University of Arkansas at Little Rock Law Review

Volume 43 | Issue 3 Article 5

2021

Constitutional Law—The Powers of State Attorneys General to Determine Public Interest

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CONSTITUTIONAL LAW—THE POWERS OF STATE ATTORNEYS GENERAL TO DETERMINE PUBLIC INTEREST

I. INTRODUCTION

State attorneys general (AGs) are politicizing the office of the Attorney General by taking partisan positions and failing to enforce (or defend) state laws.[1] Across the country, state AGs have become more aggressive in litigating high-profile cases that can springboard an AG into the political spotlight.[2] Each state's AG has similar duties and "job descriptions," but they all have different permissions or restrictions on their powers and responsibilities.[3]

In some states, the AG is vested with the common law powers and duties unless the state constitution or state statutes expressly or impliedly provide to the contrary.[4] Other states recognize that an AG's inherent common law powers "are not subject to statutory reduction."[5] In both situations, unless otherwise prescribed, AGs have the opportunity to refuse to defend state law and have free rein to control all litigation involving their states, based on "the public's interest."[6]

State AGs are charged with the duties of the chief legal officers for their states and typically serve two main roles.[7] State AGs serve as lawyers to their governors and state agencies, and they "serve as lawyers for the state as a whole," representing the public's interest.[8] State AGs have both the motivation and authority to advance important public policy goals.[9] Many state AGs have increased the politicization of their offices and are litigating to legislate instead of allowing the legislative branch to fulfill its duty to

1. Alan Greenblatt, *State AGs Are Increasingly Powerful—and Partisan*, GOVERNING (Sept. 2016), https://www.governing.com/topics/politics/gov-state-attorneys-general.html.

2. Elaine S. Povich, *When a State Attorney General Takes on a National Fight, What's He Gunning For?*, PEW: STATELINE (Nov. 11, 2019), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2019/11/11/when-a-state-attorney-general-takes-on-a-national-fight-whats-he-gunning-for.

3. Neal Devins & Saikrishna Bangalore Prakash, *Fifty States, Fifty Attorneys General, and Fifty Approaches to the Duty to Defend*, 124 YALE L.J. 2100, 2123 (2015).

4. 7A C.J.S. *Att'y Gen.* § 28 (2019).

5. *Id.*

6. *See* NAT'L POLICY & LEGAL ANALYSIS NETWORK (NPLAN), PUB. HEALTH LAW CTR. AT WILLIAM MITCHELL COLL. OF LAW, STATE AGS: WHO THEY ARE AND WHAT THEY DO 2 (2010), https://www.publichealthlawcenter.org/sites/default/files/resources/phlc-fs-agwho what-2010.pdf.

7. *Id.* at 1.

8. *Id.*

9. *Id.* at 2.

propose and make law.[10] This note addresses the uncertainty surrounding the common law duties and powers of state AGs and what state AGs should do when the public's interest is in question.

Part II of this note provides the common law background relating to state attorneys general. Part III surveys the common law powers of state AGs, attempts to answer the question of how to determine the public's interest in controversial situations, and reviews the AG's duty to defend state law. Finally, Part IV provides an argument that proposes to align the duties of state AGs to be consistent with one another, determines the actual constitutional duties of state AGs, and defines the "public's interest" to impose the duty to defend.

II. HISTORICAL BACKGROUND OF THE OFFICE OF ATTORNEY GENERAL

A. The Attorney General of England

In 1243, the King of England appointed an attorney to represent the King's interests in each major court, dubbing him "King's attorney."[11] His duties included

> initiating actions to recover rents and lands, proceeding against those who pronounced a sentence of excommunication against a royal servant, guarding the King's right to present to churches, investigating homicides to hear and determine what pertained to the Crown, and on one occasion, engaging in a special mission to discover the marriages, wards, reliefs, and other royal rights which had been conceded or alienated within a particular township since the time of King John's coronation.[12]

In 1461, the King appointed attorneys for life, authorized them to appoint subordinates to carry out the King's attorney's duties, provided these attorneys to give legal advice to the House of Lords, and dubbed the King's attorney the "Attorney General of England."[13] In the seventeenth century, the AG began to advise the House of Commons in drafting legislation and

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10. *See, e.g.*, *id.*; *AG Paxton Sues Battleground States for Unconstitutional Changes to 2020 Election Laws*, KEN PAXTON, ATT'Y GEN. OF TEX. (Dec. 8, 2020), https://www.texasattorneygeneral.gov/news/releases/ag-paxton-sues-battleground-states-unconstitutional-changes-2020-election-laws (announcing the lawsuit filed by the Texas AG to contest the 2020 presidential election); *Attorney General James Files Lawsuit to Dissolve NRA*, LETITIA JAMES, NY ATT'Y GEN. (Aug. 6, 2020), https://ag.ny.gov/press-release/2020/attorney-general-james-files-lawsuit-dissolve-nra (announcing the lawsuit filed by the New York AG attempting to dissolve the NRA).

11. NAT'L ASS'N OF ATT'YS GEN., STATE ATTORNEYS GENERAL POWERS AND RESPONSIBILITIES 2 (Emily Myers ed., 4th ed. 2018).

12. *Id.*

13. *Id.* at 3.

gave legal advice to various departments of state.[14] During this time, the AG established that his duty extended to the public's interest and became more of a people's lawyer than a government lawyer for the Crown.[15] At the same time, in 1643, the first attorney general was appointed in the American colony of Virginia.[16]

B. Historical Background of States' Attorneys General

Early state attorneys general were modeled after the AG of England and existed in each of the thirteen American colonies.[17] State AGs struggled to fulfill their duties as proficiently as their English counterparts due to a lack of capable and willing appointees.[18] As the National Association of Attorneys General (NAAG) points out, state AGs were probably present "for some time before the AG was mentioned in official records."[19] Even in early American history, AGs had duties and responsibilities that were influenced by other nations in addition to the English common law.[20]

Of the fifty states, thirty-four states either created or maintained the office of AG in their original state constitutions, and eight others established an AG by law.[21] Arkansas, for example, originally split the office of the AG into judicial districts until it "was unified in 1843 by legislative act, and the unified office was made constitutional in 1912."[22]

As the United States grew, states gave their AGs more autonomy and more power by making the office a popularly elected position.[23] State AGs may investigate both governmental and non-governmental entities, and some state AGs have the statutory authority to bring a multitude of cases to court.[24] In areas from cybercrime to tobacco regulation, state AGs provide a broad range of services, leading some AGs to create task forces and special units for specific legal areas.[25] In most states, the AG has both broad common law authority as well as specific statutory duties prescribed in state

14. *Id.*
15. *Id.* at 4.
16. *Id.*
17. William P. Marshall, *Break up the Presidency? Governors, State Attorneys General, and Lessons from the Divided Executive*, 115 YALE L.J. 2446, 2450 (2006).
18. NAT'L ASS'N OF ATT'YS GEN., *supra* note 11, at 4.
19. *Id.* at 5 (discussing the lack of records in early American history and an example from Maryland, which was first "settled" in 1634, but the AG was not mentioned in official records until twenty-four years later, in 1658).
20. *Id.* at 7.
21. *Id.*
22. *Id.*
23. Marshall, *supra* note 17, at 2451.
24. *See id.* at 2452; NAT'L ASS'N OF ATT'YS GEN., *supra* note 11, at 11.
25. NAT'L ASS'N OF ATT'YS GEN., *supra* note 11, at 46–47.

constitutions and statutes.[26] As of 2019, "forty-three state attorneys general are elected and forty-eight are free from gubernatorial control."[27] No state has moved in the opposite direction and placed the AG under direct control of the Governor.[28] Most state AGs have common law powers, limited to some extent by statute.[29] However, in some states, state legislatures have broadened the scope of the duties of state AGs by adopting new laws and programs.[30]

C. The United States Attorney General

The U.S. Constitution is silent regarding the AG, but the Judiciary Act of 1789 created the Attorney General of the United States and stated that he was to be appointed by the Supreme Court.[31] However, the bill was changed to provide that the President instead of the Supreme Court appoint the AG.[32] The United States AG is charged to prosecute and conduct all suits in the Supreme Court in which the United States might be concerned.[33]

Edmund Randolph was the first Attorney General of the United States, appointed by President George Washington.[34] The early role of the U.S. AG was limited, and these limitations frustrated Randolph to the point that he complained by letter to President Washington.[35]

The letter included requests that Congress would

> (1) require the district attorneys to keep the Attorney General informed of judicial business and to follow his instructions on such matters, (2) authorize the Attorney General to advocate the interests of the United States in *any* case in which the United States was interested, whether or not the Attorney General had been involved in bringing the suit, and (3) provide a clerk.[36]

All requests from the letter were denied except for the portion relating to the requirement to keep the U.S. AG informed of lower court proceedings.[37] The U.S. AG had no power over district attorneys.[38] The U.S. AG had

26. *Id.* at 34–35.
27. Marshall, *supra* note 17, at 2452.
28. *See* NAT'L ASS'N OF ATT'YS GEN., *supra* note 11, at 46.
29. *Id.* at 44.
30. *Id.* at 11.
31. *Id.* at 9.
32. *Id.*
33. 28 U.S.C. §§ 516–518 (2020).
34. Susan Low Bloch, *The Early Role of the Attorney General in Our Constitutional Scheme: In the Beginning There Was Pragmatism*, 1989 DUKE L.J. 561, 564, 583 (1989).
35. *Id.* at 585.
36. *Id.* at 587.
37. *Id.*

very little power and was directed to "prosecute and conduct all suits in the Supreme Court in which the United States was concerned."[39] However, "Congress was notably silent regarding who was to decide when and whether the interests of the United States were 'concerned' and warranted representation in the courts."[40]

In the first decade of the new United States of America, only three AGs represented the U.S. in the Supreme Court a grand total of six times.[41] But in that same time period, these first three AGs authored more than forty opinions.[42] Most states had their own AGs, who were tasked with serving the state and its people's interests.[43] The power and support by state level officials that state AGs had was greater than the power and support of the U.S. AG.[44]

The U.S. AG's role in law has expanded and given the U.S. AG more authority within the Judiciary.[45] The U.S. AG generally represents the government in matters concerning the United States and provides opinions to the President and other departments of the federal government, although many agencies are permitted to hire separate counsel.[46] The U.S. AG is also head of the Department of Justice, which oversees the Federal Bureau of Investigation, U.S. Attorneys and Marshals, the Drug Enforcement Administration, and various other Department of Justice agencies,[47] but does not hold any power besides that of political persuasion over state AGs. The U.S. AG, a legal position by name, is unquestionably a political position since the U.S. AG's loyalties are to the President rather than to public interest.[48]

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38. *Id.* at 585–86.
39. Bloch, *supra* note 35, at 579.
40. *Id*.
41. *Id*. at 589–90.
42. *Id.* at 589.
43. *See* COMM. ON THE OFFICE OF ATT'Y GEN., NAT'L ASS'N OF ATT'YS GEN., COMMON LAW POWERS OF STATE ATTORNEYS GENERAL 10–12 (1975), https://www.ncjrs.gov/pdffiles1/Digitization/16297NCJRS.pdf.
44. *See id.* at 22.
45. Bloch, *supra* note 35, at 618–21.
46. NAT'L ASS'N OF ATT'YS GEN., *supra* note 11, at 10.
47. *Id.*
48. *See, e.g.*, Charlie Savage, *Is an Attorney General Independent or Political? Barr Rekindles a Debate*, N.Y. TIMES (May 1, 2019), https://www.nytimes.com/2019/05/01/us/politics/attorney-general-barr.html (questioning U.S. Attorney General Barr and his handling of the Mueller Report as well as his position in being described as White House counsel); Ron Elving, *A Brief History of Nixon's 'Saturday Night Massacre*,*'* NPR (Oct. 21, 2018, 8:12 AM), https://www.npr.org/2018/10/21/659279158/a-brief-history-of-nixons-saturday-night-massacre (describing the firing of Special Prosecutor Archibald Cox, the resignations of AG Elliot Richardson, and the firing of Deputy AG William Ruckelshaus). In both of these situations, the AG was in a position to act either in the public's interest or in the interests of the President.

Fast-forward to 2011, where U.S. AG Eric Holder stated that the Department of Justice would no longer defend the Defense of Marriage Act (DOMA).[49] Oddly, AG Holder stated that the Department of Justice would stay on as a party to the cases regarding DOMA to "represent the interests of the United States throughout the litigation."[50] AG Holder asserted that the President had concluded that Section Three of DOMA was unconstitutional.[51] However, the President's constitutional duty is to "take Care that the Laws be faithfully executed,"[52] not to determine whether an act of Congress is constitutional. The AG has the authority to represent, defend, and enforce the legal interests of the United States, as well as advise and opine on legal matters to the President and the Cabinet.[53]

III. SURVEY OF STATE ATTORNEYS GENERAL

A. Common Law Powers and the Public's "Interest"

The common law provides AGs with the "authority to represent, defend, and enforce the legal interests of state government and the public."[54] With the adoption of the English common law in America, "[l]ittle attempt was made to define or enumerate [the AG's] duties, for the American Attorney General became possessed of the common law powers of the English Attorney General."[55]

A common theme explored in the following cases is, "What is the public's interest?" It seems to be a simple question, but the discretion provided to state AGs to litigate in the public's interest leads to case selection that benefits the state AG's political ambitions rather than the best interests of the state.

According to the Mississippi Code, the AG "shall have the powers of the Attorney General at common law and, except as otherwise provided by law, is given the sole power to bring or defend a lawsuit on behalf of a state agency, the subject matter of which is of statewide interest."[56] In *State ex*

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49. U.S. ATT'Y GEN., STATEMENT OF THE ATTORNEY GENERAL ON LITIGATION INVOLVING THE DEFENSE OF MARRIAGE ACT, P.R.N. 11-222 (Feb. 23, 2011).

50. *Id.*

51. *Id.*

52. U.S. CONST. art. II, § 3.

53. *Organization, Mission & Functions Manual: Attorney General, Deputy and Associate*, U.S. DEP'T OF JUST., https://www.justice.gov/jmd/organization-mission-and-functions-manual-attorney-general (last updated Sept. 9, 2014).

54. NAT'L ASS'N OF ATT'YS GEN, *supra* note 11, at 27.

55. *Id.* at 31 (quoting Cooley, *Predecessors of the Federal Attorney General: The Attorney General in England and the American Colonies*, 2 AM. J. LEGAL HIST. 307, 309 (1958)) (first alteration original); *see supra* Part II.

56. MISS. CODE ANN. § 7-5-1 (2019).

rel. Patterson for the Use and Benefit of Adams County v. Warren,[57] the Court discussed the common law powers of the state AG:

> At common law the duties of the attorney general, as chief law officer of a realm, were numerous and varied. He was chief legal adviser of the crown, was entrusted with the management of all legal affairs, and prosecution of all suits, criminal and civil, in which the crown was interested. He had authority to institute proceedings to abate public nuisances, affecting public safety and convenience, to control and manage all litigation on behalf of the state, and to intervene in all actions which were of concern to the general public.[58]

Thus, in Mississippi as in many other states, the AG has the authority to intervene or act in any matter determined of "concern to the general public."[59] However, the way in which the AG determines whether a matter is "of *concern to the general public"* or in the public's interest is not described.[60]

Another case that details the Mississippi AG's powers and responsibilities at common law is *Bell v. State*,[61] a case pertaining to illegal gambling. This case establishes that the Mississippi AG has all of the power and authority from the common law.[62] In *Bell*, the court held the AG is "a constitutional officer possessed of all the power and authority inherited from the common law as well as that specially conferred upon him by statute."[63] Also, in *Gandy v. Reserve Life Insurance Co.*, the court held that the AG has the authority and the duty to preserve "the lawfully enacted statutes of the state."[64] That authority includes "the right to institute, conduct and maintain all suits necessary for the enforcement of the laws of the state, preservation of order and the protection of public rights."[65] These duties, both from statute and from common law, provide the Mississippi AG with virtually unfettered power to dictate suits that involve the state or the public's interest.

State ex rel. Williams v. Karston[66] upholds the notion that the AG "'control[s] . . . all litigation in behalf of the state'" and may "'intervene in all suits or proceedings which are of concern to the general public.'"[67] *Karston* confirmed the Arkansas AG's power to "'institute proceedings to

57. 180 So.2d 293 (Miss. 1965).
58. *Id.* at 299.
59. *See supra* Part I.
60. *See supra* Part I.
61. 678 So.2d 994 (Miss. 1996).
62. *Id.* at 996.
63. *Id.*
64. 279 So.2d 648, 649 (Miss. 1973).
65. *Id.*
66. 208 Ark. 703, 187 S.W.2d 327 (Ark. 1945).
67. *Id.* at 708, 187 S.W.2d at 329 (quoting 5 AM. JUR. § 234).

restrain acts which are injurious to public health, safety, or morals, and [to] prevent any invasion upon the rights of the public in highways, parks, and other public lands, and in navigable waters.'"[68] The AG may intervene and join suits as long as the action was in the public's interest.[69]

The Mississippi AG's unconstrained power was tested and slightly limited in the following case. In *Williams v. State*,[70] the defendant was tried and convicted, receiving a sentence of life in prison. But, after new evidence came to light and the case was remanded, the district attorney sought an order of nolle prosequi, which was granted.[71] The AG's office subsequently was appointed as special prosecutor, and Williams moved to dismiss, claiming the original nolle prosequi brought the case to an end.[72] The AG's office argued that *Bell*[73] applied and that the AG is vested with constitutional, common law, and statutory authority that entitle the AG to prosecute the defendant.[74] However, the court stated, "Mississippi law does not permit a trial court to disqualify a duly elected and serving district attorney and replace him with the attorney general where the district attorney has decided, in the lawful exercise of his discretion, not to prosecute."[75] Although the AG was not permitted to continue trying this case, there was only a slight limit placed on the AG's ability to manage all litigation on behalf of the state and intervene in actions which are of concern to the general public, as long as those actions are not opposed to or in conflict with the district attorney's. [76]

State v. Heath,[77] a Tennessee case, looked at whether the AG's powers are limited by the Tennessee Consumer Protection Act. The court held that the AG can basically act in any situation using public interest as the underlying reason for suit.[78] The court stated that the AG "may exercise such authority as the public interest may require and may file suits necessary for the enforcement of state laws and public protection."[79] Further, "the attorney general may participate in litigation of a private character where it bears on the interest of the general public."[80] This gives the AG the power to act in almost any situation using the "public interest" as means of suit.[81] "'To pre-

68. *Id.* at 708–09, 187 S.W.2d at 329 (quoting 5 AM. JUR. § 244).
69. *Id.* at 709, 187 S.W.2d at 329.
70. 184 So.3d 908 (Miss. 2014).
71. *Id.* at 909.
72. *Id.* at 910.
73. 678 So.2d 994 (Miss. 1996).
74. *Williams*, 184 So.3d at 912–13.
75. *Id.* at 917.
76. *See id.* at 912.
77. 806 S.W.2d 535 (Tenn. 1990).
78. *Id.* at 537 (citing 7 AM. JUR. 2D *Att'y Gen.* § 9 (1980)).
79. *Id.*
80. *Id.* (citing 7 AM. JUR. 2D *Att'y Gen.* § 15 (1980)).
81. NAT'L ASS'N OF ATT'YS GEN, *supra* note 11, at 40.

vent the wrongdoing of one resulting in injury to the general welfare is often of itself sufficient to give [the AG] standing in court.'"[82] In other words, the AG has the power to bring suit whenever he or she sees necessary to act in the interest of the state, without a judicial limitation or legislative oversight in determining what is or is not public interest.[83]

In another Tennessee case, *State v. Chastain*,[84] the Tennessee Supreme Court addressed whether the AG could challenge the constitutionality of a state statute. There is a jurisdictional split about whether a state AG may challenge its state's statutes; however, the underlying question is whether the AG is acting in the interest of the state and public.[85] The Court stated that "the best resolution of this issue [is to] recogniz[e] the duty of the attorney general to advocate the position of the state" but keep his "oath to support and defend the Constitution of the United States and the Constitution of the State of Tennessee."[86] Thus, in certain situations, the AG's duty to uphold the state constitution and protect the public's interest are duties requiring separate treatment.[87]

Florida law provides that the AG "[s]hall appear in and attend to, in behalf of the state, all suits or prosecutions, civil or criminal or in equity, in which the state may be a party, or in anywise interested, in the Supreme Court and district courts of appeal of this state."[88] This statute gives the AG the power to intervene and determine when and if the state is interested: the AG "[s]hall have and perform all powers and duties incident or usual to such office."[89]

State ex rel. Shevin v. Exxon Corp.[90] comprehensively discussed the common law powers of the AG. The court stated that the issue of the AG's authority "simply [was] not an extremely close question."[91] The court spoke of how the AG fits within the common law, statutes, and constitution.

[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. There is and has been no doubt that the legislature may deprive the attorney general of specific powers; but in the absence of such legislative action, he typically may exercise all such authority as the public interest

82. *Heath*, 806 S.W.2d at 537 (citing 7 AM. JUR. 2D *Att'y Gen.* § 15).
83. *See id.*
84. 871 S.W.2d 661 (Tenn. 1994).
85. *Id.* at 662–63, 665.
86. *Id.* at 665.
87. *See id.*
88. FLA. STAT. § 16.01(4) (2020).
89. *Id.* § 16.01(7).
90. 526 F.2d 266 (Fla. 1976).
91. *Id.* at 274.

requires. And the attorney general has wide discretion in making the determination as to the public interest.[92]

The Florida court, in 1976, held that the AG has "wide discretion in making the determination as to the public interest," and appears to have predicted that what is of public interest might be at issue in the future.[93] However, it failed to elaborate on this point, leaving the issue up to future debate.

In *Barati v. State*,[94] another Florida case, the state via the AG filed a motion of voluntary dismissal that left the plaintiff with no standing. In this case a private citizen filed a qui tam lawsuit on behalf of the State against Motorola, Inc., under the Florida False Claims Act.[95] After service of the complaint, the State via the AG conducted an investigation and decided not to join the action.[96] The private citizen continued to litigate and prosecute the claim for three years until the AG filed a motion of voluntary dismissal, therefore ending the citizen's only opportunity to recover.[97] The petitioner moved to strike the dismissal, but the Court affirmed that the AG did have the power to dismiss the action.[98] By statute, the AG is given absolute authority to terminate qui tam litigation and is only limited by the requirement to show a good cause to intervene in the action.[99]

In *State ex rel. Allain v. Mississippi Public Service Commission*,[100] Mississippi Power and Light Company attempted to change utility rates with the Mississippi Public Service Commission. The AG intervened on behalf of the State as a "substantial rate payer ($7,011,824.00 in 1980), and all taxpayers of the State."[101] The Court stated,

> Paramount to all of his duties, of course, is his duty to protect the interest of the general public. . . . The attorney general has a large staff which can be assigned in such a manner as to afford independent legal counsel and representation to the various agencies. The unique position of the attorney general requires that when his views differ from or he finds himself at odds with an agency, then he must allow the assigned counsel or specially appointed counsel to represent the agency unfettered and unin-

92. *Id.* at 268–69.
93. *See id.* at 269.
94. 198 So.3d 69 (Fla. Dist. Ct. App. 2016).
95. *Id.* at 72 (explaining that when a private citizen brings an action and sues on behalf of himself and the State, that "action is called a *qui tam* action, from the Latin phrase: "*qui tam pro domino rege quam pro se ipso in hac parte sequitur*." *Black's Law Dictionary* translates the phrase as: 'who as well for the king as for himself sues in this matter.'" (quoting State v. Barati, 150 So. 3d 810, 811–12 (Fla. Dist. Ct. App. 2014)).
96. *Id.*
97. *Id.*
98. *Id.*
99. *Id.* at 78 (citing FLA. STAT. § 68.084 (2009)).
100. 418 So.2d 779 (Miss. 1982).
101. *Id.* at 780.

> fluenced by the attorney general's personal opinion. If the public interest is involved, he may intervene to protect it.[102]

The holding provides that the AG may intervene in a case on behalf of the public and assign staff lawyers to represent a state agency even in a highly controversial case. Because the AG disagreed with the agency position, he was required to assign the case to counsel independent of his supervision. However, it is not easy to ascertain an individual's personal opinion. These cases show that the AG has the common law authority to utilize "public interest" to determine what and how to represent, defend, and enforce the legal interests of state government and the public.[103] State AGs have the power to control and manage all litigation on behalf of the state,[104] but they frequently use this power in a manner that accords with their political ambitions over the public interest.

B. Duty to Defend

An AG's duty to defend has become a controversial topic of discussion as of late.[105] In both political parties, AGs have refused "to defend state laws on the grounds that those laws transgress the federal and state constitutions."[106] "The acute split among [AGs] is predictable; the absence of clear law and the abundance of politics account for the divide."[107] As Devins and Praskash point out, AGs can cite to their oath of office in justifying their failure to defend.[108]

In Arkansas, the state constitution is silent upon the duty to defend, but by statute, "[t]he Attorney General shall maintain and defend the interests of the state in matters before the United States Supreme Court and all other federal courts and shall be the legal representative of all state officers, boards, and commissions in all litigation where the interests of the state are involved."[109]

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102. *Id.* at 782, 784.

103. *See supra* Part II.A.

104. *See* 7A C.J.S. *Att'y Gen.* § 28.

105. *See* Matt Apuzzo, *Holder Sees Way to Curb Bans on Gay Marriage*, N.Y. TIMES (Feb. 24, 2014), http://www.nytimes.com/2014/02/25/us/holder-says-state-attorneys-general-dont-have-to-defend-gay-marriage-bans.html (noting that attorneys general in California, Illinois, Nevada, Oregon, Pennsylvania, and Virginia have all refused to defend bans on same-sex marriage); Niraj Chokshi, *Seven Attorneys General Won't Defend Their Own State's Gay-Marriage Bans*, WASH. POST: GOVBEAT (Feb. 20, 2014), https://www.washingtonpost.com/blogs/govbeat/wp/2014/02/20/six-attorneys-general-wont-defend-their-own-states-gay-marriage-bans (same).

106. Devins & Prakash, *supra* note 3, at 2102.

107. *Id.* at 2103.

108. *Id.*

109. ARK. CODE ANN. § 25-16-703(a) (2019).

Mississippi statutorily mandates that the AG defend the constitutionality of state law, prescribing that the AG assume all powers at common law.[110] The Mississippi Constitution is silent on whether the AG has a duty to defend.[111] The AG is charged to intervene in any action where the constitutionality of a statute is called into question and to "argue the constitutionality of any [such] statute."[112] Consequently, a duty to defend is mandated by this statute. Yet whether the AG actually performs this duty to his or her best ability is questionable. There has been no known issue with the Mississippi AG failing or refusing to defend a law, although the issue drew public attention in 2019.[113] In 2012, the Mississippi legislature amended the state statute to provide state agencies and officers the power to employ independent counsel when the AG refuses to represent the agency or officer or when the agency has a "significant disagreement with the Attorney General as to the legal strategy to be used in the matter."[114] This statute refers back to the holding in *State ex rel. Allain v. Mississippi Public Service Commission*.[115]

The Tennessee Constitution is silent on the AG's duty to defend state laws, but Tennessee provides statutory guidance for when the AG may and may not refuse to defendstate law.[116] The Tennessee Code grants the AG an "out" from the duty to defend as long as "*a sufficient adversary relationship exists* before the discretion not to defend . . . be exercised."[117] There are three reported instances where the Tennessee AG has refused to defend state law, once in 1993 and twice more in 1999, in cases that involved abortion and tax notices.[118]

Recently, the Tennessee legislature considered a bill to expand the AG's duties to include representation of employees in a court or administrative tribunal arising out of the adoption of a policy requiring individuals to utilize the facilities that correspond to that individual's biological sex.[119] This issue could cause another scenario in which an AG refuses to defend

110. MISS. CODE ANN. § 7-5-1; NAT'L ASS'N OF ATT'YS GEN., *supra* note 11, at 32.

111. Devins & Prakash, *supra* note 3, at 2166.

112. MISS. CODE ANN. § 7-5-1.

113. *See* Larrison Campbell, *Hood Will Continue Defending 6-Week Abortion Ban*, MISS. TODAY (June 20, 2019), https://mississippitoday.org/2019/06/20/hood-will-continue-defending-6-week-abortion-ban/ (discussing AG Jim Hood of Mississippi and his decision to defend abortion ban after speculation that he might refuse to fulfill his statutory duty to defend state law in *Jackson Women's Health Org. v. Dobbs*, 379 F. Supp. 3d 549 (S.D. Miss. 2019)).

114. H.B. 211, 2012 Leg., Reg. Sess., sec. 6 (Miss. 2012); MISS. CODE ANN. § 7-5-39.

115. *Mississippi Public Service Commission*, 418 So.2d at 782.

116. *See* TENN. CODE ANN. § 8-6-109(b)(9)–(10) (2019); MISS. CODE ANN. § 7-5-1; ARK. CODE ANN. § 25-16-702 (2019).

117. TENN. CODE ANN. § 8-6-109(b)(9)–(10) (emphasis added).

118. Devins & Prakash, *supra* note 3, at 2180–81.

119. S.B. 1499, 111th Gen. Assemb., Reg. Sess. (Tenn. 2019). (This bill died in chamber.)

state law. The "bathroom bill" would have provided an option to fund a private attorney that would be in the best interest of the local education agency or local education agency's employee.[120] If passed, the AG would have been required to advise local education agencies in regard to implementing policies "on the use of multi-person locker rooms, restrooms, or other similar facilities for use based on one's biological sex."[121] This situation almost certainly would have resulted in the AG opting to take the position that a sufficient adversary relationship exists; however, the bill failed.

The Florida Constitution is silent as to whether the AG has a duty to defend.[122] However, Florida statute provides that the AG "[s]hall appear in and attend to, . . . all suits or prosecutions, civil or criminal or in equity, in which the state may be party, or in anywise interested, in the Supreme Court and district courts of appeal of this state,"[123] thus mandating that the AG defend whenever the State is a party of interest. In 2000, the AG refused to defend when the State moved to dismiss an appeal of a partial-birth abortion statute.[124] The duty to defend has become a prominent issue in the United States.[125] The duty-to-defend analysis has become a review of the public's interest by courts on a case-by-case basis.

IV. RECOMMENDATIONS

In *State Attorneys General Powers and Responsibilities*, the NAAG says that the powers and responsibilities of state AGs have expanded and "enhanced the role of the attorney general as a 'public interest lawyer' and offer many opportunities to improve the quality of life for citizens of the states and jurisdictions."[126] AGs are generally housed within the executive branch of state government.[127] Situations that result in disagreement between the AG and state officials form one area of concern with partisan views being more prominent in today's time.[128]

As the NAAG said, "[o]rdinarily, attorney general representation of a state agency fulfills the public interest."[129] However, the public interest can sometimes be unclear. Of course, there is bipartisan support in protecting citizens in issues like asbestos litigation, the ill effects of tobacco, cyber-

120. *Id.*
121. *Id.*
122. Devins & Prakash, *supra* note 3, at 2160.
123. FLA. STAT. ANN. § 16.01(4) (2019).
124. Devins & Prakash, *supra* note 3, at 2181 (*citing* A Choice for Women v. Butterworth, 54 F. Supp. 2d 1148 (S.D. Fla. 1998)).
125. Devins & Prakash, *supra* note 3, at 2153.
126. NAT'L ASS'N OF ATT'YS GEN., *supra* note 11, at 47.
127. *Id.* at 49.
128. *Id.*
129. *Id.* at 53.

crime, organized crime prosecution, and pharmaceutical drug manufacturers exploiting citizens.[130] The Arkansas case *Karston* provides the best example of what the public's interest should be: "'to restrain acts which are injurious to public health, safety, or morals, and [to] prevent any invasion upon the rights of the public in highways, parks, and other public lands, and in navigable waters.'"[131]

In 2019, the Mississippi Governor and both legislative houses had a Republican majority, but the AG was a Democrat tasked with upholding the AG's duty to defend lawfully enacted state statutes. An abortion statute was passed by the Mississippi Legislature that pushed the envelope of constitutionality.[132] Many believed that AG Hood would refuse to defend the statute, though he ultimately did defend it.[133] But the matter could have easily gone in another direction; all AG Hood would have had to use as an excuse for declining the defense of the new statute was that he was acting in the "public's interest" in declining to defend the anti-abortion statute. He might also have appointed independent counsel to handle the case.

As the top law officers of the states, AGs should have an obligation to defend the constitutionality of state statutes to their utmost ability, even if they disagree with the policy fostered by the statute. Since most AGs are popularly elected, they hold the trust of the citizens and should have a duty to defend statutes that the citizens' representatives have established. The question of what is the "public's interest" is not a legal test like the "shocks the conscience" test. Determining the public's interest is a political test that is measured by elections and legislation.

As stated in Tennessee's *State v. Heath*,[134] "'[t]o prevent the wrongdoing of one resulting in injury to the general welfare is often of itself sufficient to give it standing in court,'" but further guidance on what is or is not of the public interest is absent in this opinion. Arkansas's *Karston* is a bit more specific in stating that the public's interest concerns "public health, safety, or morals."[135] Issues pertaining to tobacco and drugs clearly fall under these parameters, but partisan issues leave room for speculation and an opportunity not to defend. States should consider statutory guidelines to provide the proper analysis for AGs to perform when determining what is

130. *See id.* at 46–47.

131. State *ex rel.* Williams v. Karston, 208 Ark. 703, 708–09, 187 S.W.2d 327, 329 (Ark. 1945) (quoting 5 AM. JUR. § 244).

132. Larrison Campbell, *Hood Will Continue Defending 6-Week Abortion Ban*, MISS. TODAY (June 20, 2019), https://mississippitoday.org/2019/06/20/hood-will-continue-defending-6-week-abortion-ban/ (discussing AG Jim Hood of Mississippi's decision to defend abortion ban after speculation that he might refuse to fulfill his statutory duty to defend state law).

133. *Id.*

134. 806 S.W.2d 535, 538 (Tenn. 1990) (quoting 7 AM. JUR. 2D *Att'y Gen.* § 15 (1980)).

135. *Karston*, 208 Ark. 703 at 708–09, 187 S.W.2d at 329.

the public's interest and how best to ensure that the AG acts on behalf of the public's true interest. Or states could mandate the duty to defend lawfully enacted state laws because without the AG's defense, there might be little opportunity to advocate fully for state law under judicial assault.

In 2017, Alan Greenblatt, Senior Staff Writer for *Governing*, wrote, "The American system of governance is all about splitting power. When it comes to legal matters, the attorney general is most often going to be the one who has the final word."[136] Defending state laws is a cornerstone of the AG's duties, and the courts are where constitutionality of state laws should be determined.[137] Former AG of Indiana Greg Zoeller says, "To bring that question to the courts, there has to be a lawyer on both sides."[138] Therefore, when AGs refuse to defend or opt out, they undermine the ability of the judicial process properly to vet the constitutionality of statutes.

AGs are the chief law officers in all states, and in most states have the exclusive authority to represent the state and its officers.[139] However, what is "usual" to the AG's office is not so clear. The common law can be confusing and sometimes counterintuitive to providing the best outcome for citizens. States like Mississippi should amend their constitutions or enact new statutes to provide a clear and precise prescription of the AG's powers and responsibilities when it comes to representing the public's interest. In Tennessee, providing the AG with an out to decline the defense of a state law when "*a sufficient adversary relationship exists*" curtails the opportunity to determine constitutionality of state law and determine the public's interest.[140]

A targeted universal approach to reforming state constitutions and statutes would provide an agreeable framework that requires AGs to defend state law and uphold the public's interest without continuously politicizing the office. AGs have the constitutional experts residing in their offices, so they should work more closely with legislatures in developing state laws,[141] possibly by designating an Assistant AG to their respective state legislatures to aid in drafting in an effort to reduce the number of constitutional challenges and improve the legislation the Legislature produces.

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136. Alan Greenblatt, *What Happens When the Attorney General Refuses to Defend a Law?*, GOVERNING (Aug. 2017), https://www.governing.com/gov-attorney-general-refusal-defend-state-laws.html?flipboard=yes (noting that in lawsuits involving high-profile partisan issues, some state attorneys general choose to sit out.).

137. *See id.*

138. *Id.*

139. NAT'L ASS'N OF ATT'YS GEN., *supra* note 11, at 51.

140. *See* TENN. CODE ANN. § 8-6-109 (emphasis added on what is necessary for the AG to not defend a state law or statute).

141. *See* Greenblatt, *supra* note 136.

V. CONCLUSION

Part I asked the question, "What is the public's interest?" Each state's AG has similar duties and "job descriptions," but they all have different levels of restrictions on their powers and responsibilities.[142] As discussed in Part III, each state builds on the common law derived from English common law, though now fragmented, since each state establishes its own common law. The common law provides state AGs with the authority to "represent, defend, and enforce the legal interests of state government and the public"[143] but does not create the same powers and responsibilities from state to state.[144]

The main focus of this note looked to what is and is not in the public's interest for the AG to utilize his or her powers.[145] In situations that lead to disagreement between state AGs and the other executive officers, state agencies, or the federal government, the AG has the upper hand in determining how the state's legal strategy will play out. A targeted universal approach should be considered to develop a statutory framework that would require state AGs to uphold their obligation to serve at the public's interest and defend the constitutionality of state laws to their utmost ability, even if they disagree politically. A balance of the executive at the state level is necessary to defend the office of the state attorney general from becoming a strictly political position.

*J. Dillon Pitts**

142. Devins & Prakash, *supra* note 3, at 2123.
143. NAT'L ASS'N OF ATT'YS GEN., *supra* note 11, at 27.
144. Devins & Prakash, *supra* note 3, at 2123.
145. *See supra* Part III.

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