

BREAK UP THE PRESIDENCY?: GOVERNORS, INDEPENDENT ATTORNEYS
GENERAL, AND THE LESSONS FROM THE DIVIDED EXECUTIVE

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The debate over whether the United States Constitution vests exclusive power in the President to execute the laws is one of the richest and most thoughtful in constitutional law.¹ Does the Constitution express a commitment to a so-called “unitary executive” in which the President maintains authority over all executive officials or does the Constitution allow the Congress to create agencies and/or offices independent of presidential prerogative? Because this debate has focused on executive power at the federal level, it has framed the unitary executive question as one that concerns the relative powers of Congress and the President. The issue is not generally understood as one about the power of the President *vis a vis* other executive branch officials. This is, of course, quite understandable. The President is the only federal officer who is vested with executive authority under the Constitution and, along with the Vice-President, he is the only federal executive officer who is popularly elected.

The federal model of one elected executive officer,² however, is not the governing model embraced by the states. The states, rather, employ what is termed a “divided executive” in which executive power is apportioned among different executive

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¹ See, e.g., Steven G. Calabresi and Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L. J. 541, 543 (1994); Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L. J. 1725 (1996); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 5 (1994).

² The federal Vice President, while not subject to the President's removal, has no independent executive authority.

officers not subject to gubernatorial control.³ In forty-eight states, for example, the Attorney General is not subject to removal by the Governor;⁴ and in many states, other executive branch officers such as the Secretary of State, Treasurer, and Auditor are also independent of gubernatorial control.⁵ In fact, there is no state in which all the executive officers work under the authority of the Governor.⁶

The state experience with a divided executive branch presents both advantages and disadvantages. The fact that executive power is dispersed serves as a check against any particular officer overreaching, but power dispersal may also raise substantial governance problems when executive branch officials disagree. A Governor who does not exercise direct authority over her Attorney General or Secretary of State, for example, may be seriously hampered in pursuing her agenda. A divided executive can also be especially troublesome when the state is involved in litigation. A recent Georgia case, for example, saw the Attorney General and the Governor on different sides in litigation regarding reapportionment.⁷ Who, in such circumstances, should be deemed the party that represents the state? How are the relative responsibilities of the Governor and the Attorney General to be determined?

In this paper, I will raise and discuss the policy and legal problems raised by a divided executive. In this discussion, I will focus particularly on the issues raised by the

³ Patrick C. McGinley, *Separation of Powers, State Constitutions & the Attorney General: Who Represents the State?*, 99 W. VA. L. REV. 721, 722 (1997).

⁴ Forty-three states elect their attorneys general and five of the remaining seven non-elected attorneys generals are also independent of gubernatorial control.

⁵ Jewell C. Philips, *State and Local Government in America* (1954).

⁶ The only possible exception to this is Alaska. In that state, only the Governor and Lieutenant Governor are elected and they run together as a team. The Lieutenant Governor, however, apparently has his own set of powers under his authority, including those traditionally allocated to the office of the secretary of state in other states. The Attorney General also serves at the will of the Governor in Wyoming, however, in that state the auditor, secretary of state, treasurer, and superintendent of public instruction are all independently elected officials.

⁷ *Perdue v. Baker*, 586 S.E.2d 606 (Ga. 2003).

division of executive power between Governors and Attorneys General. I will do so for three reasons. First, the division between Governors and Attorneys General provides a particularly illustrative example of the advantages of the divided executive. Second, there is an intriguing body of law addressing the division of power between Governors and Attorneys General that has been relatively ignored in the literature. Third, examining the dispersal of power between a Governor and an Attorney General may provide useful insight as to whether there should be an analogous dispersal of power at the federal level. We live in an era of increasing (and some would say increasingly unchecked) presidential power. It may therefore be useful to imagine whether an appropriate and workable check on that power may be constructed from within the executive itself and not just from the other two branches of the federal government.

Part I of this paper, as introduction, will provide a brief discussion of the history and evolution of office of the state Attorney General to its contemporary status, in which forty-three state Attorneys General are elected and forty-eight are free from gubernatorial control. As part of this discussion, this section will also provide a brief background into the development of the federal office of the Attorney General. Part II will explore from a number of angles the relationships between the Governors and the Attorneys General under a system of divided government. It will describe the structure of the divided executive, explain how the system works in practice, identify the sources of potential conflict that the system creates between the offices of the Governors and Attorneys General, and canvass the cases that address the relative powers of the Governors (or other members of the state executive branch) and Attorneys General in the divided executive. As will be shown, these cases, with some exception, hold that it is the Attorney General,

and not the Governor, who is the final authority regarding the state’s legal position and it is the Attorney General, and not the Governor, who is the party entitled to formally represent the state in court. The section will then conclude with an assessment of why, and in what circumstances, the majority rule best reflects the purposes and design of the divided executive. Finally, Part IV will pose the question of whether the federal government should adopt a divided executive model. Because of a wide range of factors, the power of the presidency has dramatically expanded in the last half century. The result of this expansion is that Congress and the courts may no longer be able to check executive power in a timely fashion particularly with respect to matters that demand an immediate response. The only possible check on presidential power, in these circumstances, then, must rest within the executive branch itself. The problem with this, of course, is that because the executive branch officials such as the Attorney General are not independent of the President, their capability to provide any effective check on presidential excesses may be illusory. The question then becomes whether the federal executive should be restructured to provide for more effective internal checks against potential abuse. One option in this regard is to learn from the state experience and amend the Constitution to make the Attorney General an independently elected office, as the majority of states provide. Part IV will examine this possibility.

I. The Office of the State Attorney General: A Brief History and Overview

A. Common Law Origins

The roots of the office of the Attorney General date back to the 13th century, when English kings appointed attorneys to represent “regal interests” in each major court

or geographical area.⁸ Initially, the attorneys had limited powers, based either on the courts in which they appeared or the business which they were assigned to conduct.⁹ During the Middle Ages, however, this practice was superseded by the appointment of a single attorney with broad authority, including the power to appoint subordinates to carry out his responsibilities.¹⁰ The Attorney General emerged as chief legal adviser to the Crown and was often appointed for life tenure--a practiced that continued until the reign of Henry VIII when it was changed to service at the pleasure of the Crown.¹¹

Throughout the 16th and 17th centuries, the duties of the Attorney General continued to evolve and expand;¹² and, with eminent tenants such as Coke and Bacon, the office also continued to gain in prestige.¹³ The Attorney General was often summoned by writ of attendance to the House of Lords where he was consulted on bills and points of law.¹⁴ In 1673, he began to sit in the House of Commons, advising that

⁸ 6 Holdsworth, *A History of English Law*, 459 (1966).

⁹ *Id.*

¹⁰ *Id.* at 460-61.

¹¹ *Id.*

¹² As one historian noted, “[t]he English office was assuming its modern form as the American colonies were being settled.” Rita W. Cooley, *Predecessors of the Federal Attorney General: The Attorney General in England and the American Colonies*, 2 AM. J. LEGAL HIST. 304, 309 (1958). According to Cooley:

[b]y the seventeenth century the powers exercised by the Attorney General at common law were quite numerous. He was charged with the prosecution of all actions necessary for the protection and defense of the properties and revenue of the Crown; he was to bring certain classes of persons accused of crimes and misdemeanors to trial; by *scire facias* he was to revoke and annul grants made improperly in the name of the Crown; by information, he was to recover money or damages for wrongs committed on the possessions of the Crown; by *quo warranto* to determine usurpation of office or charter violations by corporations; by *mandamus* to compel admission of officers duly chosen to office and to compel restoration when illegally ousted; by information in chancery to enforce trusts and to prevent public nuisances; by proceedings *in rem* to recover property to which the Crown was entitled and to protect rights of lunatics and others under the protection of the Crown.

Id.

¹³ *Id.* at 307.

¹⁴ 6 Holdsworth, *supra* note ____ at 463.

body and assisting in the drafting of legislation.¹⁵ He also gave legal advice to the various departments of state and appeared for them in court.¹⁶

Importantly, during this period, the Attorney General also established that his duty of representation extended to the public interest and not just to the ministries of government.¹⁷ In fact, by 1757, the Attorney General was able to refuse “to prosecute or to stop a prosecution on the orders of a department of the government, if he disapproved of this course of action.”¹⁸ Accordingly, the Attorney General became less the government’s lawyer and more an independent public official “responsible for justice.”¹⁹

B. The State Attorneys General

At the time of the founding of the Constitution, ten of the original thirteen states provided for an office of the Attorney General in their constitutions. Of those ten, five required that the Attorney General be directly appointed by the legislature and five by the Governor. The terms of tenure varied considerably. North Carolina, for example, provided for a lifetime appointment by the legislature.²⁰ In New York, the Attorney General was appointment by the Governor with the advice and consent of an Executive Council and could be impeached and removed from office for “mal or corrupt conduct,” but only by a vote of two-thirds of those present in the Assembly.²¹ Maryland provided for the appointment by the Governor, with the advice and consent of the Executive

¹⁵ *Id.* at 465.

¹⁶ Cooley, *supra* note ____, at 307.

¹⁷ 12 Holdsworth, *A History of English Law*, 305 (1966).

¹⁸ *Id.*

¹⁹ National Association of State Attorneys General, *State Attorneys General: Powers and Responsibilities*, 6 (Lynne M. Ross ed. 1990) [hereinafter *State Attorneys General*]. Notably, the English model was carried over to the American colonies as the Crown granted colonial attorneys general the same powers and duties as the attorneys general had at home. The effectiveness of the colonial attorneys general, however, was far more limited than their English counterparts owing to their significant lack of resources. *Id.*

²⁰ N.C. CONST. of 1776, art. XII, § 2.

²¹ N.Y. CONST. of 1776, art. XXIII.

Council, and the Attorney General held the commission “during good behavior, removable only for misbehaviour on conviction in a Court of law.”²² Delaware allowed for the appointment of the Attorney General by the Governor, upon confirmation by the Privy Council, for a term of five years.²³ The Massachusetts Constitution of 1780 also provided for appointment by the Governor, with the advice and consent of the Council, but was silent as to when or how the Attorney General could be removed from office.²⁴ Rhode Island in the late eighteenth century was, by statute, the one state that allowed for the popular election of the Attorney General, a practice dating back to 1650.²⁵

The framers of the federal constitution placed the Attorney General under the control of the President²⁶ adopting the model of the “unitary executive,” at least in so far that they did not directly create separate federal officers independent of the President.²⁷ Supporters of the unitary executive have contended that, in so doing, the framers “swept the . . . plural executive forms into the ash bin of history.”²⁸ Actually, however, as the structures of state governments further developed, the federal model proved to have very little influence, suggesting that the normative issues were far from settled. In fact, in the years following the ratifying of the federal constitution, the states by and large tended to reject the federal model precisely because they were concerned with the concentration of too much power in one executive officer. Ohio, for example, in reaction to a territorial

²² MD. CONST. of 1776, arts. XL & XLVIII.

²³ DE CONST. of 1776.

²⁴ MASS. CONST. of 1780, Ch. 2, § I, art. 9.

²⁵ The office of the Attorney General was formally created by Constitution, as elected by qualified electors in 1842. R.I. CONST. of 1842, art. VIII, § 1.

²⁶ As will be discussed subsequently, there is actually some ambiguity on whether the office was originally intended to be subject to presidential control. *See infra* notes ___--___ and accompanying text.

²⁷ The question of whether Congress could create officers or agencies not subject to presidential control has been, of course, the dominant issue in the “unitary executive” debate.

²⁸ Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23, 25 (1995).

Governor who was perceived to be too autocratic, drafted its first state constitution in 1802 to specifically minimize the authority of the Governor and disperse executive power over a range of independent executive branch officers.²⁹

The move towards the creation of independent state executive officers gained particular traction with respect to the office of the state Attorney General during the nineteenth century. Few states, during this period, placed the position of the Attorney General under the direct control of the Governor and even the states that gave the Governor some power over the position often granted that authority only with significant strings attached. Thus, although Georgia in its 1798 Constitution granted the Governor the power to appoint the Attorney General, he could remove him only “on the address of two-thirds of each branch of the general assembly.”³⁰

Moreover, as the Nation matured, the states began offering the Attorney General even greater autonomy by making the office popularly elected. Again, as with Ohio, the states’ purpose in dividing the executive was to weaken the power of a central chief executive. The Minnesota Supreme Court observed, in reference to its 1851 constitution, that “[r]ather than conferring all executive authority upon a Governor, the drafters of our constitution divided the executive powers of state government among six elected officers. This was a conscious effort on the part of the drafters, who were well aware of the colonial aversion to royal Governors who possessed unified executive powers.”³¹

²⁹ STEVEN H. STEINGLASS AND GINO J. SCARSELLI, *THE OHIO STATE CONSTITUTION* 163 (2004). Interestingly the office of the Attorney General was not one of the executive officers established in Ohio’s first constitution and was not subsequently created until 1851.

³⁰ GA. CONST. of 1798, art III, § 3. The Georgia constitution also provided that the Attorney General could be impeached. *Id.*

³¹ *State ex rel. Mattson v. Kiedrowski*, 391 N.W.2d 777, 782 (Minn. 1986).

Accordingly, as the nineteenth century unfurled, numerous new states provided for the popular election of the Attorney General (as well as other executive branch officials) in their constitutions upon their admission to the Union while many of the established states amended their constitutions for similar purpose. New York, for example, moved to an elected Attorney General in 1846,³² Virginia in 1851,³³ Massachusetts in 1855,³⁴ Maryland in 1864,³⁵ Georgia in 1865,³⁶ North Carolina in 1868,³⁷ and Delaware in 1897.³⁸ The end result of all this was that by 1900, thirty-five of the forty-five states had an independently elected Attorney General.³⁹ The trend has continued. Currently forty-three of fifty the state Attorneys General are elected,⁴⁰ with Pennsylvania being the most recent addition, having moved to an elected Attorney General in 1980.⁴¹ Notably, no state has reversed direction and moved from an independent Attorney General to one subject to gubernatorial control.⁴² Moreover, Attorney General independence is still the rule in five of the seven states where the position remains appointed.

³² N.Y. CONST. of 1846, art. V, § 1.

³³ VA. CONST. of 1851, § 22.

³⁴ MASS. CONST. of 1855, amend. 17.

³⁵ MD. CONST. of 1864, art. V, § 1.

³⁶ GA. CONST. of 1865, art IV, § 3.

³⁷ N.C. CONST. of 1868, art. III, § 1.

³⁸ DEL. CONST. of 1897, art. III, § 21.

³⁹ Scott M. Matheson, Jr., *Constitutional Status and Role of the State Attorney General*, 6 U. FLA. J. L. & PUB. POL'Y 1, 6 (1993). "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." *Id.* at 6 n.18. Matheson describes this trend in part to the advent of Jacksonian democracy, but, in fact, relatively few states moved to an elected Attorney General during the Jacksonian period.

⁴⁰ In Alaska, Hawaii, New Hampshire, New Jersey and Wyoming the Attorney General is appointed by the Governor. In Tennessee, the Attorney General is appointed by the state supreme court and in Maine the officeholder is elected by the legislature.

⁴¹ PA. CONST., art. 4, § 4.1.

⁴² Matheson, *supra* note ____, at 28.

The powers of the state Attorneys General differ significantly from state to state,⁴³ although virtually all are empowered to provide legal advice to other executive branch officials.⁴⁴ For example, there are significant variations among the states in the power of the Attorney General to enforce criminal law. In some states the Attorney General is the state's chief prosecutor while in others she has no power to initiate criminal proceedings. Some states afford the Attorney General powers to enforce particular types of regulations such as those pertaining to consumer protection, the environment, civil rights, or anti-trust; and some states vest the Attorney General with oversight authority over public lands or charitable trusts.⁴⁵ Many state Attorneys General have significant investigative authority—focusing both on internal government misconduct and, more broadly, on issues of substantial public interest⁴⁶ and most have the power to represent the state in court, although in some states that authority may also be shared with other entities.⁴⁷ Finally, many state Attorneys General enjoy broad common law powers to pursue public advocacy programs or the right to bring suits *parens patriae* in the public interest,⁴⁸ although neither of these authorities are found universally.⁴⁹

⁴³ As one commentator notes:

[a]lthough many courts in the United States have agreed that the Attorney General of the contemporary American state is endowed with the common law powers of his English forebearer . . . the application from one jurisdiction to another of this seemingly simple principle has produced an astonishing array of mutations which make it altogether impossible to reach any sweeping generalization on the matter.

DeLong, *Powers and Duties of the State Attorney General in Criminal Prosecutions*, 25 J. CRIM. L. 392 (1934).

⁴⁴ *State Attorneys General*, *supra* note ____, at 12. Some state attorneys general have the additional power of advising the legislature. *Id.* at 13.

⁴⁵ The attorneys general's authority in specific subject areas is catalogued in *State Attorneys General*, *supra* note ____.

⁴⁶ *State Attorneys General*, *supra* note ____, at 14.

⁴⁷ *See, e.g.*, *Perdue v. Baker*, 586 S.E.2d 606, 610 (Ga. 2003), in which the court held that the Governor and the Attorney General have concurrent power to direct reapportionment litigation. *Id.* at 617.

⁴⁸ *See, e.g.*, *In re Cardizem CD Antitrust Litig.*, 218 F.R.D. 508 (E.D. Mich. 2003) (describing variations in common law powers of Attorney Generals across states).

⁴⁹ *E.g.*, *Blumenthal v. Barnes*, 804 A.2d 152, 165 (Conn. 2002) (holding that the state Attorney General does not have common law powers).

As we shall see subsequently, there are also significant differences among the state Attorneys General with respect to the level of autonomy they enjoy within the executive branch. In some states, the Attorneys General have considerable independence and, without gubernatorial approval, are free to pursue their own policy initiatives, represent or refuse to represent state officers and agencies according to their best legal judgment, or bring actions against other state officials. In other states, however, their authority is far more circumscribed and may be directly limited by the Governors or other state officials. Still, only in two states, Alaska and Wyoming, do the Attorneys General serve entirely at the will of the Governors.⁵⁰

C. The Federal Attorney General

In contrast to the states, the federal Attorney General is an appointed position who serves at the will of the President. It does not appear, however, that setting up the office in this manner was forefront in the minds of the framers. Although all of the states had an office of the Attorney General in one form or another at the time of the founding, the office of the Attorney General is not mentioned in the Constitution and was not even discussed in the Constitutional Convention (although interestingly enough, it was considered, and rejected, by the drafters of the Articles of Confederation).⁵¹ Rather the office was established by statute in the Judiciary Act of 1789.

The placement of the office in the executive branch may have been something of an afterthought. Although the final version of the Judiciary Act apparently provided that

⁵⁰ See ALASKA CONST., art. 3, § 25; WYO. STAT. § 9-1-601.

⁵¹ Cooley, *supra* note ____, at 312.

the position would be appointed by the President,⁵² that structure was not foreordained. Early drafts of the legislation had the Attorney General appointed by the Supreme Court.⁵³ Moreover, unlike the other executive branch positions established at the time, the Judiciary Act did not expressly provide that the Attorney General would serve at the President's will. The power to remove the Attorney General was left ambiguous.

The original charge of the office was two-fold. First, the Attorney General was to represent the United States before the Supreme Court. Second he was to provide legal advice to the President. There were no other powers. Criminal law enforcement, for example, the power most associated with the office today, was left to appointed federal district attorneys (United States Attorneys) or to state prosecutors.⁵⁴ And although the first Attorney General, Edmund Randolph proposed to place the United States Attorneys under his office's control, that change did not occur until 1861.

As its relative lack of authority might suggest, the office of the Attorney General did not have a major role in the early years of the republic. Randolph was a personal confidant of President Washington and for that reason was a close advisor to him, but the office itself was not originally part of the Cabinet⁵⁵ and Randolph did not attend Cabinet

⁵² There is actually some ambiguity on this point. The final version of the Judiciary Act did not in fact specify how the Attorney General or the district attorneys would be appointed. See Susan Low Bloch, *The Early Role of the Attorney General in our Constitutional Scheme: In the Beginning there was Pragmatism*, 1989 DUKE L. J. 561, 567, n. 24 (1989). According to Bloch, "[t]he President nevertheless immediately assumed that responsibility, went to the Senate for advice and consent, presumably reading article II, section 2 to support and perhaps require this approach." *Id.*

⁵³ *Id.*

⁵⁴ E.g. Saikrishna Prakash, *The Chief Prosecutor*, 73 GEO. WASH. L. REV. 521 (2005); Harold J. Krent, *Executive Control over Criminal Law Enforcement: Some Lessons from History*, 38 AM. U. L. REV. 275, 286 (1989); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 15-16 (1994).

⁵⁵ Daniel Meador, *The President, the Attorney General, and the Department of Justice*, White Burkett Miller Center of Public Affairs, University of Virginia 6 (1980).

meetings until three years into his tenure.⁵⁶ The workload of the original office was also incredibly modest. Randolph himself was a one-person show serving without staff or subordinates.⁵⁷ Even so, he was not overworked and was able (and needed to) supplement his income by practicing law on the side.⁵⁸ Indeed, as his biographer notes, the position offered Randolph so little challenge that he eventually discovered that he could be much more useful to Washington as a political adviser than he could as a mere Attorney General.⁵⁹

The office has evolved, of course, so that it is now one of the most important in the federal government. But its role in many ways remains ambiguous. On the one hand, the Attorney General is closely tied to the President. She is a member of the President's cabinet and is often one of his most trusted advisors. On the other hand, the office is also seen as having greater obligations that go beyond fealty to a specific President and, similar to its common law predecessors, is (at times) considered the defender of the rule of law. Whether an appointed and politically dependent Attorney General can be both the representative of the President and of "the Law" simultaneously, however, raises the central question of whether the federal government's unitary structure should be maintained or whether it should be refashioned in the state model of the divided executive. Before asking that question, however, we must first ascertain the nature of the divided executive and how it works in practice.

II. The Governors and the State Attorneys General

⁵⁶ *Id.* And, even though the Attorney General attended cabinet meetings beginning on March 31, 1792, "he was always ranked below all other cabinet officers until his rank as fourth in the cabinet was fixed by Congress in 1886." *Id.*

⁵⁷ The Department of Justice was not established until 1870.

⁵⁸ See John J. Reardon, *Edmund Randolph: A Biography* 195 (1974). Randolph apparently was not particularly successful in supplementing his official salary by private practice. See *id.*

⁵⁹ *Id.* at 203.

A. The Structure of the Divided Executive

The defining attribute of a divided executive is that executive power is apportioned among two or more independent officers or entities. Beyond this truism, the divided executive can take numerous forms. It may consist of multiple independently elected officers, it may involve a combination of independently elected and appointed officers, it may have a chief executive officer who cannot act in certain matters without the approval of an independent executive council, and it may be constructed in a numerous other ways. North Carolina, for example, elects a slate of executive officers ranging from Governor to the Superintendent of Public Instruction.⁶⁰ New Hampshire elects only the Governor statewide but has an independent Attorney General and an elected executive council through which many of the Governor's most important decisions must be ratified.⁶¹ In Texas, the Governor, Lieutenant Governor, Attorney General, Comptroller of Public Accounts, and Commissioner of the General Land Office are all elected positions;⁶² but the Secretary of State is appointed by the Governor, with the advice and consent of the senate, to serve during the term of the Governor.⁶³ Indeed the executive structures of each of the fifty states appears to be unique.⁶⁴

More directly on point to the central concerns of this article, there is also no uniformity in the manner the states have structured the divisions of authority between the Governors and the (independent) Attorneys General.⁶⁵ Although in virtually every state,

⁶⁰ N.C. CONST., art. 3, §7.

⁶¹ See N.H. CONST., pt. 2, arts. 42, 47, 60, 67.

⁶² TEX. CONST. art. 4, § 1.

⁶³ *Id.* at §21.

⁶⁴ For a compendium of how state executive officers are chosen see The Council of State Government, *The Book of the States* (2005).

⁶⁵ As noted previously, forty-eight of the fifty states have independent attorneys general.

the Governor is assigned the duty to see that the laws are faithfully executed,⁶⁶ the relationship of this authority to the powers of the Attorney General varies considerably from state to state depending on constitutional provision,⁶⁷ statute, and judicial decision.

In any event, although not all of its forms may be of equal merit, the divided executive presents some theoretical advantages over the unitary approach. First, as its architects intended, the divided executive model disperses power.⁶⁸ Accordingly, it minimizes some of the risks of abuse that attends too much authority being invested in one individual.⁶⁹ Second, a divided executive offers an intra-branch system of checks and balances that complements an inter-branch structure.⁷⁰ In this manner, a divided executive is the analog to the bicameral legislature which, after all, is also a divided structure designed precisely to create checks and balances.⁷¹ Third, dividing executive authority among a range of officers requires those officers to consult and collaborate in a manner that can improve both the processes and the results of governmental action. As one commentator has argued, “[d]iversifying the voices heard in government not only helps to prevent one point of view from becoming too strong, but also promotes the affirmative goal of democratizing governmental decision-making.”⁷²

⁶⁶ See, e.g., PENN CONST. art. 4, § 2 (“the supreme executive power shall be vested in the Governor, who shall take care that the laws be faithfully execute”); MONT. CONST. art. 6, § 4 (“the executive power is vested in the Governor who shall see that the laws are faithfully executed”); ILL. CONST., art. 5, § 8 (the “Governor shall have the supreme executive power, and shall be responsible for the faithful execution of the laws”).

⁶⁷ The office of the Governor is established in the constitutions of all fifty states except Rhode Island. The Council of State Government, *The Book of the States* (2005). The office of the Attorney General is set forth in the constitutions of forty-four states. See *States Attorneys General*, *supra* note ____, at 31.

⁶⁸ See, e.g., *State ex rel. Mattson v. Kiedrowski*, 391 N.W.2d 777, 782 (Minn. 1986).

⁶⁹ Flaherty, *supra* note 1.

⁷⁰ E.g. *Perdue v. Baker*, 586 S.E.2d 606 (Ga. 2003).

⁷¹ The Federalist Papers 51 (James Madison); The Federalist Papers 62 (James Madison).

⁷² Abner S. Greene *Checks and Balances in an Era of Presidential Lawmaking*, 61 U. Chi. L. Rev. 123, 134 (1994). Involving more than one actor in the decision making process, as the divided executive requires, also can improve transparency which, in turn, can help improve the democratic process by informing the

Proponents of the unitary executive will, of course, suggest that these “benefits” are actually serious deficiencies. Power dispersal, they might argue, creates debilitating inefficiencies and undercuts political accountability. Intra-branch checks and balances, they might contend, sap the executive of the energy necessary to fulfill its obligations. Mandatory collaboration, they might assert, can unduly interfere with the need of the executive to act with secrecy and dispatch. These arguments are not without merit and will be revisited subsequently.⁷³ But as the next two sub-sections will show, the state system of dividing power between the Attorney General and the Governor has, for the most part, not only worked in practice (despite the fears of the unitarians) but also offers dividends that go beyond the advantages provided by the divided executive more generally.

B. The Divided Executive in Practice

As noted previously, the divided executive is likely to draw criticism from proponents of the unitary model on grounds that such a structure is bound to fail because it would inevitably lead to a weakened executive fraught with internal conflict. What is remarkable, then, in reviewing the state experience, is that debilitating conflict has not materialized. After all, the divided executive has been the rule, rather than the exception, in virtually every state for most of the Nation’s history, yet there is little to suggest that it has created endemic dysfunction. This is not to say that serious disputes have never occurred or that Governors have never complained about having to deal with Attorneys General whom they do not control (or vice versa). Certainly they have. And it is also true that the divided executive has occasionally been the target of reforms that would

electorate as to the bases of executive branch actions. *See generally* Eric Luna, *Transparent Policing*, 85 Iowa L. Rev. 1107 (2000).

⁷³ *See infra* notes ___--___ and accompanying text.

make the Attorney General subject to gubernatorial appointment and removal.⁷⁴ But history suggests that both Governors and Attorneys General have generally learned to cooperate effectively within a divided executive framework.

The mechanisms for cooperation are not technical. Most Governors and Attorneys General have senior staff who work with each other to coordinate legal issues, and, in the vast majority of instances, the staffs come together with the expectation that any disagreements will be fully worked out. This is because, despite the significant potential for conflict discussed below,⁷⁵ the incentives for cooperation are also compelling.

For example, on the one side, the Governor has the general incentive to accept the Attorney General's legal position because he may not want to be seen as acting in derogation of the Attorney General on matters where public expectation is that, as the chief legal officer, the Attorney General will have the greater expertise. A Governor who rejects the Attorney General's position therefore risks expending political capital by appearing reckless, if not lawless. He also, moreover, risks the potential of becoming even more vulnerable on that point if his legal position eventually loses in court.⁷⁶

On the other side, the Attorneys General are also aware that their role is, in large part, defined by public expectations and that their primary obligation is to defend, and not contradict, the policies of state officers or agencies, except when those policies otherwise violate the law. Indeed this understanding is so prevalent that according to former Maine Attorney General James Tierney, virtually all of the state Attorneys General have

⁷⁴ See, e.g., Matheson, *supra* note ____, at 28 n. 148.

⁷⁵ See *infra* notes ____ - ____ and accompanying text.

⁷⁶ Many states allow the Governor (or other executive official or agency) to employ separate counsel to represent them in court if the Attorney General refuses to take the legal position that her executive branch 'client' desires. See, e.g., *Perdue v. Baker*, §586 S.E.2d 606 (Ga. 2003).

institutionalized this approach in in-house memoranda.⁷⁷ As Tierney explains, there are sound reasons why the Attorneys General have adopted this approach:

The first is that state Attorneys General know full well that they are in the business of providing legal and not policy advice to state government. They know they were not elected to be policy makers in non-legal areas. For that reason alone, most offices of attorney general strive to approximate the same attorney client relationships that exist in the world of private practice. . . . [Second] [m]ost Attorneys General know that this is not only the right thing to do, it is also the most practical thing to do. They know that Governors, state cabinet members and state legislators are unwilling to cede broad areas of decision making to an independent attorney general. Even if unsuccessful in mounting a legal challenge to an attorney general, the executive and legislative branches know full well how to utilize the power of the budget to curtail an attorney general who is too independent to their liking.⁷⁸

In fact, however, the most powerful incentives for cooperation may be mutual. To begin with, as repeat and interdependent players, both sides have the incentive to maintain a functioning relationship in order to assure they can fulfill the duties of their own respective offices. They will also feel significant political pressure to work together because it will be harmful to both if they are seen as unwilling or unable to work across political divides. The electorate, after all, does not tend to reward those who bring government to a standstill. (For this reason, it is often the case that Governors and Attorneys General from different political parties are able to maintain particularly successful relationships because both are interested in conveying the impression that they are leaders who can reach across the aisle and get things done.)⁷⁹

Further, both sides may be motivated to come together because reaching internal consensus may fortify their actions against third parties taking the opposite view. When

⁷⁷ James E. Tierney, The State Attorney General: "Who Is the Client?" Pass It On - the Newsletter of the Public Lawyer Section of the American Bar Association, September, 1995.

⁷⁸ *Id.*

⁷⁹ Conversation with former Maine Attorney General James E. Tierney (notes on file with author).

both the Governor and the Attorney General agree that a course of action is permissible, the authority behind that position is greater than when either party reaches that conclusion alone.⁸⁰ Finally, and perhaps unduly idealistically, the Governor and Attorney General may also be united by a common sense of duty. As one court has noted, a divided executive requires the executive officers to “*combine and cooperate* (even if they have differing policy views and perspectives) to provide an efficient and effective executive branch of government.”⁸¹ It may be that in state government, the tradition has been to take that duty seriously.⁸²

C. The Potential Sources of Conflict Within the Divided Executive

Conflicts between the Governor and the Attorney General, of course, do commonly arise and, indeed, the opportunities and incentives for such conflicts to occur are substantial.⁸³ First, there is a matter of simple politics. In states where the Governor and the Attorney General are independently elected, the two officers may come from different political parties with diametrically opposed partisan agendas. If so, they can be expected to be in constant political opposition to the other.⁸⁴ Moreover, even when the two officers are from the same party, they can, and often are, divided by personal

⁸⁰ As will be discussed subsequently, this factor can also be a danger to a successful system of checks and balances if, by combining forces, the officers of the executive become too powerful in relation to the other branches.

⁸¹ *State ex rel. McGraw v. Burton*, 212 W. Va. 23, 33 (2002) (emphasis added).

⁸² To be sure, this idealism cuts directly against the framers’ premises that those in authority will inevitably attempt to maximize their powers. Greene, *supra* note ___ at 132 (“the framers’ argument against concentrated governmental power was based on a prediction derived from a particular theory of human nature—that human beings holding delegated authority will tend, too often, to use that authority to advance their own interests, rather than the ‘public good.’”)

⁸³ Thad L. Beyle, *Governors in the American States 191- 192*, Virginia Gray *et al.* eds., 4th ed. (1983) (noting that “the two offices have the potential for built-in conflict at several levels, from politics to policy to administration”).

⁸⁴ *See, e.g.*, Michael Cooper, *Ending a Truce, Pataki and Spitzer Trade Barbs*, sec. B, col. 1, pg. 3, THE NEW YORK TIMES (Apr. 16, 2005); Walter Woods, *NASCAR HALL OF FAME: Georgia sues on secrecy; Attorney General cites public funds*, The Atlanta Journal-Constitution (Aug. 19, 2005); Rhonda Cook, *Governor, AG take power fight to court*, The Atlanta Journal-Constitution (May 7, 2003).

rivalries or ideological differences. And even when the two officers agree on a particular issue, they may compete with each other to be the most aggressive in addressing the issue in order to curry favor with a particular constituency.⁸⁵ Add to this the political reality that the office of the Attorney General has long been seen by many of its occupants as a stepping stone to the Governor's office⁸⁶ and the blueprint for confrontation and conflict is manifest.

Substantively, the relative spheres of authority in the two offices may also be a source of conflict. Obviously, the broader the powers of the Attorney General, the more that it is likely that her powers will overlap with that of the Governor in a manner that increases the potential for conflict between the two officers. But virtually all of the Attorney General's powers raise some possibility for conflict. Consider the Attorney General's powers to provide advice on legal matters. The Governor presumably must also interpret the laws as part of his obligation to see that the laws are faithfully executed. If so, he may disagree with an Attorney General's opinions in certain circumstances and believe it is in his power to ignore or reinterpret the Attorney General's legal conclusions.⁸⁷ The Attorney General, in turn, may advise that actions that the Governor has taken are actually beyond his authority.⁸⁸

The Attorney General's authority to represent the state in court can also lead to considerable conflict. Again, the Governor's duty to take care that the laws are faithfully exercised would seemingly extend to overseeing how the state's laws are enforced in

⁸⁵ See, e.g., Al Baker, Pataki, Environmentalist? Little and Late, Critics Say, sec. B, col. 1, pg. 2, The New York Times (Feb. 18, 2003).

⁸⁶ See William N. Thompson, *Should We Elect or Appoint State Government Executive? Some New Data Concerning State Attorneys General*, 8 MIDWEST REV. PUB. ADM. 17, 29-31 (1974).

⁸⁷ Most state courts hold that an Attorney General's opinion is not formally binding but reliance upon an opinion will often confer immunity on its recipient. *State Attorneys General*, *supra* note __ at 69-7.

⁸⁸ See Daniel T. Kobil, *Do the Paperwork or Die: Clemency, Ohio Style?*, 52 OHIO ST. L.J. 655 (discussing an Attorney General's challenge to a Governor's use of the pardon power).

court.⁸⁹ As such, the conduct of state litigation is arguably within the ambit of both the Attorney General's and the Governor's authorities. But, depending upon their respective legal and policy judgments about the matter at hand, the two officers may disagree as to how litigation should proceed. A Governor may propose, for example, that a particular agency rule or legislative enactment should be defended while, at the same time, the Attorney General believes the provision is indefensible as beyond agency authority or otherwise unconstitutional.⁹⁰

The opportunities for conflict further increase when the Attorney General has the authority to initiate legal actions pro-actively in the name of the public interest, such as in her exercise of *parens patriae* or common law authority. Because those powers invest in her the ability to engage in policy-making that goes beyond mere legal interpretation, they insert the Attorney General into the heart of setting the state's policy agenda which, needless to say, is also in the province of the Governor. An Attorney General, for example, who chooses to use these powers in support of consumer or environmental protection goals may run directly into a Governor whose policies are more anti-regulatory;⁹¹ and even when both the Governor and Attorney General are committed to the same policy agenda, conflicts will result if they do not agree as to how to best achieve the desired results. Finally, (and most obviously) the Attorney General and the Governor will be in direct conflict when the Attorney General proceeds directly against him or other executive branch officials or agencies for malfeasance or over-reaching.

⁸⁹ See *People ex rel. Deukmejian v. Brown*, 624 P.2d 1206 (Cal. 1981).

⁹⁰ See, e.g., *People ex rel. Salazar v. Davidson*, 79 P.3d 1221 (Colo. 2003).

⁹¹ Or vice versa. A "pro-business" Attorney General with ties to the business community might be less inclined to energetically enforce environmental or consumer regulations than his gubernatorial counterpart.

The greatest potential for conflict, however, relates to the relative autonomy afforded the Attorney General in a particular state. Should the Attorney General be construed as a servant of the Governor (and the other officers and agencies of the state) or as an official empowered to pursue an independent agenda on behalf of the state as she deems suitable? Not surprisingly, Governors tend to view Attorneys General as subservient officers. Most Attorneys General, on the other hand, do not see their duty as being confined to following the Governor's direction.⁹² Although they acknowledge some obligation to represent the Governor and the other parts of state government, they tend to perceive their overriding obligation to be to the broader concerns of representing the state, the law, and the public interest.⁹³ This difference in perception as to the appropriate role of the Attorney General, coupled with the Attorney General's and the Governor's overlapping powers, provides more than ample opportunity for substantial disagreement to arise between the two officers; and, as we shall see in the next section, provides the critical fodder for the leading cases in the area.⁹⁴

D. The Cases Addressing the Relative Powers of the Governors and Attorneys General

Notably, given the potential for conflict, there are remarkably few cases addressing the relative powers of the Governor and Attorney General. The cases that do exist can be broken into three categories: First, cases raising the issue of whether the Attorney General has the right to use her powers to further an independent policy agenda,

⁹² As we shall see subsequently, the relatively few judicial decisions on the subject tend to support this broader view.

⁹³ Matheson, *supra* note __, at 28 (1993) citing 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, 359 (1990); William A. Saxbe, *Functions of the Office of Attorney General of Ohio*, 6 CLEV. MARSHALL L. REV. 331, 334 (1957).

⁹⁴ See *infra* notes __--__ and accompanying text.

such as initiating criminal prosecutions against certain types of defendants or bringing civil actions to further consumer or environmental goals without the Governor's approval or in direct contradiction to the Governor's choice. Second, cases in which the Attorney General chooses to exercise independent legal judgment and either refuses to represent the Governor (or other executive officers or agencies) or takes a position opposed to the Governor (or other executive officers or agencies) in litigation. Third, independent actions brought by the Attorney General directly against the Governor or other members of the executive. This section will first briefly canvass the cases within each of these categories and then provide an overview to place these decisions in theoretical perspective.

1. The Power to Initiate Enforcement Actions Against Private Parties

The power of the executive to bring either civil or criminal actions, needless to say, may have a profound effect on a state's policy agenda. A Governor who runs for office as an anti-pornography crusader, for example, will be seriously limited in his ability to deliver on this issue if the state Attorney General refuses to bring pornography prosecutions. Similarly, a Governor who promises to create a pro-business climate could be hampered in achieving this result if the state Attorney General decides to be aggressive in maintaining consumer or environmental protection actions against the state's industries.

Whether the state Attorney General has the power to initiate criminal or civil actions independent of the Governor is largely a function of statutory authority and, particularly in the case of civil matters, whether the Attorney General of a particular state

is deemed to enjoy common law powers. Thus, in *Ohio v. United Transportation, Inc.*,⁹⁵ the court held that, because he had common law powers, the Attorney General of Ohio had the authority to bring an antitrust action under state and federal law against local taxicab companies without either the approval of the Governor or the state assembly.⁹⁶ As the court stated: “[t]he Ohio Supreme Court has long recognized the broad inherent common law powers of the Attorney General in serving in his dual role with regard to civil litigation: championing the proprietary and pecuniary interests of the government itself, and contesting infringements of the rights of the general public via the doctrine of *parens patriae*.”⁹⁷ The common law power recognized in cases such as *United Transportation*, moreover, is quite broad. As the court held in *State of Florida ex rel. Shevin v. Exxon Corp.*,⁹⁸ the Attorney General is entrusted, under the common law, with “wide discretion” and a “significant degree of autonomy” in determining what is in the public interest.⁹⁹ Indeed the Attorney General’s common law authority is so unfettered that it may allow her to bring suits in the public interest even when other executive officers or agencies oppose such actions.¹⁰⁰

⁹⁵ 506 F. Supp. 1278 (S.D. Ohio 1981).

⁹⁶ *Id.*; see also *State of Florida ex rel. Shevin v. Exxon Corp.*, 526 F.2d 266 (5th Cir. 1976) (upholding the right of the Florida Attorney General to maintain an anti-trust suit against various oil companies).

⁹⁷ *Id.* at 1281-1282; see *cf.* *In re Cardizem CD Antitrust Litig.*, 218 F.R.D. 508 (E.D. Mich. 2003) (holding that Plaintiffs States’ Attorneys General had the authority to settle and release indirect purchaser claims in a *parens patriae* or other representative capacity).

⁹⁸ 526 F.2d 266 (5th Cir. 1976).

⁹⁹ *Id.* at 268-69 (“[T]he Attorney General’s power to institute litigation on his own initiative is not limited to quo warranto proceedings in Florida or elsewhere; it is as broad as the ‘protection and defense of the property and revenue of the state,’ and, indeed, the public interest requires.”); see *Martin v. Thornburg*, 359 S.E.2d 472, 479 (N.C. 1987) (“[T]he Attorney General of this State has the common law duty to prosecute all actions necessary for the protection and defense of the property and revenue of the sovereign people of North Carolina.”); *cf.* *Texas v. Am. Tobacco Co.*, 14 F. Supp. 2d 956 (E.D. Tex. 1997) (noting that the Attorney General has the power to bring suits in order to protect the “quasi-sovereign interest” that the State has in the well-being of its populace).

¹⁰⁰ *Id.* at 272; see also *State v. Texas Co.* 7 So. 2d 161, 162 (La. 1942) (holding that the Attorney General is “vested with full discretion” to determine when suits should be brought in the name of the State and “is not required to obtain the permission of the Governor or any other executive or administrative officer or board to exercise it”); *Nebraska v. Freemont, Elkhorn & Missouri Valley R.R. Co.*, 35 N.W. 118, 119-20 (Neb.

In other states, however, the courts have held that the Attorney General's powers are far more circumscribed. In *Haskell v. Houston*,¹⁰¹ for example, the court held that the Attorney General must have the permission of the Governor in order to maintain a civil nuisance action against an oil company because it is within the Governor's responsibility to see that the laws are "faithfully administered."¹⁰² Moreover, in a few states, not only is the Attorney General prohibited from initiating actions without the Governor's approval, but the Governor can also compel the Attorney General to prosecute an action even when the Attorney General does not want to proceed. Thus, the court in *Kansas ex. rel. Stubbs v. Dawson*,¹⁰³ held that the Governor could compel the Attorney General, over his objections, to prosecute a defendant for violating a liquor prohibition act.¹⁰⁴

2. The Power of the Attorney General to Exercise Independent Legal

Judgment in Litigation

A second line of cases deals with the refusal of the Attorney General to take the Governor's or other executive officer's or agency's position in court. Must the Attorney General represent the position of the Governor or other executive on a disputed legal

1887) (holding that the Attorney General is "intrusted by law with the management and control of all cases in which the state is a party or interested" and could proceed with the prosecution of the case over the objections of the executive agency involved in the suit).

¹⁰¹ 97 P. 982 (Ok. 1908).

¹⁰² *Id.* at 985-87 (concluding that the Governor has the sole and exclusive right to exercise executive discretion to determine if a suit should be brought on behalf of the State and the Attorney General cannot interfere with the Governor's discretion); *State of Oklahoma ex rel. Cartwright v. Georgia-Pacific Corp.*, 663 P.2d 718 (Ok. 1983) (noting that the Attorney General must seek permission of Governor to initiate suit even though Attorney General changed from appointed to elected position).

¹⁰³ 119 P. 360 (Kan. 1911).

¹⁰⁴ *Id.* at 364. In so holding the court relied on the constitutional and statutory powers of the Governor, noting significantly that the Governor possessed "the supreme executive power" and determining that: [w]hile . . . manifold and arduous duties rest upon the attorney-general, the Governor is charged with the execution of the law, and this can only be done through means provided by the constitution and laws. Among these is the assistance of the attorney-general, and in the enforcement of the prohibitory law, the power of that officer to examine witnesses touching its violation. If the Governor may not invoke that power, then he is denied recourse to means which the legislature believed to be necessary to its enforcement.

Id.

issue or is she free to substitute her own independent legal judgment? Again the cases are divided. The majority rule, however, is that the Attorney General may exercise her independent legal judgment as to the best interests of the state and is not bound to take the proposed legal position of her client.¹⁰⁵ Her primary duty, in short, is to represent the public interest and not simply “the machinery of government.”¹⁰⁶

In *Secretary of Administration and Finance v. Attorney General*,¹⁰⁷ for example, the Massachusetts Supreme Judicial Court held that the Attorney General can refuse to appeal an adverse decision even when his executive agency client wants to do otherwise. The court reasoned that as the chief law officer, the Attorney General “has control over the conduct of litigation involving the Commonwealth [including] the power to make a policy determination not to prosecute” an appeal.¹⁰⁸ Two years later, in *Feeney v. Commonwealth*,¹⁰⁹ the Supreme Judicial Court came to the same result when the parties’ intentions were inversed, holding this time that the Attorney General could prosecute an appeal even when his executive agency client objected.¹¹⁰ In both circumstances then the Attorney General was empowered to decide on his own matters of legal policy that

¹⁰⁵ *Manchin v. Browning*, 296 S.E. 2d 909 (W.Va. 1982) (Neely, J. dissenting) (describing the majority rule).

¹⁰⁶ *Commonwealth ex rel. Hancock v. Paxton*, 516 S.W.2d 865, 867 (Ky. 1974) (construing statute designating Attorney General as “chief law officer of the Commonwealth” to mean that “in case of a conflict of duties the Attorney General’s primary obligation is to the Commonwealth, the body politic, rather than to its officers, departments, commissions, or agencies”). The *Hancock* court noted that at common law the Attorney General represented the king “he being the embodiment of the state But under the democratic form of government now prevailing the people are the king” *Id.* at 867; *see also* *Ex parte Weaver*, 570 So. 2d 675, 684 (Ala. 1990) (holding that Attorney General had the authority to dismiss legal proceedings over the objection of an executive agency).

¹⁰⁷ 326 N.E.2d 334 (Mass. 1975).

¹⁰⁸ *Id.* at 336. The court noted significantly that “when an agency head recommends a course of action, the Attorney General must consider the ramifications of that action on the interests of the Commonwealth and the public generally, as well as on the official himself and his agency.” *Id.* at 338.

¹⁰⁹ 366 N.E.2d 1262 (Mass. 1977).

¹¹⁰ *Id.* at 1266; *see also* *Arizona ex rel. Morrison v. Thomas*, 297 P.2d 624 (Ariz. 1956) (holding that even though Attorney General did not retain common law powers, he had the statutory authority to appeal an adverse decision without the approval of the agency client involved because the Attorney General “may, like the Governor, go to the courts for protection of the rights of the people”).

would normally be reserved to the client in a traditional attorney-client relationship.¹¹¹

The only limits on the Attorney General's powers in this respect, according to the court, were that the Attorney General's actions could not be illegal or capricious.¹¹²

An Alabama case, *Ex parte Weaver*,¹¹³ provides an additional example of the scope of the Attorney General's power in this area. In *Weaver*, the Attorney General moved to dismiss an appellate proceeding that had already been brought by the Department of Insurance on the grounds that the Attorney General had the complete power to control all litigation involving the state and could therefore act in disregard of, and in opposition, to the positions of his agency-client. The Alabama Supreme Court agreed:

The most far-reaching of the Attorney General's common-law powers is the authority to control litigation involving state and public interests. It is generally accepted that the attorney general is authorized to bring actions on the state's behalf. As the state's chief legal officer, the attorney-general has power, both under common law and by statute, to make any disposition of the state's litigation that he deems for its best interest. . . . He may abandon, discontinue, dismiss or compromise it. In addition to having authority to initiate and manage an action, the attorney general may elect not to pursue a claim or to compromise or settle a suit when he determines that continued litigation would be adverse to the public interest. Most courts have given the attorney general 'a broad discretion . . . in determining what matters may, or may not, be of interest to the people generally.'¹¹⁴

¹¹¹ See *id.* at 1266; see also *State of Mississippi ex rel. Allain v. Mississippi Public Service Commission*, 418 So.2d 779 (Miss. 1982) (recognizing that "agencies will from time to time make decisions, enter orders, take action or adopt rules and regulations which are, in spite of good intentions, either illegal or contrary to the best interest of the general public").

¹¹² *Id.*

¹¹³ 570 So. 2d 675 (Ala. 1990).

¹¹⁴ *Id.* at 677-678 (quotations and citations omitted); see also *Providence Gas Co. v. Burke*, 419 A.2d 263 (R.I. 1980) (allowing Attorney General to intervene in suit seeking review of executive commission's decision on behalf of the State). *Weaver* does suggest, however, that the Attorney General should allow the state agency to employ counsel to represent its position if the Attorney General refuses to do. 570 So.2d at 677-78; see also *State ex rel. Allain v. Mississippi Public Service Commission*, 418 So. 2d 779, 784 (Miss. 1982) (allowing the state Attorney General to intervene in a case against the interests of his agency client but requiring the Attorney General to assure that the agency's position has appropriate representation); *Superintendent of Insurance v. Attorney General*, 558 A.2d 1197 (Maine 1989) ("The unique position of the Attorney General requires that when his views differ from or he finds himself at odds with an agency,

Although recognizing that its decision was in the minority, the West Virginia Supreme Court reached an opposite result in *Manchin v. Browning*.¹¹⁵ In that case the court granted a mandamus requiring the Attorney General to represent the secretary of state in federal court over the Attorney General's objection. According to the *Manchin* Court, the Attorney General is in a traditional attorney-client relationship with the other state executive officers and has no independent power to represent his own vision of the public interest.¹¹⁶ Thus, his authority to manage and control litigation on behalf of a state officer was "limited to his professional discretion to organize legal arguments and to develop the case in the areas of practice and procedure so as to reflect and vindicate the lawful public policy of the officer he represents."¹¹⁷

Of similar result, but with broader rationale, is the decision of the Arizona Supreme Court in *Santa Rita Mining Co. v. Department of Property Valuation*.¹¹⁸ In *Santa Rita Mining*, the Attorney General appealed an adverse property tax judgment against the express wishes of his agency client. The defendants petitioned for a special action to dismiss the pending court of appeals action and the court granted the requested

then he must allow the assigned counsel or specially appointed counsel to represent the agency unfettered and uninfluenced by the Attorney General's personal opinion."); *Frazier v. State by and through Pittman*, 504 So.2d 675, 691 (Miss. 1987) (holding that where Attorney General refuses to represent state agency, agency is entitled to its own lawyer).

¹¹⁵ 296 S.E. 2d 909, 921 n.6 (W.Va. 1982); *see also id.* at 925 (Neely, J. dissenting) ("The vast weight of authority has, unsurprisingly, held contrary to our majority (as the majority opinion itself admits.)").

¹¹⁶ *Id.* at 919-921 (reasoning that the executive officer made party to the suit "has, in the performance of his official duties, acted in contemplation of the constitution and in the best interests of the state" thus the Attorney General need not act independently to protect the public interest); *see also* *Chun v. Bd. Of Trustees of the Employees' Retirement System of the State of Hawaii*, 952 P.2d 1215, 1235 (Haw. 1998) (holding that when the Attorney General's views differ from that of his agency-client's, the Attorney General cannot control the litigation "as to advance her view of the 'public welfare'"). *See generally* *League of United Latin Am. Citizens v. Entz*, 999 F.2d 831(5th Cir. 1993); *Tice v. Dept of Transportation*, 312 S.E.2d 241 (N.C. 1984); *State v. Southwestern R..R.*, 66 Ga. 403 (1881); *State ex rel. Amerland v. Hagan*, 175 N.W. 372 (Ga. 1919), *overruled on other grounds*, *Benson v. North Dakota Workmen's Compensation Bureau*, 283 N.W.2d 96 (N.D. 1979); *Cook County v. Patka*, 405 N.E.2d 1376 (Ill. 1980); *State of West Virginia ex rel. Caryl v. MacQueen*, 385 S.E.2d 646 (W.Va. 1989).

¹¹⁷ *Id.* at 921.

¹¹⁸ 530 P.2d 360 (Ariz. 1975).

relief, holding that the Attorney General lacked the authority to maintain the appeal without the approval of his agency client. The court did not base its decision on the Attorney General's attorney-client relationship with the agency. Instead, the court concluded that the Governor alone was empowered to protect the public interest and ensure that the laws are faithfully executed.¹¹⁹ Accordingly, the Attorney General was bound to represent the position of the executive branch and not his own views of the public interest in order to preserve the appropriate division of powers within the executive branch.

In one unusual case, the court found that the Governor and the Attorney General had concurrent powers. The underlying litigation in *Perdue v. Baker*,¹²⁰ involved a challenge to the State of Georgia's reapportionment plan. A lower federal court held that the plan violated the Voting Rights Act and before the appellate processes were completed the Georgia legislature passed a back-up plan that would go into effect if the original plan continued to be found invalid. Apparently favoring the back-up plan more than the original, the Governor sued the Attorney General seeking to have him drop his appeal to the United States Supreme Court. The Georgia Supreme Court rejected the Governor's petition. Explaining that its decision was based in part upon the policy of promoting a system of checks and balances between the two officers, the Court held that both the Governor and the Attorney General were entitled to represent the state before the Supreme Court.¹²¹

¹¹⁹ *Id.* at 362 (citing *Arizona State Land Dept. v. McFate*, 348 P.2d 912 (Arz. 1960)).

¹²⁰ 586 S.E.2d 606 (Ga. 2003).

¹²¹ *Id.* at 610 ("By giving both the Governor and the Attorney General the responsibility for enforcing state law, . . . it [is] less likely that the State will fail to forcefully prosecute or defend its interests in a court of law or other legal proceeding Most important, it provides a system of checks and balances within the executive branch so that no single official has unrestrained power to decide what laws to enforce and when to enforce them."). The Georgia Court, however, did obliquely hint that its decision in the case might be

3. The Power of the Attorney General to Sue the Governor or Other Executive Officers.

The third category of cases is those in which the Attorney General sues the Governor or other executive officer. The issue often arises with respect to the power of the Attorney General to question the constitutionality of state enactments when the nominal defendant is a state executive charged with the enforcement of the provision.¹²² In such cases, the majority rule rests with the power of the Attorney General to bring the action.¹²³ Thus, in *People ex rel. Salazar v. Davidson*,¹²⁴ a Democratic Attorney General, contending that a Republican-led redistricting plan (signed by a Republican Governor) violated the state constitution, sued the Secretary of State to have the plan invalidated. The Colorado Supreme Court upheld the Attorney General's prerogative, holding that "the Attorney General must consider the broader institutional concerns of the state" even though those concerns were not shared by other executive officers.¹²⁵ The power of the Attorney General to sue to have statutes declared unconstitutional, moreover, also appears to include cases in which the nominal defendant is the Governor. Thus, in *State ex rel. Douglas v. Thone*,¹²⁶ the Attorney General was allowed to bring an action against the Governor to enjoin the implementation of a statute that authorized plans for the development of alcohol plants and facilities in Nebraska.

limited to the highly politically charged area of redistricting.

¹²² See, e.g., *Hancock v. Paxton*, 516 S.W.2d 865, 867 (Ky. Ct. App. 1974) ("[T]he duty of the Attorney General to uphold the Constitution, [] surely embraces the power to protect it from attacks in the form of legislation as well as from attacks by way of lawsuits by other persons against state officers or agencies.").

¹²³ *Hansen v. Barlow*, 456 P. 2d 177 (Utah 1969) (stating this as majority rule). *But see* *State v. Burning Tree Club*, 481 A.2d 785, 788-89 (Md. 1984).

¹²⁴ 79 P.3d 1221 (Colo. 2003).

¹²⁵ *Id.* at 1231.

¹²⁶ 286 N.W.2d 249 (Neb. 1979).

Even more controversially, some cases support the power of the Attorney General to sue the Governor over matters involving the Governor's own actions. In *State ex rel. Condon v. Hodges*,¹²⁷ for example, the South Carolina Supreme Court allowed the Attorney General to sue the Governor for the latter's actions in attempting to circumvent the provisions of an appropriations bill. Rejecting the argument that a lawyer cannot sue his own client, the court held that the state Attorney General has a dual role as the attorney for the Governor and the attorney to vindicate wrongs against the state – including the power to seek legal redress for separation of powers violations by other state executive officers.¹²⁸

Although there are not many cases in which the Attorney General directly sues the Governor, *Hodges* is not the only example. Mississippi has allowed the Attorney General to intervene in a case seeking to declare that a Governor's partial vetoes of certain bills were unconstitutional.¹²⁹ Kentucky, although holding that the Attorney General had not justified his claim for injunctive relief on the merits, allowed the Attorney General to bring an action seeking to enjoin the Governor from being sworn in and act as a member of the state university board of trustees pursuant to the Governor's own self-appointment.¹³⁰ And, although not involving a Governor, the Florida courts allowed an Attorney General to bring a *quo warranto* action against a Lieutenant

¹²⁷ 562 S.E.2d 623 (SC 2002).

¹²⁸ *Id.* at 627-28.

¹²⁹ *Fordice v. Bryan*, 651 So. 2d 998 (Miss. 1995) (holding that Attorney General could intervene, on behalf of the State, in a lawsuit seeking to declare that a Governor's partial vetoes of 29 legislative bills were unconstitutional). Even more recently, the Mississippi Attorney General sued to block the Governor's cut back on Medicaid. See James Dao, *In Mississippi, Setting the Pace for a New Generation of Republican Governors*, New York Times, sect. A, col. 1, pg. 18 (Feb. 8, 2005).

¹³⁰ *Com. ex rel. Cowan v. Wilkinson*, 828 S.W.2d 610 (Ken. 1992).

Governor seeking to have him removed from office because of his apparent lack of necessary qualifications.¹³¹

Nevertheless, the right of the Attorney General to sue executive branch officers or agencies has not been universally approved. In *Arizona Land Department v. McFate*,¹³² for example, the court held that the Attorney General could not bring suit against a state agency to enjoin its sale of public lands. As the *McFate* court explained, the Arizona Constitution charges that the Governor “shall take care that the laws are faithfully executed” and that “the powers and duties of the Attorney General, shall be as prescribed by law Thus, the Governor alone, and not the Attorney General, is responsible for the supervision of the executive departments and is obligated and empowered to protect the interest of the people and the State.”¹³³ Similarly, in *Hill v. Texas Quality Board*,¹³⁴ the court held that the Attorney General did not have the authority to sue to have an agency rule set aside. As in *McFate*, the *Hill* court found no independent authority for the Attorney General to represent the public interest and not the specific interests of his client-agency. And in *City of York v. Pennsylvania Public Utility Commission*,¹³⁵ a case

¹³¹ *State ex rel. Attorney General v. Gleason*, 12 Fla. 190 (1868); *c.f.* *United States v. Troutman*, 814 F.2d 1428, 1437 (10th Cir. 1987) (holding that Attorney General acted properly in assisting federal officials in the prosecution of an executive officer for conspiracy to commit extortion because he had an “affirmative, statutorily defined duty to prosecute all criminal actions when, in his judgment, it is in the best interest of the state to do so”).

¹³² 348 P.2d 912 (Arz. 1960).

¹³³ *Id.* at 918 (concluding that “the assertion by the Attorney General in a judicial proceeding of a position in conflict with a State department is inconsistent with his duty as its legal advisor; and the initiation of litigation by the Attorney General in furtherance of interests of the public generally, as distinguished from policies of practices of a particular department, is not a concomitant function of this role”); *see also* *People ex rel. Deukmejian v. Brown*, 624 P.2d 1206 (Cal. 1981) (holding that the Attorney General can refuse to represent state agencies or officers but cannot assert an adverse position in any legal proceeding in part because it would conflict with the attorney-client relationship and in part because it is the Governor, alone, who retains the supreme executive power to determine the public interest).

¹³⁴ 568 S.W.2d 738 (Ct of Civ App of Tex. 1978).

¹³⁵ 295 A.2d 825 (Penn. 1972).

involving an appointed Attorney General who served at the will of the Governor,¹³⁶ the court held that the Attorney General could not intervene in an appeal against a state commission on the grounds that such intervention would create a conflict of interest.¹³⁷

4. The Cases in Theoretical Perspective

Some of the results in the cases reviewed in the last sections can be explained simply by the courts' engaging in close textual analysis of the relevant constitutional and statutory provisions setting forth the attorney general's (and governor's) powers. Thus the *McFate* decision, for example, was decided based on the relatively broad powers accorded to the Governor under the Arizona Constitution compared to the narrow grant of authority vested in the Attorney General.¹³⁸ In other cases such as *Shevin*, when the constitutional and statutory principles are less explicit, the courts have had to rely on more general principles.¹³⁹

But whether derived from constitutional provision, statutory text, or judicial gloss, two general approaches have emerged in deciding how the power of the Governor and the Attorney General are to be allocated in a divided executive. The first, based on ethics, argues that the Governor or other officers within the executive should prevail because the Attorney General is bound by the obligations of the attorney-client relationship and cannot represent such abstractions as the "state" or public interest in derogation of the specific legal interests of her state officer or agency client. The second is based upon arguments stemming from the constitutional structure of the divided executive. This

¹³⁶ The Pennsylvania Attorney General was changed from an appointed to an elected position in 1980.

¹³⁷ *York*, 295 A.2d at 832. The *York* court rejected the line of cases holding that the Attorney General could appoint special counsel to represent the Governor's or executive agencies' interests and intervene on behalf of the State. The court feared that appointed counsel would be placed in the impossible position of having to defend the agency "while at the same time being controlled and directed by the Attorney General who is advocating a position directly opposite" *Id.* at 833.

¹³⁸ 348 P.2d 912 (Ariz. 1960).

¹³⁹ 526 F.2d 266 (5th Cir. 1976).

approach, however, can lead to differing results depending upon which structural premise the court relies. In support of the Governor is the principle that as the chief executive, he is the officer charged with overseeing that the laws are faithfully executed and therefore he can direct the Attorney General for that purpose. In support of the Attorney General is the position that she should prevail because of her designated role as the state's chief legal officer.¹⁴⁰

a. The Argument from Ethics

The leading case in support of the position that the Attorney General is bound by the principles of the attorney-client relationship to represent the interests of his state officer or agency client is *People ex rel. Deukmejian v. Brown*.¹⁴¹ As the *Deukmejian* court stated, there is “nothing [unique to the duties of the Attorney General which] justif[ies] relaxation of the prevailing rules governing an attorney’s right to assume a position adverse to his clients or former clients”¹⁴² The approach taken in *Deukmejian* has an initial, intuitive attraction. After all, if the Attorney General is the

¹⁴⁰ As will be discussed, these approaches are not necessarily mutually exclusive and may cut across the categories of cases discussed in the previous section. For example, an Attorney General may be free to exercise independent legal judgment in deciding whether or not to pursue an appeal based upon her view of whether the legal position of the Governor or state agency client is meritorious while at the same time be required to advance the position of the Governor or state agency when her disagreement with them is based on pure policy. Iowa appears to be one state that has this approach. Compare *Motor Club of Ohio v. Dept. of Transportation of the State of Iowa*, 251 N.W. 2d 510 (Iowa 1977) (holding that the Attorney General does not have the power to supercede the policy decision of a state agency in pursuing an appeal), with *Fisher v. Iowa Bd. of Optometry Examiners*, 476 N.W.2d 48 (Iowa 1991) (holding that the Attorney General has the authority to guide state litigation consistent with what he believes are the interests of justice).

¹⁴¹ 624 P.2d 1206 (Cal. 1981). *Deukmejian*, although the leading case in support of this position, is actually somewhat unusual in that before the Attorney General opposed the Governor in court concerning the constitutionality of a state employer-employee relations act, he had counseled the state agency charged with enforcing the law about its implementation.

¹⁴² *Id.* at 1209; see also *Tice v. Department of Transportation*, 312 S.E.2d 241, 246 (1984) (“[T]he Attorney General . . . is bound by the traditional rule governing the attorney-client relationship”); *Chun v. Board of Trustees of the Employees’ Retirement System of the State of Hawaii*, 952 P.2d 1215 (Haw. 1998) (“[T]he Attorney General’s statutory authority to prosecute and defend all actions brought by or against any state officer [or instrumentality] simply provides such officer [or instrumentality] with access to [the Attorney General’s] legal services and does not authorize the Attorney General ‘to assert his vision of state interest.’”).

lawyer and the Governor the client, the normal expectation would be that the former should advance the latter's legal positions.¹⁴³ In fact, however, the attorney-client relationship approach is easily dismissed.¹⁴⁴

To begin with, this approach ignores that the Attorney General's role is significantly more complex than that of a private attorney. Not only has it been true that since 17th Century England, the Attorney General has generally been deemed to represent the 'state' or public interest, and not only the machineries of government,¹⁴⁵ but, in the modern era of expansive government, she is also often charged with representing a wide range of state officers and agencies, many of whom have positions diametrically opposed to each other. Accordingly, and in recognition of this reality, most courts have held that an Attorney General does not violate ethical rules when she engages in the dual representation of competing state entities.¹⁴⁶ It is therefore not a giant step to conclude that a dual representation between a state entity and the "state" or public interest is also not an ethical violation and, indeed, a majority of jurisdictions have so held.¹⁴⁷

Furthermore, the nature of an independent Attorney General belies the conclusion that an Attorney General should be ethically bound to represent her client-officer. Ethical

¹⁴³ See Bill Aleshire, *The Texas Attorney General, Attorney or General?*, 20 REV. LITIG. 187 (2000).

¹⁴⁴ For a thoughtful discussion of the ethical issues involved, see Justin G. Davids, *State Attorneys General and the Client-Attorney Relationship, Establishing the Power to Sue State Officers*, 38 COLUM. J.L. & SOC. PROBS. 365 (2005).

¹⁴⁵ See *supra* notes __--__ and accompanying text.

¹⁴⁶ See, e.g., *Public Utility Commission of Texas v. Cofer*, 754 S.W.2d 121 (Tex. 1988); *People ex rel. Sklodowski v. Illinois*, 642 N.E. 2d 1180 (Ill. 1984); *Connecticut Commission on Special Revenue v. Connecticut Freedom of Information Commission*, 387 A. 2d 533 (Conn. 1978).

¹⁴⁷ See, e.g., *People ex rel. Salazar v. Davidson*, 79 P.3d 1221 (Colo. 2003); *E.P.A. v. Pollution Control Bd.*, 372 N.E.2d 50 (1977); *Commonwealth ex rel. Hancock v. Paxton*, 516 S.W.2d 865 (Ky. 1974); *Humphrey ex rel. State v. McAllen*, 402 N.W.2d 535 (Minn. 1987); *State ex rel. Allain v. Mississippi Pub. Service Comm'n.*, 418 So.2d 779 (Miss. 1982). *But see* *People ex rel. Deukmejian v. Brown*, 624 P.2d 1206, 172 Cal. Rptr. 478 (1981); *City of York v. Pennsylvania Pub. Util. Comm'n.*, 295 A.2d 825 (1972).

rules do not provide an attorney with much room to reject the position of her client¹⁴⁸ and, if they in fact limited her authority, there would be little reason for an Attorney General to have independent status. Certainly, an Attorney General, ethically bound to represent the Governor, would not serve as a check on a Governor who was intent on exceeding his constitutional or statutory authority. At best, she would be able only to refuse to facilitate the Governor's actions.¹⁴⁹

Finally, ethical concerns also weigh in favor of an Attorney General's independence. As the court held in *People ex rel. Salazar v. Davidson*,¹⁵⁰ imposing a rigid obligation on the Attorney General to advance the executive's positions can undermine the Attorney General's ethical obligations to uphold the law and constitution in circumstances when the Governor seeks to defend a measure that the Attorney General believes to be unlawful.¹⁵¹

b. The Argument from Structure

The structural argument supporting the Governor, to repeat, is that, as the officer charged with taking care that the laws are faithfully exercised, he has the ultimate authority to direct executive branch action. Accordingly, allowing the Attorney General to exercise independent powers would undercut the Governor's ability to fulfill this

¹⁴⁸ See e.g., Ohio Code of Professional Responsibility E.C. 5-1 ("The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties."); see also ABA Model Rules of Prof. Resp., Canon 5.

¹⁴⁹ *Manchin*, 296 S.E.2d at 923 (Neely, J. dissenting) (confining the Attorney General to a role mandated by the attorney-client relationship, places the Attorney General in a role "analogous to a legal aid attorney for State employees sued in their official capacity . . . [who is] bound to advocate zealously the personal opinions of the officer whom he represents").

¹⁵⁰ 79 P.3d 1221, 1231 (Colo. 2003)

¹⁵¹ For the Attorney General's obligations to refuse to defend unconstitutional laws see Seth P. Waxman, *Defending Congress*, 79 N. C. L. REV. 1073, 1088 (May 2001); Dawn E. Johnsen, *Presidential Non-enforcement of Constitutionally Objectionable Statutes*, 63 LAW & CONTEMP. PROBS. 7 (Winter/Spring 2000).

constitutionally assigned duty.¹⁵² As the North Carolina Appellate Court said in *Tice v Dept. of Transportation*:¹⁵³

The Governor is a constitutional officer elected by the qualified voters of the State. The executive power of the State is vested in him and he has the duty to supervise the official conduct of all executive officers. The Attorney General is a constitutional officer elected independently of the Governor is the head of the Department of Justice, and has the duty to supervise that Department's activities. The constitutional independence of these offices, and their differing functions and duties, create clear potential for conflict between their respective holders. In the event of such conflict, power in the Attorney General to resolve, without their consent, controversies involving agencies or departments under the supervision of the Governor, could be abused by exercise in a manner effectively derogative of the Governor's constitutional duties to exercise executive power and to supervise the official conduct of all executive officers.¹⁵⁴

Unlike the ethical argument, the structural position in favor of the Governor can be persuasive, at least in some instances. Although not involving a Governor directly, consider the decision in *Motor Club of Iowa v. Dept of Transportation of State of Iowa*.¹⁵⁵ In that case a motor club challenged the validity of a state agency rule establishing a Sixty-five foot length limitation for trucks.¹⁵⁶ After the agency lost in the trial court, it decided it did not want to appeal because a majority of agency commissioners no longer supported the length limit. The Attorney General, however, attempted to pursue the appeal without the agency's approval. The court found the Attorney General did not have the authority to pursue the appeal absent agency authorization.

¹⁵² Neal Devins makes this point in the context of the federal executive when he argues that giving the Solicitor General independence would unconstitutionally infringe upon his power "to take Care that the Laws be faithfully executed." See Neal Devins, *Unitariness and Independence: Solicitor General Control over Independent Agency Litigation*, 82 CAL. L. REV. 255, 259 (1994) (quoting U.S. Const. art. II § 3).

¹⁵³ 312 S.E. 2d 241 (N.C. App. 1984).

¹⁵⁴ *Id.* at 245.

¹⁵⁵ 251 N.W.2d 510 (Iowa 1977).

¹⁵⁶ *Id.* at 514.

From a structural perspective the decision makes sense. After all, if the agency no longer supports its own rule, why should the Attorney General be able to substitute her policy judgment for that of the entity empowered to make the policy decisions?¹⁵⁷ A similar rationale, accordingly should also apply to the Attorney General's relationship to the Governor. If the Governor is the sole officer charged with setting the policy agenda of the state, it makes sense that the Attorney General should defer to his (non-legal) policy judgments.

To be sure, the lines between legal judgment and policy decision are often less than apparent. (Some might even suggest that all law is policy based.)¹⁵⁸ But even if all legal decisions have some policy overtones, not all policy decisions involve law. As *Iowa Motor Club* suggests, there are some policy decisions, such as appropriate truck length, that are not legally-based. The reason why the state's chief legal officer should have the authority or political license to direct the state on such policy matters is therefore not immediately clear.

The structural argument, however, does not equally protect the Governor on matters involving legal, as opposed to policy judgments.¹⁵⁹ Presumably, a primary reason for having an independent Attorney General is to allow for independent legal judgment. Empowering the Governor to be the final authority on legal decisions makes

¹⁵⁷ *Id.* at 516. As the court reasoned, to allow the Attorney General to pursue an appeal without the approval of his agency-client under these circumstances would “leave all branches and agencies of government deprived of access to the court except by [the Attorney General’s] grace In a most fundamental sense such departments and agencies would [otherwise] exist and ultimately function only through [the Attorney General].” *Id.* The court noted, however, that if the Attorney General believes the wishes or directions of his agency-client are not in the public interest he may provide substitute counsel to the agency and intervene in the suit himself “in behalf of what he perceives to be the state interest.” *Id.*

¹⁵⁸ *Cf.* Lawrence M. Friedman, *American Law in the 20th Century* 589 (2002) (noting all lawyers and judges are at times legal realists,).

¹⁵⁹ To begin with, affording the Attorney General the power to exercise independent legal judgment is not necessarily inconsistent with the Governor's duty to assure that the laws are faithfully executed--it does not interfere with the Governor's role to assure that a 'law' is faithfully executed if the Governor is required to defer to a legal officer for the latter's interpretation of what the meaning of that "law" is.

this independence a nullity (as well as, nonsensically enough, vesting in a non-legal officer the power to have the final say on legal meaning.)¹⁶⁰ But this argument as well can go too far. Consider the first category of cases discussed in the previous section, dealing with the power to institute lawsuits against private parties on behalf of the state. No doubt the decision to bring cases such as the anti-trust action in *Ohio Transportation*¹⁶¹ or the civil nuisance action in *Haskell*¹⁶² involves the exercise of legal judgment. But they also involve non-legal considerations that can be integral to a state's overall policy agendas. Whether to bring such cases is therefore a matter within the province of both the Governor's and the Attorney General's responsibilities and recourse to structural argument alone may not always solve the dispute.¹⁶³

The structural argument more consistently favors the Attorney General in the class of cases, such as *Perdue*¹⁶⁴ and *Feeney*,¹⁶⁵ that address the power of the office to refuse to take the position of executive branch officers or agencies in ongoing litigation. Assuming the Attorney General's actions are based upon her judgment as to the legal merits of the case,¹⁶⁶ her prerogatives to refuse to take the executive branch client's

¹⁶⁰ *Manchin v. Browning*, 296 S.E.2d 909, 924 (Neely, J. dissenting) (“To take the control of the State’s case away from the ‘chief “law-trained” officer of the State and inject the opinions of [an executive] officer who has no legal training is nonsensical.”).

¹⁶¹ *Ohio v. United Transportation, Inc.*, 506 F. Supp. 1278 (S.D. Ohio 1981), discussed at *supra* note ___--___ and accompanying text.

¹⁶² *Haskell v. Houston*, 97 P. 982 (Ok. 1908), discussed at *supra* note ___--___ and accompanying text.

¹⁶³ Structural arguments should play a role in cases when the Attorney General refuses to bring suit against a private party because she believes that a proposed law enforcement action sought by the Governor is based on an unconstitutional statute, constitutes an abuse of process, or is otherwise legally non-meritorious. In these circumstances the Attorney General is acting solely in her capacity as chief legal officer and her decision therefore should be accorded more deference than one in which her disagreement with the Governor about instituting a particular action is only that it is unwise from a pure policy standpoint.

¹⁶⁴ *Perdue v. Baker*, 586 S.E.2d 606 (Ga. 2003), discussed at *supra* note ___--___ and accompanying text.

¹⁶⁵ *Feeney v. Commonwealth*, 366 N.E.2d 1262 (Mass. 1977), discussed at *supra* note ___--___ and accompanying text.

¹⁶⁶ As opposed, for example, to the Attorney General's decision in *Iowa Motor Club* which, as we have seen, was based on pure policy grounds. See *supra* notes ___--___ and accompanying text.

position should be supported by her structural role as independent legal officer.

Moreover, the intra-branch litigation that could result from allowing the Attorney General to take a position opposite to other executive officers or agencies also reflects another benefit of the divided executive - - it promotes a fuller and more thorough examination of intra-executive disputes, both in court and in pre-litigation consultation, than would occur if the Governor was empowered to impose his position unilaterally.¹⁶⁷ Indeed, the values of intra-branch litigation have been implicitly recognized even with respect to the federal executive in cases like *United States v. Nixon*¹⁶⁸ and *Tennessee Valley Authority v. United States Environmental Protection Agency*,¹⁶⁹ where the courts refused to dismiss intra-branch litigation as non-justiciable on grounds that the United States government was effectively suing itself.¹⁷⁰ Rather the courts heard both sides of the issues involved, presumably reaching a more considered judgment than might have occurred if the matters had been decided intra-branch.¹⁷¹ The results in *Perdue* and *Feeney*, one would suspect, were similarly informed.

¹⁶⁷ For this reason, the rule established in most cases that the Governor can be represented by separate counsel when the Attorney General refuses to take his position also makes sense. *See, e.g., Ex parte Weaver*, 570 So. 2d 675 (Ala. 1990).

¹⁶⁸ 418 U.S. 683 (1974).

¹⁶⁹ 278 F.3d 1184 (11th Cir. 2002), *opinion withdrawn in part sub nom.*, *Tennessee Valley Authority v. Whitman*, 336 F.3d 1236 (11th Cir. 2003), *cert. denied sub nom.*, *Leavitt v. Tennessee Valley Authority*, 541 U.S. 1030 (2004).

¹⁷⁰ The TVA case held that the justiciability question in such circumstances should be resolved by a two-prong test. As the court stated, "First, we must determine whether the issue is traditionally justiciable. Second, we must decide whether the setting of the dispute demonstrates true adversity between the parties." 278 F.3d at 1197.

¹⁷¹ As Neal Devins reports, the Supreme Court, in furtherance of its interest in fully hearing an issue, has occasionally chided the Solicitor General for not reporting intra-branch disputes. *See Devin supra* note ___, at 316. To be sure, intra-branch litigation can be inefficient and awkward. The infamous case of *Bob Jones University v. United States*, 461 U.S. 574 (1983), for example, had the United States, through an Assistant Attorney General, opposing its own Treasury Department before the United States Supreme Court on the controversial issue of denying tax breaks to racially discriminatory schools. But as strange as the posture of the litigation was, the quality of the proceedings and of the results were surely better than if one side of the issue had been effectively muted. *See Devins, supra* note ___, at 276.

Finally, the structural argument may play its clearest role in supporting the Attorney General's power in cases where she sues another part of the executive branch for exceeding its authority.¹⁷² Indeed, if the *raison d'etre* of the divided executive is to create an intra-branch system of checks and balances, there is no better mechanism to achieve this result than dividing executive power between a chief executive and a chief legal officer. The key concern in a system of checks and balances, after all, is to assure that no entity exceeds its constitutional or legal authority and who other than the state's chief legal officer is better poised to make this judgment? (Additionally, because the Attorney General is relatively more removed than the Governor from the political pressures and demands that face state government,¹⁷³ she may be able, other things being equal, to approach the issues regarding the bounds of authority more dispassionately.¹⁷⁴) The most compelling argument supporting the Attorney General's authority to police the boundaries of executive power, however, rests in the inherent weaknesses of the alternative solution--specifically with the problems of self-dealing that would occur in a system in which the Governor has the final say. Cases like *State ex rel. Condon v. Hodges*¹⁷⁵ effectively prove the point. In *Condon*, the Attorney General was permitted to sue the Governor for circumventing the provisions of an appropriations bill. Had the Court ruled the other way and allowed the Governor to quash the action, the advantages of the divided executive would have been eviscerated because the Governor would have

¹⁷² See *supra* notes ___--___ and accompanying text.

¹⁷³ She may also, because of the traditions of her office, have greater insulation from political pressure because of her perceived role in upholding the rule of law, although one would think that this perception might vary widely among specific personalities.

¹⁷⁴ This is not to say that politics will never play a role in the Attorney General's decisions. It is undoubtedly no accident that the legal positions of Attorneys General Baker and Salazar in their respective redistricting and reapportionment cases reflected the positions of their political party. See *People ex rel. Salazar v. Davidson*, 79 P.3d 1221 (Colo. 2003); *Perdue v. Baker*, 586 S.E.2d 606 (Ga. 2003).

¹⁷⁵ *State ex rel. Condon v. Hodges*, 562 S.E.2d 623 (SC 2002).

effectively become the judge of his own authority. There is neither check nor balance in such a structure.¹⁷⁶

III. Should The Federal Government Adopt The State Model of an Independent Attorney General?

Given that the state experience with an independent Attorney General demonstrates that the theoretical benefits inherent in a divided executive can be effectively realized, the question arises as to whether such a structure would be appropriate for the federal government? The suggestion is not novel. Congressional hearings on the subject were held in the wake of Watergate scandal¹⁷⁷ and President Carter was sufficiently intrigued that his justice department was asked to formally opine on whether a proposal to make the department an independent agency would be constitutional. (The department concluded that it would not be.)¹⁷⁸ The fact that forty-eight states employ such a structure also suggests that the idea is not all that radical, particularly when one also remembers that, as an historical matter it is not all that clear that the office was intended to be controlled by the President in the first place. As noted previously, the original version of the Judiciary Act establishing the office had the position appointed by the Supreme Court,¹⁷⁹ and given that during the founding period the office was at times located in the legislative or judicial branches of the state and colonial

¹⁷⁶ See Deukmejian, 624 P.2d at 1212 (Richardson, J. dissenting) (noting that allowing the Governor to prohibit the Attorney General from seeking a judicial pronouncement of the lawfulness of legislation which the Governor would implement would cause the “system of checks and balances envisioned by the Constitution [to] fail”).

¹⁷⁷ See Removing Politics from the Administration of Justice: Hearings Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary, 93rd Cong. (1974).

¹⁷⁸ See Proposals Regarding an Independent Attorney General, 1 Op. O.L.C. 75, 77-78 (1977) (Griffin Bell).

¹⁷⁹ See *supra* note ___ and accompanying text. Further evidence that the office may not have been originally conceived as part of the executive stems from the fact that, as Susan Low Bloch notes, unlike the language found in the organic acts establishing the Departments of Foreign Affairs and War, the text of the Judiciary Act did not label the office of the Attorney General as executive. See Bloch, *supra* note ___, at 578.

governments, there is little reason to believe that the framers would necessarily associate the office with the executive branch.¹⁸⁰ More importantly and history aside, the office is not, in any event, purely executive.¹⁸¹ As a functional matter, the position is at least “quasi –judicial” both in its role in issuing formal opinions and in its role as an officer of the court.¹⁸²

This section, then, will accordingly explore the advisability of creating an independent office of the Attorney General. Part A will briefly inquire whether the state and federal government are sufficiently analogous to form a suitable comparison. Part B will present the arguments that support why an increasingly powerful presidency supports the need for intra-branch check on executive power. Part C will explain why the current federal structure of an appointed Attorney General may not be sufficient to perform this checking function. Part D will offer a preliminary suggestion of what an independent office of the Attorney General might look like and then explore the possible objections to such a structure.

A. Are the States and the Federal Government Structures Analogous?

There are numerous reasons why the state experience with divided government in the form of an independent Attorney General may not easily translate to the federal government. First, most state governments do not as rigidly conform to a three branch

¹⁸⁰ Further, the Attorney General’s power to enforce the criminal law, currently one of its core functions, is also not deeply embedded in the prerogatives of presidential power. The power to prosecute criminal actions was not given to the office of the Attorney General until the 1860’s and has been, and remains, relatively decentralized. *See, e.g.,* Harold J. Krent, *Executive Control Over Criminal Law Enforcement: Some Lessons From History*, AM. U. L. REV. 38 (1989). *But see* Saikrishna B. Prakash, *The Chief Prosecutor*, 73 GEO. WASH. L. REV. 521 (2005).

¹⁸¹ William B. Gwyn, *The Indeterminacy of the Separation of Powers and the Federal Courts*, 57 GEO. WASH. L. REV. 474, 476 (1989).

¹⁸² Henry J. Abraham & Robert R. Benedetti, *The State Attorney General: A Friend of the Court?*, 117 U. PA. L. REV. 795, 797-98 (1969). The office may also be considered quasi-legislative in the states in which it is also charged with the duty of providing advice to the legislature. *See State Attorneys General, supra* note ____, at 55-56.

separation of powers model as does the federal, and the inclusion of a separate independent executive officer may upset the balance and design of the federal structure in a more fundamental way than would occur in the states. Second, the states generally have a multi-pronged independent executive and, although a division of power between Governor and Attorney General may work in that context, there may be a different and untested dynamic when the executive is divided into only two officers. Third, the necessity for having an independent Attorney General available to check against executive branch overreaching may be greater at the state level because state legislatures are often part-time and therefore unable to effectively police the actions of the full-time officers of the executive branch.¹⁸³ (To be sure, there is a strong counterpoint to this argument in that there may be a greater need for an additional check at the federal level because, while the federal government may be available to check against any excesses by the state executives, there is no comparable outside authority that can check the federal government.) Fourth, the powers of the federal Attorney General are far greater, particularly in her centralized authority over criminal matters, than is true in any of the state Attorneys General offices because, in most states, prosecutorial authority is localized and not under Attorney General control. Creating an independent United States Attorney General, accordingly, will carve out of the executive a far broader swath of power than is true in the case of state Attorneys General.

The most important distinction, however, suggesting that the structures of the state and federal governments are not analogous is that the federal government's role in national security and foreign policy is unlike any responsibility within the province of the

¹⁸³ See Amicus Curiae Brief of the Georgia Legal Foundation 4, *Perdue v. Baker*, Case No. S03A1154 (Ga. Sup. Ct. 2003).

states. The President's need to act with dispatch and expedience in these areas may create a greater need for decision-making to be concentrated in one individual than exists in the states. Moreover, separating the Attorney General's power from the President may seriously infringe upon the President's ability to execute foreign policy and promote national security because questions of legal authority are so critical in this area.

These same areas of national security and foreign policy, interestingly enough however, also cut exactly the other way in suggesting that an additional check on presidential power in the form of an independent Attorney General may be advisable. The power of the presidency has increased exponentially since the founding and while in some areas, particularly with respect to the growth of the administrative state, such growth has arguably been matched by the correspondingly greater powers of the Congress,¹⁸⁴ this has not been true in the areas of foreign policy and national security.¹⁸⁵ In these areas, presidential power has dramatically expanded without an arguably commensurate development in the other branches.¹⁸⁶ Thus we have seen an increasing ability of the President to lead the nation into armed conflict without substantial check, his increasing capacity to circumvent Congressional, judicial, and public oversight in the war on terror and other matters, his capability to detain and suspend the civil liberties of individuals including American citizens, and his facility in interpreting the Constitution to construe his own powers expansively in a manner that negates Congressional and

¹⁸⁴ There is a wide and spirited debate as to whether it is the Congress or the President whose powers have gained more from the expansion of the administrative state. See Calabresi, *supra* note 1; Lessig and Sunstein, *supra* note 1; Flaherty, *supra* note 1; Greene, *supra* note ___; Shane, *supra* note ___.

¹⁸⁵ But see Todd Peterson, *The Law and Politics of Shared National Security Power*, 59 GEO. WASH. L. REV. 747, 761 (1991) (arguing that Congress has substantial power to control the President's national security powers). According to Peterson, the problem in this area is not that the President has assumed too much power in this area, it is that Congress has exercised too little. *Id.* at 767.

¹⁸⁶ See, e.g., Flaherty, *supra* note 1, at 1727.

international restrictions on his power.¹⁸⁷ In these contexts, Congress and the courts seem increasingly ill-equipped to check and balance Presidential power because of the exigencies surrounding how that power must be exercised.

In such circumstances, then, when neither the courts nor the Congress are in a position to check against presidential power, the only possible restraint on its improper exercise rests within the executive branch itself--most particularly within the office of the Attorney General who, as the nation's chief legal officer, is charged with determining the legality of presidential action. Recent history suggests, however, that the capability of that office to serve as a check on presidential power has failed as well because the office lacks the independence necessary to curb presidential abuse.¹⁸⁸ Accordingly, although the state and federal structures of government may not, in and of themselves, be easily translatable, the need for an intra-branch check on executive power may be as great, if not greater, at the federal level than at the states. The remainder of this section will therefore discuss the case in favor of creating an independent office of the Attorney General.¹⁸⁹

B. The Increasingly Powerful (and Unchecked) Presidency

¹⁸⁷ E.g. Memorandum from Jay S. Bybee, Assistant Attorney General, to Alberto R. Gonzales, Counsel to the President (Aug. 1, 2002), in *The Torture Papers: The Road to Abu Ghraib* 172, 172 (Karen J. Greenberg & Joshua L. Dratel eds., 2005) (holding that the President's power to act under his authority as commander-in-chief is absolute and cannot be circumscribed by domestic or international prohibitions on torture).

A similar effort by the President to broadly interpret his powers occurred at the end of the 19th Century when, in cases like *In re Debs*, 158 U.S. 564 (1895) and *Cunningham v. Neagle*, 135 U.S. 1 (1890), in which the President asserted broad authority to act without Congressional authorization in domestic matters. *Debs* involved the right of the President to take actions to end a labor strike; *Neagle* concerned his authority to order bodyguard protection for Supreme Court Justices. The President prevailed in both cases although, unlike the torture memo, he did not, in either case take the position that he could ignore Congressional action.

¹⁸⁸ See *infra* notes ___--___ and accompanying text.

¹⁸⁹ The Congressional inquiry as to whether the DOJ should become more independent did not examine whether the constitution should be amended to have the Attorney General independently elected.

The observation that presidential power has dramatically increased since the Constitution was enacted is not news.¹⁹⁰ Nor is it news that this increased power has limited the effectiveness of the constitutional system of checks and balances. Justice Jackson wrote over fifty years ago in *Youngstown Sheet & Tube Co. v. Sawyer*:¹⁹¹

[I]t is relevant to note the gap that exists between the President's paper powers and his real powers. The Constitution does not disclose the measure of the actual controls wielded by the modern presidential office. That instrument must be understood as an Eighteenth-Century sketch of a government hoped for, not as a blueprint of the Government that is. Vast accretions of federal power, eroded from that reserved by the States, have magnified the scope of presidential activity. Subtle shifts take place in the centers of real power that do not show on the face of the Constitution. Executive power has the advantage of concentration in a single head in whose choice the whole Nation has a part, making him the focus of public hopes and expectations. In drama, magnitude and finality his decisions so far overshadow any others that almost alone he fills the public eye and ear. No other personality in public life can begin to compete with him in access to the public mind through modern methods of communications. By his prestige as head of state and his influence upon public opinion he exerts a leverage upon those who are supposed to check and balance his power which often cancels their effectiveness.¹⁹²

As Justice Jackson implied, the reasons why power has concentrated in the executive go far beyond the ambitions and personalities of those who have held the office.¹⁹³ Rather they are the inevitable results of technological and social change.

First, if, as Judge Patricia Wald and Professor Jonathan Siegel maintain, “[i]n the information age, information is power”¹⁹⁴ then most of that power rests with the

¹⁹⁰ To be sure this conclusion is not universally accepted. See Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV., 23 (1995).

¹⁹¹ 343 U.S. 579 (1952).

¹⁹² *Id.* at 653-54 (Jackson, J. concurring).

¹⁹³ This is not to say that personality has not played a part. The efforts of Presidents Reagan and Clinton, for example, to give the President greater control over federal agency action have had substantial effects in consolidating presidential authority over the administrative state. See Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001).

¹⁹⁴ Patricia M. Wald & Jonathan R. Siegel, *The D.C. Circuit and the Struggle for Control of Presidential Information*, 90 GEO. L.J. 737, 739 (2002).

executive. Because of its vast resources, the executive branch has far greater access to information than do the co-branches of government. Equally importantly, it has far greater ability and expertise to examine and cull that information than do the transitory legislative staffs in the Congress or the limited personnel of the judiciary. The co-branches, for example, do not have at their disposal, the information gathering capabilities of the intelligence agencies or the technical expertise of the military in determining when there is a threat to national security. The co-branches must rely on the executive for that appraisal.

Second, again as Justice Jackson observed fifty years ago,¹⁹⁵ presidential power has also been magnified by the nature of media coverage which focuses on the White House as the center of national power. This focus on the President, moreover, has only increased since Jackson's day as the rise of and dominance of television has increasingly identified the image of the nation with the particular image of the President holding office.¹⁹⁶ His face is the visage that speaks for the nation. Additionally, unlike the Congress or the Court, the President is particularly able to demand the attention of the media, and, in so doing, has unparalleled ability to direct the nation's political agenda.¹⁹⁷

Third, Presidential power also has increased because the exigencies of decision making in the modern world necessarily vest power in the entities that can react swiftly. Congress, for example, cannot respond quickly enough after hostilities break out to decide whether those hostilities are a sufficient basis from which to declare war; the courts cannot adjudicate the question as to whether the President should have first

¹⁹⁵ *Youngstown*, 343 U.S. at 653-54.

¹⁹⁶ For an account of the power of image in its relation to politics see NEIL POSTMAN, *AMUSING OURSELVES TO DEATH* (1986).

¹⁹⁷ On the power of media generally to set the political agenda, *see* Doris A. Graber, *Media Power in Politics* (1994).

consulted with Congress before military action is required. By necessity, the power to make initial decisions must be with the executive. Moreover, given the apparently irreversible trend of the country to engage in military action without declaring war, neither co-branch has the ability, much less the power to act before the President orders such actions to commence. The power that comes with being the first to act in an emergency, moreover, does not substantially abate even after the initial crisis is over. Crisis decisions are not easily undone. As Mark Tushnet explains, when executive decisions are made committing the military to armed conflict, the inevitable result is a “rally round the flag” reaction that reinforces the initial decision.¹⁹⁸ As Vietnam and now Iraq have shown, Congress is likely to be very slow in second guessing a President’s decision that places soldiers’ lives in harm’s way. That it would use its powers (as opposed to its rhetoric) to directly confront the President by, for example, cutting off military appropriations seems fanciful.

The same problem exists, probably to even a greater degree, with respect to the courts’ ability to check the President after the fact. In such circumstances, the ability (or inclination) of the courts to challenge the President is always tenuous. Thus, at times, such as in the cases involving challenges to the Vietnam War, the courts will simply avoid confronting the legality of executive branch actions by such devices as the non-justiciability doctrine.¹⁹⁹ At other times, as in *Korematsu v. United States*,²⁰⁰ it may

¹⁹⁸ Mark Tushnet, *Controlling Executive Power in the War on Terrorism*, 118 HARV. L. REV. 2673 (2005).

¹⁹⁹ See, e.g., *Ange v. Bush*, 752 F. Supp. 509 (D.D.C. 1990); *Crockett v. Reagan*, 720 F.2d 1355 (D.C. Cir. 1983), *cert. den’d*, 467 U.S. 1251 (1984); *Holzman v. Schlesinger*, 484 F.2d 1307 (3d Cir.), *cert. den’d*, 416 U.S. 936 (1973); *DaCasta v. Laird*, 471 F.2d 1146 (2d Cir. 1973); *Sarnoff v. Connally*, 457 F.2d 809 (9th Cir. 1972), *cert. den’d*, 409 U.S. 929 (1972); *Orlando v. Laird*, 443 F.2d 1039 (2d Cir.), *cert. den’d*, 404 U.S. 869 (1971); *Simmons v. United States*, 406 F.2d 456 (5th Cir.), *cert. den’d*, 395 U.S. 982 (1969); see also Anthony D’Amato & Robert O’Neil, *The Judiciary and Vietnam* 51-58 (1972) (describing political question doctrine in cases concerning Vietnam War).

²⁰⁰ 324 U.S. 885 (1945).

simply reaffirm the President's actions because, as Justice Jackson held, it was effectively powerless to do otherwise.²⁰¹ Certainly, there are some exceptions. The Court in *Youngstown* found President Truman's seizure of the steel mills to be beyond his authority²⁰² and more recently, the court found in the *Hamdi* case that the President could not detain an American citizen as an enemy combatant without providing a hearing.²⁰³ But *Youngstown* and *Hamdi* may be the exceptions that prove the rule. As no less of an authority as Justice Rehnquist wrote, courts are always likely to be restrained in their actions and deferential to presidential decision in times of national emergency,²⁰⁴ particularly when their review of executive action will necessarily occur after the fact.

Finally, the President has at his command resources unimaginable at the time of the founding. In addition to the enormous military power that the President is able to unleash without significant *ex ante* check, the President has at his disposal agencies such as the CIA and the FBI that have enormous means to invade individual rights through investigation, surveillance, and detention. Such agencies, needless to say, have enormous capabilities for mischief and, correspondingly, are able to provide the President with more than ample opportunity to use those agencies for mischief of his own. At the same time, because the activities of these agencies are inherently secretive, there is little opportunity for them to be subject to effective oversight by the other branches or by the media. Accordingly, if Justice Scalia was correct in writing that the "purpose of the separation of powers in general, and the unitary Executive in particular, was not merely

²⁰¹ *Id.* at ___.

²⁰² 343 U.S. 579 (1952).

²⁰³ *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

²⁰⁴ *Cf.* WILLIAM H. REHNQUIST, *ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME* (1998).

to assure effective government but to preserve individual freedom,”²⁰⁵ there are serious questions of whether the existing structure can still effectively promote this goal. Too much Presidential power now lies unchecked.

C. The Executive’s Internal Watchdog: The Department of Justice

On paper at least, the President faces an internal watchdog on constitutional issues regarding the limits of his authority. The United States Attorney General through the divisions of the Department of Justice (“DOJ”) commonly reviews the legality of executive branch action, either in preparation for litigation or in its capacity as legal adviser to the President. The key divisions of the DOJ in this respect are the Office of the Solicitor General (“SG”), the office charged with litigating cases before the Supreme Court, and the Office of Legal Counsel (“OLC”), the office charged with providing legal advice.²⁰⁶ The question, however, is whether the check provided by the DOJ is effective? The answer is that while it may have idealistic aspirations to this effect, in many instances, it is not and is not intended to be, a check on presidential power.²⁰⁷ Rather much depends on the relative expectations of the persons holding the respective offices and the exigencies of the specific issues involved.

As Nina Pillard notes, there are two competing models of executive branch lawyering.²⁰⁸ The first, the client model, suggests that the government lawyers use their

²⁰⁵ Morrison v. Olson, 487 U.S. 654, 727 (1988) (Scalia, J. dissenting); see also Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary* 105 HARV. L. REV. 1155 (1992) (“[t]he genius of the American Constitution lies in its use of structural devices to preserve individual liberty”).

²⁰⁶ Cornelia T. L. Pillard, *The Unfulfilled Promise of the Constitution in Executive Hands*, 103 MICH. L. REV. 676, 682 (2005) (characterizing the SG and the OLC as the “principle constitutional interpreters for the executive branch”).

²⁰⁷ Neal Devins, *Unitariness and Independence: Solicitor General Control over Independent Agency Litigation*, 82 CAL. L. REV. 255, 301 (1994) (“That the Solicitor General, a political appointee, is influenced by political circumstances comes as no surprise.”).

²⁰⁸ Pillard, *supra* note ___, at 685.

legal skills to further the interests of their client, the President. Under this model, rather than being a check on presidential power, government lawyers are agents of it, subject only to internal conscience or ethical constraints. The second, the arms-length or idealistic vision, posits that the lawyers act, not as “advocates for executive power” but as “proponents of the best view of the law.”²⁰⁹

Historically, advocates of both approaches have occupied the Office of the Attorney General. Attorney General Edward Bates, appointed by Lincoln, for example, reportedly stated that it was his duty “to uphold the Law and to resist all encroachments, from whatever quarter of mere will and power.”²¹⁰ Robert H. Jackson, however, in looking back at his role as Attorney General from the perch of a Supreme Court Justice, apparently saw his role otherwise, describing in one case the opinion he offered as Attorney General as “partisan advocacy.”²¹¹ The occupants of the White House, on the other hand, have held a more consistent view. As the authors of one study state, “[t]he President expects his Attorney General . . .to be his advocate rather than an impartial arbiter, a judge of the legality of his action.”²¹²

The President, of course, has the ability to assure, if he so chooses, that his Attorney General shares the view that the primary duty of the office is to the administration and not to some abstract view of “the Law.” Much can be accomplished, in this respect, simply by the choice of appointment. President Kennedy selected his

²⁰⁹ Pillard, *supra* note ____, at 685.

²¹⁰ Luther A. Huston, Arthur S. Miller, Samuel Krislov, and Robert D. Dixon, Jr., Roles of the Attorney General of the United States 51(1968).

²¹¹ *Youngstown*, 343 U.S. at 648 n.17 (Jackson, J., concurring); *see also* Lincoln Caplan, *The Tenth Justice: The Solicitor General and the Rule of Law* 277 (1987) (ascribing to the SG’s Office under President Reagan the practice of routinely elevating politics over independent legal judgment in pursuing its cases).

²¹² Huston et al, *supra* note ____, at 52.

brother, President Nixon his campaign manager. Neither appointment, I suspect, was based on the desire to have an obstreperous DOJ.

Yet, even when the President chooses a person renowned for her independence, the pressures to bend to the President's will are considerable. Not only does the Attorney General act under the threat of removal, but she is likely to feel beholden to the President and bound, at least in part, by personal loyalty. True, there have been some exceptions. Elliott Richardson resigned from office rather than obeying President Nixon's directive to fire Special Prosecutor Archibald Cox, but Richardson had been appointed in the first place because the President was too weak politically to pick someone loyal to him.

The ability (and motivation) of the Attorney General to challenge a President is also likely to be diminished in times of crisis. The most famous documented example of this involves Attorney General Francis Biddle and the evacuation of Japanese Americans during World War II. Although Biddle had considerable doubts as to the constitutionality of the evacuation order, he ended up dropping his opposition in the face of military objections and a President who had decided to go through with the action nevertheless.²¹³ Certainly, whether Biddle would have continued to stand up to a President had he been an independently elected, rather than an appointed, Attorney General is speculative, but Biddle himself believed that his judgment was influenced by his belief that, as a new member of the President's Cabinet, he should defer to the decisions of others.²¹⁴

An argument could be made that even if the Attorney General may be overly susceptible to the influence of the President who appointed her, the same should not be true of the career legal staff of the SG and the OLC, many of whom see their role as

²¹³ Greg Robinson, *By Order of the President* 107 (2001).

²¹⁴ *Id.*

upholding the constitution rather than implementing any President's specific agenda. Both offices do have traditions to this effect. But those traditions have not been unbroken,²¹⁵ and their ability to effectively check executive branch power is more illusory than real. First, both the SG and OLC are likely to have some disposition in favor of the government if only because their clients are the President and the executive branch.²¹⁶ Second, as a practical matter, if these offices are staffed with lawyers hired for the ideological and political support of the President, there will be little inclination to oppose the President's position in any case. Third, as a recent instance at DOJ demonstrates, the President's appointees can always remove or redeploy staff attorneys if they find them too independent.²¹⁷ Fourth, even if some staff lawyers have initial resistance to the President's position, the internal pressures created by so-called "groupthink" may eventually take over.²¹⁸ The ability of a staff attorney to be able to withstand the pressures of her peers in adhering to legal principle in the face of arguments based on

²¹⁵ Lincoln Caplan, *The Tenth Justice: The Solicitor General and the Rule of Law 277* (1987) (noting the politicization of the SG's office during the Reagan era).

²¹⁶ Pillard, *supra* note ___, (noting the traditional role of the SG in defending executive branch prerogative).

²¹⁷ See, e.g., Dan Eggen, *Staff Opinions Banned in Voting Rights Cases*, Washington Post, (Dec. 10, 2005).

²¹⁸ The term 'groupthink' was coined originally by Yale social psychologist Irving Janis as "a mode of thinking that people engage in when they are deeply involved in a cohesive in-group, when the members' strivings for unanimity override their motivation to realistically appraise alternative courses of action." Irving Janis, *Groupthink*, 2d ed., Houghton Mifflin, (1982). Janis developed this theory by examining how "small, high-level groups of government officials used faulty decision making procedures that resulted in fiascoes in U.S. policy," see Marleen A. O'Connor, *The Enron Board: The Perils of Groupthink*, 71 U. CIN. L. REV. 1233, 1257 (2003), such as Roosevelt's complacency before Pearl Harbor, Truman's invasion of North Korea, Kennedy's Bay of Pigs, Johnson's escalation of the Vietnam War, and Nixon's Watergate break-in. According to Janis,

under the influence of groupthink, groups believe that their goals are based on ethical principles and they stop questioning the morality of their behavior. This tendency may foster overoptimism, lack of vigilance, and sloganistic thinking about out-groups. At the same time, groupthink causes members to ignore negative information by viewing messengers of bad news as people who "don't get it."

Id. Thus, Janis explains, group members engage in self-censorship to repress dissent. Irving Janis, *Victims of Groupthink*, Houghton Mifflin (1972).

public safety or national security can often be tenuous, particularly when the result of nay-saying may lead the lawyer to exile in a less attractive assignment.

Consider the recent so-called torture memos authored by OLC in response to the war on terror.²¹⁹ The memos argued, among other controversial contentions, that the power of the President as Commander-in-Chief was virtually unlimited and that he could not be bound, for this reason, by any domestic or international legal restrictions on torture.²²⁰ As W. Bradley Wendel has noted, the OLC effort was not one “of which anyone could be proud [and] [t]he overwhelming response by experts in criminal, international, constitutional, and military law was that the legal analysis in the government memos was so faulty that the lawyers' advice was incompetent.”²²¹ But, as Wendel continues, the reason why the OLC reached its results were that its processes were effectively designed to do so by excluding those lawyers who might have differing views. In any case, in both substance and process the memos do not raise confidence in the viability of OLC as a check on Presidential over-reaching.²²² Without any structural assurance of independence, the OLC (as well as the rest of the office of the Attorney General) will only be as independent as the President wants it to be.

D. An Independent Attorney General?

²¹⁹ Memorandum from Jay S. Bybee, Assistant Attorney General, to Alberto R. Gonzales, Counsel to the President (Aug. 1, 2002), in *The Torture Papers: The Road to Abu Ghraib* 172, 172 (Karen J. Greenberg & Joshua L. Dratel eds., 2005).

²²⁰ *Id.*

²²¹ W. Bradley Wendel, *Legal Ethics and the Separation of Law and Morals*, 91 CORNELL L. REV. 67, 68 (2005). *But see* John Yoo, Commentary: Behind the ‘Torture Memos,’ UC Berkeley News (Jan. 4, 2005), available at, http://www.berkeley.edu/news/media/releases/2005/01/05_johnyoo.shtml.

²²² Indeed, rather than OLC’s serving to check presidential power, the converse may be true. Many of the legal issues that the OLC addresses are likely to never come before the courts because they are non-justiciable on political question, standing, or other such grounds; and in those circumstances, the OLC provides the last word on the constitutionality of executive branch action. To the extent the OLC views itself as the representative and facilitator of presidential prerogative, then, its decisions are likely to favor, rather than check against, expansions in executive power.

The question then is should the constitution be amended to immunize the office of the Attorney General from presidential control?²²³ Before reaching this issue, however, there is an initial obstacle that must be overcome. What should the contours of such an office look like? As we have seen from our discussion of the states, there is no singular model for an independent Attorney General. A federal office, therefore, could take an almost limitless number of forms with each proposed formulation generating its own debate. In order to focus discussion then, let us consider a federal model that, while borrowing from the state examples, is aimed expressly at addressing the concerns about presidential overreaching discussed in the previous sections. Accordingly, the office would be empowered to provide independent advice to the government on matters of executive power, to exercise independent legal judgment in executive branch litigation (including, when appropriate, as in the *Perdue* case, the prerogative of taking a litigation position opposite to the executive's position), and to pro-actively bring actions against the executive, as in *Condon*, when the executive exceeds its authority.²²⁴ (The office, in short, would enjoy autonomy in the exercise of the functions currently performed by the SG and OLC and would have the additional authority to institute actions against the executive for exceeding its powers.²²⁵) At the same time, the President, like the

²²³ That making the office of the Attorney General independent would require a constitutional amendment seems indisputable. *See* Proposals Regarding an Independent Attorney General, 1 Op. O.L.C. 75, 77-78 (1977) (Griffin Bell).

²²⁴ *See also* *Hancock v. Paxton*, 516 S.W.2d 865 (Ky. Ct. App. 1974).

²²⁵ This article does not purport to enter the debate as to whether an independent Attorney General's office should also have the power to bring ethics or corruption charges against particular executive branch officers in the manner of the independent counsel without presidential authority. Certainly, there are strong reasons for there to be independence in this area. As has been noted, an executive branch cannot easily be expected to investigate itself. *See, e.g.*, Lawrence Lessig & Cass R. Sunstein, *supra* note 1, at 109. Moreover, as Abner Greene as argued in the context of the independent counsel statute, providing independent authority to prosecute executive branch malfeasance does not interfere with the President's execution of the laws but only with his "failed execution of the laws." Greene, *supra* note ___ at 176. The focus of this article, however, is on the need for an intra-branch check on executive branch over-reaching and not one on governmental officer malfeasance.

Governors in most states, would have the right to be independently represented in the litigation where his position is as odds with the Attorney General if he so chooses²²⁶ and, like the Governors in some states, could also have the authority to direct the Attorney General to take particular actions in areas other than those demanding complete Attorney General independence.²²⁷ We shall also momentarily take our lead from the majority of states and make this office a separately elected position but we shall revisit that subject subsequently.

The normative advantages of such a structure have already been noted. An independent office of the Attorney General would be freer to exercise independent legal judgment in furtherance of the rule of law than one that is subject to presidential control; it would provide a more effective check on presidential excesses than does an appointed Attorney General; it would remove from presidential control the decisions about the constitutional limits of the President's own power; and it would provide greater transparency and collaboration in executive branch legal decision making because the President and Attorney General would need to consult with each other before embarking on a course of action. But there are serious normative concerns that can be raised against such an office as well. Some of these objections stem from the classic arguments that have been advanced in favor of the unitary executive generally. Others pertain to specific problems that might arise from dividing the executive between the Governor and the Attorney General. Each will be addressed in turn.

1. Energy and Efficiency

²²⁶ See, e.g., *supra* note 79.

²²⁷ *Kansas ex rel. Stubbs v. Dawson*, 119 P. 360 (Kan. 1911) (holding that the Governor may order the Attorney General to institute particular proceedings); *State ex rel. Jackson v. Coffey*, 118 N.W. 2d 939 (1963) (same).

The first objection to dividing the executive is that unitariness is needed to foster energy and efficiency. The foundation of this argument traces to Alexander Hamilton in Federalist 70²²⁸ and actually involves four separate points. First, a unitary executive is necessary to allow the executive to act with dispatch;²²⁹ second it is required because a plural executive could lead to internal disagreements that would weaken the ability of the executive to carry out its operations;²³⁰ third, a unitary executive prevents divisive internal executive branches from developing as they would if there were numerous executives competing for power;²³¹ fourth, a unitary executive, by having a national constituency (as opposed to the regional constituencies of the members of Congress) would be more energetic on behalf of the entire national community and not distracted by local geographic pressures.²³²

The last two of these arguments can be immediately dismissed in the context of the divided executive. An elected Attorney General would not be subject to the pressures of local faction similar to a member of Congress because, like the President, she would be a nationally selected officer (whether elected or appointed) and therefore responsive to, the needs of the national constituency. Hamilton's concern with intra-executive factions, in turn, would not be implicated because the models of a plural executive that he addressed involved broadly shared powers and not one in which a chief executive holds most of the reigns of power while a secondary officer has relatively

²²⁸ The Federalist Papers 70 (Alexander Hamilton). Although referring in large part to the ability of the government to conduct foreign policy, Hamilton offered salient points that apply to the conduct of domestic affairs as well. *Id.*

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ *Id.* As he argued, plural executives could split the executive branch into “the most violent and irreconcilable factions, adhering to the different individuals who composed the magistracy.” *Id.*

²³² Calabresi, *supra* note ___ at 38.

limited authority.²³³ When the vast majority of executive power rests with one person, the incentive for intra-executive cabals to develop to support the officer with significantly less authority seems less likely.²³⁴

Some of the energy and efficiency concerns, however, could apply.²³⁵ Certainly, an executive divided between President and Attorney General would interfere with efficiency and expedience because the President would be forced to consult with another executive officer and presumably work out any disagreements prior to taking action.²³⁶ This requirement could even lead to complete deadlock if the officers are not able to come to agreement.²³⁷

The state experience, however, may shed some light on whether the inefficiency and energy concerns have actually been realized. The answer, at least in the aggregate, appears to be no. A lack of energy at the state executive level, for one, does not appear to be a problem. Governors continue to aggressively pursue their policy agendas and do not appear to be stilled from doing so merely because of the powers of the Attorney General.

²³³ Hamilton's examples of problematic plural executives were the Roman model in which two magistrates shared expansive power, and an executive council model, in which the approval of an independent council was necessary before the executive could undertake significant action. In both of these examples, the possibility that competing alliances would maneuver to gain power was manifest because the entire range of executive power was at issue.

²³⁴ Only if the Attorney General is seen as a pretender to the throne should greater problems arise in this respect. But in that case one would assume that that the Attorney General may not be in any position significantly different than the Vice President.

²³⁵ There is, of course, an initial question as to whether the framers' concern with energy still applies in the modern era. As Martin Flaherty has written, "[m]odern government at its most lethargic is energetic beyond the Founders' most reckless speculation." Flaherty, *supra* note 1, at 1826.

²³⁶ The concern with expedience may actually be overstated. The President's ability to act with dispatch would not be seriously inhibited if he needed to consult with a single legal officer before proceeding. Presumably, every President already confers with his legal advisers (including DOJ attorneys) when his legal authority to take a specific action is ambiguous.

²³⁷ Moreover, if the final authority on some matters is given to the Attorney General such as, for example, taking a particular position before the United States Supreme Court, executive branch energy may be weakened to the extent the President is limited thereby in pursuing his policy agenda. See Neal Devins and Michael Herz, *The Battle That Never Was: Congress, The White House, and Agency Litigation Authority*, 61 LAW & CONTEMP. PBLMS. 205, 219 (1998) (discussing the attempts by the White House to centralize its litigation authority in order to exercise greater control over the administrative state).

Indeed, in circumstances where both officers have policy authority, political competition may drive either officer to act more aggressively in order to capture the attention of political constituencies.²³⁸

Still the state experience shows there are inefficiencies. A Governor who does not have to work through another independent executive officer can act more expeditiously than one who does, and a Governor who does not need to worry about negative legal advice from an outside source is less likely to be chilled in taking particular actions than one who has to work through an independent officer. Inefficiencies are also created, as the cases demonstrate, in litigation where the state is a party. Having both the Governor and the Attorney General separately representing the state and taking opposite positions as in the *Perdue* litigation is anything but efficient. And even when the Attorney General is deemed the state's official representative in litigation, the power of the Governor, recognized in most states, to intervene separately still fosters inefficiency in the allocation of resources -- not to mention presenting a decidedly mixed message before the courts.

But the issue, in any event, is not simple inefficiency or lack of energy. For example, as we have seen, the inefficiency in having different state officers take opposing positions before the courts can also beneficially promote the fullest and most thorough airing of the issue and thereby help improve the overall quality and effectiveness of the eventual judicial decision.²³⁹ More broadly, as the framers' three branch design already establishes, inefficiencies and inhibitions on government actions are not always negatives

²³⁸ New York Governor George Pataki and Attorney General Elliot Sptizer for example, have had engaged in spirited efforts to show who was more aggressive in addressing environmental concerns. *See supra* note

²³⁹ *See supra* notes ___ --___ and accompanying text.

and can affirmatively foster other important goals such as dispersing power and maintaining a system of checks and balances. The actual issue then in choosing between a unitary and a divided executive may be termed as ‘optimal inefficiency’ – are the benefits offered by the divided executive worth the inefficiency costs?²⁴⁰ Certainly a President who needs to work through an independent Attorney General in order to, for example, initiate an extensive program of warrantless electronic surveillance or detention of American citizens may be stilled in his efforts to do so. But having Presidents less energetic in testing the boundaries of their powers would also presumably serve the goal of protecting individual liberty.²⁴¹

2. Accountability

The second classic argument against a divided executive, that it undermines political accountability, can also be found in Federalist 70.²⁴² As Hamilton argued, a plural executive “tends to conceal faults, and destroy responsibility”²⁴³ by either increasing the chances that various officers may hide responsibility by blaming others for any miscalculations or errors or by colluding in first instance in order to deliberately cloud the lines of responsibility and avoid subsequent blame. To this may be added another political accountability claim. As the experience with the independent counsel may have shown, if the office is truly independent, there will be few checks on its

²⁴⁰ The current tripartite system of the federal government, of course, can also be seen as an effort to promote optimal efficiency.

²⁴¹ Moreover, to the extent that certain law enforcement functions of the Attorney General are truly necessary for the President’s ability to conduct foreign policy and foster national security, the provision granting independence to the Attorney General could be qualified, consistent with the division of executive powers in some states, to grant the President the authority to direct the Attorney General to take particular actions. *See, e.g., State ex rel. Jackson v. Coffey*, 118 N.W. 2d 939 (1963). Such an approach could both protect some presidential prerogative while providing a political guard against overreaching.

²⁴² The Federalist Papers 70 (Alexander Hamilton).

²⁴³ *Id.*

exercise when it engages in questionable behavior. The possibility for abuse then, as Justice Scalia foresaw in *Morrison v. Olsen*, is considerable.²⁴⁴

Again, however, it is not clear how significantly these arguments contradict the creation of an independent Attorney General. Most importantly, if the position is independently elected, there would not be the problems associated with that of the independent counsel. Unlike an independent counsel, the Attorney General would not be an officer with only one charge and no accountability to any electorate. Rather she would have authority over a wider range of matters and responsibility to the electorate for deficiencies or errors in her judgment.

This is not to say that lines of accountability between the President and the Attorney General could never be blurred. A President who promises to do everything to combat terrorism, for example, may be held accountable if one of the reasons his efforts fail is because an Attorney General has informed him that his desired course of action is unconstitutional. Similarly, it may be possible for a President and Attorney General to collude beforehand in a particular matter in order to deliberately hide responsibility, as might be the case if they agree to refuse to initiate, or to prolong, a potentially politically embarrassing investigation. But although there may be some problems with blurred accountability, they will not be as extensive as in the types of plural executives of concern to Hamilton because the scope of the Attorney General's authority does not extend to all executive decisions and pertains only to matters of legal judgment. The

²⁴⁴ 487 U.S. 654 (1988) (Scalia, J., dissenting).

lines of decisions to both the Attorney General and President should therefore normally be relatively clear.²⁴⁵

Moreover, a divided executive between the President and the Attorney General actually has the potential to foster greater accountability than the unitary model. As Peter Shane has argued, the persuasiveness of the accountability argument as support for the unitary executive may be overstated because the electoral process requires the voter to combine a series of political choices into a vote for a single personality who is unlikely to reflect her views on all those issues.²⁴⁶ A voter who is pro-life or anti-tax might vote to re-elect a President who reflects her position on those issues even if she disagrees with the latter's legal stance on the limits of Presidential power. If so, allowing her to vote separately for the officer charged with formulating legal positions may foster her ability to have more of her policy choices realized. To be sure, this argument may prove too much as it would suggest in its extreme that the executive should be divided into an elective office for every galvanizing political issue.²⁴⁷ But again, if the role of the Attorney General is sufficiently defined in relatively narrow terms, the overall political accountability of the executive branch could be increased.

In any event, the question of whether a divided executive truly undermines political accountability may have been answered by the state experience. Empirical study on this point may be needed, but at this point there is little to suggest that, in the

²⁴⁵ Additionally, to the extent that Rebecca Brown is correct in her conclusion that the value of political accountability is less to foster majoritarian results and more to allow the people to protect themselves from government tyranny, a divided executive, may complement, rather than undermine, this purpose. See Rebecca L. Brown, *Accountability, Liberty, and the Constitution*, 98 COLUM. L. REV. 531 (1998).

²⁴⁶ Peter M. Shane, *Political Accountability in a System of Checks and Balances: The Case of Presidential Review of Rulemaking*, 48 ARK. L. REV. 161,197-99 (1994).

²⁴⁷ *Id.* at 199 (arguing that if true representativeness had been the framers' goal, they would have created a multiple presidency).

overwhelming number of states where the voters choose both the Governor and the Attorney General, the state executive has become politically unaccountable.

3. Separation of Powers

The third generic concern is that a divided executive undermines separation of powers by weakening the executive in its battles with the other two branches of government. The foundation for this argument stems from Madison in Federalist 51. Madison theorized that because those in power would inevitably attempt to expand their powers, fortifying each branch was necessary to prevent against the encroachments of another. As Madison famously wrote:

But the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. The provision for defense must in this, as in all other cases, be made commensurate to the danger of attack. Ambition must be made to counteract ambition.²⁴⁸

To Madison, the branch with the greatest ability to invade the prerogatives of the others was the legislature.²⁴⁹ Based on this premise, he concluded that, in order to assure that the branches were protected “commensurate to the danger of attack,” the legislature needed to be divided into two. The executive, however, was to be unitary not because it was intended to be powerful for its own sake, but because it was needed to constrain the power of the legislature.²⁵⁰

Undoubtedly, dividing the executive could weaken it in its struggles with Congress. But if the bases of Madison’s initial calculations have changed, and the executive, and not the legislature, is now the most dangerous branch, then restructuring

²⁴⁸ The Federalist Papers 51 (James Madison).

²⁴⁹ *Id.*

²⁵⁰ See Greene, *supra* note ____, at 141-48.

the government in order to reflect the new reality would be consistent with, and not antithetical to, Madison’s vision and design.²⁵¹ The separation of powers argument, in short, normatively defends the unitary executive only if the original calibrations setting out what defenses the branches need to counter “the danger of attack” are still accurate.

Well maybe not exactly. The separation of powers argument, ironically enough, may work against dividing the executive precisely because it may provide the executive with too much power.²⁵² Consider the effect of an independent Attorney General’s opinion *ratifying* the legality of a Presidential action in the face of Congressional opposition. In such circumstances, the power of the executive will be greater *vis a vis* the Congress because two independent officers have acted in concert than if a unitary executive had taken the same position. Even more dramatic are the potential consequences of what might occur if the President and Attorney General both concluded that a decision of the United States Supreme Court was in error. The legal support of an independent Attorney General could provide the President with the political cover and ability to ignore an unfavorable Supreme Court decision that he otherwise would have if the executive were unitary. In order to guard against this possibility, the text of the provision establishing the office of the Attorney General might therefore need to include language proscribing this result.²⁵³

4. Specific Objections to An Independent Attorney General

²⁵¹ Flaherty, *supra* note 1 at 1727.

²⁵² Hamilton may have envisioned this problem in Federalist 70 as well. As he wrote, the “united credit and power of several individuals must be more formidable to liberty than the credit and influence of either of them separately.”

²⁵³ At the same time, care should be taken to assure that incentives are not created that would not overly-discourage the Governor and Attorney General from cooperating because, as discussed previously, the advantages of combined decision-making are one of the reasons why the divided executive works in practice. *See supra* notes ___--___ and accompanying text.

In addition to the generic concerns with dividing the executive noted above, there are other more specific points that could be raised in opposition to the creation of an independent Attorney General. First, there is the practical concern that a President may choose not to consult with an Attorney General if the latter is independent. Instead, a President may decide to seek advice only from his own attorneys such as the office of the White House Counsel in order to avoid the possibility of unfavorable advice. (Indeed, in this respect, it is notable that the trend in state government has been that Governors have increasingly employed their own counsel.²⁵⁴) If so, much of the benefits of an independent Attorney General could potentially dissipate. After all, an Attorney General cannot advise the President that a proposed course of action is unconstitutional if the President fails to consult with her in the first place.²⁵⁵ Again, the constitutional provision would need to be drafted to assure that consultation occurred.²⁵⁶

Second, even if the presidency is not inordinately weakened in its relationship to Congress, an independent Attorney General might be. Unlike the President, who will have numerous tools at his disposal in his interactions with Congress, an Attorney General is likely to have very little leverage. A divided executive, accordingly, may make the DOJ more susceptible to pressures from Congress, including threats relating to

²⁵⁴ Matheson, *supra* note __, at 19 (indicating that Governors may rely on in-house attorneys in order to avoid working through an independent Attorney General); Tierney, *supra* note __ (noting the increasing use of in-house counsel by the Governors).

²⁵⁵ A related practical difficulty pertains to matters of attorney client privilege. Firewalls will need to be constructed to assure that privileged communications between executive branch clients and their attorneys are not compromised. In fact, recognizing the practical problems that arise when the Attorney General is charged with both representing state officials and the public interest, some state attorneys general have divided staffs in which some lawyers are assigned to agency clients while others are charged with representing the public interest. *See State Attorneys General, supra* note __, at 85.

²⁵⁶ Conversely, a President might take his responsibility to consult with the Attorney General so seriously that he takes less effort to consult with Congress as well. The President, in short, may substitute intra-branch consultation for his obligations to engage in inter-branch consultation.

appropriations, than is the case when the Department is part of a unified executive.²⁵⁷ Moreover, if the Attorney General's decision is opposed by the President and the Congress, the office will be particularly vulnerable to political retaliation. As we have seen, such vulnerability may serve a purpose, at least up to a point in checking against Attorney General over-reaching,²⁵⁸ but perhaps, like the Supreme Court's guarantees of life tenure and guaranteed compensation,²⁵⁹ some protection for the office against over-retaliation might be needed to be built into the structure.

Finally, although making the office of the Attorney General an elected position would minimize concerns about political accountability, electing the Attorney General may politicize the office in a manner that could undermine its ability to function effectively. For an Attorney General to have the credibility to challenge a President's actions, she may need to be seen as a statesperson whose primary fealty is to the Law and Constitution and not as a partisan official motivated primarily by her own political agenda. The demands and exigencies of a national political campaign, however, could compromise her ability to maintain the necessary apolitical stature. Moreover, if the political history in the states is any indication, an elected Attorney General may be seen as partisan simply because so many state Attorneys General use the office as a jumping off point for running for Governor.²⁶⁰

²⁵⁷ See Proposals Regarding an Independent Attorney General, 1 Op. O.L.C. 75, 77-78 (1977) (Griffin Bell).

²⁵⁸ See *supra* note ___ and accompanying text (discussing the role of appropriations threats in checking the Attorney General's use of her powers).

²⁵⁹ See U.S. Const. Art. III § 1.

²⁶⁰ 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).

An additional concern with creating an independent office of the Attorney General might be that the arguments in favor of dividing the executive could lead to the position that other Cabinet departments should be made independent as well. After all, many of the states have independent treasurers, secretaries of state, auditors, and other officers. Why should only the Attorney General be independent? To be sure,

5. Designing the Office to Avoid the Objections

As already indicated above, many of the objections to an independent Attorney General discussed in this section could be addressed by designing the office at the outset in a way to avoid the particular problem. (The advantages of holding the constitutional drafting pen, after all, are considerable.) Thus, for example, in order to protect against the President and the Attorney General combining their authority and becoming too powerful in relation to the Supreme Court, the constitutional provision establishing the office, as discussed above, could explicitly require that an Attorney General's opinion does not supercede a Supreme Court decision.²⁶¹ Similarly, measures that would guard against the office from becoming overly politicized could be adopted, such as making the election non-partisan, having it occur in an off-year from the presidential election, or having as a condition for holding the office that its occupant would be ineligible to run for President or Vice President. Depoliticizing the office, moreover, might also be accomplished by making the office an appointed, instead of an elected, position and not granting the President the right of removal;²⁶² but this approach, in turn, could lead to the office becoming too politically unaccountable. This last illustration, of course, points to a

creating an independent Attorney General might spark discussion of breaking off other departments from direct presidential control. (The progressive era, for example, was marked by attempts to provide for the independent election of more and more executive officers.) But there are strong arguments that suggest that the arguments in favor of separating the office of the Attorney General from the rest of the executive can be cabined to that office. First, if the primary concern in creating such an office is to assure that the executive does not exceed its legal authority, the only officer situated or qualified to make that decision is the nation's chief legal officer. Second, as we have seen there are both historical and functional reasons that suggest the office is not purely executive in the first place. *See supra* notes ___--___ and accompanying text. Other executive branch offices do not share this mixed pedigree.

²⁶¹ *See supra* notes ___--___ and accompanying text.

²⁶² In New Hampshire and New Jersey, for example, the Attorneys General are appointed by the Governor but do not serve at will. In New Jersey the Governor is appointed for the length of the Governor's term. In New Hampshire the Attorney General is appointed for a four year term although the Governor's elected term is only that of two years. The Attorney General's tenure therefore can span multiple gubernatorial administrations.

central difficulty in creating the office. Addressing some of its potential concerns will inevitably exacerbate some of others.²⁶³

No solution is likely to be free of difficulty and designing the optimum approach will take some development and empirical study that are beyond the bounds of this article. The critical question, however, is not whether the creation of an independent federal office of the Attorney General would be a perfect solution but whether it would be preferable to the current model in which the Attorney General is politically dependent and subservient to the President. That the state experience with independent Attorneys General has proved workable provides a starting point for assessing the viability and desirability of this option as a method for restraining presidential power. That the current federal system seems increasingly unable to check presidential excesses provides an incentive for having this approach seriously considered.

CONCLUSION

The debate over the unitary executive has tended not to look at the state experience although a divided executive structure exists in the governments in virtually all fifty states. As the state experience demonstrates, a divided executive presents its share of concerns. As the proponent of the unitary executive might suggest, the structure can impose inefficiency and coordination costs. But the structure offers benefits as well, particularly when it affords a measure of independence to state Attorneys General. State Attorneys General who are not under the control of the Governor are freer to offer objective advice and have the ability to better steer the machinery of the state in accord with the rule of law than merely in the pursuit of one individual's political agenda.

²⁶³ See also *supra* notes ___ and ___ and accompanying text (discussing the role of appropriations threats in checking against Attorney General overreaching but also noting that some protections may be needed against appropriation retaliation in order to the Attorney General to effectively fulfill her duties).

That they can do so, moreover, without imposing substantial burdens on the efficacy of state government makes the independent Attorney General an attractive model for potential adoption at the federal level. The current presidency has the potential of becoming a lawless institution as the expediency and demands of modern government have effectively made the President himself, through his ability to control the office of the Attorney General and the department of justice, the only arbiter of the legality of his actions. An independent Attorney General, in the form of the state divided executive, may be an appropriate model from which to reconstruct a workable system of checks and balances.