The Constitutional Powers of the Governor and Attorney General: Which Officer Properly Controls Litigation Strategy When the Constitutionality of a State Law is Challenged?

Michael B. Holmes
COMMENTS

The Constitutional Powers of the Governor and Attorney General: Which Officer Properly Controls Litigation Strategy When the Constitutionality of a State Law is Challenged?

I. INTRODUCTION

By 1991 La. Acts No. 26 the Louisiana legislature proposed what has been called the strictest anti-abortion law in the nation. The governor, exercising his constitutional prerogative, promptly vetoed the bill. Undaunted by the governor's action, the legislature voted to override his veto.

Opponents of the law seek to have it declared unconstitutional. The state has been forced to defend the constitutionality of the new abortion law in both state and federal court. As of this writing, the law has been held to be in violation of the United States Constitution, and the state has been enjoined from enforcing its provisions.

The state's attorney general has, thus far, defended the law on behalf of the state. The usual procedure in a case such as this is to continue appealing until, ultimately, the case goes before the United States Supreme Court. But what if the governor directs the attorney general not to appeal the decision? Or what if the governor, purporting to speak on behalf of the state, moves to dismiss the appeal? May the attorney general disregard the governor's instructions? Should a court allow the governor to speak on behalf of the state to the exclusion of the attorney general?

The purpose of this comment is to explore power—power within the executive branch of the State of Louisiana. Specifically, this comment addresses the issue of which executive officer—the governor or the state's attorney general—properly controls litigation strategies under the Louis-

Iana Constitution when the constitutionality of a statute or provision of the constitution is challenged. 2

It is the contention of this writer that the attorney general, rather than the governor, properly controls litigation strategy for the state when the constitutionality of a statute or state constitution provision is challenged. In order to support this contention, this comment will first examine the powers of the two offices under prior Louisiana constitutions as well as the Constitution of 1974. Both the provisions of the constitutions and the records of the Constitutional Convention of 1973 will be surveyed in order to establish that the Constitution of 1974 did not

---

2. It should be recognized that the governor and attorney general will often have similar opinions concerning litigation strategies. However, instances do arise when the two have differing views on what position the state should take. This comment will attempt to address only the latter instance.

A good example of differing opinions is the litigation in United States v. State of Louisiana, 751 F. Supp. 608 (E.D. La. 1990), Louisiana's higher education desegregation suit. In this complex litigation, Louisiana's four board system of higher education was declared unconstitutional under the United States Constitution by a federal district judge. During the remedy portion of the trial, the state was represented by a number of parties, including the attorney general and counsel for the governor, who advocated several different remedies to achieve desegregation.

The governor accepted the findings of the district judge and advocated the elimination of the four board system and creation of one "super board" for higher education. The attorney general maintained that the four board system of higher education was constitutional and opposed any remedy that would eliminate the system. The federal court was faced with deciding which position represented the position of the State of Louisiana.

The disagreement between the governor and the attorney general has grown into a battle over which officer holds the power to speak for the state under the Louisiana constitution. For a complete description of the complex proceedings involved in United States v. State of Louisiana, see Guste, 1991 WL 258626.

The federal court in United States v. State of Louisiana was faced with a difficult task. Because of the nature of the litigation and the potential ramifications of finding the four board system unconstitutional, the court sought input from many groups in order to fashion a remedy. Many of these groups were entities created by the State of Louisiana—the Louisiana State Board of Supervisors, the Southern Board of Supervisors, the Louisiana Board of Regents—but each supported markedly different positions, not only on remedies, but also on the constitutionality of the four board system itself. The court, therefore, was confronted with the burden of deciding which party advocated the one position of the State of Louisiana concerning the constitutionality of the four board system and the possible remedies. In reality, there were, and still are, several positions.

In order to avoid the confusion created by such a scenario, this writer chooses to limit discussion of this topic to a dispute within the state courts of Louisiana involving only a conflict between the governor and the attorney general as to what position or litigation strategy Louisiana should follow.

3. Louisiana has drafted eleven constitutions: 1812, 1845, 1852, 1861, 1864, 1868, 1879, 1898, 1913, 1921, and 1974. However, the Constitution of 1861 merely substituted "the Confederate States" for "the United States" and the Constitution of 1864 was rejected by the U.S. Congress. For a more thorough history of Louisiana constitutions, see Constitutions of the State of Louisiana (Huey P. Long comp., 1930).
significantly change the relationship that had existed between the governor and the attorney general under prior constitutions. Secondly, the comment will explore Louisiana jurisprudence under prior Louisiana constitutions interpreting the proper roles of the attorney general and governor with respect to litigation on behalf of the state. Finally, this comment will outline the policy considerations which support the conclusion that the attorney general is the proper party to represent the state in this instance.

II. PROVISIONS OF THE LOUISIANA CONSTITUTIONS

The Constitution of 1974 was written by a convention of delegates called together in 1973. The delegates debated and discussed the various provisions of the constitution at the convention. Significantly, the Constitution of 1974 was the first Louisiana constitution to place the office of the governor and the office of the attorney general in the executive branch. Prior constitutions had placed the governor in the executive branch; however, the attorney general had always been placed in the judiciary. Although placement of the two officers in the executive branch is commonplace in most states, insight into the powers and duties of the positions may be gained by examining the motivation of the framers of the Constitution of 1974 for moving the attorney general from the judiciary to the executive branch. Also, an analysis of the movement will help to determine the nature of the relationship between the governor and the attorney general within the executive branch.

4. A constitutional convention was called to meet on January 5, 1973 by 1972 La. Acts No. 2.

5. Article IV, section 1(A) of the Constitution of 1974 provides that "[t]he executive branch shall consist of the governor, lieutenant governor, secretary of state, attorney general . . ." (emphasis added).

6. See infra notes 11 and 12 and accompanying text.

7. See infra notes 21 and 22 and accompanying text.


9. Interestingly, even while the office of attorney general was housed in the judicial branch of government under the constitution, Louisiana courts recognized that the attorney general of Louisiana was essentially an executive officer. See State v. New Orleans, 15 La. Ann. 354, 358 (1860).

10. The effect of this move is critical in determining if and to what extent the governor may exercise control over the attorney general, an executive branch officer. In the context of deciding whether the governor or the attorney general properly controls litigation strategy for the state, it is relevant to note that constitutional convention Delegate Tom Stagg, a member of the Committee on the Executive Branch, commented:

the [executive] committee . . . debated what ought to be the powers that would adhere to [the attorney general's] office for him effectively to be able to be
The following section of this comment will briefly trace the historical provisions of Louisiana constitutions to establish the powers and duties of the governor and state's attorney general as they existed prior to the Constitution of 1974. Secondly, this section will examine the specific changes approved by the delegates to the Constitutional Convention of 1973 along with the delegates' deliberations concerning these changes. Finally, this section will present the conclusion that the changes made to the constitution did not significantly alter the respective roles and powers of the governor and attorney general vis-a-vis each other.

A. The Office of the Governor

Louisiana's first constitution, approved in 1812, vested "supreme executive power of the state" in a "chief magistrate, styled the Governor of Louisiana."11 This language remained a part of subsequent constitutions12 until passage of the Constitution of 1974. In addition to being vested with the "supreme executive power," the governor was also charged with the duty of "tak[ing] care that the laws be faithfully executed."13 Of course, the prior constitutions, as well as the Constitution of 1974, gave the governor the powers traditionally held by that office.14 The Constitution of 1974 described the office of the governor a bit differently than had prior constitutions.

Article IV, Section 5(A) of the Constitution of 1974 provides for executive authority as follows:

The governor shall be the chief executive officer of the state. He shall faithfully support the constitution and laws of the state and of the United States and shall see that the laws are faithfully executed.15

the state's chief legal officer, to guard the rights of all of the people of the state, without having . . . so much authority that he might become more than just the state's chief legal officer.


However, it is also relevant to note that Stagg's statement was made during discussions concerning the delegation of powers between the attorney general and the district attorneys, not the delegation of powers between the attorney general and the governor. Id. at 879-81.

11. La. Const. of 1812, art. 3, § 1.
12. La. Const. of 1845, art. 38; La. Const. of 1852, art. 35; La. Const. of 1861, art. 35; La. Const. of 1864, art. 43; La. Const. of 1868, art. 48; La. Const. of 1879, art. 59; La. Const. of 1898, art. 62; La. Const. of 1913, art. 62; La. Const. of 1921, art. 5, § 2.
13. Id. See infra note 17 and accompanying text.
14. For example: power to grant reprieves, power to appoint various executive officers, power of veto, Commander-in-Chief. Since the powers are not essential to the discussion at hand, no elaboration will be made.
Prior to 1974, the duty to "see that the laws are faithfully executed" had appeared in Louisiana constitutions in some form. Nevertheless, the import of this provision may still be a factor in determining the proper role of the governor with respect to control of litigation strategies for the state.

In contrast, the statement that "[t]he governor shall be the chief executive officer . . ." had not appeared in previous state constitutions. Consequently, the intent behind this change in language should be determined in order to properly assess: (1) the relationship between the governor and other executive branch officers, including the state's attorney general, and (2) the role of the governor, if any, with regard to challenges to the constitutionality of statutes or state constitution provisions.

The change in wording from "supreme executive" to "chief executive officer" was not a subject of debate at the Constitutional Convention of 1973. Concerning the change, Delegate Duval explained that "chief executive officer" was an accurate description of what he felt the governor was. In other words, the change in language merely reflects a

16. La. Const. of 1812, art. 3, § 15; La. Const. of 1845, art. 55; La. Const. of 1852, art. 52; La. Const. of 1864, art. 59; La. Const. of 1868, art. 65; La. Const. of 1879, art. 72; La. Const. of 1898, art. 75; La. Const. of 1913, art. 75; La. Const. of 1921, art. 5, § 14.

17. The vesting of "supreme executive power" in a governor, together with the duty to take care that the laws be faithfully executed, has served as the partial basis for a California court's decision that the governor holds the power to determine public interest to the exclusion of the attorney general. See People ex rel. Deukmejian v. Brown, 624 P.2d 1206 (Cal. 1981). See also Arizona State Land Dep't v. McFate, 348 P.2d 912 (Ariz. 1960). Some might suggest that the rationale in Brown supports a similar conclusion concerning the roles of the governor and attorney general in Louisiana—at least under Louisiana constitutions prior to 1974. However, the relationship between California's governor and attorney general, under the California constitution, may be distinguished from the relationship between Louisiana's governor and attorney general under Louisiana constitutions prior to 1974.

California's constitution vests supreme executive power in the governor while, at the same time placing the attorney general in the executive branch and subjecting the attorney general to control by the governor. Brown, 624 P.2d 1206, 1209 (explaining the construction of Cal. Const. art. V, §§ 1 and 13). In contrast, all Louisiana constitutions, prior to the Constitution of 1974, placed the governor and attorney general in two separate branches of the government. See supra notes 5-7 and accompanying text.

Furthermore, the Louisiana Constitution of 1974 no longer vests supreme executive power in the governor. See La. Const. art. 4, § 1 (1974). At no time has any Louisiana constitution both vested supreme executive power in the governor and placed the attorney general in the executive branch.


19. Delegate Duval: The present constitution provides that the governor is the supreme executive power. We deleted that language and put chief executive officer which, I think, more accurately states what the governor really is . . . the chief executive officer.

Id.
legal truism and was not an attempt to detract from or add to the governor's powers.\textsuperscript{20}

\textbf{B. The Office of the Attorney General}

The Office of Louisiana Attorney General has been a constitutionally mandated office since the Constitution of 1812.\textsuperscript{21} Interestingly, in 1812 the drafters of the first constitution placed the office in the judicial branch. The office remained in the judiciary\textsuperscript{22} until its removal to the executive branch by the Constitution of 1974.\textsuperscript{23}

The process of filling the office has been both appointive and elective. From 1812 until passage of the Constitution of 1852 the attorney general was an appointive position.\textsuperscript{24} In 1852 the office was made an elective position, employing a state-wide election to determine who would serve the office for four years.\textsuperscript{25} The position remained an elective one throughout subsequent constitutions, including the present Constitution of 1974.

The grant of powers and duties of the office also have varied. The Constitution of 1812 did not prescribe the duties of the attorney general. Instead, it stated that his "duties shall be determined by law."\textsuperscript{26} Subsequent constitutions, likewise, did not specifically enumerate the powers

\textsuperscript{20} Further support for this proposition can be found in Louisiana jurisprudence. Many decisions, written before the passage of the Constitution of 1974, refer to the governor as the "chief executive officer" or "chief executive." See State ex rel. McEnery v. Nicholls, 42 La. Ann. 209, 220, 7 So. 738, 742 (1890); Durbridge v. State, 117 La. 841, 855, 42 So. 337, 341 (1906); State ex rel. Pleasant v. Dumser, 132 La. 967, 967, 61 So. 994, 1000 (1913) (Monroe, J., dissenting); Roy v. Board of Supervisors of Elections, 198 La. 489, 500, 3 So. 2d 747, 750 (1941).

\textsuperscript{21} La. Const. of 1812, art. 4, § 7.

\textsuperscript{22} La. Const. of 1845, art. 74; La. Const. of 1852, art. 83; La. Const. of 1864, art. 83; La. Const. of 1879, art. 94; La. Const. of 1898, art. 97; La. Const. of 1913, art. 97; and La. Const. of 1921, art. 7, § 55.

\textsuperscript{23} For a discussion of the significance of this move, see supra note 10 and infra notes 36-40 and 44-45 and accompanying text.

\textsuperscript{24} The governor, with the advice and consent of the senate, was to appoint the attorney general. The appointive rather than elective nature of the office of attorney general raises questions as to the extent of control the governor could properly exercise over the attorney general. However, since the office of attorney general is now an elective office, there is no need to further explore the relationship of governor and attorney general under an appointive scheme. Instead, the emphasis of the analysis will be focused on the proper relationship between two executive branch officers who are elected on a state-wide basis.

\textsuperscript{25} La. Const. of 1852, art. 74. Changing the position of attorney general from an appointive one to a state-wide elective one is significant. Popular, state-wide election supports the idea that the attorney general is a representative of the people, i.e., the attorney general receives a grant of power directly from the populous which elects him. See infra notes 69-70 and accompanying text.

\textsuperscript{26} La. Const. of 1812, art. 4, § 7.
and duties of the office. It was not until 1910, by constitutional amendment, that the powers and duties of the state's attorney general were again placed in the text of the constitution. This amendment represented the first time that the powers and duties of the Louisiana attorney general and his assistants were constitutionally mandated. The terms of this amendment were adopted in significant part by the subsequent Constitution of 1913.

The Constitution of 1921 adopted language similar to that of the Constitution of 1913; however, the language of the 1921 document implies a broader grant of power. In fact, the language indicates the intent of the framers of the Constitution of 1921 to give the attorney general expansive authority to take charge of litigation in which the state has an interest. Additionally, this language establishes the idea

---

27. This tradition was continued in the 1845 and 1852 constitutions. See La. Const. of 1845, art. 74; La. Const. of 1852, art. 74. Similarly, the Constitution of 1864 was silent concerning the powers and duties of the state attorney general, that is, it contained no specific grant of power, nor powers granted by way of the phrase, "[his] duties shall be determined by law," as in the 1812 document. Similarly, the constitutions of 1868, 1879, and 1898 made no mention of the powers or duties of the office.

28. 1910 La. Acts No. 136. The 1910 amendment to the Constitution of 1898 provided for the appointment of two assistant attorneys general and further provided:

[The Assistant Attorneys General] shall take charge of and attend to all such legal matters as the State may be interested in, or be a party to, and shall prosecute and defend all suits wherein the State, may be a party or may have an interest, when thereto assigned by the Attorney General . . . .

29. The adoption of this provision represented the first time the attorney general was a state-wide elected officer and had specific powers enumerated in the state's constitution. Consequently, the decisions from this time forward more accurately reflect courts' opinions of the scope of the attorney general's powers. When facing a question of the extent of the powers of the attorney general, a court should consider that the office is a state-wide elective position with specific powers enumerated in the constitution. Consequently, decisions interpreting the powers and duties of the attorney general after 1910 should be given greater weight than earlier decisions.

30. La. Const. of 1913, art. 97.

31.

[The attorney general or his assistants] shall attend to, and have charge of all legal matters in which the State has an interest, or to which the State is a party, with power and authority to institute and prosecute or to intervene in any and all suits . . . as they may deem necessary for the assertion or protection of the rights and interests of the State.

La. Const. of 1921, art. 7, § 56 (emphasis added).

32. Use of phrases such as "attend to, and have charge of all legal matters," "power and authority to institute and prosecute or intervene in any and all suits," and "as they deem necessary for the assertion or protection of the rights and interests of the state" are suggestive of a comprehensive grant of power. Accord La. Const. art. 4, § 8 (1974).

that the office of attorney general is one of "protector" of the rights and interests of the state and its people. The Constitution of 1974 preserved most of the language pertaining to the powers and duties of the attorney general contained in the Constitution of 1921; however, it differed from the 1921 document in several aspects.

Article IV, Section 8 of the Constitution of 1974 provides:

There shall be a Department of Justice, headed by the attorney general, who shall be the chief legal officer of the state. The attorney general shall be elected for a term of four years at the state general election ....

As necessary for the assertion or protection of any right or interest of the state, the attorney general shall have authority (1) to institute, prosecute, or intervene in any civil action or proceeding; ... (3) for cause, when authorized by the court which would have original jurisdiction and subject to judicial review, ... (b) to supersede any attorney representing the state in any civil or criminal action.

The reference to the state attorney general as the "chief legal officer of the state" had not appeared before in a Louisiana constitution. This language is significant because it bears on the issue of which executive officer properly controls litigation strategy under the current Louisiana Constitution. An examination of convention debates will better illustrate this point.

Throughout the Constitutional Convention, there was much debate over what powers and duties should be allocated to the attorney general. Most of this debate centered around the power of the state attorney general to supersede a district attorney. Yet some of the debate indicates concern over the placement of the attorney general in the executive branch and the proper allocation of power within the executive department between the governor and the state attorney general.

Pertaining to the allocation of power to the attorney general, Mr. Perez expressed his concern that the attorney general remain independent of the governor:

So, I say to you that I am sincerely trying to work the situation out so that we will have an independent attorney general, in a position where he is independent of the governor, where his functions cannot be allocated away to the point where he is no longer what we know as an attorney general.

---

34. Accord Delegate Stagg's comment supra note 10 (the attorney general should have powers which allow him to "effectively ... guard the rights of all of the people of the state ... ").
36. Convention Transcripts, supra note 10, at 3275 (emphasis added).
The emphasized portion of this excerpt demonstrates that at least one delegate was concerned that the attorney general remain independent of the governor. The excerpt also demonstrates a recognition by the convention that placement of the attorney general within the executive branch creates a possibility for usurpation of the attorney general's power by the governor, the chief executive. Other excerpts question the effect of moving the office from the judiciary to the executive branch.

Pertaining to the placement of the attorney general in the executive branch, Delegate, now Judge, Tom Stagg, explained that the feeling of the Committee on the Executive Branch was that the attorney general should be placed in the executive branch because he was the "state's chief legal officer." And an exchange between Delegates Warren and Burson indicates not only concern over moving the office of attorney general from the judiciary to the executive branch, but also the apprehension of some delegates over the allocation of power within the executive.

37. Mr. Perez was a member of neither the Committee on the Executive Branch nor the Committee on the Judiciary. He was a member of the Committee on Style and Drafting and made this statement during a discussion concerning how his committee should resolve a drafting dispute between the executive committee and the judiciary committee. Nevertheless, the statement does demonstrate his concern that the attorney general remain independent of the governor.

38. Delegate Stagg stated:

[When the Committee on the Executive Branch was deliberating and trying to design an executive branch of government, it was the feeling of that committee . . . that the attorney general ought to be considered to be one of the executive branch of government, since he was the state's chief legal officer.

Convention Transcripts, supra note 10, at 879.

39. By Delegate Warren:

[But I would still like to know from whoever that is wanting . . . you know wanted him [the attorney general] in one branch or the other so bad, I'd like to know the difference; I really would.

By Delegate Burson:

Well, Mrs. Warren, this has been going on since the convention began. The Executive Committee said he ought to be part of the Executive Branch because he is part of the Executive Branch in the national government and in all other state governments we know about, and the Judiciary Committee said, "Well, that may be true, but he's always been in the Judiciary Branch in our constitution and we think he ought to stay there because he might be subject to executive influence otherwise." I feel that we have . . . by the caveat that we've put in here, by the specific reservation against affecting or diminishing any of his constitutional powers, we've taken care of that because under the old constitution, if you'll look at Article 7, Section 56, there's very, very little set out in the old constitution about the attorney general's power; the rest is all by statute anyway. So, actually we have set out much more specifically in this constitutional provision the attorney general's power than is done under the old Section 56. I don't think there's any question about that.

Id. at 3381 (emphasis added).
Thus, while there was concern over moving the office to the executive branch, the delegates apparently were satisfied that there was sufficient protection of the attorney general's power within the constitution. Under the Constitution of 1974, the attorney general was to have as much power and independence as he had under the Constitution of 1921, if not more. Furthermore, at least part of the impetus for placing the attorney general in the executive branch was a desire to make Louisiana's constitutional scheme conform with the national government as well as the governments of other states.

As mentioned earlier, the "chief legal officer" language in Article IV, Section 8, of the Constitution of 1974 was new. No prior constitution had so named the Louisiana attorney general. Therefore, the question arises whether the change of language is indicative of an attempt on the part of convention delegates to change the powers of the Office of Attorney General.

The "chief legal officer" language came from a proposal submitted at the Constitutional Convention by the Committee on the Executive Branch.40 The comments provided by the Committee on the Executive Branch said simply, "The attorney general is made the state's 'chief legal officer,'" without further explanation.41 The delegates voted to

40. The proposal as originally introduced stated:

Section 8. Powers and Duties of the Attorney General

Section 8. There shall be a department of justice, headed by the attorney general who shall be the state's chief legal officer. As may be necessary for the assertion or protection of the rights and interests of the state, the attorney general shall have authority to:

1. institute, and prosecute or intervene in any legal actions or other proceedings, civil or criminal;
2. exercise supervision over the several district attorneys throughout the state; and
3. for cause, supersede any attorney representing the state in any civil or criminal proceeding.

He shall have such other powers and perform such other duties as may be authorized by this constitution or provided by statute.


The Committee on the Judiciary also submitted a proposal providing for the powers of the attorney general within the judicial branch. See Committee Proposal No. 4, §§ 28-29, in Convention Journal, supra note 40, at 100. However, that proposal did not contain the "chief legal officer" language.

The proposal submitted by the Committee on the Executive Branch reached the convention floor first, but the powers of the attorney general were not debated at that time. Instead, Delegate Camille Gravel, a member of the Committee on the Executive Branch, proposed an amendment that deleted references to powers, but kept the introductory phrase of the proposal that provided, "There shall be a department of Justice, headed
keep only the introductory language of this proposal (establishing the Department of Justice within the executive branch and naming the attorney general the "chief legal officer"), leaving debate over the specific powers of the attorney general open until the proposal from the Committee on the Judiciary came before the convention.\textsuperscript{42} Therefore, the designation of the attorney general as the "state's chief legal officer" appears to be simply a truism,\textsuperscript{43} and not an attempt to increase or diminish the powers and duties of the state's attorney general.

\section*{C. Significance of the Changes: A Summary}

It is submitted that as to the allocation of power between the governor and attorney general, constitutional convention delegates intended the governor and the state attorney general to retain essentially the same relationship as had been mandated under the Constitution of 1921 and, indeed, as had been mandated under every Louisiana constitution since 1812. Although the Office of Attorney General was moved to the executive branch, the convention transcripts indicate a desire on the part of the delegates to ensure that the attorney general remain "independent"\textsuperscript{44} and free from "executive influence."\textsuperscript{45}

Furthermore, the designation of the governor as "chief executive officer" and the attorney general as "chief legal officer" does not modify

by the attorney general who shall be the state's chief legal officer." Hargrave, supra, at 831.

Mr. Gravel explained:

[A]ll that this does is to create the department ... and to constitutionally declare that the attorney general shall be the head of that department and the state's chief legal officer. All of the matters relating to the functions, powers and duties of the department and of the office of attorney general will be relegated to future consideration when we consider the judiciary article.

Convention Transcripts, supra note 10, at 625.

\textsuperscript{42} See Hargrave, supra note 41, at 831.

\textsuperscript{43} The idea that this phrase is merely a truism is further supported by jurisprudence and legal dictionaries. For example, in State ex rel. Guste v. Board of Highways, 275 So. 2d 207, 212 (La. App. 1st Cir. 1973), the court, quoting the language of the trial judge, stated, "The Attorney General of the State is the chief legal officer of the State ...." While not determinative of the issue, the use of this language in this decision seems to suggest that the Constitution of 1974 merely states a truism about the attorney general: he is the "chief legal officer of the state."

In further support of the contention that the language represents but a truism, see William C. Anderson, A Dictionary of the Law 93 (1891) ("Attorney-General ... [the chief law officer in the government of each State"); See also Black's Law Dictionary 129 (6th ed. 1990) ("Attorney General ... [i]In each state there is ... an attorney general, who is the chief law officer of the state").

\textsuperscript{44} See supra note 36 and accompanying text.

\textsuperscript{45} See supra note 31 and accompanying text. As used by Mr. Burson, "executive influence" connotes improper control or persuasion of the attorney general by the executive—the governor.
the historical relationship between the two offices. Both designations are merely truisms. Therefore, in order to properly evaluate the powers of the governor and attorney general as they relate to the control of litigation strategy for the state when the constitutionality of a statute or constitutional provision is challenged, it is necessary to examine the jurisprudence which interprets these powers under prior Louisiana constitutions.46

III. LOUISIANA JURISPRUDENCE

Louisiana jurisprudence, unfortunately, does not directly address the issue at hand in this comment.47 There is, however, jurisprudence interpreting language in prior constitutions which speaks to the propriety of the governor instituting legal action on behalf of the state. Similarly, there is much jurisprudence interpreting the powers of the attorney general when purporting to act on behalf of the state.

There is one decision which would tend to support the proposition that the governor is the proper party to speak for the state when an “interest” of the state is at issue. In State ex rel. Strauss v. Dubuclet,48 the relator had challenged the authority of the governor to maintain an appeal on behalf of the state when the attorney general had also taken an appeal but failed to prosecute the appeal. The Louisiana Supreme Court held the governor “has the right to appeal, on behalf of the State . . . .”49 This decision, however, involved the interpretation of the

46. There is one case which arose after the passage of the Constitution of 1974 that involved a situation wherein the governor and the state attorney general disagreed over what the state's position ought to be. In State ex rel. Guste v. Texaco, Inc., 433 So. 2d 756 (La. App. 1st Cir. 1983), special counsel for the state sought to have attorney's fees that had been deposited into the registry of the court awarded to them after the main suit had been settled and dismissed. The governor, through his own special counsel, opposed special counsel's request. He believed the claim for attorney's fees should be handled by the Commissioner of Administration as provided for by statute, not by the district court. To the contrary, the attorney general requested the funds be turned over to special counsel because the state possessed no claim to the money. The court of appeal agreed with the governor's position.

Although the court recognized that the state did “not present an undivided front,” this case does not represent an instance in which a court decided the governor, and not the attorney general, was the proper spokesman for the state. Id. at 759. Both the attorney general and the governor were each allowed to argue his position. The governor was not allowed to speak on behalf of the state to the exclusion of the attorney general.


49. Id. at 163.
governor's authority pursuant to a legislative act\textsuperscript{50} rather than pursuant to a constitutional provision. Therefore, \textit{Dubuclert} is not authority for the proposition that the governor, under the powers delegated to him by the constitution, is the proper party to represent the state and control litigation strategy. Instead, it is merely an affirmation of the governor's authority to act pursuant to a legislative act.\textsuperscript{51} What authority, then, exists which would support the conclusion that the attorney general is the proper party to control litigation strategy for the state?

In the early case of \textit{State v. Bank of Louisiana},\textsuperscript{32} the attorney general instituted suit against the bank to force it to pay the State a percentage of the profits it made on the sale of certain state bonds. The bank challenged the attorney general's authority to bring the suit. The Louisiana Supreme Court stated that "[t]he authority of the attorney-general to prosecute or defend any suit, in which the state is concerned ... is necessarily implied from the nature of his office ..."\textsuperscript{33} While the court did not elaborate on the extent of the authority "implied from the nature of his office," the language does make it clear that some authority or power is "necessarily implied from the nature of the [attorney general's] office."\textsuperscript{34}

In \textit{State v. Texas Co.},\textsuperscript{35} the defendants had contested the attorney general's power to bring suit on behalf of the State to cancel a mineral lease. In perhaps what was a discourse on the extent of the "implied powers" of the office of attorney general, the supreme court pronounced:

\begin{itemize}
\item \textsuperscript{50} The governor was acting pursuant to Act 21 of the Second Legislative Session of 1872. This act authorized the governor to succeed the attorney general in the event of incapacity of the attorney general or vacancy of his office. However, the act did \textit{not} authorize the governor to supercede the attorney general when the attorney general was representing the state as a separate party; rather it authorized the governor to succeed the attorney general when the attorney general represented state officials in their official capacities.
\item \textsuperscript{51} Some might argue the attorney general's power to control litigation strategy for the state is not absolute under the Louisiana constitution since the legislature had the power to pass an act authorizing the governor to supercede the attorney general in certain instances. However, one must remember that the act itself did not give the governor personal control over litigation strategy. See infra note 57 and accompanying text.
\item Also, 1872 La. Acts No. 21 was passed at a time when there were no assistant attorneys general. If the attorney general was unable to defend the state officer, there was no one else in his office who could do so. The passage of 1910 La. Acts No. 136, amending Article 97 of the Constitution of 1898, created two positions for assistant attorneys general and obviated the necessity for the governor to appoint counsel to defend a state officer when the attorney general was unable to defend him; the assistant attorneys general could act in the attorney general's stead. See supra note 28 and accompanying text.
\item \textsuperscript{52} 5 Mart. (n.s.) 327 (La. 1827).
\item \textsuperscript{53} Id. at 344.
\item \textsuperscript{54} Id.
\item \textsuperscript{55} 7 So. 2d 161 (1942).
\end{itemize}
The Attorney General has unquestionably the right to file a suit in the name of the State and he is not required to obtain the permission of the Governor or any other executive or administrative officer or board in order to exercise it. This power and duty is inherent in him in the nature of things and has been specially charged to him by the people themselves in the Constitution.

It is clear that the Attorney General not only has the power to file suit on behalf of the State but is also vested with full discretion in determining whether or not proceedings should be brought.56

In State ex rel. Baldwin v. Dubuclet,57 the plaintiff claimed that he had been elected as "fiscal agent." He sued the state treasurer to compel the treasurer to deliver to him money from the treasury. After his demand was rejected by the trial court, he appealed. The governor then attempted to supersede the attorney general and replace him with another attorney for the defense of the state treasurer.

Interpreting a statute which allowed the governor to appoint an attorney to represent the state when the attorney general was unable to act because of death, absence, or personal interest in the suit,58 the supreme court stated that "[t]he Attorney General is the proper officer to represent the State in all her lawsuits, and the statute in question was not intended to deprive him of the control and management of his cases." The court noted that even when the statute authorized the governor to appoint an attorney for the state, "[t]he act [gave the governor] no personal control of the case whatever."59

Finally, in Saint v. Allen,60 the attorney general sued the members of the Louisiana Highway Commission to prevent the commission from employing five private attorneys without his consent. The supreme court explained:

[I]t is the duty of the Attorney General . . . to prosecute and defend all suits . . . to which the state is a party, and to have charge of all legal matters in which the state, as a distinct entity, apart from other entities or corporate agencies it may create, has an interest. . . . [S]o far as relates to the Constitution, that

56. Id. at 850-51, 7 So. 2d at 162.
57. 27 La. Ann. 29 (1875).
58. This was the same act that was interpreted in State ex rel. Strauss v. Dubuclet, 25 La. Ann. 161 (1873). See supra note 50.
60. 172 La. 350, 134 So. 246 (1931).
instrument, with reference to the duties of the Attorney General
. . . has confined . . . the duties . . . to those interests, possessed
by the state, as a distinct entity . . .

If the Louisiana highway commission is a distinct legal entity
from the state, then there would seem to be no reason . . . why
other arrangements [for representation] could not be made . . . .

Although the court held the state did not have an interest in the matter
before it, the language used by the court suggests there are instances
when the state, as a distinct entity, does have an interest in litigation.
This language is pivotal. The court suggests in Saint that there are times
when the state is a party to litigation and possesses such an interest in
the litigation that the constitution authorizes the attorney general to oust
or supersede all other attorneys who would purport to represent the
state. Presumably, this would include counsel appointed by the governor
to represent the state. A necessary concomitancy to being the sole
representative of the state, in these instances, is the power to control
litigation strategy for the state.

The holding, however, begs the question: When does the state, as
a distinct entity, possess an interest in litigation such that the attorney
general may exercise his unfettered power to represent the state? To
answer the question, the word “state” must first be defined. Once
defined, it will be easier to determine when the “state” possesses an
“interest” in a particular suit.

The word “state” was defined by the Louisiana Supreme Court in
Stokes v. Harrison:

In the Constitution the term “state” most frequently expresses
the combined idea . . . of people, territory and government. A
State, in the ordinary sense of the Constitution, is a political
community of free citizens occupying a territory of defined
boundaries, and organized under a government sanctioned and
limited by a written constitution, and established by the consent
of the governed . . .

And there are instances in which the principal sense of the
word seems to be that primary one to which we have adverted
of a people or political community, as distinguished from a
government.

So, the primary definition of “state” is the people living within certain
territorial boundaries, organized under a constitutionally sanctioned gov-
ernment. Or, more precisely, the people themselves.

61. Id. at 359, 134 So. 2d at 248-49 (emphasis added).
63. Id. at 358, 119 So. 2d at 378 (emphasis added) (citations omitted).
Surely, the people who have ordained and established the Louisiana Constitution have an "interest" in assuring that its provisions are upheld against attack under the United States Constitution. Similarly, when the constitutionality of a statute is challenged, the legislature, the elected, representative body of the people, has an interest in assuring that its enactments are upheld. Therefore, when the constitutionality of a state statute or provision of the constitution is challenged, the state (the people), as an entity distinct from the corporate entities created by the government, has an interest in defending the constitutionality of the statute or provision.

IV. POLICY CONSIDERATIONS

There are several important policy considerations which favor allowing the attorney general rather than the governor to advocate the state's position in litigation when the constitutionality of a statute or constitutional provision is challenged. First, the Louisiana constitution requires that the attorney general be an attorney, learned in the art of law. There is no such requirement of the office of governor. Mindful that there are times when their interests will need protection, the people of Louisiana chose to include within their government an advocate.

64. The Preamble of the Constitution of 1974 states:
   We, the people of Louisiana, grateful to Almighty God for the civil, political, economic, and religious liberties we enjoy, and desiring to protect individual rights to life, liberty, and property; afford opportunity for the fullest development of the individual; assure equality of rights; promote the health, safety, education, and welfare of the people; maintain a representative and orderly government; ensure domestic tranquility; provide for the common defense; and secure the blessings of freedom and justice to ourselves and our posterity, do ordain and establish this constitution.

65. The government "originates with the people [and] is founded on their will alone . . . ." See La. Const. art. 1, § 1 (1974).

66. The Louisiana Constitution of 1974, and indeed all prior Louisiana constitutions, was ordained and established by the people of Louisiana. See La. Const. Preamble (1974).

67. La. Const. art. 4, § 2 (1974). The attorney general must be licensed to practice law in the state and have at least five years of practical experience.

68. Id.

69. Indeed, the Louisiana Supreme Court has spoken to the grant of power given to the attorney general by the people: The power to institute "suit in the name of the State . . . is inherent in [the attorney general] . . . and has been specially charged to him by the people themselves in the Constitution." State v. Texas Co., 199 La. 846, 850-51, 7 So. 2d 161, 163 (1942).

Or as one writer has put it, "[The attorney general's] commission is direct from the people. He owes no allegiance except to the people . . . ." George Cosson, President's Annual Address, The National Association of Attorneys General, 1913 (speaking generally of states' attorneys general without identifying any particular state).
whose sole responsibility is to assert and protect their rights.\textsuperscript{70}

Secondly, the attorney general's Department of Justice is already equipped to conduct such litigation. The department employs a large

\textsuperscript{70} See La. Const. art. 4, § 8 (1974). Similarly, the people of Louisiana have charged the governor with certain rights and responsibilities. While it may be argued that the governor could be a good advocate for the people, that argument ignores two important realities: the people have specifically provided for an elected advocate in the constitution, i.e., the attorney general, and the governor's judgments concerning litigation are more likely to be influenced by political agendas and struggles within an administration.

Given that the office of the attorney general is one of "protector" or "guardian" of the rights of the people of the state, and that the will of the people is embodied in the state constitution and statutes passed by the legislature, the question arises whether the attorney general must defend every challenge to the state constitution or statutes? Would it be an abdication of his official duties if the attorney general decided not to appeal a decision striking down a provision of the Louisiana Constitution or a statute as unconstitutional under the United States Constitution?


A detailed discussion of the issues raised by these questions is beyond the scope of this comment; however, a brief comment on these issues is appropriate.

Concerning the authority of the attorney general to institute and prosecute suits, Article 4, section 8 of the Louisiana Constitution of 1974 contains the proviso, "As necessary for the assertion or protection of any right or interest of the state, the attorney general shall have authority . . . ." The words "as necessary" indicate some degree of discretion on the part of the attorney general in deciding when suit is necessary to assert or protect the rights of the state. Furthermore, Article 4, section 8 does not provide that the attorney general shall institute suit, instead it provides that the attorney general "shall have authority" to institute suit. This, too, indicates the discretionary nature of his power. Arguably, this discretion is exercised when the attorney general decides that settlement, rather than exhaustive appeal, of a suit is in the best interest of the state. Accord La. R.S. 13:5036 (1991) ("The attorney general may institute and prosecute any and all suits he may deem necessary for the protection of the interests and rights of the state.") (emphasis added). See also La. Const. of 1921, art. 7, § 56.

However, given that this settlement would, effectively, render unenforceable both provisions of the state constitution and legislative acts, it might be argued that the attorney general has overstepped his authority. For even in the case of a state officer given very broad discretion in which to act, it has been recognized that "intentional interference[ence] with the execution of any law would be a failure to perform a duty lawfully required of [him] under [his] oath [of office] and would constitute malfeasance." State v. Perez, 464 So. 2d 737, 742 (La. 1985). In Perez the court opined that a district attorney's oath to "support the constitution and laws of [Louisiana] . . . imposed a specific duty upon [him] not to obstruct or interfere with the execution of those laws." Id. See La. Const. art. 10, § 30 (oath of office for public officials). Conceivably, this same reasoning could be applied to the acts of the attorney general.
staff and has many resources which can readily be drawn on to defend the state in court. Should the governor be allowed to set up a large legal staff of his own, it would unnecessarily burden an already tight state budget.

Next, the attorney general is divorced from the legislative process. Unlike the governor who, at times, may take a position adverse to the legislature on a particular piece of legislation, the attorney general has little opportunity to influence legislation by injecting his personal views into the debate over the passage of statutes. Also, if the attorney general finds himself unable to defend the constitutionality of a particular statute because of his personal views, he may delegate the management of the litigation to one of his assistants.

Moreover, to allow the governor to control litigation strategy when the issue to be decided by the court is the constitutionality of a statute or provision of the constitution which the governor has publicly expressed his opposition to and/or vetoed, may, in fact, give the governor a second veto power. In the example set out at the beginning of this comment, the governor would be able to exercise a "veto-override veto"—though his first veto was overridden, he would have the option of declining an appeal of an unsuccessful defense of the statute. Similarly, in a situation such as that in United States v. State of Louisiana, where the governor may believe a provision of the Louisiana constitution is unconstitutional, the governor may allow the provision to fall to an attack under the United States Constitution without appeal. This is clearly contrary to the separation of powers scheme set out in the Constitution of 1974 and prior constitutions.

Furthermore, the framers of the Constitution of 1974 provided for an executive branch of divided powers. In other words, Article IV, Section 1 of the Constitution of 1974 decentralizes the executive power and apportions particular elements of the executive power to individual executive officers. Decentralization of executive power is good from

---

71. The author does not mean to suggest that Governor Roemer actually expressed the opinion that the four board system of higher education in Louisiana was unconstitutional under the United States Constitution. The author does not know what Governor Roemer's opinion was in this matter. Still, for whatever reason(s), Governor Roemer's counsel did support the suggestion of the court-appointed special master to abolish the four board system, mandated in the Louisiana Constitution. See United States v. State of Louisiana, 751 F. Supp. 608 (E.D. La. 1990).


74. Although Article 4, section 5(A) of the Constitution of 1974 names the governor
the standpoint of preventing abuses of the power by would-be despotic governors.\footnote{75}

V. Conclusion

When the constitutionality of a statute or provision of the constitution is challenged under the United States Constitution, the attorney general is the proper executive officer to exercise power in controlling litigation strategies of the state. The Constitution of 1974 did not limit the duties and powers given to the attorney general under prior constitutions vis-a-vis the governor. Records of the Constitutional Convention of 1973, jurisprudence, and policy considerations support the conclusion that the attorney general, and not the governor, should control litigation strategies for the state.

Michael B. Holmes

"chief executive officer," it does not vest in him supreme executive power. Instead, it divides the executive power between several executive officers. This division of executive powers is similar to the division of executive powers mandated by the Minnesota Constitution.

The mandate in [the Constitution of Minnesota], that the executive department consist of a governor, lieutenant governor, secretary of state, auditor, treasurer and attorney general, implicitly places a limitation on the power of the legislature ... to prescribe the duties of such offices. The limitation is implicit in the specific titles the drafters gave to the individual offices.

Rather than conferring all executive authority upon a governor, the drafters of our constitution divided the executive powers of state government among six elected officers. This was a conscious effort on the part of the drafters, who were well aware of the colonial aversion to royal governors who possessed unified executive powers.

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

The implicit limitation of power distribution in the Louisiana Constitution of 1974 should also apply as between the officers in the executive branch. Thus, the Constitution of 1974 designates the attorney general the "chief legal officer of the state." He, being "chief," is the highest legal officer in the state and in the executive branch.

75. The policy of decentralization of power would likely be furthered by allowing both the attorney general and governor to advocate the state's position in court. Neither officer should be allowed to speak for the state to the exclusion of the other. See United States v. State of Louisiana, 751 F. Supp. 608, 620 (E.D. La. 1990) (even if the Louisiana Constitution allotted power to control litigation strategy for the state to the state's attorney general the court would allow the governor to speak amicus curiae).

Yet, if the governor is given the power to control litigation strategy for the state to the extent that he is able to refuse to prosecute an appeal and prevent the attorney general from doing the same, there is no power decentralization. Indeed, there is power usurpation—not only from a fellow executive officer, but possibly from the legislature as well. See supra notes 71-72 and accompanying text.