

11-2018

The People's Lawyer: The Role of Attorney General in the Twenty-First Century

Mark J. Herring

Follow this and additional works at: <https://scholarship.richmond.edu/lawreview>



Part of the [Civil Law Commons](#), [Civil Procedure Commons](#), [Civil Rights and Discrimination Commons](#), [Constitutional Law Commons](#), [Courts Commons](#), [Criminal Law Commons](#), [Criminal Procedure Commons](#), [Judges Commons](#), [State and Local Government Law Commons](#), and the [Supreme Court of the United States Commons](#)

Recommended Citation

Mark J. Herring, *The People's Lawyer: The Role of Attorney General in the Twenty-First Century*, 53 U. Rich. L. Rev. 1 (2018).

Available at: <https://scholarship.richmond.edu/lawreview/vol53/iss1/2>

This Foreword is brought to you for free and open access by the Law School Journals at UR Scholarship Repository. It has been accepted for inclusion in University of Richmond Law Review by an authorized editor of UR Scholarship Repository. For more information, please contact scholarshiprepository@richmond.edu.

FOREWORD

THE PEOPLE'S LAWYER: THE ROLE OF ATTORNEY GENERAL IN THE TWENTY-FIRST CENTURY

*The Honorable Mark R. Herring **

For the last five years, it has been my privilege to serve the people as their attorney general.

The origin of the position of attorney general can be traced back centuries, but in a world that has become more interconnected, complex, and fast-paced, what does the role of a state attorney general entail in the twenty-first century and beyond? Is the proper role as a diligent but reactive defender of statutes and state agencies, or is there a deeper responsibility that calls for a more proactive and engaged use of its tools and authority?

I have found that the job of attorney general is not necessarily well-understood, nor does the general public often think about the positive impact that their attorney general can have on their lives. In the voting booth, the office is usually relegated to, at best, the third line on the ballot, and sometimes our best and most important work is done quietly, away from the bright lights.

It is self-evident that the position affords the officeholder a considerable amount of legal firepower, authority, and resources. The question then, for each person who has the honor of serving as attorney general, is how to utilize the available talent, authority, and resources, and whether the demands of the day compel a

* Attorney General of the Commonwealth of Virginia. J.D., 1990, University of Richmond School of Law; M.A., 1986, University of Virginia; B.A., 1983, University of Virginia.

modern attorney general to continually rethink how these tools could or should be deployed to best meet the needs of the people.

Each attorney general comes to the job with an approach shaped and informed by his or her own background and experiences, and I am no exception.

As a young man, I was drawn to the practice of law based on a belief, informed by my own experience and upbringing, that the law exists to protect and help all of us—especially the most vulnerable among us—those who are discriminated against or marginalized, those who truly need the arm and shield of the law. I ran for attorney general because I had a vision for the job that built in an essential role as a champion for those same values and those same people.

I believe that the attorney general is the people's lawyer, not simply the lawyer for their government. To be sure, I take great pride in and place a high priority on providing high-quality, objective legal advice to the state's agencies, boards, commissions, and public colleges and universities. But that is only one part of the job.

I believe that the attorney general today also has a fundamental obligation to the people themselves—an obligation to see that their rights and civil liberties are protected, to keep them and their families and communities safe from harm, and to promote justice, equality, and opportunity for all. This is especially true in states, like Virginia, that elect their attorney general. While a few other states mirror the federal organizational chart and make the attorney general a gubernatorial appointment who is accountable to the chief executive, Virginia and most states make the attorney general accountable *to the people*.

My philosophy and vision for the job are rooted in the origins of the office. The position of attorney general can be traced to the courts of medieval England when the Crown decided, not surprisingly, that it should have a skilled and knowledgeable advocate to represent and protect its interests.¹ The position crossed the At-

1. See generally Anton-Hermann Chroust, *Legal Profession During the Middle Ages: The Emergence of the English Lawyer Prior to 1400*, 31 NOTRE DAME LAW. 537, 574–81, 591–96 (1956) (explaining the origins of the attorney general in England); W.S. Holdsworth, *The Early History of the Attorney and Solicitor General*, 13 ILL. L. REV. 602, 602–07 (1919) (comparing the work done by the king's attorneys in the Middle Ages to the modern day position of the attorney general).

lantic and took root in the colonies, but after the American Revolution, a tectonic shift occurred.² The attorney general was no longer the representative and defender of the Crown, but rather the representative and defender of the People and the guardian of the public interest.³ To me, that is a cherished obligation, unique in our Republic, and it has served as a guidepost throughout my tenure.

So as I make decisions and set the Commonwealth's legal strategy, I consider whether there is an opportunity to help Virginians and advance the interests of the Commonwealth through the positions we take and the actions we pursue, consistent with what the law requires.

One example of how this approach has worked in practice is *Bostic v. Schaefer*,⁴ the marriage equality litigation I inherited upon taking office, which eventually brought marriage equality to the Commonwealth nine months before the United States Supreme Court rendered its decision in *Obergefell v. Hodges*.⁵

The case had already been filed and briefed when I took office in 2014.⁶ Two same-sex couples, one who was denied a marriage license in Norfolk and one whose California marriage was not recognized by the Commonwealth, filed suit to invalidate Virginia's state constitutional and statutory prohibitions on marriage for same-sex couples.⁷

When I took office, a hearing on cross motions for summary judgment was already scheduled in the United States District Court for the Eastern District of Virginia in Norfolk. I had just two weeks to decide whether the Commonwealth would proceed in the litigation on the arguments made and briefs filed by my predecessor, or whether we would take a different approach.

2. *See What Does an Attorney General Do?*, NAT'L ASS'N ATT'YS GEN., http://www.naag.org/naag/about_naag/faq/what_does_an_attorney_general_do.php (last visited Oct. 1, 2018).

3. *See id.*

4. *See* 760 F.3d 352, 398 (4th Cir. 2014).

5. 576 U.S. __, __, 135 S. Ct. 2584, 2607–08 (2015).

6. *See* Brief in Support of Motion for Summary Judgment, *Bostic*, 760 F.3d 352 (No. 2:13-cv-00395); Memorandum in Support of the Motion of Commonwealth of Virginia to Intervene, *Bostic*, 760 F.3d 352 (No. 2:13-cv-00395); Complaint for Declaratory, Injunctive & Other Relief, *Bostic*, 760 F.3d 352 (No. 2:13-cv-00395).

7. *Bostic*, 760 F.3d at 368–70.

My team and I spent long days and nights poring over the legal analysis, focusing much of our attention on two sets of cases. The first was a long line of cases going back more than a century, including *Zablocki v. Redhail*,⁸ *Turner v. Safley*,⁹ and the landmark *Loving v. Virginia*,¹⁰ declaring that marriage is a fundamental right. The second was a more recent, but quickly growing, series of cases like *Romer v. Evans*,¹¹ *Lawrence v. Texas*,¹² *Windsor v. United States*,¹³ and *Hollingsworth v. Perry*,¹⁴ that looked skeptically on laws that discriminated on the basis of sexual orientation. I concluded that our case represented the intersection of those two lines of case law, and that if the Supreme Court were presented with our case, it would likely invalidate Virginia's marriage ban.

But that was not the end of the analysis for me. I then had to think long and hard about what an attorney general can and should do when confronted with that situation. We found ample authority for the proposition that an attorney general can decline to defend and even challenge a provision of state law he or she believes to be unlawful or unconstitutional, including examples of Virginia attorneys general having done so.¹⁵ To be sure, such a

8. 434 U.S. 374 (1978).

9. 482 U.S. 78 (1987).

10. 388 U.S. 1 (1967).

11. 517 U.S. 620 (1996).

12. 539 U.S. 558 (2003).

13. 570 U.S. 744 (2013).

14. 570 U.S. 693 (2013).

15. See, e.g., *Falwell v. Miller*, 203 F. Supp. 2d 624, 632 (W.D. Va. 2002) (finding that article IV, section 14(20) of the Virginia Constitution, which prohibited the incorporation of a church or religious organization, violated the First Amendment); *id.* at 627 (noting the “peculiar procedural position in this case” of State Corporation Commission Chairman Miller, who did not file an answer to Falwell’s complaint and did “not contest the merits of Plaintiffs’ legal argument that § 14(20) violates the U.S. Constitution”); see also *id.* at 632 (“Because the Defendant has chosen not to defend the constitutional merits of Article IV, § 14(20), he, as a result, has presented no governmental interest—compelling or otherwise—to justify the existence of § 14(20). Therefore in this case, the Virginia constitutional provision does not withstand strict scrutiny, and must be invalidated.”); Brief of Thurbert E. Baker, Attorney General of Georgia & Lawrence E. Long, Attorney General of South Dakota & the Attorneys General of 42 Other States and Territories as Amici Curiae in Support of Respondent at 9–10, *People ex rel. Salazar v. Davidson*, 79 P.3d 1221 (Colo. 2003) (No. 03SA147) (“The Attorney General has both a legal and a professional duty to uphold the law [and] [w]hen, as here, he believes a statute violates the constitution, he has a paramount obligation to defend the constitution he is sworn to uphold.”); Letter from Kenneth T. Cuccinelli II, Att’y Gen., Commonwealth of Va., to Robert F. McDonnell, Governor, Commonwealth of Va. (Aug. 27, 2013), https://www.richmond.com/letter-from-attorney-general-ken-cuccinelli/pdf_bc1eb544-14b9-11e3-86b1-0019bb30f31a.html (declining to defend a constitutional challenge to the law establishing the Opportunity Educa-

move is rare and cannot be done lightly, and must always be with due regard for important principles of separation of powers.

I also thought about Virginia's long and sadly undistinguished history in landmark civil rights cases. Too often, individual Virginians have had to stand up and demand that their own government respect their rights. Too often, their own attorney general stood in their way—whether it was in *Davis v. Prince Edward County School Board*,¹⁶ *Loving v. Virginia*,¹⁷ or *United States v. Virginia*.¹⁸

I was committed to ensuring that the injustices of those past cases were not repeated. So I changed the Commonwealth's legal position, brought Virginia into the fight for marriage equality, and argued for the fundamental right to marry.¹⁹ And we won.²⁰ As the case proceeded through the courts, Virginians saw their attorney general fighting *for* their fundamental rights, helping to make lives better and families stronger.

My philosophy and approach to the job is also evident in the public safety arena. My team and I have used the law and the resources at our disposal to take on emerging public safety challenges in a collaborative and innovative way.

I have been proud to lead the Commonwealth's response to the heroin and opioid crisis. In early 2014, I began sounding the alarm about what I saw as a growing crisis that had the potential to overwhelm Virginia if left unchecked.

Since then we have handled more than 120 prosecutions involving more than 434 pounds of heroin worth more than \$25 million on the street.²¹ We have also launched groundbreaking pre-

tional Institution, Act of May 3, 2013, ch. 805, 2013 Va. Acts 1664, 1666, which was subsequently invalidated in *Sch. Bd. of the City of Norfolk v. Opportunity Educ. Inst.*, 88 Va. Cir. 317 (2014) (Norfolk City)).

16. 103 F. Supp. 337, 338 (E.D. Va. 1952), *rev'd sub nom.* *Brown v. Bd. of Educ.*, 349 U.S. 294, 298–99 (1955).

17. 388 U.S. 1, 1 (1967).

18. 518 U.S. 515, 523 (1996).

19. *See Bostic v. Schaefer*, 760 F.3d 368, 369 (4th Cir. 2014); Press Release, Office of the Attorney Gen., Commonwealth of Va., Attorney General Herring Changes Virginia's Position in Marriage Equality Case (Jan. 23, 2014), <https://www.oag.state.va.us/media-center/news-releases/96-attorney-general-herring-changes-virginia-s-legal-position-in-marriage-equality-case>.

20. *See Bostic*, 760 F.3d at 398.

21. *Saving Lives and Addressing the Heroin/Opioid Epidemic*, VIRGINIA.GOV, <https://www.oag.state.va.us/programs-initiatives/heroin-opioid-epidemic> (last visited Oct. 1,

vention and education initiatives, made great strides in reducing the stigma of substance use disorder, pursued needed legislative changes to save lives, and sued a drug company that we believe contributed to and prolonged the crisis.²²

We have also led a transformation in the way Virginia works to prevent and respond to sexual and domestic violence, including spurring changes in the law to better serve the needs of survivors. We have made tremendous progress on a \$3.4 million project to completely eliminate Virginia's decades-old backlog of untested physical evidence recovery kits ("PERKs").²³

We have regvanized our consumer protection team, utilizing legal tools that had gone underused to pursue enforcement actions against predatory lenders and other businesses that deceive, exploit, abuse, or otherwise violate the rights of Virginians, particularly when they target Virginia seniors, students, and veterans or military families. During my nearly five years as attorney general, we have secured nearly \$250 million in relief for consumers and payments from violators.²⁴

A growing area of work for state attorneys general is multistate litigation against large corporate defendants and even the federal government when it acts in a way that adversely affects the interests of our states or our citizens. The tobacco master settlement is often cited as a watershed moment in multistate cooperation and the level of interaction and joint actions has only grown since then.²⁵

2018).

22. See Press Release, Office of the Attorney Gen., Commonwealth of Va., Attorney General Herring Sues Purdue Pharma for Lies That Helped Create and Prolong Opioid Crisis (June 27, 2018), <https://www.oag.state.va.us/media-center/news-releases/12-14-june-27-2018-attorney-general-herring-sues-purdue-pharma-for-lies-that-helped-create-and-prolong-opioid-crisis>.

23. Press Release, Office of the Attorney Gen., Commonwealth of Va., Attorney General Herring Hosts OAG Cold Case Sexual Assault Training Conference as Part of PERK Testing Project (Oct. 12, 2017), <https://www.oag.state.va.us/media-center/news-releases/1054-october-12-2017-herring-hosts-cold-case-sexual-assault-training-conference-as-part-of-perk-testing-project>.

24. Press Release, Office of the Attorney Gen., Commonwealth of Va., Attorney General Herring Alleges Illegal Predatory Loans in Suit Against One of Virginia's Largest Online Lenders (May 4, 2018), <https://www.oag.state.va.us/media-center/news-releases/1185-may-4-2018-herring-alleges-illegal-predatory-loans-in-suit-against-one-of-virginia-s-largest-online-lenders>.

25. See Thomas A. Schmeling, *Stag Hunting with the State AG: Anti-Tobacco Litigation and the Emergence of Cooperation Among State Attorneys General*, 25 LAW & POLY 429, 430, 451 (2003).

This remains an area where significant bipartisan cooperation remains possible, as political or geographic divides can often be bridged by a shared pursuit of justice on behalf of our people.

An important and profound example of this phenomenon is playing out right now as nearly every state attorney general works together on a large, complex investigation into the practices of those involved in the opioid supply chain including pharmaceutical companies, drug manufacturers and distributors, and others. Because every state is dealing with the significant social, fiscal, public health, and public safety impacts of the opioid crisis, we have seen states come together in an inspiring way to demand answers and to hold bad actors accountable.

Admittedly this multistate cooperation can get significantly more complicated and polarized when the federal government is the target of an investigation or litigation. In these cases, state attorneys general tend to distribute themselves more predictably along partisan lines, though bipartisan litigation against the federal government is not uncommon.

The Trump presidency has created multitudinous opportunities, and I would say an unprecedented and weighty responsibility, for attorneys general to challenge the administration's actions in court when they violate statutory or constitutional boundaries.

For me, it began just a few days into his term when President Trump issued his initial "travel ban."²⁶ I immediately identified the hastily created and poorly implemented Executive Order, with its obvious constitutional infirmities, as his long-promised Muslim ban, and courts around the country would quickly come to see it the same way. The ban was instantly disruptive to Virginia families, businesses, and universities, and one of the epicenters of the chaos that ensued was at Dulles International Airport near my home in Loudoun County.²⁷ Within days we had sued and won the nation's first preliminary injunction blocking the initial executive order based on a mountain of unrefuted evidence

26. Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017); see Amber Phillips, *A Brief Rundown of the Long Legal History of Trump's Travel Ban*, WASH. POST: THE FIX (June 26, 2018), <https://www.washingtonpost.com/news/the-fix/wp/2018/06/26/a-brief-run-down-of-the-long-legal-history-of-trumps-travel-ban/>.

27. Travis Fain, *AG Herring: Virginia to Join Lawsuit Challenging Immigration Order*, DAILY PRESS (Jan. 31, 2017, 7:42 PM), <http://www.dailypress.com/news/politics/dp-ews-herring-virginia-immigration-lawsuit-20170131-story.html>.

that it had been conceived of and issued in anti-Muslim animus in violation of the Establishment Clause of the First Amendment.²⁸

Since then, I have continued to lead and join colleagues in challenging Trump Administration moves that violate the law and hurt our Commonwealth and its residents, particularly in the areas of healthcare,²⁹ reproductive rights,³⁰ gun violence prevention,³¹ environmental matters,³² and immigration and immigrants' rights.³³

My team and I are first and foremost guided by the law and work hard to maintain the credibility and reputation of our office within the legal community and the courts in which we practice. That is why we have not pursued legal challenges over every policy disagreement with the Trump Administration, and why we are conscientious about using the proper tool at the proper time.

If our disagreement is truly over a policy choice, I register my objections through the appropriate channels including the public comment process, or through communications with the administration or our federal legislative representatives.

We have also initiated or recommitted to programmatic efforts on issues that may not be a priority for this Administration. Thus far that has included providing additional resources and tools to prevent and respond to hate crimes and the rise of white supremacist violence, address campus sexual violence, and ensure equal justice and safe, fair policing.

And, if I believe a move by President Trump has truly crossed the line into unlawful conduct, I have not been afraid to go to court to protect Virginians and our rights and interests.

28. *Aziz v. Trump*, 234 F. Supp. 3d 724, 736, 738–39 (E.D. Va. 2017).

29. Intervenor-Defendants' Brief in Opposition to Plaintiffs' Application for a Preliminary Injunction, *Texas v. United States*, No. 4:18-cv-00167-0 (N.D. Tex. June 7, 2018).

30. First Amended Complaint for Declaratory and Injunctive Relief, *California v. Hargan*, No. 417-cv-05783-HS6 (N.D. Cal. Nov. 1, 2017).

31. First Amended Complaint for Declaratory and Injunctive Relief, *Washington v. Dep't of State*, No. 2:18-cv-01115-RSL (W.D. Wash. Aug. 2, 2018).

32. Petition for Review, *California v. EPA*, No. 18-1114 (D.C. Cir. May 1, 2018).

33. *Vidal v. Nielson*, 279 F. Supp. 3d 401 (E.D.N.Y. 2018); Complaint for Declaratory and Injunctive Relief, *Washington v. United States*, No. 2:18-cv-00939 (W.D. Wash. June 26, 2018).

Change is a powerful, undefeated force in the law, in our economy, and in our politics, and its pace is only quickening. That will mean that the role of attorney general will have to continue to evolve and adapt to meet the needs of our citizens. The challenges I worry about now are different than those that concerned me just five years ago when I took office. In particular, the democratization of technology and its proliferation and integration into our lives and economy presents opportunities and challenges for which we must prepare. Criminal enterprises now increasingly operate digitally, whether it is selling stolen goods on electronic marketplaces, moving fentanyl and heroin on the dark web, or hacking databases of personal information. We must think more creatively about how we defend ourselves and how we build a legal framework that allows for innovation and growth while still protecting the rights, privacy, and safety of Virginians.

I hope in my own small way I am helping to move the office in a more modern direction, expanding people's understanding and expectations of what their attorney general can and should do for them. And so long as I have the privilege of serving as Attorney General, the powers of the office will always be on the side of the people.