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Constitutional Crisis in the Commonwealth: Resolving the Conflict Between Governors and Attorneys General

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CONSTITUTIONAL CRISIS IN THE COMMONWEALTH: RESOLVING THE CONFLICT BETWEEN GOVERNORS AND ATTORNEYS GENERAL

Michael Signer *

I. INTRODUCTION

In recent years, Virginia, like many other states across the country, has confronted the difficult question of whether the Governor or the Attorney General has the right to control the legal strategies of state agencies. The issue frequently arises in controversial cases that possess both legal and political dimensions, such as whether state-run colleges and universities may practice affirmative action, or whether redrawn legislative boundaries are unconstitutionally gerrymandered. In states such as Virginia, where the Attorney General is charged with the representation of agencies, the issue is how to determine, using constitutional principles, whether the Governor or the Attorney General should prevail.

With the election in 2005 of Timothy M. Kaine as Governor and Robert F. McDonnell as Attorney General, the Commonwealth of Virginia is facing its second four year term in which the two officeholders belong to different parties. The prospect for conflict over legal and policy choices at the agency level is therefore significant. In fact, in early 2006, soon after taking office, Attorney General McDonnell issued an opinion finding that an Executive Order issued by Governor Kaine barring sexual discrimination against gays and lesbians at state agencies[1] was unconstitutional

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1. *See* Exec. Order No. 1 (2006) (Jan. 14, 2006), *available at* www.governor.virginia.

because "the addition of sexual orientation as a protected employment class within state government was intended to, and in fact did, alter the public policy of the Commonwealth."[2]

In this article, I argue the solution to agency conflict and the broader problem of establishing the proper scope of executive authority lies in establishing that Virginia has a "statutory" rather than a "common-law" model of the Attorney General's powers, and that the Office of the Attorney General is therefore circumscribed by statute. Contrary to popular understanding, I will argue that *Wilder v. Attorney General of Virginia*[3] effectively establishes Virginia as a statutory state and resolves the conflict in favor of the Governor. Because the Supreme Court of Virginia is unlikely to act more strongly in favor of the statutory model, however, the best long-term solution to Virginia's constitutional conflict lies in a statutory change by the legislature to establish a "Governor's counsel" in each state agency.

Agency representation poses additional questions of broader significance. While the original intent of assigning the Attorney General a monopoly over the representation of state agencies was to provide agencies with more consistent and efficient legal representation, times have changed. In an age of increasingly active and ambitious attorneys general, the policy has given power to the Attorney General at the expense of the Governor. Today, the Attorney General's representation of agencies constitutes a strong check on the executive. The larger issue is the proper scope of executive authority. In a time when theories such as the "unitary executive" receive substantial discussion at the federal level, we are witnessing an erosion of the power of governors at the hands of attorneys general. Nowhere is the issue more pressing than in the Commonwealth of Virginia, which has seen two constitutional conflicts in the last twelve years, with every indication that more will follow.

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gov/Initiatives/ExecutiveOrders/pdf/EO_1.pdf.

2. Op. to Hon. Robert G. Marshall (Feb. 24, 2006), *available at* www.oag.state.va.us/opinions/2006opns/05-094w.pdf.

3. 247 Va. 119, 439 S.E.2d 398 (1994).

II. AN AGE OF CONFLICT

A. *The "Unitary Executive"*

The topic of just how strong the executive branch should be relative to other branches of government has received substantial attention in recent years at the federal level. The 2001 memorandum authored by John Yoo when he was at the Office of Legal Counsel arguing in favor of the "unitary executive" theory[4] has been hotly debated.[5] Yoo's argument was that the Constitution's description of the President as "Commander-in-Chief" confers on the President essentially unlimited discretion to make policies linked to military decisions.[6] In his memorandum, Yoo wrote: "The centralization of authority in the President alone is particularly crucial in matters of national defense, war, and foreign policy, where a unitary executive can evaluate threats, consider policy choices, and mobilize national resources with a speed and energy that is far superior to any other branch."[7]

Later, Yoo would write a book elaborating the argument, *The Powers of War and Peace: The Constitution and Foreign Affairs after 9/11*.[8] Yoo's critics have argued that his argument has ambitions for dangerously restructuring the executive branch: "[N]amely, to endow the president with power over foreign affairs virtually identical to that of the king of England."[9] Supporters, most notably Vice President Dick Cheney, argue that executive independence has weakened, and that the United States is worse for it.[10]

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4. Memorandum re: The President's Constitutional Authority To Conduct Military Operations Against Terrorists and Nations Supporting Them, from John C. Yoo, Deputy Assistant Attorney General, to Timothy Flannigan, Deputy Counsel to the President (Sept. 25, 2001), *available at* http://www.usdoj.gov/olc/warpowers925.htm [hereinafter Yoo Memorandum].

5. *See* David Cole, *All Power to the President—The Case of John Yoo*, NEW YORK REVIEW OF BOOKS, Nov. 17, 2005, at 8; Ronald Dworkin, *The Strange Case of Judge Alito*, NEW YORK REVIEW OF BOOKS, Feb. 23, 2006, at 14.

6. *See* Yoo Memorandum, *supra* note 4.

7. *Id.*

8. JOHN YOO, THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11 (2005).

9. Cole, *supra* note 5, at 9.

10. *See* Peter Baker & Jim VandeHei, *Clash Is Latest Chapter in Bush Effort to Widen Executive Power*, WASH. POST, Dec. 21, 2005, at A1.

Opponents argue that the executive branch should be only as strong as the other two branches of government. The liberal columnist Nat Hentoff, for instance, recently said that Yoo had justified an "imperial presidency" and cited James Madison in the Federalist No. 47: "'The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.'"[11]

While the debate has raged primarily at the federal level,[12] it has recently begun to descend to the state level. In March 2006, the *Yale Law Journal* sponsored a symposium titled *The Most Dangerous Branch? Mayors, Governors, Presidents and the Rule of Law: A Symposium on Executive Power.*[13] Professor William P. Marshall of the University of North Carolina at Chapel Hill School of Law presented a paper expressly arguing that, in the face of the embrace of a unitary executive at the federal level, the fact that many states have divided executives between attorneys general and governors and, in Marshall's view, have not suffered adverse consequences, suggests that the federal executive should be similarly divided.[14] As will be discussed, Professor Marshall's conclusions differ substantially from those reached in this article. However, Professor Marshall's article illuminates a central insight: that the experience in the states can shed considerable light on the federal question of the unitary executive.

B. *Conflicts in Virginia*

Conflicts in the states show the debate over the proper scope of the chief executive's power should not be cabined to the federal

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11. Nat Hentoff, Op-Ed., *The Imperial President; Bush's Assault on Our Freedoms*, WASH. TIMES, Jan. 30, 2006, at A19 (quoting THE FEDERALIST NO. 47, at 298 (James Madison) (Clinton Rossiter ed., Signet Classic 2003)).

12. Justice Samuel Alito was questioned regarding the "unitary executive" theory during Supreme Court confirmation hearings. *See Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 37–38, 43 (2006) (statements of Sen. Schumer, Member, Senate Comm. on the Judiciary, and Sen. Durbin, Member, Senate Comm. on the Judiciary).

13. Symposium, *The Most Dangerous Branch? Mayors, Governors, Presidents and the Rule of Law: A Symposium on Executive Power*, 116 YALE L.J. (forthcoming Oct. 2006).

14. *See* William P. Marshall, *Break Up the Presidency?: Governors, Independent Attorneys General, and the Lessons from the Divided Executive*, 116 YALE L.J. (forthcoming Oct. 2006) (manuscript on file with author).

government. In the last twelve years, major conflicts have erupted between the Attorney General and the Governor in Virginia. The first took place in 1992 between Governor Doug Wilder and Attorney General Mary Sue Terry over representation of the Virginia Retirement System ("VRS").[15] In a highly public and contentious dispute, Governor Wilder argued that, in the course of publicly opposing several policies of the VRS, the Attorney General had effectively pre-empted herself from being able to serve the Agency.[16] Attorney General Terry countered that she was required by statute to serve the Agency and that no disability had been proven.[17] The dispute went to the Supreme Court of Virginia, where the Governor prevailed, and the court provided suggestive if ambiguous language intimating a restriction on the Attorney General's ability to import politics into its representation of agencies.[18]

The second clash occurred in 2002 between Governor Mark Warner and Attorney General Jerry Kilgore. This imbroglio centered on a redistricting plan authored by Republican members of the General Assembly.[19] In a reverse twist to the earlier dispute, the Governor retained private counsel to sue the state agency in charge of administering the plan, while state officials from the Attorney General's office defended the Agency.[20] The Attorney General won the case in front of the Supreme Court of Virginia, which was not persuaded that the plan was racially gerrymandered in violation of state and federal law.[21] The conflict triggered a range of wide-reaching secondary political conflicts, including an eavesdropping scandal in which the executive director of the Republican Party of Virginia was ultimately indicted.[22]

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15. *See* John F. Harris, *Va. Power Struggle in Court; Wilder, Terry Fight Over Pension Fund*, WASH. POST, Dec. 23, 1992, at D3; *see also* Wilder v. Attorney Gen. of Va., 247 Va. 119, 439 S.E.2d 398 (1994).

16. *See* Harris, *supra* note 15.

17. *See Wilder*, 247 Va. at 122, 439 S.E.2d at 400.

18. *See id.* at 127, 439 S.E.2d at 403.

19. *See* Tyler Whitley, *Warner Takes Issue with Kilgore Move; Remap Decision "Not Appropriate," Governor Says*, RICH. TIMES-DISPATCH, Mar. 13, 2002, at A1.

20. *See* Wilkins v. West, 264 Va. 447, 454, 571 S.E.2d 100, 103 (2002).

21. *Id.* at 477, 571 S.E.2d at 117.

22. *See* Alan Cooper & Tyler Whitley, *GOP Chief Is Indicted, Resigns Job; Hearing Set for April 19 in Eavesdropping Case*, RICH. TIMES-DISPATCH, Apr. 10, 2002, at A1.

C. *Conflicts in Other States*

The troubled state of Virginia's executive branch becomes less surprising when viewed against the backdrop of the nation. The trend of increased activism by attorneys general often results in direct clashes with governors. Three examples recently occurred in Colorado, South Carolina, and New Mexico.

In Colorado, Governor Bill Owens, a Republican, signed a redistricting bill into law in 2003 intended to affect the state's congressional delegation.[23] Attorney General Ken Salazar, a Democrat, petitioned the Supreme Court of Colorado to enjoin the Secretary of State, Republican Donetta Davidson, from enforcing the law.[24] Davidson then sued Salazar, arguing that a lawsuit against a government employee violated the attorney-client relationship.[25] The court ruled in favor of Salazar, finding that the Attorney General could bring an action to the state supreme court "in matters of great public importance," because "'it is the function of the Attorney General . . . to protect the rights of the public.'"[26]

South Carolina also recently saw a constitutional collision. Attorney General Charlie Condon, who unsuccessfully ran for Governor in 2002, was perhaps the most high-profile and contentious Attorney General South Carolina has ever had.[27] Whereas most previous attorneys general had performed behind the scenes, Condon, a Republican, took strongly ideological stands against Governor Jim Hodges on a host of issues, from the Confederate flag to sex education to abortion.[28] The tension between the two culminated in a lawsuit Condon filed against Hodges in 2001 over Hodges's transfer of $28.5 million from state colleges to the general fund in an effort to balance the budget.[29] In response, Hodges argued that Condon lacked the legal authority to sue a Gover-

23. *See* People *ex rel.* Salazar v. Davidson, 79 P.3d 1221, 1224–25, 1227 (Colo. 2003).

24. *See id.* at 1227.

25. *See id.*

26. *See id.* at 1229 (quoting People *ex rel.* Miller v. Tool, 86 P. 224, 227 (Colo. 1905)).

27. *See* Henry Eichel, *Spotlight Fades for Outspoken Condon; Attorney General Has Been Quiet Since Losing His Bid for Governor*, CHARLOTTE OBSERVER, Aug. 18, 2002, at B12.

28. *See id.*

29. *See State High Court Accepts Suit Against Hodges*, CHARLOTTE OBSERVER, Aug. 26, 2001, at Y1.

nor.[30] Hodges's argument was ultimately rejected by the Supreme Court of South Carolina, which ruled that the General Assembly, not the Governor, possessed responsibility and authority for balancing the budget.[31]

Finally, a clash directly parallel to that between Attorney General Kilgore and Governor Warner erupted in New Mexico in 2001 between Democratic Attorney General Patricia Madrid and Republican Governor Gary Johnson.[32] Madrid challenged the authority of Johnson's private attorney to represent Johnson in redistricting lawsuits in state and federal court.[33] A similar conflict had occurred in 2000, when a Johnson natural resources appointee feuded with Madrid over a federal lawsuit regarding a Superfund site.[34] The state supreme court concluded that Madrid, rather than the Governor's official, had the authority both to file and take charge of the lawsuit in federal court.[35]

In addressing these conflicts, state supreme courts have announced decisions that range from the equivocal to the creative. In 2003, the Supreme Court of Georgia split the baby, ruling that neither the Governor nor Attorney General had the exclusive power to determine the course of a state agency's litigation in *Perdue v. Baker*.[36] In 1975, the Supreme Court of Massachusetts found that when the Governor and Attorney General disagreed on policy, the Attorney General should appoint a special assistant to represent the Governor's interests in *Secretary of Administration & Finance v. Attorney General*.[37] However, the court added a qualifier: "It is only where the Attorney General believes that there is no merit to the appeal, or where the interests of a consistent legal policy for the Commonwealth are at stake, that the Attorney General should refuse representation at all."[38] Thus, the public policy conflict was reintroduced, rather than resolved, by the opinion.

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30. *See id.*
31. *See* State *ex rel.* Condon v. Hodges, 562 S.E.2d 623, 632 (S.C. 2002).
32. *See* Loie Fecteau, *AG Challenges Governor*, ALBUQUERQUE J., Sept. 24, 2001, at B8.
33. *See id.*
34. *See id.*
35. *See id.*
36. 586 S.E.2d 606 (Ga. 2003).
37. 326 N.E.2d 334 (Mass. 1975).
38. *Id.* at 339–40 n.8.

III. THE OFFICE OF ATTORNEY GENERAL

A. *The Attorney General as Policymaker*

Against the backdrop of these conflicts, surprisingly little attention is given in the legal literature to resolving the conflict between a Governor and Attorney General. Standard legal norms have, as a default, provided little resolution. *Corpus Juris Secundum*, for instance, simply states a feel-good but ineffectual norm:

> An attorney general's statutory authority to prosecute and defend all actions brought by or against any state officer or instrumentality simply provides the officer or instrumentality with access to the attorney general's legal services. It does not authorize the attorney general to assert his or her vision of the state interest.[39]

The mandate that the Attorney General should refrain from inserting policy visions into her legal strategies certainly sounds good. But what if the Attorney General asserts her vision anyway? *Corpus Juris Secundum* does say that in cases of conflict over the execution of the state's laws, "[T]he governor retains the supreme executive power to determine the public interest, and the attorney general may act only subject to the powers of the governor," but only in "some jurisdictions."[40] A similarly idealistic provision is found in a 1979 report by the National Association of Attorneys General ("NAAG") on agency representation:

> Many Attorneys General's offices will not answer policy oriented requests, reasoning that the Attorney General's role is to provide legal advice and not policy counsel. These offices are careful not to use, or appear to use, their powers as a means to dictate or unduly influence the policy determinations of state agencies.[41]

One can almost hear strains of *Mr. Smith Goes to Washington* in the background—but as background music only. As will be discussed, since this passage was written, the office of the state Attorney General has undergone an explosion in political potential and ambition, resulting in a much more frequent interposition of

39. 7A C.J.S. *Attorney General* § 34 (2004) (citing Chun v. Bd. of Trs. of Employees' Ret. Sys. of Haw., 952 P.2d 1215 (Haw. 1998)).

40. *Id.* § 42 (citing People *ex rel.* Deukmejian v. Brown, 624 P.2d 1206 (Cal. 1981)).

41. NAT'L ASS'N OF ATTORNEYS GEN., REPRESENTATION OF STATE AGENCIES 9 (1979).

policy preferences in the lawyering performed by the Attorney General on behalf of state agencies.

As the above examples amply demonstrate, constitutional conflicts are arising between attorneys general and governors, in Virginia and across the country, with striking frequency. The question is how to lessen the tension in a way consistent with law and constitutional design.

B. *Election and Politics*

Attorneys general have always suffered from a certain ambiguity. Upon importation to the colonies, it was immediately clear that the office possessed an unstable conceptual foundation. A Massachusetts Attorney General, for instance, complained that he "'never could know what was my duty,—What I Should doe [sic] . . . . All other officers know their power duty & dues by the law, but Relating to the King's Atturney [sic] the law is Silent.'"[42] It has never been quite clear whether the Attorney General is a servant of the sovereign or an independent political actor in her own right.

The underlying premise driving the independence and relative authority of the modern Attorney General is her status as an elected official. Originally, most states chose not to elect their attorneys general. In its 1776 Constitution, Virginia's legislature decided to appoint the Attorney General, who was "viewed primarily as a judicial officer."[43] Before 1845, attorneys general were appointed in twelve states, whether by the Governor, the legislature, or another authority.[44] The populist revolution led by President Andrew Jackson, however, sparked a trend toward the popular election of many state officials.[45] By 1860, eleven of thirty-three states had popular elections for attorneys general, twenty-eight of thirty-eight by 1880, thirty-five of forty-five by 1900, thirty-nine of forty-eight by 1920, and forty-two of forty-nine by

42. OLIVER W. HAMMONDS, THE ATTORNEY GENERAL IN THE AMERICAN COLONIES 6 (1939) (quoting 7 Mass. Acts & Resolves 709 (1692–1702) [1892]).

43. 2 A.E. DICK HOWARD, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA 663 (1974).

44. NAT'L ASS'N OF ATTORNEYS GEN., STATE ATTORNEYS GENERAL: POWERS AND RESPONSIBILITIES 19 (Lynne M. Ross ed., 1990) [hereinafter Ross].

45. *See id.*

1959.[46] Virginia was in the first wave, deciding to elect its own Attorney General in 1851.[47]

Today, the Attorney General is popularly elected in forty-three states.[48] The Governor appoints the office in five states (Alaska, Hawaii, New Hampshire, New Jersey, Wyoming, and the District of Columbia).[49] In Maine, the legislature selects the Attorney General by secret ballot.[50] In Tennessee, the supreme court votes for the office.[51]

C. *Partisanship and Political Entrepreneurship*

That most attorneys general are now elected sets up an obvious contest with the Governor if the two office-holders belong to different parties or are politically competitive. Clashes naturally occur in states, like Virginia, where the Attorney General is both elected and a member of a different party than the Governor. Virginia mirrors the many states whose attorneys general have recently been playing a larger role and advancing more entrepreneurial politics. In fact, more than a third of elected state attorneys general are members of a different political party than the incumbent Governor.[52] Attorneys general frequently run for higher office. Of Virginia's last thirteen governors, four first served as Attorney General: Lindsay Almond, Albertis Harrison, Gerald Baliles, and Jim Gilmore.[53]

Perhaps the most significant cause of the constitutional clashes is the increased ambitions of attorneys general—as a group and individually. A half-century ago, state attorneys general were generally politically passive. In government litigation, they usually played only a defensive role in court, representing their state

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46. Scott M. Matheson, Jr., *Constitutional Status and Role of the State Attorney General*, 6 U. FLA. J.L. & PUB. POL'Y 1, 6 n.18 (1993) (citing Byron R. Abernathy, *Some Persisting Questions Concerning the Constitutional State Executive* 32 (Governmental Research Center, University of Kansas Report 23 1960)).

47. *See* 2 HOWARD, *supra* note 43, at 663.

48. Ross, *supra* note 44, at 15.

49. *Id.*

50. *Id.*

51. *Id.*

52. *See* Patrick C. McGinley, *Separation of Powers, State Constitutions & the Attorney General: Who Represents the State?*, 99 W. VA. L. REV. 721, 755 (1997).

53. *See* List of Governors of Virginia, http://www.reference.com/browse/wiki/List_of_Governors_of_Virginia (last visited Sept. 20, 2006).

agencies and government in suits brought by others.[54] The infrequent unilateral commencement of actions nearly always took place at the request of the Governor or other official, rather than on the initiative of the Attorney General himself.[55] A commentator as late as 1969 made an observation that would today seem anomalous: "The majority of students in public administration . . . consider the attorney general to be the governor's attorney and administrator."[56] Moreover, the criminal powers of the Attorney General were severely limited. While some had prosecutorial jurisdiction, it had lapsed in many states, and was exercised only by local prosecutors.[57]

The trend toward today's activist attorneys general began only in the late 1950's, with a new focus on protecting consumers, investors, and the environment. Just as today's New York Attorney General Eliot Spitzer has played a prominent national role in trust-busting and securities regulation,[58] in the late 1950s, New York Attorney General Louis J. Lefkowitz steered the office in a new, activist direction, establishing a Consumer Frauds and Protection Division and a Civil Rights Bureau.[59] His actions set the pace for attorneys general in states across the nation.[60]

One example of the recent prominence of attorneys general is the NAAG. Although it was founded in 1907, NAAG has become increasingly ambitious in recent years by coordinating the collective efforts of attorneys general to take on challenging and high-profile legal and political issues. Successes include forty-six attorneys general coordinating a successful suit against the tobacco companies[61] and the successful effort of fifty-two attorneys gen-

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54. Philip Weinberg, *Office of N.Y. Attorney General Sets Pace for Others Nationwide*, N.Y . ST. B.J., June 2004, at 10, 10, *available at* http://www.nysba.org/ContentNavigationenu/Attorney_Resources/Bar_Journal/Bar_Journal_Archive/2004_Archive/journaljune04weinberg.pdf.

55. *Id.*

56. Henry J. Abraham & Robert R. Benedetti, *The State Attorney General: A Friend of the Court?*, 117 U. PA. L. REV. 795, 797–98 (1969).

57. Weinberg, *supra* note 54, at 10.

58. *See* Brooke A. Masters, *Eliot Spitzer Spoils for a Fight: Opponents Blast Unusual Tactics of N.Y. Attorney General*, WASH. POST, May 31, 2004, at A1.

59. *See* Weinberg, *supra* note 54, at 11.

60. *Id.* at 10.

61. Shantar Vedantam, *Attorneys General Craft Plan To End Tobacco Lawsuits*, SAN ANTONIO EXPRESS-NEWS, Oct. 9, 1998, at 9A; *see also* Nat'l Assoc. of Attorneys Gen., *NAAG Projects: Tobacco*, http://www.naag.org/issues/issue-tobacco.php (last visited Sept. 20, 2006).

eral against Ford Motor Company in connection with the tendency of its sport utility vehicles to roll over.[62]

The effectiveness of the NAAG today has roots in efforts in the 1970's to advocate for the policy of "consolidation," where the Attorney General has a monopoly on legal representation of all state officials and agencies. In 1971, the NAAG adopted two resolutions. The first stated, "The Attorney General should have the sole authority to employ counsel and represent the state in litigation."[63] The second stated, "All state legal staff should be under the Attorney General's supervision; he should determine their salaries and increments, classifications, and otherwise control personnel."[64] In 1976, the NAAG provided several specific rationales for the policy of consolidation. They included increased efficiency in the delivery of legal services, more accuracy in planning legal services, increased collaboration and a decreased need to reinvent the wheel, superior review of legal work than would otherwise occur at the agency level, more consistent application of statutory and case law, and increased clarity in the responsibilities of the Attorney General and agencies.[65]

IV. LEGAL ISSUES SURROUNDING THE ATTORNEY GENERAL'S AUTHORITY

A. *The Common-Law Model Versus the Statutory Model*

The legal rules governing the Attorney General are as complex as the office's history. Just as we find an often awkward compromise between the legal and political duties of the office, we also see a difficult marriage of two different political lineages in most state attorneys general. The first is the English common-law model of the office, which entails an expansive, unlimited, and populist conception of the Attorney General's role and responsi-

62. Nat'l Assoc. of Attorneys Gen., *Multistate Actions: 52 Attorneys General and the District of Columbia Corporation Counsel Reach a $51.5 Million Settlement with Ford Motor Company,* http://www.naag.org/issues/20021223-multi-ford.php (last visited Sept. 20, 2006).

63. Ross, *supra* note 44, at 51.

64. *Id.*

65. *Id.* at 51–52.

bilities.[66] The second is a statutory, limited, and delegated model, which intends the Attorney General to be beholden to other elected officials, the legislature, and to possess only those specific powers which are expressly delegated to him by statute or by the constitution.[67]

Supporters of the common-law view look to the general authority of English law over American constitutional practice. In England, the Attorney General first evolved to represent the King in court, as the King could not appear to represent himself.[68] The idea quickly grew that the Attorney General was in possession of nearly unlimited powers to act unilaterally as the representative of the people's legal interests. In one case, a court ruled, "'The *Attorney-General* is an officer of the Crown, and in that sense only, the officer of the public.'"[69] The responsibility to act for the King and for the people in general was thus apparently fused in the common-law model of the office. When America was colonized, the English Attorney General had grown in stature to the "chief legal officer of the royal government."[70]

The most frequently cited list of the English common-law powers is found in an 1868 New York decision,[71] *People v. Miner*,[72] which conferred on the Attorney General certain powers, such as the ability "[t]o prosecute all actions, necessary for the protection and defence [sic] of the property and revenues of the crown."[73] With powers such as these, though unelected, the common-law state Attorney General became a near-political figure on par with other elected officials and was entrusted with the same obligation—to act for the people.

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66. *See* Rita W. Cooley, *Predecessors of the Federal Attorney General: The Attorney General in England and the American Colonies*, *in* 2 AMERICAN JOURNAL OF LEGAL HISTORY 304, 304–05 (Erwin C. Surrency ed., 1958); *see also* Hugh H.L. Bellot, *The Origin of the Attorney-General*, 25 LAW Q. REV. 400, 410–11 (1909).

67. *See* 2 HOWARD, *supra* note 43, at 660.

68. *See id.* at 661.

69. Attorney-General v. Brown, 36 Eng. Rep. 384, 396 (Ch. 1818), *quoted in* Bill Aleshire, Note, *The Texas Attorney General: Attorney or General?*, 20 REV. LITIG. 187, 204 (2000).

70. 2 HOWARD, *supra* note 43, at 661–62.

71. Ross, *supra* note 44, at 35.

72. 2 Lans. 396 (N.Y. Gen. Term 1868).

73. *Id.* at 398.

The statutory model, on the other hand, is a polar opposite, holding that the Attorney General is solely a creature of legislative law. If no statute charters the office, so goes the argument, the office does not exist, and if no law grants any single ability or immunity, then the Attorney General entirely lacks that ability or immunity. A quintessential framing of the proposition is found in *Ryan v. District Court*,[74] a 1972 Nevada decision in which the Attorney General sought to prosecute a public official for bribery without consulting the District Attorney.[75] The court ruled:

> Assuming, without deciding, that the common law may have granted the attorney general the power he here seeks to exercise, such an exercise of power would be repugnant to the statutory law of this state, as we have already explained. The attorney general may not look to the common law to justify his action.[76]

In *State v. Davidson*,[77] the Supreme Court of New Mexico also ruled against the common law in favor of statute as the source of the Attorney General's power:

> [The common-law doctrine] is based entirely upon the initial premise that the Attorney General was recognized as being vested with common-law powers before any attempt was made to enumerate or define his powers by statute. In New Mexico, the converse of this condition exists. The powers and duties of the Attorney General were enumerated by the very statute which created that office.[78]

In *Arizona State Land Department v. McFate*,[79] the Supreme Court of Arizona said "'the Attorney General has no common law powers.'"[80] Specifically, the court referred to authorizing statutes, finding: "The statutes relating to the State Land Department and the State Land Commissioner confirm the role of the Attorney General as legal advisor and not as policy maker."[81]

As the case law demonstrates, the statutory model entirely abandons the idea that the people have some sort of right, *a priori* to legislative action, to a single statewide officer representing

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74. 503 P.2d 842 (Nev. 1972).

75. *Id.* at 842–43.

76. *Id.* at 845 (citations omitted).

77. 275 P. 373 (N.M. 1929).

78. *Id.* at 375.

79. 348 P.2d 912 (Ariz. 1960).

80. *Id.* at 914 (quoting Westover v. State, 185 P.2d 315, 318 (Ariz. 1947)); *see also* State *ex rel.* Woods v. Block, 942 P.2d 428, 431 (Ariz. 1997).

81. *McFate*, 348 P.2d at 917.

them legally. In contrast to the common-law model, the statutory view entails a subordinate, delegated role for the Attorney General, who acts only when given specific authority either by statute or by another officer or agency.

Most states today follow the common-law model.[82] A "significant minority," however, have embraced the statutory model, including Arizona, Connecticut, Indiana, Iowa, New Mexico, New York, Oregon, Texas, Washington, and Wisconsin.[83] The NAAG itself recognizes that, at most, the common-law model is a modified default and that legislatures have a strong power over the Attorney General: "While at common law the Attorney General had the exclusive power and duty to render legal counsel to the government, not all courts acknowledge the Attorney General's common law powers, and most of those that do have recognized the legislature's right to modify those powers."[84] Moreover, certain states, such as New Jersey and Hawaii, expressly refer to the common law in the Attorney General's enabling statutes.[85] Virginia, however, does not.

B. *Governing in Virginia's Constitutional Gray Area*

The statutory and common-law models naturally run a collision course with each other. In the absence of a clear judicial decision on the matter, the proper scope of the Attorney General's authority can be impossible to define—especially in Virginia. Professor A.E. Dick Howard, the author of *Commentaries on the Constitution of Virginia*, observes, "Whether Virginia's Attorney General has powers deriving from the common law is not a settled issue."[86] Traditionally, Virginia's Attorney General was thought to represent an ungainly hybrid of both the common-law and the statutory models.[87] As Howard notes, "[I]mplicit in the existence

82. Justin G. Davids, Note, *State Attorneys General and the Client-Attorney Relationship: Establishing the Power to Sue State Officers*, 38 COLUM. J.L. & SOC. PROBS. 365, 372 (2005).

83. *See* 7 AM. JUR. 2D *Attorney General* § 7 n.39 (2003).

84. Ross, *supra* note 44, at 32.

85. *See id.* at 33–34.

86. 2 HOWARD, *supra* note 43, at 665.

87. Professor Howard notes that the NAAG has argued the Virginia Attorney General possesses common-law powers using two cases "of dubious value," *Blair v. Marye*, 80 Va. 485 (1885), and *James v. Almond*, 170 F. Supp. 331 (E.D. Va. 1959). 2 HOWARD, *supra* note 43, at 666 n.37.

of the Attorney General are common law powers as well as those specified by Constitution and statute."[88] The awkward design of the office, combined with Virginia courts' failure to rule decisively on the correct parameters of the office, have placed the Attorney General on a collision course with the Governor that runs directly through the Governor's most direct means of operating the government—administrative agencies. As Professor Howard has noted, "[U]nclear is the extent to which the Attorney General, in the actual conduct of litigation (*e.g.,* the positions he takes on issues, the filing of responses, the taking of appeals), is subject to the wishes of whatever state agency or office may be his 'client.'"[89]

These words were written in 1974. As we shall see, these issues were only clarified in 1994, in *Wilder v. Attorney General of Virginia*,[90] an opinion that has been underappreciated as a resolution to the increasingly tense posture between Virginia's Governor and Attorney General.

V. THE OFFICE OF ATTORNEY GENERAL IN VIRGINIA

A. *Constitutional Design*

A review of the history of the Office of the Attorney General in Virginia and of the statutory governance of the relationship between the two branches of government reveals that the clashes between the Attorney General and Governor stem at least in part from Virginia's constitutional design. The Virginia Attorney General's political role seems quite constricted by statute. The office is created by article V, section 15 of the Constitution of Virginia, which requires that the Attorney General "shall perform such duties . . . as may be prescribed by law."[91] Today's dilemma is rooted in the most recent changes to the constitution, which were announced in 1969. The 1969 revisions of Virginia's Constitutional Commission transferred the Attorney General from the judicial to the executive article of the constitution.[92] The change meant that foes of the Attorney General's political independence could no

88. 2 HOWARD, *supra* note 43, at 661.
89. *Id.* at 667–68.
90. 247 Va. 119, 439 S.E.2d 398 (1994).
91. VA. CONST. art. V, § 15.
92. *See* 2 HOWARD, *supra* note 43, at 664.

longer argue that her function was solely a function of the judicial power, and therefore apolitical. It also meant that the Attorney General could begin to assert powers that were executive in function, rather than simply judicial, setting the stage for the more serious conflicts with the Governor that would arise years later.

The alteration did not occur without a fight, however. The Commission recommended against the transfer, but the Senate moved the section, and the House later concurred.[93] During this revision, other changes were also implemented. The Attorney General would no longer be subject to the removal procedures for judges.[94] Instead, the Attorney General could only be removed from office through impeachment.[95] The revisions also dropped the requirement of commissioning the Attorney General by the Governor, placed her third in succession to the Governor, and gave her a role in certifying any disability of the Governor.[96]

Finally, the Commission kept the office elective. In its official report, the Commission noted the controversy over this issue, but failed to explain its reasoning in refusing to make the Attorney General an appointed office.[97] The Commission simply noted that "suggestions have been made" to have the Attorney General appointed, but that "the reasoning which underlay" the 1928 amendments rendering other offices appointed, such as the State Treasurer or Commissioner of Agriculture, "does not obtain in the case of the Attorney General."[98] The Commission made its recommendation with the barest reference to executive independence, stating: "In the judgment of the Commission, there is merit in not having the Commonwealth's chief legal officer dependent upon the executive branch, and hence no change in the method of selecting the Attorney General is recommended."[99]

93. *Id.* at 664 n.23.
94. *Id.* at 664.
95. *Id.*
96. *Id.*
97. *See* THE CONSTITUTION OF VIRGINIA: REPORT OF THE COMMISSION ON CONSTITUTIONAL REVISION 212–13 (1969).
98. *Id.*
99. *Id.* at 213.

B. *Representation of Agencies*

The battlefield where attorneys general and governors spar—the representation of state agencies—is governed by Virginia Code section 2.2-510, which states, "No special counsel shall be employed for or by the Governor or any state department, institution, division, commission, board, bureau, agency, entity, official, justice of the Supreme Court, or judge of any circuit court or district court" except in certain cases described in the statute.[100] When the Attorney General is "unable to render" a legal service to an agency, the Governor may employ special counsel "to render such service as the Governor may deem necessary and proper."[101] The process for determining the Attorney General's inability to serve is two-fold. Under Virginia Code section 2.2-510(1), the Governor may issue an exemption order "stating with particularity the facts and reasons upon which he bases his conclusion" of the Attorney General's inability.[102] Under Virginia Code section 2.2-510(4), the Attorney General herself may trigger the Governor's retention of special counsel by certifying to the Governor that she has a "conflict of interests, or that [s]he is unable to render certain legal services."[103] Under Virginia Code section 2.2-510(2) and (3), the Attorney General may also act unilaterally to retain special counsel where it is "impracticable or uneconomical" for the Attorney General to provide counsel.[104]

The above statutes were first enacted in 1950. Such provisions requiring the Attorney General exclusively to represent state agencies most likely stemmed from a concern not with an overly powerful Governor, but rather with inadequate and inconsistent legal strategy at the agency level. States across the country were concerned with having both lawyers and non-lawyers performing ad hoc counseling services in agencies on legal matters. In West Virginia, for example, a 1963 legal opinion by the state's Attorney General focused on the problems of "house counsel" presenting claims on behalf of one agency while failing to assert claims of

100. VA. CODE ANN. § 2.2-510 (Repl. Vol. 2005).
101. *Id.* § 2.2-510(1) (Repl. Vol. 2005).
102. *Id.*
103. *Id.* § 2.2-510(4) (Repl. Vol. 2005).
104. *Id.* § 2.2-510(2)–(3) (Repl. Vol. 2005).

another agency.[105] House counsel might also present claims conflicting with those of the Attorney General himself.[106] In addition, the opinion presented problems relating to the house counsel's loyalty and ethics: "'With the use of State department-employed 'house counsel' . . . loyalties and psychological influences are too easily distorted, making it difficult, if not impossible, for such department-employed attorneys to render independent opinions, free of bias and influence.'"[107] Similar reasoning was almost certainly at work in the 1950 Virginia revisions.

C. *Statutory Limitations*

1. Opinion-Writing is Limited

The Attorney General's independent ability to initiate advice to agencies is formally limited by the Virginia Code. Virginia Code section 2.2-505(A) states, "The Attorney General shall give his advice and render official advisory opinions in writing *only when requested in writing so to do*" by members of the General Assembly, a judge of courts of record or courts not of record; the State Corporation Commission; commonwealth's attorneys; county, city, or town attorneys; clerks of a court of record; city or county sheriffs; city or county treasurers; commissioners of the revenue; chairmen or secretaries of electoral boards; and the heads of state departments, divisions, bureaus, institutions or boards.[108] While the scope of potential clients is large, the Attorney General has no power to act unilaterally in soliciting their business.

Virginia Code section 2.2-505(B) further circumscribes the Attorney General's ability to issue judicial opinions (which, in general, have the presumptive force of law)[109]:

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105. *See* McGinley, *supra* note 52, at 733 (citing 50 W. VA. ATT'Y GEN. BIENNIAL REP. & OPINIONS 185, 189 (1963)).

106. *Id.*

107. *Id.* at 734 (quoting 50 W. VA. GEN. BIENNIAL REP. & OPINIONS 185, 192 (1963)).

108. VA. CODE ANN. § 2.2-505(A) (Repl. Vol. 2005) (emphasis added).

109. "Although the trend has been away from early court decisions holding attorney general opinions as binding on the recipients, as a practical matter the opinions work a prescriptive effect on state government administration and therefore carry legal force comparable to a court decision." Matheson, *supra* note 46, at 9 (footnote omitted).

> Except in cases where an opinion is requested by the Governor or a member of the General Assembly, the Attorney General *shall have no authority to render an official opinion unless the question dealt with is directly related to the discharge of the duties of the official requesting the opinion.*[110]

In other words, the Attorney General may not use a request for an opinion as a pretext for opinions touching on more expansive areas of law than the request itself. Moreover, the Attorney General's office issued an opinion on December 27, 2001, further limiting the opinion-writing authority exclusively to questions of law, rather than matters of fact.[111]

2. Civil litigation Is Almost Unlimited

A much broader range of action for the Attorney General in civil litigation is provided by Virginia Code section 2.2-507. Virginia Code section 2.2-507(A) states that "[a]ll legal service in civil matters for the Commonwealth, the Governor, and every state department, institution, division, commission, board, bureau, agency, entity, official, court, or judge . . . shall be rendered and performed by the Attorney General."[112] The only substantial qualification arrives in Virginia Code section 2.2-507(C), which states that "[i]f, in the opinion of the Attorney General, it is impracticable or uneconomical" for the Attorney General to provide such counsel, he may employ special counsel.[113] Under this section, the determination of the Attorney General's incapacity to represent these potential clients rests with the Attorney General herself. However, the following section also allots that power to the Governor.[114]

VI. *WILDER V. ATTORNEY GENERAL OF VIRGINIA*

As we have seen, Virginia's Attorney General and Governor currently jockey for position in a gray area of ambiguity between the common law and statutes. Case law further indicates unclear

110. VA. CODE ANN. § 2.2-505(B) (Repl. Vol. 2005) (emphasis added).

111. 2001 Op. Va. Att'y Gen. 73, 74, 76, *available at* http://www.oag.state.va.us/OPINIONS/2001Opns/01-047.pdf.

112. VA. CODE ANN. § 2.2-507(A) (Repl. Vol. 2005).

113. *Id.* § 2.2-507(C) (Repl. Vol. 2005).

114. *Id.* § 2.2-510 (Repl. Vol. 2005).

parameters on the Attorney General's authority. This gray area has resulted in substantial constitutional conflicts between the two offices. Old case law appears to give some weight to the common-law view at the expense of the statutory model. In 1895, the Supreme Court of Virginia ruled in *Blair v. Marye*[115] that the legislature does not have the authority to remove powers from constitutional officers, because the legislative power operates in a separate sphere from those of the officers created by statute:

> The office of attorney-general of Virginia, is of *constitutional* creation, and not of *legislative* enactment . . . . "We think it may fairly be assumed in the outset to be an undeniable proposition, that the two branches of the legislature, as the direct representatives of the people, have the right, when no restrictions have been imposed upon them, either in express terms, or by necessary implication, by the constitution, to create and abolish offices accordingly as they may regard them as necessary or superfluous. And that they may also, under like circumstances, deprive the officers of their salaries, either directly by removing them from office, or indirectly by so changing the organization of the departments to which they are attached as to leave them without a place. But, of course, this power in the legislature cannot be construed to extend to any of the various classes of officers which are known as constitutional officers."[116]

This early decision's emphasis on the constitution, rather than statutes, as the source of the creation of the Attorney General seems to lean in favor of the Attorney General in conflicts with the Governor. Despite the apparent authority found in *Blair v. Marye* of at least a mild version of common-law authority, however, the supreme court seems to have overruled *Blair* in a 1994 decision, *Wilder v. Attorney General of Virginia*.

A. *Background*

Wilder v. Attorney General of Virginia[117] stemmed from the actions of Mary Sue Terry, an enterprising Attorney General who would later mount a vigorous yet unsuccessful campaign for Governor. The dispute hinged on the two adverse constitutional officers' interpretations of Virginia Code section 2.1-122(a), which stated, in relevant part:

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115. 80 Va. 485 (1885).

116. *Id.* at 490–91 (quoting Foster v. Jones, 79 Va. 642, 644 (1884)).

117. 247 Va. 119, 439 S.E.2d 398 (1994).

> Where because of the nature of the service to be performed, the Attorney General's office is unable to render same, the Governor after issuing an exemption order stating with particularity the facts and reasons upon which he bases his conclusion that the Attorney General's office is unable to render such service, may employ special counsel to render such service, may employ special counsel to render such service as the Governor may deem necessary and proper.[118]

In 1992, Terry disagreed with members of the board of the Virginia Retirement System ("VRS") on several matters related to Freedom of Information Act ("FOIA") requests. Displeased with what he saw as the Attorney General's antagonistic stance toward board members of the agency, Governor Doug Wilder responded on December 10, 1992, with a letter advising her that he intended to supplant her with special counsel pursuant to Virginia Code section 2.1-122(a).[119] He argued that the Attorney General's representation of individual members of the VRS board in the FOIA requests "'resulted in [her] drawing and making public certain legal and administrative policy conclusions about those same sensitive matters.'"[120] He wrote, "'In essence, you have condemned the client and then purport to represent the same. The attorney-client privilege is thereby breached.'"[121]

The Attorney General responded with a letter on December 11, 1992, in which "[s]he denied any acts of ethical impropriety, and challenged the Governor's authority to appoint special legal counsel."[122] She argued that Virginia Code section 2.1-121 required her representation.[123] Virginia Code section 2.1-121 stated that "[a]ll legal service" for agencies shall be provided by the Attorney General, and continued, "No regular counsel shall be employed for or by the Governor or any state department, institution, division, commission, board, bureau, agency, entity or official."[124]

In a follow-up letter dated December 21, 1992, Governor Wilder reasoned that the Attorney General had "'render[ed] [her] office unable to render effective legal representation'" to VRS, because

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118. VA. CODE ANN. § 2.1-122(a) (current version at VA. CODE ANN. § 2.2-510(1) (Repl. Vol. 2005)).

119. *Wilder*, 247 Va. at 121, 439 S.E.2d at 400.

120. *Id.*

121. *Id.* at 121–22, 439 S.E.2d at 400.

122. *Id.* at 122, 439 S.E.2d at 400.

123. *See id.* at 124, 439 S.E. at 401.

124. VA. CODE ANN. § 2.1-121 (current version at VA. CODE ANN. § 2.2–507(A) (Repl. Vol. 2005)).

she "'decided to make [her] criticisms and conclusions publicly rather than maintaining the confidences of [her] clients.'"[125] Governor Wilder explained that Virginia Code section 2.1-122(a) allowed the appointment of special counsel,[126] "Where because of the nature of the service to be performed, the Attorney General's office is unable to render such service."[127] The Governor then appointed several private attorneys to provide general representation to the VRS.[128] He stated that they would continue to serve "'until such time as the conflicts between your office and [the Virginia Retirement System] have abated and your office will once again be able to provide legal representation to [the Virginia Retirement System].'"[129]

B. *The Opinion of the Supreme Court of Virginia*

In an opinion that directly addressed the constitutional scope of the Attorney General's power versus the Governor, the Supreme Court of Virginia ruled in favor of Governor Wilder. Chief Justice Hassell first dismissed the Attorney General's argument that the trial court's finding that the Governor had appointed "regular" rather than "special" counsel was a finding of fact alone and therefore binding on the supreme court under *Richmond Newspapers, Inc. v. Gill*.[130] Instead, the court ruled that the circuit court's finding was a mixed question of law and fact and therefore not binding on the court.[131]

The court concluded that the question of deciding whether the lawyers appointed by the Governor were "general" or "special" could be decided exclusively by the Governor unless his actions were arbitrary and capricious.[132] The court ruled that the Gover-

125. *Wilder*, 247 Va. at 122, 439 S.E.2d at 400.

126. *Id.*

127. VA. CODE ANN. § 2.1-122(a) (current version at VA. CODE ANN. § 2.2-510(1) (Repl. Vol. 2005)).

128. *Wilder*, 247 Va. at 125, 439 S.E.2d at 402.

129. *Id.* at 122–23, 439 S.E.2d at 400 (alteration in original).

130. *Id.* at 124, 439 S.E.2d at 401 (citing *Richmond Newspapers, Inc. v. Gill*, 224 Va. 92, 95, 294 S.E.2d 840, 841 (1982)).

131. *Id.*

132. *See id.* at 125–26, 439 S.E.2d at 402.

nor's actions were not arbitrary and capricious as a matter of fact.[133]

The court then turned to two arguments made by the Attorney General. The first, an assertion of statutory interpretation that the words "unable" and "conflict of interest" were mutually exclusive, was quickly dismissed and was of no major significance.[134] The second argument was more substantial, though it was addressed with little substantive discussion. The Attorney General argued that Virginia Code section 2.1-122(a) was unconstitutional because it "'permits a governor to remove duties and powers from an attorney general and to assume those same powers himself.'"[135] The Attorney General was clearly arguing for a common-law theory of an *a priori* infinite capacity of power for the Attorney General; under that argument, Governor Wilder's actions had detracted from the limitless, adumbrated powers of the Attorney General.

In response to the argument, the court observed, as an initial matter, that the Attorney General had "fail[ed] to identify the specific constitutional provision that she claims may be implicated."[136] The court expanded:

> Article V, § 15 of the Constitution of Virginia unequivocally permits the General Assembly to prescribe the duties of the Attorney General and the General Assembly did so by its enactment of statutes such as Code § 2.1-121. Contrary to the assertion of the Attorney General, the Governor did not remove her from office when he exercised the limited grant of power conferred upon him by Code § 2.1-122(a). Rather, utilizing that grant of power, he appointed special counsel to represent an agency of the Commonwealth because, in his judgment, the Attorney General was unable to act.[137]

Justice Whiting dissented, arguing that because the counsel appointed by the Governor would not be confined to "discrete and limited areas,"[138] they did not comport with the "plain meaning of the adjective 'special.'"[139]

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133. *Id.* at 126, 439 S.E.2d at 402.
134. *See id.* at 126–27, 439 S.E.2d at 402–03.
135. *Id.* at 127, 439 S.E.2d at 403.
136. *Id.*
137. *Id.*
138. *Id.* at 128, 439 S.E.2d at 404 (Whiting, J., dissenting).
139. *Id.*, 439 S.E.2d at 403 (Whiting, J., dissenting).

Although it is not expressly framed as such, the majority opinion, taken in the context of the dissenting opinion as well as the underlying discussion of the Governor's power vis-à-vis that of the Attorney General, is an endorsement (albeit not a very clear one) of the statutory theory of the Attorney General in Virginia. This interpretation is bolstered by the underlying opinion overruled by the supreme court.

C. *The Opinion of the Richmond City Circuit Court*

In the underlying decision, Judge Robert L. Harris, Sr., of the Richmond City Circuit Court explicitly ruled in favor of a common-law theory of the office of the Attorney General. Judge Harris found a "quasi-independent role established for the Attorney General in Virginia's constitutional scheme," marked by the "distinct areas of authority" reserved for both the Governor and the Attorney General.[140] Though the court recognized that Virginia courts have not explicitly recognized the common-law authority of the Attorney General, Judge Harris held that "the constitutional and statutory scheme strongly suggest such a conclusion" and explained, "The obligations of the Attorney General to the public, under the merging of the English common law treatment with the American electoral system, is the critical point missed by the Governor in the instant case."[141] The court explained that the former common law was "generally continued in force" under Virginia Code section 1-10 and that "all governmental power is derived from the electorate" under article I, section 2 of the Constitution of Virginia.[142] Finally, the court concluded, "Although in Virginia, the common law authority of the Attorney General has not been explicitly recognized by the courts, the constitutional and statutory scheme strongly suggests such a conclusion."[143]

The most important concept introduced by Judge Harris was the notion that the Attorney General's responsibility runs to the people of Virginia, rather than to the Governor or the agencies he controls. Harris wrote:

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140. *Terry v. Wilder*, 29 Va. Cir. 418, 425 (Cir. Ct. 1992) (Richmond City).

141. *Id.* at 428, 430.

142. *Id.* at 427 (citing VA. CONST. art I, § 2 ("[A]ll power is vested in, and consequently derived from, the people . . . .")).

143. *Id.* at 428.

> Under the common law of England, the Attorney General was the legal representative of the Crown, who was the embodiment of "the rights and liberties of his people." Since, from the American (and Virginian) perspective, the people's rights needed no such embodiment, it follows that an elected Attorney General, in the American system, is the people's legal representative.[144]

Judge Harris bolstered this conclusion with two points. First, he observed that Virginia prohibits state entities from employing their own regular counsel, pursuant to Virginia Code section 2.1-121, meaning that "the independent role contemplated for the Attorney General by the Virginia scheme is undiluted."[145] The court drew an analogy from the independence of secretaries and other officers from the Governor, observing that "'[t]he governor is, neither in fact nor in theory, personally or politically responsible for the conduct'" of these officials.[146] Because the agencies are exclusively represented by the Attorney General, the court concluded that her role "is not subject to intrusion by another elected official—in this instance, the Governor—unless some specific statutory authority grants such a power."[147]

Under Judge Harris's reasoning, the "popular" model of the Attorney General would also have implications for the traditional rules that would otherwise constrain an attorney, both in relation to attorney-client conduct and in her relationship with the Governor. Judge Harris ruled that "[a]lthough some might question the judgment exercised in the Attorney General's public criticism of the VRS Board," there was simply nothing to be done in response—even by the court itself.[148] Judge Harris continued, "Neither this Court nor the Governor is empowered to supervise her job performance."[149] The logic linked back to the "popular" model: "Only through subsequent popular elections, or, in particularly egregious circumstances, the impeachment power, can that performance be second-guessed."[150] Not only did the court thus embrace the common-law model of the office, it endorsed its most far-reaching implication: that the Attorney General is essentially

144. *Id.* at 429 (citations omitted).
145. *Id.*
146. *Id.* at 430 (quoting Field v. People, 3 Ill. (2 Scam.) 79, 118 (1839)).
147. *Id.*
148. *Id.* at 431.
149. *Id.*
150. *Id.* (citation omitted).

unaccountable to any entity other than the people in the next election.

D. *The Significance of* Wilder v. Attorney General of Virginia

As we can see in light of the Supreme Court of Virginia's opinion, the chief problem with the popular model, as presented by Judge Harris, is a conflict of interest for the Attorney General. One scholar has framed the issue: "[T]o whom does the attorney general owe allegiance? Is the attorney general a lawyer for the state government and its officers, or is she the lawyer for the citizens as a whole? If these two duties are in conflict, which client prevails?"[151] *Wilder v. Attorney General of Virginia* finally provides an answer to that question—just one that has not been heard.

Viewed against the underlying opinion, the supreme court's decision clearly rejects the common-law theory of the Attorney General in favor of a statutory model, in a ruling that unambiguously embraces the specific controversy about whether agency representation could fairly be decided unilaterally by the Governor. The strength of the court's opinion may be seen in contrast to opinions in other states firmly endorsing the common-law model. For example, in *Florida ex rel. Shevin v. Exxon Corp.*,[152] the "authoritative judicial opinion" on the common-law power,[153] there is a dramatically different discussion of the office:

> The office of attorney general is older than the United States and older than the State of Florida. . . .
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> . . . [T]he attorneys general of our states have enjoyed a significant degree of autonomy. Their duties and powers typically are not exhaustively defined by either constitution or statute but include all those exercised at common law. . . .
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> . . . .
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> . . . "The Attorney-General is the attorney and legal guardian of the people, or of the crown, according to the form of government. His duties pertain to the Executive Department of the State, and it is his duty to use means most effectual to the enforcement of the laws, and

151. Davids, *supra* note 82, at 367.
152. 526 F.2d 266 (5th Cir. 1976).
153. Ross, *supra* note 44, at 27.

> the protection of the people, whenever directed by the proper authority, or when occasion arises."[154]

Although *Wilder* fails explicitly to narrate the legal underpinnings of its action, it clearly rebuts the sort of premise trumpeted in cases such as the above—a default deference to the Attorney General in deciding the parameters of her own powers. In this regard, the decision speaks for itself and seems finally to resolve the lack of clarity in law that Professor Howard referenced in *Commentaries on the Constitution of Virginia*, writing that the "compulsory representation" of the current system "obviously can be a source of difficulty," and concluding that "the law is still unclear" both as to the Attorney General's discretion in refusing cases and to the desires of the "client" state agency.[155]

VII. PROPOSAL: ESTABLISH "GOVERNOR'S COUNSEL" AT AGENCIES

With the implied endorsement of the statutory model in *Wilder v. Attorney General of Virginia*, a policy to restore the constitutional balance between the two offices is desirable for two reasons. First, the checks and balances already in place in the Constitution of Virginia are sufficient. One scholar notes, "The idea of checks and balances is that they operate between, as opposed to within, the three divisions or departments of government."[156] The question of how far to go with checks and balances is an interesting political-theoretical question in its own right, involving one's wariness over accumulation of power. A recent multi-variate study by a political science professor at the University of North Carolina at Chapel Hill ranked the Governor of Virginia only the twenty-sixth most powerful in the country.[157] This result suggests scant need for extra-constitutional constraints on his power.

Second, a relatively unitary state executive confers governmental benefits on the Commonwealth of Virginia. In *Federalist No. 70*, Alexander Hamilton argued for such a design, contending that "one of the weightiest objections to a plurality in the execu-

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154. *Shevin*, 526 F.2d at 268–70 (footnotes omitted) (quoting State *ex rel.* Attorney Gen. v. Gleason, 12 Fla. 190, 212 (1869)).

155. 2 HOWARD, *supra* note 43, at 667–68.

156. Matheson, *supra* note 46, at 11.

157. *See* Thad Beyle, *Gubernatorial Power: The Institutional Power Ratings for the 50 Governors of the United States*, http://www.unc.edu/~beyle/gubnewpwr.html (last visited Sept. 20, 2006).

tive . . . is that it tends to conceal faults and destroy responsibility."[158] In other words, to check and balance the executive further than necessary may distract the public away from the real accomplishments of executive branch policy toward simple political maneuvering. These two arguments taken together suggest that a Governor should not be stymied in the representation of *his own* agencies. Especially because legal issues can sometimes become political ones, the Governor ought to be able to choose the legal strategies of his agencies without interference from another executive branch official.

Virginia Code section 2.2-507 currently prohibits the Governor or any state agency from retaining "regular counsel."[159] A statutory reform that would reset the constitutional balance between the two constitutional officers would allow the Governor to appoint a separate "Governor's counsel" in each agency who would be in charge of making legal decisions for the agency, and who would report directly to the Governor. Some of the original concerns underlying the prohibition of in-house counsel—that they would be overly partisan or simply unaccredited or unprofessional lawyers[160]—could be addressed with strict requirements.[161]

Over two decades ago, Pennsylvania enacted such a proposal with a statute that could prove a suitable model for Virginia: the Commonwealth Attorneys Act of 1980.[162] According to one scholar, the act changed the balance of power in state law enforcement.[163] The act provided for an office of General Counsel to be appointed by the Governor.[164] The General Counsel was charged with appointing counsel and assistant counsel to executive agencies and rendering advice to and cooperating with independent agencies.[165] Independent agencies were given their own

158. THE FEDERALIST NO. 70 (Alexander Hamilton), *supra* note 11, at 426.

159. VA. CODE ANN. § 2.2-507(A) (Repl. Vol. 2005).

160. *See* McGinley, *supra* note 52, at 733.

161. The idea is also endorsed by Scott Matheson in his authoritative article, *supra* note 46. "With a gubernatorially-appointed counsel for state agencies, the accountability of executive branch agencies would not be confused with the quality of performance of attorneys loyal to an independently elected employer." *Id.* at 29.

162. 1980 Pa. Laws 950.

163. *See* George Jugovic, Jr., *Legislating in the Public Interest: Strict Liability for Criminal Activity Under the Pennsylvania Solid Waste Management Act*, 22 ENVTL. L. 1375, 1380–82 (1992).

164. 71 PA. STAT. ANN. § 732-301 (West 1990).

165. *See id.* § 732-301(1)–(4).

agency counsel.[166] Both the General Counsel and the agency counsel were allowed to supersede the Attorney General in matters involving the agencies.[167] If the Attorney General did not accede to the succession, the Governor could authorize the General Counsel to "intervene in the litigation,"[168] or the agency head could authorize the agency counsel similarly to intervene.[169]

With this statute, Pennsylvania directly attacked the problem faced in Virginia today. The Attorney General was maintained as an independent, elected office, while his ability to control unilaterally the course of litigation involving state agencies under the Governor's control was constrained. The balance of the executive branch was thus restored. Such a measure could also ameliorate the constitutional tension present in Virginia and other states where governors and attorneys general battle over the representation of state agencies. Moreover, it could be implemented efficiently, with a small number of "Governor's Counsel," each responsible—like an assistant Attorney General—for a number of executive agencies. Governor's Counsel would work with the Office of the Attorney General. But in the event of a conflict in a matter involving the agency, the Governor's Counsel would be authorized to prevail, thereby restoring control to the Governor over the legal and policy direction of state agencies while retaining the Attorney General as an executive officer with proper powers over the other provinces allotted to her by the Constitution of Virginia and by statute.

VIII. THE ARGUMENT FOR A DIVIDED EXECUTIVE

Professor William Marshall has taken a dramatically different position from the foregoing analysis in his article published in the *Yale Law Journal* in October 2006.[170] Professor Marshall makes a serious and valuable contribution to a basic idea: that the federal unitary executive theory deserves examination through the lens of the state constitutional experience. In his consideration of conflicts between governors and attorneys general in the states,

166. *Id.* § 732-401.
167. *Id.* § 732-303(a), -403(a).
168. *Id.* § 732-303(b).
169. *Id.* § 732-403(b).
170. *See* Marshall, *supra* note 14.

however, Professor Marshall adduces two problematic premises, which together support a creative, but ultimately unpersuasive, policy proposal: that the federal Attorney General should be independent from the President.

A. *The Argument for a Divided Executive*

Professor Marshall's first premise is that because conflicts between governors and attorneys general are minor, they are salutary, leading to helpful compromises between the Governor and Attorney General.[171] Professor Marshall writes:

> What is remarkable, then, in reviewing the state experience, is that debilitating conflict has not materialized. This is not to say that serious disputes have never occurred or that governors have never complained about having to deal with independent attorneys general (or vice versa). Certainly they have. And it is also true that the divided executive has occasionally been the target of reforms that would make the Attorney General subject to gubernatorial appointment and removal. But history suggests that both governors and attorneys general have generally learned to cooperate effectively within a divided executive framework.[172]

The argument wholly depends on empirical statements—that conflict "has not" occurred and that the two officers "have generally learned" to cooperate. However, evidence is not provided, either generally or specifically.

The lack of support is unfortunate, because it entails a hypertheoretical argument that may not square with actual experience in the states. The Commonwealth of Virginia provides one example. Walter McFarlane, counsel to Governor Wilder during the dispute with Attorney General Terry that occasioned *Wilder v. Attorney General of Virginia*, recounts that the conflict led to a "a total breakdown of the relationship."[173] The Governor essentially severed the Attorney General from any discussion of legal issues during the remainder of his tenure in office.[174] In McFarlane's words:

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171. *See id.* (manuscript at 107–09).

172. *Id.* (manuscript at 108).

173. Telephone Interview with Walter McFarlane, Former Legal Counsel, Former Governor Doug Wilder (Sept. 1, 2006). Mr. McFarlane served over twenty years in the Office of the Attorney General under both Democratic and Republican Attorneys General.

174. *Id.*

> Basically, after Terry filed suit, that was the end of any of our discussions with her on anything that was sensitive. And that's when she became angry. We were doing things, handling things, that she thought she should be involved in. But quite frankly if she could divulge anything, we told her, and she could make any decision, we said to heck with it.[175]

A second issue that does not factor into Professor Marshall's analysis is the very real risk entailed by overt conflict over state agencies. Again, Virginia serves as evidence. As noted earlier, the clash between Governor Mark Warner and Attorney General Kilgore over redistricting in Virginia became so fractious that it led to illegal acts—the state Republican Party's eavesdropping on Warner-led conference calls and the indictment and plea of the Republican Executive Director.[176] When such acts occur, it is improbable, if not impossible, to argue that abstract "checks and balances" have generated harmony.

This is, at the end, an argument about baselines—one person's conflict may be another's harmony. To some, the concern about a Governor overstepping certain bounds is so high as to generate a high tolerance for constitutional conflict. Others may find an independent Attorney General with both legal and policy powers to be so salutary for governance that substantial conflict is an acceptable cost for the benefit. There certainly is no clear answer to this question, but there are certainly grounds for more debate than we currently have. The aforementioned *Yale Law Journal* symposium on executive power is a good start, as is Professor Marshall's article.

B. *The Argument for Analogizing States to the Federal Government*

A second problem raised by Professor Marshall's argument is the hard analogy drawn from the states to the federal government. Professor Marshall argues that the divided executive model checks executive branch excess "as its architects intended" and protects against "executive branch overreaching."[177] In these pur-

175. *Id.*
176. *See* Cooper & Whitley, *supra* note 22.
177. Marshall, *supra* note 14 (manuscript at 121).

portedly felicitous aspects, the states provide a model for those searching to resolve the excesses of the federal unitary executive.

The problem with the constitutional argument is twofold. First, it simply does not address the current system of checks and balances at the state level. As has been noted, the "architects" of the divided executive did not necessarily "intend" for it to result in serious conflict over state agencies. These conflicts are instead relatively recent developments, the result of both individual entrepreneurial strategies by attorneys general and of collective strategizing by the NAAG for increased prominence and influence.

Second, not only does no strong analogy exist between the checks and balances at the state and federal levels, but there is in fact grounds for *dis*analogy. Entirely different concerns are to be checked and balanced at the state and federal levels. The President has war-making at his disposal. Indeed, the grounds of John Yoo's unitary executive theory are that the President, because he needs unified, immediate, and consistent powers in his role as Commander-in-Chief, ought to have a corresponding constitutional prerogative. An absolute parallel cannot be drawn to a state Governor, who even in the most heated of instances cannot match the sheer power of an American President's actions. The consequences of a President's "overreaching" are therefore exponentially more dangerous than those of a Governor.

C. *Interrogating the Unitary Executive Theory*

The essential problem is the Attorney General's ability and desire to make policy, not just provide legal counsel. With the same hopeful tone of the *Corpus Juris Secundum* section earlier referenced,[178] Professor Marshall argues for the saving grace of the divided state executive: it "requir[es] the Attorney General to advance the interests of the Governor when her disagreement is based on pure policy or upon any other factor deemed to fit best within the final authority of the Governor."[179]

But what if the Attorney General simply fails to exercise such restraint? In an interview, Walter McFarlane recounted Vir-

178. *See supra* notes 39–40 and accompanying text.

179. Marshall, *supra* note 14 (manuscript at 122).

ginia's experience following Attorney General Terry's decision to attempt to discipline what she perceived as irregularities and poor policy-making by the VRS, against the Governor's wishes.[180] McFarlane said, "if the Attorney General has common-law power, they can decide whether the Governor's policy decisions are right."[181] The question, then, is whether attorneys general ought to be given this basic authority to determine policy of executive agencies, even if that policy is cloaked as a "legal" issue. Professor Marshall repeatedly praises a divided executive at the state level. But the evidence and arguments suggest instead that a divided state executive may be the problem, rather than the solution.

IX. CONCLUSION

The Attorney General is a critical and storied position that rightly should be elected by, and accountable to, the voters. The Attorney General can and should play an independent role in the areas for which the office was designed, such as consumer protection, law enforcement and crime prevention, monitoring the rule of law, and preventing corruption. However, the Attorney General should not be directing policy of the government agencies that the Governor was elected to run. Especially in a time of deep reflection on the proper meaning and scope of executive governance at the federal level, we should not invite further complications and contradictions within the office of the chief executive of the American state. Statutorily giving the Governor control of the legal representation of her own agencies would restore balance to the constitutional structure in states like Virginia. Such a change would help resolve the tortured constitutional status of the Attorney General, prevent ungainly and inefficient intra-executive branch conflicts, and maintain the Attorney General as a robust executive office. The crisis in the executive branch would thus be addressed, and the Attorney General and Governor returned to their properly separate constitutional spheres.

180. Telephone Interview with Walter McFarlane, *supra* note 173.
181. *Id.*