaders Legal Standing*, WRAL (July 26, 2013), <http://www.wral.com/lawmakers-give-leaders-legal-standing-/12705623/>. The General Assembly corrected this typographical error in 2014. Act of Aug. 11, 2014, ch. 115, § 18, 2014 N.C. Sess. Laws __, __ (to be codified at N.C. GEN. STAT. § 1-72.2).

142. N.C. R. CIV. P. 24(a).

143. N.C. GEN. STAT. § 1-72.2 (2013).

144. N.C. R. CIV. P. 24(a). One interesting and currently unanswered question is whether this right of intervention even applies at the appellate level, because the North Carolina appellate courts operate under the North Carolina Rules of Appellate Procedure, not the North Carolina Rules of Civil Procedure. Arguably, if the General Assembly failed to intervene at the trial court level, they would *not* have an absolute right to intervene later in the case at the appellate level.

In federal court, however, the same outcome is not mandated, due primarily to different procedural rules and constitutional standing requirements. Rule 24 of the Federal Rules of Civil Procedure does not mandate intervention as the result of a state law;¹⁴⁵ rather, Rule 24(2) provides only permissive intervention at the discretion of the court “if a party’s claim is based on (A) a statute or executive order administered by the officer or agency; or (B) any regulation, order, requirement, or agreement issued or made under the statute or executive order.”¹⁴⁶ As a result, for cases brought in federal court, such as a lawsuit initiated by the Department of Justice, the judge must grant the legislative leaders’ request to intervene before they may proceed.¹⁴⁷

Such an intervention in federal court likewise raises a second, more complex problem: Article III standing. Federal courts are not constitutionally empowered to settle disputes unless an “actual controversy” between two parties with judicially cognizable interests exists throughout the duration of a case.¹⁴⁸ When the constitutionality of a state law is challenged in federal court, it is well settled that “a State has a cognizable interest ‘in the continued enforceability’ of its laws that is harmed by a judicial decision declaring the state law unconstitutional,”¹⁴⁹ and that the State therefore has standing to appeal an adverse decision.¹⁵⁰ A problem may arise, however, when a party other than the State intervenes to defend the constitutionality of a law and seeks to appeal an adverse decision,¹⁵¹ and courts must decide whether that party has a judicially cognizable interest in continuing the litigation.¹⁵²

In a recent case, *Hollingsworth v. Perry*,¹⁵³ the United States Supreme Court took up this question.¹⁵⁴ In *Hollingsworth*, California voters had passed a voter-led referendum, “Proposition 8,” amending the California constitution to define marriage as between a man and woman only.¹⁵⁵ After the amendment passed, opponents of Proposition 8 filed suit in federal court, challenging the

145. FED. R. CIV. P. 24.

146. *Id.* at 24(b)(2).

147. *See id.*

148. *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2661 (2013).

149. *Id.* at 2664 (quoting *Maine v. Taylor*, 477 U.S. 131, 137 (1986)).

150. *See id.*

151. *See id.* at 2662.

152. *Id.*

153. 133 S. Ct. 2652 (2013).

154. *Id.*

155. *Id.* at 2659.

constitutionality of the law and naming as parties the executive officials responsible for enforcing its provisions.¹⁵⁶ The Attorney General and Governor, apparently under the belief that the law was unconstitutional, declined to defend.¹⁵⁷ As a result, the referendum's official proponents under California law moved to intervene so that they might defend the amendment's legality, and the federal district court allowed them to do so.¹⁵⁸

When the district court ruled the amendment unconstitutional and enjoined the state officials from enforcing the amendment, the state did not pursue an appeal, but the proponents did.¹⁵⁹ In considering their standing to do so, the Ninth Circuit certified a question to the California Supreme Court and asked whether the official proponents were, under California law, able to assert the state's interest in the validity of the law such that they would have standing to defend on appeal.¹⁶⁰ The California Supreme Court responded that, under state law, the official proponents may assert the State's interest in the validity of the law should the state officials charged with that duty refuse.¹⁶¹ The Ninth Circuit thus ruled that the proponents had standing and proceeded to decide the case on the merits.¹⁶²

The U.S. Supreme Court, however, rejected this argument, holding that because the official proponents had not been affected by the district court's order, they had no particularized interest in appealing the judgment.¹⁶³ In responding to the argument that the proponents were effectively representing the State's interest in the validity of the law, the Court stated that, while states could designate agents to represent their interests, only state officials could be chosen as agents, not private parties.¹⁶⁴

This ruling has interesting implications for the prospect of legislative intervention in North Carolina. On the one hand, one could certainly contemplate factual circumstances in which the General Assembly's role aligns with that of the proponents in *Hollingsworth*. The General Assembly could intervene under Rule 24 pursuant to the legislative intervention statute, and the executive

156. *Id.* at 2660.

157. *See id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.* at 2662.

164. *Id.* at 2665.

officials could decline to defend. Under the general rationale of *Hollingsworth*, the General Assembly would not have standing to appeal because the outcome of the case would not affect its legal rights or obligations; in short, the legislative body would have no specific interest at stake.¹⁶⁵

On the other hand, the *Hollingsworth* majority's provision for the State to identify its own agents, acting pursuant to their official capacity, would likely also encompass the General Assembly should it seek to intervene and appeal in a suit challenging a law's validity.¹⁶⁶ The language of the new statute likewise bolsters such a claim, as "state law may provide for other officials to speak for the State in federal court."¹⁶⁷ Thus, although the legislative intervention statute does not give an unconditional right for legislative officials to intervene at the federal level,¹⁶⁸ it does provide a legal basis for the argument that, through this legislation, the State recognizes the General Assembly as an agent authorized to protect the state's interest in maintaining the validity of its laws.¹⁶⁹ As a result, the legislature's best option for defending the constitutionality of a statute in the event of executive non-defense is likely intervention.

B. *The Attorney General Chooses to Defend the Law*

Heretofore, the primary discussion has focused on the Attorney General's duty to defend, whether he or she must discharge such a duty, and what other branches of government can and must do should he or she refuse to do so. However, non-defense can come in many forms.¹⁷⁰ This threat of inadequate defense poses what is perhaps an even more interesting legal question: what options are available to other government actors to assure an "adequate" defense when the Attorney General chooses to discharge his or her duty and defend a law?

165. *See id.* at 2662 (holding that the official proponents had no individualized interest in the litigation because "the District Court had not ordered them to do or refrain from doing anything").

166. *See id.* at 2664–65.

167. *Id.* at 2664 ("To vindicate [its] interest [in the continued enforceability of its laws] . . . a State must be able to designate agents to represent it in federal court. (citing *Poindexter v. Greenhow*, 114 U.S. 270, 288 (1885)).

168. N.C. GEN. STAT. § 1-72.2 (2013).

169. *See Hollingsworth*, 133 S. Ct. at 2664 ("[S]tate law may provide for other officials to speak for the State in federal court, as New Jersey law did for the State's presiding legislative officers in *Karcher*").

170. *See Shaw*, *supra* note 13, at 260 ("If they do participate in litigation, state executives may undertake weak or perfunctory defenses; they may even express hope that their positions will not succeed, or satisfaction with decisions against them.").

At the outset, it is important to recognize an important shift in the legal issues analyzed under this inquiry. To this point, the inquiry has focused on the *existence* of the duties and powers of defense both in the Attorney General and in other government actors. It has been established that the Attorney General has both the power and the duty to represent the State's interest, but also possible legal justifications for declining to discharge that duty.¹⁷¹ Likewise, in the Attorney General's *absence*, the Governor and General Assembly have legal options at their disposal that allow them to defend the validity of a law.

The question from this point forward focuses on the *exclusivity* of the Attorney General's duty to defend. In essence, once the Attorney General decides to defend, to what extent can other government actors shape the course of the State's legal representation? While this question touches many of the issues already discussed, it approaches them in a different context and, in some cases, produces different answers.

1. The Governor

As discussed above, should the Attorney General decline to defend, section 147-17(a) grants the Governor the power to employ counsel other than the Attorney General to represent the State.¹⁷² But does the same power apply if the Attorney General chooses to defend? Section 147-17(a) reads in full:

No department, officer, agency, institution, commission, bureau or other organized activity of the State which receives support in whole or in part from the State shall employ any counsel, except with the approval of the Governor. The Governor shall give his approval only if the Attorney General has advised him, as provided in subsection (b) of this section, that it is impracticable for the Attorney General to render the legal services. In any case or proceeding, civil or criminal, in or before any court or agency of this State or any other state or the United States, or in any other matter in which the State of North Carolina is interested, the Governor may employ such special counsel as he may deem proper or necessary to represent the interest of the State, and may fix the compensation for their services.¹⁷³

171. *See supra* Part II.

172. N.C. GEN. STAT. § 147-17(a) (2013).

173. *Id.*

While the statute does give the Governor the ability to hire outside counsel, the statute is arguably ambiguous.¹⁷⁴ On the one hand, this power seems to be absolute.¹⁷⁵ The broad language of the second half of the statute appears to bestow vast authority to hire special counsel “in *any* case . . . as he may deem proper or necessary.”¹⁷⁶ On the other hand, the limitation that the Governor may only approve employment of counsel for any “organized activity” of the State if the Attorney General advises him of impracticability might be read to restrict the ability to hire counsel.¹⁷⁷

This was one of the primary issues at stake in *Martin v. Thornburg*.¹⁷⁸ In that case, the Governor and the Council of State held different positions regarding the Council’s authority to approve a particular state lease.¹⁷⁹ As the internal conflict continued and the lease situation remained unresolved, the lessor filed suit against the State.¹⁸⁰ The Governor then brought a declaratory action to determine “the rights and duties of the Governor and Attorney General in connection with lawsuits filed against the State.”¹⁸¹ The trial court held that section 147-17(a) limited the Governor’s ability to hire independent counsel, and that he could only do so when the Attorney General determined that it was impracticable for him to represent the State.¹⁸² On appeal, however, the North Carolina Supreme Court reversed, stating that, “construing the statute as a whole, we conclude that the last sentence of section 147-17(a) gives the Governor the unrestricted right to employ such special counsel as he may deem proper or necessary.”¹⁸³

This case has thus effectively settled the ability of the Governor to hire outside counsel to represent the State, whether in place of or in addition to the Attorney General.¹⁸⁴ What is less settled is exactly how such outside counsel and the Attorney General might interact while simultaneously pursuing the State’s objectives. If the Governor is a party to the litigation, then the answer is perhaps more straightforward—the Governor’s counsel represents the Governor,

174. *See id.*

175. *See id.*

176. *Id.* (emphasis added).

177. *See id.*

178. 320 N.C. 533, 359 S.E.2d 472 (1987).

179. *Id.* at 537–38, 359 S.E.2d at 474–45.

180. *Id.* at 538, 359 S.E.2d at 475.

181. *Id.* at 535, 359 S.E.2d at 473.

182. *Id.* at 539, 359 S.E.2d at 476.

183. *Id.* at 548, 359 S.E.2d at 480 (citation omitted) (internal quotation marks omitted).

184. *Id.* at 533, 359 S.E.2d 472.

and the Attorney General represents the State. If, however, the suit is against the State, and the Governor is not party to the litigation, the question essentially becomes, who is in charge of the litigation? Will the attorneys collaborate? Will they sign separate briefs, both purportedly on behalf of the state?

Although this question remains largely unanswered,¹⁸⁵ and there appears to be no definitive legal rule, the North Carolina General Statutes offer at least some guidance.¹⁸⁶ Just as section 147-17(a) authorizes the Governor and other parties to hire outside counsel in certain situations,¹⁸⁷ section 147-17(d) provides:

In those instances where more than one counsel is providing legal representation, counsel, or service on a legal matter on behalf of a State client, the client shall designate in writing which of its legal counsel possesses final decision-making authority on behalf of the State client, and other co-counsel shall, consistent with the Rules of Professional Conduct, cooperate with such designated lead counsel.¹⁸⁸

At first glance, this statute would seem to give the Governor wide authority to denote his own counsel as lead counsel and grant this lawyer final decision-making authority in connection with the defense of a statute's constitutionality. Such a holding would seemingly fit with the wide authority granted to the Governor to engage and set the compensation of counsel in "any proceeding."¹⁸⁹ However, when the Governor is not a party to the lawsuit but is instead hiring another lawyer to represent the State as party, it becomes even *less* clear who the "State client" is.¹⁹⁰ Arguably, the Governor is not the client, because the attorney has not been engaged to represent him or her. Instead, the attorney has been engaged to represent the State.

Furthermore, the Attorney General has some authority to argue that the power vested in him or her at common law gives him or her

185. In *Martin*, the court declined to rule on all constitutional issues presented, resorting simply to a statement that the Attorney General's duty to defend did not abrogate any of the Governor's rights and powers under the vesting of executive power. See *id.* at 548, 359 S.E.2d at 480-81. The court stated that the two positions can and should co-exist, but failed to give any specific guidelines for how these two rights and obligations under the current scheme may actually play out in the real world. *Id.* at 546, 359 S.E.2d at 480.

186. See N.C. GEN. STAT. § 147-17(d) (2013).

187. *Id.* § 147-17(a).

188. *Id.* § 147-17(d).

189. *Id.* § 147-17(a).

190. *Id.* § 147-17(d).

the authority to direct the course of litigation, even if the Governor's outside counsel may participate.¹⁹¹ Given his or her role "as primary legal officer of the state,"¹⁹² the Attorney General could conceivably argue that, even in the employment of outside counsel, he or she ultimately remains responsible for managing litigation.

One interesting case that may bolster such an assertion is *Atkinson v. State*,¹⁹³ in which June St. Clair Atkinson, the Superintendent of the State Department of Public Instruction, a constitutional officer independently elected statewide, filed suit against the Governor.¹⁹⁴ The North Carolina Constitution establishes the State Superintendent as the "Chief Administrative Officer" of the Department.¹⁹⁵ In 2009, former Governor Bev Perdue decided to appoint a Chief Executive Officer to hold all responsibility for the management of the Department of Public Instruction.¹⁹⁶ Atkinson claimed that such an appointment violated the state constitution, as it infringed upon her rights and obligations as the Chief Administrative Officer.¹⁹⁷

The trial court¹⁹⁸ ultimately agreed with Atkinson, stating that the appointment of a Chief Executive Officer was "unconstitutional to the extent that it purports to limit the inherent constitutional authority of the duly elected State Superintendent of Public Instruction as Chief Administrative Officer of the State Board of Education."¹⁹⁹ While there is no such constitutional language with respect to the Attorney General, given the statutory endowment of common law powers, the *Atkinson* case may bolster such a claim that the Attorney General is effectively "Chief Litigation Officer." Thus, he or she is to be in charge of managing litigation, and any other

191. Morgan, *supra* note 8, at 166–67 ("In England the Attorney General was Chief Legal Advisor for the Crown and had charge of the management of all legal affairs and the prosecution of all suits in which the Crown was interested.").

192. Edmisten, *supra* note 22, at 10.

193. *Atkinson v. State*, No. 09 CVS 006655, 2009 WL 8597173 (N.C. Super. Ct. July 17, 2009).

194. Interestingly, Superintendent Atkinson and Governor Perdue were of the same political party. See Lynn Bonner, *Atkinson Fights to Lead DPI*, NEWS & OBSERVER (Raleigh, N.C.) (Apr. 3, 2009), <http://www.newsobserver.com/2009/04/03/52139/atkinson-fights-to-lead-dpi.html?storylink=misearch>.

195. N.C. CONST. art. IX, § 4(2).

196. See *Atkinson*, 2009 WL 8597173, at *1–2.

197. *Id.*

198. Because the case was never appealed, it offers little by way of binding authority. It does, however, acknowledge the inherent powers of the constitutional offices that may bolster the Attorney General's claim as chief litigation officer.

199. *Atkinson*, 2009 WL 8597173, at *2.

attorney hired by the Governor or otherwise must ultimately submit to his or her direction.

At the same time, this seems to contradict the legal scheme set out in the section 147-17.²⁰⁰ If the Governor hires outside counsel to protect the State's interest, it would likely do little good to have that counsel simply work at the direction of the Attorney General. This sets up a litigation conundrum that has yet to be fully played out in the context of conflict between the two government officers. The State may have two separate and distinct voices ostensibly pursuing the "same" result, but working independently to do so.

2. The General Assembly

The waters become even muddier if and when the legislative branch enters the fray. Recall that there is no clear legal authority for the General Assembly to hire its own counsel to represent *the State*, whether in addition to or in place of the Attorney General.²⁰¹ This would arguably violate the arrangement contemplated by the Constitution, in which the power to defend the laws of the state rests with the executive branch.²⁰² On the other hand, the Attorney General's constitutional duties are merely "prescribed by law," which gives the General Assembly wide latitude to legislate the inner workings of inter-branch relationships when it comes to the defense of state laws.

During the summer of 2014, the General Assembly took advantage of this apparent authority to clarify its relationship with the Attorney General, thereby adding another weapon to its legal arsenal for defending the constitutionality of the laws it passes, even when the Attorney General chooses to defend a law. Specifically, the General Assembly enacted two related statutory provisions of note.²⁰³

The first new provision states:

Whenever the validity or constitutionality of an act of the General Assembly or a provision of the Constitution of North Carolina is the subject of an action in any court, if the General Assembly hires outside counsel to represent the General Assembly in connection with that action, the General Assembly shall be deemed to be a client of the Attorney

200. See N.C. GEN. STAT. § 147-17 (2013).

201. See discussion *supra* Part III.A.2.

202. See N.C. CONST. art. III.

203. See The Current Operations and Capital Improvements Appropriations Act of 2014, ch. 100, § 17.3A(a), 2014 N.C. Sess. Laws __, __ (to be codified at N.C. GEN. STAT. § 120-32.6).

General for purposes of that action as a matter of law.²⁰⁴

Such an invocation of the attorney-client relationship accomplishes several things. First, for all actions challenging the constitutionality of a state law, the Attorney General would owe the General Assembly all of the relevant professional duties an attorney owes a client under the Rules of Professional Conduct.²⁰⁵ Perhaps most importantly among those is Rule 1.2, which requires that an attorney allocate authority such that the client sets the objectives of the representation, while the attorney retains reasonable authority over the means.²⁰⁶ As such, under the new provision, the Attorney General could not refuse to take an action the General Assembly directed him or her to take, such as appealing a case.²⁰⁷ Such refusal, even under the auspices of one of the available arguments for declining defense, may constitute a breach of the Attorney General's broader ethical duties as a lawyer.²⁰⁸

Furthermore, as discussed above, section 147-17(d) allows a "State client" who has employed a lawyer in addition to the General Assembly to direct which counsel will have final decision-making authority.²⁰⁹ Arguably, under the new statute, by taking on "client" status by operation of law when the constitutionality of a statute is challenged, the General Assembly could hire outside counsel and direct that counsel to have final decision-making authority.

However, instead of leaving this argument to fall under the somewhat unclear language of section 147-17(d), the General Assembly took up a second, related provision that distinctly establishes this "lead counsel" authority.²¹⁰ Under this new provision, whenever the General Assembly hires outside counsel through its

204. *Id.* (to be codified at N.C. GEN. STAT. § 120-32.6(b)).

205. *See* N.C. Rules of Prof'l Conduct R. 1.1 to .19 (establishing duties owed by all attorneys to clients, including competence, diligence, confidentiality, communication, and loyalty). This represents a rather dramatic shift in the relationship between the Attorney General and the General Assembly; prior to the enactment of this law, any coordination between the General Assembly, its attorneys, and the Attorney General's office in lawsuits challenging the constitutionality of state laws was based on the willingness of the Attorney General and his staff to allow such coordination.

206. *Id.* R. 1.2 ("A lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are pursued.").

207. *See id.*

208. *See id.*

209. N.C. GEN. STAT. § 147-17(d) (2013).

210. *See* The Current Operations and Capital Improvements Appropriations Act of 2014, ch. 100, § 17.3A(a), 2014 N.C. Sess. Laws __, __ (to be codified at N.C. GEN. STAT. § 120-32.6).

leadership, it will have the authority to designate that counsel as “lead counsel,” who will “possess all final decision-making authority with respect to the representation.”²¹¹ The Attorney General, acting as “co-counsel,” is directed to coordinate with the lead counsel consistent with the Rules of Professional Conduct.²¹²

Although these new statutory provisions give the General Assembly significantly greater authority to shape constitutional litigation than it has enjoyed in the past, such laws certainly are not immune to criticism. Perhaps most notably, they invite a number of constitutional questions, the foremost being whether such laws violate the separation of powers provided for in the North Carolina Constitution.²¹³ Because the legislative language is so new, it is unclear whether it might be challenged and what the outcome of such a challenge would be.

Even without these new provisions, however, the General Assembly still has an option for ensuring an “adequate” defense of state laws as a result of the intervention statute.²¹⁴ Although this law does not raise the same kinds of separation of powers issues raised by the new provisions,²¹⁵ drawing the line between representing *the General Assembly as a party* and representing *the State* is nevertheless an imperfect process, which becomes exceedingly relevant when revisiting the Article III standing issue in the event the Attorney General does, in fact, defend a law. Recall that when the Attorney General declines to defend, *Hollingsworth* suggests that legislative leaders, acting in their official capacity, may serve as the agents of the State and have the right to appeal an adverse ruling on the constitutionality of a state law.²¹⁶ Arguably, this dynamic changes when the Attorney General is defending the law. When the General Assembly is no longer the lone “agent” of the State, the legislative branch, even acting in its official capacity, has no interest to

211. *Id.* (to be codified at N.C. GEN. STAT. § 120-32.6(c)).

212. *Id.*

213. There is an argument to be made that the new law is an unconstitutional infringement by the General Assembly upon the Attorney General’s role as an executive officer and his common law powers to represent the state. See *supra* Part I.B. Conversely, because the only *constitutional* statement regarding the Attorney General’s powers is that they are to be “prescribed by law,” N.C. CONST. art. III, § 7, the General Assembly likewise has an argument that the office’s powers are simply whatever the legislature says they are and therefore the law is well within the bounds of the constitution.

214. See N.C. GEN. STAT. § 1-72.2 (2013).

215. The law does not seek to abrogate executive authority, but rather to supplement it by allowing the legislature to intervene as a separate party.

216. *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2664 (2013).

vindicate.²¹⁷ Like the proponents in *Hollingsworth*, the General Assembly is unaffected by the outcome of the litigation with respect to their rights and obligations.²¹⁸ As Justice Roberts puts it, the General Assembly will not have been “ordered . . . to do or refrain from doing anything.”²¹⁹ Courts will excuse this “shortcoming” when the executive declines to defend, primarily on the grounds that the State should be able to have some official party to represent it.²²⁰ However, the General Assembly arguably has no judicially cognizable interest separate and apart from the State’s when the State’s rightful legal agent has chosen to appeal. Like the Proposition 8 proponents, legislators are no longer positioned to represent the State’s interest.²²¹

The Voter I.D. litigation once again is helpful as a hypothetical example. Imagine, for instance, that Attorney General Cooper has decided to defend the law, but the General Assembly has intervened as a party under the legislative intervention statute because the legislative leadership considered the Attorney General’s defense to be inadequate. The federal district court rules that the law is unconstitutional. Both the legislative leaders, now parties in the suit, and the State, acting through the Attorney General, appeal. The State certainly has an interest in the continued enforcement of its laws,²²² and the Attorney General’s standing, as representative of the State, is unquestioned. But is the General Assembly still an “agent” of the State such that it might also appeal as an interested party? Asked another way, can the General Assembly’s interest in the validity of the law be separate and distinct from the State’s?

Arguably, the “official” vs. “private” party distinction breaks down when multiple public officials are seeking to establish standing by contending that they represent the State’s interest.²²³ Likewise, state law on the matter is not entirely determinative.²²⁴ As a result,

217. *See id.* at 2663 (“[O]nce Proposition 8 was approved by voters . . . [p]etitioners have no role—special or otherwise—in the enforcement of Proposition 8.”). Likewise, the General Assembly has no enforcement interest in its laws, and once its agency status is lost, it too has no specialized interest.

218. *See id.* at 2662.

219. *Id.*

220. *Id.* at 2664–65.

221. *See id.* at 2663.

222. *Id.* at 2664.

223. *See id.* at 2665 (“The point of *Karcher* is not that a State could authorize *private parties* to represent its interest; [legislators] were permitted to proceed only because they were state officers, acting in an official capacity.”).

224. *Id.* at 2664. In *Hollingsworth*, the California Supreme Court had determined that, as a matter of state law, the official proponents of Proposition 8 did represent the State’s

because the interest of the State is already represented by an executive official (with arguably exclusive legal authority to do so), the General Assembly, even acting in its official capacity, has no judicially cognizable interest in the litigation, despite the fact that state law gives them such standing in *state* court. Like the proponents of Proposition 8, its role was to pass the legislation, and a court order restraining the enforcement of a statute does not restrict its legal rights.²²⁵

The standing issue aside, the practical realities of waging a defense of the State's laws when two different branches of government are represented has the potential for conflict. To complicate matters further, recall that the Governor may hire independent counsel to represent the interests of the State.²²⁶ The Governor's counsel might add his or her own constitutional defenses, some consistent with that of governmental colleagues, some in contradiction. This is, perhaps, the full measure of convolution—a multiplicity of officials across two separate branches of government claiming to represent the State's interests before the third. Is this really the situation the law contemplates?

The General Assembly's recent actions help clarify matters to some degree, but questions still remain. Even if the General Assembly can ensure representation without intervening by triggering client status, the degree to which an Attorney General will cooperate will remain to be seen. Moreover, significant constitutional questions suggest that such actions may be subject to challenge.

To a certain extent, the Voter I.D. litigation has and will continue to serve as a guide for how these relationships might function. Despite his public comments regarding the bill, Attorney General Cooper acknowledged that it is his office's duty to defend the law and maintained that his office could adequately defend the State's interests notwithstanding his own personal disagreements, and that litigation is ongoing.²²⁷ Nevertheless, Governor McCrory hired independent counsel to represent the State, arguing that Cooper's comments had undermined his confidence that the State was

interest in defending the validity of the constitutional amendment. *Id.* Nevertheless, the Court found that the private party had no cognizable individual interest, and as private parties, they could not assert the state's interest. *Id.* at 2665.

225. *See id.* at 2662.

226. *See discussion supra* Part III.A.1.

227. John Frank & Rob Christensen, *NC Attorney General Questions McCrory on Voting Lawsuit; Governor's Office Fires Back*, NEWS & OBSERVER (Raleigh, N.C.) (Oct. 1, 2013), <http://www.newsobserver.com/2013/10/01/3244928/roy-cooper-questions-pat-mccrory.html>.

adequately represented.²²⁸ In the meantime, the General Assembly has refrained from intervening as a party but has hired its own attorneys to advise it throughout the litigation and to work with the Attorney General's office.²²⁹ Thus, while the waters remain largely uncharted, further opportunities for disagreement and non-defense may yield greater guidance in the near future.

CONCLUSION

The "ancient and honorable office"²³⁰ of Attorney General has come a long way from its origins as the personal representative of the English Crown.²³¹ The office has seen significant development in North Carolina alone.²³² Yet, even so, the scope of the powers and duties of the state's modern Attorney General remain somewhat ill-defined with respect to the responsibility to defend the validity of state laws. The statutory duty to defend is possibly obscured by duties held at common law.²³³ Those taking the oath of office swear to protect the laws of the United States and of North Carolina, yet both the constitution and the laws of the state provide no direction for when they might conflict.²³⁴ The suggested framework for identifying conflict and incorporating traditional notions of executive power may provide some help, but a vast "zone of twilight" remains.²³⁵ Likewise, the ability of other government actors to respond remains a sea of uncertainty.²³⁶ While this article has shed some light on the parameters of gubernatorial and legislative authority to defend the laws of the state, in truth, their ability to do so is certainly not without question, if not legally, then practically.

What, then, can be done?²³⁷ Some have suggested moving constitutional defense out of the Attorney General's purview

228. *Id.*

229. *Id.*

230. Morgan, *supra* note 8, at 165.

231. *Id.* at 166.

232. See Edmisten, *supra* note 22, at 9–10.

233. See *supra* Part II.

234. See *supra* Part II.C.2.

235. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

236. See discussion *supra* Part III.

237. There are unique political challenges in making changes to this legal landscape. Reforming the duties of constitutional players always carries an enormous risk. The legislature may be more likely to do it when it plays to their advantage, but they often do so with an understanding of the political realities—they may be in the opposite position very soon. Nevertheless, clarity in the law is something that most can agree is valuable.

altogether and placing the responsibility in the hands of the legislature.²³⁸ Similarly, continued intra-governmental conflict of this nature may cause the public to revisit eliminating the divided executive and placing the office of Attorney General under the umbrella of the Governor.²³⁹ Still others may argue that confusion has its virtues, and that a system emphasizing the separation of powers and competing interests is actually *best* positioned to ensure a robust legal defense of the state's laws.

What is perhaps less radical, but wholly necessary, is a clarifying response. When the State lacks a clear, consistent voice, the defense of its laws is in jeopardy. The General Assembly's actions in 2014 clarified matters to some extent, but the reach of the new laws, especially its new ability to appoint a lead counsel, raises more questions even as it answers others. Moreover, while these heady legal questions deserve thoughtful consideration, one must not forget the practical challenges associated with intra-governmentally coordinated legal work. At the end of the day, words must be written and briefs filed; strategies crafted and hearings held. Whoever manages to assert final decision-making authority will truly wield significant power.

These practical realities thus illuminate both the importance and the limits of the law in this area; it defines respective government actors' rights and responsibilities, but is also ultimately shaped by those actors as they attempt to put it into practice. This is a difficult endeavor, but incremental legislative clarification and a commitment to reasonable coordination between the Attorney General and other government actors will go a long way in assuring an adequate defense of the constitutionality of the State's laws.

JOHN E. HARRIS**

What is perhaps most clear from this Comment is that the state of the law as stands is undoubtedly unclear.

238. See, e.g., Simon P. Hansen, Comment, *Whose Defense Is It Anyway? Redefining the Role of the Legislative Branch in the Defense of Federal Statutes*, 62 EMORY L.J. 1159, 1162 (2013).

239. But see Marshall, *supra* note 23, at 2448 (suggesting that a divided executive is actually a better means of securing liberty and governing effectively).

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