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The Office of Attorney General in Kentucky

By ROBERT LATANE MONTAGUE III*

Recently the office of Attorney General in Kentucky has again become a subject of scholarly and legislative discussion. The legislative activity has been set forth in House Bill, 439,** which pertains in part to modifications of the office. This bill is the first step of several which are needed to modernize and improve the effectiveness of the Attorney General's functions in Kentucky. This act has been implemented by regulations prepared by the Attorney General which are designed to improve the internal administrative operation of the office and to establish a better policy with respect to requests for official opinions.

The Attorney General's office is also assuming greater responsibilities in the field of legislative drafting for both the executive and legislative branches of the state government. This is being accomplished through a program of maintenance of records of all technical defects, failures to provide for unforeseen contingencies, and ambiguities in legislation which have been overlooked by the General Assembly. These records are to be presented to subsequent sessions of the General Assembly in the form of remedial and corrective legislation. In addition, the Attorney General's office is also beginning to function as a receiving board for regulatory and legislative proposals to the offices of the Governor and Lieutenant Governor. The Attorney General's office, under this program, will serve as a legislative research agency for the executive branch of the state government.

Another program, designed to create an awareness of the importance of state public law, is a summer internship program for a limited number of law students and law clerks.

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** Ky. Acts, 1960 Cr. 68, art. II; Ky. Rev. Stat. §§ 15.025, 15.100, 15.105, 15.180, 12.210. (1960) (hereinafter cited as KRS).

All of these programs, however, will not make the office what it should be. It is the purpose of this study to point out some of the problems and to propose suggestions for improvements. This requires some discussion of the development of the Attorney General's office and a comparison thereof with similar positions in other states.

STAGES OF CONSTITUTIONAL AND LEGISLATIVE DEVELOPMENT OF THE OFFICE

The office of Attorney General in Kentucky, as in all states, can trace its origin to England.¹ Ultimately there, the Attorney General was considered the chief law officer of the King, and it was at this stage that the office became part of the state and federal governments after the Revolution. In Kentucky, the office was first established as an appointive one,² a policy which lent itself to administrative efficiency. The Governor appointed the Attorney General who held office during good behavior.

The office as it exists today has its foundation in the Constitution of 1891. The provisions concerning the Attorney General were embodied in the short but flexible requirements of sections 91, 92 and 93 with limited control being imposed by sections 87 and 96. Under the Constitution, the duties of the office are to be "prescribed by law." There were a number of proposals relating to the office at the convention which never became incorporated in the Constitution, and which will be considered later in the present discussion.³

One of the most persistent problems in the history of the office seems to have been the question of employment of state attorneys. The legislative acts concerning the office indicate that the problem has been reconsidered on several occasions. First, the Governor only was permitted to employ counsel on the written request of a sick or incapacitated Attorney General.⁴ Later the Governor was empowered to employ counsel in actions

¹ Clay, Lyell B., "The Attorney General of West Virginia", Office of the Attorney General of West Virginia, Charleston, W. Virginia, 1957, p. 1.

² Ky. Const. art. II, § 16 (1792); Committee For Kentucky, "Blueprint for a Greater Kentucky", Report No. 12, p. 75 (1949).

³ Proceedings and Debates in the Convention to Adopt, Amend, or Change the Constitution of the State of Kentucky, 1890 pp. 1128, 1286, 1380, 1445, 1493-1506.

⁴ Ky. Acts 1892, ch. 100, art. II, § 19.

by the Commonwealth against other states or the United States.⁵ Finally, he was given a free hand in the administration of the legal business of the state.⁶

From 1908 until 1942 legal counsel could be employed by state officers, trustees, department heads, or institutions only in an emergency which, in the opinion of the Attorney General, required employment of other counsel.⁷ During this period the Court of Appeals pointed out the precise scope and meaning of the legislation.⁸ Relying upon the wording of the statutes and its

⁵ Ky. Acts 1902, ch. 62.

⁶ Carroll's Kentucky Statutes, Ch. 8, Art. II (1903).

⁷ Ky. Acts 1908, ch. 32.

⁸ In *Commonwealth v. Louisville Property Company*, 141 Ky. 731, 133 S.W. 759, 761 (1911), the Court stated:

The statute as a whole indicates that the object of its enactment was to do away with the practice, hitherto obtaining, of employing special counsel or attorneys to represent the interest of the Commonwealth in the courts, and to require the Attorney General and his assistants to take charge of and attend to all matters in litigation in which the Commonwealth is, or may be, a party in interest, whether in courts of civil or criminal jurisdiction in or out of the state, except where it is made the duty of the Commonwealth's Attorney to represent the Commonwealth, or an emergency such as subsection 5 contemplates might arise (which) would require the Attorney General to request the Governor in writing to employ special counsel. The Attorney General had the legal right, therefore, to declare Pickett (contract Attorney) and his associate counsel without authority to bring or maintain this action, and also to direct its dismissal; for not only did the statute, supra, upon becoming operative abrogate the contract made by Pickett with the former auditor and end his employment thereunder, but it repealed the former statute from which that officer derived authority to employ him.

The statute was further construed in *Commonwealth v. Roberta Coal Company*, 186 Ky. 394, 216 S.W. 584, 587-588, 590 (1919) when the Court said:

Under this statute (Sec. 112-5) Carroll's Kentucky Statutes, it is made the duty of the Attorney General and his assistants to attend to all litigation and business in which the Commonwealth or any state officer in connection with his official duties may be interested; and no state officer or state board, commission, or head of any department or institution of the state, or any person connected therewith, has any authority to employ or to be represented by other counsel at the expense of the state, or at the expense of any fund set apart for his or its use, unless the Attorney General requests the employment of such other counsel.

The statute, as we have seen, makes it the duty of his office to attend to all litigation in which the state is concerned 'unless an emergency arises' which in his opinion 'requires the employment of other counsel,' and means, as we clearly think, that the emergency must arise in respect to some particularly named suit, proceeding, prosecution, or thing, and does not contemplate the general employment of special counsel to perform general legal services, although such services in the opinion of the Attorney General might be of benefit to the state.

The nature of the "emergency" envisioned in the statute was further clarified in *Gordon v. Morrow*, 186 Ky. 713, 218 S.W. 253, 264 (1920) in the following terms:

(footnote continued on next page)

prior interpretations, the Court held in *Montgomery v. Gayle*,⁹ that the State Highway Commission was not authorized to appoint a special legal adviser, the power therefore having been denied by the statute defining the powers and duties of the Attorney General.

In 1942 the centralized powers of the office were again decentralized; administrative departments were permitted to employ counsel on the approval of the Governor.¹⁰ The Court of Appeals, doubtful of the wisdom of the act,¹¹ held it constitutional.¹²

Considering the infringement of the powers of the Attorney General the Court conceded the conflicting views of the extent of such powers and stated:

. . . it is certain that the Attorney General has been the chief law officer of the federal or state governments with

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. . . but one purpose of the statute in allowing employment of special counsel was to make provision for cases such as this and to leave it to the sound judgment of these two high officers of the state (Governor and Attorney General), to decide when an emergency demanded the employment of special counsel. Manifestly, it is better for the interest of the state that they should be allowed this discretion and be permitted, in cases of great importance to the state, to employ special counsel rather than leave the interest of the state to be looked after by counsel that might not be fitted by experience or ability to represent it, or to be left unrepresented when it was not the duty of the county or Commonwealth Attorney to attend and the Attorney General could not.

⁹ 216 Ky. 567, 228 S.W. 323 (1926).

¹⁰ Ky. Acts 1942, ch. 106.

¹¹ The Court stated in *Johnson v. Commonwealth ex rel Meredith*, 291 Ky. 829, 165 S.W. 2d 820 at 833 (1942):

The Act is indeed so broad in its scope as to be fraught with opportunities for abuse and extravagance and productive of conflict and confusion in the legal representation which has heretofore been centralized in the Attorney General and his staff. If the authority given by the Act should be exercised in its entirety, the Attorney General would be relieved of many present duties and stripped of many prerogatives which that officer has hitherto performed and enjoyed under statutory direction and authorization or through immemorial custom. However, it is not to be assumed that the attitude of the chief executive and his responsible heads of departments will be so antagonistic to the public welfare that they shall concur to such an extent that the feared evils will result. It is not supposed that they will take their eyes off the public good.

Be that as it may, it is a principle basic in its recognition and fundamental to the co-ordination of the two divisions of governmental power, that the courts do not concern themselves with the wisdom, need or appropriateness of legislation, nor the purposes motivating it. That is left where it is put by the Constitution—in the General Assembly subject only to the veto power of the Governor.

¹² *Johnson v. Commonwealth ex rel Meredith*, *supra* note 11.

the duty of representing the sovereign, national or state, in such capacity.¹³

As a matter of general recognition, unless denied specifically by statute, the Attorney General of any state is clothed with all powers incident to and traditionally belonging to his office and such others as may be added by constitution or statute.¹⁴ The Constitution of Kentucky is one of a number which merely establish the office of Attorney General and make no specific mention of his duties other than that they shall "be prescribed by law".¹⁵ The Kentucky Court in *Johnson v. Commonwealth*,¹⁶ found that there were at least three interpretations of this phrase among the various states.¹⁷

The rule in Kentucky has been that the Attorney General has common law authority, duties, powers and rights.¹⁸ It has been further held that these powers exist *except* as "limited by statute".¹⁹ Concluding that the legislature possessed the constitutional power to modify the common law in this respect, the Court in *Johnson v. Commonwealth*,²⁰ indicated that this legislative power would not extend to making the office an empty shell by stripping it of all its rights and duties.²¹

¹³ *Johnson v. Commonwealth ex rel Meredith*, *supra* note 11 at 838, 165 S.W. 2d at 826.

¹⁴ 5 Am. Jur., *Attorney General*, §§ 2, 5, 6, and 8 (1938); 7 C. J. S., *Attorney General*, §§ 5, 6, 7, 8 (1937).

¹⁵ Ky. Const. §§ 91, 93.

¹⁶ *Johnson v. Commonwealth ex rel Meredith*, *supra* note 11.

¹⁷ 165 S.W. 2d at 839: The legislature may not add duties but may limit or decrease common law duties. (citing cases)

165 S.W. 2d at 840:

The term "as prescribed by law" has been held in the following cases, in effect to negative the existence of any common law duties, so that the Attorney General has none, and the legislature may deal with the office at will. (citing cases).

165 S.W. 2d at 840:

The term has been construed in Illinois and (North Dakota) to mean that the legislature may add to the common law duties of the office, but they are inviolable and cannot be diminished. (citing cases).

¹⁸ *Johnson v. Commonwealth ex rel Meredith*, *supra* note 11; *Repass v. Commonwealth*, 131 Ky. 807, 115 S.W. 1131 (1909); *Chambers v. Baptist Education Society*, 40 Ky. (1 B. Mon) 215 (1841). *cf.* *Commonwealth ex rel. Ferguson v. Gardner*, 327 S.W. 2d 947 (Ky. 1959) (only those powers existing at common law as of 1607).

¹⁹ *Repass v. Commonwealth*, *supra* note 18.

²⁰ 291 Ky. 829, 165 S.W. 2d 820 (1942).

²¹ *Johnson v. Commonwealth ex rel Meredith*, 291 Ky. 829, 165 S.W. 2d 820, 844:

. . . We are of the opinion that, while the Attorney General possesses all the power and authority appertaining to the office under common law and naturally and traditionally belonging to it, nevertheless

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Failing to prevail in the Court, the Attorney General could only resort to the General Assembly. There was temporary success in 1944, when the legislature again centralized the legal activities of the state in the office of the Attorney General.²² It is probable that the underlying reasons for both the 1942 and 1944 acts were political in nature and that their passage indicates the relative state of harmony or disharmony which existed between the Attorney General and the Governor at the time of passage.

This theory receives some corroboration by the fact that in 1948, the power of approval which had been in the Attorney General was removed and placed in the hands of the Governor.²³ This is currently the law in Kentucky, and it greatly weakens the effectiveness with which the Attorney General can carry out his responsibilities, and renders it almost impossible for him to keep adequately informed on legal matters affecting the state which would otherwise be called to his attention more expeditiously.

THE RELATIVE POSITION OF KENTUCKY

The Act of 1948 has the effect of placing Kentucky in the unique position of being the only state in the Union in which independent counsel may "always"²⁴ be employed by any administrative department, whether headed by an elected official or otherwise. While it is not suggested that this unique attitude is in itself unwise, it nevertheless raises the question of its advisability.

This position, representing the ultimate in what could be termed the supremacy of the administrator in state government, has recently been modified by a statute which requires the

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less the General Assembly may withdraw those powers and assign them to others or may authorize the employment of other counsel for the departments and officers of the state to perform them. This, however, is subject to the limitation that the office may not be stripped of all duties and rights so as to leave it an empty shell, for obviously, as the legislature cannot abolish the office entirely, it cannot do so indirectly by depriving the incumbent of all his substantial prerogatives or by practically preventing him from discharging the substantial things appertaining to the office.

²² KRS § 15.020-15.050.

²³ KRS §§ 12.200-12.230.

²⁴ Tentative and Preliminary, The Powers, Duties and Operations of Attorneys General Offices', The Council of State Government, Chicago, Illinois, 1951, Table D. (hereinafter cited as COSGO)

governor to "consult the Attorney General as to whether the legal services requested by departments are available in the Attorney General's office."²⁵ (Emphasis added). This section simply tends to make the Attorney General aware of the need for additional attorneys by other departments of the government, but gives only a very limited degree of actual control over employment. The governor still retains the power to approve the hiring of additional attorneys.

Kentucky's position is to be contrasted with the opposite extreme, represented by Michigan, where the legal system is highly centralized and the Attorney General's staff occupies a detached position from the administrative environment.²⁶ With a few exceptions, all attorneys for the State of Michigan are on the staff of the Attorney General.²⁷

The typical attitude of Attorneys General concerning centralization of legal services is reflected in a recent message to the Michigan Legislature by the Attorney General in which he said:

As a private attorney prior to my taking office as Attorney General I had observed that Assistant Attorneys General assigned to represent particular state agencies had a tendency to lose their identity as members of the Attorney General's staff and to become involved in the administrative function of the agency with which they were chiefly concerned. I have attempted during the last biennium to cure this situation, as it is my firm belief that the Attorney General, though his assistants, may not adequately discharge his duty as attorney for the state government unless he maintains a separate and distinct entity. . . . Present and past policy makes for an institutional lawyer. The policy I suggest would in time provide the state with a legal staff prepared to represent the state government and the people of the state as a whole, rather than particular state agencies.²⁸

The problem is one of determining the relative value of the legal services rendered to the state under the two systems. The merits of the Michigan policy are plentiful, but it is not without shortcomings. The satisfactory functioning of a centralized sys-

²⁵ KRS § 12.210.

²⁶ Steud William L., "The Lawyer in Michigan State Government", Papers in Public Administration No. 31, University of Michigan, 1959, p. 5.

²⁷ *Ibid.*

²⁸ Biennial Report of the Attorney General (of Michigan), 1950, p. xiii.

tem, for example, must depend to a considerable degree on the harmony which exists between the Attorney General, the Governor, and the administrative offices of the state. In addition, the accentuation of a generally existing negative, if not hostile, attitude of lawyers and administrators toward one another may be intensified by such a system. This results primarily from the fact that administrators are chiefly concerned with accomplishment, and the concern of a lawyer is more often likely to be the method of accomplishment. In such a situation, it is definitely questionable as to just how valuable legal services which are centralized can be to a state government and the people of a state.

On the other hand, there are some cogent arguments for a more highly centralized system. The general attitude among lawyers working for the state of Kentucky and elsewhere²⁹ is that supervision of lawyers by other lawyers is preferred. There is, without question, a lack of competence on the part of a layman to judge a lawyer on his professional abilities in most cases, and it is understandable that for this reason lawyers prefer professional performance evaluation.

In addition, objectivity, a desirable characteristic in many phases of legal work, is better achieved by attorneys who are not directly under the control of the administrative department head whom they represent.³⁰ Where the lawyer is not subordinate to an administrator, he is more apt to give a candid legal opinion than where his position is such that he must simply produce an argument for the administrator's point of view.

Uniformity and consistency in interpretation of statutory and case law is another benefit resulting from a centralized legal service, since effective coordination of the law as applied to all agencies and functions of the state is possible when controlled by the office of the Attorney General. However, the difficulty to be encountered is that administrative policy within an agency may become inconsistent when the lawyer representing the agency has a dual responsibility to the Attorney General and the administrative department head. For where the lawyer is directly and

²⁹ U. S. Commission on Organization of the Executive Branch of Government, "Legal Services and Procedure, Report to Congress" (Washington; Government Printing Office, 1955) pp. 7-8.

³⁰ Steude, *op. cit. supra*, note 26 at 7.

solely responsible to the agency head, he will be better able to appreciate the administrative problems involved, and he will be in a better position to fulfill a policy-making function for the agency as well.

It is apparent from the foregoing discussion of some of the benefits and disadvantages of a centralized legal system for the state that more than mere centralization is necessary to achieve the desired goal of improved handling of the legal business of the state. Some form of compromise with absolute centralization is likely to prove much more desirable for a state such as Kentucky, which differs with the more centralized states in a number of respects, including size and political background. Before offering a solution to this and some of the other questions that arise concerning the Attorney General of Kentucky, his office should be compared to the office in other states.

A BRIEF SURVEY OF SALIENT STATISTICAL AND FACTUAL FEATURES

In the past decade, the expansion which has characterized every phase of government has not bypassed the office of Attorney General. It is the effect of such development and growth which forms a considerable portion of the need for a reappraisal and possible reorganization of the office to better fit it to carry out its continually expanding role.

One of the most obvious areas in which such expansion has been reflected has been in the budgetary increases which have taken place. In 1945, the appropriation for the office was \$51,300, whereas in 1957-58 the appropriation was \$119,000 and for 1956-57, \$117,600.³¹ The total expenditure for the two year period from January, 1956, through December, 1957, was \$235,980.95,³² and the Attorney General indicated in his report for that year that it would be impossible to keep within budgetary limitations and requested an increase in the budget for the next year to \$160,556 and \$167,438 for 1959-60. The relative increase in expenditures and the approximate size of budgetary allowance were comparable to those indicated for the states of Colorado,

³¹ Ky. Rev. Stat. ch. 47.

³² Report of the Attorney General, for the biennium beginning the first Monday in January, 1956, and ending the thirty-first day of December 1957, p. 10.

Maine, Maryland, North Carolina and Utah.³³ In states where extensive reorganization of the responsibilities and functions of the office took place, there was a correspondingly large increase of expenditures.

The salaries of the Attorney General and staff personnel have reflected a retarded response to the increase in the cost of living, but this had been a rather typical situation. The salaries generally appear to be favorably comparable to those offered in states of similar size. In 1952, Kentucky was among the 30 states which were paying the Attorney General less than \$10,000, the salary being \$8,500, while by 1956 it had joined the ranks of 32 states who pay the Attorney General \$10,000 or more, the salary now being \$12,000. The First Assistant Attorney General receives \$9,000 and salaries for other assistants range from \$5,760 to \$9,000.³⁴

In the office of every Attorney General at least some of the employees are covered by some form of public retirement plan. Kentucky has the old age and survivors insurance coverage under the Federal Social Security Act, as amended, which has been made available to state employees by over one-half of the states. It is granted to all personnel in the office. There is also an additional state system which was enacted in 1956 to provide more adequate income for retiring employees.³⁵

At present the ten Assistant Attorneys General and the Deputy Attorney General are appointed and removed by the Attorney General, and this procedure is followed in 29 states.³⁶ In five states the merit system is applied to the entire staff of the Attorney General with the exception of the elected officer who heads the department. In a considerably greater number of states, such coverage is extensive but applies only to the clerical staff, or is dependent upon whether the person holds his position by appointment or examination. Such a system has recently been enacted in Kentucky, and will include the personnel of the Department of Law by July 1, 1961.³⁷

³³ "The Office of Attorney General Personnel and Financing" COSGO, 1955, pp. 1-5.

³⁴ COSGO, 1955, p. 5-6.

³⁵ KRS §§ 61.510-61.700 (1956).

³⁶ COSGO, 1955, p. 16.

³⁷ Ky. Rev. Stat. ch. 18.

One important benefit which should be derived from a merit system is a partial neutralization of the effect of centralizing the appointive power over all state attorneys in the hands of the Attorney General. Not only should it have the effect of screening out undesirable employees, but it will perhaps have an additional effect of reducing the excessive build-up of political power in the office of Attorney General while leaving him with the desired elements of coordination and control over the state's legal affairs. Under such a system in Michigan, it has been said that:³⁸

A bill establishing a centralized Law Department for the Commonwealth of Kentucky, when coupled with the introduction of such a system, would tend to remove many of the political overtones which might otherwise accompany such a measure, and would be a durable and valuable improvement.

The size of the present staff of the Kentucky Law Department argues against the practical applicability of such a bill. But when it is considered that altogether there are at least 87 lawyers currently employed by the state of Kentucky, as well as a considerable number³⁹ of part-time contract attorneys, the justification for such a system becomes more apparent. Although this figure does not begin to compare with the number of lawyers employed by the Law Department alone in New York, where there are 217 law-trained personnel,⁴⁰ it nevertheless is a far better basis for comparison than would be the number of attorneys employed in the office itself.

It has been pointed out that the general control of the Attorney General over hiring counsel for state agencies is limited in Kentucky as it is in no other state. In answer to the question "Does the Attorney General exercise any jurisdiction over departmental counsel?" 15 states responded that their Attorney General has no control or jurisdiction over such counsel. Six

³⁸ Stuede, *op. cit. supra* note 26 at 32.

The significance of political affiliation cannot be denied . . . but it may be said of the lawyer in Michigan state government that his principal incentive stems from his close working relationships with fellow attorneys and his own career as Assistant Attorney General.

³⁹ For the period from 1955-1959, there were fifty contracts negotiated according to a memorandum prepared by Mr. William E. Bivin of the Legislative Research Commission, December 30, 1959.

⁴⁰ COSGO, 1955, p. 17.

states could not supply a satisfactory answer, and 27, of which Kentucky was one, indicated that their Attorney General does exercise some jurisdiction ranging from very slight to very extensive.⁴¹ In Kentucky the Attorney General's control is confined to the appointment, approval of appointment, and supervision of attorneys serving a limited number of specified agencies, *i.e.* the Highway and Revenue Departments and the Public Service and Railroad Commissions.⁴² His power is similarly confined in 12 states. This limited control, of course, offers considerable possibilities for contrast with that exercised in such states as Alabama, California, Illinois, Indiana, Michigan and Ohio, where he has at least the power to approve *any* counsel hired by the state or any of its boards, commissions, or bureaus, and thereby is made aware of their employment.

With regard to the question of employment of part-time or special private counsel, all but one state has indicated possession of such authority to some degree. It is, however, usually restricted to special circumstances, similar perhaps, to those suggested in *Gordon v. Morrow*,⁴³ and in any event rarely employed in most states.⁴⁴ Where such counsel are employed, they are not referred to as Assistant or Deputy Attorney General, and their appointment is made through the agency employing them or by the Governor, or by both acting together. In only one-fourth of the states does the Attorney General participate in their appointment.⁴⁵ In almost all such cases the Attorney General has no control over removal of these appointees, this function being taken care of by the appointing authority. The salaries of such counsel in Kentucky are initially determined by the department head, and only in a few instances does the Attorney General have an opportunity to approve them. This statement as to salaries apparently applies not only to special counsel, but also to some of the regularly employed departmental counsel.

Organization within the office of the Attorney General varies in formality with the size of the office from state to state, and that presently existing in Kentucky is not unusual for a state with a

⁴¹ COSGO, 1955, pp. 21-25.

⁴² COSGO, 1955, pp. 24-25.

⁴³ 186 Ky. 713, 218 S.W. 258 (1920).

⁴⁴ COSGO, 1955, p. 24.

⁴⁵ COSGO, 1951, p. 21.

Law Department of similar size. There is a certain amount of specialization by individual staff members, but such specialization is not so complete as to preclude the value of joint consultation between the several attorneys or to prevent their having several fields of activity. The Attorney General is, of course, free to handle such office organization in the manner most befitting the current needs of the state. It has been suggested that the work of the office can be considerably implemented with more frequent opportunities for a pooling of the knowledge and resources of the various attorneys in the office. At the present time meetings are held weekly, but it is suggested that a rigid schedule of staff gatherings should not be established and that the opportunity for joint discussion should be available whenever any of the attorneys feel that he has a matter which warrants it. Such meetings should include counsel assigned to other departments in order to facilitate coordination of their work by the Attorney General and to keep him abreast of the activities of their departments with which he should be concerned.

Before concluding this discussion of some of the administrative aspects of the office, some mention should be made of the relationship which should exist between the Attorney General and some of the numerous commissions, boards, and councils which exist in proliferation in Kentucky and many other state governments. Whether the Attorney General should be a member of any of these boards or commissions depends upon the prevailing conception of the place of the Attorney General in state government. Should he be regarded primarily as a policy making administrator, or is he fundamentally a lawyer functioning as an advisor to policy making administrators from an objective vantage point? It would appear that to argue that he is anything more than a legal advisor is inconsistent with the policy of centralization of legal services in his office, for if it be admitted that he should serve on a number of policy making bodies, then the argument of the administrator for close integration of the lawyer into their departmental organization would seem to be the preferable one. But perhaps there is a better solution than the integration of the individual lawyers into the various agencies, commissions and boards. The need for a closer relationship between policy makers and legal advisers might best be satisfied by confining

such a relationship to the higher level. Such confinement, however, raises the problem of whether the Attorney General's membership on policy making bodies should be limited to the Governor's cabinet. In view of the large number of commissions and boards, it is unlikely that such a pyramid theory of governmental functioning, with the Governor at the top and the Attorney General at his right hand, would be satisfactory, even if the Governor were able to control the policy of each of the various commissioners and boards.

At present, the Attorney General is a member of a number of commissions and boards.⁴⁶ In considering whether he should be placed on others or removed from some of those to which he belongs, it is suggested that the primary criterion should be whether the function of the board or commission is such as to directly relate its activity to the field of law, or present an exceptional need for continuing legal advice. Placing the Attorney General on boards and commissions for the sole purpose of providing occasional legal advice, which he would be quite able to supply in an advisory capacity as he does to all other state agencies, decreases considerably the time and effort available for other primary and essential functions of the office, some of which will be discussed, *infra*. In line with these thoughts, it is suggested that he could serve effectively on such bodies as the Legislative Research Commission, the Highway Commission, the Election Commission and the State-Local-Federal Relations Commission. These would be in addition to those on which he already serves (see Note 46). The Public Library Commission is an example of those from which he could perhaps be removed.

THE ATTORNEY GENERAL AND REPRESENTATION OF THE STATE IN CIVIL AND CRIMINAL PROSECUTIONS

In Kentucky and every state, the Attorney General represents at least some of the various agencies of the state in any litigation in which they may become involved. He ordinarily attends to the entire process of civil litigation, although in criminal matters,

⁴⁶ Constitutional Review Commission, KRS §7.170, Subsec. 2; Records Control Board, KRS §12.195; Sinking Fund Commission, KRS §41.380; State Property and Buildings Commission, KRS §56.450; County Debt Commission, KRS §66.300; Board of Trustees of Teacher's Retirement System, KRS §161.250; Public Library Service Commission, KRS §171.202; Archives and Records Commission, KRS §171.420; Water Pollution Control Commission, KRS §220.600.

he is limited to the appellate level.⁴⁷ This is in keeping with the general American trend to emphasize the activities of the Attorney General in the field of civil litigation and to leave the handling of criminal matters largely in the hands of local prosecutors, usually without adequate Attorney General supervision.⁴⁸ This is contrary to the common law under which the Attorney General did have powers to initiate criminal prosecution. In recent years, there has been a growth of effort to reinstate more effective control of criminal law enforcement and prosecutions at the state level, in order to combat organized crime more effectively.⁴⁹

Except as limited by the effect of departmental counsel, contract attorneys, and commonwealth attorneys, the Attorney General has complete control of civil matters in Kentucky. Where these counsel have primary responsibility, he may still file a brief as *amicus curiae*. The use of departmental counsel is sometimes desirable in cases where one department of the state government is engaged in litigation against the other, and this is the policy followed in Kentucky. In other states, the Attorney General may represent both sides of such cases, and in others he takes one side leaving the other to special counsel.⁵⁰ These other alternatives are worthy of consideration in view of the fact that the Attorney General, by virtue of representing the interest of the state as a whole, is in a better position to shape the outcome of the controversy to best coincide with the needs of the state.

The area in which the control exercised by the Attorney General is most lacking in Kentucky as elsewhere is in the field of criminal prosecution. The legislative grant of criminal prosecution powers to local prosecutors has been construed as vesting such powers exclusively in the local prosecutors. The Attorney General is charged with handling criminal appeals in the highest state court and with prosecuting violations of a number of specific statutes.⁵¹ Upon rare occasions he has utilized staff members to

⁴⁷ KRS § 15.090; COSGO, 1951, p. 53.

⁴⁸ COSGO, "Attorney General and Law Enforcement", 1951, p. 1.

⁴⁹ COSGO, 1951, p. 3.

⁵⁰ COSGO, "Powers, Duties, and Operations of the Attorney Generals' Offices", 1951, p. 49.

⁵¹ Institute actions to dissolve or liquidate cooperative life insurance company, KRS §299.190; fraternal benefit society, KRS §300.270; Prosecute violations of accountancy law, KRS §325.990; Appear in Disbarment proceedings, KRS §§ 80.180, 80.190; Institute actions to recover fines imposed by Keneral Assembly, (footnote continued on next page)

handle investigations into criminal charges against state officials or firms or persons dealing with the state.⁵²

Before proceeding further with a discussion of criminal prosecution by the Attorney General, a brief statement of the general attitude of the courts and the obstacles to be overcome in effecting any change in existing relationships is in order.

It should be pointed out in this connection that securing judicial sanction of such attempts to exercise common law powers presents difficult problems for an Attorney General. He must persuade the court that the common law power does not conflict with the constitutional and statutory law of the state. Moreover, taken in conjunction with the relatively infrequent use of such powers in most states and with the strongly held popular belief that criminal prosecution is the responsibility of local officials, any such attempt is likely to involve legal contest and protracted litigation as to whether the Attorney General has the right to exercise such a power. The local prosecutor, frequently one of the most powerful political figures in the local community and fortified by a strong legal claim to responsibility and power by constitutional delegation, may well challenge the right of the Attorney General to exercise the contested power.⁵³

Any powers and authority which the Attorney General may seek to exercise in the area of criminal prosecution must be derived initially from either the common law or specific constitutional or statutory grants. Where there has been any recognition of such power, it has taken the form of either supercession, intervention, investigation, or other more limited forms of supervision and assistance in criminal prosecutions.

The courts have construed the potentially broad common law powers of the Attorneys General in this area rather narrowly, especially when their holdings are compared to the control exercised by the English Attorney General of the 18th century.⁵⁴ The instances of recognition by American courts of such authority

(footnote continued from preceding page)

KRS §6.130; Prosecute violations of banking laws, KRS §287.990; Prosecute violations of building and loan association laws, KRS §289.990; Prosecute actions for usurpation of office, KRS §415.050; Prosecute actions to repeal or vacate a charter, KRS §§ 271.990 and 415.010; Prosecute violations of agricultural seed laws, KRS §250.160; Workmen's Compensation Act, KRS §342.425; Unemployment Compensation Act, KRS §341.570.

⁵² COSGO, "The Attorney General and Law Enforcement", 1951, p. 53.

⁵³ COSGO, *op. cit. supra* note 53 at 10.

⁵⁴ COSGO, *op. cit. supra* note 53 at 11.

are the unusual rather than the general rule. They have included holdings, however, which recognize the right of the Attorney General to advise the local prosecutor,⁵⁵ to assist the local prosecutor in a specific action,⁵⁶ to attend grand jury proceedings,⁵⁷ to intervene for the purpose of prosecution,⁵⁸ to intervene to enter a *nolle prosequi*,⁵⁹ to institute criminal proceedings,⁶⁰ and in very limited and questionable circumstances to supersede a local prosecutor.⁶¹ These powers, usually sanctioned only as to specific actions, appear to constitute the maximum limits of the common law powers that the courts will recognize today,⁶² and there is doubt as to whether even this limited degree of authority would be sanctioned in Kentucky, in view of statutory and constitutional considerations.

Despite the limitations attending any expanded use of the common law powers, their potential value should be considered. They may afford an Attorney General in a state such as Kentucky, where the common law powers are recognized except as restricted by statute or constitution, with authority to advise and to assist the local prosecutor but probably not to institute criminal proceedings or to intervene in actions commenced by local prosecutors where circumstances warrant such action. While this has not represented the past trend in Kentucky, exercise of such power does not appear to have been proscribed by legislation or constitution specifically. The fact that it could be exercised might serve as an effective stimulant to criminal law enforcement in the state.

Regardless of how far a court may permit the common law powers to be extended, additional statutory or constitutional authorization would be required to properly confer any desirable degree of supervisory or coordinating power over the activities of local prosecutors.

Very few (five) states have specific constitutional provisions

⁵⁵ State v. Ehrlick, 65 W. Va. 700, 64 S.E. 935 (1909).

⁵⁶ State v. Robinson, 101 Minn. 277, 112 N.W. 269 (1907).

⁵⁷ State v. Koslowsky, 238 Mass. 379, 131 N.E. 207 (1921).

⁵⁸ People v. Rich, 237 Mich. 481, 212 N.W. 105 (1927).

⁵⁹ State v. Thompson, 10 N.E. (3 Hawks) 613 (1825).

⁶⁰ State v. Karston, 208 Ark. 703, 187 S.W. 2d 327 (1945).

⁶¹ Appeal of Margiotti, 75 A. 2d 465 (Pa. 1950); see also "The Common Law Power of State Attorneys General to Supersede Local Prosecutors", 60 Yale L.J. 559 (1951) and "Attorney General Versus District Attorney", 99 U. Pa. L. Rev. 826 (1951) also Note, 37 Va. L. Rev. 132 (1951).

⁶² COSGO, *op. cit. supra* note 53 at 11.

relating to the role of the Attorney General in criminal prosecutions.⁶³ California has what is probably the most comprehensive and significant provision.⁶⁴

Subject to the powers and duties of the Governor vested in him by Article V. of the Constitution, the Attorney General shall be the chief law officer of the state and it shall be his duty to see that the laws of the State of California are uniformly and adequately enforced in every county of the State. He shall direct supervision over every district attorney and sheriff and over such other law enforcement officers as may be designated by law, in all matters pertaining to the duties of their respective offices, and may require any of said officers to make to him such written reports concerning the investigation, detection, prosecution, and punishment of crime in their respective jurisdictions as may seem advisable. Whenever in the opinion of the Attorney General any law of the state is not being adequately enforced in any county, it shall be the duty of the Attorney General to prosecute any violations of law of which the superior court shall have jurisdiction, and in such cases he shall have all the powers of a district attorney. When required by the public interest, or directed by the Governor, he shall assist any district attorney in the discharge of his duties . . .

Such positive declarations of constitutional authority are not to be found in Kentucky or most other states, but similar powers are conferred in a number of states to varying degrees by legislative enactment.

Over two thirds (38) of the states give the Attorney General power to initiate and conduct criminal proceedings independently of the local prosecutor either on his own initiative or at the discretion of some other authority. Kentucky is one of a subgroup of six states within this number that grant this power only in connection with a limited number of statutes. In ten states the Attorney General has no such power either by Constitution or by statute.⁶⁵

The Attorney General may, on his own initiative, intervene in criminal proceedings commenced by local prosecutors in 22 states, and he has the power of intervention in 16 other states when

⁶³ COSGO, *op. cit. supra* note 53 at 12.

⁶⁴ Cal. Const. art. V. § 21 as amended in 1934.

⁶⁵ COSGO, *op. cit. supra* note 53 at 15.

requested to do so by other authority, usually the Governor or the Legislature, and occasionally the local prosecutor. Kentucky is one of the ten remaining states in which he has no general power of this nature with respect to criminal cases.⁶⁶ It is doubtfully inferable in civil cases where the Governor may employ counsel to assist the Commonwealth's attorney under KRS section 69.010. In such an instance, KRS section 12.210 requires the Governor to consult with the Attorney General as to whether legal services required by a department are available in his office. If Commonwealth's attorneys be included within the term "department", the inference would follow.

Eighteen states have statutes authorizing the Attorney General to assist local prosecutors in the initiation and conduct of criminal proceedings, such assistance being given when requested by the local prosecutor in three of these. Kentucky is not included within this group.⁶⁷

Kentucky is one of 34 states in which supercession, the power to dismiss the local prosecutor from the proceedings entirely, is not among those powers possessed by the Attorney General. In 14 states, however, this power is exercised to a limited degree.⁶⁸

In addition to these more direct forms of control over local criminal prosecutions, eighteen states have statutes giving the Attorney General "supervisory" power over these activities and seven others have some limited form of "supervision". But in nearly one-half of the states, such supervisory power as may exist is derived from the other powers already discussed. Kentucky is in this group.⁶⁹

The practice of holding periodic meetings of local prosecutors and law enforcement officials is employed in a few states to discuss problems arising in the enforcement of criminal law.⁷⁰ This and the other supervisory functions discussed herein, could, if effectively carried out result in the placement of effective control over criminal prosecutions in the hands of the Attorney General, but all such provisions have been narrowly construed, and in most instances, the facilities necessary to carry them out

⁶⁶ COSGO, *op. cit. supra* note 53 at 16.

⁶⁷ COSGO, *op. cit. supra* note 53 at 17.

⁶⁸ COSGO, *op. cit. supra* note 53 at 18.

⁶⁹ COSGO, *op. cit. supra* note 53 at 18-19.

⁷⁰ COSGO, *op. cit. supra* note 53 at 19.

have not been made available. This restrictive attitude on the part of the courts, when coupled with the practical difficulty of exercising continued direction and control over local prosecutors who are frequently powerful political figures and jealous of their independence from outside supervision, will tend to limit the success of any efforts by the Attorney General in this direction.

The fact that in terms of realistic politics any proposals for revising the supervisory functions of the Attorney General over criminal prosecutors in the state would receive severe limitation if not rejection, does not alter the fact that improvements in this area are needed now. This need will continue to grow in future years. The alternatives for meeting such needs resolve into two basic approaches. One would involve the establishment of an entirely separate Department of Criminal Justice headed by a director who would be entirely independent of the Attorney General. The other approach would be to substantially increase the powers of the Attorney General and the size of his staff in order to deal adequately with the problem.⁷¹

At present, there is in Kentucky, complete lack of vertical administrative responsibility in the area of criminal investigation and prosecution. The copious evidence of the existence of vast networks of well organized crime is ample justification for measures to increase the effectiveness with which the Attorney General acting as a representative of the whole state, can operate to destroy these criminal operations.

The resources of the office as it exists now are far from adequate for the task. Not only in terms of its powers and duties, but also in terms of its organization and size would it have to be revised. Both of the alternative approaches mentioned above would be theoretically feasible. For a state of Kentucky's size, modification of the Attorney General's office would probably be satisfactory. There appear to be no constitutional limitations on

⁷¹ See *The Model Department of Justice Act*, drafted by the American Bar Association Commission on organized crime and approved by the National Conference of Commissioners on Uniform State Laws in 1952 which presents a comprehensive legislative proposal for the accomplishment of many of the reforms needed elsewhere, but particularly in Kentucky. This proposed legislation has been available for eight (8) years and has yet to be adopted in its entirety by any state although parts of it are found in the laws of a number of states. Here may lie an opportunity for Kentucky to be first in the nation. This act represents sound professional thinking on the subject worth of considerable respect.

the authority of the Legislature in Kentucky to grant him the additional powers and resources which he needs in order to function properly in this area.

On the appellate level, the power of the Attorney General is more extensive in most (36) states. In Kentucky as well as 35 others, the Attorney General has the duty to prosecute criminal appeals. In some of these states, of which Kentucky is one, the brief in these cases is prepared by the office of the Attorney General. It has been suggested that briefs in the lower court prosecutions should be submitted to the office of the Attorney General for approval and suggestions. This would help to avoid errors on the local level which might later prove difficult to eradicate, and would be an aid to local prosecutors as well, but it would have to be carefully regulated in order to avoid abuse of such a plan. Regulations similar to those provided for the issuance of opinions might be appropriate.

Local prosecutors are elected in Kentucky and 43 other states, and the Attorney General has no control over their removal, this being accomplished by impeachment in Kentucky. In only two of the smaller states does the Attorney General exercise direct control in this respect.⁷²

The demonstrated ineffectiveness of Kentucky's removal procedure makes it seem advisable to consider possible improvement in this area.⁷³ Additional methods for more effective removal of prosecutors who fail to perform their duties satisfactorily are suggested in the Conclusion.

The Attorney General is empowered to require reports from the local prosecutors in regard to their office in 17 states, but Kentucky is not included in this group. Such reports have been found useful, not only as an element of control through knowledge of their activities, but also as an important source of information in the compilation of statewide criminal statistics where the information supplied therein is sufficiently complete. To be adequate in this respect, the reports must supply more than just a tabulation of indictments and dispositions of cases.⁷⁴ If no other

⁷² COSGO, *op. cit. supra* note 53 at 22.

⁷³ *Northcutt v. Howard*, 270 Ky. 219, 130 S.W. 2d 70 (1939); *Commonwealth v. Howard*, 297 Ky. 488, 180 S.W. 2d 415 (1944); *Wilbur v. Howard*, 70 F. Supp. 930 (E.D. Ky. 1947); *Howard v. Wilbur*, 166 F. 884 (6th Cir. 1948).

⁷⁴ Model Department of Justice Act, American Bar Association Commission on Organized Crime, § 10 (2) and comment (1952).

form of supervision were to be exercised, it would certainly seem that the task of submitting a full and accurate report of his activities to the Attorney General would not unduly burden the several county attorneys, and it would provide the Attorney General with information of value to him in carrying out his criminal functions at the appellate level. No conscientious county or Commonwealth's Attorney should object to such a requirement as an undue interference with his political independence, but on the contrary should welcome the opportunity to demonstrate the proficiency with which he has been prosecuting the criminal cases in his community.

The practice of submitting such reports, when combined with the submission of all criminal briefs to the Attorney General for approval and suggestions, as is employed in Louisiana,⁷⁵ for example, would give the office of Attorney General an effective measure of control in the area of criminal prosecution without over-burdening the office with the duties of local prosecutors. It would tend to contribute to a spirit of cooperation between the local attorneys and the office of Attorney General. Perhaps the best form for such a reporting system to take would be that followed in the two states of Idaho and Montana, where the Attorney General can require reports on demand in the form specified by him.⁷⁶ Any further effort at supervision could more profitably develop from such a set-up assuming that this would be a preliminary step toward reform in this area.

In addition to his relationship with the local prosecuting attorneys, the Attorney General in some states (11) has the power to direct or assist in the direction of the activities of police officials and agencies. Kentucky is not one of these. The desirability of such a relationship is made readily apparent when it is realized that these officials and agencies provide most of the evidence used in prosecuting a criminal case. In these eleven states, the power exercised by the Attorney General consists of his being able to require police investigation of crimes over which he has prosecuting responsibilities or to use state police officials in communities where local law enforcement has broken down.⁷⁷ In some instances he may use the police to provide certain

⁷⁵ COSGO, *op. cit. supra* note 53 at 29.

⁷⁶ *Ibid.*

⁷⁷ COSGO, *op. cit. supra* note 53 at 31.

technical services or to act as a clearing house for information relating to criminal law enforcement. Such control, however, is generally exercised at the local level.

Complete centralization of criminal prosecutions at the state level has been achieved only in Delaware and Rhode Island,⁷⁸ and varying degrees of centralization have been achieved in nearly every other state. It is by no means suggested that such complete centralization is essential or practical for Kentucky. But in considering where the best balance can be found in this respect, the primary goal should be to achieve a relationship which will give an added stimulus to efficient prosecution on the local level while making the Attorney General's Office available where needed in a particular instance.

Specific statutory enactments would be the most efficacious means of accomplishing any desired changes rather than reliance on interpretation of the common law by the courts or constitutional amendment. A consideration of the traditionally independent position of the local Commonwealth Attorney in Kentucky, and the limited facilities currently available to the Attorney General, make extensive modification of the structure and powers of the office difficult, politically, to achieve. On the other hand, there definitely appears to be a need for closer cooperation between the state Attorney General and local prosecutors which can best be achieved through an adequate exchange of information, supervisory powers and assistance in areas where they are felt necessary by the Governor or by the Attorney General acting in concurrence with the local prosecutor, and provisions for intervention or supercession at the local level in cases of particular interest to the state at large. Such action should be taken by the Attorney General when requested to do so by the Governor or by a petition signed by twenty-five (25) percent of those voting in the last general election in the locality involved as certified by the clerk of the court, or by other appropriate authority such as a grand jury. The net effect of any such changes should not be to strip the offices of Commonwealth Attorney and county attorney of their political significance nor to greatly increase the power of the Attorney General except as is

⁷⁸ COSGO, *op. cit. supra* note 53 at 32.

considered necessary for the more efficient handling of the state's legal business as a counteraction to increased criminal activity.

Conclusion

The conclusion to this study is presented in the form of several suggested amendatory bills designed for introduction to the Kentucky General Assembly. They represent a possible solution to some of the questions which have been raised, but by no means the only one. Their fundamental aim is to create a more centralized form of legal service for the Commonwealth of Kentucky while striving simultaneously to satisfy the demands of administrators for a closer relationship with the legal counsel which is available to them. When the existing system is considered in conjunction with that existing in other states and with the expressed opinions of the personnel who comprise it, there remains little doubt that some further changes, designed with the particular needs of Kentucky in mind, must be forthcoming to increase the efficiency, objectivity, and relevancy of the work of the attorneys employed by the state of Kentucky in all capacities.

The first suggestion concerns the centralization of control of the appointment of, what are now termed, contract attorneys in the hands of the Attorney General.

AN ACT relating to the Department of Law providing for the employment of special counsel for the Commonwealth, repealing Sections 12.200, 12.210, 12.220 and 12.230 of the Kentucky Revised Statutes.

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

Section 1. In order to centralize and coordinate all legal services available to the government of the Commonwealth of Kentucky, to establish the position of such attorneys as may be required by the several agencies, departments, and officials of the Commonwealth of Kentucky in addition to those regularly employed in the legal service of the state, and to improve the relationship of lawyers employed by the Commonwealth in such capacity to the agencies, departments, and officials which they may serve and to the Attorney General, temporary appointments to attorney positions shall be made in accordance with the following provisions.

Section 2. (1) No state agency, department, or official shall employ or be represented by an attorney other than the Attorney General unless an emergency arises, which, in the opinion of the Attorney General, requires the employment of other or additional counsel to protect the interest of the Commonwealth, or a litigation arises in which the Attorney General has an adverse interest. In either event, the Attorney General shall in writing set forth the reasons for the employment and request the Governor to employ such other or additional counsel.

(2) When an occasion arises, which, in the opinion of a State agent or official, requires the employment of an attorney, the Attorney General shall be immediately informed in writing of such requirements in order that he may promptly and properly determine whether an emergency such as is anticipated in subsection (1) exists. In the event that he determines that counsel cannot be supplied by the existing legal staff, he may authorize the appointment of specific additional attorneys by requesting that the Governor employ them. Such attorneys shall be temporarily employed, and they shall not be controlled by the requirements of the Civil Service Commission.

(3) Before other or additional counsel is employed, his fee and compensation shall be fixed by written contract by the Attorney General and the counsel, subject to the approval of the Governor and the agency, department, or official for whom the attorney is to be employed. Compensation for such additional attorneys shall be derived from funds appropriated for the department being served. The written request for counsel and a copy of the contract shall be filed in the office of the Secretary of State; a copy of the written request and the contract shall be kept on file in the office of the Attorney General.

(4) In the event that additional counsel must be employed because the Attorney General has an adverse interest in the litigation, the contract employing said other counsel shall be made by the agency, department or official concerned subject to the approval of the Governor. A copy of such contract shall also be filed in the office of the Secretary of State and the office of the Attorney General.

(5) Except in those cases where the Attorney General has an adverse interest, any such additional counsel which are employed by the various agencies, departments, or officials of the Commonwealth shall be responsible to the Attorney General for the satisfactory performance of their profes-

sional functions as a lawyer acting for the Commonwealth, and to the agency, department, or official by whom employed for their contribution to the accomplishment of the policies and objectives of such agency, department, or official.

(6) Any attorney or attorneys employed pursuant to the provisions of this section shall have authority to appear as the attorney for and to represent the agency, department, or official in the trial and argument of any cases and proceedings in the Kentucky Court of Appeals and in any and all other courts, and before boards, governmental agencies and tribunals in or out of this Commonwealth whenever such department or any officer or any employee or official thereof is a party in interest or the official rights, powers or duties of the department or any employee or official thereof are directly or indirectly affected.

Such attorney or attorneys may institute and prosecute any suits, motions, actions, and proceedings necessary to cause the assessment of property, the collection of taxes, and the payment of all claims, accounts, demands and judgments of the Commonwealth, for the assessment or collection of which the department may be charged by law, and to take all necessary steps by suit, motion, action, or otherwise to collect or cause to be collected and paid into the State Treasury all such claims, demands, accounts, and judgments. Any attorney or attorneys so employed shall attend to any litigation and legal business within and without the state, required of him or them, by the terms of his or their employment; and also any litigation or legal business that any official of such department or agency may have in connection with or growing out of his official duties or the official duties of the department or agency; and he or they, upon the written request of any executive or ministerial officer of the department, shall give such department or official his written opinion as to the duties of such official and shall prepare proper drafts of all instruments of writing and perform such other legal services pertaining to the functions of the department as may be provided by the terms of employment.

Section 3. Sections 12.200, 12.210, 12.220 and 12.230 of the Kentucky Revised Statutes, and Chapter 122, Acts of the General Assembly (1948) are repealed.

The next recommendation is intended as a corollary to Chapter 63 of the Kentucky Acts of 1960. It would embody provisions relating to those attorneys regularly employed by the Common-

wealth, and by classifying 87 or more of them within the civil service, would attempt to neutralize any excessive build-up of political power in the hands of the Attorney General. At the same time it would provide for a more efficient career legal service.

AN ACT relating to Attorneys regularly employed by the Commonwealth of Kentucky.

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

Section 1. In order to promote efficiency in the government, to facilitate the recruitment, employment, and retention of lawyers of outstanding character and ability in the legal service of the Commonwealth, and to assure the performance of the legal work of the government in accordance with high professional standards, all attorneys and clerical personnel connected with the Law Department who are employed by the Commonwealth, with the exception of those holding elective positions and one additional exemption to be filled at the discretion of the Attorney General, shall be included within the civil service of the Commonwealth.

Section 2. The Attorney General, in cooperation with the Civil Service Commission, shall be responsible for determining the number of designated attorney positions required by the Government of the Commonwealth, its agencies, and departments, and shall be kept informed by the Civil Service Commission of the current status of those positions at all times. All attorney positions in the government of the Commonwealth shall be so designated only with the advice and consent of the Attorney General. The attorney positions in the Government of the Commonwealth shall include the following designations as well as such others as may be found necessary: Attorney (1605); Assistant Reviser of Statutes (1610); Senior Attorney (1615); Referee (1620); Principal Attorney (1621); Assistant Attorney General (1625); Reviser of Statutes (1628); Departmental Assistant Attorney General (1630); First Assistant Attorney General (1640).

Section 3. All persons occupying attorney positions established in accordance with the provisions of Section 2 shall be under the professional supervision and evaluation of the Attorney General and the senior legal officer of the department or agency in which they may be employed where such officer is provided for. The assignment, promotion, separation in the course of a reduction in force, and dismissal of such attorneys shall be effectuated by, or subject

to the approval of, the senior legal officer concerned and the Attorney General. The initial selection and employment of such attorneys and clerical personnel shall be in accordance with such procedures as may be established by the Civil Service Commission.

Section 4. All attorneys who are primarily employed in the work of a particular agency, department or official shall be additionally responsible to that agency, department, or official for their contribution to the policies and objectives of such agency, department, or official. It shall be within the discretion of any official or the head of any department or agency to request the transfer of such attorneys when it is felt that they do not satisfactorily contribute to this purpose, but only the Attorney General in cooperation with the senior legal officer of a department or agency may determine the adequacy of an attorney's performance of duty from a professional standpoint.

It is not the purpose of this discussion to offer a complete proposal for the establishment of a civil service merit system in Kentucky, but to suggest how the Law Department might be integrated into the system as it is put into effect. There would naturally be a need for considerably more detailed organization plans, but the suggested bill simply proposes a framework in which these could be established.

There is a third area which has come under consideration and which also offers opportunities for improvement. It is not considered that any sweeping reorganization of the relationship of the Attorney General to the local criminal prosecutors or Commonwealth Attorneys such as that contemplated by the Model Department of Justice Act, would be practically feasible or really necessary at the present time although it is ultimately theoretically desirable. There are, however, some practices which would, if introduced, undoubtedly further the development of a more cooperative relationship between criminal prosecutors on the local level and the Attorney General and his assistants. These are embodied in the following suggested bill.

AN ACT concerning the relationship of the Attorney General to the Commonwealth's Attorneys.

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

Section 1. In order to facilitate the exchange of information, foster a spirit of cooperation, and to promote the vigorous

prosecution of criminal cases in the Commonwealth, Section 15.020 of the Kentucky Revised Statutes is amended to read as follows:

Note: a statement of the section as it is now written is omitted here. The suggestions are intended as a supplement.)

Section 2. In all cases where it is made the duty of the Commonwealth's or county attorney to represent the Commonwealth, the Attorney General shall exercise advisory and general supervisory powers with a view to obtaining effective and uniform enforcement of the criminal laws throughout the state.

Section 3. The Attorney General shall from time to time require of these attorneys reports as to the condition of public business entrusted to their charge. These reports shall be in the form prescribed by the Attorney General, and they must be submitted no less frequently than once per annum.

Section 4. Any prosecuting attorney may request in writing the assistance of the Attorney General in the conduct of any criminal investigation or proceeding. The Attorney General may take whatever action he deems necessary in rendering such assistance.

Section 5. Whenever requested in writing by the Governor, or by the grand jury of a county, or by a petition signed by twenty-five (25) per cent of those voting in the last general election of a county or city concerned, as certified by the clerk of the court, the Attorney General shall either supersede and relieve the prosecuting attorney, or intervene in any investigation, or criminal action, instituted by the prosecuting attorney for the purpose of conducting any proceedings necessary to preserve the rights and interests of the state. Any such requests shall be confined to circumstances which are considered of particular significance to the welfare of the Commonwealth or which are beyond the resources of the local prosecutor to handle effectively.

Section 6. In the event that the Attorney General believes that the best interests of the State will be furthered by so doing, he may call the attention of the Governor to the existence of circumstances such as those prescribed in Section 5, *supra*, and request the Governor's permission to supersede or intervene as the merits of the situation may require.

Section 7. Whenever the Attorney General shall undertake any of the actions prescribed herein, he shall be authorized

to exercise all powers and perform all duties in respect to such criminal actions or proceedings which the prosecuting attorney would otherwise perform or exercise, including specifically, but not exclusively, the authority to sign, file and present any and all complaints, affidavits, informations, presentments, accusations, indictments, subpoenas, and process of any kind, and to appear before all magistrates, grand juries, courts or tribunals. The Attorney General shall have full charge of such investigations, criminal actions or proceedings, and in respect to the same, the prosecuting attorney shall exercise only such powers and perform such duties as are required of him by the Attorney General.

Section 8. Except as provided in this Act, the powers and duties conferred upon or required of the Attorney General by this Act shall not be construed to deprive the prosecuting attorney of any of their authority in respect to criminal prosecutions, or relieve them from any of their duties to enforce the criminal laws of this Commonwealth. All that is intended by this Act is to introduce the basic concept of administrative responsibility into the field of criminal prosecution.

In addition to this basic legislation, two corollary enactments are recommended to completely fill out the picture. Section 9 of the Model Department of Justice Act represents a vitally needed solution to the problem of removal of prosecuting attorneys when they are found to have failed to carry out the prescribed obligation of their office.

*AN ACT relating to the Removal of Prosecuting Attorneys.
Be it enacted by the General Assembly of the Commonwealth of Kentucky:*

In addition to any and all methods now provided for by law for removal of a prosecuting attorney, such officials may be removed from office as hereinafter provided.

(1) The Governor may, if sufficient cause is shown therefor and it appears the public good so requires, remove from office any prosecuting attorney after a public hearing and upon due notice and an opportunity to be heard in his defense or

(2) Any prosecuting attorney, if sufficient cause is shown therefor and it appears that the public good so requires, may be removed upon petition addressed to the Court of Appeals. Such petition shall be filed only with leave of court.

As a practical matter, if the Attorney General is given the substantial increase in his duties and obligations, recommended

herein, he will need an increased measure of cooperation from the various law enforcement officers of the Commonwealth as well as substantial additional financial and personnel resources for the office itself. The proper degree of cooperation could be insured by a measure such as the following:

AN ACT relating to the Development of Cooperation between Sheriffs, Police, Prosecuting Officials, and the Attorney General.

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

(1) It shall be the duty of the sheriffs of the several counties and of the police officers of the several municipalities of this Commonwealth to cooperate with and aid the Attorney General and the several prosecuting attorneys in the performance of their respective duties.

(2) It shall be the duty of the several prosecuting attorneys of this Commonwealth to cooperate with and aid the Attorney General in the performance of his duties.

(3) The Attorney General may, from time to time, and as often as may be required, call into conference the prosecuting attorneys and sheriffs of the several counties and the chiefs of police of the several municipalities of this Commonwealth or such of them as he may deem advisable, for the purpose of discussing the duties of their respective offices with the view to the adequate and uniform enforcement of the criminal laws of this Commonwealth. Each prosecuting attorney, sheriff or chief of police shall be allowed his actual and necessary expenses incurred in attending a conference with the Attorney General.

If it is possible for the suggested legislation to become law, and for some of the other recommendations contained herein to be carried out, certainly the position of the Law Department and the office of the Attorney General would be more vital and effective in the performance of legal services for the Commonwealth. Were such changes made, it would be most appropriate to rename the department headed by the Attorney General, the Department of Law and Justice. Present conditions leave the legal work of the state in an uncoordinated morass of misunderstanding. It is time for the situation to be rectified.