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Constitutional Status and Role of the State Attorney General

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CONSTITUTIONAL STATUS AND ROLE OF THE STATE ATTORNEY GENERAL

*Scott M. Matheson, Jr.**

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* This article was written and then accepted for publication in this journal when I was serving as Associate Dean for Academic Affairs and Professor of Law, University of Utah College of Law. I have since been appointed to be and currently serve as United States Attorney for the District of Utah. This article presents my own views and analysis and does not represent the position of the United States Department of Justice. My interest in this topic derived in part from my past service as a member of the Utah Constitutional Revision Commission, which has studied the constitutional status and role of the state attorney general in Utah. I wish to thank Kent Hart for research assistance on this article.

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INTRODUCTION

This article is about the American state attorney general from a constitutional perspective. It is therefore correlatively about the governor and the executive branch of state government. During the past few decades, the offices of governor and attorney general in the United States have experienced invigoration in state policy and leadership. State government reorganization and the influx of quality governors have strengthened the governor as manager and leader of the state executive branch. Legislative mandates in broad policy areas such as antitrust, consumer protection, and the environment and the general growth of state government have enlarged the attorney general's role in state law and policy.

The constitutional status and role of the state attorney general is in most places defined in the state constitution, but "the constitutional provisions do not expressly define all the powers and functions of the office."[1] The powers and the structure of the office within state government are also the product of statute and common law as well as historical circumstance.[2] The focus of this article is the attorney general as a constitutive part of state government. As a result, in referring to constitutional status and role, the written state constitution need not and should not be the only reference.[3] At the same

1. TEMPORARY COMMISSION ON THE CONSTITUTIONAL CONVENTION, STATE OF NEW YORK, STATE GOVERNMENT 193 (1967) [hereinafter N.Y. CONSTITUTIONAL CONVENTION].

2. *See generally* Lacy H. Thornburg, *Changes in the State's Law Firm: The Powers, Duties and Operations of the Office of the Attorney General*, 12 CAMPBELL L. REV. 343 (1990). In 44 states the attorney general is established in the constitution, and in six states by statute (Alaska, Hawaii, Indiana, Oregon, Vermont, and Wyoming). *See* NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, STATE ATTORNEYS GENERAL POWERS AND RESPONSIBILITIES 40 (Lynne M. Ross ed., 1990) [hereinafter NAAG].

3. Many state constitutions provide that the duties of the attorney general shall be prescribed by law.

time, it is the *constitutional* status and role of the state attorney general that is addressed here. Therefore, much of what appears in statutory provisions and case law about the state executive branch and the attorney general, and perhaps even some state constitutional provisions as well, will not be part of the analysis.

The discussion is organized as follows. In the first section key features of constitutional structure and role of the attorney general in state government are addressed, mainly in the traditional terms of executive power, separation of powers, checks and balances, and representation. The second section frames issues about state government performance based on the attorney general's constitutional status and role. Two basic questions weave through both sections: how the attorney general is selected — election or appointment — and how the provision of legal services to state agencies should be organized — through agency employment of counsel or through a centralized legal staff. The third section accordingly addresses different models of constitutional structure and role for the state attorney general.

I. CONSTITUTIONAL STRUCTURE AND ROLE

A. *Duties of the State Attorney General*

The structure of the office and the duties of the attorney general vary from state to state and are defined in state constitutions, statutes, and court decisions in varying degrees of detail and emphasis. However, to the extent a common thread can be discerned, the duties have been summarized as follows: providing informal legal advice and formal legal opinions to the governor and other state officials and agencies and sometimes the legislature; representing the state, state agencies, and state officers in litigation; enforcing state civil and criminal law; and supervising local prosecutors in some states.[4] The size and duties of the office increased during the 1970s and 1980s to embrace public advocacy roles in areas such as antitrust enforcement, child support enforcement, consumer protection, environmental protection, and utility rate intervention.[5] This trend is largely the product of state legislatures expanding the responsibilities and authority of the attorney gener-

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See, e.g., N.C. CONST. art. III, § 7.

4. NAAG, *supra* note 2, at 12-13; Kirk H. Porter, ST. ADMIN. 79-97 (1938); David W. Winder, *The Powers of State Attorneys General: A Quantitative Assessment*, 19 SE. POL. REV. 67, 73-79 (1991); *see* N.Y. CONSTITUTIONAL CONVENTION, *supra* note 1, at 194-95.

5. NAAG, *supra* note 2, at 13; Thomas R. Morris, *State Attorneys General as Interpreters of State Constitutions*, 17 PUBLIUS 133, 135 (1987); *see* Henry S. Cohn, *The Office of the Attorney General of the State of Connecticut and Its Evolution and Duties*, 59 CONN. B.J. 261, 267 (1985). For state-by-state data as of 1989-90 on the personnel and budget of the state attorneys general offices, see NAAG, *supra* note 2, app. b, at 339-47.

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

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

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

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

7. *See* Roger C. Cramton, *On the Steadfastness and Courage of Government Lawyers*, 23 JOHN MARSHALL L. REV. 165, 165 (1990) (describing similar functions for the federal attorney general).

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

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

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

11. *See, e.g.*, Feeney v. Commonwealth, 366 N.E.2d 1262 (Mass. 1977); *see also* Michael B. Holmes, Comment, *The Constitutional Powers of the Governor and Attorney General: Which Officer Properly Controls Litigation Strategy When the Constitutionality of a State Law is Challenged?*, 51 LA. L. REV. 209 (1992) (arguing that attorney general properly controls litigation strategy for the state).

12. COMMON LAW POWERS, *supra* note 10, at 4. Courts have recognized common law powers to represent and defend the state and its agencies, Martin v. Thornburg, 359 S.E.2d 472, 479 (N.C. 1987), to control litigation and appeals involving the state, Memorial Hosp. Ass'n v. Knutson, 722 P.2d 1093 (Kan. 1986), to intervene in legal proceedings on behalf of the public interest, State *ex rel.* Allain v. Mississippi Pub. Serv. Comm'n, 418 So. 2d 779 (Miss. 1982), to determine the state's legal policy, Feeney v. Commonwealth, 366 N.E.2d 1262 (Mass. 1977), and State v. Jiminez, 588 P.2d 707 (Utah 1978). *See* NAAG, *supra* note 2, at 37-38.

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

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

B. *Unitary versus Divided Executive Power*

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

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

15. The federal executive branch also is arguably not strictly unitary in the sense of political accountability because the Constitution calls for election of a Vice-President as well as a President. Indeed, recent scholarship concludes that nothing in the text or history of the presidential and vice-presidential selection process of Article II or the Twelfth Amendment requires members of the electoral college or the voters who elect them to vote for a President and a Vice-President of the same party. *See* Akhil R. Amar & Vik Amar, *President Quayle?*, 78 VA. L. REV. 913, 918-24 (1992). However, as Professors Amar and Amar point out, the Constitution bestows little authority on the Vice-President, *id.* at 939, and "the voters know that the *President*, and not his Vice, is ultimately responsible for all executive policy," *id.* at 941.

16. Congress established the office of United States Attorney General in the Judiciary Act of 1789. Act of Sept. 24, 1789, ch. 20, § 35, 1 Stat. 92. The Attorney General is not mentioned in the United States Constitution. But to say that the federal Attorney General's power and control of that power is in the hands of Congress is an overstatement. *See* Robert E. Palmer, Note, *The Confrontation of the Legislative and Executive Branches: An Examination of the Constitutional Balance of Powers and the Role of the Attorney General*, 11 PEPPERDINE L. REV. 331, 348 (1984). The President's appointment and removal authority and the constitutional directive to "take care that the laws be faithfully executed," U.S. CONST. art. II, § 3, establish independent executive power for a President with respect to an Attorney General.

17. Judiciary Act of September 24, 1789, ch. 29, § 35, 1 Stat. 93. Though not mentioned in the United States Constitution, the federal Attorney General has been a cabinet officer in American constitutional government from the beginning of the republic. Article III of the Constitution contemplates an Attorney

By contrast, the states in varying degrees typically follow a fragmented executive branch model, with several officials serving as a result of statewide election, each independently accountable to the voters. In many states the constitution establishes the office of attorney general as an elected position. This approach can be traced to the 1830s when states began to embrace Jacksonian democracy and principal state officers began to be elected by popular vote. The governors, who had achieved more independence from state legislatures, were compelled to share control over administration with a greater number of elected officials.[18]

The state attorney general is popularly elected in forty-three states. Five states (Alaska, Hawaii, New Hampshire, New Jersey, and Wyoming) provide for gubernatorial appointment of their attorneys general.[19] The legislature selects Maine's attorney general, and the state supreme court picks the Tennessee attorney general.[20]

C. *Separation of Powers*

1. Liberty and Efficiency Objectives

Separation of powers in constitutional theory is a means to certain ends. Those ends can be identified generally as preservation of political liberty and achievement of government efficiency.[21] Political liberty is secured through diffusion of authority to prevent any one branch from the exercise of arbitrary power.[22] As one of the leading separation of powers scholars noted,

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General in providing for courts to carry out the functions of a judicial system that would need the participation of an attorney general or prosecutor to discharge the nation's legal representation.

18. JEWELL C. PHILLIPS, STATE AND LOCAL GOVERNMENT IN AMERICA 205 (1954). Ten of 13 original states during the revolutionary period provided for an attorney general in their constitutions. Half of those states provided for legislative appointment, and half called for gubernatorial appointment with the consent of the council. By 1860, 11 of 33 states provided for popular election, 28 of 38 by 1880, 35 of 45 by 1900, 39 of 48 by 1920, and 42 of 49 by 1959. Byron R. Abernathy, *Some Persisting Questions Concerning the Constitutional State Executive* 32 (Governmental Research Center, University of Kansas Report 23 1960); *see also* William N. Thompson, *Should We Elect or Appoint State Government Executive? Some New Data Concerning State Attorneys General*, 8 MIDWEST REV. PUB. ADM. 17 (1974).

19. In the five states where the governor appoints the attorney general, the appointment is confirmed by the state senate (Hawaii, New Jersey, and Wyoming), both houses of the state legislature (Alaska), or by the executive council (New Hampshire). NAAG, *supra* note 2, at 23.

20. NAAG, *supra* note 2, at 15.

21. In his seminal work on separation of powers doctrine, Professor Gwyn identified five objectives for separating the functions of government. One is to create greater government efficiency. Three speak to political liberty—to assure statutory law is made in the common interest, to assure that law is impartially administered and that all administrators are under the law, and to allow the people's representatives to call executive officials to account for abuse of power. The fifth objective, to establish a balance of governmental powers, appears to be instrumental to the achievement of political liberty and government efficiency. WILLIAM B. GWYN, THE MEANING OF THE SEPARATION OF POWERS 127-28 (1965).

22. "The Framers recognized that, in the long term, structural protections against abuse of power were critical to preserving liberty." Bowsher v. Synar, 478 U.S. 714, 730 (1986). If one branch tried to use its power in an oppressive manner, "ambition [would] counteract ambition," THE FEDERALIST No. 51, at 349

the protection of liberty through separation is secured in part through the ability of the people's representatives to call executive officials to account for abuse of power.[23] To be able to do that effectively, accountability for executive action should be clear. State government reorganization efforts have stressed the need for clear accountability as a reason to limit the number of elected state officials so that the governor's power is commensurate with responsibility.[24]

The government efficiency goal of separation of powers provides added support for the state reorganization effort to focus responsibility and authority on the governor. The framers of the United States Constitution sought to achieve efficiency through a distribution of powers by combining a sensible division of labor with an energetic executive who can act with dispatch.[25] The efficiency benefits of separated powers could be hampered if the internal structure of the executive branch leads to deadlock in carrying out executive functions. The unitary executive model can thus be understood as designed to meet the efficiency justification for separation of powers "that stresses the need to ensure expeditous, centralized, and coordinated authority in law enforcement."[26]

2. Hybrid Separation of Powers Role of the State Attorney General

The classic definition of executive power is reflected in Article II, Section 3 of the United States Constitution, which states that the President "shall take care that the laws be faithfully executed."[27] The state attorney general's role in providing legal advice to the governor and state agencies and in enforcement of state laws is part of executive power. The governor is dependent on the attorney general in seeing that the laws are faithfully executed. The attorney general, whether appointed or elected, essentially is considered

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(James Madison) (Clinton L. Rossiter ed., 1961), and another branch would provide resistance, *see* MORTON G. WHITE, PHILOSOPHY, THE FEDERALIST, AND THE CONSTITUTION 159-66 (1987); Edward H. Levi, *Some Aspects of the Separation of Powers*, 76 COLUM. L. REV. 371, 374-78 (1976).

23. *See supra* note 22.

24. LARRY J. SABATO, GOOD-BYE TO GOOD-TIME CHARLIE 63-65 (2d ed. 1983); PHILLIPS, *supra* note 18, at 205-11.

25. GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 362-63 (2d ed. 1991); *see* THE FEDERALIST No. 70 (Alexander Hamilton). *See generally* William C. Banks, *Efficiency in Government: Separation of Powers Reconsidered*, 35 SYRACUSE L. REV. 715, 718-23 (1984); Louis Fisher, *The Efficiency Side of Separated Powers*, 5 J. AM. STUD. 113, 131-33 (1971).

26. STONE ET AL., *supra* note 25, at 434; *see* N.Y. CONSTITUTIONAL CONVENTION, *supra* note 1, at 93-94 (fractionated executive authority "weakens the effectiveness of the Governor").

27. "In legal theory, there is a direct line of authority running from the President through the attorney general to the various sub-officials of the Department of Justice. Accordingly, each of these sub-officials may be said to be assisting in the execution of the laws." Arthur S. Miller, *The Attorney General as the President's Lawyer*, *in* ROLES OF THE ATTORNEY GENERAL OF THE UNITED STATES 41, 45 (American Enterprise Institute 1968).

an executive branch official; and many state constitutions classify the position in this way. For example, the Utah Constitution provides that "[t]he elective constitutional officers of the Executive Department shall consist of Governor, Lieutenant Governor, State Auditor, State Treasurer, and Attorney General."[28] However, even though generally regarded as an executive branch official, the attorney general is a member of the governor's cabinet in only six states.[29]

Although considered mainly executive officials, state attorneys general perform some legislative and judicial functions. Having a significant administrative official exercise quasi-legislative and quasi-judicial chores has implications for separation of powers considerations. To the extent the attorney general is responsible to the legislature for certain functions and to the extent her judicial-like functions call for judicial-like insulation, the argument for gubernatorial control weakens because the attorney general is performing other than pure executive tasks. Gubernatorial control of such legislative and judicial functions may undermine the constitutional balance contemplated in a system of separation of powers. The United States Supreme Court recognized this principle when, for example, it relied on an FTC commissioner's having independent responsibilities as the basis to uphold congressional limitations on the President's power of removal.[30] In this sense the functional role of the attorney general is important in assessing the degree of independence she should have from gubernatorial influence.

The traditional separation of powers is not strictly followed in many states where the attorney general is called upon to provide legal advice for the legislature and the judiciary.[31] To the extent the attorney general advises the legislature and the legislators rely on that advice, and in many states they do,[32] the separation principle is blurred.[33] In states where the attorney general has responsibility to review legislation either before passage or prior to signing, this can have an impact on the governor's role in achieving a legislative agenda.[34]

All state attorneys general render advisory opinions to the governor and

28. UTAH CONST. art. VII, § 1.

29. NAAG, *supra* note 2, at 44.

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

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

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

33. "[The attorney general] occupies a unique position. A part of neither the executive nor the legislative branch, he is legal advisor to both." Arlen C. Christenson, *The State Attorney General*, 1970 WIS. L. REV. 288, 300.

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

executive departments, and many issue such opinions to the legislature and local prosecutors.[35] Their opinions can shape policy and development of the law, in part because they may be the only guidance on state constitutional and statutory issues that are infrequently or never litigated.[36] Some have discerned, including attorneys general, that the attorney general performs a judicial function in this role of opinion renderer, which again clouds the separation principle.[37] Certainly it is quasi-judicial if the advisory opinion serves as an expeditious alternative to securing a declaratory judgment.[38] "[T]he attorney general tends to act where there is a need for explanation of a particular area of the law, where judicial review is absent, and where no legislative provision has been made for defining proper state practice."[39]

Although the trend has been away from early court decisions holding attorney general opinions as binding on the recipients,[40] as a practical matter the opinions work a prescriptive effect on state government administration and therefore carry legal force comparable to a court decision.[41] Some courts hold that good faith reliance on an attorney general's opinion may be a defense in a suit against a public official.[42] In most states the attorney general serves as counsel for judges who are sued in their official capacity and in some represents the court system.[43] Unlike state counterparts having strong ties to the judicial and legislative branches, the federal attorney gener-

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

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

37. Abernathy, *supra* note 18, at 41-42; Henry J. Abraham & Robert R. Benedetti, *The State Attorney General: A Friend of the Court?*, 117 U. PA. L. REV. 795, 797-98 (1969); Morris, *supra* note 5, at 139. The Florida Supreme Court declared in 1925 that "the office of attorney general is in many respects judicial in character." State *ex rel.* Landis v. S.H. Kress & Co., 155 So. 823 (Fla. 1925). The quasi-judicial character of this role is rendered more problematic because the process leading to these advisory opinions bears little resemblance to judicial procedure. No legal briefs are required, no adversary proceedings are conducted, and there is no avenue for appeal outside the office. Morris, *supra* note 5, at 136; Thompson, *supra* note 18, at 34-35.

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

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

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

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

42. *See, e.g.*, State v. Spring City, 260 P.2d 527 (Utah 1953).

43. NAAG, *supra* note 2, at 56.

al more clearly functions as part of the executive branch.[44]

3. Separation and the Administrative State

The most significant development in the structure of American government during the twentieth century at the federal, state, and local levels is the rise of the administrative state. The framers of most state constitutions did not likely contemplate the current size of the executive branch and the variety of agencies, independent boards, and commissions. Although a few states reassessed the constitutional status and role of their attorneys general since this development, most states have adhered to an attorney general role established under nineteenth century assumptions about the size and role of state government.

Attorneys general in particular and the legal needs of state government have adapted to the enlarged role of state bureaucracy as exigencies have demanded. However, earlier notions of a basic tripartite constitutional division of governmental functions have been fundamentally transformed, and the task of channeling agency discretion and making bureaucracies accountable is the primary challenge of democratic government in the administrative state.[45] As agencies, boards, and commissions have proliferated at the state level, conflicts between agencies are inescapable and implicate the role of the attorney general.[46] This challenge has been a major impetus for state government reform, a movement spanning much of this century and having as one of its central objectives giving the governor greater responsibility, control, and accountability for the executive branch.[47]

D. *Checks and Balances — The Watchdog Function*

Elected attorneys general contend that an important aspect of their jobs is to serve as a watchdog over the executive branch, sniffing around the governor and the administration to prevent and prosecute unlawful conduct.[48] Certainly the existence of an elected attorney general without political allegiance or administrative accountability to the governor and state agency officials and with investigative and prosecutorial authority constitutes a check

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44. NANCY V. BAKER, CONFLICTING LOYALTIES, LAW AND POLITICS IN THE ATTORNEY GENERAL'S OFFICE, 1789-1990, at 48 (1992); NAAG, *supra* note 2, at 11.

45. *See generally* Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669 (1975).

46. Robert M. McGreevey, *The Illinois Attorney General's Representation of Opposing State Agencies—Conflicts of Interest, Policy and Practice*, 66 ILL. B.J. 308 (1978).

47. *See supra* note 24.

48. Abernathy, *supra* note 18, at 41; McGreevey, *supra* note 46, at 316; *see also* People *ex rel.* Deukmejian v. Brown, 624 P.2d 1206, 1211 (Cal. 1981) (Richardson, J., dissenting) ("The Attorney General's traditional watchdog function and his power to challenge questionable official conduct are important and necessary tools to assure the continued integrity of our system of government.").

and balance feature of the executive branch of state government, a means for "ambition . . . to counteract ambition."[49] The problem: who guards the guardians?

> [A]t some point this series of watchdogs-watching-watchdogs-watch administrators has to terminate in the people being their own watchdog. They may as well watch the governor directly. . . . [T]heir "watching" is much simpler when they have only the governor, responsible for the entire operation of the state's business, to watch, than when their attention must be divided.[50]

Implicit in the attorney general watchdog position is the assumption that the elected attorney general is less subject to temptation for wrongdoing than the governor and key gubernatorial appointees. The opposite is as likely to be expected because there is much greater public scrutiny of the governor than the attorney general.[51] Also implicit in the watchdog notion is that this check promotes executive branch accountability. Again, as more fully discussed below, an independently elected attorney general may actually diminish the electoral accountability of the executive branch by obscuring responsibility.

The deviation of the independently elected state attorney general from the traditional separation of powers model is manifested in the added check and balance in the executive branch that such an arrangement produces. The general issue it raises is the conflict between the attempt to separate and divide powers to restrain government, and the effort to organize government to act effectively for the public good.[52]

The attorney general, of course, is not the only source of check and balance on the governor. Indeed, in the American constitutional system of separation of powers, the legislature and the judiciary are supposed to perform that function. As state legislatures continue to become more full-time and less part-time and take their executive oversight responsibility more seriously, the need for internal checks by fragmenting the executive branch diminishes. The idea of checks and balances is that they operate between, as opposed to within, the three divisions or departments of government. Of course, to the extent an independent attorney general through exercise of the check and balance watchdog function affects the relationship of the executive with the other branches of state government, separation of powers is affected as well.

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49. THE FEDERALIST No. 51, at 322 (James Madison) (Clinton L. Rossiter ed., 1961).
50. Abernathy, *supra* note 18, at 46.
51. *Id.*
52. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 8 (2d ed. 1988).

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

A distinction is sometimes drawn as to whether the attorney general, as a lawyer, represents the people or state government; and it is drawn more sharply when the attorney general achieves office as a state-wide elected representative of the people.[53] This issue is conceptually more subtle than the simple distinction suggests, and guidance initially should be sought through notions of sovereignty and representation.

1. Representation and Delegated Sovereign Power

The office of attorney general is rooted in seven hundred years of Anglo-American history. Since the mid-thirteenth century, specially appointed lawyers have represented the sovereign's legal interests.[54] In England the role of the attorney general to the present day is based upon representation of the sovereign, which is the principle supporting the attorney general as representative of the public interest.[55] American constitutional developments during the revolutionary period shifted sovereignty to the people, who select their representatives to exercise delegated sovereign authority.[56]

Accordingly, when an attorney general provides legal services to a state officer or agency, she does so to facilitate the officer or agency in exercising delegated sovereign power. When an attorney general enforces consumer, environmental, or health legislation, she does so to implement public policy adopted pursuant to the delegated sovereign authority of the legislature. In both instances, the attorney general is representing the public interest. As one attorney general put it, "[I]t is imperative that the Attorney General simultaneously represent both the state agency and the public interest."[57]

2. Representation and Multiple Roles

The attorney general's office must play several roles and serve multiple interests. As Professor and former Assistant United States Attorney General for the Civil Division Barbara Babcock describes it, the government lawyer represents the client agency, she further represents the state as a litigant in court, and she must take account of the public.[58] Perhaps a more workable dichotomy than representation of the state or the public is to view the attorney general's role as combining loyalty to the executive with loyalty to the

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53. *See* Holmes, *supra* note 11, at 214 n.25.
54. NAAG, *supra* note 2, at 3-6; Thornburg, *supra* note 2, at 346.
55. NAAG, *supra* note 2, at 30.
56. GORDON S. WOOD, CREATION OF THE AMERICAN REPUBLIC, 1776-1787, at 372-83 (1969).
57. Thornburg, *supra* note 2, at 359; *see* Saxbe, *supra* note 35, at 334.
58. Barbara A. Babcock, *Defending the Government: Justice and the Civil Division*, 23 JOHN MARSHALL L. REV. 181, 185 (1990).

law. The attorney general, appointed or elected, fulfills responsibilities to the executive and the public by maintaining the obligation to respect and follow the law.[59]

In areas such as antitrust or consumer protection, the attorney general typically is authorized to assume the role of advocate for the state and represent the public interest consistent with the scope of discretion the legislative mandate allows. The attorney general appears in such litigation as a result of enforcement discretion and acts as the legal representative of the state and the public interest. The role can be different when the attorney general is advising or representing a state official or agency. In litigation on behalf of a state agency or official, the attorney general does not appear as a party to the action.[60] In this context of agency representation, the representative role tension can become most acute.

The problem arises, of course, when the attorney general has a different conception of the public interest than the governor or the state agency and claims that her primary responsibility is to the people (her view of the public interest) and not to an agency (the governor's or the agency's view of the public interest).[61] The problem is resolved if the attorney general confines her role to that of a lawyer providing legal services to a client agency. The client's view of the public interest, if not in violation of state law, would prevail.[62] This resolution is more easily achieved when accountability for executive branch performance is clear. At the federal level, the presumption is that the President is acting in the public interest, and government lawyers are expected to support that position subject to adherence to law and professional bounds of honesty and advocacy.[63]

Even when the attorney general is elected, resolution is possible if the authority of the office is understood to extend only to serving in a lawyer's role to those delegated sovereign powers of the executive branch.[64] Howev-

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59. *See* PHILIP B. HEYMANN, THE POLITICS OF PUBLIC MANAGEMENT 62-66 (1987).

60. *See* Manchin v. Browning, 296 S.E.2d 909, 918-19 (W. Va. 1982).

61. *See* McGreevey, *supra* note 46, at 316-17. The pressure on the attorney general-state agency relationship "is especially so when the Attorney General and the agency-client are headed by policy makers of different partisan persuasions." Thornburg, *supra* note 2, at 358.

62. "The Attorney General's role and duty is to exercise his skill as the state's chief lawyer to zealously advocate and defend the policy position of the officer or agency in litigation." *Manchin*, 296 S.E.2d at 920.

63. *See* Thomas E. Kauper, *Politics and the Justice Department: A View from the Trenches*, 9 J.L. & POL. 257, 265 (1993).

64. When Pennsylvania voters decided in 1978 to convert from an appointed to an elected attorney general, the commission charged with making recommendations to implement this change declared: "The elected Attorney General is not to function as a policymaker. Instead, the Attorney General's role is intended to encompass only the traditional role of lawyers in society. . . ." JOINT STATE GOVERNMENT COMMISSION, GENERAL ASSEMBLY OF THE COMMONWEALTH OF PENNSYLVANIA, OFFICE OF ELECTED ATTORNEY GENERAL—FINAL REPORT 5 (1978).

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

er, in light of the common law authority recognized in some jurisdictions as granting attorneys general discretion to ignore agency clients in the institution of litigation on behalf of those clients,[65] an attorney general who is answerable to a governor who is in turn responsible for serving the public interest on behalf of the executive branch constitutes the more accountable constitutional structure.

3. Representation and Defining the Public Interest

Attorneys general who tout their public interest responsibilities in representation seldom answer the obvious problem: "It is commonplace that there are as many ideas of the 'public interest' as there are people who think about the subject."[66] Professor Babcock supplies the response for the federal government lawyer, who "should take her definition of the public interest from the *presidential administration* in which she serves."[67] As another commentator put it, it is "hard . . . to define the public interest except in terms of the current administration's policies."[68] This point has grown in significance with the federal attorney general's increasingly prominent role in shaping national policy.[69]

For a state attorney general with independent electoral accountability, the issue is more cloudy. It is unrealistic to think an independently elected attorney general will confine herself in this manner. A recent Attorney General of Virginia wrote that "there has been a trend in recent years to expand the Attorney General's role in the development of public policy" and that "[t]here are good practical reasons for linking the public sector practice of law and the development of public policy."[70] There may be great benefit in drawing upon the experience and the resources of the attorney general's office to facilitate policy development and law reform, and administrators play a significant part in making decisions and shaping procedures to address competing values in public decisions.[71] But none of this is inconsistent with

career lawyer's obligation is to the responsible officials who have been properly selected through our constitutional processes of election or appointment to define the interests of the United States." Cramton, *supra* note 7, at 167 (citation omitted).

65. *See, e.g.*, Florida *ex rel.* Shevin v. Exxon Corp., 526 F.2d 266 (5th Cir. 1976).

66. Geoffrey P. Miller, *Government Lawyers' Ethics in a System of Checks and Balances*, 54 U. CHI. L. REV. 1293-95 (1987).

67. Babcock, *supra* note 58, at 191.

68. *Id.* at 192.

69. Thomas M. Boyd, *Separating Law Enforcement from Policy: The Importance of Perception*, 9 J.L. & POL. 299, 303 (1993).

70. Mary Sue Terry, *The Public Sector Practice of Law and the Development of Public Policy*, 6 J.L. & POL. 743, 743 (1990).

71. *See* Douglas T. Yates, Jr., *Hard Choices: Justifying Bureaucratic Decisions*, *in* PUBLIC DUTIES: THE MORAL OBLIGATIONS OF GOVERNMENT OFFICIALS (Joel L. Fleishman et al. eds., 1981).

or greater than the value of coherent and accountable executive branch policy.

When attorneys general urge that they should seek "to shape the public policy through suasion and the force of leadership,"[72] variance and conflict with the governor's policy agenda is inevitable. And if "the practice of law in the public sector must go hand in hand with the development of public policy,"[73] then this conflict produces the accountability problem and conflict of loyalty described below. There is no reason to assume that the attorney general can ascertain the public interest better than the governor, who is elected in the same statewide election but indisputably attracts more interest and attention than the attorney general.[74] The California Supreme Court made one of the few authoritative attempts to resolve this conflict when it interpreted the state constitution to require that when the governor and attorney general differ "over the faithful execution of the laws of this state, the Governor retains the 'supreme executive power' to determine the public interest."[75]

The resolution is more difficult if the attorney general concludes that her conception of the public interest conforms to legal requisites that conflict with the governor's or state agency's view of the public interest. Some attorneys general have sued to stop actions of agencies that otherwise would have been their clients, a matter that will be discussed further below.

II. GOVERNMENT PERFORMANCE

A. *Accountability*

State administrative agencies perform most of what state governments do, and the fairness, efficiency, and overall quality of that performance depend upon accountability.[76] Indeed, a central challenge of democratic government is to ensure that government officials are accountable.[77]

1. Gubernatorial Authority and Responsibility

In state government the people think the buck stops with the governor, irrespective of whether other elected officials should bear the responsibility. Leading gubernatorial scholar Larry Sabato explains: "The public is not

72. Terry, *supra* note 70, at 753.
73. *Id.* at 754.
74. Abernathy, *supra* note 18, at 46.
75. People *ex rel.* Deukmejian v. Brown, 624 P.2d 1206, 1209 (Cal. 1981).
76. Richard C. Elling, *State Bureaucracies*, *in* POLITICS IN THE AMERICAN STATES 244-48 (Virginia Gray et al. eds., 4th ed. 1983).
77. "[W]e are still grappling with the same question that confronted the delegates over 200 years ago: How to establish a well-administered federal government that is also responsible to the people." Prakash, *supra* note 14, at 1016. The same point applies to state government.

particularly discriminating when it comes time to assign the blame for inaction. Other elected officials may well have caused the foot-dragging, but as the 'head' of state government the governor must bear the consequences."[78]

A multi-headed executive branch contains a built-in tension between the attorney general's role as counsel for the state and the attorney general's independent electoral accountability. The conventional arrangement is that the governor appoints cabinet or department officials to administer state agencies. The attorney general serves as the lawyer for the governor and the agencies, and therefore owes a duty of loyalty to these clients. However, when the attorney general is elected independently of the governor, the governor cannot remove the attorney general from office on grounds of disloyalty or poor performance. And if the attorney general's actions cause poor performance from an executive branch agency or interference with implementation of the governor's policy objectives, the governor may nonetheless be held politically accountable as the leading political figure in the executive branch. "The fact is that people look to the *governor* to get the job done."[79] That would be more appropriate if the governor or her appointed agency officials were responsible for the hiring and supervision of legal advisors, but that is not the system in most states.

The result is that "[e]very official accused of incompetence places the blame at another's door. . . . Officers will not cooperate, and there is no way of compelling them to do so."[80] The critical question is: who is in charge, or where is accountability placed?[81] That question must be answered if the constitutional theory underlying separation of powers is to be realized.[82] The principle at stake is that the person who is ultimately held responsible for the operation of the executive branch should be able to count on the cooperation of advisors, including legal advisors.[83] Or, to put it in terms of well-estab-

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78. SABATO, *supra* note 24, at 65.

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

80. AUSTIN F. MACDONALD, AMERICAN STATE GOVERNMENT AND ADMINISTRATION 157-58 (1960). "In Michigan, it has become impossible as a practical matter to unequivocally charge the Governor with full responsibility for his administration. If projects fail, it is simple to 'pass the buck,' whereas, a focusing of accountability on a single chief executive results in greater accomplishment." Marie H. Kamberg, *Should the Governor Appoint the Secretary of State and Attorney General? Yes!*, 27 MICH. ST. B.J. 32 (1948).

81. Beyle, *infra* note 97, at 192.

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

83. As one commentator puts it:

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

lished government organization theory, authority must be commensurate with responsibility.[84] This has been a problem with state government organization generally.

2. Unity, Plurality, and Accountability

Especially before World War I, the long ballot for state elected officials rendered it very difficult for governors to coordinate and direct administration. The state government reorganization movement that has been ongoing for much of the last seventy-five years has called for strengthening the governor's control over administration by shortening the ballot, including appointment of the attorney general.[85] The widely accepted principle of administrative organization supporting this prescription is the need for clear lines of authority and responsibility.[86] "Concentration of authority in the hands of the governor would enhance accountability because the voters would know who to blame for administrative failures, as the governor became chief executive in fact and not just name."[87]

At the Philadelphia Constitutional Convention in 1787, Pennsylvania delegate James Wilson stressed that a single executive would provide the "most energy dispatch and *responsibility* to the office."[88] Alexander Hamilton stressed the accountability problem of a plural executive in *The Federalist Papers*. He contended that

> one of the weightiest objections to a plurality in the Executive . . . is that it tends to conceal faults and destroy responsibility. . . . It often becomes impossible, amidst mutual accusations, to determine on whom the blame or the punishment of a pernicious measure, or series of pernicious measures, ought really to fall.[89]

In sum,

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

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administrative organization.

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

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

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

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

87. Elling, *supra* note 76, at 251.

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

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

> any delegated power, first, the restraints of public opinion, which lose their efficacy, as well on account of the division of the censure attendant on bad measures among a number, as on account of the uncertainty on whom it ought to fall; and, secondly, the opportunity of discovering with facility and clearness the misconduct of the persons they trust, in order either to their removal from office or to their actual punishment in cases which admit of it.[90]

Hamilton argued that the notion that power is safer if dispersed among several rather than concentrated in one does not rigidly apply to executive power; that it is safer when there is "a single object for the jealousy and watchfulness of the people; and, in a word, that all multiplication of the Executive is rather dangerous than friendly to liberty."[91] Power "lodged in the hands of one . . . will be more narrowly watched and more readily suspected."[92]

As Woodrow Wilson, writing as a young political science professor, put it one hundred years later, "There is no danger in power if only it be not irresponsible. If it be divided, dealt out in shares to many, it is obscured and if it be obscured, it is made irresponsible."[93] This point later found expression in the "short ballot" principle fostered at the state level, especially in New York in the early twentieth century, which held that "only those offices should be elective which are important enough to attract (and deserve) public examination."[94] Public knowledge of the performance or even the identities of subgubernatorial statewide elected officials is "shockingly low."[95] For example, when asked in 1990 to identify the Attorney General of Virginia, who had been in office for almost six years, only thirty-seven percent of respondents could give the correct answer. By contrast, seventy-six percent could name the governor.[96]

The indeterminacy created with the multiple executive hampers the governor's capacity to achieve administrative goals because responsibility is fragmented and the political costs are high,[97] a problem that embraces both

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90. *Id.* at 55.

91. *Id.* at 57.

92. *Id.*

93. Woodrow Wilson, *The Study of Administration*, 56 POL. SCI. QTRLY. 497-98 (1941) (reprinting 1887 article from volume 2 of same quarterly).

94. RICHARD S. CHILDS, THE SHORT-BALLOT PRINCIPLES vii (1911). Woodrow Wilson headed the National Short Ballot Association, and New Yorkers who fought for the principle included Charles E. Hughes, Theodore Roosevelt, Elihu Root, Alfred E. Smith, Henry L. Stimson, and James Wadsworth. *See* Allen T. Klots, *The Selection of Judges and the Short Ballot*, 38 J. AM. JUDICATURE SOC'Y 134, 137 (1955).

95. SABATO, *supra* note 24, at 64.

96. THE GALLUP OPINION INDEX: POLITICAL, SOCIAL AND ECONOMIC TRENDS (reporting Virginia Commonwealth University survey of November 1990, poll information no. VCU111990).

97. Thad L. Beyle, *Governors*, *in* POLITICS IN THE AMERICAN STATES 191-92 (Virginia Gray et al.

the issues of accountability and the next topic of government gridlock.

B. *Stalemate*

A governor's primary role is to establish policy guidance for the various agencies in the executive branch and to supervise the agencies in the implementation of those policies.[98] Many factors affect a governor's ability to achieve effective policy coordination and control. One of the most critical is the support and cooperation of competent legal counsel.

When the attorney general has the exclusive constitutional authority to employ and supervise all lawyers involved in legal matters for executive agencies of state government, including the lawyers for other elected executive branch officials, the result is to repose in the attorney general sole power to control the nature and extent of legal services provided to executive branch agencies and to withhold those legal services as well.[99] Political pressures and the threat of impeachment would likely prevent wholesale refusal to provide legal services; but in selected circumstances the problem of deadlock and frustration of executive branch mission is a real possibility, especially when a policy disagreement or personality conflict underlies this impasse.[100] Partisan differences may cause or exacerbate the problem. Governors confronting such a situation may feel compelled to seek advice of other counsel in a manner not contemplated under the state constitution.

South Carolina delegate to the Federal Convention Pierce Butler supported a unitary executive because "[d]elays, divisions and dissensions arise from an executive consisting of many."[101] Hamilton recognized this point in making the case for a single executive in *The Federalist Papers*. Unity in the executive produces energy in the executive branch that is "essential to the steady administration of the laws."[102] Unity contributes to energy by facilitating "[d]ecision, activity, secrecy, and dispatch. . . ."[103] Hamilton pointed to the dissensions of a plural executive in Roman history.[104] He argued that conflict and rivalry "lessen the respectability, weaken the authority, and dis-

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eds., 4th ed. 1983).

98. *See* COLEMAN B. RANSONE, THE OFFICE OF GOVERNOR IN THE UNITED STATES 257-59 (1959).

99. *But see* UTAH CONST. art. VII, § 16: "The Attorney General *shall* be the legal adviser of the State officers. . . ." 101 (emphasis added). Even if this language is legally enforceable against withholding of legal assistance, the practical problems in doing so leave the state agencies at the mercy of the attorney general. *See also* McGreevey, *supra* note 46, at 312-13, 315-16.

100. "[In Michigan,] these officers seldom, if ever, work together harmoniously for the good of the state. More often, constructive projects become hopelessly deadlocked because of opposition and hostility between members of the executive branch." Kamberg, *supra* note 80, at 32; *see* James N. Miller, *Dead Hand of the Past*, 57 NAT'L CIVIC REV. 183, 186 (1968).

101. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 90 (Max Farrand ed., 1966).

102. THE FEDERALIST No. 70, at 423 (Alexander Hamilton) (Clinton L. Rossiter ed., 1961).

103. *Id.* at 424.

104. *Id.* at 424-25.

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

As a modern commentator explained,

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

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

C. *Divided Loyalty*

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

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105. *Id.* at 426.

106. *Id.* at 427.

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

108. RANSONE, *supra* note 98, at 402.

109. SABATO, *supra* note 24, at 63.

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

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

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

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

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110. *See* Dave Frohnmayer, *Representing the State: Public Interest Comes First*, 61 J. ST. GOV'T 91, 93 (1988).

111. *See* N.Y. CONSTITUTIONAL CONVENTION, *supra* note 1, at 96.

112. In North Carolina, for example,

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

Thornburg, *supra* note 2, at 358 (footnote omitted).

113. NAAG, *supra* note 2, at 44; RANSONE, *supra* note 98, at 332-33; N.Y. CONSTITUTIONAL CONVENTION, *supra* note 1, at 96.

114. A survey of public institutions of higher education regarding delivery of legal services revealed some interesting responses in this regard. Of the 18 major research universities responding to the survey, six relied upon "quasi-representation," defined as "legal advice given by an employee who is an attorney but who is not in a legal position." It is "unavoidable" not to receive such advice, according to one respondent. UTAH SYSTEM OF HIGHER EDUCATION, STATE BOARD OF REGENTS, RESPONSE TO LEGAL SERVICES QUESTIONNAIRE, Aug. 30, 1990, at 1 (on file with author).

the relationship between the agency and the attorney general.

The national trend has been toward a consolidated system in which legal services are provided to the various state agencies through the attorney general's office, especially in the area of litigation.[115] This structure is said "to maintain consistent policy on state legal issues and efficient use of state resources."[116] The case for centralized legal services is strongest for litigation so that government agencies do not take inconsistent positions in court and to facilitate the resolution of inter-agency disputes within state government.[117]

One attorney general argues that in states not following a consolidated legal services system, the attorney general is made accountable for the rendering of legal services, including bad performance, despite lack of control over house counsel.[118] It is ironic that those who argue forcefully for centralized legal services based on accountability also argue strenuously against an appointed attorney general, even though the latter approach is also based on the same principle of centralized accountable administration. Nonetheless, unlike the appointed federal attorney general, whose jurisdiction over government lawyers is not complete because other agencies employ their own attorneys, many state attorneys general are responsible for all of their states' legal work.[119]

The problem becomes intolerable in the situation where non-lawyers in the agencies attempt to give legal advice, perhaps due in part to a scarcity of legal resources in state government. A partial solution to this problem is to make clear that the attorney general is the chief legal advisor and has the power and the responsibility to formulate consistent legal policy. The other is to eliminate the agency attorneys altogether and consolidate all representation in the attorney general's office, but then the divided loyalty problem emerges.

Indeed, these issues of constitutional structure and role can lead to a variety of hybrid arrangements. The range includes: the attorney general assigning deputies to work with the agencies, staff lawyers hired by the agencies with the consent of the attorney general, the attorney general employing private law firms, independent agencies hiring their own counsel, and the closet attorneys and non-lawyers providing legal services within the exec-

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115. The attorneys general agree that the consolidated services arrangement is optimal, as reflected in resolutions adopted by the National Association of Attorneys General in 1971. *See* NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, POWERS, DUTIES AND OPERATION OF STATE ATTORNEYS GENERAL 161, 170-71 (1977). Central litigating authority for the federal government rests with the Attorney General by statute. *See* 28 U.S.C. §§ 515-519, 547 (Attorney General has power to appear in court on all cases in which the United States has an interest).

116. NAAG, *supra* note 2, at 51.

117. Babcock, *supra* note 58, at 188-89.

118. Frohnmayer, *supra* note 110, at 92; *see* NAAG, *supra* note 2, at 12.

119. NAAG, *supra* note 2, at 11.

utive branch without the support and often the knowledge of the attorney general.

D. *Politicization*

Whether appointed or elected, the attorney general serves in a political office. However, if elected, the attorney general is subject to interest group electoral politics and all the potentially compromising influences that entails, including reliance on financial support to be elected and re-elected to office. The reasons for giving judges some independence from elective politics apply to this position as well. On the other hand, an appointed attorney general could be the product of political cronyism and therefore be subject to undue political pressures and interference from the governor and her supporters. In a survey of attorneys general reported some time ago, both those favoring election and those preferring appointment gave the same reason for their choice: the advantage of political independence in rendering legal services and law enforcement.[120] However, the politicization problem cuts in favor of the appointive model.

The appointed attorney general is at least one step removed from interest group politics. The risk that an attorney general will compromise professionalism and bend to political pressure in rendering opinions and carrying out law enforcement responsibilities is greater with a popularly elected and politically ambitious attorney general who has gubernatorial aspirations. History teaches that many of them do.[121] Elective attorneys general are more likely to regard the office as a political stepping stone.[122] One study of state attorneys general found that appointees had a slightly stronger educational record, more experience in law practice and the legal work of state governments, and a slightly higher standing in their profession.[123] "The data certainly confirm the assumption that elective status increases the political nature of the office."[124]

At the very least, popular election seems to offer little benefit over appointment as a means to insulate the work of the office from inappropriate political influence.[125] A major exception may be the attorney general's role as chief criminal law enforcer. When the political relationship between the governor and attorney general is too close, misplaced loyalty and trust can result in misuse of power. The Watergate experience is frequently offered as

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120. Abernathy, *supra* note 18, at 36.

121. Thad L. Beyle, *Governor*, *in* POLITICS IN THE AMERICAN STATES 208 (Virginia Gray et al. eds., 1990).

122. Thompson, *supra* note 18, at 29-31.

123. *Id.* at 24-41.

124. *Id* at 28.

125. Abernathy, *supra* note 18, at 47.

an example.[126]

E. *Counseling versus Prosecution*

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

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

F. *Rogue Agency*

An attorney general should not interfere with an agency's policy choice as long as the policy is legal.[129] However, whether a policy decision is legal is not always clear. When it is unclear, an independently elected attorney general could unnecessarily frustrate public policy. When it is clear, howev-

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

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

128. *See* Morrison v. Olson, 487 U.S. 654, 677 (1988) (upholding independent counsel provisions in the Ethics in Government Act of 1978); Beth Nolan, *Removing Conflicts from the Administration of Justice: Conflicts of Interest and Independent Counsels Under the Ethics in Government Act*, 79 GEO. L.J. 1, 6-11 (1990).

129. *See* Frohnmayer, *supra* note 110, at 92.

er, and the agency is intent on acting illegally, the attorney general, elected or appointed, faces a practical challenge.

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

G. *Resources and Management*

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

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

131. *See* People *ex rel.* Deukmejian v. Brown, 624 P.2d 1206, 1207 (Cal. 1981).

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

133. *See* People *ex rel.* Deukmejian v. Brown, 624 P.2d 1206, 1209 (Cal. 1981).

134. *See, e.g.*, Connecticut Comm'n on Special Revenue v. Connecticut Freedom of Info. Comm'n, 387 A.2d 533 (Conn. 1978); Feeney v. Commonwealth, 366 N.E.2d 1262 (Mass. 1977); E.P.A. v. Pollution Control Bd., 372 N.E.2d 50 (Ill. 1977). In Superintendent of Ins. v. Attorney General, 558 A.2d 1197 (Me. 1989), the court held that the Maine Attorney General who disagrees with a state agency is not disqualified from participation in litigation "affecting the public interest merely because members of his staff had previously provided representation to the agency at the administrative stage of the proceeding." *Id.* at 1204.

III. ALTERNATIVE MODELS

The foregoing discussion points to two basic issues: organization and selection.[135] The organizational question is whether the legal work for a state should be provided by agency counsel employed by and accountable to the client agencies or by counsel employed and supplied to the client agencies by a centralized legal office. Resolution of this question can include a variety of hybrid arrangements and exceptions involving agency counsel and central legal staff. The selection question is whether the attorney general should be elected or appointed. Depending on the way responsibilities for legal representation are allocated, the organization and selection issues can overlap.

A. *Agency Counsel or Consolidated Legal Services*

It is useful to distinguish between litigation and agency counseling in addressing the organization question. The case for centralized litigation staffing is strong. There may be exceptions based on special need that could be handled by the attorney general hiring outside counsel or by authorizing agency litigation counsel under state law or through agreement with the attorney general's office. The special need may be based on area of expertise or the exigencies of a particular case.

The case for consolidated legal staffing of advice and counsel to state agencies is based on the the goals of achieving efficient and consistent legal policy for the state. A related argument is to guard against the unnecessary proliferation of lawyers throughout state government, although this danger could be alleviated with effective executive management and legislative budget oversight. The consistency and efficiency arguments, however, favor the consolidated model as a general rule. However, there may be cause for more exceptions to this approach than in the litigation context.

A given agency may have special need for agency counsel to assist in policy implementation. In a state where the attorney general is elected, a given agency may be so central to the governor's policy agenda that accountability and loyalty considerations may point to agency counsel. This has been recognized especially for the governor's office itself. Moreover, the practical needs of agency representation, including the specialization and expertise required, may point more strongly in some instances to an on-site, in-house counsel working closely with agency staff.

Entities in state government such as independent agencies and institutions

135. Another issue is tenure, which includes the length of term and any restrictions on re-election or re-appointment. Greater tenure offers more time to achieve proficiency and to exert more influence over state government issues and therefore generally enlarges the attorney general's power. *See* Winder, *supra* note 4, at 74-75.

of higher education that are largely outside the governor's management span of control may merit employment of in-house counsel, particularly when accountability should be and often is focused upon the head of that agency or institution.[136] Given a general preference for consolidated legal services, the burden to justify in-house counsel should be on those state entities seeking that arrangement; and a process to meet that burden, such as legislative approval, should be followed. Even under those circumstances, ultimate responsibility for establishing the state's legal policy should be lodged with the attorney general, whether that official is elected or appointed.

B. *Appointed Attorney General*

Five states and the federal government appoint the attorney general. Under this system, the governor or agency heads are more likely than in the elective model to select their own lawyers within budget and policy constraints set by the legislature. The attorney general reports to the governor, making the legal representation for the executive branch accountable to the governor.

Public administration experts recognize the attorney general as one of the most important administrative officials and generally recommend gubernatorial appointment of the attorney general.[137] Leading scholars on the American governorship have advocated centralization of state government management and planning[138] and gubernatorial appointment of top executive branch officials as opposed to statewide elections.[139] The National Municipal League's "Model State Constitution" calls for the governor to be the only statewide elected official, declaring that the attorney general "must be part of the chief executive's administrative team."[140] The state government reorganization movement during the twentieth century has stressed the values of effectiveness, efficiency, and economy, which are public administration goals traceable to the works of Woodrow Wilson and the President's Committee on Administrative Management (the Brownlow Committee).[141] The main objective of reform has been to achieve unity of command in the governor, including reduction of constraints on gubernatorial appointment power.[142]

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136. The Utah Supreme Court has recognized that the state university "is not an executive department agency" and accordingly its "functions may require special legal counsel." Hansen v. Utah State Retirement Bd., 652 P.2d 1332, 1336, 1340 (Utah 1982).

137. PHILLIPS, *supra* note 18, at 208.

138. William H. Young, *The Development of the Governorship*, 31 ST. GOV'T 181 (1958).

139. Bennett Mitlow Rich, STATE CONSTITUTIONS: THE GOVERNOR, STATE CONSTITUTIONAL STUDIES PROJECT, Series 11, No. 3, at 30-33 (1960).

140. COMMITTEE ON STATE GOVERNMENT, NATIONAL MUN. LEAGUE, MODEL STATE CONSTITUTION WITH EXPLANATORY ARTICLES (1948).

141. James K. Conant, *In the Shadow of Wilson and Brownlow: Executive Branch Reorganization in the States, 1965 to 1987*, PUBLIC ADM. REV. 892 (Sept./Oct. 1988).

142. *Id.* at 893.

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

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

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

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143. *Id.* at 894-95.

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

145. A West Virginia poll resulted in 24% in favor and 63% opposed to abolishing the state elected office of attorney general. THE GALLUP OPINION INDEX: POLITICAL, SOCIAL AND ECONOMIC TRENDS (reporting the West Virginia Poll of March 1989, poll information no. WVA31989). *See generally* JAMES L. GARNETT, REORGANIZING STATE GOVERNMENT: THE EXECUTIVE BRANCH 51 (1980).

146. Elling, *supra* note 76, at 252-53. Some fear giving the governor too much power. *See* Emmanuel B. Reese, *Should the Governor Appoint the Secretary of State and Attorney General? No!*, 27 MICH. ST. B.J. 33 (1948).

147. Voters resist appointment because they think direct election is more democratic. CHARLES R. ADRIAN, STATE AND LOCAL GOVERNMENTS 262 (1976); SABATO, *supra* note 24, at 66.

148. *Id.* at 66; Thompson, *supra* note 18, at 18. Since New York changed from an appointed to an elected attorney general in 1846, numerous attempts have been made to go back to an appointed attorney general, but none has succeeded. *See* N.Y. CONSTITUTIONAL CONVENTION, *supra* note 1, at 195-96. Several factors have been identified that impede administrative reorganization, including opposition of vested interests within the organization, special interest groups supportive of the status quo, the difficulty of effectuating constitutional change, the persistence of Jacksonian theories of popular democracy, and the need for compromise. Phillips, *supra* note 18, at 219. Indiana in the early 1940s and Pennsylvania in 1980 changed from executive appointment to popular election. NAAG, *supra* note 2, at 20.

C. *Elected Prosecutor/Public Advocate Attorney General*

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

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

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

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

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

150. A recent article on the federal Attorney General argues that "The Attorney General's role as the nation's chief law enforcement officer has the potential for clashing with the Attorney General's White House role as the President's legal adviser." Mitchell Rogovin & Wendy M. Rogovin, *The Office of Attorney General: Not Properly Political*, 9 J.L. & POL. 317, 318 (1993). The Rogovins conclude that "a President must select two people to fulfill these positions." *Id.* at 321; *see also* Whitney N. Seymour, Jr., *United States Attorney: An Inside View of "Justice," in* AMERICA UNDER THE NIXON ADMINISTRATION 229-32 (1975) (proposing to divide functions between a presidential advisor and a chief prosecutor).

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

review of fiscal records of state agency spending is not an administrative officer and should not be appointed by the governor but should be independently elected, either by the public or the legislature.[152] Like the auditor's function, the watchdog role of the attorney general would be recognized and focused.

Finally, a state wishing to address the constitutional structure and role problems of the status quo attorney general arrangement may find less political resistance and historical inertia (though much would still remain) with a model that preserves popular election with more focused and better-defined responsibilities.[153]

D. *Elected Attorney General with Separate Legal Functions*

There are many variations on the standard elected attorney general model. One variation is to elect the attorney general, allow the governor and executive branch agencies in some instances to hire their own counsel, and determine where to draw the line between legal work in the executive branch agencies and the legal work remaining with the attorney general's office. A way to draw the line would be to assign the advisory function to the agency lawyers and the litigation function to the attorney general. In the federal system, client agencies do not generally have litigating authority but do have in-house counsel. Each agency contains a general counsel's office that operates between its policy administration and the Department of Justice.[154] It would be possible to limit the litigation in the elective attorney general's office by defining the nature of the litigation to those matters that involve a substantial public interest component or a public policy question within the attorney general's watchdog role. The attorney general could also be assigned to resolve interagency disputes (akin to the Office of Legal Counsel in the federal Department of Justice).

CONCLUSION

The goal of the foregoing is to channel discussion about the constitutional status and role of the state attorney general, not to prescribe specific struc-

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152. *See* PHILLIPS, *supra* note 18, at 209-10, 218. "An auditor should be outside gubernatorial control, as he audits how state funds were spent to see if legislative intent was indeed carried out. The governor is generally in charge of carrying out this intent, so it would do the legislature or the taxpayer little good to have him also select the auditor." Beyle, *supra* note 97, at 191.

153. Pennsylvania is an example of a variation on this model. The "Commonwealth Attorneys Act" of 1980 divided legal responsibilities between an elected attorney general and a general counsel appointed by the governor. *See* PA. STAT. ANN. tit. 71, §§ 732-101 to -506 (1990); George Jugovic, Jr., *Legislating in the Public Interest: Strict Liability for Criminal Activity under the Pennsylvania Solid Waste Management Act*, 22 ENVTL. L. 1375, 1380-82 (Portland) (discussing how Commonwealth Attorneys Act changed the balance of power in state law enforcement).

154. Babcock, *supra* note 58, at 186.

tures and duties for a particular state. Every state is unique, and no state can write on a clean slate on this issue. Nonetheless, the dearth of theoretical and empirical work on this subject suggests the need to assess critically the assumptions and historical antecedents of the state attorney general's office. For example, the position was constituted in almost all states before the twentieth century growth of state bureaucracies, which rely upon legal counsel for advice and representation.

It is a complex office with a broad range of responsibilities, including quasi-legislative and judicial functions. How best to carry out those duties in an efficient and accountable manner points in certain directions. For executive branch legal representation, gubernatorial appointment of counsel would offer greater political accountability, a lower risk of policy gridlock, and diminished conflict of loyalty, but perhaps cause some sacrifice of a checking function within the executive branch.

For public law enforcement, civil and criminal, the independent election of the attorney general would insulate legal decisionmaking from political pressures of the governor and the governor's appointees, but would also in some areas pose the dangers of accountability confusion, policy impasse, and politicizing an office with quasi-judicial responsibilities. Even so, at least for criminal investigation and prosecution, the advantages of political independence may outweigh the disadvantages.

Provision of legal services to state government increasingly occurs through a centralized attorney staff. As a general rule, this approach makes sense from an efficiency and consistency perspective. However, there may be circumstances in which agency appointment of in-house counsel would be appropriate, especially when the agency head is regarded as having accountability for agency performance independent of the governor. Independent agencies and state colleges and universities are the prime examples.

Trying to sort this out in the turf-hungry battlefield of state politics may require heroic measures of statecraft and short-term political sacrifice. That may be too much to expect, especially when the terms of the dialogue are cast initially, as reflected here, at such a general level. The dialogue should move forward with more focused attention on the office and its place in state government. Then perhaps expectations for meaningful reform will improve with time.